

The Office of Exceptional Children

Special Education Process Guide for South Carolina

Revised 03/20/13

The purpose of this document is to provide comprehensive information on State Board of Education regulation 43-243. This guidance provides the South Carolina Department of Education's interpretation of various statutory provisions and does not impose any requirements beyond those included in federal and state laws and regulations. In addition it does not create or confer any rights for or on any person.

Please use this document as a:

- o Structured process for implementing special education policies.
- o Reference for answering questions.
- o Staff development tool.
- o Source for resources of support and assistance.

It is a living document and will be updated on a regular basis as South Carolina receives further guidance from the United States Department of Education, Office of Special Education Programs, results of court decisions, and changes in state statute. For the South Carolina special education regulations, please consult State Board of Education regulation 43-243. To ensure that you are referencing the most recent version of the policies and procedures, please check the date of the document.

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These policies and procedures were created to provide a practical guide to implementation of the IDEA and its implementing regulations. This is a "living" document and will change and grow as resources and information become available.

CHAPTER 1: PARENT RIGHTS IN SPECIAL EDUCATION (PROCEDURAL SAFEGUARDS)

INTRODUCTION

The reauthorization of the Individuals with Disabilities Education Improvement Act of 2004, retained important procedures which local education agencies (LEAs) must use when evaluating eligibility for special education services, when developing or changing a child's Individualized Education Program (IEP), or when attempting to resolve serious disputes regarding special education issues. These procedures are sometimes referred to as "procedural safeguards" or "parent rights." This chapter will focus on the procedural safeguards related to evaluations and to the development and revision of the IEP. Later chapters will address procedures regarding dispute resolution processes, such as due process hearings, mediation, and complaints to the state department of education. The procedural safeguards specified in the IDEA were primarily designed to help LEAs and parents work together to develop effective educational programs for children with disabilities.

This chapter provides information to assist LEAs in ensuring that parents and students receive their rights as established in the IDEA-2004. The following topics will be discussed:

- A. [Parent Participation](#)**
- B. [Definition of Parent](#)**
- C. [Parent Rights in Special Education Notice](#)**
- D. [Prior Written Notice](#)**
- E. [Parent Consent](#)**
- F. [Parent Consent Requested but Not Provided](#)**
- G. [Notice of IEP Meeting](#)**
- H. [Student Rights at Age 18](#)**
- I. [Questions and Answers about Parent Rights](#)**

A. PARENT PARTICIPATION

To address the requirement to strengthen the role of parents in the special education process, Congress mandated that LEAs afford parents the opportunity to be members of any decision-making team for their child, including eligibility, initial evaluation and reevaluation, and development of an IEP for the provision of a FAPE. LEAs are to ensure that parents have the opportunity to be members of the IEP team that makes decisions on the educational placement of their child. Although logistically this increased involvement of parents may present challenges in arranging convenient meeting times, it should result in decisions that are individualized to meet the unique needs of students and in the development of a closer, more collaborative relationship with parents. Additionally, parents have a responsibility to participate and provide their input into their child's education (34 CFR § 300.501(b) and (c)).

Every child with a disability aged 3 to 21 is entitled to receive a FAPE. Parent rights are intended to ensure that children receive a FAPE. A FAPE is defined as special education and related services that meet the following criteria:

- Are provided at public expense, under public supervision and direction, and without charge;
- Meet the standards of the state, including the requirements of this part;

- Include an appropriate preschool, elementary school, or secondary school education in the state; and
- Are provided in conformity with an IEP that meets the requirements of 34 CFR §§ 300.320 through 300.324. (34.CFR § 300.117)

Parents must be provided notice of meetings related to eligibility, evaluation, reevaluation, IEP development, provision of a FAPE for their child and educational placement decisions, to ensure that they have the opportunity to participate in the meetings. The notice requirements are the same as for notice of an IEP meeting (34 CFR § 300.501(b)(2); 34 CFR § 300.322(a)(b)(1)).

The LEA must make reasonable efforts to ensure that the parents understand, and have the opportunity to participate in these meetings, including arranging for an interpreter for parents with deafness, or for parents whose native language is other than English. The parent and the LEA may agree to use alternative means of meeting participation, such as video conferences or conference calls (34 CFR § 300.322(e)).

These meeting requirements do not apply to informal or unscheduled conversation of LEA personnel on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting (34 CFR § 300.501(b)(3)).

B. DEFINITION OF PARENT

LEA personnel must determine the appropriate person(s) to make educational decisions on behalf of the child. Those individuals have a right to receive notice, give or revoke consent, file formal complaints, request mediation, file for a due process hearing, give or deny permission for release of records, etc.

In South Carolina “parent” is defined as a person who legally has the care and management of a child. (S.C. Code Ann. § 63-1-40 (2010))

According to the IDEA, a “parent” is defined as:

a) Parent means

- (1) A biological or adoptive parent of a child;
- (2) A foster parent, unless state law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;
- (3) A guardian generally authorized to act as the child’s parent, or authorized to make educational decisions for the child (but not the state if the child is a ward of the State);
- (4) An individual acting in the place of a biological 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
- (5) A surrogate parent who has been appointed in accordance with 34 CFR § 300.519 of the IDEA.

If there is more than one party qualified to act as parent and the biological or adoptive parent attempts to act as the parent, the biological or adoptive parent must be presumed to be the parent and legal decision-makers unless the biological or adoptive parent does not have legal authority to make educational decisions for the child. A judge may decree or order a person acting as a parent or legal guardian to act as the “parent” to make educational decisions about the child. The LEA must recognize this person(s) as the legal decision maker for the child. (34 CFR § 300.30 (b))

Surrogate parents

The LEA must assign an individual to act as a surrogate parent when

- o No parent (as defined above) can be identified;
- o The LEA, after reasonable efforts, cannot locate a parent;
- o The child is a ward of the state under the laws of that state; or
- o The child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11434a(6)).

The LEA must have a method for determining whether a child needs a surrogate parent and for assigning a surrogate parent to the child. The LEA must maintain a list of people eligible to serve as surrogate parents. The LEA may compensate or make arrangements for the compensation of surrogate parents when they are utilized. A surrogate parent is not an employee of the LEA solely because he or she is paid to serve as a surrogate. Surrogate parents will be selected by the LEA. A surrogate parent may live outside the LEA as long as he or she meets the necessary requirements.

Any employee of an LEA or public agency, the SCDE, a residential treatment facility (RTF), group home, hospital, or any physician, judicial officer, or other person whose work involves the education or treatment of children and who knows a child needing special education services and knows that the parents or guardians are either not known or cannot be located or that the child is a ward of the state, may file a request for assignment of a surrogate parent. This request must be made to the LEA involved in the child's educational process. In the case of a child who is a ward of the state, the surrogate parent may be appointed by the judge overseeing the child's case, as long as the surrogate meets the requirements listed below.

A surrogate parent may be removed when a parent appears to represent the child or revokes consent or when the child is no longer eligible for special education services. A person serving as a surrogate parent may resign at any time by submitting his or her resignation in writing to the LEA.

The LEA must ensure that a person selected as a surrogate parent:

- o Is not an employee of the SEA, the LEA, or any other agency that is involved in the education or care of the child;
- o Has no personal or professional interest that conflicts with the interest of the child the surrogate parent represents; and
- o Has knowledge and skills that ensure adequate representation of the child.

The surrogate parent may represent the child in all matters relating to the identification, evaluation, and educational placement of the child and the provision of a FAPE.

In the case of a child who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs may be appointed as temporary surrogate parents without regard to the requirements, until a surrogate parent can be appointed that meets all of the requirements. The LEA must make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after determining that the child needs a surrogate parent.

In cases where a parent is unresponsive, lives a great distance from their child's LEA, or is incarcerated, the LEA may obtain written authorization from the parent to appoint a surrogate parent to represent the child after the initial consent for placement has been obtained. Parent permission for the appointment of a surrogate parent must be voluntary and explicitly authorized in writing and is revocable at any time. The surrogate parent, once appointed, may then represent the child until such time as the parent revokes authorization.

C. PARENT RIGHTS IN SPECIAL EDUCATION NOTICE

To ensure that parents have knowledge about their rights under the federal and state special education laws, LEAs are required to provide a copy of the Notice of Procedural Safeguards to the parents:

- o At least one time in a school year; and
- o Upon a referral or parent request for initial evaluation;
- o First formal complaint or due process complaint filed in a school year;
- o Upon a disciplinary removal from school that constitutes a change in placement; and
- o Upon parent request.

The notice must be written in language understandable to the general public and provided in the native language of the parent or other mode of communication used by the parent unless it is clearly not feasible to do so. If the language or mode of communication is not a written language, the LEA must translate the notice orally or use another mode of communication so that the parent understands the content of the notice. Parents may elect to receive the Notice of Procedural Safeguards by electronic mail communication, if the LEA makes that option available (34 CFR § 300.503(c)(i-ii); 34 CFR § 300.505). If the Parent Rights Notice is provided electronically the LEA should have a copy of the email sent to the parent and documentation that the notice was received. The LEA may place a current copy of the Parent Rights Notice on its Internet Web site if one exists (34 CFR § 300.504(b)). However, simply putting the notice on the LEA's website does not fulfill an LEA's obligation to provide notice to the parents.

The Parent Rights Notice must include a full explanation of all of the procedural safeguards available as identified in 34 CFR § 300.504(c).

D. PRIOR WRITTEN NOTICE

One of the procedural safeguards afforded to parents is the required Prior Written Notice (PWN) of certain proposed special education actions. This notice must be provided to parents within a reasonable amount of time before the date the LEA proposes or refuses to initiate or change the

- o identification,
- o evaluation,
- o educational placement of their child, or
- o provision of a FAPE to their child. (34 CFR § 300.503(a))

The PWN provided to parents for each proposed special education action must contain specific information:

- o a description of the action proposed or refused;
- o an explanation of why the LEA proposes or refuses to take the action;
- o a description of each evaluation procedure, assessment, record, or report the LEA used as basis for proposed or refused action;
- o a description of the other options the IEP team considered and reasons why they were rejected;
- o a description of any other factors relevant to the proposal or refusal;
- o a statement that the parents have parental rights under the law; and
- o sources for parents to contact to assist in understanding their rights.

Additionally, if the PWN is to propose to conduct an initial evaluation or a reevaluation, the notice must describe any evaluation procedures that the LEA proposes to conduct (34 CFR § 300.304(a)(1)).

The PWN is to be provided in language understandable to the general public, and in the native language of the parent unless it is clearly not feasible to do so. Additionally, if the native language or other mode of communication of the parent is not a written language, the LEA must take steps to ensure that (a) the notice is translated orally, or by other means, to the parent in his or her native language or other mode of communication (such as sign language); (b) the parent understands the content of the notice; and (c) there is written documentation that these requirements are met. (34 CFR § 300.503(b) and (c))

In addition to LEA staff, there are other resources parents can access for more information to understand their parent rights. The IDEA provides funding for a Parent Training and Information (PTI) Center in each state. In South Carolina, PRO-Parents, is the PTI and provides training, information and resources for parents. LEAs are encouraged to include any additional resources, including local resources that are knowledgeable and available to parents.

Prior Written Notice **IS NOT** required **BEFORE** a meeting (even for possible changes in placement), but **IS** required **AFTER** all meetings prior to implementing any changes recommended by the team. PWN must be sent at the conclusion of the meeting (**prior** to the implementation of any changes decided upon or refusal to make changes). This PWN provides information about what changes will be implemented or what changes the IEP team refused to make.

In amending a child's IEP, the parent of a child with a disability and the LEA representative may agree not to convene an IEP team meeting for the purpose of making those changes, and instead may develop a written document to amend or modify the child's current IEP. Even when using the IEP amendment process, the LEA must provide PWN of any changes agreed upon in the IEP. For additional information concerning amending the IEP, see Chapter 4, Section F.

E. PARENT CONSENT

Federal and state laws and regulations have specific requirements for requesting parent consent. Consent must always be "informed consent." The PWN must accompany the request for consent for each proposed special education action. The parent must agree in writing to the action for which his or her consent is sought (34 CFR § 300.300). In determining that informed consent is obtained, the following must be ensured:

- The parent is 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 the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom.
- The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.
- If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked). (34 CFR § 300.9)

Parent consent with PWN is required for the following actions:

- o Consent to conduct an initial evaluation. If the child is enrolled in a public LEA or seeks to be enrolled in a public LEA and the parent does not provide consent (refuses) for initial evaluation, or the parent fails to respond to a request to provide consent, the LEA may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards available under special education laws and regulations, including mediation. If the parent refuses or does not respond, the LEA does not violate its obligation for the provision of a FAPE to the child if it declines to pursue the evaluation (34 CFR § 300.300(a)).
- o Consent to conduct a reevaluation. If the parent refuses to consent to a reevaluation, the LEA may, but is not required to, pursue the reevaluation by using mediation or due process procedures. Additionally, informed parental consent is not required to conduct a reevaluation if the LEA can demonstrate that: (a) it made reasonable efforts to obtain such consent; and (b) the child's parent has failed to respond (34 CFR § 300.300(c)).
- o Consent for the initial provision of services on the IEP. If the parent fails to respond or refuses to consent to initial services the LEA cannot use mediation or due process procedures in order to obtain agreement or a ruling that the services may be provided to the child. Under these circumstances, the LEA does not violate its obligation for the provision of a FAPE to the child for failure to provide the child with the special education and related services for which the public agency requested consent. In addition, the LEA is not required to convene an IEP meeting or develop an IEP for the child (34 CFR § 300.300(b)).

The following requests for parent consent do not require that the parent be provided the PWN as described in Section D above, however; parents must be fully informed about what they are being asked to provide consent.

- o Consent to excuse an IEP team member from IEP team meeting: A required member of the IEP team, may be excused from attending an IEP team meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if, (a) the parent, in writing, and the LEA consent to the excusal; and (b) the IEP team member submits, in writing to the parent and the IEP team, input into the development of the IEP prior to the meeting (34 CFR § 300.321(e)).
- o Consent to invite outside agency: When the IEP team is considering a child's postsecondary goals and transition services needed to assist the child in reaching those goals, the LEA is required to invite a representative of any agency that is likely to provide or pay for transition services. The LEA must obtain parental consent to invite the representative from that agency because confidential information about the child would be shared at the meeting. (34 CFR § 300.321(b)(3))
- o Consent for use of private insurance and Medicaid: The district must obtain a **one-time written consent** from the parent, after providing written notification of the intent to bill, but *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., Department of Health and Human Services). 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.
 - o In addition to the requirement to provide written notification prior to 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, the district must continue to provide **written**

- notification** annually to the child's parents before accessing the public benefits or insurance.
- o The written notification must explain all of the protections available to parents under Part B of the IDEA, as described in 34 C.F.R. § 300.154(d)(2)(v) to ensure that parents are fully informed of their rights before a public agency can access their or their child's public benefits or insurance to pay for services under the IDEA. The notice must be written in language understandable to the general public and in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.
 - o Consent to allow an individualized family services plan (IFSP) to be used as an IEP: 34 CFR § 300.323(b), consistent with section 614(d)(2)(B) of the Act, allows an IFSP to serve as an IEP for a child with a disability aged 3 through 5 under the following conditions: (a) using the IFSP as the IEP is consented to by the agency and the child's parents; (b) the child's parents are provided with a detailed explanation of the differences between an IFSP and an IEP; (c) written informed consent is obtained from the parent if the parent chooses an IFSP; (d) the IFSP contains the IFSP content, including the natural environments statement; (e) the IFSP includes an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills for children with IFSPs who are at least three years of age; and (f) the IFSP is developed in accordance with the IEP procedures under Part B of the Act.

Parental consent is not required for the following actions:

- o Review of existing data as part of an initial evaluation or a reevaluation,
- o Administration a test or other evaluation that is administered to all children unless consent is required of parents of all children (34 CFR § 300.300(d)); or
- o Change in placement (increase/decrease in amount of special education services) once parent has given consent for initial provision of special education services. In these situations, only PWN to the parent of the action proposed is required.

Figure 1: Requirements for Prior Written Notice and Parental Consent

(34 CFR § 300.503)

Proposed Action by the LEA	Prior Written Notice (PWN) §300.503 or Notification §300.322	Requires Parental Consent	Due Process If Parent Refuses to Give Consent
Initiate evaluation	PWN	Yes, if additional information will be gathered	May or may not use
Refuse to initiate initial evaluation or reevaluation	PWN	No	N/A
Collection of new data for initial evaluation and reevaluation	PWN	Yes	May or may not use
Identification and Eligibility Determinations (initial identification, any changes in category, and no longer eligible for	PWN, Must contain (a) the proposed	No	N/A

special education)	disability classification for initial eligibility; or (b) the LEAs refusal to change the disability classification		
Initial provision of special education and related services	PWN	Yes	Not allowed
Revocation of parental consent for special education services	PWN	No	Not allowed
Evaluation, reevaluation, or initiation of services for children parentally placed in private schools	PWN	Yes	Not allowed
Notification of all IEP meetings	Notification	No	N/A
Notification of the decisions made at an IEP meeting, including changes in placement prior to implementation of proposed changes	PWN	No	N/A
Invitation of an outside agency to the IEP for secondary transition	Notification	Yes	N/A
Use of private insurance or Medicaid	Notification (both before accessing benefits and annually thereafter)	Yes	N/A
Use of IFSP for an IEP	Notification	Yes	N/A

Proposed Action by the LEA	Prior Written Notice (PWN) §300.503 or Notification §300.322	Requires Parental Consent	Due Process If Parent Refuses to Give Consent
Evaluation, reevaluation, or initiation of services for children parentally placed in private schools if a FAPE is at issue	PWN	Yes	Yes
Notification of all IEP meetings (prior to the discussion of proposed changes)	Notification	No	N/A
Notification of the decisions made at an IEP meeting (prior to implementation)	PWN	No	N/A
Invite an outside agency to the IEP for secondary transition	Notification	Yes	N/A
Use of private insurance or Medicaid	Notification	Yes	N/A
Use of IFSP for an IEP	Notification	Yes	N/A
Change in placement due to the student receiving a South Carolina high school diploma or when exiting as a result of reaching maximum age	PWN	No	N/A
Disciplinary removal for more than 10 consecutive school days	PWN	Yes, if manifestation of the child's disability. No, if not a manifestation of the child's disability; however, a disciplinary change of placement DOES require issuance of procedural safeguards	May or may not use
Disciplinary removal to an IAES for not more than 45 school days	PWN	No, however, disciplinary change of placement DOES require issuance of procedural safeguards	NA

F. PARENTAL CONSENT REQUESTED BUT NOT PROVIDED

Parents Do Not Respond

The LEA must make reasonable attempts to obtain consent from the parents for each special education action as required. Documentation of reasonable attempts should be kept including detailed

records of telephone calls made or attempted and the results, copies of written correspondence sent to the parents and their response if any, and visits made to the parents' home or place of employment, and the response, if any, from the parents (34 CFR § 300.322(d)(1)). Reasonable attempts include at least two varied methods of contacting the parent.

As indicated previously, parent consent is required to conduct a reevaluation. However, parent consent is not required for this action if the parent does not respond to the LEA's requests for consent and the LEA can document its attempts to obtain parental consent as outlined above. Additionally, under the disciplinary protections, the LEA would not be deemed to have knowledge of the child's disability if the parent has not allowed an evaluation or refused services; or the child has been evaluated and determined not to have a disability.

Parents Revoke Consent

Under the December 2008 amendment to regulation 34 CFR § 300.300(b)(4), a parent or student who has reached the age of majority may revoke consent for the continued provision of special education and related services. This revocation must be provided to the LEA in writing so that both the parent and the LEA have documentation that the child will no longer receive special education and related services. When parents revoke their consent for special education services, the revocation is not retroactive but becomes effective on the date that it was revoked (34 CFR § 300.9). Therefore, the revoking of consent does not negate any action that has occurred after the previous consent was given and before the consent was revoked.

Once an LEA receives a parental revocation of consent, in writing, for all special education and related services for a child and provides PWN in accordance with 34 CFR § 300.503, the LEA must, within a reasonable time, discontinue all special education and related services to the child. In situations where a parent disagrees with the provision of a particular special education or related service and the parent and LEA agree that the child would be provided with a FAPE if the child did not receive that service, the LEA should remove the service from the child's IEP. If, however, the parent and LEA disagree about whether the child would be provided with a FAPE if the child did not receive a particular special education or related service, the parent may use due process procedures to obtain a ruling that the service with which the parent disagrees is not appropriate for their child. The parent may not revoke consent for a particular service.

Once the LEA has received the written revocation of services from the parent, the LEA must promptly provide the parent or student who is 18 or older with PWN regarding the change in educational placement and services that will result from the revocation. The LEA may ask why the parent is revoking consent, but may not require the parent to provide an explanation. The LEA's inquiry may provide an opportunity to discuss and resolve the problem, but may not delay or deny the discontinuation of services.

The PWN must be provided a reasonable time before the LEA discontinues services and must give the parent information and time to fully consider the change and its implications. This PWN will ensure that parents are fully informed of the educational services and supports that they are declining. The PWN must inform the parent, as plainly as possible, that the student will no longer receive any special education or related services; nor will the student be entitled to the protections under the IDEA disciplinary procedures if he or she violates the LEA's disciplinary code of conduct. The PWN must be clear and specific so that the parent or student can make an informed decision. The LEA may not discontinue services until the PWN has been provided to the parent. If the student who has reached age 18 revokes consent for services, the LEA is required to provide any notice (including PWN) to the student and parents under 34 CFR § 300.520(a)(1)(i). The LEA may not use the dispute resolution mechanisms in the IDEA (mediation and due process) when a parent revokes consent. The LEA does not have the ability to override a parent's revocation of consent for the continued provision of services.

Revocation of consent releases the LEA from responsibility and liability for providing a FAPE from the time the parent revokes consent in writing until the time, if any, that the child is again evaluated and deemed eligible for special education services and related services. The LEA will not be deemed to have knowledge that the child is a child with a disability under 34 CFR § 300.534(c)(1)(ii) and the child may be disciplined as a general education student and is not entitled to discipline protections under the IDEA. Once a parent has revoked consent and PWN has been provided, the child is considered to be a general education student. Teachers are no longer required to provide previously identified IEP accommodations in the general education environment. The revocation is for all special education services.

Once a parent revokes consent for a child to receive special education and related services, the child is considered a general education student under the Elementary and Secondary Education Act (ESEA). Therefore, if a parent revokes consent after the school year begins, but before administration of the annual state assessment required under the ESEA, the child is considered a general education student who has exited special education for accountability purposes. Section 200.20(f) of the Title I regulations allows states to include, for a period of up to 2 Adequate Yearly Progress determination cycles, the scores of students who were previously identified with a disability under the IDEA, but who no longer receive special education services, in the special education subgroup for purposes of calculating AYP (but not for reporting purposes). Therefore, the state may continue to include a child whose parent revokes consent for special education and related services in the special education subgroup for purposes of calculating AYP for 2 years following parental revocation of consent. While the state may continue to include the child in the students with disabilities subgroup for purposes of calculating AYP for up to 2 years, the child will not have an IEP; therefore, the state will no longer be required under the IDEA to provide accommodations that were previously included in the child's IEP.

The parent's revocation of consent is not retroactive; therefore, the LEA would not be required to amend the child's educational records to remove any references to the child's receipt of special education and related services. The parent still retains the right, however, to request amendments to information that is inaccurate or misleading or violates the privacy or other rights of the child.

The child find provision in 34 CFR § 300.111 require the LEA to identify, locate, and evaluate all children with disabilities residing in the LEA. Children who have previously received special education services and subsequently had consent revoked should not be treated any differently in the child find process than any other child. Ensuring that general education teachers make appropriate referrals for children suspected of having a disability, which would include the referral of children whose parents have previously revoked consent, is consistent with the child find responsibility.

After withdrawing their child from special education services, the parent maintains the right to subsequently request an initial evaluation to determine if the child is a child with a disability who needs special education. There is no limit as to how frequently a parent may revoke consent and then subsequently request an initial evaluation. If a child who had previously received special education services and had consent revoked was again referred for an evaluation, the LEA must treat this referral as an initial evaluation under 34 CFR § 300.301 rather than as a reevaluation. Depending on the data available, a new evaluation may not always be required. On the basis of the review of existing evaluation data and input from the child's parents', IEP team, and other qualified professionals, the group would identify what, if any, additional data were needed. The parent retains the right to refuse to provide consent for an initial evaluation.

Special education and related services must be discontinued promptly upon receipt of the written revocation of parent consent and the sending of PWN. The LEA may consider the appropriateness of a 504 evaluation under Section 504 of the Rehabilitation Act of 1973 (Section 504) for the child. The OEC is

currently awaiting guidance on how, if at all, the parent's revocation of consent for services under the IDEA affects the child's right to services under 504.

G. NOTICE OF IEP TEAM MEETING

The LEA must take steps to ensure that one or both parents are present at each IEP meeting or are otherwise afforded the opportunity to participate in the IEP meeting. The meeting is to be scheduled at a mutually agreed upon time and place. The LEA must provide notice of an IEP meeting to the parents for the initial IEP meeting and any subsequent IEP meetings. The written notice must indicate:

- o the purpose;
- o the date;
- o the time;
- o the location of the meeting;
- o the titles or positions of the persons who will attend on behalf of the LEA (The LEA is to notify the parents about who will be in attendance at an IEP team meeting, however, individuals may be indicated by position only. The LEA may elect to identify participants by name, but they have no obligation to do so.); and
- o information about the parents' right to invite to the IEP meeting individuals whom the parents believe to have knowledge or special expertise about their child;
- o information about the parents' right to have the local Part C coordinator or other representative invited if their child was previously served in Part C; this would help ensure a smooth transition.

In addition, beginning not later than the first IEP to be in effect when the child turns 13, or younger if determined appropriate by the IEP team, the notice must:

- o indicate that a purpose of the meeting is the consideration of the postsecondary goals and transition services;
- o indicate that the LEA will invite the student; and
- o identify any other agency that will be invited, with parent consent (or student consent if age 18), to send a representative. (34 CFR § 300.322(b))

LEA Responsibilities

Sometimes it is difficult to determine the situation with parents. There is a difference between "unavailable" and "unwilling." An uncooperative parent is not unavailable. A parent who can be located by mail, personal visits, or phone is not unavailable, even though she or he does not respond to the LEA's attempts to involve him or her in the student's education. If a parent has not responded to a request for consent to conduct a reevaluation, under federal and state regulations, the LEA may conduct the reevaluation without parent consent as long as they have documentation of required attempts made and the parent did not respond. (See Chapter 7, Reevaluation.)

If a parent is in jail, she/he is technically not "unknown or unavailable". The parent's participation may be obtained by telephone and consent may be obtained through contact by mail, unless it is not feasible to do so.

H. STUDENT RIGHTS AT AGE 18

On or before the student's 17th birthday, the IEP of the student must contain a statement that the student has been informed that at age 18, he or she has attained the age of majority in South Carolina and all parent rights transfer to him/her. Thus, at age 18, students become their own educational decision makers.

When a student reaches the age of majority, LEA personnel must provide all required special education notices to both the student and to the parents and obtain informed consent for specified special education actions from the student (same requirements as for parents). Parents are not entitled to attend the IEP meeting; however, either the LEA or the student may, but are not required to, invite the parents to attend IEP meetings as persons who are knowledgeable about the student.

The only situation in which all rights do not automatically transfer to the student at age 18 is when a court has judged the student to be unable to fulfill his or her responsibilities (determined the student to be "incompetent"). When this has occurred, the LEA must provide PWN and obtain informed consent from the person whom the court has appointed as the legal guardian. LEAs may provide parents information about other options and resources about this topic.

Once rights have been transferred to the student, he or she may be able to execute a power of attorney under S. C. Code Ann. § 62-5-501 (Supp. 2010). This regulation allows a person who is not affected by a disability to execute a power of attorney to grant another party the right to act as the agent or attorney-in-fact for the person. The term "disability" here means cause for a protective order which involves the appointment of a conservator or other protective order by the court to act on behalf of an individual. The term does not relate to whether the person has a disability as defined by the IDEA. There are additional requirements under this statutory provision that must be met.

I. QUESTIONS AND ANSWERS ABOUT PARENT RIGHTS

1. Who can give consent for a student's educational program?

Parents and/or legal educational decision makers must be given Prior Written Notice (PWN) and the request for consent whenever an LEA proposes to initiate or change (or refuses to initiate or change) the identification, evaluation, placement or educational services of a child with a disability. Parents may then provide or withhold consent for decisions regarding these matters. Consent from one parent is sufficient, even if the other parent refuses to consent.

2. What if there is disagreement about an action that requires consent?

Parents and other legal educational decision makers should clarify the issues about which there is no disagreement. Those actions, or portions of the IEP, should be implemented without delay.

For the area of disagreement requiring consent, there are two options: (1) mediation as an impartial proceeding whereby a mediator works with the parents and the LEA representative to reach consensus and develop a written agreement, and (2) a due process hearing in which a hearing officer makes the decision. In mediation, both parties must first agree that they want to mediate. There is no cost to the parents. Either the parents or the LEA may request a hearing.

3. May parents revoke consent to a special education service, but not the goals for that service; or in reverse, consent to goals, but not the service necessary to implement the goals?

Parents provide consent only for the initial provision of special education and related services. They do not have the option of consenting to each individual annual goal in the IEP. Annual goals are the method for measuring the progress made by the provision of services.

4. What obligation does an LEA have to allow parents or other non-school personnel to observe or video tape a child in the educational setting?

Neither federal or state laws nor regulations give parents the right to observe their children in class. An LEA may, however, give a parent permission to observe a child in class if doing so would not disrupt LEA activities and would help the LEA and the parent work together to develop an appropriate IEP. Many LEAs have policies that define the conditions under which parents and others may observe children in school and for videotaping children in the classroom.

5. May an LEA allow a student to sign a waiver at age 18 to waive his rights?

No, only a court of law may disallow the transfer of rights at age 18. Prior to the promulgation of State Board of Education (SBE) regulation 43-243 in August 2007, LEAs were allowed to use waivers in this situation. Any waivers signed prior to the promulgation of this regulation were "grandfathered" in; however, the rights must now automatically transfer to the student, unless the parent has an order issued by the Probate Court or the student signs power of attorney voluntarily transferring his or her legal rights to the parent.

6. May a parent revoke consent for a particular special education or related service?

In situations where a parent agrees with the majority of services in his/her child's IEP, but disagrees with the provision of a particular service or services, such as physical therapy or occupational therapy, the

LEA should work with the parent informally to achieve agreement. While the parent and LEA are attempting to resolve their differences, the LEA should provide the service or services that are not in dispute.

In situations where a parent disagrees with the provision of a particular special education or related service, and the parent and LEA later agree that the child would be provided with FAPE if the child did not receive that service, the LEA could decide not to provide the service with which the parent disagrees. If, however, the parent and the LEA disagree about whether the child would be provided with FAPE if the child did not receive a particular special education or related service with which the parent disagrees, and the parent and LEA cannot resolve their differences informally, the parent may use the procedures in subpart E of the *IDEA* regulations to pursue the issue of whether the service with which the parent disagrees is not appropriate for their child. This includes the mediation procedures in 34 CFR §300.506 or the due process procedures in 34 CFR §§300.507 through 300.516.

The parent may not revoke consent for a particular service. Under 34 CFR § 300.300(b)(1), parental consent is for the initial provision of special education and related services, not for a particular service or services; therefore, the parent may not revoke consent for a particular service. Revocation of consent is for **all** special education and related services.

7. Does the requirement that an LEA must 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?

No. Under 34 CFR § 300.300(b)(1), an LEA 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 LEA 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.

8. If the parent requests a change in identification (category of disability or from a child with a disability to a child without a disability) and the LEA disagrees, what must the LEA do?

PWN must be provided and must include a description of the action being refused, which, in the case of identification, would include the category of disability being refused and could include, as part of the explanation of reasons for the refusal, the category of disability under which the LEA believes the child remains eligible.

9. How does prior written notice work within the evaluation context?

School districts are not obligated to grant every parental request for an evaluation, however, a refusal to evaluate triggers PWN.

10. Do we have to give prior written notice for a child transitioning from Part C to Part B?

OSEP Early Childhood Transitions Frequently Asked Questions, 53 IDELR 301 (December 1, 2009). "If a child who has been served in Part C is referred to Part B, the LEA is responsible for giving the

parents of the child a copy of the procedural safeguards notice. 34 CFR § 300.504(a)(1). If the LEA suspects the child has a disability, the LEA must initiate the evaluation process to determine whether the child is a child with a disability. 34 CFR § 300.301(b). Before conducting an initial evaluation under Part B, the LEA must, after providing the parents prior written notice consistent with 34 CFR § 300.503, obtain informed consent, consistent with 34 CFR § 300.9, from the parent of the child. 34 CFR § 300.300(a).”

11. Is a FAPE what we determine in an IEP meeting?

Yes, and for that reason your IEP Team decisions trigger a duty to provide prior written notice. Letter to Lieberman, 52 IDELR 18 (OSEP 2008). “Under 34 CFR § 300.17(d), FAPE means, among other things, special education and related services that are provided in conformity with an IEP that meets the requirements of §§ 300.320 through 300.324. Therefore, a proposal [or refusal] to revise a child's IEP...would trigger notice under 34 CFR § 300.503.”

12. Do we have to give prior written notice to change an elective?

It depends on whether the particular elective is part of the IEP. Examining the goals will give insight as to whether a proposed change will substantially or materially affect the composition of the educational program. For example, in the case of *In re: Student with a Disability*, 110 LRP 54899 (SEA Wyo. 2010), a Wyoming Hearing Officer ruled against a district when it unilaterally transferred the student from P.E. to art without holding an IEP meeting and providing prior written notice. The Hearing Officer found that although students generally have the option of which elective class to enroll in, they are not interchangeable where a student's IEP goals are tied to his attendance in a particular course. Specifically, P.E. corresponded to a goal that the student would maintain his gross motor skills.

13. Is a prior written notice required regarding a change that is requested by a parent? In the circumstances where a school district is not proposing a change but rather agreeing with a change that has been proposed by a parent, would the school district be required to provide a notice?

Letter to Lieberman, 52 IDELR 18 (OSEP 2008). “Yes. The purpose of the written notice requirement is to inform parents of a public agency's final action on a proposal or refusal to initiate or change the identification, evaluation, or educational placement, or the provision of FAPE to a particular child. Regardless of how a change to the above factors is suggested, it is the responsibility of the public agency to make a final decision and actually implement any determined change. Therefore, in the circumstances where a public agency is not proposing a change, but rather agreeing with a change that has been proposed by a parent, the public agency would be required to provide prior written notice to the parent, consistent with 34 CFR § 300.503.”

CHAPTER 2: CHILD FIND

INTRODUCTION

LEAs must have policies and procedures in effect to ensure that all children with disabilities who are in need of special education and related services are identified, located, and evaluated. This includes children who attend public or private schools; those who are homeschooled; those who are highly mobile, including migrant and homeless; Adult Education Students; students in residential treatment facilities; and those who are wards of the state. The child find requirement for LEAs applies to children birth to 21. Child find in South Carolina involves referral to Part C for children birth to 3, a screening process for children from age 3 through age 5, and a general education intervention process for children from kindergarten to age 20. LEA staff, in conjunction with parents, uses these processes to locate, evaluate, and identify children who may need special education and related services. Children in need of special education services should be identified as young as possible, and also as soon as possible after the concern is noted. This includes children who are suspected of having a disability even though they are advancing from grade to grade (34 CFR § 300.111(a)(c)). The earliest possible identification of educational or behavioral concerns will diminish the impact of the concerns on the child's education.

This chapter includes information on the following topics:

- A. [Child Find Process](#)
- B. [Methods for Child Find](#)
- C. [General Education Intervention for Children from Kindergarten to Age 21](#)
- D. [Referral for Initial Evaluation](#)
- E. [Coordinated Early Intervening Services](#)
- F. [Questions and Answers about Child Find](#)

A. CHILD FIND PROCESS

The first step in the child find process is to provide information to the public concerning the availability of special education services for children with disabilities, including procedures for accessing these services. Copies of the information from child find activities are kept on file by the LEA as documentation for implementing policies and procedures.

Information on the child find process may be provided through a variety of methods. Informational materials must be distributed to various entities in the area, including private schools, other agencies and to professionals who would likely encounter children with a possible need for special education. LEAs may publish yearly notices in local newspapers, provide pamphlets, furnish information on their websites, broadcast announcements on radio or television and provide information at parent-teacher conferences. Suggested methods to accomplish public notice include:

- o Newspaper articles or ads,
- o Radio, TV, or cable announcements,
- o Community newspaper notices
- o School handbook and calendar
- o Letters to all patrons in the LEA
- o Poster in child care programs
- o Poster in health departments or doctors' offices

- o Poster in grocery stores, department stores and other public places

B. METHODS FOR CHILD FIND

The LEA must operate a comprehensive system of child find in order to identify, locate, and evaluate children with disabilities who reside within the LEA. Child find activities usually involve a screening process to determine whether the child should be referred for a full evaluation to determine eligibility for special education and related services. Intervention is another method. Screenings usually focus on medical, communication, cognition, motor, adaptive behavior, and/or social and emotional development. Child find activities, including these screenings, are free of charge to parents. If the screening finds a problem in one or more of these areas, then a full and individual evaluation is necessary. This is also free to the parents.

Mass screening of all children is not required, but a process must be available for any child for whom there is a concern about an area of development including communication, cognitive development, social-emotional development, self-help/adaptive behavior, and/or physical development; and hearing and vision. Young children's needs must be identified as soon as possible, so that early intervention and/or special education and related services may be provided. Screening is considered to be a quick look at the developmental areas to assist in determining whether a child should be referred for an initial evaluation.

The Part B child find requirements begin at birth and therefore overlap with the Part C child find requirements. LEAs should work with their local Part C BabyNet providers to refer children birth through age 2 for Part C child find activities to ensure that all children have access to interventions and services in a timely manner.

Children who are transitioning from the Part C Infant and Toddler program are not required to participate in a Part B screening process at age 3. For children receiving Part C services who may need an initial evaluation to determine eligibility for Part B special education services, the Part C Infant-Toddler Program may make a referral to the LEA. The referral is to be made at least 90 calendar days prior to the child's third birthday and according to the LEA's policy for making a referral for an initial evaluation.

LEAs must maintain documentation on results of child find activities and collaboration with Part C throughout the transition process. LEAs must ensure that the collection and use of data under the child find requirements are subject to confidentiality requirements under the Family Educational Rights and Privacy Act (FERPA).

C. GENERAL EDUCATION INTERVENTION

The purpose of general education intervention is to intervene early for any child who is presenting academic, functional, or behavioral concerns. This early intervention leads to a better understanding of the supports children need in order to be successful in the general education curriculum and school setting. Additionally, the data collected during general education intervention assists LEA personnel in determining which children may be children with disabilities who need to move into initial evaluation for special education. Collaboration between special education and general education staff is an important part of the general education intervention process.

The ESEA and the IDEA place a strong emphasis on using scientifically research-based interventions, as appropriate, for children in general education. ESEA defines scientifically research-based as "research that involves the application of rigorous, systemic, and objective procedures to obtain reliable and valid knowledge relevant to education activities and programs" (Federal Register, August 14, 2006, p. 46683). These practices and programs apply to all schools and all children in general education.

According to the Office of Special Education Programs (OSEP) Memo dated January 21, 2011, the provisions related to child find in section 612(a)(3) of the IDEA, require that a state have in effect policies and procedures to ensure that the state identifies, locates and evaluates all children with disabilities residing in the State, including children with disabilities who are homeless or are wards of the state, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services. It is critical that this identification occur in a timely manner and that no procedures or practices result in delaying or denying this identification.

The regulations at 34 CFR §300.301(b) allow a parent to request an initial evaluation at any time to determine if a child is a child with a disability. The use of Response to Intervention (RTI) strategies cannot be used to delay or deny the provision of a full and individual evaluation, pursuant to 34 CFR §§300.304-300.311, to a child suspected of having a disability under 34 CFR §300.8. If the LEA agrees with a parent who refers their child for evaluation that the child may be a child who is eligible for special education and related services, the LEA must evaluate the child. The LEA must provide the parent with notice under 34 CFR §§300.503 and 300.504 and obtain informed parental consent, consistent with 34 CFR §300.9, before conducting the evaluation. An LEA must conduct the initial evaluation within 60 calendar days of receiving parental consent for the evaluation. 34 CFR §300.301(c).

The general education intervention process should continue until a successful intervention is determined, until it is evident that the successful intervention requires resources beyond those available in general education, and/or until the team suspects the child is a child with a disability. At any time during the general education intervention, the team responsible for planning and implementing the interventions has three decisions that may be made:

1. Continue the intervention and monitor the child's progress; or
2. Change or modify the intervention and monitor the child's progress; or
3. Change or modify the intervention, monitor the child's progress, and refer the child for an initial evaluation to determine eligibility for special education and related services.

It should be made clear here that the process of continually designing and re-designing supports for children is one that does not end until the child is successful. Even when the decision has been made to move from general education intervention into an initial evaluation, the intervention process should not stop. Rather, it becomes part of the evaluation process.

The child might be referred for evaluation if:

- LEA personnel have data-based documentation which indicates that general education interventions and strategies would be inadequate to address the areas of concern for the child.
- LEA personnel have data-based documentation that indicates that prior to, or as a part of the referral, the following were met:
 - the child was provided appropriate instruction in regular education settings that was delivered by qualified personnel;
 - the child's academic achievement was repeatedly assessed at reasonable intervals which reflected formal assessment of the child's progress during instruction;
 - the assessment results were provided to the child's parents; and
 - the assessment results indicate an evaluation is appropriate.

As indicated previously, general education intervention may be carried out through a school-wide approach of providing a multi-tiered system of scientifically, research-based interventions for all children or

through an individual child problem solving approach. Regardless of the approach used, the focus should be on designing supports for children who need additional assistance in order to be successful in the general education curriculum and environment.

D. REFERRAL FOR INITIAL EVALUATION

Screening and general education interventions are child find activities, and either process may result in the determination that an initial evaluation for special education is needed. Most decisions to move forward into initial evaluation will come as a result of these processes. However, there are instances when requests for evaluation may be made by parents or by adult students. The following describes the procedures to be used when such requests occur:

Referral from parents: Parents have requested an evaluation. The request may be oral or written. The LEA may set a policy as to how a referral is to be made. If the LEA does have a specific policy, that policy must be clearly communicated to the parent upon request for a referral or request for referral information. The LEA must respond to the request within a reasonable period of time. The building principal or person designated to respond to parent requests for evaluations should explain to the parents the following:

- o They have the right to request an evaluation;
- o The LEA may refuse to conduct the evaluation. The PWN would explain why the LEA refuses to conduct the evaluation;
- o If the school has an RTI process in place and the team recommends participation in the process, then the parent can request the initial evaluation be conducted without waiting for general education interventions to conclude, the general education intervention process may be conducted as part of the initial evaluation.

Regardless of how the decision to move forward with an initial evaluation is made, it is crucial that the LEA have a process which will ensure that all data collected prior to the evaluation (i.e., data collected as part of screening, or general education intervention) is provided to the evaluation team. This ensures the evaluation team has a basis for understanding what additional data may be need to be collected as the initial evaluation process goes forward. Chapter 3 details all of the procedures and requirements that must be met at the time the child moves into the initial evaluation.

E. CORDINATED EARLY INTERVENING SERVICES (CEIS)

The OSEP states that the use of some Part B funds for CEIS has the potential to benefit special education, as well as the education of other children, by reducing academic and behavioral problems in the regular education environment and reducing the number of referrals to special education that could have been avoided by relatively simple regular education interventions (Federal Register, August 14, 2006, pp. 46626–46627). These early intervening services are not the same as “early intervention” services under the Part C, Infant-Toddler program, or child find activities, and are not available for preschool children ages 3 and 4, or 5 year olds not in kindergarten.

The LEA may carry out a variety of activities including:

- o Professional development (which may be provided by entities other than the LEA) for teachers and other LEA 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; and

- o Providing educational and behavioral evaluations, services and supports, including scientifically based literacy instruction.

F. QUESTIONS AND ANSWERS ABOUT CHILD FIND

1. Who is responsible for child find?

The Office of Exceptional Children (OEC) has policies and procedures in place to ensure that all children with disabilities residing in the State, including children with disabilities attending public or private schools, are home schooled; are highly mobile, including migrant and homeless; or are wards of the State, and who are in need of special education and related services are identified, located, and evaluated. LEAs are required to conduct ongoing public notice, screening, general education interventions, and evaluation to ensure that children from birth to age 5 with disabilities, and children from kindergarten through age 20 with disabilities are identified appropriately. For children birth through age 2, this involves referral to Part C. For children of school age attending a private elementary or secondary school, the LEA in which the private school is located is responsible for child find for children who are residents and non-residents of the LEA who may be attending the private school. For preschoolers, the LEA where the child resides is responsible for child find, even if the child attends preschool or child care in another LEA. This responsibility to conduct child find efforts for children from birth through age 2 is shared with the Part C Infant-Toddler program.

2. What is the timeline for the general education intervention process?

There is no rule of thumb for a timeline. The area(s) of concern and the nature of the interventions attempted will be the determining factors. The team will develop a plan that includes a timeline appropriate for each student. If it appears that the interventions involve intense or sustained resources, or if the team suspects the child may have a disability, the team must make a referral for an initial evaluation. The LEA may not use the general education intervention process to delay an initial evaluation.

3. Are there situations when the general education intervention process for children K-12 would not be used?

Usually, the general education intervention process occurs prior to a student being referred for an initial evaluation. However, under some circumstances, it would not be necessary to begin with the general education intervention process before referring the student for an initial evaluation. This would most likely occur in an instance where a student with an obvious disability has not been identified previously. Another example might be for a student who has recently sustained a traumatic brain injury. Of course in situations such as these it would be inappropriate to delay further evaluation to determine the student's need for special education. In these kinds of cases, the data used for documentation that general education intervention would be inadequate to address the needs of the student might come from medical records, previous school records, observations, parent and teacher reports, etc. However, in cases such as this, even though it is appropriate to move directly to evaluation, it is recommended that general education intervention and strategies occur as part of the student's special education evaluation so that the team may collect data to determine what the best instructional approach for the student might be.

4. What happens to the information gathered about the child after the child find activities have been conducted?

If either the screening or general education intervention process is used to make a referral for an initial evaluation, the information may become part of the data used to determine eligibility during the initial evaluation process. However, screening information may not be the only information used to determine eligibility. Thus, it becomes part of the student's record, regardless of whether the student is eligible or not. Likewise, even if the screening or general education intervention process did not result in a referral for an initial evaluation, the information would be retained for documentation in the event that future issues arise. For example, if a student is later suspended or expelled and the parents assert that the student should have

been receiving special education services because she or he has a disability, this information would be very helpful for the LEA to have.

Because the screening information contains personally identifiable information about the child, it is confidential and must be kept in a secure location, according to FERPA requirements. See Chapter 11 for additional details.

5. At what point does the screening of a school-age child through general education intervention become an evaluation for special education eligibility which signals the protections of procedural safeguards and due process?

Federal requirements indicate that the screening of a student to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services (34 CFR § 300.302). Further explanation in the comments to the federal regulations indicates that screening refers to a process that a teacher or specialist uses to determine appropriate instructional strategies. The comments go on to describe screening as typically being a relatively simple and quick process that is used to determine strategies to more effectively teach children. This would include examples of such things as universal screening and progress monitoring tools that yield information teachers may use to more appropriately select interventions tailored to a student's area of academic need; observations of children in various environments from which analyses of behavior patterns may occur in order to direct staff to appropriate intervention selection; and diagnostic tools which assist LEA personnel in a deeper understanding of the student's presenting concern so that more effective interventions may be selected. It should be made very clear that the latitude given by this regulation is NOT to be interpreted as a way to circumvent other regulations pertaining to evaluation.

The difference between screening and evaluation is the **intent** of the activities. If the intent of the activities is to determine instructional strategies, that constitutes screening. It is clear in the regulation and subsequent comments that the **ONLY** activities that may be considered screening are those activities which result directly in information to be used solely for the purpose of designing instructional strategies. At any point that the intent changes to seek to determine if the student is a child with a disability or if the student is in need of special education services, this is evaluation and all due process protections come into play. At this point, parents must be contacted to seek consent for initial evaluation.

CHAPTER 3: INITIAL EVALUATION AND ELIGIBILITY

INTRODUCTION

As discussed in Chapter 2, the South Carolina child find process is intended to identify children who may be in need of special education services. Child find includes early childhood screening for young children ages 3 through 5, and general education interventions for children enrolled in kindergarten through grade 12 as well as screening for students enrolled in adult education classes through age 20. Information obtained from screening and general education interventions will assist teams in making decisions about referrals for initial evaluation. An appraisal of the extent of the presenting concern, the effectiveness of interventions tried, and the degree to which the interventions require substantial resources are important to consider when deciding whether a child should be referred for possible special education services, and are essential in planning and conducting the initial evaluation after a referral has been made. When the team conducting general education interventions begins to question whether the child might be a child with a disability, or when the team begins to question whether the child might need special education and related services, then a referral for an initial evaluation must be considered.

An initial evaluation involves the use of a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to assist in determining if the child is eligible for special education services. There is a two-pronged test for eligibility: (1) whether the child is a child with a disability and by reason thereof, (2) has a need for special education and related services. This two-pronged test has driven eligibility decisions for many years. However, it is clear more than ever in the law that evaluations must also determine the present levels of academic achievement and functional performance (related developmental needs) of the child (34 CFR § 300.305(a)(2)(i)-(iii)). This shifts the focus of the initial evaluation from the determination of eligibility for services to the determination of what the child needs to enable him/her to learn effectively and to participate and progress in the general education curriculum.

This chapter includes information on the required elements of the process to conduct an initial evaluation and determine eligibility, and also suggests ways to synthesize the team process at the building level. The initial evaluation process begins when a referral for initial evaluation is made and applies to all children beginning at age 3.

The following topics related to initial evaluation are discussed within this chapter:

- A. [Referral for Initial Evaluation](#)
- B. [Prior Written Notice and Request for Consent](#)
- C. [The Evaluation Team](#)
- D. [Timeline for Conducting the Initial Evaluation](#)
- E. [Conducting the Evaluation](#)
- F. [Eligibility Determination and Documentation](#)
- G. [Prior Written Notice for Identification](#)
- H. [Independent Educational Evaluation](#)
- I. [Questions and Answers about Initial Evaluation and Eligibility](#)

A. REFERRAL FOR INITIAL EVALUATION

Referrals for initial evaluation may come from a variety of sources. These include:

- Early childhood screening clinics
- Part C (BabyNet)
- General education intervention teams (individual problem-solving teams)
- Parents
- Self-referral by adult students

A referral for an initial evaluation is made whenever it is suspected that a child may be a child with a disability. For a preschool child the referral may be a result of screening described in the previous chapter or from a Part C (BabyNet) service provider. A school-aged child would typically participate in a general education intervention process prior to the referral. As a result of general education intervention, the LEA would have data-based documentation of repeated assessments of achievement at reasonable intervals, that indicate the instruction and educational interventions and strategies presented to the child in the general education setting were not adequate and indicated an evaluation for special education is appropriate (34 CFR § 300.309(c)(1)). A parent or adult student may request an evaluation at any time.

Upon referral for an initial evaluation, regardless of the source, the first action the LEA must take is to provide the parents or the adult student, with a copy of the Parent Rights Notice (procedural safeguards) (34 CFR § 300.503).

B. PRIOR WRITTEN NOTICE AND REQUEST FOR CONSENT

Whenever a child has been referred for an evaluation, the LEA must provide PWN to the parents that describes any evaluation procedures the LEA proposes to conduct (34 CFR § 300.304(a)). In addition, there are standard components the notice must also contain. The purpose of providing notice to the parents is so they understand what action the public agency is proposing (in this case, to conduct an initial evaluation) and the basis used for determining the action is necessary.

The PWN must include:

- 1) A description of the action proposed by the agency;
- 2) An explanation of why the agency proposes the action;
- 3) *A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed action;*
- 4) A statement that the parents have protection under the procedural safeguards and how a copy of the procedural safeguards can be obtained;
- 5) Sources for parents to contact to obtain assistance in understanding their procedural safeguards;
- 6) A description of other options considered and the reasons why those options were rejected; and
- 7) A description of other factors that is relevant to the agency's proposal. (34 CFR § 300.503(b))

Additionally, since this notice is to propose to conduct an initial evaluation, the notice must describe any evaluation procedures that the LEA proposes to conduct (34 CFR § 300.304(a)(1)).

The notice must be written in language understandable to the general public and provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. If the native language or other mode of communication of the parent is not a written language, the LEA must take steps to ensure that the notice is translated orally or by other means to the

parent in his or her native language or other mode of communication, that the parent understands the content of the notice. The LEA must have written evidence that this has been done (34 CFR § 300.503(c)).

1. Preparing the Prior Written Notice

When a referral for initial evaluation occurs, whether initiated from outside the LEA or within the LEA, staff will consider information provided in the referral or in the parent request for an evaluation and in the child's file including information collected during general education interventions. Based on this information the LEA will determine whether it will propose to conduct an evaluation and what procedures the evaluation will include (such as review of existing information or new assessment tools and strategies). The staff will then prepare the PWN of *proposed* action to provide to the parent. In some cases, the LEA staff may determine that there is not enough evidence to support conducting an initial evaluation and would, therefore, refuse to conduct the initial evaluation.

PWN must contain all of the required components as well as which assessments and other evaluation measures may be needed to produce the data needed to meet the requirements of eligibility determination (34 CFR § 300.305(c)). Every evaluation should be approached and designed individually based on the specific concerns of the child to be evaluated. Thoughtful planning is required to ensure that the team will use appropriate tools to collect the data needed, while eliminating time spent collecting information that is either unnecessary or overly time-consuming for no clear purpose. It would be inappropriate to use the same battery of assessments for all children or to rely on any single tool to conduct an evaluation.

The first activity the evaluation team should conduct is a review of existing data. The evaluation team needs to consider all data that are currently available including evaluations and information provided by the parents, current classroom-based, local, or state assessments, and classroom-based observations, and observations by teachers and related service providers; and the child's response to scientifically, research-based interventions, if implemented. The review of existing data, as part of the evaluation, may be conducted without a meeting and without consent from the parents (34 CFR § 300.305(b); 34 CFR § 300.300(d)(1)).

The purpose of reviewing existing data is to identify what additional data, if any, are needed to determine:

- a. if the child is a child with a disability;
- b. whether the child needs special education and related services;
- c. the educational needs of the child;
- d. the present levels of academic achievement and functional performance (related developmental needs) of the child; and
- e. whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable goals set out in the IEP and to participate, as appropriate, in the general education curriculum. (34 CFR § 300.305(a)(2))

After the team has reviewed the existing data, there must be a determination of what data, if any, will be collected during the evaluation. The PWN will be completed to reflect the data that will be collected as part of the evaluation.

a. Requirements if No Additional Data are Needed

If the team has determined that no additional data are needed to determine whether the child is a child with a disability, and to determine the child's educational needs, the LEA must notify the parents:

- o of that determination and the reasons for it; and
- o of the right of the parents to request an assessment to determine whether the child is a child with an disability, and to determine the educational needs of the child. The LEA is not required to conduct the assessment described above unless requested to do so by the child's parents. In addition, if the parents request an assessment of their child, the LEA may refuse to do so, but it must provide the parents with PWN of the refusal to conduct the assessment and the reasons for the refusal. The parents may then request mediation or due process if they want the assessment conducted.

b. Requirements if Additional Data are Needed

If the team has determined that additional data **are** needed, the team should plan who will collect it and plan to ensure all data will be collected within the evaluation timeline. The procedures to be used to collect the data should be described on the PWN for the initial evaluation and provided to the parents for their consent. The PWN does not have to include the name or description of every test to be administered.

2. Parent Consent

The LEA must obtain informed consent from the parent of the child before conducting the evaluation (34 CFR § 300.300(a)). In determining that informed consent is obtained, the following must be ensured (34 CFR § 300.9):

- a. The parent has been fully informed of all information relevant to the activity for which consent is being sought, in his or her native language, or other mode of communication.
- b. The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom.
- c. The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.
- d. If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

Parental consent for initial evaluation must not be construed as consent for the initial provision of special education and related services.

3. Failure to Respond or to Provide Consent

The LEA must make reasonable attempts to obtain consent from the parents to conduct the initial evaluation. "Reasonable attempts" might include at *least two contacts by two different methods* (phone calls, letters, visits, email, etc.). Documentation of such attempts should be kept in the student's folder, including detailed records of telephone calls made or attempted and the results, copies of written correspondence sent to the parents and their response if any, and visits made to the parents home or place of employment, and the results, if any, from the parents (34 CFR § 300.322(d)).

If the parent does not provide (refuses) consent or fails to respond to a request to provide consent for an initial evaluation, the LEA **may, but is not required to**, pursue the initial evaluation by utilizing mediation or by requesting a due process hearing. The LEA does not violate its obligation to provide a FAPE if it declines to pursue the evaluation (34 CFR § 300.300(a)(3)). Additionally, under the disciplinary protections, the LEA would not be deemed to have knowledge of the child's disability if the parent has not allowed an evaluation or refused services; or the child has been evaluated and determined not to have a disability.

The LEA is required to locate, identify, and evaluate children who are placed by a parent in a private school or home schooled. If the parent of a child who is home schooled or placed in a private school does not provide consent for the initial evaluation, or the parent fails to respond to a request to provide consent, the LEA cannot use mediation or due process procedures to obtain consent. In this case the LEA is not required to consider the child as eligible for services and does not violate the a FAPE requirement (34 CFR § 300.300(b)(4)).

C. THE EVALUATION TEAM

Once consent has been obtained from the parent, a team is formed that will have the responsibility of carrying out the evaluation process. The membership of the evaluation team is the child's IEP team (should the child be found eligible), including the parents. The team may include other qualified professionals, as appropriate. The addition of the other qualified professionals, if appropriate, is used to provide flexibility for public agencies to include other professionals who may not be part of the child's IEP team in the group that determines if additional data are needed to make an eligibility determination and determine the child's educational needs.

The make up of this team would include:

- The parents of the child;
- Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment); if the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or if the child is less than school age, an individual qualified to teach a child of his or her age;
- Not less than one special education teacher of the child, or where appropriate, not less than one special education service provider of the child;
- A representative of the local education agency who:
 - Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disability,
 - Is knowledgeable about the general education curriculum, and
 - Is knowledgeable about the availability of resources of the public agency;
- An individual who can interpret the instructional implications of evaluation results;
- At the discretion of the parent or agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate. (34 CFR § 300.321; 34 CFR § 300.308)

D. TIMELINE FOR CONDUCTING THE INITIAL EVALUATION

South Carolina has established a 60 day timeline consistent with federal regulations (34 CFR § 300.301(c)). The timeline for conducting the initial evaluation starts upon receipt of written parental consent to conduct the evaluation, and ends with the verification that all of the required information has been gathered in order to make an eligibility determination. The LEA must begin this timeline the day the first person in the LEA receives the signed parental consent for evaluation and must maintain documentation to show that there was no delay in the initiation of the evaluation process. When there is a delay in receiving the consent, the LEA will maintain a record of attempts to obtain the consent. This record could include a description of telephone calls and/or home or work visits made as well as other written correspondence with the parents such as notes or e-mails.

For children who transfer from one public agency to another in the same school year, assessments are coordinated with the child's prior LEA, as necessary and as expeditiously as possible, to ensure prompt completion of an evaluation begun by the prior LEA (34 CFR § 300).

Exceptions to the Timeline

There are only two specific instances when an extension of the 60-day timeline may be justified:

- a. If the parent of the child repeatedly fails or refuses to produce the child for the evaluation;
- b. If a child enrolls in a new LEA after the evaluation has begun and before the determination of eligibility; however, the new LEA is required to make sufficient progress to ensure a prompt completion of the evaluation, and the parent and the LEA must agree to a specific timeline for completion; and the parent and the LEA agree in writing to a specific time when the evaluation will be completed. (34 CFR § 300.301(d))

A third instance when an extension may be justified occurs for *specific learning disabilities only* 34 CFR § 300.309(b). This occurs when prior to a referral a child has not made adequate progress after an appropriate period of time when provided instruction, as described in §§ 300.306(b)(1) and (b)(2); and whenever a child is referred for an evaluation. The instruction referred to in the above sections are (1) Data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings delivered by qualified personnel; *and* (2) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided by the child's parents. The agreement to extend the timeframe must be in a written mutual agreement of the child's parents and a group of qualified professionals as described in § 300.306(a)(1).

The eligibility group referenced above must consider data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was suspected of having a SLD is not due to lack of appropriate instruction in reading or math. The information referred to in 34 CFR § 300.309(b)(2) may be collected as a part of the evaluation process, or may be existing information from the regular instructional program of a school or LEA. It must be reviewed and weighed by the evaluation group. As noted in the Analysis of Comments and Changes for the final IDEA Part B regulations, Federal Register, Vol. 71, No. 56, Monday, August 14, 2006, 71 Fed. Reg. 46540, 46657, "[a] critical hallmark of appropriate instruction is that data documenting a child's progress are systematically collected and analyzed and that parents are kept informed of the child's progress." This information is necessary to ensure that a child's underachievement is not due to lack of appropriate instruction.

Another caveat to this third exclusion is if a child suspected of having a SLD has participated in a process that assesses the child's response to scientific, research-based intervention, under 34 CFR §300.311(a)(7), the documentation of the determination of eligibility, as required in 34 CFR §300.306(a)(2), must contain a statement of the instructional strategies used and the student-centered data collected; and the documentation that the child's parents were notified about the State's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided, the strategies for increasing the child's rate of learning and the parents' right to request an evaluation.

E. CONDUCTING THE EVALUATION

The initial evaluation must include a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that

may assist in determining whether the child is a child with a disability, the educational needs of the child, and the content of the child's IEP, including information related to enabling the child to be involved in and progress in the general education curriculum or, for preschool children, to participate in appropriate activities. In addition, the procedures must also lead to the determination of the present levels of academic achievement and functional performance of the child. The LEA must administer such assessments and other evaluation measures as may be needed to produce the data to determine:

- o if the child is a child with a disability;
- o whether the child needs special education and related services;
- o the educational needs of the child;
- o the present levels of academic achievement and functional performance (related developmental needs) of the child; and
- o whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable goals set out in the IEP and to participate, as appropriate, in the general education curriculum. (34 CFR § 300.305(a)(2))

As stated previously, the data collected is critical not only for the purpose of determining whether a child is eligible for special education services, but also to assist in the development of present levels of academic achievement and functional performance. Federal and state regulations clearly state that the evaluation must result in determining the content of the child's IEP (if found eligible) including information related to enabling the child to be involved in and progress in the general curriculum (or for a preschool child, to participate in appropriate activities) (34 CFR § 300.304(b)(ii)). However, the evaluation should assist in the development of an instructional plan for the child if the child is not found to be eligible.

If the team has proposed to conduct the evaluation based only on existing data, the existing data must meet the requirements of this section for an evaluation.

1. Evaluation Procedures

During the evaluation process, the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities (34 CFR § 300.304(c)(4)). All assessment tools and strategies must provide relevant information that directly assists in determining the educational needs of the child (34 CFR § 300.304(c)(7)).

When conducting an evaluation, no single measure or assessment shall be used as the sole criterion for determining whether the child is a child with a disability and for determining an appropriate educational program for the child. When selecting assessment tools to assist in gathering the evaluation data across any of the six typical sources of data (general education curriculum progress, general education interventions, records review, interviews, observations, and tests), those conducting the evaluation must also ensure the following requirements are met (34 CFR § 300.304(b) and (c)):

- o Use a variety of assessment tools and strategies.
- o Use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.
- o Materials and procedures used to assess a child with limited English proficiency shall be selected and administered to ensure that they measure the extent to which the child has a disability and needs special education, rather than measuring the child's English language skills.
- o Assessments and other evaluation materials are:
 - selected and administered so as not to be discriminatory on a racial or cultural basis;

- provided and administered in the child's native language or other mode of communication, and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to do so;
- used for the purposes for which the assessments or measures are valid and reliable;
- administered by trained and knowledgeable personnel;
- administered in accordance with instructions provided by the producer of the assessments (Note: if an assessment is not conducted under standard conditions, a description of the extent to which it varied from standard conditions (e.g., the qualifications of the person administering the test, or the method of test administration) must be included in the evaluation report.)
- tailored to assess specific areas of educational need and not merely those designed to provide a single general intelligence quotient;
- selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

The evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category being considered for the child. If the child is found eligible, this information translates into the present levels of academic achievement and functional performance and forms the basis for making all the decisions in the IEP. If the child is not found eligible, this information assists the LEA in determining other appropriate supports for the child. Ultimately, at the close of an evaluation, the team must have enough information to support the child whether or not the child is found eligible for special education services. The team must be able to describe where the child is currently performing within the general education curriculum and standards as well as able to describe how (or if) the child's unique learning characteristics are impacting his or her ability to access and make progress in the general education curriculum (or for early childhood, to participate in appropriate activities). Other issues that are impacting the child's ability to function in the learning environment must also be described so that the extent of the child's needs may be realized.

There are two methods of evaluation, the child's response to scientific, research-based intervention and a pattern of strengths and weaknesses, which are outlined in federal regulations with regard to the identification of students with specific learning disabilities. South Carolina recognizes both as appropriate for use to determine eligibility for any of the areas of disability.

2. Collecting Evaluation Data

Collecting relevant functional, developmental, and academic information related to enabling the child to be involved in, and progress in, the general curriculum (or for a preschool child, to participate in appropriate activities) requires that data be collected not only about the child, but about the child's interactions in the curriculum, instruction, and environment as well. Every evaluation should be approached and designed individually based on the specific concerns and the selection of assessment tools based on the information needed to answer the eligibility questions. It would be inappropriate to use the exact same battery of assessments for all children or to rely on any single tool to conduct an evaluation. Data should be collected from across the six typical sources – general education curriculum progress, general education interventions, records review, interviews, observations, and tests.

F. ELIGIBILITY DETERMINATION AND DOCUMENTATION

At the time the evaluation is completed and the information is compiled, the team should schedule a time to convene in order to make the determination of eligibility. Eligibility determination must be made no later than fifteen business days after the completion of the evaluation. Parents must be provided an opportunity to participate in the eligibility meeting, which can be conducted at the same time as the IEP team meeting. The team must ensure that information obtained from all sources used in the evaluation is documented and carefully considered (34 CFR § 300.306(c)(1)(ii)). The parents and other qualified professionals review the results of the initial evaluation to determine:

- (1) whether the child is a child with a disability as defined in federal and state laws and regulations and
- (2) the educational needs of the child (34 CFR § 300.306(a)).

When interpreting evaluation data for the purpose of making these determinations, the team must:

- o draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior; and
- o ensure that information obtained from all of these sources is documented and carefully considered (34 CFR § 300.306(c)(1)(i) and (ii)).

The team must ensure that the child meets the definition of one of the categories of disability and, as a result of that disability, needs special education and related services (i.e., the two-pronged test) (34 CFR § 300.8). If a child meets the definition of a disability category but does not need special education and related services, she or he cannot be determined eligible under the IDEA. If the child has a need for special education and related services but does not meet the definition of a disability category, she or he cannot be determined eligible. In the case of a child who is found to have a disability, but does not need special education and related services, a referral for a 504 evaluation may be considered.

Prong 1 - Determining Whether the Child is a Child with a Disability

The team reviews the data to determine whether or not the child is a child with a disability. To do this, team members compare the data about the child to see if there is a match to one of the disability categories defined in SBE regulation 43-243.1. However, even when the data point to a particular area of disability, there are exclusionary factors that must be examined before determining the child is a child with a disability.

Federal and state regulations are very clear with regard to the fact that a child must **NOT** be determined to be a child with a disability if:

- o the determinant factor is:
 - Lack of appropriate instruction in reading, including the essential components of reading instruction (defined in § 1208(3) of the ESEA as phonemic awareness, phonics, vocabulary development, reading fluency including oral reading skills, and reading comprehension strategies);
 - Lack of appropriate instruction in math; or
 - Limited English proficiency ; and
- o the child does not otherwise meet the eligibility criteria as a child with a disability (34 CFR § 300.306(b)).

There are unique issues that must be examined before a child may be determined to have a specific learning disability. It is important that the team attend to collecting the data needed to examine these issues prior to and/or as part of the initial evaluation. According to (34 CFR § 300.309(a)), the group evaluating a child for a specific learning disability collects the following:

- Data to determine that the child does not achieve adequately for the child's age or to meet state-approved grade-level standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child's age or state-approved grade-level standards:
 - oral expression;
 - listening comprehension;
 - written expression;
 - basic reading skill;
 - reading fluency skills;
 - reading comprehension;
 - mathematics calculation; or
 - mathematics problem solving.

Additionally, in order for a child to be eligible as a child with a specific learning disability, the evaluation and eligibility report must document that the child meets the following conditions:

- The child does not achieve adequately for the child's age or to meet state-approved grade-level standards when provided with learning experiences and instruction appropriate for the child's age or state-approved grade-level standards,

AND

- The child does not make sufficient progress to meet age or state-approved grade-level standards when using a process based on the child's response to scientific, research-based intervention;

OR

- The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, state-approved grade-level standards, or intellectual development.
- The determinate factor for why the child does not achieve adequately for the child's age or does not make sufficient progress to meet age or state-approved grade-level standards, or exhibits a pattern of strengths and weaknesses, is not primarily the result of:
 - a visual, hearing or motor disability;
 - intellectual disability;
 - emotional disturbance;
 - cultural factors;
 - environmental or economic disadvantage; or
 - limited English proficiency (34 CFR § 300.309(a)(3)).

If the evaluation data indicate there is a match with a particular category of disability and the team has ruled out the presence of any exclusionary factors, the team may determine that the child meets one of the requirements of eligibility as a child with a disability (Prong 1 of the test of eligibility). If there is not a match or exclusionary factors are present, the team must determine that the child **does not** meet the eligibility of a child with a disability.

Prong 2 - Determining Whether the Child Needs Special Education and Related Services

The second prong of the test of eligibility is to determine whether or not the child needs special education and related services. It is helpful for teams to remember that by definition special education means

specially-designed instruction (34 CFR § 300.39(a)(1)), and, that specially-designed instruction means adapting the content, methodology or delivery of instruction to address the unique needs of a child that result from the child's disability to ensure access of the child to the general education curriculum in order to meet the educational standards that apply to all children (34 CFR § 300.39(b)(3)(i) and (ii)). This implies that in order to have a need for special education services, the child has specific needs which are so unique that they require specially designed instruction in order to access the general education curriculum.

Federal and state regulations require that prior to referral for an initial evaluation the LEA must have data-based documentation of having provided appropriate instruction to the child and having implemented educational interventions and strategies for the child, along with repeated assessments of achievement at reasonable intervals, which reflect formal assessment of the child's progress during instruction. The results of which indicate that the child is suspected of having a disability and may require special education and related services. If the LEA is implementing a multi-tiered model of intervention, it will have data regarding the child's needs related to the intensity of instruction and supports required for the child to be successful.

The team must review the evaluation data in such a way as to understand the extent of the child's needs with regard to specially designed instruction. Teams must be able to use the data to describe the intensity of the support needed to assist the child in accessing and progressing in the general education curriculum. It is only through this discussion that the team can determine whether or not the child's need for having adapted content, methodology, or delivery of instruction is so great that it cannot be provided without the support of special education.

If the team determines that the child's need for having adapted content, methodology, or delivery of instruction is so great that it cannot be provided in regular education without the support of special education, the team may determine that the child needs special education and related services (Prong 2 of the eligibility test). If the data suggests the child's needs for instruction can be provided within the regular education setting without the support of special education and related services, the team must determine that the child is not in need of special education and related services.

3. Eligibility Report

The evaluation team shall ensure that the information obtained from all sources is documented and considered. After carefully considering all data and making the eligibility determination, the team then must document the decision made regarding the child's eligibility for special education and related services. Once the evaluation report and documentation of eligibility has been completed, each team member must certify in writing whether the report reflects the member's conclusion. If it does not reflect the member's conclusion, the team member must submit a separate statement presenting the member's conclusions (34 CFR § 300.311(b)).

The eligibility determination serves as the documentation of the child's eligibility. The evaluation report and the documentation of eligibility must be provided, at no cost, to the parent (34 CFR § 300.306(a)(2)). The eligibility documentation must document that the determinant factor for the determination of eligibility is NOT due to a lack of appropriate instruction in reading or math, or a limited English proficiency. The LEA must also document that information was drawn from a variety of sources, including tests are required by the South Carolina Eligibility Requirements, parent input, teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior. The report must also identify the proposed category of disability.

There are specific requirements for reporting the eligibility determination for a child with a specific learning disability (34 CFR § 300.311). The evaluation report must include the following statements:

- a. whether the child has a specific learning disability;
- b. the basis for making the determination, including an assurance that the determination was made in accordance with applicable laws and regulations;
- c. the relevant behavior noted during the observation of the child; and for LD the relationship of that behavior to the child's academic functioning;
- d. the educationally relevant medical findings, if any;
- e. Whether
 - (i) the child does not achieve adequately for the child's age or to meet State approved grade-level standards when provided with learning experiences and instruction appropriate for the child's age or State-approved grade-level standards;

AND

the child does not make sufficient progress to meet age or State-approved grade-level standards when using a process based on the child's response to scientific, research-based intervention;

OR

the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-level standards, or intellectual development.

- (ii) the team determines the reason the child does not achieve adequately for the child's age, does not make sufficient progress to meet age or State-approved grade level standards, or exhibits a pattern of strengths and weaknesses, is not primarily the result of:
 - o visual, hearing or motor disability;
 - o intellectual disability
 - o emotional disturbance;
 - o cultural factors;
 - o environmental or economic disadvantage; or
 - o limited English proficiency.
- f. if the child has participated in a process that assesses the child's response to scientific, research-based intervention, the report must also document
 - o the instructional strategies used; and
 - o the student-centered data collected.
- g. Documentation that the child's parents were notified about the process, including the following information:
 - o the state's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided;
 - o strategies for increasing the child's rate of learning; and
 - o the parent's right to request an evaluation (34 CFR § 300.309(a)(3); 34 CFR § 300.311(a)); and
- h. Signatures of each team member indicating whether the report reflects their conclusion. If it does not reflect the team member's conclusion, the team member must submit a separate statement presenting his or her conclusion and attach it to the IEP.

G. PRIOR WRITTEN NOTICE FOR IDENTIFICATION

After the eligibility determination is made, the LEA is required to provide PWN to the parents that the LEA proposes to initially identify the child as a child with a disability (including the category proposed) and that the child requires special education and related services. (Letter to Atkins-Lieberman, August 5, 2010.) Likewise, LEA personnel must give PWN to the parents if they determine that a child is not eligible

for special education services or related services. The required content of the PWN is identical to the content described earlier in Section B of this chapter.

H. INDEPENDENT EDUCATIONAL EVALUATION

After an initial evaluation is completed, if the parents disagree with the LEA's evaluation, they have the right to ask for an independent educational evaluation at public expense. If the parent obtains an independent educational evaluation at public expense or provides the agency with an evaluation obtained at private expense, the results of the evaluation shall be considered by the LEA, if it meets the LEA's criteria, in any decision made with respect to the provision of a FAPE to the child.

Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the LEA responsible for the education of the child in question. Public expense means that the LEA either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.

If the parent requests an independent educational evaluation the LEA must either:

- Provide information to the parent about where an independent educational evaluation can be obtained, the agency criteria (which may include qualifications of examiners and location to obtain the evaluation); and
- Ensure that the evaluation is provided at public expense, unless the special education due process hearing officer determines that the independent educational evaluation did not meet agency criteria; or
- Initiate a due process hearing to show that the LEA's evaluation was appropriate.

If a parent requests an independent educational evaluation, the LEA may ask the reason for the objection to the public evaluation. However, the explanation by the parent cannot be required, and the LEA cannot unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.

A due process hearing officer would determine whether the LEA must pay for the independent educational evaluation. If the LEA's evaluation is found to be appropriate and the parents still want an independent educational evaluation, the expense is the responsibility of the parents. When an independent educational evaluation is conducted, the LEA or a special education due process hearing officer, or both must consider the results of the independent educational evaluation in decisions made with respect to a FAPE for the child.

If an independent educational evaluation is provided at public expense, the criteria under which the evaluation is obtained must be the same as the criteria that the LEA uses when it initiates an evaluation. These criteria may include the location of the evaluation and the qualifications of the examiner. The credentials of the independent evaluator or evaluators must be comparable to the LEA's evaluators. The LEA may set reasonable limitations on the costs for which it will be responsible. The LEA may have to exceed those costs if necessary to ensure that the independent educational evaluation meets the child's unique needs.

If a special education due process hearing officer requests an independent educational evaluation, the evaluation is provided at public expense. The LEA either pays the full cost of the evaluation, or ensures that the evaluation is otherwise provided at no cost to the parents. A parent is entitled to only one independent education evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees (34 CFR § 300.502(b)(5)).

I. QUESTIONS AND ANSWERS ABOUT INITIAL EVALUATION AND ELIGIBILITY

1. What happens when a child transfers to a different LEA during the initial evaluation?

Assessments for a child who transfers to a different LEA in the same school year during the initial evaluation are coordinated with the child's prior and subsequent LEAs, as necessary and as expeditiously as possible, to ensure prompt completion of the full evaluation. The 60-day timeline for the initial evaluation may be extended only if the new LEA is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and the new LEA agree to a specific time when the evaluation will be completed.

2. How can LEA staff ensure that evaluation materials and procedures used to assess racially and culturally diverse children are appropriate?

It is important that professionals conducting evaluations be aware of the potential bias that exists in all areas of assessment and seek to choose techniques and tools that reduce bias to the largest extent possible. This may involve being more aware of the growing body of research literature on this topic, developing a deeper understanding of the cultural and linguistic diversity represented in the LEA, purchasing evaluation materials that have been developed to reduce bias, and utilizing trained bilingual examiners. Further, professionals conducting the evaluation must document the extent that an assessment was not conducted under standard conditions (e.g., giving a standardized test in a language other than the one it was originally developed for). Teams should carefully consider the presence of bias and interpret the results of that evaluation accordingly.

3. What are the qualifications of the people doing the assessment?

Each assessment must be given and interpreted by a licensed or certified professional in the area being assessed (e.g., speech and language, motor, behavior, or other area). Certain test developers/suppliers also have specific requirements with regard to training and qualifications that must be considered. Assessments during initial evaluations encompass much more than test administration, however. When planning to collect the data for an evaluation, teams should determine which individuals have the most appropriate skills to obtain whatever data is needed.

4. May an initial evaluation consist only of existing data?

Yes. Existing data should be reviewed as a part of any initial evaluation. This would include evaluations and information provided by the parents, current classroom-based, local or state assessments, classroom-based observations, and observations from teachers and related service providers. For an initial evaluation, such data would help the team to decide if more information is needed to determine eligibility--both the presence of a disability and the determination of the child's educational need. The existing data will also help identify the present levels of academic achievement and related developmental needs of the child, and whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum, or for preschool-age children, an age appropriate environment. If the team has enough information from the existing sources of data (general education progress in curriculum/interventions, record review, interviews, observations, tests), the team may conclude that no additional data are needed and eligibility may be determined based upon existing data. The PWN would include: (1) a statement of this fact and the reasons for it; and (2) a statement of the right of the parents to request additional assessment to determine whether the child is a child with a disability. Parent consent to conduct the initial evaluation is required, whether or not additional data is needed.

5. What is the parent's role in the review of existing data?

As members of the team, parents may review any existing data, as well as provide existing data to the evaluation team. Parents may contribute relevant medical data or other records that the parent has concerning the child.

6. If the eligibility determination team fails to reach consensus about a child's eligibility for special education services, who makes the decision?

Teams should try to reach consensus about the eligibility decision. If a member of the LEA team does not agree with the others, they are able to record their disagreement on the documentation of eligibility. However, if the team cannot reach agreement, the final decision rests with the person who serves as the LEA representative at the eligibility determination meeting.

7. Can the evaluation team use severe discrepancy between ability and achievement to determine eligibility for learning disability?

Remember the two-prong test for eligibility. The existence of a severe discrepancy between ability and achievement is only a single indicator of whether a child might be a child with a disability (Prong 1). Other supporting data would be needed to establish the presence of a learning disability. In addition, other types of data would be needed to indicate that the child needs special education and related services (Prong 2).

8. Once a child has been dismissed from special education services, must you complete an initial evaluation upon receiving a referral to determine the need for special education services?

Once the child has been dismissed from special education services, any subsequent evaluation would be an initial evaluation and all requirements would apply.

9. If the parent presents written information from an outside agency (i.e., medical doctor) stating the need for an evaluation and/or IEP is the LEA obligated to complete an evaluation to determine eligibility?

This should be considered a referral for an evaluation. The LEA has the right to determine the need for an evaluation. The LEA must ensure that the child has been presented with general education interventions whether before or during the evaluation process and collect data to determine the child's need for an evaluation. The LEA must provide PWN to the parent if it refuses to conduct an evaluation.

10. How should LEA staff respond if the parent and/or outside agency request a specific assessment be completed as part of an evaluation?

The LEA evaluation team is to determine what assessments must be conducted as part of the evaluation process. They should consider any request from the parent or outside agency. If the LEA proposes to conduct the evaluation with no additional data, the parent may request the LEA conduct an assessment to determine if the child is a child with a disability and to determine the educational needs of the child.

11. If a parent presents an outside evaluation report to the LEA, is the LEA obligated to implement the recommendations made by the outside evaluation team?

After an initial evaluation is completed, if the parents disagree with the LEA's evaluation, they have the right to ask for an independent educational evaluation at public expense. If the parent obtains an independent educational evaluation at public expense or provides the agency with an evaluation obtained at private expense, the results of the evaluation must be considered by the evaluation team, if it meets the LEA's criteria, in any decision made with respect to the provision of a FAPE to the child. However, the IEP team is not obligated to implement the recommendations made by the outside evaluation team.

12. Is the conclusion of an evaluation the last day an assessment is given?

No. An evaluation is concluded upon verification that all of the required information has been gathered to make the eligibility determination. Since one assessment or a list of assessments is not the only information needed to determine eligibility, the conclusion of the *gathering* of the data would signify the end of the evaluation. If a results report is written following a formal assessment, the information may not be collected until after the report is written. Methods for determining that all information has been gathered may vary. An LEA may have a sign off mechanism as each piece of data is gathered; one person may be designated as providing verification that all information is gathered; or there may be a meeting concluding the information gathering process. However, each LEA is responsible for keeping documentation that the information was gathered within the 60 days.

13. If the evaluation is completed in 30 days, does that mean the LEA still has another 30 days before determining eligibility?

No. Once the evaluation is completed, the LEA has fifteen business days in which to determine eligibility.

14. May the verification that the evaluation is completed and the determination of eligibility happen on the same day?

Yes. An LEA may choose to examine the evaluation information on the day that the last piece is verified as collected and determine eligibility at the same time.

15. If a child has an impairment, but only needs related services, is that child eligible under IDEA?

It is important to note that under 34 CFR §300.8, a child must meet a two-prong test to be considered a child with a disability: (1) have one of the specified impairments (disabilities); and (2) because of the impairment, need special education and related services. If a child has one of the impairments, but needs only related services and does not need special education, the child is not a child with a disability (see 34 CFR §300.8(a)(2)(i)).

16. Does 'existing,' as used in the IDEA [Individuals with Disabilities Education Act] phrase 'review of existing data' have a reasonable 'physical location' component, and if so, what? For example, should a 'review of existing data' include a physical review of educational records not readily available to IEP [individualized education program] team members (because they are stored in a special ed [sic] file in another office/building and adherence to policies to obtain)? Or, can this review activity be satisfied by obtaining and reviewing those that are readily available, such as currently implemented IEP, school-wide monitoring (i.e., grade reports attendance records, state-wide testing results), grade-wide progress monitoring and teacher input?

As described in 34 CFR §300.305(a)(1), existing evaluation data on the child consist of both written and observational data. The determination of what constitutes existing evaluation data on the child is left to the IEP Team, which includes the child's parents, and other qualified professionals, as appropriate. Under this regulation, an IEP Team *cannot* refrain from reviewing existing evaluation data on the child solely because it determines that the data are not stored in a location that makes them readily available to the IEP Team.

CHAPTER 4: THE INDIVIDUALIZED EDUCATION PROGRAM (IEP)

INTRODUCTION

The Individualized Education Program (IEP) is defined as a written statement for each student with a disability which describes that child's educational program and is developed, reviewed, and revised in accordance with special education laws and regulations. The team that develops the IEP includes parents, LEA professionals, the student (when appropriate), and personnel from other agencies as appropriate (especially when addressing transition). Each IEP must be developed with careful consideration of the individual child's capabilities, strengths, needs, and interests. The IEP should direct the child toward high expectations and toward becoming a member of his or her community and the workforce. It should function as the tool that directs and guides the development of meaningful educational experiences, thereby helping the child learn skills that will help him/her achieve his or her goals. In short, it should assist the child in meeting the goals and challenging standards of our educational system as well as identified postsecondary goals.

The IEP describes and guides services for each child on an individual basis. Such a guide also assists teachers and other staff to have very specific, well-defined measurable annual goals for each eligible child. All persons involved should have high expectations for children and work from a strengths perspective in developing educational programs. The IDEA includes numerous IEP requirements. Additionally, for children ages 3 through 5, an IFSP may be used, with parent consent.

This chapter addresses the following topics:

- A. [IEP Team](#)
- B. [Notice of IEP Team Meeting](#)
- C. [Using an IFSP Instead of An IEP](#)
- D. [When IEP/IFSP Must Be in Effect](#)
- E. [Development of the IEP](#)
- F. [Meeting to Review and Revise the IEP](#)
- G. [Transfer within State or from Out-Of-State](#)
- H. [Implementing the IEP](#)
- I. [Using the IEP software](#)
- J. [Questions and Answers about the IEP](#)

A. IEP TEAM

The IEP team is a group of people, knowledgeable about the child, who come together at an IEP meeting in order to develop or review and revise a child's IEP. Collaboration among IEP team members is essential to ensure that each child's educational experience is appropriate and meaningful. All members of the IEP team are equal partners in IEP discussions. Because of their long-term perspective and unique relationship, parents bring a valuable understanding of their child to the table. Children also can express their own needs, strengths, and interests. Educators, on the other hand, bring an educational focus to the meeting; an understanding of the curriculum, the challenging educational standards for the child, and the relationship to the general education environment. With this in mind, parents and educators must continue to recognize their responsibility to maintain and enhance partnerships with each other and the child throughout the school year in order to create a collaborative environment at each IEP team meeting.

The IEP team should work toward consensus; however, if an IEP team is unable to come to consensus the LEA has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive a FAPE. Following the IEP meeting, the LEA must provide the parents with the LEA's proposal for services as identified in the child's IEP. If, after all options have been exhausted, the parents and the LEA cannot come to agreement, either party may request mediation or a due process hearing to resolve the differences.

1. IEP Team Membership

The positions of members of the IEP team are specifically identified and described in state and federal laws and regulations. In addition to the following list of required members of the IEP team, if parents need a sign language or foreign language interpreter, the LEA must provide that service (34 CFR § 300.322(e); 34 CFR § 300.321). If the required members of the team are not present, and proper excusal procedures are not completed, then the meeting is non-compliant and the resulting IEP is invalid.

The **student** must be invited to attend his or her own IEP meeting beginning at age 13, or younger, if a purpose of the meeting is consideration of the student's postsecondary goals and the transition services needed to assist the student in reaching those goals. If the student elects not to participate, the IEP team must take other steps to ensure that the student's preferences and interests are considered in developing the IEP (34 CFR § 300.321(b)(2)). The LEA may invite the student to attend his or her own IEP team meeting at any age, when appropriate. Beginning at age 18, unless the student has been determined incompetent by a court, the rights have transferred to the student, and both the student and parents must receive written notice of the IEP team meeting.

The **parents** must be members of the IEP team. The parents are equal partners and play an active role in providing critical information about their child's abilities, interests, performance, and history. They are involved in the decision-making process throughout the development of the IEP.

The team must include not less than one **special education teacher of the child**, or where appropriate, not less than one special education provider of the child. The LEA may determine the particular individual(s) to be members of the IEP team.

The team must also include not less than one **general education teacher of the child**, if the child is, or may be, participating in the general education environment. This must be a teacher who is or may be working with the child to ensure success in the general curriculum and implement portions of the IEP. The general education teacher is knowledgeable about the curriculum, appropriate activities of typically developing peers, and how the child's disability affects the child's participation (involvement and progress) in the curriculum or those appropriate activities. General education teachers assist in the development, review, and revision of the IEP including determining appropriate positive behavioral interventions and supports and other strategies for the child, as well as supplementary aids and services, program modifications and supports to enable general education teachers to work with the child.

If the child has several general education teachers, at least one must attend the IEP meeting. However, it may be appropriate for more to attend. The LEA may designate which teacher or teachers will serve as IEP team member(s), taking into account the best interests of the child. The general education teacher who serves as a member of the child's IEP team should be one who is, or may be, responsible for implementing a portion of the IEP. The LEA is strongly encouraged to seek input from the teachers who will not be attending the IEP team meeting. All general education teachers of the child must be informed by the IEP team of their specific responsibilities related to implementing the child's IEP and the specific accommodations, modifications, and supports that must be provided for the child in accordance with the

IEP. The child's IEP must be accessible to each general education teacher who is responsible for its implementation. The parent may also request specific teachers to be invited to the meeting.

General education teacher for early childhood

If an LEA provides general education preschool services to nondisabled children, or if a preschool child with disabilities is enrolled in a preschool program for children without disabilities operated by the LEA, the preschool teacher has the same requirements to attend the IEP meeting that the general education teacher of school-age children has. If the child is enrolled in a preschool program for children without disabilities that is not operated by the LEA, the LEA is required to invite the preschool teacher, but has no authority to require his or her attendance. If the preschool teacher of the child does not attend, the LEA shall designate a teacher who, under state standards, is qualified to serve children without disabilities of the same age.

For a child 3 through 5 years of age, the representative may be a preschool teacher (e.g., regular preschool, Title I preschool, Head Start, Migrant, 4-year-old at-risk, etc.). For four or five year old child, the general education teacher may be the kindergarten teacher, if the child is or will be attending kindergarten within the term of the IEP. Early childhood providers working in various community settings must meet the credentialing requirements of their hiring agencies.

For a child 3 through 5 years of age in a setting that does not provide a preschool educational component (e.g., home setting or child care), the child is not considered to have a regular education teacher and is not considered to participate in a general education environment; therefore, a general education teacher is not required to be part of the IEP team. However, a parent may invite a child care provider to attend the IEP team meeting as a person with knowledge or expertise about the child.

General education teacher for children in separate settings

It is expected that the circumstances will be rare in which a general education teacher would not be required to be a member of the child's IEP team. However, there may be situations where a child is placed in a separate school and participates only in meals, recess periods, transportation, and extracurricular activities with children without disabilities and is not otherwise participating in the general education environment, and no change in that degree of participation is anticipated during the next twelve months. In these instances, since there would be no current or anticipated general education teacher for a child during the period of the IEP, it would not be necessary for a general education teacher to be a member of the child's IEP team.

The **LEA** or designee must be a member of the IEP team. There are three requirements of the LEA representative or designee. The LEA representative or designee:

- o is qualified to provide or supervise provision of special education services;
- o has knowledge of the general education curriculum; and
- o is knowledgeable about the availability of the LEA's resources.

The primary responsibility of the LEA representative must be to commit LEA resources and ensure that services written in the IEP will be provided. The LEA representative must have the authority to commit LEA resources and be able to ensure that whatever services are described in an IEP will actually be provided. The LEA will be bound by the IEP that is developed at an IEP meeting. (Federal Register, August 14, 2006, p. 46670).

A person **who can interpret instructional implications of any new evaluation or assessment results** must also be a member of the IEP team. This may include individuals who participated on the

evaluation team. Certainly a school psychologist, a special education teacher, general education teacher, speech/language pathologist, or other related service provider might have evaluation results that need to be interpreted and provide instructional implications.

Others individuals who have knowledge or special expertise regarding the child, including related services personnel, as appropriate, and those who are invited by the parents or the LEA may attend the IEP meeting. The determination of who has knowledge or special expertise regarding the child is made by the party (parents or LEA) who invited the individual to be a member of the IEP team. Therefore, the other party may not bring into question the expertise of an individual invited to be a member of the IEP team and may not exclude another team member's expert based on the amount or quality of their expertise. (34 CFR § 300.321(c)).

Although parents are not required to do so, the LEA may ask the parents to inform them of the individuals they are bringing. The person who contacts the parents may wish to ask them if they intend to bring other people to be sure that the room is adequate for the number of participants.

Other team members may also be added, based on the child's individual needs. For example, for a child who uses assistive technology or who may be in need of such services, an internal or outside expert may be required at this meeting. In other circumstances, the school nurse or another health professional should attend. Any child with a need for a health care plan should have a health professional participate at the annual review meeting for the IEP, and other meetings as appropriate. Other team members might include occupational or physical therapists or adapted physical education teachers.

Representatives of any other agency may be invited to attend the IEP meeting. For a child with a disability age 13 or older the IEP team will consider the transition services of the child, and the IEP team must determine, to the extent appropriate, any other public agency representatives that must be invited to the IEP meeting because they are likely to be responsible for providing or paying for transition services. The parents, or a student who is 18 years of age, must provide consent prior to each IEP Team meeting if a public agency proposes to invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services. (34 CFR § 300.321(b)(3)).

Consent from the parent (or adult student) is required when inviting outside agencies to ensure the protection of confidentiality of any personally identifiable data, information, and records collected or maintained by the LEA. Although the LEA has the responsibility to invite (after receiving parent or adult student consent) individuals from other agencies, the LEA does not have the authority to require the other agency representative to attend the IEP meeting (Federal Register, August 14, 2006, p. 46672).

When conducting an initial IEP team meeting for a child who was previously served under Part C of the federal law, an LEA, at the request of the parent, must send an invitation to attend the IEP meeting to the local Part C services coordinator or other representatives of the Part C system to assist with the smooth transition of services.

The law allows for individuals to represent more than one of the membership roles on the IEP team. If a person is representing more than one role, he or she must meet the individual qualifications for each role at the IEP team meeting. Additionally, all of the requirements for one representative do not have to be filled by one person; other members of the school team may meet one or any of these requirements. Individuals assuming more than one role at an IEP team meeting should document their roles on the signature page of the IEP. Although there is no legal minimum number of participants at IEP team meetings, the number of participants should be reasonable and appropriate to address the needs of the child and to carry out the intent of the law. It would not be responsible for only one member of the LEA staff to adequately represent every required membership role at an IEP team meeting. (34 CFR § 300.321)

2. IEP Team Attendance and Excusals

The IDEA provides the possibility that certain IEP team members might be excused from attending either a part or an entire IEP meeting. Allowing IEP team members to be excused from IEP meetings is intended to provide additional flexibility to parents in scheduling IEP team meetings and to avoid delays in holding meetings when a team member cannot attend due to a scheduling conflict. This provision applies specifically to the following IEP members:

- o The child's regular education teacher, if the child is or may be participating in the regular education environment;
- o The child's special education teacher, where appropriate, the child's special education provider;
- o The representative of the LEA who is qualified to provide or supervise the provision of specially-designed instruction and an individual who can interpret the instructional implications of the evaluation results.

Note that written agreement or consent is needed to excuse **required** members of the IEP team. Neither written agreement nor consent is needed to excuse an IEP team member who has knowledge or special expertise and attends at the invitation of the parent or LEA since such individuals are not required members of the IEP team.

The requirements to excuse a member of the team depend upon whether or not the member's area of expertise will be discussed at the meeting. The requirements in one situation call for an "agreement" between parents and the LEA; in the other situation, parental "consent" is required. An agreement is not the same as consent, but instead refers to an understanding between the parent and the LEA. "Consent" refers to informed written consent which is defined in 34 CFR § 300.9. This level of consent is not required for "agreement." Agreement is less formal and does not trigger the IDEA's procedural safeguard and the other requirements that must be met when requesting informed parental consent.

When a member of the IEP team's area of expertise is **not** being modified or discussed, the member may be excused from attending the meeting, in whole or in part, under two conditions: the parents and LEA **agree** that the member's attendance is not necessary and the parents' and LEA's agreement is **in writing**.

If a member is excused by written agreement and it becomes evident during the IEP meeting that the absence of the excused member inhibits the development of the IEP, the team must reconvene after the needed information is obtained either by having the member attend or having the member submit the information in writing as long as the IEP is developed in a timely manner.

When a member of the IEP team's area of expertise **is** being modified or discussed, the member may be excused from attending the meeting, in whole or in part, under two conditions: the parents and LEA **consent** to excuse the member and the member submits in writing to the parent and team input into the development of the IEP *before* the meeting. The IDEA does not specify how far in advance of the meeting a parent must be notified of the LEA's request to excuse a member, but the ideally the LEA would provide the parents with as much notice as possible and have the agreement or consent signed at a reasonable time period prior to the meeting. (34 CFR § 300.321(e)).

Caution must be exercised if excusing the LEA designee since the public agency remains responsible for conducting IEP Team meetings that are consistent with the IEP requirements of the IDEA and its implementing regulations. It may not be reasonable for the public agency to agree or consent to the excusal of the public agency representative. For example, the public agency cannot consent to the excusal of the public agency representative from an IEP Team meeting if that individual is needed to ensure that

decisions can be made at the meeting about commitment of agency resources that are necessary to implement the IEP being developed, reviewed, or revised. If a public agency representative is excused from attending an IEP Team meeting, consistent with 34 CFR 300.321(e), the public agency remains responsible for implementing the child's IEP and may not use the excusal as a reason for delaying the implementation of the child's IEP.

Neither the IDEA nor the state specifies a timeframe (other than prior to the meeting) or the form or content of the written input. To specify either of these (timeframe or form/content) would effectively counter the intent of providing additional flexibility to parents in scheduling IEP meetings. Best practice would call for the Notice of Meeting and attachments with the consent and written input from the excused team member to be sent at least 5 days in advance of the meeting.

Parents' rights are protected since parents can request an additional IEP meeting at any time and do not have to agree to excuse a team member. (Federal Register, August 14, 2006, p. 46674). Parents who want to confer with an excused team member may ask to do so before agreeing or consenting to excusing the member. A LEA may not routinely or unilaterally excuse IEP team members as parent agreement or consent is required for **each** excusal. It is up to each LEA to determine the individual with the authority to make the agreement with the parent to excuse a team member. The designated individual must have the authority to bind the LEA to the agreement with the parent or to provide consent on behalf of the LEA. Neither the IDEA nor the state has specifically identified a timeframe within which the LEA must complete the agreement or consent since to do so would effectively counter the intent of providing additional flexibility to parents in scheduling IEP meetings. Best practice would call for the Notice of the Meeting and agreement/consent to be sent to the parents at least 5 days prior to the meeting. If an LEA requests the excusal of a team member at the last minute or the parent needs additional time or information to consider the request, the parent always has the right not to agree or consent to the excusal.

When any member is excused from an IEP meeting, information must be shared with this team member. In fact, the IDEA requires that the child's IEP must be accessible to each regular education teacher, special education teacher, related services provider, and other service providers who is responsible for the implementation regardless of whether that team member was present at the IEP meeting.

B. NOTICE OF IEP MEETING

The LEA must take steps to ensure that one or both parents are present at each IEP meeting or are otherwise afforded the opportunity to participate in the IEP meeting. The meeting is to be scheduled at a mutually agreed upon time and place. The LEA must provide notice of an IEP meeting to the parents for the initial IEP meeting and any subsequent IEP meetings. If the child is at least 13 years old, the notice must inform the parents that their child is invited to attend the meeting.

Beginning at age 13, or younger, if a purpose of the meeting is consideration of the student's postsecondary goals or transition services, the student must be invited to attend and participate in the IEP team meetings. The LEA is not required to give children who are younger than age 18 the same notice that is required for parents, but should document that the student was invited to the meeting. The LEA is required to invite the student to the IEP meeting even if the student's parents do not want their child to attend the meeting. However, because parents have authority to make educational decisions for their child (under 18 years of age), the parents make the final determination of whether their child will attend the meeting (Federal Register, August 14, 2006, p. 46671).

Beginning at age 18, if rights have transferred to the student, all notices are to go to both the adult student and the parent, including the notice of the IEP meeting. When a student reaches 18 years of age, the

parents no longer have a right to attend or participate in an IEP meeting for their child. The LEA or the student may invite the parents to attend the meeting as persons with knowledge or expertise about the student. The notice of the IEP meeting could be used as an invitation for all team members who are invited to attend the IEP meeting.

1. Content of Notice of IEP Meeting

The written notice must indicate (34 CFR § 300.322(b)):

- o the purpose;
- o date;
- o time;
- o location of the meeting;
- o the titles or positions of the persons who will attend on behalf of the LEA (the LEA is to notify the parents about who will be in attendance at an IEP team meeting, however, individuals may be indicated by position only. The LEA may elect to identify participants by name, but they have no obligation to do so.);
- o inform the parents of their right to invite to the IEP meeting individuals whom the parents believe to have knowledge or special expertise about their child; and
- o inform the parents that if their child was previously served in Part C they may request that the local Part C coordinator or other representative be invited to participate in the initial IEP meeting to ensure a smooth transition of services.

In addition, beginning not later than the first IEP to be in effect when the child turns 13, or younger if determined appropriate by the IEP team the notice must also:

- o indicate that a purpose of the meeting is the consideration of the postsecondary goals and transition services;
- o indicate that the LEA will invite the student; and
- o identify any other agency that will be invited, with parent consent (or adult student consent), to send a representative.

Prior Written Notice **IS NOT** required **BEFORE** a meeting (even for possible changes in placement), but **IS** required **AFTER** all meetings prior to implementing any changes recommended by the team.

There are typically four types of meetings that would be held:

- o Initial services provision
- o Annual review
- o Reevaluation review
- o Special review to discuss lack of progress/problems

Each meeting type requires a notice of meeting early enough to ensure that the parents have an opportunity to attend. In addition to indicating the date, time, and location of the meeting, the notice of the IEP meeting must include information concerning the reason for the meeting. If the meeting is a special review, then the purpose of the meeting is to discuss the child's lack of progress in certain areas or problems that are occurring (for example, difficulty mastering math concepts, discipline referrals, lack of progress in reading). The result of the meeting will be proposed changes (for example, addition of goals, change of placement, and addition of related services) to the IEP that will address these issues. However, if it is known

that a change of placement will be discussed, that must be included. You are informing them of what will be *considered* at the meeting.

If the meeting is for a child age 13 and above where transition services must be discussed, the Notice must also indicate that a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the child; that the child will be invited; and identify any other agency that will be invited to send a representative.

For example, if the child is having problems with class disruptions and has received a discipline referral for outbursts, the Notice of meeting would indicate the purpose to be a discussion of the recent behavior outbursts and discipline referral. The purpose is not to discuss a possible change in placement. This *may* be the **outcome** of the discussion, but is not the purpose of the meeting. The Notice must provide enough information about the reason for the meeting so that the parent can be properly prepared to participate in the discussion meaningfully. Following the meeting, the parent is given a PWN that describes the proposed changes and reasons for the proposed changes or the refusal of changes and reasons.

You may use the notice of meeting that is currently in Excent. If you check “Special Review”, you must also check “Other” and describe the reason for the meeting in enough detail to allow the parents to participate appropriately in the meeting and to make decisions concerning their need to invite additional people to the meeting. This process would apply to other types of meetings as well, if it is known that other issues/concerns will be discussed.

2. Methods to Ensure Parent Participation

IEP meetings are to be scheduled at a mutually agreed upon time and place. The LEA should work with the parent to reach an amicable agreement about scheduling. The LEA must take whatever action is necessary to ensure the parents understand the proceedings at the IEP meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English (34 CFR § 300.322(e)).

If the parent is not able to physically attend the IEP meeting, the parent and the LEA may agree to use alternative means of participation, such as video conferences and individual or conference telephone calls (34 CFR § 300.322(c); 34 CFR § 300.328). Each parent must be provided a final copy of the IEP at no cost (34 CFR § 300.322(f)).

3. Conducting the IEP Team Meeting without a Parent

An LEA may conduct an IEP meeting without the parent(s) in attendance if the LEA, despite repeated documented attempts, has been unable to contact the parents to arrange for a mutually agreed upon time or to convince the parents that they should participate (34 CFR § 300.322(d)). The LEA must keep a record of its attempts to arrange a mutually agreed on time and place to secure the parents’ participation. The record could include the following:

- o Detailed records of telephone calls made or attempted, including the date, time, person making the calls, and the results of those calls;
- o Detailed records of visits made to the parents’ home or place of employment, including the date, time, person making the visit, and the results of the visits;
- o Copies of correspondence sent to the parents and any responses received; and
- o Detailed records of any other method attempted to contact the parents and the results of that attempt.

An LEA is encouraged to use its judgment about what constitutes a good-faith effort in making repeated attempts to involve each family in the IEP process.

C. USING AN INDIVIDUAL FAMILY SERVICES PLAN (IFSP) INSTEAD OF AN IEP

The IEP team may consider the use of an IFSP in place of an IEP for children with a disability ages 3 through 5. The IFSP would be developed in accordance with all of the IEP procedures, but contain the content described in 20 U.S.C. § 1436, Part C. If the LEA and the parents agree to use an IFSP, the LEA must provide the child's parents a detailed explanation of the differences between an IFSP and an IEP, and obtain written informed consent from the parents.

If the LEA uses the IFSP, as stated above, the IFSP must include the natural environments statement required under Part C (34 CFR 303.18; 34 CFR 303.344(d)(1)(ii)). The IFSP must also contain an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills (34 CFR § 300.323(b)).

If the child has participated in the Part C Infant-Toddler Program prior to being determined eligible for early childhood special education services, and already has an IFSP that is in effect, the IEP team may review the content of the child's current IFSP to see if it meets the needs of the child for one year, as identified through the Part B evaluation process. If it does, the IEP team may use the existing IFSP, but must ensure that all of the requirements for the development of an IEP are met, including timelines for development and implementation, and designation of a new current implementation date for the IFSP. If the current IFSP does not meet the needs of the child for one year, the IEP team, including the parent, will develop a new IFSP, or IEP, for the child.

D. WHEN THE IEP/IFSP MUST BE IN EFFECT

1. For Children Ages 3 to 21

An IEP must be developed within 30 calendar days of a determination that the child needs special education and related services and must be implemented as soon as possible after written parent consent is granted for the services in the IEP. In addition the LEA is required to ensure that an IEP is in effect at the beginning of each school year for each child with a disability. (34 CFR § 300.323(a) and (c)).

2. For Children Ages 3 through 5

Each LEA must make a FAPE available to all eligible children by their third birthday. An IEP must be developed and implemented in accordance with federal and state laws and regulations. If a child's birthday occurs during the summer, the child's IEP team must determine the date when services under the IEP will begin, including the consideration of extended school year (ESY) services.

Many children who have participated in Part C Infant-Toddler services transition to early childhood special education services by their 3rd birthday. Each child must be identified as eligible through a Part B initial evaluation prior to receiving services at age 3.

For a child who is transitioning into the Part B early childhood special education services from the Part C early intervention services, the LEA is required to ensure that:

- o the child is determined eligible under Part B requirements;
- o an IEP or IFSP is in effect by the child's 3rd birthday;

- o if a child's 3rd birthday occurs during the summer, the child's IEP team must determine the date when services will begin, but not later than the beginning of the school year following the 3rd birthday; and
- o a representative of the LEA will participate in transition planning conferences arranged by the Part C program.

E. DEVELOPMENT OF THE IEP

An IEP that promotes challenging expectations and ensures participation and progress in the general education curriculum is one that focuses on local and state curricular content standards and related assessments. Thus, statements of present levels of academic achievement and functional performance, measurable annual goals, special education and related services, and the ongoing monitoring and evaluation of IEPs, should relate to state and local standards. It is also important that the IEP address each of the child's other educational needs identified in the present levels of performance that result directly from the child's disability. For example, measurable annual goals for instruction in Braille may be appropriate for children who are blind, even though Braille is not included in the general education curriculum. Likewise, measurable annual goals for instruction in sign language may be appropriate for children who are deaf, even though sign language may not be part of the general education curriculum. Annual goals in academic content areas will be drawn from the general education curriculum. Other annual goals may be based on standards that are appropriate to meet the child's unique needs that result from the disability and that allow the child to participate and progress in the general curriculum.

1. IEP Team Considerations (Special Factors)

In order to assure that the IEP team addresses all of the special education and related service needs of the child there are several special factors that the IEP team must consider in the development of the IEP.

a. Strengths of the Child

The IEP team must be aware of the strengths of the child, and utilize those strengths during the development of the IEP to assist in addressing the child's needs where possible. The strengths should be included in the present levels of academic achievement and functional performance of the child, as identified through the evaluation.

b. Concerns of the Parents

Parents must have the opportunity to express their concerns for enhancing the education of their child during the IEP meeting. This provides the parents an opportunity to share with the LEA what they see as the most important in meeting the needs of their child. The concerns of the parents must be considered by the IEP team but do not obligate the IEP team.

c. Results of the Initial Evaluation or Most Recent Evaluation

In developing each child's IEP, the IEP team must consider the results of the initial or most recent evaluation of the child. This must include a review of valid evaluation data and the observed needs of the child resulting from the evaluation process and, as appropriate, any existing data, including data from current classroom-based, local and state assessments.

d. The Academic, Developmental, and Functional Needs of the Child

In developing each child's IEP, the IEP team is required to consider the academic, developmental, and functional needs of the child. A child's performance on state or LEA assessments logically would be included in the IEP team's consideration of the child's academic needs. The consideration of state- and district-wide assessment programs is consistent with the emphasis on the importance of ensuring that children with disabilities participate in the general curriculum and are expected to meet high achievement standards. Effective IEP development is central to helping these children meet these high standards.

These assessments, however, should not make up the entirety of the academic, developmental, and functional needs of the child. The IEP team must review existing data, including data from current classroom based and local assessments. In order to develop a full view of a child's needs, many pieces of information must be considered.

e. Behavioral Concerns

In the case of a child whose behavior impedes the child's learning or that of others, the IEP team must consider the use of positive behavioral interventions and supports, and other strategies, to address the behavior. The focus of behavioral interventions and supports in the IEP is prevention of the behavior, not just provision for consequences subsequent to the behavior. This means that the team will need to attempt to identify the function of the behavior, usually through a functional behavioral assessment, and develop strategies to prevent the behavior from occurring again in the future.

The positive behavioral interventions and supports could be implemented through the IEP annual goals, program modifications, or a behavioral intervention plan (BIP). If a BIP is developed by the IEP team, it becomes part of the IEP and any changes to it would require a meeting of the IEP team to consider the proposed changes to the plan. Special education laws and regulations place a strong emphasis on supports and interventions, including positive behavior interventions and supports that are scientifically research-based. Scientifically based research means that the interventions or supports must be accepted by a peer-reviewed journal or approved by a panel of independent experts through a comparably rigorous, objective, and scientific review. (Federal Register, August 14, 2006, p. 46683) These strategies are designed to foster increased participation of children with disabilities in general education environments or other less restrictive environments, not to serve as a basis for placing children with disabilities in more restrictive settings. No child should be denied access to special education services and the opportunity to progress in the general education curriculum.

f. Limited English Proficiency

The IEP team must consider the language needs of the child who has limited English proficiency as those needs relate to the IEP including the impact of how service providers communicate with the student and progress is measured.

g. Braille

For a child who is blind or visually impaired, the IEP team must consider instruction in Braille. The use of Braille should be provided unless the IEP team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child. If Braille is to be taught as a method of accessing printed material, it is to be indicated in the IEP.

h. Communication Needs

The communication needs of **all** students with disabilities must be considered on each IEP. It is required that the IEP team considers the communication needs of each child, regardless of disability. This consideration must include the unique communication needs of all children in order to help them achieve their educational goals.

For a child who is deaf or hard of hearing, it is important that the LEA recognize that this consideration is not an administrative decision for only one particular type of sign language interpreting to be available, nor is it a parental decision based on parental choice. Instead, it is an IEP team decision based on the unique communication needs of each child. The LEA must provide the communication services that each child requires.

i. Assistive Technology

The IEP team must determine whether an individual child needs an assistive technology (AT) device or service, and if so, the nature and extent to be provided. It is possible that an assistive technology evaluation will be required to determine if the child would need an assistive technology service and/or assistive technology device. Any needs identified should be reflected in the content of the IEP, including, as appropriate, the instructional program and services provided to the child.

j. Extended School Year Services (ESY)

For children with disabilities, the IEP team must consider each individual child's need for ESY services during time periods when other children, both disabled and nondisabled, normally would not be served. If ESY is determined to be necessary to enable the child to benefit from his or her education, then the type and amount of special education services to be provided, including frequency, location and duration, are documented in the IEP. LEAs must not limit the availability of ESY services to children in particular categories of disabilities, or limit the type, amount, or duration of these necessary services.

For an eligible child who will turn 3 during the summer, the IEP team must make the determination of the need for ESY services during that summer. (See Chapter 5 for more information on ESY.)

2. Content of the IEP

Evaluation information for a child with a disability must identify each of the child's specific needs that result from the disability, provide baseline information, and describe how the disability affects the child's participation and progress in the general education curriculum. Utilizing baseline data established in the present levels of academic achievement and functional performance, the IEP team must develop measurable annual goals, including academic and functional goals that meet the child's needs and enable the child to be involved in and make progress in the general education curriculum. The special education, related services, supplementary aids and services, program modifications, and supports for LEA personnel described in the IEP must reflect the child's needs in order to ensure he or she receives educational benefit.

a. Present Levels of Academic Achievement and Functional Performance

The IEP for each child with a disability must include a statement of the child's present levels of academic achievement and functional performance, including: how the child's disability affects the child's involvement and progress in the general education curriculum; or for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities

The present levels of performance summarizes the child's current performance and provides the foundation upon which all other decisions in the child's IEP will be made. The present levels identify and prioritize the specific needs of a child and establish a baseline from which to develop meaningful and measurable goals. For present levels to be complete, they need to include information about:

- Current academic achievement and functional performance: This is the broadest type of information that is included in the present level statement. This might include information such as standardized assessments, learning rate, social issues, vocational interests, independent living skills, and other interests, strengths, and weaknesses.
- Impact of the disability upon ability to access and progress in the general curriculum: In addition to describing the child's current performance (academics and functional areas), present levels must describe how the disability affects the child's involvement and progress in the general curriculum. The present levels statement must also include more specific information that clearly describes how the child's disability impacts (or manifests itself) within the general education curriculum that prevents the child from appropriately accessing or progressing. By completing this statement it will make it clear to the team what the child's needs are and which ones are of highest priority to be addressed.
- Baseline: Baseline data provides the starting point for each measurable annual goal, so there must be one baseline data point for every measurable annual goal on the child's IEP. Baseline data in the present levels are derived from locally developed or adopted assessments that align with the general education curriculum. Examples of baseline data include percent of correct responses, words read correctly, number of times behavior occurs, and mean length of utterances. Other issues important in collecting baseline data are the understanding that any goal written will have the same measurement method used in collecting its baseline data. Also, when selecting baseline data it needs to be:
 - specific – to the skill/behavior that is being measured; the skill/behavior is described in relationship to expectations within the general education setting (norms/standards/expectations included);
 - objective – so that others will be able to measure it and get the same results;
 - measurable – it must be something that can be observed, counted, or somehow measured; and
 - able to be collected frequently – when progress reports are sent out, the progress of the student toward the goal will have to be reported using the same measurement method as used to collect the baseline data. Non-examples of this would be self-esteem or social awareness without a more specific description of what it means.

For preschool children, the present levels describe how the disability affects the child's participation in appropriate activities. The term "appropriate activities" includes activities that children of that chronological age engage in as part of a preschool program or in informal activities. Examples of appropriate activities include social activities, pre-reading and math activities, sharing-time, independent play, listening skills, and birth to 6 curricular measures. The federal regulation at 34 CFR § 300.323(b) indicate that preschool programs for children with disabilities should have an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills. Teachers should become familiar with the curriculum standards for kindergarten to know what is expected at that age and to give direction for learning activities and from future early childhood standards.

For children ages 13 and older (or younger if appropriate), the present levels also describe the child's transition needs in the areas of education/training, employment and where appropriate independent living skills.

The IEP team should consider the following questions when writing the present levels:

- o In areas of concern, what is the child's present level of performance in relationship to LEA standards and benchmarks in the general education curriculum?
- o In areas of concern, what is the child's present level of performance in relationship to level of performance that will be required to achieve the postsecondary goals?
- o Are there functional areas of concern related to the disability not reflected in the general education curriculum (e.g., self-care skills, social skills, organizational, etc.)?
- o What is the degree of match between the skills of the child and the instructional environment?
- o What strengths of the child are relevant to address the identified concerns?

Examples of Present Levels Statements:

Example of Current Academic Achievement and Functional Performance:

Jeremiah is a 9 year old fourth grade student with average ability, whose achievement testing shows relative strength in reading and weakness in math. Jeremiah is reading at grade level and has good comprehension. His most recent CBM testing showed that he read 111 words per minute, which is at the 65th percentile on local norms. Math CBM testing showed that he scored 9 digits correct in a two minute timing, which is at the 17th percentile on LEA fourth grade norms. Mom reports that he brings home assignments requiring reading, but he forgets his math homework.

Example of Impact of Disability:

Jeremiah has difficulty paying attention during class time. His inability to stay on task and follow directions is negatively affecting his classroom performance. When asked to begin work, he often looks around as if he does not know what to do. Observations indicate he often looks to peers for directions, rather than attending to the teacher. This occurs in both classes that he likes and in those he does not like. When the teacher goes to him to provide individual help, he refuses help and insists he understands what to do, but then he often completes the assignment incorrectly.

Jeremiah also needs to work on staying in his personal space and not invading others' personal space. This is exhibited when he swings a backpack or his arms around in a crowded room or while walking down the hall. Observations of Jeremiah show this is also an issue during games in PE class and in unstructured activities during recess, such as playing tag. He is unable to appropriately interact with others. He sometimes stands very close to other students, squaring up to them, in a posture that is intimidating to younger students, and challenging to those his own age. He has also been observed to inappropriately touch other students. These behaviors have been especially problematic during special out-of-school activities, and Jeremiah has not been allowed to attend the last two class field trips, because of the severity of problems on earlier field trips.

Example of Baseline Data:

Teachers estimate that Jeremiah inappropriately invades others' space at least 50% of the time during unstructured activities. Observations using interval recording indicate that during recess he invaded others' space (using defined behavioral criteria) during 70% of the observation intervals. During classroom time, he was out of his seat and inappropriately close to another student during 35% of the observation intervals. Total off-task behavior during classroom observation was 60% of observed intervals.

Other Examples of Present Levels Statements:

Example of Current Academic Achievement and Functional Performance:

In his general education 8th grade math classroom, Mike is currently turning in about half of his assignments, and only about a third of those assignments are completed. Accuracy of his turned-in work fluctuates markedly. Because of his poor assignment completion, Mike received a mid-quarter failing warning letter. Mike's completion of assignments in other curricular areas is not a concern.

Example of Baseline Data:

Todd, a fourth grader, currently reads 85 words per minute with 5 errors when given a first semester, second grade-level passage. According to district norms, Todd is reading at the 5th percentile for fourth graders in the fall.

b. Measurable Annual Goals

Measurable annual goals are descriptions of what a child can reasonably be expected to accomplish within a 12-month period with the provision of special education (specially designed instruction) and related services. When selecting areas of need to address through annual goals, the IEP team's focus should be on selecting goals from the needs from the present levels. For curricular needs, the IEP team must consider identifying goals allowing the student to participate in the general education to the greatest extent possible. To accomplish this, it is necessary that the child's performance be measured against the LEA or state standards, benchmarks, and indicators. As LEAs develop assessments to measure their standards, all children need to be included.

Measurable annual goals must be related to meeting the child's needs that result from the child's disability, to enable the child to be involved and progress in the general or advanced curriculum. In addition, they must meet each of the child's other educational needs that result from the child's disability. Annual goals are not required for areas of the general curriculum in which the child's disability does not affect the ability to be involved and progress in the general curriculum. The annual goals included in each child's IEP should be individually selected to meet the unique needs of the individual child. The goals should not be determined based on the category of the child's disability or on commonly exhibited traits of children in a category of disability. For those children with disabilities who take alternate assessments aligned with alternate achievement standards, a description of benchmarks or short-term objectives must be included.

There is a direct relationship between the measurable annual goal, baseline data, and the needs identified in the present levels of performance. Because the present levels are baseline data for the development of measurable annual goals, the same criteria used in establishing the present levels must also be used in setting the annual goal.

The essential characteristic of IEP goals is that they must be measurable and be measured. The IEP must describe how the student's progress toward the annual goals will be measured. The IEP must include schedule for reporting progress to a student's parents as often as students in general education get report cards.

Four critical components of a well-written goal are:

- o The **behavior** clearly identifies the performance that is being monitored, usually reflects an action or can be directly observed, and is measurable.
 - Sarah will read...
 - Claude will correctly solve...
 - Mary will respond...
- o The **conditions** specify the manner in which progress toward the goal is measured. Conditions are dependent on the behavior being measured and involve the application of skills or knowledge.
 - When presented with 2nd-grade-level text...
 - Given a mixed, 4th-grade-level math calculation probe...
 - Given a story prompt and 30 minutes to write...
- o The **level of proficiency** identifies how much, how often, or to what standards the behavior must occur in order to demonstrate that the goal has been reached. The goal criterion specifies the amount of growth the child is expected to make by the end of the annual goal period. The goal must allow a clear yes or no determination of whether or not it has been achieved.
 - 96 words per minute with 5 or fewer errors.
 - 85% or more correct for all problems presented.
 - 4 or better when graded according to the 6-trait writing rubric.
- o The **measurement** is the "as measured by" piece. It describes how progress will be measured. The description should include what tool or methodology will be used; who will collect data; when data will be collected; and if appropriate, where data will be collected.
 - As measured by a weekly one minute oral reading fluency probe administered by the special education teacher....
 - In his daily journal....
 - Objectives to measure the goal may be written.

Also, the IEP may include a timeframe. The **timeframe** is usually specified in the number of weeks or a certain date for completion. A year is the maximum allowed length for the timeframe.

- In 45 instructional weeks...
- By November 19, 2008...
- By the end of the 2008–2009 school year...

Measurable Annual Goal

Well-written measurable annual goals will pass the "Stranger Test." This test involves evaluating the goal to determine if it is written so that a teacher who does not know the child could use it to develop appropriate instructional plans and assess the child's progress. These goals should also pass the "Dead Person Test." This test avoids using words such as "won't do" or "refrain from" as a dead person can do that. Write the target as something the student CAN do rather than NOT do.

The number of goals addressed in the IEP depends on the child's needs. Prerequisite skills, immediate needs, and general applicability are all factors to consider when establishing priorities. Parents, general education teachers, and children are also essential sources of information when setting priorities.

If the child needs accommodations or modifications in order to progress in an area of the general curriculum, the IEP does not need to include a goal for that area; however the IEP would need to specify the modification and accommodations.

c. Short-Term Objectives (required for students on South Carolina Alternate Assessment (SC-Alt) only)

Short-term objectives are only required on the IEP of a child with a disability **who takes or has taken** an alternate assessment aligned to alternate achievement standards (34 CFR 320(a)(2)(ii)). This means that only children who take the SC-Alt would be required to have short-term objectives or benchmarks on their IEPs. This requirement would apply to preschool children and children with disabilities in kindergarten through grade two only if these children are assessed in a state or district-wide assessment program based on alternate achievement standards. However, this requirement would not prohibit the use of short-term objectives to be used to measure progress toward meeting the measurable annual goals for any child with a disability (Federal Register, August 14, 2006, p. 46663).

Measureable annual goals with objectives must not use “Student will improve (insert skill here) by completing x of x of the following objectives.” Instead, an appropriate statement should read, “Student will improve (insert skill here) by completing the following objectives.” All objectives under the goal are required to satisfy the completion of the goal and objectives must be measurable, and both must be directly linked to present levels of performance. A goal and objective must give a clear picture of where the student is currently functioning on the skill, and where will that student be at the end of the IEP.

Example of Present Levels Statement, Measurable Annual Goal, and Benchmarks for Student taking the SC-Alt

Present levels: Jennifer uses the BIGmack switch or step by step when it is presented, but she uses these devices only with adults, and not with her peers. She requires physical prompting to use the devices at least 90% of the time. She does not acknowledge the presence of peer communicative partners in an observable manner.

Measurable Annual Goal 1: Within 36 educational weeks, Jennifer will acknowledge the presence of a peer communication partner at every encounter as evidenced by gestures, changes in body position, or vocalizations, and participate in a familiar structured turn-taking communicative routine with physical prompting in at least one school setting.

Objective 1: In 9 instructional weeks, when joined by a peer, Jennifer will acknowledge the presence of a peer communication partner as evidenced by gestures, changes in body position, or vocalizations.

Objective 2: In 18 instructional weeks, when joined by a peer, Jennifer will acknowledge the presence of a peer communication partner as evidenced by gestures, changes in body position, or vocalizations, and will participate in a structured turn-taking activity with a peer when physically prompted by an adult.

Objective 3: In 27 instructional weeks, while participating in a familiar, structured turn-taking activity with a peer, Jennifer will recognize when it is appropriate to take her turn and respond to

this opportunity as evidenced by gestures, changes in body position, vocalizations, or actions, and by activating a voice-output device at the appropriate time with physical prompts from an adult.

d. Measuring and Reporting Progress on Annual Goals

Once the IEP team has developed measurable annual goals for a child, the team must include a description of how the child's progress toward meeting the annual goals will be measured. This measure of progress will enable parents, children, and educators to monitor progress during the year, and, if appropriate, to revise the IEP to be consistent with the child's instructional needs. Measurement is one of the components of a correctly written annual goal.

A well written annual goal allow a clear yes or no determination of whether or not it has been achieved and tells evaluators what to do to determine if the goal was achieved. Remember that goals must be tied to the present levels and must be able to answer where the student started from and what level of growth will be achieved.

The IEP must include a description of when parents will be provided periodic reports about their child's progress toward meeting the annual goals. An example might be through the use of quarterly or other periodic reports concurrent with the issuance of LEA report cards (34 CFR § 300.320(a)(3)). However, if the team decides progress reports must be given more frequently than that of the general education progress reports, the IEP may reflect that decision. The reporting may be carried out in writing or through a meeting with the parents (including documentation of information shared at the meeting); whichever would be a more effective means of communication. Whatever the method chosen, child progress toward the goals must be monitored in the method indicated on the IEP and progress reports should include a description of the child's progress toward his or her measurable annual goals.

e. Participation in State- and District-Wide Assessments

The IEP team must make a decision about how the child with a disability will participate in state assessments and district-wide assessments. There are three options for each content area available to children with disabilities for the South Carolina state assessments. Currently the assessments are the Palmetto Assessment of State Standards (PASS), the High School Assessment Program (HSAP) And the SC-Alt. The IEP team must decide which assessment is appropriate for the child for each curricular area being assessed in that child's grade level during the upcoming IEP year. These options include the:

- o South Carolina State Assessments (PASS and HSAP) with no accommodations,
- o South Carolina State Assessments (PASS and HSAP) with accommodations, and
- o South Carolina Alternate Assessment (SC-Alt).

The intent is that all children will be assessed and will be part of the state and LEA accountability systems. The IEP team should apply the eligibility criteria for the PASS or HSAP and SC-Alt to help determine which assessment is the most appropriate for the child. The eligibility criteria for each assessment are included in the Test Administrators' Manual for each assessment. The eligibility criteria for SC-Alt are also available online at <http://ed.sc.gov> on the Office of Assessment page.

If the IEP team determines that the child shall take the SC-Alt, the IEP must include a statement of:

- o why the child cannot participate in the regular assessment and
- o why the particular alternate assessment selected is appropriate for the child.

South Carolina has identified allowable accommodations for state assessments for both general education and special education children. These are listed in the Testing Students with Disabilities area available at <http://ed.sc.gov> on the Office of Assessment page. Most accommodations allowed for the South Carolina general assessment are for all students, but certain accommodations are designated as allowed for students with IEPs or 504 Plans only.

Any accommodation regularly used in instruction should be used on classroom assessments for children with IEPs. Individual LEAs may establish their own policies for allowable accommodations for district-wide assessments. All accommodations that are necessary in order for the child to participate in state- or district-wide assessments must be documented on the IEP. For current information regarding the South Carolina state assessments see <http://ed.sc.gov>, Office of Assessment.

f. Secondary Transition

Beginning at age 13, and updated annually, the IEP must contain (1) appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training/education, employment and where appropriate, independent living skills; and (2) the transition services, including appropriate courses of study, needed to assist the child in reaching the stated postsecondary goals; and (3) a statement of needed transition services for the child, including, when appropriate, a statement of the interagency responsibilities or any needed linkages.

Transition Assessment

The LEA must conduct age-appropriate transition assessment at a minimum in the areas of education/training, employment, and, where appropriate, independent living. The purpose of transition assessment is to provide information to develop and write practical, achievable measurable postsecondary goals and assist in the identification of transition services necessary in helping the student reach those goals. Transition assessment must be conducted prior to the student's reaching age 13 and prior to the development of the measurable post secondary goals and transition services in the students IEP. For each postsecondary goal there must be evidence that at least one age-appropriate transition assessment was used to provide information on the student's needs, strengths, preferences, and interests regarding postsecondary goals. Evidence would most likely be found in the student's file.

Those responsible gather the information needed to understand student needs, taking into account strengths, preferences, and interests through career awareness and exploration activities and a variety of formal and informal transition assessments. These assessments should seek to answer questions such as:

- What does the student want to do beyond school (e.g., further education or training, employment, military, continuing or adult education, etc.)?
- Where and how does the student want to live (e.g., dorm, apartment, family home, group home, supported or independent)?
- How does the student want to take part in the community (e.g., transportation, recreation, community activities, etc.)?

Measurable Postsecondary Goals

Each IEP for a student with a disability, who will be 13 or older during the time period of the IEP, must have measurable postsecondary goal(s) that address the areas of: training/education, employment, and when appropriate, independent living.

Descriptions of these categories are:

- o Training/Education – specific vocational or career field, independent living skill training, vocational training program, apprenticeship, on-the-job training, military, Job Corps, etc., or 4 year college or university, technical college, 2 year college, military, etc.
- o Employment - paid (competitive, supported, sheltered), unpaid, non-employment, etc.
- o Independent living skills – adult living, daily living, independent living, financial, transportation, etc.

Measurable postsecondary goals are different from measurable annual goals in that they measure an outcome that occurs after a student leaves high school. A measurable annual goal measures the progress of the student while in school. However, it is important to note that for each postsecondary goal, there must be an annual goal included in the IEP that will help the student make progress towards the stated postsecondary goal. When developing annual goals, the team should ask “What postsecondary goal(s) does this annual goal support?” The requirements for measurable postsecondary goals are specific to the areas of training/education, employment, and, where appropriate, independent living and may be written into a single combination goal that addresses both training/education, employment, and, where appropriate, independent living, as a single goal or as separate goals. Measurable postsecondary goals should be stated in a way that can be measured as “yes, it was achieved” or “no, it was not achieved. The statement needs to indicate what the student “will” do after graduating or completing their secondary program rather than what the student “plans”, “hopes”, “wishes” or “wants” to do.

Regarding postsecondary goals related to training and education, the IDEA and its implementing regulations do not define the terms “training” and “education.” However, the areas of training and education can reasonably be interpreted as overlapping in certain instances. In determining whether postsecondary goals in the areas of training and education overlap, the IEP Team must consider the unique needs of each individual student with a disability, in light of his or her plans after leaving high school. If the IEP Team determines that separate postsecondary goals in the areas of training and education would not result in the need for distinct skills for the student after leaving high school, the IEP Team can combine the training and education goals of the student into one or more postsecondary goals addressing those areas. For example, for a student whose postsecondary goal is teacher certification, any program providing teacher certification would include education as well as training. Similarly, a student with a disability who enrolls in a postsecondary program in engineering would be obtaining both education and occupational training in the program. The same is true for students with disabilities enrolled in programs for doctors, lawyers, accountants, technologists, physical therapists, medical technicians, mechanics, computer programmers, etc. Thus, in some instances, it would be permissible for the IEP to include a combined postsecondary goal or goals in the areas of training and education to address a student’s postsecondary plans, if determined appropriate by the IEP Team. This guidance, however, is not intended to prohibit the IEP Team from developing separate postsecondary goals in the areas related to training and education in a student’s IEP, if deemed appropriate by the IEP Team, in light of the student’s postsecondary plans.

On the other hand, because employment is a distinct activity from the areas related to training and education, each student’s IEP must include a separate postsecondary goal in the area of employment

Examples of Measurable Postsecondary Goals:

Upon graduation from high school, Sara’s will attend college to study drafting. Upon completion of her course of study in college, Sarah will obtain employment as a CAD operator.

Courses of Study

Each IEP for a student with a disability (who will be 13 or older during the time period of the IEP) must also contain a description of the course of study needed to assist the student in reaching those goals. The courses of study must focus on improving the academic and functional achievement of the student to facilitate movement from school to post-school by describing the courses and/or educational experiences that are related to the student's postsecondary goals.

In South Carolina, the law governing postsecondary transition for all children, the Education and Economic Development Act (EEDA), also applies to children with disabilities.

EEDA: Individual Graduation Plan (IGP)

Section 59-59-90: Beginning with the 2006-07 school year, counseling and career awareness programs on clusters of study must be provided to students in the sixth, seventh, and eighth grades, and they must receive career interest inventories and information to assist them in the career decision-making process. Before the end of the second semester of the eighth grade, eighth grade students in consultation with their parents, guardians, or individuals appointed by the parents or guardians to serve as their designee shall select a preferred cluster of study and develop an individual graduation plan, as provided for in Section 59-59-140.

Section 59-59-140: An individual graduation plan is a student specific educational plan detailing the courses necessary for the student to prepare for graduation and to successfully transition into the workforce or postsecondary education. An individual graduation plan must:

- (1) align career goals and a student's course of study;
- (2) be based on the student's selected cluster of study and an academic focus within that cluster;
- (3) include core academic subjects, which must include, but are not limited to, English, math, science, and social studies to ensure that requirements for graduation will be met;
- (4) include experience-based, career-oriented learning experiences including, but not limited to, internships, apprenticeships, mentoring, co-op education, and service learning;
- (5) be flexible to allow change in the course of study but be sufficiently structured to meet graduation requirements and admission to postsecondary education;
- (6) incorporate provisions of a student's individual education plan, when appropriate; and
- (7) be approved by a certified school guidance counselor and the student's parents, guardians, or individuals appointed by the parents or guardians to serve as their designee.

All students with disabilities beginning in 8th grade have an individual graduation plan (IGP). The IGP should help guide the development of the student's IEP. The IEP team should review the transcript of required courses toward graduation and the student's IGP. The IEP **does not** take the place of the IGP. The guidance counselor, school-to-work or transition coordinator, or other career counselors may need to be involved in the IEP meeting should there be changes to the coursework. Other school experiences need to be considered as well. Each year the IEP team reconsiders the student's postsecondary goals and aligns the course of study with those desired goals. The decisions regarding the course of study should relate directly to where the student is currently performing and what he or she wants to do after graduation. These should be drawn from the IGP for that student. The connection between the student's postsecondary goals and the courses of study should be obvious. To address the courses of study, the team should ask:

- o Do the transition courses of study focus on improving the academic and functional achievement of the child to facilitate his or her movement from school to post-school?
- o Do the courses of study (and other educational experiences) align with the student's postsecondary goal(s) and IGP?

The statement of course of study is not a listing of individual courses but could be part of the statement, if appropriate, for the student. The following are examples of statements of the course of study:

Examples of Course of Study

Sam will participate in the general college prep curriculum with a focus on math and sciences.

Gregory will follow the County Occupational Diploma curriculum to attain the skills necessary to obtain the employment skills necessary.

Alicia is currently a seventh grader. She will complete the middle school course of study in order to enter the high school with her grade level peers.

The examples above are brief statements that frame the types of courses and reasons why the student will be taking them. It's important to keep in mind the reasoning behind including courses of study in the IEP as a way to engage and help the student to see the relevance of their secondary education. Be certain to write it in a way that is meaningful and emphasizes the connections to the student.

Each IEP of a student with a disability must also contain an additional statement of transition services for the child, including, when appropriate, a statement of the interagency responsibilities or any needed linkages to these services. Transition services should be a coordinated set of activities or strategies that support the student in achieving their desired postsecondary goals. The IEP team builds this set of activities from information contained in the present levels of educational performance that describe where the student is currently performing in relationship to his or her postsecondary goals. With that as the starting point, the team needs to determine what skills, services, or supports the student will need in order to successfully transition from where he or she is now to his or her desired postsecondary goals. For each postsecondary goal, there should be consideration of transition services in the areas of (a) instruction, (b) related service(s), (c) community experience, (d) development of employment and other post-school adult living objective, (e) if appropriate, acquisition of daily living skill(s), or (f) if appropriate, provision of a functional vocational evaluation listed in association with meeting the postsecondary goal. The LEA may also include the multi-year plan for activities and transition services in the IEP as part of the transition services. If the LEA decides to include a multi-year plan there must be a clear distinction between those activities/services that are being provided for the current IEP year and the activities or services that are being planned for the future.

Transition services statement must document activities and transition services for the current IEP year and identify the responsible agency and document who will pay for which services if an agency outside of the LEA has responsibility.

Examples of transition services statements:

Sam needs to improve his employment skills. He will participate 2 hours a day in the community work placement program this year.

Georgia will need adult employment supports. By the end of first semester the school will provide Georgia and her family with information about applying to SC Vocational Rehabilitation for services.

The IEP team must determine, to the extent appropriate, any other public agency that must be invited to the IEP meeting because they are likely to be responsible for providing or paying for transition

services. The parents, or a student who is 18 years of age, must provide consent for the LEA to invite any outside agency to the IEP meeting (34 CFR § 300.321(b)(3)). Consent from the parent (or adult student) is required when inviting outside agencies to ensure the protection of confidentiality of information under the FERPA (Federal Register, August 14, 2006, p. 46672).

It is expected that transition services to be provided by agencies other than the LEA will be included in the IEP. If an agency other than the LEA, fails to provide the transition service in the IEP that it had agreed to provide, the LEA must reconvene the IEP team to identify alternative strategies to meet the transition objectives for the child that are set out in the IEP (34 CFR § 300.324(c)(1)). Alternative strategies might include the identification of another funding source, referral to another agency, the public agency's identification of other district-wide or community resources that it can use to meet the student's identified needs appropriately or a combination of these strategies.

The LEA, or any participating agency, including the state vocational rehabilitation agency, is responsible to provide or pay for any transition service that the agency would otherwise provide to children with disabilities who meet the eligibility criteria of that agency. This is to be done without delay. The LEA may claim reimbursement from an outside agency that failed to provide or pay for the service pursuant to an interagency agreement or other financial arrangement (34 CFR § 300.324(c)(2); 34 CFR § 300.103; 34 CFR § 300.154). If a participating agency, other than the LEA, fails to provide the transition services described in the IEP, the LEA must reconvene the IEP team to identify alternative strategies to meet the transition objectives for the child.

For students incarcerated in an adult correctional facility whose eligibility under the IDEA will end because they will turn 21 years old before they will be eligible to be released from prison, the requirements relating to transition planning and transition services do not apply (34 CFR § 300.324(d)).

g. Age of Majority

Beginning at age 17, the IEP team must inform the student and the parents that at the age of majority under state law (age 18 in South Carolina), the rights under the IDEA will transfer to the student. The LEA must provide documentation in the IEP, at least one year before the student is 18, that the student has been informed of rights provided in the federal and state law that will transfer to the student. If parents believe that their child may not be able to make educational decisions, they may wish to find out about obtaining a limited guardianship or some other legal means to support the student upon reaching the age of majority. It is important for the LEA to provide information and resources to the student and parents early in the IEP process to assist them in understanding the implications of the transfer of these rights under the IDEA.

For students with disabilities incarcerated in adult correctional institution, students are 17 are provided a surrogate parent. At age 18, all rights are transferred to the student.

h. Statement of Special Education and Related Services

Each IEP for a child with a disability must include a statement of:

- o the special education services;
- o related services;
- o supplementary aids and services (including accommodations), based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child;
- o a statement of the program modifications; and
- o supports for LEA personnel that will be provided for the child to:
 - advance appropriately toward attaining the annual goals;

- be involved in and make progress in the general education curriculum, and participate in extracurricular and other nonacademic activities; and
- be educated and participate with other children with and without disabilities in these activities.

Each of these areas must be addressed on the IEP even if the way it is addressed is indicating the child does not need the service. All services - special education and related services, supplementary aids and services, program modifications, and supports for LEA personnel, as outlined in the IEP (including transition services) - must indicate the projected date for the beginning of the services and the anticipated frequency, location, and duration of those services. It is possible that service dates may vary throughout the year and should be indicated as such on the IEP.

The amount of services to be provided must be stated in the IEP so that the level of the LEA's commitment of resources will be clear to parents and other IEP team members. The amount of time to be committed to each of the various services to be provided must be appropriate to the specific service, and stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP (Federal Register, August 14, 2006, p. 46667).

i. Least Restrictive Environment

Least restrictive environment (LRE) means the educational placement in which, to the maximum extent appropriate, children with disabilities, including children in institutions or other care facilities, are educated with children who are not disabled. The IEP must contain an explanation of the extent, if any, to which the child will **not** participate with children without disabilities in the general education class, and in extracurricular and nonacademic activities with program modifications or supports for LEA personnel. Children with disabilities are to be removed from the general education environment only if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services or modifications cannot be achieved satisfactorily.

In determining the location for special education and related services the IEP team must consider the continuum of educational placements necessary to implement the IEP. The LEA must ensure that the parents of each child are members of any group that makes decisions on the educational placement of their child. The placement decision must be made in conformity with the requirement of providing services in the least restrictive environment (LRE). The educational placement is to be:

- o determined at least annually;
- o based upon the child's IEP; and
- o located as close as possible to the child's home, consistent with the requirements of the IEP.

Students may not be removed from required courses in order to receive their special education services. In February 2010, in the letter to Irby, OSEP clearly stated that it would be inappropriate for the IEP Team to deny children with disabilities the opportunity to participate in general education classes required of all students solely to receive special education services. The IEP Team should consider additional strategies and scheduling, such as an extended school day or extended school year, if the child requires such instruction in order to receive a free appropriate public education. IEP Teams must take into consideration the time required in subjects that are the components of the LEA instructional program.

F. MEETING TO REVIEW, REVISE, OR AMEND THE IEP

1. Annual Review of the IEP

The IEP is to be reviewed at least once every 12 months, to determine whether the annual goals for the child are being achieved and to revise the IEP as appropriate. The review and revision of the IEP is to address: (a) any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate; (b) the results of any reevaluation conducted; (c) information about the child provided by the parents; (d) the child's anticipated needs; or (e) other matters. The IEP team is to consider any of the special factors related to the child's IEP (see IEP Team Considerations (Special Factors) in this Chapter).

2. Amend the IEP

At an annual IEP team meeting, changes to the IEP must be made by the entire IEP team. However, between annual IEP reviews, if the parent and LEA representative agree, changes can be made without an IEP team meeting, by amending the IEP rather than by rewriting the entire IEP. The LEA should develop and implement a policy indicating who has the authority to amend the IEP without a meeting.

In amending a child's IEP, the parent of a child with a disability and the LEA representative may agree not to convene an IEP team meeting for the purpose of making those changes, and instead may develop a *written document to amend* or modify the child's current IEP. There are no restrictions on the types of changes that may be made, so long as the parent and the LEA representative agree to make the changes without an IEP team meeting. If changes are made to the child's IEP without a meeting, the LEA must ensure that the child's IEP team is informed of those changes (34 CFR § 300.324(a)(4)) and that the child's IEP is updated in the Excent software. The parent must be provided with a revised copy of the IEP with the amendments incorporated.

Even when using the IEP amendment process, the LEA must provide PWN of any changes in the IEP. Specific day-to-day adjustments in instructional methods and approaches that are made by either a general or special education teacher to assist a child with a disability to achieve his or her annual goals do not require action by the child's IEP team.

3. Request by Parent or LEA Staff for IEP Meeting

Although the LEA is responsible for determining when it is necessary to conduct an IEP meeting, the parents of a child with a disability have the right to request an IEP meeting at any time. The child's teacher or other LEA staff may also propose an IEP meeting at any time they feel the IEP has become inappropriate for the child and revision should be considered.

G. IMPLEMENTING THE IEP

Once the IEP team has completed developing the **initial** IEP, PWN, describing the proposed action must be provided to the parents and a request made for consent to initiate special education and related services. Services must be initiated as soon as possible.

The LEA must obtain informed consent from the parent of the child before the initial provision of special education and related services to the child. The LEA must make reasonable efforts to obtain informed consent from the parent.

If the parent fails to respond or refuses to consent to the initial provision of services, the LEA may not use mediation or due process procedures in order to obtain agreement or a ruling that the services may be provided to the child. However, in such cases, the LEA is not considered to be in violation of the requirement to make available a FAPE to the child for the failure to provide the child with the services for which the LEA requests consent. Under these circumstances, the LEA is not required to convene an IEP team meeting or develop an IEP for the child. In the situation where the parent fails to respond or refuses consent, this would also exclude the child from the IDEA discipline protections that are provided to students when an LEA suspects the child to be a child with a disability.

Once an IEP has been completed and consent for services has been obtained from the parents, the child's IEP must be accessible to each regular education teacher, special education teacher, related services provider, and any other service provider who is responsible for its implementation. Regardless of whether an individual participates in the IEP meeting or is excused, all individuals who are providing education to the child (regular education teacher, special education teacher, related service provider, and any other service provider who is responsible for implementation of the IEP) must be informed by the IEP team of (1) his or her specific responsibilities related to implementing the child's IEP, and (2) the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP (34 CFR § 300.323(d)(2)).

The implementation date of the IEP may change if there is a special review. The implementation date reflects the implementation of services in the most recent IEP, which may be a special review. The annual review date remains the same until the LEA holds another annual review.

H. TRANSFERS WITHIN THE STATE AND FROM OUT-OF- STATE

When a student moves into a new LEA, the new LEA must take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous LEA in which the child was enrolled. The previous LEA in which the child was enrolled must take reasonable steps to promptly respond to the request from the new LEA (34 CFR § 300.323(e), (f), and (g)). Since this is a transfer of educational records from the child's old LEA to the new LEA no consent for release of documents is required.

1. Transfer within State

When a child with a disability transfers to a new LEA in South Carolina, with an IEP that is current in the previous LEA in South Carolina, the new LEA, in consultation with the parents, must provide a FAPE to the child, including services comparable to those described in the child's IEP from the previous LEA. The new LEA must not delay the provision of the comparable services.

Once the new LEA receives the current IEP, the new LEA may adopt the child's IEP from the previous LEA or develop and implement a new IEP. When a student moves within the state, eligibility has already been established and a reevaluation is not required. The IEP team must determine what information in addition to the current IEP is needed from the previous LEA.

OSEP interprets "comparable" to have the plain meaning of the word, which is "similar" or "equivalent." Therefore, when used with respect to a child who transfers to a new LEA from a previous LEA in the same state (or from another state), "comparable" services means services that are "similar" or "equivalent" to those that were described in the child's IEP from the LEA, as determined by the child's newly designated IEP team in the new LEA. (Federal Register, August 14, 2006, p. 46681).

If a child with a disability who received special education and related services in a previous LEA, but whose previous LEA failed to conduct a timely annual review, transfers within the state to a new LEA, the new LEA must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous LEA), until the new LEA either:

1. adopts the child's IEP from the previous LEA; or
2. develops, adopts, and implements a new IEP that meets the applicable requirements in the regulations.

2. Transfer from Out-of-State

When a child with a disability, who has an IEP that is current in another state, transfers to an LEA in South Carolina, the new LEA, in consultation with the parents, must provide the child with a FAPE, including services comparable to those described in the child's IEP from the previous LEA. Comparable services have the meaning of "similar" or "equivalent" to the services that were described in the child's IEP from the previous LEA, as determined by the child's newly designated IEP team in the new LEA. If there is a dispute between the parent and the LEA regarding what constitutes comparable services, the dispute could be resolved through mediation procedures or, as appropriate, the due process hearing procedures. If the parent disagrees with the new LEA about the comparability of services, stay-put would not apply (Federal Register, August 14, 2006, p. 46682).

The new LEA may adopt the current IEP or conduct an initial evaluation to determine eligibility, and develop and implement a new IEP. If, after reviewing appropriate information, including the current IEP, the IEP team has reason to suspect the child is not eligible under South Carolina eligibility criteria, the team would need to conduct an evaluation to determine eligibility. The evaluation conducted by the new LEA would be to determine if the child is a child with a disability under South Carolina's eligibility criteria and to determine the educational needs of the child. Therefore, the evaluation would be an initial evaluation, which would require parental consent. If, however, the IEP team does not question the child's eligibility under South Carolina's criteria, the team would adopt the IEP from the previous state.

If the out-of-state transfer student cannot provide a copy of his/her IEP, but the parent describes the services the student was receiving, the new LEA must take reasonable steps to obtain the student's records from the out-of-state LEA. If the new LEA is unable to obtain the IEP from the previous LEA or from the parent, the new LEA is not required to provide special education and related services to the child.

Even if the parent is unable to provide the child's IEP from the previous LEA, if the new LEA decides that an evaluation is necessary because it has reason to suspect that the child has a disability, nothing in the *IDEA* or its implementing regulations would prevent the new LEA from providing special education services to the child while the evaluation is pending, subject to an agreement between the parent and the new LEA. However, if the child receives special education services while the evaluation is pending, the new LEA still must ensure that the child's evaluation, which would be considered an initial evaluation, is conducted within 60 days of receiving parental consent for the evaluation. If the new LEA conducts an eligibility determination and concludes that the child has a disability under 34 CFR §300.8 and needs special education and related services, the new LEA still must develop and implement an IEP for the child in accordance with applicable requirements in 34 CFR §§300.320 through 300.324 even though the child is already receiving special education services from the new LEA.

If the parent refuses to provide consent for the evaluation under these circumstances, the LEA may, but is not required to pursue the initial evaluation by utilizing the procedural safeguards including mediation or due process procedures. If the LEA chose to pursue a due process hearing to override the parent's refusal, the stay-put provision does not apply. The LEA would treat the child as a general education student and

would not be required to provide the child with comparable services while the due process complaint is being resolved.

In this situation (parent refuses consent for the initial evaluation), if the LEA does not violate its obligation under Child Find if it declines to pursue the evaluation. The LEA would then treat the student as a general education student.

I. USING THE IEP SOFTWARE

The statewide IEP software system, currently Excent TM, is required for the writing of IEPs and the submission of data required for Federal reports. All LEAs are to have the current IEP in place in the system as soon as possible after the meeting. If the LEA chooses to use the letters and forms included in the system, then those should also reflect the latest documents created. If the LEA chooses not to use the letters and forms in the system, the OEC strongly encourages the use of the attachment system to scan and attach the forms to the electronic record. All IEP amendments should also be recorded in the electronic system.

J. QUESTIONS AND ANSWERS ABOUT THE IEP

1. May an IEP be written with no measurable annual goals?

No, measurable annual goals document the child's anticipated progress as the result of special education services. Special education is defined as "specially designed instruction to meet the unique needs of a child with a disability." If no measurable annual goals are necessary and no specially designed instruction is necessary, the child's continued need for special education and related services should be reconsidered. If only modifications, accommodations, consultation, or services that don't require specially designed instruction are required, the child's needs may be able to be met through a Section 504 plan or other means.

2. When using short-term objectives for children who take an alternate assessment aligned to alternate achievement standards, can the short-term objectives be measured through the use of graphs, or by simply stating the criteria for progress reporting periods without restating the entire goal multiple times?

No specific format for short-term objectives is prescribed by law. So long as the short-term objectives are measurable intermediate steps that "enable a child's teacher(s), parents, and others involved in developing and implementing the child's IEP to gauge, at intermediate times during the year, how well the child is progressing toward achievement of the annual goal," they are legally compliant.

3. May teachers develop their own assessments, including rubrics and informal probes, as criteria for the measurable annual goals?

Yes, so long as the assessments contain specific, objective, measurable criteria that are aligned with local curriculum and instruction. Personal opinions and other subjective measures are not appropriate. If a teacher-made assessment is developed to establish baseline data in the present levels and the measurable annual goal, it should be attached to the IEP so that anyone who may become involved in implementing the IEP can use it to develop appropriate instructional plans and assess child progress as necessary.

4. What happens when the IEP team cannot reach an agreement?

The IEP team should work toward consensus. It is not appropriate for an IEP team to make IEP decisions based upon a majority vote. If the IEP team cannot reach agreement the LEA representative at the meeting has the ultimate authority to make a decision and then to provide the parents with PWN.

5. What should the LEA do if the child's only parent is in jail and will not be released before the IEP annual review date?

If neither parent is able to attend the IEP team meeting, the LEA must take steps to ensure parent participation, including individual or conference telephone calls. Depending upon the facility, it may even be possible to hold the IEP team meeting at the jail. Incarceration of a parent does not invalidate the parent's right to participate in the development, review, and revision of their child's IEP.

In cases where a parent is unresponsive, lives a great distance from their child's LEA, or is incarcerated, the LEA may obtain written authorization from the parent to appoint a surrogate parent to represent the child after the initial consent for placement has been obtained. Parent permission for the appointment of a surrogate parent must be voluntary and explicitly authorized in writing and is revocable at any time. The surrogate parent, once appointed, may then represent the child until such time as the parent revokes authorization.

6. Do IEP team members' signatures on the IEP constitute consent to the contents of the IEP?

No. IEP team members' signatures on the IEP only indicate who was present and participated in the development, review, and revision of the IEP. Signatures on the IEP do not constitute consent or agreement. For this reason, no one should sign the IEP who did not attend and did not participate in the IEP team meeting.

7. Must students incarcerated in adult prisons take state- and district-wide assessments?

No. According to 34 CFR § 300.324(d), requirements relating to students with disabilities taking state and district-wide assessments do not apply to students incarcerated in adult prisons. Students, even if convicted as adults, in local or state juvenile correctional facilities, however, **are not** exempted from taking state and district-wide assessments and must participate in these assessments.

8. If a child has many general education teachers or special education teachers and related services personnel, which one must be a member of the IEP team?

Not less than one general education teacher of the child and not less than one special education teacher or related services personnel who is or will be working with the child, must attend the IEP meeting. The LEA may designate which teacher or teachers will serve as IEP team member(s), taking into account the best interests of the child. The general education teacher who serves as a member of the child's IEP team should be one who is, or may be, responsible for implementing a portion of the IEP. More than one teacher may attend as appropriate.

9. May parents sign a waiver stating that they do not wish to receive additional copies of the Parent Rights Notice this year?

It is permissible for the LEA to send the notice through electronic mail communication if the parent agrees to it and the LEA makes that option available (34 CFR § 300.505). It is permissible for the parents to refuse the Parent Rights Notice after the LEA has offered it, or to return the document to the LEA. The LEA must document that they provided the notice at the required times.

The Parent Rights Notice must be given to parents, at a minimum:

- (1) Only one time in a school year; and
- (2) Upon initial referral or parent request for evaluation;
- (3) Upon receipt of the first formal complaint to the State in a school year;
- (4) Upon receipt of the first due process complaint in a school year;
- (5) Upon initiation of a disciplinary change of placement; and
- (6) Upon parent request.

10. What should the IEP team do if a child moves to the LEA with no records or IEP at all?

The provision of the special education and related services the child needs in order to receive a FAPE and progress in the general curriculum should not be withheld pending the receipt of records when the LEA knows the child has been identified as a child with a disability and has an IEP.

If the new LEA has no records and no documentation at all that the child was receiving special education services in the previous LEA, then the child must be placed in the general education setting until such time as the new LEA receives the documentation or conducts an initial evaluation.

11. After the child is age 13 or older, is the LEA required to provide the child with his or her own separate IEP meeting notice?

No, the LEA is not required to send the child his or her own separate Notice. However, children ages 13 to 17 must be invited with documentation of their participation in the IEP meeting or input into the IEP. After the age of majority (18 in South Carolina), the LEA MUST provide any Notice to BOTH the adult student and the parents. The parents are only notified of the meeting. To attend the meeting, they must be invited by their child or the LEA.

12. What happens if the parent does not show up for the IEP meeting?

The LEA may conduct an IEP meeting without the parents if the LEA has made repeated attempts but has been unable to secure the parents participation.

If a parent has received notice of the IEP team meeting which includes the meeting date, time and location, and agrees to participate, but does not come to the meeting, the LEA may conduct the meeting without the parent. If necessary, other means of parent participation may be used, such as conference calls. Detailed records are to be maintained of attempts to contact the parents.

13. Can the IEP team develop a draft IEP prior to the IEP team meeting?

Yes, a draft IEP may be developed before any IEP meeting. However, in order to ensure full team participation in the development of the IEP, the IEP may not be completed before the IEP team meeting. Members of the IEP team may come with evaluation findings and recommended IEP components, but should make it clear to the parents that these are only suggestions and the parents' input is required in making any final recommendations. If LEA personnel bring drafts of some or all of the IEP content to the IEP meeting, there must be a full discussion with the IEP team, including the parents, before the child's IEP is finalized, regarding content, the child's needs and the services to be provided to meet those needs. Parents have the right to bring questions, concerns, and recommendations to an IEP meeting for discussion (Federal Register, August 14, 2006, p. 46678).

14. What if the child does not want the parent to attend the IEP meeting? Is it mandatory to send the notice to both?

For children under the age of 18, the parent is a required member of the IEP team and must attend the IEP team meeting. The notice must be sent to the parent and if the child is invited to the IEP team meeting, the notice may be sent/given to the child, or the child may be invited verbally. Once the child turns age 18, the LEA is required to send the notice to both the parent and the adult student. However, the parent has no right to attend the meeting unless invited by the student or the LEA as a person with knowledge or expertise about the student.

15. What should the remaining IEP team members do if any required member of the IEP team who is invited to attend, and is not excused, does not show up for the meeting?

If a required member, whose area of the curriculum or related services is being discussed or modified, has not been excused from the IEP team meeting, by consent of the parent and the LEA, and has not provided input into the development of the IEP in writing prior to the meeting, the LEA must reschedule the meeting for a time when all required members can be present or can be officially excused, and, if necessary, provide written input into the meeting. To conduct an IEP meeting without all of the required IEP team members present or having the appropriate excusals is not legally compliant.

16. If someone is listed on the Notice of IEP Meeting do they have to come?

No, listing a person's name on the Notice of IEP meeting just documents they were invited and does not obligate their attendance *unless they are one of the required IEP team members*. The IEP may list the role of a team member, such as, general education teacher or speech therapist rather than the names of specific people.

17. Can IEP meetings be recorded with audio or video recorders?

There is no federal or state statute or regulation that either authorizes or prohibits the recording of an IEP meeting by either a parent or a LEA official. The LEA has the option to require, prohibit, or regulate the use of recording devices at IEP meetings. If there is a local policy that prohibits or limits the use of recording devices at IEP meetings, that policy must provide exceptions necessary to ensure that the parent understands the IEP or the IEP process or to ensure parental rights guaranteed under the IDEA. If a policy is adopted by a local agency it should also ensure that it is uniformly applied. Additionally, any recording of an IEP meeting maintained by the LEA is an "educational record" within the meaning of FERPA (20 U.S.C. § 1232g), and is subject to the confidentiality requirements of both FERPA and the IDEA (Federal Register, March 12, 1999, p. 12477).

18. Can a required IEP team member be excused from more than one IEP meeting at a time?

No, the excusal to attend an IEP meeting is specific to each individual meeting.

19. Who must participate in making changes to the IEP when an IEP is amended without convening an IEP team meeting?

The regulations provide, in 34 CFR §300.324(a)(4)(i), that in making changes to a child's IEP after the annual IEP team meeting for a school year, the parent of a child with a disability and the LEA may agree not to convene an IEP Team meeting for the purpose of making those changes, and instead may develop a written document to amend or modify the child's current IEP. IDEA regulations are silent as to which individuals must participate in making changes to the IEP where there is agreement between the parent and the LEA not to convene an IEP team meeting for the purpose of making the changes.

20. Must an LEA provide a parent with prior written notice if an IEP is amended without convening an IEP team meeting?

Yes. The regulations in 34 CFR §300.503(a) require that written notice that meets the requirements of 34 CFR §300.503(b) must be given to the parents of a child with a disability a reasonable time before the public agency (1) proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or (2) refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. This provision applies, even if the IEP is revised without convening an IEP team meeting, pursuant to 34 CFR §300.324(a)(4).

21. May the LEA representative be excused from attending an IEP meeting?

Yes. The LEA representative is not required to attend an IEP Team meeting in whole or in part, if the parent of the child with a disability and the LEA agree, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting. When the meeting does involve a modification to, or discussion of, the member's area of the curriculum or related services, 34 CFR §300.321(e)(2) provides that a representative of the LEA

may be excused from attending an IEP Team meeting, in whole or in part, if (i) the parent, in writing, and the LEA consent to the excusal; and (ii) the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

However, because the LEA remains responsible for conducting IEP Team meetings that are consistent with the IEP requirements, it may not be reasonable for the LEA to agree or consent to the excusal of the LEA representative. For example, the LEA cannot consent to the excusal of the LEA representative from an IEP Team meeting if that individual is needed to ensure that decisions can be made at the meeting about commitment of LEA resources that are necessary to implement the IEP being developed, reviewed, or revised. If an LEA representative is excused from attending an IEP Team meeting, consistent with 34 CFR 300.321(e), the LEA remains responsible for implementing the child's IEP and may not use the excusal as a reason for delaying the implementation of the child's IEP.

22. May more than one member of an IEP team be excused from attending the same meeting?

Yes. There is nothing in IDEA that would limit the number of IEP team members who may be excused from attending an IEP meeting, so long as the LEA meets the requirements that govern when IEP team members can be excused and how they are excused (34 CFR §300.321(e))

23. Must the LEA receive consent from a parent to excuse multiple regular education teachers if at least one regular education teacher will attend an IEP meeting?

No. As provided in 34 CFR §300.321(a)(2), the LEA must ensure that the IEP Team includes “[n]ot less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment) . . .” The IDEA does not require that an IEP Team include more than one regular education teacher. Therefore, if an IEP Team includes more than one regular education teacher of the child, the excusal provisions of 34 CFR §300.321(e)(2) would not apply if at least one regular education teacher will be in attendance at the IEP Team meeting.

24. Is there a specific timeline in IDEA for LEAs to notify parents of a request to excuse an IEP team member from attending an IEP meeting? May a state establish such a timeline?

The IDEA does not specify a time period in which an LEA must notify parents of a request for an excusal. In public comments on the proposed Part B regulations, the Department was asked to specify a timeline, through regulations, in which an LEA must notify parents of requests for excusing IEP team members from attending IEP team meetings. In declining the commenter's request to regulate, the Department noted that Part B does not specify how far in advance of an IEP team meeting an LEA must notify a parent of the LEA's request to excuse an IEP team member from attending the IEP team meeting. Further, Part B does not specify, when the parent and LEA must sign a written agreement that the IEP Team member's attendance is not necessary or when the parent and LEA must provide written consent regarding the IEP team member's excusal. The Department also explained that requiring the request for excusal or the written agreement or written consent to occur at a particular time prior to an IEP team meeting would not account for situations where it would be impossible to meet the timeline (e.g., when an IEP Team member has an emergency). Thus, requiring specific timelines could impede Congressional intent to provide additional flexibility to parents in scheduling IEP team meetings. Moreover, the Department believes that it would be inconsistent with 34 CFR §300.321(e) to permit States to impose timelines for parents and LEAs to agree or consent to the excusal of an IEP team member. A State may not restrict, or otherwise determine, when an IEP team member can be excused from attending an IEP team meeting, or prohibit the excusal of an IEP team member, provided the conditions in 34 CFR §300.321(e)(1) and (e)(2) are satisfied.

25. Does the Notice of the IEP team meeting, evaluation reports and progress reports have to be translated into the parent's native language?

The only legal requirement for providing documents in the parents' native language or other mode of communication used by the parent is for PWN and Procedural Safeguards Notice (34 CFR § 300.503(c)).

26. Can an attorney come to an IEP meeting on behalf of the parent or LEA?

Yes, an attorney may attend an IEP meeting if the parents or LEA believe an attorney is needed. However, the presence of an attorney is strongly discouraged as it often sets an adversarial tone for the meeting. If the attorney is coming at the invitation of the LEA they must be included on the notice of meeting provided to the parents. Parents are encouraged, but are not required, to inform the LEA of any additional persons they are bringing regardless who they are.

27. If a child was found eligible for special education services under the category of emotional disabilities must he or she have a behavioral goal or may they have only an academic goal?

Measurable annual goals should never be dependent upon the child's label; the goals should always be related to the individual child's needs. Therefore, some ED students will need behavioral goals, but others may not. The issue with many children with ED is that their behavior has interfered with their learning for so long, that even when their behavior comes under better control, they frequently continue to have academic deficits. The present levels should clearly describe how the child's disability impacts their ability to access and progress in the general education curriculum. Based upon the information the IEP team has, the team will need to prioritize needs and identify the goals, accommodations, behavior plans or other services needed to address the impact of the disability. Depending upon the results of the assessment the child may have need for a behavioral goal and/or and academic goal. Either would be appropriate. For children whose behavior has improved, celebrate the achievement, and continue to address the issues around how their disability impacts their ability to access and progress in the general curriculum. This should be evident in the present levels of academic achievement and functional performance section.

28. Can a teacher or a principal keep a child from attending special education services in an IEP because they have not completed their general education assignments or do not have passing grades?

Each teacher (and administrator) working with the child should be informed about the services on the child's IEP. They are legally responsible for ensuring that the child receives the services. If they feel that the IEP is not adequate for the child to participate and make progress in the general education curriculum they can ask for an IEP meeting to see if the IEP should be revised.

29. What if a student whose IEP has not been subject to a timely annual review, but who continues to receive special education and related services under that IEP, transfers to a new LEA in the same state? Is the new LEA required to provide FAPE from the time the child arrives?

If a child with a disability who received special education and related services pursuant to an IEP in a previous LEA (even if that LEA failed to meet the annual review requirements in 34 CFR §300.324(b)(1)(i)) transfers to a new LEA in the same State and enrolls in a new school within the same school year, the new LEA (in consultation with the parents) must, pursuant to 34 CFR §300.323(e), provide FAPE to the child (including services comparable to those described in the child's IEP from the previous LEA), until the new LEA either (1) adopts the child's IEP from the previous LEA; or (2) develops, adopts, and implements a new IEP that meets the applicable requirements in 34 CFR §§300.320 through 300.324.

30. What options are available when an out-of-state transfer student cannot provide a copy of his/her IEP, and the parent identifies the “comparable” services that the student should receive?

The new LEA in which the child enrolls must take reasonable steps to promptly obtain the child’s records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous LEA in which the child was enrolled, pursuant to 34 CFR §99.31(a)(2); and the previous LEA in which the child was enrolled must take reasonable steps to promptly respond to the request from the new LEA.

After taking reasonable steps to obtain the child’s records from the LEA in which the child was previously enrolled, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, if the new LEA is not able to obtain the IEP from the previous LEA or from the parent, the new LEA is not required to provide special education and related services to the child pursuant to 34 CFR §300.323(f).

Even if the parent is unable to provide the child’s IEP from the previous LEA, if the new LEA decides that an evaluation is necessary because it has reason to suspect that the child has a disability, nothing in the IDEA or its implementing regulations would prevent the new LEA from providing special education services to the child while the evaluation is pending, subject to an agreement between the parent and the new LEA. However, if the child receives special education services while the evaluation is pending, the new LEA still must ensure that the child’s evaluation, which would be considered an initial evaluation, is conducted within 60 days of receiving parental consent for the evaluation or within the State-established timeframe within which the evaluation must be conducted, in accordance with 34 CFR §300.301(c)(1). Further, under 34 CFR §300.306(c), if the new LEA conducts an eligibility determination and concludes that the child has a disability under 34 CFR §300.8 and needs special education and related services, the new LEA still must develop and implement an IEP for the child in accordance with applicable requirements in 34 CFR §§300.320 through 300.324 even though the child is already receiving special education services from the new LEA.

If there is a dispute between the parent and the new LEA regarding whether an evaluation is necessary or the special education and related services that are needed to provide FAPE to the child, the dispute could be resolved through the mediation procedures in 34 CFR §300.506 or, as appropriate, the due process procedures in 34 CFR §§300.507 through 300.516. If a due process complaint requesting a due process hearing is filed, the LEA would treat the child as a general education student while the due process complaint is pending. 71 FR 46540, 46682 (Aug. 14, 2006).

31. Is it permissible for an LEA to require that a student with a disability who transfers from another state with a current IEP that is provided to the new LEA remain at home without receiving special education and related services until a new IEP is developed by the new LEA?

No. Under 34 CFR §300.323(f), if a child with a disability (who had an IEP that was in effect in a previous LEA in another State) transfers to an LEA in a new State, and enrolls in a new school within the same school year, the new LEA (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child’s IEP from the previous LEA), until the new LEA (1) conducts an evaluation pursuant to 34 CFR §§300.304 through 300.306 (if determined to be necessary by the new LEA); and (2) develops and implements a new IEP, if appropriate, that meets the applicable requirements in 34 CFR §§300.320 through 300.324.

Thus, the new LEA must provide FAPE to the child with a disability when the child enrolls in the new school in the LEA in the new State, and may not deny special education and related services to the child pending the development of a new IEP.

32. What is the timeline for a new LEA to adopt an IEP from a previous LEA or to develop and implement a new IEP?

Neither IDEA or state regulations establish timelines for the new LEA to adopt the child's IEP from the previous LEA or to develop and implement a new IEP. However, consistent with 34 CFR §300.323(e) and (f), the new LEA must take these steps within a reasonable period of time to avoid any undue interruption in the provision of required special education and related services.

33. What happens if a child with a disability who has an IEP in effect transfers to a new LEA or an LEA in a different state and the parent refuses to give consent for a new evaluation?

If a child with a disability (who has an IEP in effect) transfers to an LEA in a new State, and enrolls in a new school within the same school year, the LEA (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous LEA), until the new LEA (1) conducts an initial evaluation (if determined to be necessary by the new LEA); and (2) develops and implements a new IEP, if appropriate, that meets the applicable requirements in §§300.320 through 300.324. Nothing in 34 CFR §300.323(f) would preclude the new LEA in the new State from adopting the IEP developed for the child by the previous LEA in another State. If the new LEA determines that it is necessary to conduct a new evaluation, that evaluation would be considered an initial evaluation because the purpose of that evaluation is to determine whether the child qualifies as a child with a disability and to determine the educational needs of the child. 71 FR 46540, 46682 (Aug 14, 2006). The LEA must obtain parental consent for such an evaluation in accordance with 34 CFR §300.300(a). However, 34 CFR §300.300(a)(3)(i) provides that if a parent does not provide consent for an initial evaluation, or fails to respond to a request to provide consent, the new LEA may, but is not required to, pursue the initial evaluation by utilizing the Act's consent override procedures (mediation and due process procedures).

Because the child's evaluation in this situation is considered an initial evaluation, and not a reevaluation, the stay-put provision in 34 CFR §300.518(a) does not apply. The new LEA would treat the student as a general education student and would not be required to provide the child with comparable services if a due process complaint is initiated to resolve the dispute over whether the evaluation should be conducted. Also, 34 CFR §300.300(a)(3)(ii) is clear that the LEA does not violate its obligation under 34 CFR §§300.111 and 300.301 through 300.311 (to identify, locate, and evaluate a child suspected of having a disability and needing special education and related services) if it declines to pursue the evaluation. Similarly, if the parent does not provide consent for the new evaluation and the new LEA does not seek to override the parental refusal to consent to the new evaluation, the new LEA would treat the student as a general education student.

CHAPTER 5: SPECIAL EDUCATION AND RELATED SERVICES

INTRODUCTION

One of the most important considerations for IEP teams is the special education, related services, and supplementary aids and services to be provided to the child or on behalf of the child. The IEP team must also consider the program modifications or supports for LEA personnel that will be provided on behalf of the child. All services and supports are provided to enable the child: (1) to advance appropriately toward attaining the annual goals; (2) to be involved in and make progress in the general education curriculum, or appropriate activities for children ages 3 through 5; (3) to participate in extracurricular and other nonacademic activities; and (4) to be educated and participate with their nondisabled peers to the maximum extent appropriate, in all of these activities.

Federal laws emphasize having high expectations for each child and enabling each child to participate and progress in the general education curriculum. Given those foundations, resulting educational placement decisions must be based upon providing services within the least restrictive environment. (See also Chapter 6, Educational Placement and Least Restrictive Environment.) The IEP team must consider special education and related services required to meet the individual needs of children with disabilities.

This chapter addresses these services and is organized according to the following headings:

- A. [Special Education Services](#)
- B. [Related Services](#)
- C. [Supplementary Aids and Services](#)
- D. [Program Modifications and Supports for LEA Personnel](#)
- E. [Extended School Year](#)
- F. [Frequency, Location and Duration of Services](#)
- G. [Services in Local Detention Facilities, Department of Juvenile Justice, and Department of Corrections Facilities](#)
- H. [Qualified Special Education Personnel](#)
- I. [Questions and Answers about Special Education and Related Services](#)

A. SPECIAL EDUCATION SERVICES

1. Local Authority

Each LEA is responsible for ensuring that all children with disabilities receive the special education, related services, and supplementary aids and services that are specified in their IEPs. Regardless of the method used for service delivery, providers must meet the standards and criteria set by the SBE. Under Part B regulations, personnel providing ESY, medical homebound, homebased, interim alternative educational, or compensatory services must be highly qualified per state requirements.

2. Provision of Special Education Services

Children with disabilities are entitled to receive special education and related services. This term means specially-designed instruction to meet the unique needs of a child with a disability, and includes physical education, travel training, and vocational education. Special education and related services must be provided at no cost to the parents.

All special education services, related services, and supplementary aids and services must be based on peer-reviewed research, to the extent practicable. Peer-reviewed research is research that is reviewed by qualified and independent reviewers to ensure that the quality of the information meets the standards of the field before the research is published. It may be important to note that OSEP comments state that special education services that are based on “peer-reviewed research” must be provided to the extent that it is possible, given the availability of the research. If no such research exists, the service may still be provided if the IEP team determines that such services are appropriate. Further, the OSEP states that failure to base services on peer-reviewed research is not necessarily a violation of a FAPE, because the IEP team determines what services the child will receive based on the child’s individual needs. The IEP is not required to include specific instructional methodologies unless the IEP team determines that it is necessary for a child to receive a FAPE (Federal Register, August 14, 2006, pp. 46664 and 46665).

Each IEP team makes decisions about the special education instruction and related services, as well as supplementary aids and services to be provided to the child, or on behalf of the child, so that the child will advance appropriately toward meeting his or her annual goals, advance in the general curriculum, and be educated with his or her peers.

The IEP must also include any services needed to support LEA personnel. For example, if the general education teacher needs instruction to learn how to use an assistive technology device that the child will use in the classroom, or if the general education teacher may need training in order to carry out a BIP in the classroom, or the teacher is being sent to receiving training to work with a child with autism, these services would be included in the IEP for the child.

The decision about what services, the amount of services, and the setting of services necessary to meet the unique needs of a child with a disability is based on a variety of factors. The IEP team must identify the child's present levels of academic achievement and functional performance and determine the annual goals and, if appropriate, benchmarks/short-term objectives. Once the present level of performance and goals are established, the IEP team decides what services must be provided. The IEP team decides the specific services and the amount of services that will be needed for the child to make the necessary progress to achieve the measurable annual goals. After the IEP team determines which services and the amount of services are necessary the team next needs to decide where those services will be provided and the amount of time the child will spend in general education settings, special educational settings, or in a combination of settings. All special education and related services must be individually determined in light of each child’s unique abilities and needs to meet the annual goals in the IEP and make progress in the general education curriculum.

B. RELATED SERVICES

Related services are developmental, corrective, and supportive services required to assist a child, who has been identified as a child with a disability, to benefit from special education services. Generally, related services are provided in addition to special education instruction. The IEP team determines what additional services are necessary for the child to benefit from the special education services. The IEP team must consider each child's goals and the services or supports needed to assist the child to achieve them.

1. Surgically Implanted Devices

Related services do not include a medical device that is surgically implanted, including cochlear implants. They also do not include the optimization of that device's functioning (e.g., mapping), maintenance, or the replacement of that device. However, the child with a surgically implanted device may receive any of the related services that the IEP team determines is necessary for the child to receive a FAPE.

The LEA must appropriately monitor and maintain medical devices that are needed to maintain the health and safety of the child, including breathing, nutrition, or operation of other bodily functions, while the child is transported to and from the LEA or is at the LEA. The LEA must also routinely check external components of a surgically implanted device to make sure it is functioning properly. (34 CFR § 300.34(b); 34 CFR § 300.113(b) and (c))

2. Medical Services and School Health Services

There is an important distinction between "medical services" and "school health services." According to regulation 34 CFR § 300.34(c)(5), medical services are defined as "services provided by a licensed physician to determine a child's medically-related disability that results in the child's need for special education and related services." LEAs are required to provide medical services only for diagnostic or evaluation purposes (34 CFR § 300.34(a)).

On the other hand, school health services are to be specified on the IEP of a child with a disability and are provided by a school nurse or other qualified person. School nurse services are services provided by a qualified school nurse. School health services and school nurse services are related services, which must be provided whenever needed to assist a child with a disability to benefit from special education services (34 CFR § 300.34(a)).

The United States Supreme Court has clarified the distinction between medical services and health services. According to the Supreme Court, medical services are services that must be performed by a physician. It is only those services that require the skills of a physician, therefore, that are limited to diagnostic or evaluation purposes. Health services that may be performed by persons who are not physicians (nurses or other qualified persons) are related services which must be provided by the LEA when needed to assist a child with a disability to benefit from special education.

Medical services may be a related service only when it involves a procedure requiring the training, knowledge, and judgment of a licensed physician. Even then it is limited to diagnostic or evaluation purposes. Federal regulations and Supreme Court cases indicate any health-related procedure that does not require the services of a physician is a related service (school health service), which must be provided by the school when needed to assist a child with a disability to benefit from special education.

The IDEA has clarified that parents cannot be required to obtain a prescription for medication for a child as a condition of attending school, receiving an evaluation or receiving special education and related services (34 CFR § 300.174(a)).

3. Transportation

Transportation is a related service when it is needed in order for the child to benefit from special education services. Each situation is considered individually, and if for a particular child, transportation is required, the LEA must provide it or make other arrangements for the child to be transported. In addition to travel to and from school, transportation, as a related service, also includes travel between schools as well as travel in and around school buildings. Thus, the IEP team may need to also assess a child's ability to access

school facilities. Like all related services, when an IEP team determines it is needed, transportation services will be included on the child's IEP.

If the IEP team determines that the parent will provide transportation that should be indicated on the IEP. For some children, special considerations for transportation may be necessary. For example, if a child uses a wheelchair, a bus with a lift may be needed. The IEP for a child with severe asthma who requires air conditioning may need to specify an air-conditioned bus. A child may need a paraeducator on the bus for his or her safety and well-being. In determining who should attend the IEP meeting, the IEP team may consider the need to invite the bus driver, if there are special transportation needs. Behavioral considerations could be an example. Certainly, if a driver was included in a behavioral intervention plan, she or he could be involved in the development of that plan.

4. Interpreting Services

If a child is deaf or hard of hearing and the IEP team determines that she or he needs a sign language interpreter to receive a FAPE, then that service is required and must be written in the IEP as a special education service or a related service. The IEP team should also address the need for a sign language interpreter in nonacademic and extracurricular activities.

Interpreting services include oral transliteration services, cued language transliteration services, sign language transliteration and interpreting services, and transcription services, such as communication access real-time translation (CART), C-Print, and TypeWell. Interpreting services would also include special interpreting services for children who are deaf-blind (34 CFR § 300.34(c)(4)).

C. SUPPLEMENTARY AIDS AND SERVICES

Supplementary aids and services means aids, services and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate.

The IEP team determines what supplementary aids and services and other supports, are to be provided to the child with a disability or on behalf of the child in general education classes or other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with children without disabilities to the maximum extent appropriate (the least restrictive environment). The supplementary aids and services must be based on peer-reviewed research to the extent that they are available. Examples of supplementary aids and services include paraeducator services, assistive technology devices and services, and other accommodations as appropriate.

1. Assistive Technology Devices and Services

An example of a supplementary aid or service is assistive technology, which may also be considered as a related service. An IEP team may determine an evaluation is needed to assess the need for assistive technology devices and services. If a child needs assistive technology to remain in the general education class or other education-related setting to enable him/her to be educated with children without disability to the maximum extent appropriate, then assistive technology must be listed as a supplementary aid or service on the IEP including the frequency, location, and duration.

Questions may arise about the responsibility for maintaining, servicing, repairing, or insuring an assistive technology device. The federal definition makes it clear that the LEA is responsible for maintaining, repairing, and replacing these devices identified on the IEP. The LEA may want to revise the LEA's insurance to cover such equipment, both on and off campus. If a device is used in the child's home or another location away from the school, the home insurance, school insurance, or other coverage may be used. In some cases, it may be worthwhile to purchase special insurance for some devices. For example, if the LEA has purchased an augmentative communication device or a hearing aid for a preschool-aged child, the nominal insurance fee may be worth considering, especially if the child is very active.

Another issue to consider is the need for the assistive technology device at home or in other settings. Federal and state regulations make it clear that if the child needs access to the device at home or in other settings in order to receive a FAPE, then it must be allowed and the IEP should state that the device is necessary in the non-school setting(s). An important consideration by the IEP team regarding this issue is

that homework and extracurricular activities are an important component of the child's educational experiences.

2. Nonacademic and Extracurricular Services

The IEP team must determine whether the child requires supplementary aids and services, that are appropriate and necessary, to afford the child an equal opportunity for participation in nonacademic and extracurricular services and activities. These are nonacademic and extracurricular activities that are LEA sponsored during the regular school year.

Nonacademic and extracurricular services may include counseling services, athletics, transportation, health services, recreational activities, referrals to agencies that provide assistance to individuals with disability, and employment of students, including employment by the LEA (34 CFR § 300.107). Nonacademic and extracurricular activities may also include meals, recess, counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the LEA, referrals to agencies that provide assistance to individuals with disabilities, both employment by the LEA and assistance in making outside employment available. Some other LEA-sponsored events or activities include student council, school dances, school sporting events, school newspaper or yearbook, school plays and musicals, school music concerts, academically related events like spelling or math bees, and nonacademic events like pep rallies. This list is not all-inclusive; many options exist within each school. Appropriate involvement in such activities and events can enrich the lives of children with disabilities, just as they do for children without disabilities.

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, field trips and the services specified above, the LEA must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate and to the needs of the child (34 CFR § 300.117). For example, the IEP team might consider if the child could attend an after-school activity, a club, or group meetings in which other students would participate. Another example might be a football game. If the LEA is sponsoring the freshman class to go to a school football game on a bus, then the IEP team needs to provide an equal opportunity for that student to participate in that school-sponsored activity. However, if a child simply wishes to attend a football game in which there is no school-sponsored activity for the class, then that child would not necessarily require any accommodations provided through the IEP. If a child's IEP states that the child needs a sign language interpreter and if this school-sponsored event is after school or on the weekend, then the LEA needs to arrange for an interpreter to be available.

3. Access to Instructional Materials

South Carolina has adopted the National Instructional Materials Accessibility Standard (NIMAS), for the purposes of providing instructional materials to blind persons, or other persons with print disabilities that meet the NIMAS eligibility requirements, in a timely manner. All public agencies, including the LEAs, shall provide children with disabilities who need instructional materials in accessible formats. Even if students are not included in the definition of blind or other persons with print disabilities, or they need materials that cannot be produced from NIMAS files, they still must receive instructional materials in a timely manner. The LEA shall take reasonable steps to provide instructional materials at the same time as other children receive instructional materials (34 CFR § 300.172(a) and (b); 34 CFR § 300.210).

D. PROGRAM MODIFICATIONS AND SUPPORTS FOR LEA PERSONNEL

Each IEP for a child with disability must include a statement of the program modifications, or supports for LEA personnel that will be provided to the child, or on behalf of the child, to enable the child to

participate with nondisabled peers to the maximum extent appropriate and to enable the child to advance appropriately toward the annual goals. The modifications may address various areas including environmental and structural changes, how the child will participate in direct instruction, learning activities, collaborative work groups, large-group discussions, and other events occurring in their general education classroom. Necessary modifications for children with disabilities must be documented on the child's IEP. (34 CFR § 300.320(a)(4)(i))

The IEP should also include a statement of the supports for LEA personnel that need to be provided for each child to enable him/her to advance appropriately toward attaining their measurable annual goals and to be involved and progress in the general education curriculum. These supports may include specialized staff development (e.g., learn sign language, learn a software program the child will use), consultation by a special teacher, or materials or modifications to the environment.

The program modification and/or supports for LEA personnel in the IEP must indicate the projected date for the beginning of the services or supports, including the frequency, location, and duration.

E. EXTENDED SCHOOL YEAR/DAY SERVICES

When the IEP is developed initially or reviewed annually, the IEP team must consider the need for ESY services for children with disabilities. ESY services are different than general education summer school. ESY may or may not be provided in conjunction with the general education summer school. ESY may be needed by a child even though summer school is not offered for general education children. In fact, for certain children, services over winter or spring breaks may be needed. The reason for these services is to ensure the provision of a FAPE so that the child can make progress toward the goals specified on the child's IEP and to prevent regression, which would impede such progress.

The need for ESY is to be decided individually. Therefore, an LEA must not have a policy that no ESY services will be provided, that they are only available to a certain group or age of children, or that services are only provided for a set amount of time or a specified number of days. Personnel providing ESY services should meet the same requirements that apply to personnel providing the same types of services as a part of a regular school program.

The IEP team may use the following methods to decide if a student with a disability needs ESY services. Note that each is not mutually exclusive and consideration of all of these factors may be warranted. *These reasons are not all-inclusive.*

1. Is a significant regression anticipated if ESY services are not provided? The LEA is not required to provide ESY services merely because the student will benefit from them. Instead, the IEP team should determine if the regression experienced by the student would significantly affect his or her maintenance of skills and behaviors.

2. What is the nature and severity of the disability? Each student's needs must be considered individually.

3. Are instructional areas or related services needed that are crucial in moving toward self-sufficiency and independence? Particular consideration for ESY services should be given to students who need instruction in such self-help skills as dressing or eating, or who need continued structure to develop behavioral control.

4. The IEP team could use the following information and data in determining the need for ESY services:

- o Teacher assessment of the student's success with various instructional interventions;
- o Criterion-referenced and standardized test data;
- o Health and health-related factors, including physical and social/emotional functioning;
- o Past educational history, as appropriate, including any ESY services;
- o Direct observation of the student's classroom performance;
- o IEP goals and objectives;
- o Student performance (pretest and posttest data);
- o Behavior checklists; and
- o Parent interviews and student interviews where appropriate.

It is important for the IEP team to address the educational needs of each student and how they might be addressed, such as:

- o The scope of the special education instructional services including the duration and content of the program;
- o Which current goals and objectives will be addressed to maintain present skills and behaviors;
- o Implementer(s) of the ESY services;
- o What related services will be made available; and
- o If contracting with other schools or private agencies is needed; the provider must meet the standards of the state, including HQT.

If a dispute arises that involves ESY, parents must understand their rights include an expedited resolution. The dispute should be settled in a manner such that the time ESY should be provided will not lapse.

F. FREQUENCY, LOCATION, AND DURATION OF SERVICES

Each IEP must indicate the projected beginning date and the anticipated frequency, location, and duration for the special education and related services, supplementary aids and services, and modifications. It is possible that beginning and ending service dates may vary throughout the year and should be indicated as such on the IEP.

For data collection purposes the frequency of the services and modifications can be reported as minutes/days/weeks. This would indicate how many minutes per day, how many days per week and how many weeks per school year the services must be provided. This information would be determined at the IEP team meeting when decisions are being made about what services will be provided.

Sometimes it is difficult to be precise in determining just how much service will be required throughout the year. Sometimes services are provided on an "as needed" basis, such as "reading the math test to the child." The IEP should not indicate the services are "as needed." The provider has to describe when and how the service would be provided throughout the year. For example, the IEP might say that the math teacher gives a weekly math test over work covered each week, gives a chapter test at the end of each chapter, and the student is taking the state math assessment during the year. The student will go to the resource room to have the math tests read to him/her. For reporting purposes you might estimate based on historical events or current information (use of existing data) that the total anticipated amount of time would be 1.5 hours per week over 36 weeks—or 90 minutes, 1 day per week for 36 weeks.

The location of services would be the school building or other facility and the setting where the services will be provided. This should be described in the IEP so that the parents and the IEP team members

will know where the child is to receive services, including the extent of the child's participation with children who are nondisabled.

The amount of services to be provided must be stated in the IEP so that the level of the school's commitment of resources will be clear to parents and other IEP team members. The amount of time to be committed to each of the various services to be provided must be (1) appropriate to the specific service, and (2) stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP (Federal Register, August 14, 2006, p. 46667). In addition, the IEP team addresses the extent, if any, to which the child will not participate with children without disabilities in the general education curriculum and nonacademic activities.

If the child has been identified as a child with a disability, the LEA must document that the parents have been informed of the child's need for services and their availability at the public school.

G. SERVICES IN LOCAL DETENTION FACILITIES, DEPARTMENT OF JUVENILE JUSTICE, AND DEPARTMENT OF CORRECTIONS FACILITIES

The LEA is required to provide a FAPE according to an IEP that meets the requirements of federal and state laws and regulations to each student with a disability detained or incarcerated in a local juvenile or adult detention facility located within its jurisdiction. The requirements concerning placement and LRE may be modified in accordance with the student's detention or incarceration.

If a student is in a juvenile correctional facility, the Department of Juvenile Justice (DJJ) is obligated to make a FAPE available according to an IEP that meets the requirements of federal and state laws and regulations for each student with a disability. Requirements concerning parental rights, placement, and LRE may be modified in accordance with state and federal laws and the student's conditions of detention or incarceration.

If a student is in a state adult correctional facility, the Department of Corrections is obligated to make a FAPE available according to an IEP that meets the requirements of federal and state laws and regulations for each student with a disability. However, the correctional institution or facility may modify the student's IEP or placement if it can demonstrate a bona fide security or compelling penological interest that cannot otherwise be accommodated. A student age 18 or over, who is incarcerated in an adult correctional institution or facility and was not identified as a student with a disability and did not have an IEP in their educational placement prior to incarceration, is not entitled to a FAPE.

The Department of Mental Health (DMH) is the state agency responsible for referring and placing children with disabilities who have serious mental illness and who are in the custody of the DJJ in RTFs when both agencies believe that because of the child's mental illness, he or she cannot receive adequate care in a secure DJJ facility. DMH will notify the child's home LEA prior to placing the child in the RTF to ensure that the child can receive a FAPE in the RTF. (SCDE letter to K. DuBose, SCDMH, September 15, 2008).

H. QUALIFIED SPECIAL EDUCATION PERSONNEL

Each LEA must ensure that all personnel necessary to carry out the requirements of the IDEA are appropriately and adequately prepared and trained. All special education personnel, as appropriate, shall have the content knowledge and skills to serve children with disability. This includes special education teachers, related services personnel and paraeducators. LEAs must take steps to actively recruit, hire, train,

and retain qualified personnel to provide special education and related services to children with disabilities. (34 CFR § 300.156; 34 CFR § 300.207).

Related services personnel must meet the qualifications of the licensing agency that apply to the professional discipline in which those personnel are providing special education or related services. Each teacher employed by a public school as a special education teacher must meet the requirements as highly qualified (34 CFR § 300.156(c)). This requirement does not apply to teachers hired by private elementary schools and secondary schools including private school teachers hired or contracted by the LEA to provide equitable services to parentally-placed private school children with disability (34 CFR § 300.18(h)).

I. QUESTIONS AND ANSWERS ABOUT SPECIAL EDUCATION AND RELATED SERVICES

1. Depending on the individual situation, could a LEA be required to provide a computer or other assistive technology for a child with a disability in order to allow that child to remain in the LRE?

Yes. Children with disabilities are entitled to special education and related services, as well as supplementary aids and services. As such, if an assistive technology evaluation demonstrated that the child needs an assistive technology device (e.g., software, computer, writing aids, prone stander, etc.) to remain in the LRE, the IEP team would list that service on the IEP, and the LEA must provide it or ensure that it is provided.

2. May an IEP include only related services?

No. To receive related services, the child must be in need of specially-designed instruction (special education) since the definition of a related service is that of a service that is required to assist a child with a disability to benefit from special education.

3. May special education paraeducators provide services to children outside of the classroom? For example, may they assist during recess, lunch, and other LEA activities?

Yes. The IEP team is to determine and address needs of the child during nonacademic and extracurricular activities, as appropriate. If paraeducator services are needed at recess, lunch, club activities, and other times identified by the IEP team, they must be included on the child's IEP.

4. Federal and state law says that each child with a disability must have an IEP in effect at the beginning of each school year. Does that mean that the child must begin to receive the special education and related services specified in the IEP on the very first day of school?

It depends on the frequency, location, and duration of services documented in the child's IEP. The IEP team must make an individual determination regarding when special education and related services will begin and end for each child. Some services may not be provided to the child until the second quarter or second semester of the school year. Some children with disabilities may benefit from having the first week of school in general education in order to acclimate to new general education teachers, classrooms, expectations, and routines.

Other children, such as children with autism, may need services beginning the very first day of school. Decisions regarding when special education and related services will begin for a new school year are not to be based on convenience of school staff, but the individual needs of each child. If the IEP is silent regarding provision of services during the first and last weeks of a school year, it is reasonable to expect that services will be provided during that time. The IEP is to indicate when services begin and the frequency, location and duration of the services. This must be clear to the parents and the providers.

5. Do special education and related services missed due to events beyond the control of the LEA (e.g., school closure due to weather, mandatory emergency drills, or absence of the child) have to be made up at a later date?

As discussed within this chapter, the IEP team must consider the services needed for the child to address IEP goals, access the general curriculum, and participate in extracurricular and nonacademic activities with children without disabilities. In this context, the team should also discuss what is to be done when services are missed. For example, if a child with learning disabilities needs help taking tests, that

service isn't needed if the school is closed. However, if regular, ongoing physical therapy is needed to maintain mobility, the team must find a way for the service to be provided if school is closed.

Another consideration for the IEP team is whether a number of missed services would constitute a denial of a FAPE. Again, the team would create a plan for those circumstances.

6. What if the IEP team determines that a student is eligible for ESY services and the parent indicates the student will not be participating due to other summer commitments?

When a child with a disability is enrolled in the LEA during the regular school year and the parent provided consent for the child to receive special education services, the LEA is responsible for ensuring the provision of any services necessary for the child to receive a FAPE, including ESY services if these are determined necessary. If the child's IEP team determines ESY services are needed, the parent cannot waive these services. It is important that the LEA explain the need for these services to the parent. The LEA should anticipate far enough in advance so that parents can be informed and plan activities around these service times. The IEP team may also need to be creative in ways to deliver the services. If the parent refuses to produce the child for the services, the LEA can decide whether a truancy report is in order.

CHAPTER 6: EDUCATIONAL PLACEMENT AND LEAST RESTRICTIVE ENVIRONMENT (LRE)

INTRODUCTION

Educational placement refers to the educational environment for the provision of special education and related services rather than a specific place, such as a specific classroom or school. The IEP team makes the decision about the child's educational placement. For children with disabilities, the special education and related services must be provided in the environment that is least restrictive, with the general education classroom as the initial consideration. The team's decision must be based on the child's needs, goals to be achieved, and the least restrictive environment for services to be provided. "Least restrictive environment" (LRE) means the child is provided special education and related services with peers who are not disabled, to the maximum extent appropriate. The IEP team must consider how the child with a disability can be educated with peers without disabilities to the maximum extent appropriate, and how he or she will participate with children without disabilities in other activities such as extracurricular and nonacademic activities.

Placement decisions for all children with disabilities, including preschool children with disabilities, must be determined annually, be based on the child's IEP, and be as close as possible to the child's home. Additionally, each child with a disability must be educated in the school the child would attend if the child did not have a disability, unless the child's IEP requires some other arrangement. LRE does not require that every child with a disability be placed in the general education classroom regardless of the child's individual abilities and needs. The law recognizes that full time general education classroom placement may not be appropriate for every child with a disability. LEAs must make available a range of placement options, known as a continuum of alternative placements, to meet the unique educational needs of children with disabilities. This requirement for a continuum reinforces the importance of the individualized inquiry, not a "one size fits all" approach, in determining what placement is the LRE for each child with a disability. The continuum of alternative educational placements include instruction in general education classes, special classes, special schools, home instruction, and instruction in hospitals and institutions (34 CFR § 300.115(b)(1)).

This chapter includes federal and state requirements for determining educational placement and the following topics are discussed:

- A. [Parent Participation](#)**
- B. [Determining Educational Placement](#)**
- C. [Least Restrictive Environment \(LRE\)](#)**
- D. [Early Childhood Least Restrictive Environment](#)**
- E. [Charter School](#)**
- F. [Virtual School Program](#)**
- G. [Questions and Answers about LRE and Placement](#)**

A. PARENT PARTICIPATION

Parents have the right to be part of the decision-making team for determining their child's educational placement and have input into that decision. Placement decisions are made by the IEP team. The parent must be provided notice of the IEP team meeting in an amount of time that the parents have an opportunity to participate. When conducting IEP meetings addressing placement, if neither parent can participate, the parents and the LEA may agree to use alternative means of participation in the meeting, such

as video conferences and conference calls. LEAs must ensure that parents understand and are able to participate in any discussions concerning the educational placement of their child. The LEA must provide an interpreter if parents have a hearing impairment, or whose native language is other than English (34 CFR § 300.501(b) and (c)(1) through (3)).

The team may hold the IEP meeting to determine placement without the parents if the LEA has made multiple attempts to contact them and the parents did not respond, or the LEA is unable to convince them to participate. The LEA is required to have documentation of the attempts made to contact the parents to provide them notice of the meeting and to secure their participation. The record should have at least two of the following methods: telephone calls, visits to parents' home, copies of correspondence sent to the parents, and detailed records of other methods. (34 CFR § 300.501(c)(4)).

Once the IEP team has made the decision on the initial placement of a child with a disability, the parents must be provided PWN about the placement decision and must be requested to provide consent before initial provision of special education and related services in the proposed placement. Within the notice requirements, parents must be informed about the placement options that were considered and the reasons why those options were rejected.

B. DETERMINING EDUCATIONAL PLACEMENT

In determining the educational placement of a child with a disability (including preschool children with disabilities), each LEA must ensure that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. IEP teams, including the parents, must make each child's educational placement decisions on an individual basis. Placement decisions must be based on the child's IEP and must be determined at least annually. For children with disabilities, the placement should as close to the child's home as possible, and be in the school the student would normally attend, unless other factors determine this is not possible.

The team must consider each child's unique educational needs and circumstances, rather than the child's category of disability. Placement decisions should allow the child with a disability to be educated with nondisabled children to the maximum extent appropriate. The first placement option considered for each child with a disability is the general education classroom in the school that the child would attend if not disabled, with appropriate supplementary aids and services to facilitate this placement. Therefore, before a child with a disability can be placed outside of the general education environment, the full range of supplementary aids and services that could be provided to facilitate the child's placement in the general education classroom setting must be considered. Following that consideration, if a determination is made that the child with a disability cannot be educated satisfactorily in the general educational environment, even with the provision of appropriate supplementary aids and services, that child could be placed in a setting other than the general education classroom.

Federal and state regulations also preclude removing a child from a general education class just because the general curriculum must be modified to meet his or her individual needs (34 CFR § 300.116(e)). If an entirely different curriculum is needed for the child's alternate goals, it needs to be determined if appropriate special education supports (for both the child and teacher) can be appropriately provided within the context of the general education classroom. It is not the intent to have the general education teacher devote all or most of his or her time to the child with a disability or to modify the general education curriculum beyond recognition. A child's removal from the general education environment cannot be based solely on the category of disability, configuration of the delivery system, availability of special education and related services, availability of space or administrative convenience.

1. Continuum of Placement Options

LEAs are required to ensure that a continuum of placement options is available to meet the needs of children with disabilities for special education and related services in the LRE. Although each school is not required to establish or maintain all options on the continuum, it must make an option available if the individual needs of a child require a specific placement option. The continuum includes various educational settings, such as general education class, special classes, special schools, home instruction, instruction in hospitals, and instruction in institutions (34 CFR § 300.115(b)(1)). This continuum of various types of classrooms and settings in which special education is provided is intended to ensure that a child with a disability is served in a setting where the child can be educated successfully with other children without disabilities to the maximum extent appropriate.

In addition, although each school building is not required to be able to provide all the special education and related services for all types and severities of disabilities at the school, the LEA has an obligation to make available a full continuum of alternative placement options that maximize opportunities for its children with disabilities to be educated with nondisabled peers to the extent appropriate. In all cases, placement decisions must be individually determined on the basis of the child's abilities and needs and on each child's IEP; and not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience. (Federal Register, August 14, 2006, p. 46588.) To help LEAs make the full continuum available, the following options may be used for meeting the LRE requirement by providing services within its schools; in the home, hospital, or other facilities; through a contract with another LEA; through a cooperative agreement with one or more LEAs; or through a contract with a private nonprofit or a public or private institution. Facilities where special education services are provided must be equivalent to those where general education classes are held.

2. Harmful Effects

The IEP team must also consider possible harmful effects in determining the educational placement, both in terms of the general education setting and a more restrictive setting. The language in 34 CFR § 300.116(d) mentions "possible harmful effects on the child or on the quality of services that he or she needs." For example, the team must consider the distance that the child would need to be transported to another school, if not in the home school (e.g., length of bus ride, importance of neighborhood friendships, and other such considerations). In addition, potential disadvantages of being removed from the general education setting must be assessed (such as, what curriculum content will the child miss when out of the classroom, etc.). Parents and other team members, including the child's general education teacher, should discuss openly the possibility of supplementary aids and services, and other supports, that would allow the child to remain in the general education setting. A part of this discussion must include what is needed for the child to be able to participate and progress in the general education curriculum.

The IEP team must also consider other harmful effects such as those that may exist when it may be inappropriate to place a child in a general education classroom. For example, the IEP team may consider the well-being of the other children in the general classroom (e.g., would being in the classroom impede the child's or the ability of other children to learn). Courts have generally concluded that, if a child with a disability has behavioral problems that are so disruptive in a general education classroom that the education of other children is significantly impaired, the needs of the child with a disability generally cannot be met in that environment. However, before making such a determination, LEAs must ensure that consideration has been given to the full range of supplementary aids and services that could be provided to the child in the general education educational environment to accommodate the unique needs of the child with a disability.

If the group making the placement decision determines, that even with the provision of supplementary aids and services, the child's IEP could not be implemented satisfactorily in the general education environment, that placement would not be the LRE placement for that child at that particular time, because her or his unique educational needs could not be met in that setting.

C. LEAST RESTRICTIVE ENVIRONMENT

The process for determining the LRE must be individualized for each child with a disability, including preschool age children, children in public schools, private schools, or other care facilities. The IEP team must ensure that children with disabilities are educated with children who do not have disabilities to the maximum extent appropriate. Removing a child from the general education classroom must not occur unless the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily. The IEP must include an explanation of the extent, if any, that the child will NOT participate with children without disabilities in general education classes AND in extracurricular and other nonacademic activities. The general education environment encompasses general education classrooms, and other settings in schools such as lunchrooms and playgrounds in which children without disabilities participate.

When determining LRE, IEP teams must consider:

- o Whether the child's IEP can be implemented in the regular educational environment with the use of supplementary aids and services (34 CFR § 300.114(a)(2)(ii)).
- o Whether placement in the regular classroom will result in any potential harmful effect on the child or on the quality of services that he needs (34 CFR § 300.116(d)).
- o Whether placement in the regular classroom, even with appropriate behavioral interventions, will significantly impair the learning of classmates (34 CFR § 300.324(a)(2)(i)).

The IEP team must discuss what program modifications or supports for teachers and staff may need to be provided to enable the child: (1) to advance appropriately in attaining the annual goals listed on the IEP, (2) be involved in and make progress in the general curriculum and participate in extracurricular and nonacademic activities, and (3) be educated and participate with other children with and without disabilities in these activities, as appropriate.

1. Supplementary Aids and Services

IEP teams must consider the supplementary aids and services, and other supports, that may be needed for the child to be in the general education class, other education-related settings, and in extracurricular and nonacademic settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate (34 CFR § 300.42). Examples of supplementary aids and services may include paraeducator or interpreter services, assistive technology devices and services, resource room and itinerant services to be provided in conjunction with regular class placement.

In the case of a child who is deaf or hard-of-hearing, a sign language interpreter may be needed to enable the child to participate in the general education classroom. The sign language interpreter would sign what the teacher and children say, and if necessary voice what the child who is deaf or hard-of-hearing signs. The teacher and children may need training about communicating through an interpreter, how best to communicate with the child, and the interpreter's role on the educational team. Assistive technology needs of the child may also require training and ongoing technical assistance for teachers and other staff members (34 CFR § 300.9). For example, if a communication device is used, LEA personnel and parents may need training to be able to use the system initially and thereafter when the device is updated with new vocabulary. The IEP team should identify these needs for teacher training under supports for LEA personnel.

2. Nonacademic and Extracurricular Services and Activities

In order to receive a FAPE, children must be included in more than just classroom activities. The LEA must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP team to be appropriate and necessary for the child to participate in LEA sponsored nonacademic and extracurricular settings. Children with disabilities are to participate with children without disabilities in nonacademic settings and extracurricular activities, to the maximum extent appropriate. Again, these services or activities must be considered based on the child's individual needs. This requirement also applies to children who are being educated solely with others who have disabilities, including those in public schools, private institutions or other care facilities (34 CFR § 300.107; 34 CFR § 300.117).

The IEP team is responsible for considering how the child with a disability can participate with children who do not have a disability in a wide range of possible nonacademic and extracurricular services and activities to the maximum extent appropriate. Parents and others close to the child should consider what would benefit the child and promote the achievement of IEP goals and objectives as well as the provision of access to other children without disabilities. It is difficult to make general statements about such activities as senior trips, activities sponsored by the Student Council (technically not school-sponsored), and other such nonacademic activities. Again, such decisions would need to be made individually by the IEP team.

3. Children in Other Educational Placements

LEAs are responsible for ensuring that LRE requirements are applied to children placed by the public school in private institutions or other care facilities. As IEP teams make educational placement decisions about children for whom they do not have an appropriate program at the public school, they must consider all LRE requirements carefully.

The LRE requirement may be modified for students who are incarcerated in local detention facilities, a state juvenile correctional facility or an adult correctional institution.

4. Support for Staff

LEAs must ensure that all teachers and administrators know their responsibilities in ensuring LRE, and that the staff is provided with the needed technical assistance and training. Considerations might include: providing written information to staff; offering ongoing in-service training, professional development, results-based staff development; individual technical assistance; or mentoring by experienced teachers and administrators.

LEAs must consider the supports that all general and special education teachers and related services personnel need to maintain a child in the LRE. Such support might include training for the general education teacher, paraeducators and other personnel. Special educators or related services personnel might provide this training regarding supports that are required. Other examples would be the supports that staff need to implement a child's behavioral intervention plan, such as training regarding modeling, providing positive feedback, and offering peer interactions as appropriate. (34 CFR § 300.119 and § 300.320(a)(4))

D. EARLY CHILDHOOD LEAST RESTRICTIVE ENVIRONMENT

For preschool children ages 3 through 5 with disabilities, placement and LRE requirements are the same as for school-aged children. This means that preschool children with disabilities must have a continuum of placement options available and have the right to be educated with their peers without disabilities to the maximum extent appropriate. As with school-aged children, the needs of preschoolers are

to be considered individually, and the individual needs of the child would determine the most appropriate setting for services to be provided. Most preschoolers benefit from placement in a preschool program with typically developing peers.

LEAs that do not operate programs for preschool children without disabilities are not required to initiate general education programs solely to satisfy the LRE requirements. However, many LEAs provide early childhood services to children without disabilities in programs such as 4-year-old at-risk preschools, child care centers, and various other early childhood settings all constituting general education environments. LEAs that do not operate early childhood programs for children without disabilities may seek alternative means to provide inclusive options for young children through collaborative relationships with private preschool programs or other community-based settings. If a preschool child with a disability is already attending a general education preschool program, the IEP team should consider whether special education and related services can be provided in that setting with the use of supplementary aids and services, or supports for LEA personnel (Federal Register, August 14, 2006, p. 46589).

Various educational placement options are possible, both within the community and at the school. The key question for the IEP Team to consider is where this child would be if she or he did not have a disability. The full continuum of placement options, including integrated placement options with typically developing peers, must be available to preschool children with disabilities. Examples include Head Start, community-based preschools (may be in churches, whether or not religiously affiliated), child care centers or family child care homes, mothers'-day-out programs, Title I programs, at-risk 4-year-old preschools, migrant or bilingual programs, play groups, and other such early childhood programs. For children who are age 5 by September 1, kindergarten would be the least restrictive environment, to the extent appropriate. Note that children with IEPs cannot be counted for general fund reimbursement in the 4-year-old at-risk preschool program, but they may participate in the program.

The regulations allow LEAs to choose an appropriate option to meet the LRE requirements. LEAs are encouraged to explore and use community resources to provide comprehensive services. Paying for the placement of preschool children with disabilities in a private preschool with children without disabilities is one, but not the only, option available to LEAs to meet the LRE requirements. However, if a LEA determines that placement in a private preschool program is necessary as a means of providing special education and related services to a child with a disability, the program must be at no cost to the parent of the child.

E. CHARTER SCHOOLS

Children with disabilities, who attend public charter schools, including virtual schools authorized by the LEA, are served in the same manner as the LEA serves children in its other schools. The LEA is responsible for the provision of a FAPE and other the IDEA requirements in the same manner as it provides for other schools in the LEA. This includes:

- o providing supplementary and related services on site at the charter school to the same extent the LEA has a policy or practice of providing these services on the site of its other public schools;
- o providing funds to the charter school on the same basis as it provides funds to the other schools in the LEA;
- o distributing other federal funds to the charter school as it distributes funds to the other schools in the LEA, consistent with the state's charter school law;

Children with disabilities who attend the state's public charter LEA, including virtual schools within that LEA, are also served in the same manner. The public charter LEA is responsible for the provision of a FAPE and all other the IDEA requirements since it is an LEA under state law.

F. SCDE VIRTUAL SCHOOL PROGRAM

The SCDE offers a virtual school program accessed by LEAs that allows student participation in high school classes in a virtual manner. These courses are accessed as part of the student's regular high school program. The LEA retains all responsibility for access to the program just as if the class were in the physical building.

For students earning a regular state high school diploma, the IEP team should meet either before or after approval for class to review and revise, as necessary, the IEP to ensure that appropriate accommodations, supports and services are in place.

For students not earning a regular state high school diploma, the IEP team should meet PRIOR to class approval to determine if the class can be modified to the extent that participation of the student in class is appropriate. (Modifications are not always necessary. It is possible that accommodations, supports and services are sufficient.)

The full range of accommodations must be available to participants in virtual classes as appropriate. Common accommodations such as reading texts aloud to the student, extended time, etc. must also be made available to virtual school participants.

The IEP must be shared with the virtual school teacher. The virtual school teacher is responsible for implementing the accommodations and modifications on the IEP for his or her class. The school district is responsible for any hardware or software necessary for the student to access the course.

The approving school should have a system in place to ensure that IEP meetings occur in a timely manner.

G. QUESTIONS AND ANSWERS ABOUT EDUCATIONAL PLACEMENT AND LEAST RESTRICTIVE ENVIRONMENT

1. Does the LEA have to provide supplementary aids and services to assist the child with disabilities to enable him or her to remain in a general education classroom? What if the LEA says that providing those supplementary aids and services is too expensive?

The LEA must provide supplementary aids and services to accommodate the special educational needs of children with disabilities in the general curriculum in the LRE. The law, regulations, and court decisions all presume in favor of maximum appropriate contact with children without disabilities.

2. What if the LEA says the child cannot be included because she or he cannot benefit academically from instruction in the general education class?

The LEA should not make such an assertion. The law requires educating a child with disabilities in a general education classroom if the child can receive a satisfactory education there, even if it is not the best academic setting for the child. Children with disabilities may require and be entitled to substantial curriculum changes to ensure they benefit from being in the general education class. The LEA must address the unique needs of a child with disabilities, recognizing that the child may benefit differently from education in the regular classroom than other students.

If an entirely different curriculum is needed for the child's alternate goals, it needs to be determined if appropriate special education supports (for both the child and teacher) can be most appropriately provided within the context of the general education classroom. It is not the intent to have the general education teacher devote all or most of his or her time to the child with a disability nor to modify the general education curriculum beyond recognition.

3. What are supplementary aids and services that would help the child in the general education classroom?

The law is very broad and includes: "aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate..." Supplementary aids and services might include paraeducator services, assistive technology devices and services, and other accommodations, as appropriate.

4. If the child is not placed in a general education classroom, does the LEA have any other LRE responsibilities?

Even if the child is not placed in a general education classroom, the LEA must still find ways for the child to be with children without disabilities in noneducational and extracurricular activities as much as is appropriate to meet the child's needs. Where the LEA suggests a placement other than a general education classroom, the PWN for informed written consent must list other placement the IDEAs that were considered and the reasons they were rejected. Also, according to 34 CFR § 300.320(a)(5), the IEP team must document in the IEP the extent to which the child will not participate with nondisabled children in the regular class and in other LEA activities. The IEP team may also address the potential for moving to a less restrictive environment in the future. The LRE for each child must be considered annually to determine whether the current placement is appropriate.

5. Is there anything that the LEA may not consider in deciding LRE?

The LEA may not make placement decisions based only on such things as the category or severity of the child's disability, convenience of staff, the choices for placement options currently available, the availability of educational or related services, space availability, availability of staff, bus routes, or administrative convenience.

6. If a child is not placed in the general education classroom, can she or he participate in other LEA activities or services?

Yes. The law is clear that children with disabilities have the right to participate in nonacademic and extracurricular services and activities with children who do not have disabilities to the maximum extent appropriate to their needs (34 CFR § 300.117). Also, LEAs must provide these activities in a way that gives children with disabilities an equal opportunity to participate (34 CFR § 300.107). Such services and activities include:

- o lunch
- o counseling services
- o recess
- o transportation
- o athletics
- o recreational activities
- o health services
- o special interest groups or clubs
- o employment opportunities

7. May the nature or severity of a child's disability be used to justify a segregated educational setting?

All children with disabilities have the right to an education in the LRE based on their individual educational needs, not the "label" that describes their disability. LEAs must ensure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled.

Special classes, separate schooling, or other removals of children with disabilities from the general education environment occur only if the nature or severity of the disability is such that education in general education classes with the use of supplementary aids and services cannot be achieved satisfactorily (34 CFR § 300.114(a)(2)).

8. What responsibility does the general education staff have in serving children in the LRE?

Both general and special educators are required to be members of IEP teams who make decisions about services needed by eligible children and where they should be provided. This is a mutual responsibility for general and special education staff. The IEP team is required to consider the supplementary aids and services needed for a child to be successfully educated in the general education classroom. Some examples are:

- o Aids to assist the child
- o Class/environmental accommodations
- o Adaptive equipment
- o Adapted/modified/enriched curriculum
- o Co-teaching staff
- o Classroom tests modified or accommodated

- o Assistive technology
- o Training or supports for the teacher.

These strategies can be used in any class, including classes like physical education, art, music, and vocational education. Teacher-made tests can include any accommodations the child needs; with regard to state and district-wide assessments, however, IEP teams should be careful to avoid specifying accommodations that would invalidate the tests.

The IEP team must include at least one of the child's general education teachers, if the child is or may be participating in general education classes. The general education teacher must, as much as is appropriate, help develop the IEP. This includes helping to decide things like appropriate positive behavioral interventions and strategies, supplementary aids and services, program modifications, and support for LEA staff in providing the supplementary aids and services and program modifications. After the initial IEP has been developed, the general education teacher must also help review and revise the IEP. The IEP team must also have an LEA representative who is knowledgeable about the general curriculum and what resources are available in the LEA. The LEA is responsible for providing the services on the IEP. That means both special and general education teachers must assist in determining the services and ensuring that appropriate services are provided.

9. What if the LEA has a policy that related services are available only at a segregated location?

A policy of this nature is against the law. The LEA cannot legally have a policy that predetermines placement for related services. The LEA must provide the needed related services to meet individual needs of the child in the least restrictive environment. A decision about location of services is determined by the IEP Team.

The OSEP states, "The determination of appropriate program placement, related services needed, and curriculum options to be offered is made by the IEP team based upon the unique needs of the child with a disability rather than the label describing the disabling condition or the availability of programs."

10. Does LRE apply to preschool?

Yes, LRE requirements apply to children who are ages 3 through 5. Some settings for LRE for preschool to serve children where they would be if not disabled include:

- o Public school preschools
- o Community preschool
- o Head Start
- o Child care
- o Play groups
- o Kindergarten for 5 year olds

11. If services are needed during an extracurricular activity, do we need a goal that addresses it?

No. The IEP team is required to address how children will participate with others who do not have disabilities during nonacademic and extracurricular activities. Services may be listed to meet those needs, without having a specific goal.

12. Is parent consent required when moving a child from placement in a neighboring LEA back to the home LEA?

No, if the placement in both LEAs is the same place on the continuum and the child has the same opportunity to participate with peers without disabilities. If the IEP specifies a certain classroom in a certain school, then consent would be required. Placement is not determined by the name of the building, rather it is the place on the continuum of service environments. For example, if the IEP reads "services will be provided in Mrs. Jones' 4th grade class at Eisenhower Elementary School," then parent permission would be needed to move the student from Mrs. Jones' classroom. However, if the IEP reads "services will be provided in a regular 4th grade classroom," then parent permission would not be needed, if everything else stayed the same. Placement is not the same as location.

13. Is moving a child from a regular bus to a special education bus a change of placement?

Yes, since a special education bus is a more restrictive setting than a regular education bus (34 CFR § 300.107). Nonacademic services include transportation as a service; therefore the IEP team would need to ensure a child with disabilities participates with children without disabilities (34 CFR § 300.117). If the change is made, the IEP team would need to provide PWN.

14. May students with disabilities attend charter schools, virtual schools, or virtual charter schools?

Yes, students with disabilities may attend a charter or virtual school that is authorized by the LEA or may attend a school within the state's public charter LEA. The student with a disability and his or her parents retain all rights under the IDEA.

CHAPTER 7: REEVALUATION

INTRODUCTION

An evaluation that is conducted at any time after an initial evaluation and initial determination of eligibility as a child with a disability is considered a reevaluation. LEAs must ensure that a reevaluation of each child with a disability is conducted if conditions warrant a reevaluation, or if the child's parents or teacher requests a reevaluation, but at least once every 3 years. Reevaluations may not occur more than once a year, unless the parent and the LEA agree otherwise. New requirements also allow the parent and the LEA to agree that a 3 year reevaluation is not necessary (34 CFR § 300.303(b)(2)).

Most components of the reevaluation process are identical to those required for initial evaluation. See Chapter 3, Initial Evaluation and Eligibility, for a complete explanation of the evaluation process. However, there may also be some differences from the initial evaluation. The specific individuals on the reevaluation team may be different than they were for the initial evaluation. The roles are the same, but the people themselves may be different. A report of the reevaluation must be written and provided to the parents. Under certain circumstances the reevaluation may be conducted without parent consent. This chapter includes a discussion of the following topics:

- A. [Purpose of the Reevaluation](#)
- B. [Need for the Reevaluation](#)
- C. [Prior Written Notice and Request for Consent](#)
- D. [Members of the Reevaluation Team](#)
- E. [Conducting the Reevaluation](#)
- F. [Determining Continued Eligibility](#)
- G. [Reevaluation for a Child Identified as Developmentally Delayed](#)
- H. [Questions and Answers about Reevaluation](#)

A. PURPOSE OF THE REEVALUATION

The reevaluation process is required every 3 years, or more often, if needed, to determine:

- o if the child continues to be a child with a disability, whether the child continues to need special education and related services;
- o the educational needs of the child;
- o the present levels of academic achievement and functional performance (related developmental needs) of the child; and
- o whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.

The information gathered as a result of the reevaluation provides valuable information about the child's progress and needs. In addition to using the information to determine whether the child continues to be eligible for special education services and related services, this information should be used to review the IEP, revising it if necessary, in accordance with 34 CFR §§ 300.301 through 300.311.

B. NEED FOR THE REEVALUATION

A reevaluation must be conducted if the LEA determines that the education or related services needs, including improved academic achievement and functional performance of the child, warrant a reevaluation, or, if the child's parent or teacher requests a reevaluation. A reevaluation must be conducted before an LEA determines a child is no longer a child with a disability. However, a reevaluation shall not occur more than once a year, unless the parent and the LEA agree otherwise (34 CFR § 300.303(b)(1)).

If a parent requests a reevaluation, or more than 1 reevaluation per year, and the LEA disagrees that a reevaluation is needed, the LEA must provide PWN to the parent that explains, among other things, why the LEA refuses to do the reevaluation and the parent's right to pursue the reevaluation through mediation or a due process hearing.

A reevaluation is to occur at least once every 3 years, unless the parent and the LEA agree that a reevaluation is unnecessary (34 CFR § 300.303(b)(2)). Prior to conducting a reevaluation, the parent and the LEA shall determine whether a reevaluation is needed. They must consider the child's educational needs, which may include whether the child is participating in the general education curriculum and being assessed appropriately. The parent and the LEA will discuss the advantages and disadvantages of conducting a reevaluation, as well as what effect a reevaluation might have on the child's educational program (Federal Register, August 14, 2006, p. 46640, 46641).

There are circumstances when a reevaluation is not required:

- o before the termination of a child's eligibility due to graduation with a regular diploma; however, PWN is required for the change of placement; or
- o due to exceeding the age of eligibility for a FAPE, which would be the end of the school year in which the student becomes 21 years of age. (34 CFR § 300-305(e)(2))
- o when the LEA and parent agree that a reevaluation is not needed.

C. PRIOR WRITTEN NOTICE AND REQUEST FOR CONSENT

Whenever an LEA proposes to conduct a reevaluation, the LEA must provide PWN to the parents of the child that describes any evaluation procedures the LEA proposes to conduct (34 CFR § 300.304(a)). In addition, there are standard components of content the notice must also contain. The purpose of providing notice to the parents is so they understand what action the public agency is proposing (in this case, to conduct a reevaluation) and the basis used for determining the action is necessary. The PWN must include:

- o A description of the action proposed by the agency.
- o An explanation of why the agency proposes the action.
- o A description of each evaluation procedure, assessment, record, or report the agency used as a basis to determine the need for the proposed action.
- o A statement that the parents have protection under the procedural safeguards and how a copy of the procedural safeguards can be obtained.
- o Sources for parents to contact to obtain assistance in understanding their procedural safeguards.
- o A description of other options considered and the reasons why those options were rejected.
- o A description of other factors that are relevant to the agency's proposal. (34 CFR § 300.503(b))
- o Additionally, for a reevaluation, the notice must describe any evaluation procedures that the LEA proposes to conduct (34 CFR § 300.304(a)).

The notice must be written in language understandable to the general public and provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. If the native language or other mode of communication of the parent is not a written language, the LEA must take steps to ensure that the notice is translated orally or by other means to the parent in his or her native language or other mode of communication, that the parent understands the content of the notice and that there is written evidence that this has been done (34 CFR § 300.503(c)).

1. Preparing the Prior Written Notice

The team must plan to administer the assessments and other evaluation measures needed to produce the required data, if any, for determining continued eligibility and educational needs (34 CFR § 300.305(c)). Every reevaluation should be approached and designed individually based on the specific concerns of the child to be evaluated. Thoughtful planning is required to ensure that the team will use appropriate tools to collect the data needed, while eliminating time spent collecting information that is either unnecessary or overly time consuming for no clear purpose. It would be inappropriate to use the same battery of assessments for all children or to rely on any single tool to conduct an evaluation.

The first activity the reevaluation team undertakes is a review of existing data. The reevaluation team needs to consider all data that are currently available including evaluations and information provided by the parents, current classroom-based, local, or state assessments, and classroom-based observations; and observations by teachers and related service providers; and the child's response to scientifically, research-based interventions, if implemented. The review of existing data, as part of the reevaluation, may be conducted without a meeting and without consent from the parents (34 CFR § 300.305(b); 34 CFR § 300.300(d)(1)).

The purpose of reviewing existing data is to identify what additional data, if any, are needed to determine:

- o if the child continues to be a child with a disability and continues to need special education;
- o the educational needs of the child;
- o the present levels of academic achievement and functional performance (related developmental needs) of the child; and
- o whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable goals set out in the IEP and to participate, as appropriate, in the general education curriculum. (34 CFR § 300.305(a)(2))

After the team has reviewed the existing data, there must be a determination of what data, if any, will be collected during the reevaluation, with the PWN completed to reflect that determination.

a. Requirements if No Additional Data are Needed

If the team has determined that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the LEA must notify the parents:

- o of that determination and the reasons for it; and
- o the right of the parents to request an assessment to determine whether the child continues to be a child with an disability, and to determine the educational needs of the child (34 CFR § 300.305(d)).

The LEA is not required to conduct the assessment described above unless requested to do so by the child's parents.

b. Requirements if Additional Data Are Needed

If the team has determined that additional data are needed, the team should plan who will collect it and plan to ensure all data will be collected within the evaluation timeline. The procedures to be used to collect the data should be described on the PWN for the reevaluation and provided to the parents for their consent.

2. Request for Consent

The LEA must obtain informed consent from the parent of the child before conducting any reevaluation (34 CFR § 300.300(c)). In determining that informed consent is obtained, the following must be ensured

- The parent has been fully informed of all information relevant to the activity for which consent is being sought, in his or her native language, or other mode of communication.
- The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom.
- The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.
- If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

3. Failure to Respond or Refusal to Consent

The LEA must make reasonable attempts to obtain consent from the parents to conduct the reevaluation. Reasonable attempts may include at least two contacts by two different methods (phone calls, letters, visits, email, etc.) and such attempts should be documented, including detailed records of telephone calls made or attempted and the results, copies of written correspondence sent to the parents and their response if any, and visits made to the parents home or place of employment, and the response, if any, from the parents (34 CFR § 300.322(d)(1)).

If the LEA can demonstrate that it has made reasonable attempts and parents have failed to respond, informed parental consent need NOT be obtained for the reevaluation.

If the parent refuses consent for the reevaluation the LEA may, but is not required to, pursue the reevaluation of the child by utilizing the procedural safeguards, including mediation. The LEA does not violate its obligation for child find or to conduct a reevaluation of the child if it declines to pursue the reevaluation (34 CFR § 300.300(c)(1)). If a parent refuses to consent to a three-year reevaluation under 34 CFR §300.303(b)(2), but requests that the LEA continue the provision of special education and related services to their child, the LEA has the following options:

1. The LEA and the parent may, as provided in 34 CFR §300.303(b)(2), agree that the reevaluation is unnecessary. If such an agreement is reached, the three-year reevaluation need not be conducted. However, the LEA must continue to provide FAPE to the child.
2. If the LEA believes that the reevaluation **is** necessary, and the parent refuses to consent to the reevaluation, the LEA may, but is not required to, pursue the reevaluation by using the consent override procedures described in 34 CFR §300.300(a)(3) including mediation and due process procedures.

3. If the LEA chooses **not** to pursue the reevaluation by using the consent override procedures described in 34 CFR §300.300(a)(3), and the LEA 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 LEA may determine that it will not continue the provision of special education and related services to the child. If the LEA determines that it will not continue the provision of special education and related services to the child, the LEA must provide the parent with prior written notice of its proposal to discontinue the provision of FAPE to the child consistent with 34 CFR §300.503(a)(2), including the right of the parent to use the mediation procedures in 34 CFR §300.506 or the due process procedures in 34 CFR §§300.507 through 300.516 if the parent disagrees with the LEA's decision to discontinue the provision of FAPE to the child.

If a parent of a child who is home schooled or voluntarily placed in a private school by the parents does not provide consent for the reevaluation, or the parent fails to respond, the LEA may not use mediation or request a due process hearing (34 CFR § 300.300(d)(4)).

During reevaluation, like initial evaluation, the LEA is required to inform parents of their right to an independent educational evaluation, according to 34 CFR § 300.502. Chapter 3 includes a full discussion of independent educational evaluations.

D. MEMBERS OF THE REEVALUATION TEAM

The membership of the team that conducts the reevaluation and determines continued eligibility is the same as the IEP team with the addition of other qualified professionals if a child is suspected of having a specific learning disability, as appropriate. The additional professionals that would participate are based on the identified concerns to be addressed in the reevaluation process. The actual team members on each reevaluation team may differ; however, there are specific members and skills that must be represented on the team. The make up of this team would include:

- o The parents of the child.
- o Not less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment).
 - o If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or if the child is less than school age, an individual qualified to teach a child of his or her age;
- o Not less than one special education teacher of the child, or where appropriate, not less than one special education service provider of the child.
- o A representative of the local education agency who:
 - o Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of child with disabilities,
 - o Is knowledgeable about the general education curriculum, and
 - o Is knowledgeable about the availability of resources of the public agency;
- o An individual who can interpret the instructional implications of reevaluation results.
- o At least one person qualified to conduct individual diagnostic examinations of children, if these are determined necessary.
- o At the discretion of the parent or agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate. (34 CFR § 300.321; 34 CFR § 300.308)

E. CONDUCTING THE REEVALUATION

The reevaluation must include a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining whether the child continues to be a child with a disability, the educational needs of the child, and the content of the child's IEP, including information related to enabling the child to be involved, and progress, in the general education curriculum or, for preschool children, to participate in appropriate activities.

In addition, the procedures must also lead to the determination of the present levels of academic achievement and functional performance of the child. The public agency must administer such assessments and other evaluation measures as may be needed to produce the data to determine:

- o if the child continues to be a child with a disability;
- o the educational needs of the child;
- o the present levels of academic achievement and functional performance (related developmental needs) of the child;
- o whether the child continues to need special education and related services; and
- o whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable goals set out in the IEP and to participate, as appropriate, in the general education curriculum. (34 CFR § 300.305(a)(2))

As stated previously, the data collected is critical not only for the purpose of determining whether a child continues to be eligible for special education services, but also to assist in the development of present levels of academic achievement and functional performance. Regulations clearly state that the reevaluation must result in determining the content of the child's IEP (if still eligible) including information related to enabling the child to be involved in and progress in the general curriculum (or for a preschool child, to participate in appropriate activities) (34 CFR § 300.304(b)(ii)). However, the reevaluation should also assist in the development of an instructional plan for the child if the child is not found to be eligible.

Every reevaluation should be approached and designed individually based on the specific concerns of the child being evaluated. Thoughtful planning is required to ensure that the team will use appropriate tools to collect the data needed, while eliminating time spent collecting information that is unnecessary or for no clear purpose. It would be inappropriate to use the same battery of assessments for all children or to rely on any single tool to conduct a reevaluation.

1. Procedures for Conducting the Reevaluation

The LEA shall ensure that a reevaluation meets all of the same requirements for an initial evaluation as described in Section E, of Chapter 3, in this Handbook. The reevaluation team members must utilize a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information from the parents, and information related to enabling the child to be involved in and progress in the general curriculum (or for a preschool child, to participate in appropriate activities). The tools and strategies must yield relevant information that directly assists in determining the educational needs of the child.

Collecting relevant functional, developmental, and academic information related to enabling the child to be involved in, and progress in, the general curriculum (or for a preschool child, to participate in appropriate activities) requires that data be collected not only about the child, but about the curriculum, instruction, and environment as well. Every evaluation should be approached and designed individually based on the specific concerns for the child and the selection of assessment tools based on the information

needed to answer the eligibility questions. It would be inappropriate to use the exact same battery of assessments for all children or to rely on any single tool to conduct an evaluation. The following methods of gathering information should prove useful:

General Education Curriculum Progress: During the reevaluation, the team should thoroughly examine the child's progress in the general education curriculum. The team needs to understand how the child is progressing in general education curriculum across settings with the available supports. To do this they must understand the outcomes of the general education curriculum and how the skills represented in those outcomes relate to the needs of each child. Are the skills needed for this child's progress different than the skills that general education children need? Is the instruction required for the child to learn those skills different? The general education curriculum outcomes and the supports available through general education are unique to each LEA. Gaining an understanding of what support is available and the level of support needed by the child is one of the most important parts of the reevaluation.

Record Review: The evaluation team should also include as part of the reevaluation a review of records. These records would include such things as information provided by the parents, current classroom-based assessments, state assessments, information from previous services providers, screenings, previous evaluations, reports from other agencies, portfolios, discipline records, cumulative file, and other records.

Interview: It is important to understand the perceptions of significant adults in the child's life and of the child himself. Parents, teachers, and the child can all typically provide insight into areas of strengths and needs. Interviews can also provide information about significant historical events in the child's life as well as about his performance in the classroom and other settings.

Observation: An LEA must ensure the child is observed in the child's learning environment (including the regular education classroom setting) to document the child's academic performance and behavior in the areas of difficulty (34 CFR § 300.310). In the case of a child of less than school age or out of school, a team member must observe the child in an environment appropriate for a child of that age. If the child is already in an educational setting the observation should be done in that setting opposed to bringing them into a different setting just for observation. These observations could include structured observations, rating scales, ecological instruments, behavioral interventions, functional analysis of behavior and instruction, anecdotal, and other observations (conducted by parents, teachers, related services personnel, and others). The purpose of the observation is to help the evaluation team understand the extent to which the child's skills are impacting his or her ability to participate and progress in a variety of settings. Observations allow you to see first hand how a child is functioning in naturally occurring settings. Observation data can also allow you to compare the child's behavior to that of peers in the same setting. Observation data helps us to understand not only the child's current functional performance but also the level of independence demonstrated which can help determine necessary supports.

Test: A wide range of tests or assessments may be useful in determining an individual child's skills, abilities, interests, and aptitudes. Typically, a test is regarded as an individual measure of a specific skill or ability, while assessment is regarded as broader way of collecting information that may include tests and other approaches to data collection. Standardized norm-referenced tests are helpful if the information being sought is to determine how a child compares to a national group of children of the same age or grade. Criterion-reference tests are helpful in determining if the child has mastered skills expected of a certain age or grade level. Tests typically provide specific information but are never adequate as a single source of data to determine eligibility for special education. Because tests require a controlled testing environment, the result is that children are removed from their learning environments to participate. This is a very intrusive way of gathering data and the value of the data obtained should always be weighed carefully against the cost of missed class time. For this reason, tests should be thoughtfully selected and be used for specific purposes when data cannot be obtained through other sources. Some test information may already have been

collected, especially if the child attends a school that uses school-wide benchmark assessment. However, additional information may need to be collected during the reevaluation. This might include curriculum-based assessments (e.g., curriculum based assessment, curriculum based measurement, curriculum based evaluation), performance-based assessments (i.e., rubric scoring), or other skill measures such as individual reading inventories. The testing that needs to be done will vary depending on what information already has been collected and the needs of the individual child. Diagnostic testing might include measures of reading, math, written language, or other academic skills, or tests of motor functioning, speech/language skills, adaptive behavior, self-concept, or any domain of concern. As with all types of data collection, the information from testing needs to be useful for both diagnostic and programmatic decision-making.

This approach offers a framework in which to organize and structure data collection. It is not that any data source or assessment procedure is inherently good or bad. All procedures and tools are appropriate as long as they are selected thoughtfully and for the appropriate purposes. A team will not necessarily use all data sources every time an evaluation is conducted, but it does mean that thoughtful planning will need to be given for each child to ensure that the team is collecting the appropriate data using the appropriate tools to ensure the correct information to make the continued eligibility determination.

The instruments utilized in the reevaluation must meet all of the requirements as described in Section E. of Chapter 3 in this Handbook. Federal and state laws and regulations specify requirements for evaluation and reevaluation (34 CFR § 300.304)

F. DETERMINING CONTINUED ELIGIBILITY

Upon completion of the reevaluation, the team should compile all data (that which previously existed and/or was collected as part of the reevaluation) into a format that will be useful when the team convenes to make the continued eligibility determination. It is important that all the information be in an understandable format that allows the team, including the parent, to understand the child's strengths and weaknesses and how the child is progressing in the general curriculum in addition to information about the child's disability and needs for special education.

At the time the reevaluation is completed, the team should schedule a time to convene in order to make the determination of continued eligibility. Parents must be provided an opportunity to participate in this meeting, which can be conducted at the same time as the IEP team meeting.

When the meeting is convened, the reevaluation team, including the parents, reviews the results of the reevaluation to determine:

- o if the child continues to be a child with a disability;
- o the educational needs of the child;
- o the present levels of academic achievement and the functional performance (related developmental needs) of the child;
- o whether the child continues to need special education and related services; and
- o whether any additions of modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate in the general education curriculum.

As is the case in all reevaluations, when making the determination of whether the child continues to be a child with a disability and whether the child continues to need special education and related services, teams must take into account that the child has made progress since the time he or she was initially evaluated and determined to be eligible for services. The fact that the child's performance gap may be less than at the time of the initial evaluation would not necessarily mean that the child is no longer a child with an disability

and no longer in need of special education services. Initial eligibility criteria need no longer be met for a reevaluation.

The data collected at the time of the reevaluation should assist the team in decision making. Teams should thoroughly discuss the child's present levels of educational performance and consider the child's rate of progress. Teams should also consider what level of support is needed in order for the child to access and progress in the general curriculum and whether that level of support would continue to require specially designed instruction. If at the time of reevaluation, a student needs only general accommodations, then the student is no longer eligible for special education services, but should be referred for consideration of eligibility for a 504 plan. These careful considerations should drive the determination of continued eligibility.

Documenting Continued Eligibility

After completion of appropriate reevaluation procedures, the team of qualified professionals and the parent of the child shall prepare a written reevaluation report. A copy of the reevaluation report and documentation of whether or not the child continues to be a child with a disability must be given to the parents.

G. REEVALUATION FOR A CHILD IDENTIFIED AS DEVELOPMENTALLY DELAYED

Special considerations impacting reevaluation are needed for children who have been determined eligible for special education services under the category of developmental delay (DD). These considerations must be made in accordance with regulations regarding a child's continuing eligibility for services.

If a child ages 3 through 9 was determined eligible as a child with DD, a reevaluation must be conducted before the child turns age 10 to determine whether the child continues to be a child with an disability as defined by any of the categorical areas under the law and whether the child continues to need special education and related services. The reevaluation to determine continued eligibility as a child with a disability may take place anytime prior to the child's 10th birthday.

H. QUESTIONS AND ANSWERS ABOUT REEVALUATION

1. What does the LEA do if parents refuse consent for a reevaluation?

The LEA must try to obtain consent from the parents. The LEA may, but is not required to seek to mediate the dispute or request a due process hearing to pursue the reevaluation. The LEA would not violate the requirement to conduct a reevaluation if it declines to pursue the reevaluation when the parent refuses to provide consent. The school would continue to serve the child according to the IEP. However, if a parent of a child who is home schooled or voluntarily placed in a private school by the parents does not provide consent for the reevaluation, or the parent fails to respond, the LEA may not use mediation or request a due process hearing.

2. What does the school do to document reasonable measures were taken to obtain consent, if parents do not respond to the request to reevaluate?

If the parent does not respond the school must keep detailed records of its attempts to obtain parental consent including written correspondence sent to the parents, phone calls made or attempted and visits made to the parent's home or place of employment, and the response, if any, from the parent. Repeated measures might include two attempts, using at least two different methods. If the school is not successful after repeated reasonable measures, then the school may continue with the reevaluation procedures. (34 CFR § 300.300(c)(2) and (d))

3. What does the LEA do if parents want a specific test conducted, but the rest of the reevaluation team believes no additional data are needed? Must the school conduct the test?

Yes. According to 34 CFR § 300.305(d), If the IEP Team determines that no additional data are needed, the public agency must notify the child's parents of

- (i) The determination and the reasons for the determination; and
- (ii) The right of the parents to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs

The public agency is not required to conduct the assessment described in paragraph (d)(1)(ii) of this section *unless requested to do so by the child's parents*.

4. If no additional data are needed, does the reevaluation team need to write a report just to determine continued eligibility and need?

Yes. Upon the completion of the reevaluation (which may include only existing data) and determination of continued eligibility, the team develops a reevaluation and eligibility report as described in Chapter 3. The report includes what data were examined and the team's reasons for determining continued eligibility for special education and related services. The parents must receive a copy of this report.

5. May staff discuss information related to a child's instruction without the parents?

Yes. The comments to the federal regulations clarify that 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 service provision if those issues are not addressed in the child's IEP. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

6. Once a child has been dismissed from special education services, must the LEA complete an initial evaluation upon a referral to determine need for special education?

Once the child has been dismissed, any subsequent evaluation would be an initial evaluation. The evaluation must include a review of existing data. If the team determines the current available data are adequate for the purposes of eligibility determination, there do not need to be any further assessments conducted.

7. When a student with a disability is graduating and exiting from special education services, must the LEA conduct a reevaluation to determine post-school program eligibility?

LEAs are not required to conduct a reevaluation for a child to meet the entrance or eligibility requirements of a post-school institution or agency because to do so would impose a significant cost on the LEA that is not required by the law (Federal Register, August 14, 2006, p. 46644). However a summary of Performance must be provided.

CHAPTER 8: SUSPENSION AND EXPULSION OF CHILDREN WITH DISABILITIES FOR DISCIPLINARY VIOLATIONS

INTRODUCTION

This chapter examines issues related to disciplinary actions for code of conduct violations including the option for violations related to weapons, drugs, serious bodily injury, and behavior substantially likely to result in injury to the child or others.

LEAs may use customary disciplinary techniques for all children, including those with disabilities. The LEA's focus should be on prevention; that is, methods used to prevent future occurrences of behavior problems. LEAs may use a school wide multi-tiered system of positive behavior supports (PBIS) for all children in the school. For children with disabilities, traditional forms of discipline such as in-school suspension, detention, time-out, study carrels, or the restriction of privileges can also be used so long as these forms of discipline are also used with nondisabled children and do not violate the provisions of a child's IEP or the child's right to a FAPE.

Most legal problems arise when a school proposes to suspend or expel a child with a disability. When the issue is suspension or expulsion, the law has special provisions which sometimes require LEAs to treat children with disabilities differently than other children. The South Carolina special education laws and regulations contain provisions that parallel federal suspension and expulsion requirements.

This chapter includes a discussion of the following topics:

- A. [LEA Responsibilities](#)
- B. [Code of Conduct Violations](#)
- C. [Short-Term Removals \(Not a Change of Placement\)](#)
- D. [Long-Term Removals \(A Change of Placement\)](#)
- E. [45 School Day Interim Alternative Educational Setting \(IAES\) - Weapons, Drugs, or Serious Bodily Injury](#)
- F. [Appeals](#)
- G. [Children Not Yet Eligible for Special Education Services](#)
- H. [Questions and Answers about Suspension and Expulsion](#)

A. LEA RESPONSIBILITIES

Requirements for imposing disciplinary removals of children with disabilities are found in numerous federal and state laws and regulations. Some of these apply to all children in public schools. It is important for LEAs to examine their current policies to ensure that they comply with all requirements. Additionally, LEAs may wish to consult with their attorney to consider what other policies might be needed. It is advisable for LEAs to develop clear definitions and inform children and parents of the LEA's expectations in terms of behavior and conduct.

The IDEA encourages LEAs to establish preventive measures and approaches, such as the use of positive behavioral interventions, supports and strategies. LEAs are also advised to provide sufficient staff development activities to ensure that both new employees and experienced staff are knowledgeable about Federal and State requirements. Both special and general education administrators need to know what to do immediately when serious situations arise.

LEAs must carefully consider the personnel involved when disciplinary situations result in a hearing. There are two kinds of hearing officers. One is a school administrator, employee, or committee authorized by the local school board as the **school's disciplinary hearing officer**. The second kind of hearing officer is a **special education due process hearing officer**, who addresses any special education issue that arises as a result of an appeal regarding special education actions related to suspension and expulsion (i.e., change of placement, manifestation determination, etc.). The special education due process hearing officer is assigned for a due process hearing and may not be an employee of the LEA. It is important that LEAs understand when each kind of hearing officer is required. The terms "school's disciplinary hearing officer" and "special education due process hearing officer" will be used throughout this chapter to differentiate the two types of hearing officers.

School officials may also use in-school or out-of-school suspension so long as it does not constitute a change of placement. The law does not set an absolute limit on the number of cumulative school days needed to constitute a change of placement, but requires a case-by-case examination of specific factors and requires that services be provided after the 10th school day of suspension in a school year.

B. CODE OF CONDUCT VIOLATIONS

When a child with a disability violates an LEA's code of conduct, that behavior could result in suspension or expulsion. Such removals from school are subject to the disciplinary provisions of special education law. Therefore, LEA officials must consider suspension and expulsion for children with disabilities very carefully. Several terms used throughout this chapter are defined as follows:

1. Change in Placement for Disciplinary Reasons

Change in Placement for Disciplinary Reasons (long-term removal) means that school officials or a special education due process hearing officer has ordered any of the following changes in placement of a child with a disability:

- o The child is suspended or expelled from school for more than 10 consecutive school days.
- o The child is subjected to a series of short-term suspensions that constitute a pattern because **all** of the following have occurred:
 - they cumulate to more than 10 school days in a school year,
 - each incident of misconduct involves substantially the same behavior, **and**
 - because of other factors such as the length of each suspension, the total amount of time the child is suspended, and the proximity of the suspensions to one another.
- o The child is placed in an IAES.

2. School Day

School day means any day, including a partial day (50% of the day), that all children, including children with disabilities, are in attendance at school for instructional purposes (34 CFR § 300.11(c)). Given this definition, if a child is suspended for part of a school day, the partial day counts as a full day for purposes of determining if a change of placement has occurred, or if educational services are required during the period of suspension.

3. School Official

School official means (1) A regular education administrator; (2) the director of special education or the director's designee or designees; and (3) a special education teacher of the child with a disability.

4. Short-Term Suspension

Short-term suspension means removal for a short term not exceeding 10 school days (or a series of removals not constituting a change in placement).

5. Controlled Substance

Controlled substance means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)). (34 CFR § 300.520(d)(1)).

6. Illegal Drug

Illegal drug means a controlled substance; but does not include a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law (34 CFR § 300.520(d)(2)).

NOTE: Alcohol and tobacco are not included in this definition.

7. Weapon

Weapon means any weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2½ inches in length.

8. Serious Bodily Injury

Serious bodily injury means a bodily injury that involves one or more of the following: a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

Additionally, in this chapter, the term “dangerous behavior” may be used interchangeably with the phrase “substantially likely to result in injury to the child or others”.

C. SHORT TERM REMOVALS (NOT A CHANGE OF PLACEMENT)

School officials may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate IAES, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct, as long as those removals do not constitute a change of placement or total more than 30 days as reflected in state law (S.C. Code Ann. §59-63-220 (2004)). The school need not provide educational services during the first 10 days of removal in a school year, unless it provides educational services to a child without disabilities who is similarly removed.

Subsequent Short-Term Removals (Not a Change in Placement)

When a child with a disability has more than a single suspension in a school year, school officials should carefully monitor the cumulative number of school days of suspension and make decisions about the effect of imposing additional short-term suspensions. If school officials order two or more short-term suspensions of a child with a disability during a school year, these suspensions are not a change in placement for disciplinary reasons if the suspensions do not constitute a pattern of removals.

To determine if a change of placement has occurred, school officials must consider whether the series of suspensions constitutes a pattern of removals. School officials may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the

other requirements, is appropriate for a child with a disability who violates a code of student conduct. (34 CFR § 300.530(a))

Under 34 CFR § 300.536, when a series of suspensions/removals total more than 10 school days in a school year, school officials should determine whether a pattern of removals has developed by considering:

- o Whether the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals
- o Other factors such as:
 - The length of each removal;
 - The total amount of time the child has been removed; and
 - The proximity of the removals to one another.

School officials have the authority to make the determination of whether a series of short-term suspensions of a child with a disability constitute a change in placement for disciplinary reasons. This determination is subject to review through due process proceedings.

School officials should be addressing the issues of the suspensions prior to reaching the 11th day. By addressing accumulated days of suspension early, the school may be able to avoid the need for a suspension that would result in a disciplinary change in placement. Suspensions should be carefully monitored so that school personnel will be aware of whether another removal will constitute a change of placement.

Schools must provide a FAPE to all children with disabilities, including those who are suspended or expelled from school after the 10th day of suspension. Nevertheless, children with disabilities, like students without disabilities, may be given short-term suspensions. As stated previously, the school is not required to provide educational services to children with disabilities during the first 10 cumulative days of suspension in a school year. However, when the total number of school days of suspension in a school year reaches 11, and the current removal is for not more than 10 consecutive school days and is not a change of placement, the school must begin providing educational services. School officials must determine the extent to which special education and related services must be provided to the child beginning on the 11th school day of suspension. In this situation, "school officials" means a general education administrator, special education director or designee(s), and the child's special education teacher, as specified. Beginning on the 11th school day of suspension in a school year, and each school day of suspension thereafter, special education and related services needed for the child must be provided to enable the child to:

- o participate in the general education curriculum, although in another setting; and
- o progress toward meeting the goals set out in the child's IEP.

If the short-term suspension includes the 11th cumulative school day of suspension in a school year, necessary services identified by the school officials must be provided. The 11th day rule applies, whether or not the 11th school day of suspension results in a pattern of removal that constitutes a change of placement.

Additionally, if the child has not had a functional behavioral assessment (FBA) and the LEA has not implemented a BIP for the child, school officials may (but are not required to) determine that the child needs a FBA to address the behavior that resulted in the suspension and to develop a BIP if the assessment suggests such a plan is necessary for the child

The comments to the federal regulations clarify that the services to be provided to the child on the 11th day do not have to "replicate every aspect of the services that a child would receive if in his or her normal classroom." (Federal Register, 2006, p. 46716) "The act modified the concept of a FAPE in these

circumstances to encompass those services necessary to enable the child to continue to participate in the general curriculum, and to progress toward meeting the goals set out in the child's IEP." "An LEA is not required to provide children suspended for more than 10 school days in a school year for disciplinary reasons, exactly the same services as they were receiving prior to the imposition of discipline." It is important, however, that the child continue to progress toward meeting graduation requirements.

Federal regulations (34 CFR § 300.530(b)(1) and (2) and (d)(1), (3), and (4)) address these requirements, as do South Carolina state regulations.

D. LONG-TERM REMOVALS (A Change of Placement)

To determine if a change of placement has occurred, school officials must consider whether the series of short-term removals (less than 10 consecutive school days) constitutes a pattern of removals. School officials may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements, is appropriate for a child with a disability who violates a code of student conduct. (34 CFR § 300.530(a))

A removal of a child with a disability is a change of placement when:

- o The removal is for more than 10 consecutive school days; or
- o The removal is one of a series of short-term removals that constitutes a pattern of removals.

There are **specific steps to follow** when school officials consider either a long-term suspension for more than 10 consecutive school days, an expulsion, or another short-term suspension that cumulates to more than 10 school days and shows a pattern constituting a change of placement (34 CFR § 300.530(d)(5) and (e)).

- o On the date the decision is made to make a removal that constitutes a change of placement of a child with a disability the school must notify the parents of that decision, and provide the parents with a copy of the Parent Rights notice.
- o On the 11th school day of removal, the school must begin providing appropriate special education and related services. Note that the determination of services needed as a result of a disciplinary change of placement is not made by the school officials as in the previous situations. Instead, the **IEP team decides on these services and where they will be provided.**
- o The school, the parent, and relevant members of the child's IEP team (as determined by the parent and the school) **must determine if the child's violation of the school's code of student conduct was a manifestation of his or her disability.**
- o The school must convene meetings regarding the manifestation determination and services as expeditiously as possible, but no later than 10 school days after the decision to change placement due to disciplinary reasons is made.

When a disciplinary change of placement occurs, the IEP team, including the parent, determines the special education and related services to be provided during the removal. However, **parental consent for the disciplinary change in placement is not required.**

1. Manifestation Determination

As soon as practical, but not later than 10 school days after the date on which the decision is made to change the placement of a child with a disability because of a violation of a student code of conduct, the representative of the school, the parent and other relevant members of the child's IEP team, as determined by the parent and the school, must meet to review:

- o all of the relevant information in the child's file,
- o the child's IEP,

- o any teacher observations, and
- o any relevant information provided by the parent.

Based on its review of all the relevant information, the group must determine if the conduct in question was:

- a. caused by, or had a direct and substantial relationship to the child's disability; or
- b. the direct result of the school's failure to implement the child's IEP (34 CFR § 300.530(e)(1)).

If it is determined by the group that the conduct of a child was a result of either "a" or "b" above, then the conduct must be determined to be a manifestation of the child's disability.

3. Determination Behavior WAS a Manifestation of the Disability

If the school, the parent and other relevant members of the child's IEP team (as determined by the parent and school) determine that the student's behavior was the direct result of the school's failure to implement the IEP, the LEA must take immediate action to remedy those deficiencies.

If the school, the parent and other relevant members of the IEP team (as determined by the parent and school) determine that the child's behavior was a manifestation of the disability, the IEP team must:

- o Return the child to the placement from which the child was removed, unless the parent and the school agree to a change of placement as part of the modification of the behavioral intervention plan; and
- o Either:
 - Conduct a functional behavioral assessment, unless the school had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or
 - If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior.

If it is determined that the child's behavior is a manifestation of the child's disability the child cannot be subject to a long-term removal for the behavior. However, the school and the parents could agree to another setting. Also, even when the behavior **is a manifestation** of the child's disability the school could request a special education due process hearing officer to order placement in an IAES for up to 45 school days if the LEA can show that maintaining the current placement is substantially likely to result in injury to the child or others.

Requirements for the manifestation determination review, as stated above, are found in Federal regulations (34 CFR § 300.530(e).

3. Determination Behavior WAS NOT a Manifestation of the Disability

If the IEP team determines the behavior was NOT a manifestation of the child's disability, the LEA may proceed with suspension and expulsion proceedings. Using these proceedings, school officials may remove a child with a disability if it is determined that:

- o the conduct of the child violated the code of student conduct;
- o the behavior was not a manifestation of the child's disability; and

- o if the relevant disciplinary procedures applicable to children without disabilities are applied in the same manner and the discipline is for the same duration as would be applied to a child without disabilities.

A child with a disability must continue to receive educational services during the period of a long-term disciplinary removal. These services are determined by the IEP team and must enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. If the IEP team determines it is appropriate, the child must receive a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur (34 CFR § 300.530(d)(1))

If the violation of the code of student conduct is not a manifestation of the child's disability, the LEA may transmit the special education and disciplinary records of the child to the school's disciplinary hearing officer for consideration in making the final determination in the disciplinary action. [Note: 34 CFR § 300.535 only requires transmittal of special education records to appropriate authorities when a crime has been reported.] Even if the school's disciplinary hearing officer determines that the child should be suspended or expelled, the LEA must continue to provide a FAPE for the child.

The IEP team is required to hold a manifestation determination each time a student is removed for more than 10 consecutive days or each time the LEA determines that a series of removals constitutes a change of placement. The latter would occur any time the series of removals total more than 10 days in a school year; the child's behavior is substantially similar to the behavior that resulted in the previous removals; AND because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. All 3 criteria must be met in order for the behavior to be determined to be a pattern that constitutes a change in placement.

E. 45 SCHOOL DAY IAES (Option for Behavior Related to Weapons, Drugs, Serious Bodily Injury)

School officials may remove a child with a disability to an IAES up to 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child:

- o Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of the LEA or the SBE;
- o Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of the LEA or the SBE (tobacco and alcohol are not illegal drugs under this definition); or
- o Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the LEA or the State. (34 CFR § 300.530(g))

When a child has been removed to an IAES, **the IEP team** (NOT the district hearing officer) must determine what special education and related services are needed and where the services will be provided to enable the child to:

- o participate in the general education curriculum, although in another setting; and
- o progress toward meeting their goals set out in the child's IEP.

Although a manifestation determination review is necessary, this unilateral removal can be made without regard to whether the behavior is determined to be a manifestation of the child's disability. If the IEP team determines that a FBA would be appropriate, one will be conducted. If appropriate, the IEP team will review and revise any existing BIP or develop one with services and modifications that are designed to address the behavior violation so that it does not recur.

When a child commits a violation related to **weapons, drugs, or serious bodily injury**, the school officials may initially suspend the child for up to 10 school days without educational services (if the suspension includes the 11th cumulative day of suspension in the school year, educational services should begin on the 11th day). When the IEP team meets, it can determine the location of the IAES and the services to be provided to the child.

On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct (including weapons, drugs or serious bodily injury) the school must notify the parents of that decision, and provide the parents the Parent Rights Notice.

Once the child has been placed in an IAES or otherwise removed for disciplinary reasons, if the school believes that returning the child to the setting specified in the child's IEP would be substantially likely to result in injury to the child or others, the LEA may request an expedited due process hearing to request the hearing officer to order another up to 45 school days placement in the IAES. The burden of proof is on the LEA to justify an additional removal be ordered by the hearing officer.

F. APPEALS

If the child's parents disagree with any decision regarding the disciplinary placement or the results of the manifestation determination, the parents may appeal the decision by requesting an **expedited due process hearing**. Additionally, if the LEA believes that maintaining the child's current placement is substantially likely to result in injury to the child or others, the school may request an expedited due process hearing. (34 CFR § 300.532(a)).

A parental request for a due process hearing does not prevent the LEA from seeking judicial relief such as a temporary restraining order or an injunction, when necessary.

Resolution Meeting During Expedited Due Process Hearing

A resolution meeting must occur within 7 days of the school receiving notice of a parent's due process hearing request, unless the parents and school agree in writing to waive the resolution meeting or agree to use the mediation process. The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the school's receipt of the due process complaint.

If the LEA fails to conduct the resolution session within the required 7 calendar days and the parties have not agreed in writing to waive the resolution sessions or the parents have not requested mediation in lieu of the resolution session, this is an issue of noncompliance and the SCDE must issue a written finding of noncompliance relative to this matter.

G. CHILDREN NOT YET ELIGIBLE for SPECIAL EDUCATION SERVICES

The IDEA allows the parents of a child who has not been determined eligible for special education and related services to assert IDEA protections, including the use of due process, in circumstances when the LEA had knowledge that the child was a child with a disability before the occurrence of the behavior that caused the disciplinary action. (34 CFR § 300.534(a))

There are three circumstances under which the LEA is deemed to have knowledge that the student is a student with a disability:

- The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
- The parent of the child requested an evaluation of the child; or
- The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.

A public agency would not be deemed to have knowledge if the parent of the child has not allowed an evaluation of the child, has refused special education services for the child, or the child has been evaluated in accordance with §§ 300.300 through 300.311 and determined to not be a child with a disability .

If the parent requests an evaluation and challenges the proposed disciplinary action, and the LEA has had no knowledge of the student's disability, then it must conduct an expedited evaluation, but the child remains in the educational placement decided upon by school authorities, which may include suspension or expulsion without educational services.

H. QUESTIONS AND ANSWERS ABOUT SUSPENSION AND EXPULSION FOR CODE OF CONDUCT INCLUDING WEAPONS, DRUGS, OR SERIOUS BODILY INJURY

1. Does in-school suspension count as a day of suspension toward the 11th day rule?

Whether school days of in-school suspension count as school days of suspension for determining if a change of placement has occurred, depends on the nature of the in-school suspension environment. Many schools already use in-school suspension for code of conduct violations. Because children frequently are unsupervised and undirected by school personnel if placed on out-of-school suspension, many LEAs prefer to use in-school suspension, at least for first-time offenders or less serious offenses. Comments following the federal regulations indicate that LEAs have authority to utilize in-school suspension as a disciplinary tool (Federal Register, August 14, 2006, p. 46715).

Additionally, a school day of in-school suspension should not count as a school day of suspension for services or change of placement purposes if, during the in-school suspension, the child is afforded an opportunity to:

- o Continue to appropriately progress in the general curriculum;
- o Continue to receive the services specified on his or her IEP; and
- o Continue to participate with children without disabilities to the extent they would have in their current placement.

The assumption is that LEAs may use in-school suspension for children with disabilities just as they would for children without disabilities. The issue is really whether the school day(s) count toward accumulating the 11th school day of suspension which would require the beginning of educational services or toward the 10 consecutive school days for change of placement or provision of services. The Comments to the regulations indicate that for children with disabilities, if the in-school suspension approximates the current placement in the areas outlined above, it does not count toward the 10 school days needed for a change of placement or provision of services. On the other hand, if in-school suspension is a place where children are held without opportunities to progress in the general curriculum, receive IEP services, and participate with children without disabilities to the same extent they would have in the current placement, the days **do** count as school days of suspension for change of placement and provision of services purposes.

2. May a student with a disability be suspended from the bus?

Yes, children with disabilities may be suspended from using public school transportation even though they are not suspended from school. However, bus suspension may affect the LEA's requirement to provide a FAPE. If special education services are needed for the child to receive a FAPE and the child needs transportation to receive special education services, transportation would be needed and must be addressed by the IEP team. The following guidance to LEAs to determine if school days for bus suspension count as school days for change of placement and provision of services purposes may be useful:

- o The LEA is always required to provide a FAPE. If a child with a disability cannot get to school to benefit from special education services, it is likely that the school is required to continue to provide transportation in some manner.
- o If transportation is specified as a related service on the IEP, school days of suspension from bus transportation would count in determining if a change of placement occurs and in the provision of services unless the LEA provides transportation some other way.
- o If transportation is NOT required as a related service under the IEP, school days of suspension from the bus should NOT count as school days of suspension for change of placement and provision of

services. In such cases, the child's parents have the same obligation to get the child to and from school as a child without disabilities who has been suspended from the bus (unless the parents cannot provide the needed transportation). Also, if bus transportation is not included on the IEP, the comments to the regulations suggest a suspension from transportation privileges may indicate the IEP team should consider whether that behavior on the bus should be addressed within the IEP or a BIP for the child. (Federal Register, August 14, 2006, p. 46715.)

3. Do the discipline provisions of the IDEA 2004 extend to children who are in the process of being identified as eligible for special education services?

Yes. Federal regulations for the IDEA 2004 state that if a school had knowledge that the child is a child with a disability, the child is covered under these provisions. An LEA is deemed to have knowledge if a teacher or other personnel have expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education or to other supervisory personnel or if the parent of the child requested an evaluation or expressed concerns in writing to district administrative personnel. . Records from the general education intervention process should be maintained in the student's cumulative folder. Such data will provide documentation that if there was a suspected disability at some time in the past, the school made the determination whether or not the child should be referred for an initial evaluation to determine eligibility. Therefore, it is important for schools to maintain records on children as such data could be important should a disciplinary proceeding occur later.

If a child engages in behavior that violates the code of student conduct prior to a determination of his/her eligibility for special education and related services, and the LEA is deemed to have knowledge (the child has been referred for evaluation, for example), the child is entitled to all of the IDEA protections afforded to a child with a disability, unless specific exception applies. In general, once the student is properly referred for an evaluation under IDEA, the LEA would be deemed to have knowledge that the child is a child with a disability for the purposes of IDEA's disciplinary provisions. However, under § 300.543(c), the LEA is considered NOT to have knowledge that a child is a child with a disability if the parent has not allowed the evaluation of the child under IDEA, the parent refused services, or if the child was evaluated and determined not to be a child with a disability under IDEA. In these instances, the child would be subject to the same disciplinary measures applicable to children without disabilities.

4. What steps must be completed by the end of the 10th school day for a student to be suspended for a long term, or expelled from school, for behavior not involving weapons, drugs, or the infliction of a serious bodily injury?

The LEA must conduct a manifestation determination within 10 school days from the decision to impose a long-term suspension or an expulsion. School personnel may not implement a long-term suspension or expulsion of a child with a disability until a manifestation determination has been completed.

5. Who determines the IAES?

It depends on the behavior and the situation in which the determination is being made. The LEA can determine the IAES for a short-term removal for 10 consecutive school days or less, or for a short-term removal of more than 10 days that does not constitute a change in placement. When the child is being removed for more than 10 school days and the behavior is not a manifestation of the child's disability, the IEP team will determine the IAES.

For behavior relating to drugs, weapons, or serious bodily injury the decision regarding IF a student is ordered to an IAES is made by designated school officials. However, the decision of WHERE that setting

will be is made by the child's IEP team. For behavior substantially likely to result in injury to the child or others, the decision regarding an appropriate IAES is made by a special education due process hearing officer (34 CFR § 300.532(b)(2)(ii)).

6. Federal law is specific in defining a pocket knife with a blade of more than 2-1/2 inches in length as being a weapon. What about a scalpel, Xacto knife, or box cutter?

These items could very well be considered a weapon under the law, which defines a weapon, in part, as any instrument or material that is used for, or is readily capable of, causing death or serious bodily injury. The exception for a knife having a blade of less than 2-1/2 inches in length applies only to "pocket" knives

7. May a child be placed in an IAES more than one time each school year?

Yes, however, a LEA cannot order a second IAES for the same incident of behavior. A child could be placed in a short term IAES several times if the removals are not more than 10 consecutive days or if they do not constitute a change in placement. If a child brings a gun to school, the school officials could impose one 45 school day IAES, and if the school believes returning the child to his placement specified in the child's IEP at the end of the 45 school day period is substantially likely to result in injury to the child or others, the LEA could ask a special education due process hearing officer to order an additional 45 school day the IAES placement.

8. If a child without a disability has been disciplined, and during the disciplinary period the child was evaluated and found to be eligible for special education services, would the days of discipline prior to eligibility count toward a long term suspension?

The days prior to the disciplinary incident that led to the current suspension would not count toward the child's ten days. However, all suspension days count towards the child's maximum of 30 total as reflected in state law (S.C. Code Ann. § 59-63-220 (2004)).

9. If a child with a disability is sent home for part of a day is it considered a suspension?

Yes, if the suspension is at least 50% of the school day.

10. If a child with a disability has a BIP that calls for a removal from school, is that considered a suspension?

IEP teams should take caution when including a removal from school as part of a BIP. If a child is removed from school without educational services this would be counted as a suspension.

11. If the school has a school-wide behavior plan for all students, and a child with a disability reaches the point where he or she is suspended, what behavior does the team consider during a manifestation determination?

The team must consider all behaviors that led to the suspension.

12. With regard to a manifestation determination, what is meant by conduct that has a "direct and substantial" relationship to a student's disability?

One way that a student's behavior is determined to be a manifestation of the student's disability is when relevant members of the student's IEP team determine that the behavior in question was caused by, or had a "direct and substantial" relationship to the child's disability. The phrase "direct and substantial" has not been specifically defined. The only guidance to what is meant by the phrase "direct and substantial" is a statement in the comments to the federal regulations indicating that a behavior should not be determined to be a manifestation of a student's disability if the relationship of that behavior to the child's disability was merely "an attenuated association, such as low self-esteem." Federal Register, August 14, 2006, pg. 46720.

With so little guidance regarding this question, it is useful to examine the plain meaning of the words themselves. Webster's dictionary defines the term "direct," as the term appears to be used in the context of a manifestation determination, as "proceeding in a straight line or by the shortest course; straight; not oblique; proceeding in an unbroken line of descent." The term "substantial" is defined as "of ample or considerable amount, quantity, size, etc." See, Webster's College Dictionary, Random House (Second Edition 1999). Accordingly, to have both a direct and substantial relationship to a student's disability, the student's behavior must be linked straight to the student's disability without the necessity of examining outside influences or effects and the link of the behavior to the disability must be one of ample or considerable proportion. This is a subjective standard and reasonable minds on the team may disagree. When that happens, the school representative on the team must make the final decision. A parent has a right to challenge the decision of a manifestation team through an expedited due process hearing.

13. When the parents of a child and the school personnel are in agreement about the child's change of placement after the child has violated a code of student conduct, is it considered to be a removal under the discipline provisions?

No, if the parent(s) of a child and the school district agree to a specific change in the current educational placement of the child.

14. Do the discipline provisions apply if the child violates the school's code of conduct after a parent revokes consent for special education and related services?

No. Under §§ 300.9 and 300.300, parents are permitted to unilaterally withdraw their children 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 children. When a parent revokes consent for special education and related services under § 300.300(b), the parent has refused services as described in § 300.534(c)(1)(ii); therefore, the LEA is not deemed to have knowledge that the child is a child with a disability and the child will be subject to the same disciplinary procedures and timelines applicable to general education students and not entitled to IDEA's discipline protections. It is expected that parents will take into account the possible consequences under the discipline procedures before revoking consent for the provision of special education and related services.

15. If a removal is for 10 consecutive days or less and occurs after a student has been removed for 10 school days in that same school year, and the public agency determines, under 34 CFR § 300.530(d)(4), that the removal does not constitute a change of placement, must the agency provide written notice to the parent?

No. Under Part B, a LEA's determination that a short-term removal **does not constitute a change of placement** is not a proposal or refusal to initiate a change of placement for purposes of determining services under 34 CFR § 300.530(d)(4). Therefore, the agency is not required to provide written notice to the parent.

16. What is the definition of "unique circumstances" as used in 34 CFR §300.530(a), which states that "school personnel may consider any unique circumstances on a case-by-case basis when determining

whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct?”

The Department believes that “unique circumstances” are best determined at the local level by school personnel who know the individual child and are familiar with the facts and circumstances regarding a child’s behavior. “Factors such as a child’s disciplinary history, ability to understand consequences, expression of remorse, and supports provided ... prior to the violation of a school code [of student conduct] could be unique circumstances considered by school personnel when determining whether a disciplinary change in placement is appropriate for a child with a disability.”

17. What constitutes an appropriate IAES?

What constitutes an appropriate IAES will depend on the circumstances of each individual case. An IAES must be selected so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child’s IEP.

18. May an LEA offer “home instruction” or “home-based” as the sole IAES option?

No. For removals under 34 CFR § 300.530(c), (d)(5), and (g), the child’s IEP team determines the appropriate IAES (34 CFR § 300.531). IDEA and 34 CFR § 300.530(d) are clear that an appropriate IAES must be selected “so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child’s IEP.” Therefore, it would be inappropriate for an LEA to limit an IEP team to only one option when determining the appropriate IAES. As noted in the *Analysis of Comments and Changes* accompanying the regulations published on August 14, 2006, and became effective on October 13, 2006, at 71 Federal Register 46722:

Whether a child’s home would be an appropriate interim alternative educational setting under § 300.530 would depend on the particular circumstances of an individual case such as the length of the removal, the extent to which the child previously has been removed from his or her regular placement, and the child’s individual needs and educational goals. In general, though, because removals under §§ 300.530(g) and 300.532 will be for periods of time up to 45 days, care must be taken to ensure that if home instruction is provided for a child removed under § 300.530, the services that are provided will satisfy the requirements for services for a removal under § 300.530(d) and section 615(k)(1)(D) of the Act.

Where the removal is for a longer period, such as a 45-day removal under 34 CFR § 300.530(g), special care should be taken to ensure that the services required under 34 CFR § 300.530(d) can be properly provided if the IEP team determines that a child’s home is the appropriate IAES.

19. Do all services in the child’s IEP need to be provided in the IAES for a removal under 34 CFR §300.530(c) or (g)?

It depends on the needs of the child. The LEA is not required to provide all services in the child’s IEP when a child has been removed to an IAES. In general, the child’s IEP team will make an individualized decision for each child with a disability regarding the type and intensity of services to be provided in the IAES. 34 CFR § 300.530(d)(1) clarifies that a child with a disability who is removed from his or her current placement for disciplinary reasons under 34 CFR § 300.530(c) or (g) must continue to receive educational services as provided in 34 CFR § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting his or her IEP goals. For removals that constitute a change of placement, the child’s IEP team determines the appropriate services under 34 CFR § 300.530(d)(1). If a student whose placement has been changed under 34 CFR § 300.530(c) or (g) is not progressing toward meeting the IEP goals, then it would be appropriate for the IEP team to review and revise the determination of services and/or the IAES.

20. Was the requirement for a “positive behavioral intervention plan” removed from the discipline regulations?

No. Under 34 CFR § 300.324(a)(2)(i), the use of positive behavioral interventions and supports must be considered in the case of a child whose behavior impedes his or her learning or that of others. The requirement in 34 CFR § 300.530(f) that a child with a disability receive, as appropriate, an FBA and a BIP and modifications designed to address the child’s behavior now only applies to students whose behavior is a manifestation of their disability as determined by the LEA, the parent, and the relevant members of the child’s IEP team under 34 CFR § 300.530(e). However, FBAs and BIPs must also be used proactively, if the IEP team determines that they would be appropriate for the child. The regulations in 34 CFR §300.530(d) require that school districts provide FBAs and behavior intervention services (and modifications) “as appropriate” to students when the student’s disciplinary change in placement would exceed 10 consecutive school days and the student’s behavior was not a manifestation of his or her disability.

21. Under what circumstances must an IEP team use FBAs and BIPs?

FBAs and BIPs are required when the LEA, the parent, and the relevant members of the child’s IEP team determine that a student’s conduct was a manifestation of his or her disability under 34 CFR § 300.530(e). If a child’s misconduct has been found to have a direct and substantial relationship to his/her disability, the IEP team will need to conduct an FBA of the child, unless one has already been conducted. Similarly, the IEP team must write a BIP for this child, unless one already exists. If a BIP already exists, then the IEP team will need to review the plan and modify it, as necessary, to address the behavior.

An FBA focuses on identifying the function or purpose behind a child’s behavior. Typically, the process involves looking closely at a wide range of child-specific factors (e.g., social, affective, environmental). Knowing why a child misbehaves is directly helpful to the IEP team in developing a BIP that will reduce or eliminate the misbehavior.

For a child with a disability whose behavior impedes his/her learning or that of others, and for whom the IEP team has decided that a BIP is appropriate, or for a child with a disability whose violation of the code of student conduct is a manifestation of the child’s disability, the IEP team must include a BIP in the child’s IEP to address the behavioral needs of the child.

22. Is consent required to do an FBA for a child?

Yes. An FBA is generally understood to be an individualized evaluation of a child in accordance with 34 CFR §§ 300.301 through 300.311 to assist in determining whether the child is, or continues to be, a child with a disability. The FBA process is frequently used to determine the nature and extent of the special education and related services that the child needs, including the need for a BIP. As with other individualized evaluation procedures, and consistent with 34 CFR § 300.300(a) and (c), parental consent is required for an FBA to be conducted as part of the initial evaluation or a reevaluation.

23. If a parent disagrees with the results of an FBA, may the parent obtain an independent educational evaluation at public expense?

Yes. The parent of a child with a disability has the right to request an IEE of the child, under 34 CFR § 300.502, if the parent disagrees with an evaluation obtained by the public agency. However, the parent’s right to an IEE at public expense is subject to certain conditions, including the LEA’s option to request a due process hearing to show that its evaluation is appropriate. The Department has clarified

previously that an FBA that was not identified as an initial evaluation, was not included as part of the required triennial reevaluation, or was not done in response to a disciplinary removal, would nonetheless be considered a reevaluation or part of a reevaluation under Part B because it was an individualized evaluation conducted in order to develop an appropriate IEP for the child. Therefore, a parent who disagrees with an FBA that is conducted in order to develop an appropriate IEP also is entitled to request an IEE.

24. What occurs if there is no agreement on whether a child's behavior was or was not a manifestation of his/her disability?

If the parents of a child with a disability, the LEA, and the relevant members of the child's IEP team cannot reach consensus or agreement on whether the child's behavior was or was not a manifestation of the disability, the LEA must make the determination and provide the parent with prior written notice pursuant to 34 CFR § 300.503. The parent of the child with a disability has the right to exercise his/her procedural safeguards by requesting mediation and/or a due process hearing to resolve a disagreement about the manifestation determination. A parent also has the right to file a State complaint alleging a violation of Part B related to the manifestation determination.

25. What recourse does a parent have if he/she disagrees with the determination that his/her child's behavior was not a manifestation of the child's disability?

The regulations at § 300.532(c) provide that the parent of a child with a disability who disagrees with the manifestation determination may appeal the decision by requesting an expedited due process hearing.

26. Is the IEP team required to hold a manifestation determination each time a student is removed for more than 10 consecutive school days or each time that the LEA determines that a series of removals constitutes a change of placement?

Yes, under the regulations at § 300.530(e), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct the LEA, the parent, and relevant IEP team members must conduct a manifestation determination.

27. Does a school need to conduct a manifestation determination when a student is unilaterally removed for weapons, drugs, or serious bodily injury?

Yes, within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the IEP team must conduct a manifestation determination. However, when the removal is for weapons, drugs, or serious bodily injury under § 300.530(g), the child may remain in an IAES, as determined by the child's IEP team, for not more than 45 school days, regardless of whether the violation was a manifestation of his/her disability. This type of removal can occur if the child: carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of the state educational agency or the LEA; knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of the state education agency or LEA; or has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the state education agency or LEA.

The following questions may assist school officials and administrators in the discipline process:

Figure 2: Initial Questions for Administrators

INITIAL QUESTIONS FOR ADMINISTRATORS

1. Is the child a child with a disability?

- If yes, continue with these questions.
- If no, could the school be deemed to have knowledge that the child, although not identified, is a child with a disability?

2. Does the anticipated disciplinary action involve suspension or expulsion?

- If yes, continue with these questions.
- If no, this chapter does not apply to your situation.

3. How many cumulative school days has the child been suspended during the current school year? (It is important to monitor the number of school days of suspension.) **NOTE: Over 50% of the school day counts as a full school day.**

- If the number is 10 or less, school officials may suspend the student without educational services, but should be addressing the behavior that results in suspensions.
- If this suspension will result in the 11th cumulative school day of suspension, school officials or the IEP team must determine what services are needed.
- If this removal results in a pattern of removals that constitutes a change of placement see Section D of this Chapter.

4. Was the behavior subject to discipline a code of conduct violation involving weapons, drugs, serious bodily injury or behavior substantially likely to result in injury to the child or others?

- If your situation is a code of conduct violation not involving weapons, drugs, serious bodily injury or behavior substantially likely to result in injury to the child or others, see Section C and D of this chapter.
- If your situation did involve weapons, drugs, serious bodily injury or behavior substantially likely to result in injury to the child or others, see Section E of this chapter.

CHAPTER 9: CHILDREN IN PRIVATE AND PAROCHIAL SCHOOLS INCLUDING HOMESCHOOLS

INTRODUCTION

Federal and state laws and regulations recognize that children with disabilities may be receiving their education in private elementary and secondary school settings for different reasons. In different situations, LEAs have different obligations. An LEA's obligation to provide special education services or pay for services provided to children in private schools depends on whether:

- o The child with a disability is placed in the private school by the public school as a means of providing special education and related services;
- o The child with an disability is enrolled in a private school by his or her parents because the provision of a FAPE is at issue; or
- o The child with a disability is voluntarily enrolled in a private school by his or her parents to receive general education.

South Carolina defines a private school as: "a school established by an agency other than the State or its subdivisions which is primarily supported by other than public funds, and the operation of whose program rests with other than publicly elected or appointed officials" (S.C. Code Ann. § 59-1-110 (2004)). The definition of private schools includes parochial schools and home-school programs.

Additionally, South Carolina defines elementary and secondary schools as follows: (1) "Elementary school" means any public school which contains grades no lower than kindergarten and no higher than the eighth. (2) "Secondary school" means either a junior high school or a high school. (3) "High school" means any public school which contains grades no lower than the seventh and no higher than the twelfth. (4) "junior high school" shall be considered synonymous with the term "high school" (S.C. Code Ann. § 59-1-150 (2004)).

South Carolina's statutory definition of "elementary school" does not include preschool programs. Charter schools in South Carolina are considered part of the LEAs and are not private schools.

This chapter addresses the following topics:

- A. Children Placed in Private Schools by the Public School or Public Agency**
- B. Children Enrolled by Their Parents in Private Schools Where a FAPE is at Issue**
- C. Child Find for Children Voluntary Enrolled in Private Schools by Their Parents**
- D. Federal Requirements for Children Voluntary Enrolled in Private Schools or Home-Schooled by Their Parents**
- E. Preschool Children Enrolled in Private Settings**
- F. Mediation and Due Process Rights of Private School Children**
- G. Questions and Answers about Private Schools**

A. CHILDREN PLACED IN PRIVATE SCHOOLS BY THE PUBLIC SCHOOL OR PUBLIC AGENCY

Both federal and state laws and regulations allow an LEA to place a child with a disability in a private school in order to meet its obligation to provide a FAPE to the child. In most situations, however, schools are able to offer services to meet children's needs within their LEAs. Only when the IEP team determines that the LEA is not able to provide the services locally, would they arrange for services in a private school. Sometimes a private school setting is the LRE where a child can achieve educational benefit. In such cases, the IEP team may determine that the most appropriate educational placement is the private school.

When the LEA determines, through the IEP process, that a child with a disability should be placed in a private school or facility, the child's educational program, including special education and related services, must:

- be provided according to an appropriately developed IEP and at no cost to the parents;
- ensure the special education program is provided by staff who meet SCDE personnel standards, including HQT;
- ensure that the private school provides services consistent with the IDEA requirements and other pertinent Federal and State laws and regulations (e.g., in accordance with IEP requirements); and
- ensure that the child has all rights of a child with a disability who is served by the public school.

Before the LEA places a child with a disability in a private school or facility, the LEA must initiate and conduct a meeting to develop an IEP for the child. The LEA must ensure that a representative of the private school or facility attends the meeting. If a representative cannot attend, the LEA must use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.

After the child with a disability enters the private school or facility, the LEA responsible for providing a FAPE to the child may allow any meetings to review and revise the child's IEP to be initiated and conducted by the private school or facility. If the private school or facility initiates and conducts the IEP meeting, the private school must notify the LEA and the LEA must ensure that the parents and an LEA representative participate in any decision about the child's IEP. In addition, the LEA and the parent must agree to any proposed changes in the IEP before those changes are implemented.

Any time a child with a disability is placed in a private facility with a private school component by his or her LEA or a state agency, the home LEA is obligated to ensure that the private facility can provide the child with a FAPE. The home LEA is the LEA where the child last resided with his or her biological or adoptive parents, legal guardian, or an individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) who was legally responsible for the child's welfare at the time he or she was referred to or placed in the alternative residence by the LEA or state agency or taken into the custody of the state. The home LEA must adhere to all federal and state requirements for children with disabilities placed in the private facility with the private school component just as they would for children with disabilities enrolled in and attending a school program within the LEA. This includes the provision of services by HQT personnel.

When an LEA receives notification that a child with a disability was placed in an RTF by a state agency, the LEA in which the RTF is located is required to convene an IEP meeting to develop an appropriate educational program for the child. Proviso 1.66 (2011) of the General Appropriations Act requires the LEA in which a RTF is located ("the facility school district") to provide appropriate educational programs and services to students with and without disabilities who are referred or placed in the RTF by the

State. The facility school district is responsible for ensuring that all students with disabilities receive special education and related services in the least restrictive environment by appropriately certified and highly qualified teachers. This includes children with disabilities who are served through a medical homebound model at the RTF. As with any other educational placement decision for a child with a disability, decisions about the appropriateness and amount of services (including those medical homebound in nature) must be made on an individualized basis by the child's IEP team. Additionally, Proviso 1.66 requires that all students enrolled in the facility school district shall have access to the facility school district's general education curriculum, which will be tied to the South Carolina academic standards in the core content areas, and be eligible to receive the educational credits (e.g., Carnegie Units) earned through their educational efforts.

S.C. Code Ann. § 59-33-90 (2004) states that no agency of the state may place or refer a child with a disability to a private school, RTF, institution, or other alternative residence without first ensuring that the child can receive a FAPE in that setting. In placing children with disabilities, state agencies must obtain advance approval that the educational program of the alternative setting meets the standards established by the SCDE, except in an emergency situation. The failure of the agency to ensure that the child can receive a FAPE in the alternative setting may result in the home LEA's release of responsibility to pay for educational services.

B. CHILDREN ENROLLED BY THEIR PARENTS IN PRIVATE SCHOOLS WHEN a FAPE IS AT ISSUE

If the parents of a child with a disability, who previously was receiving special education and related services from LEA, enroll their child, without the consent of or referral by the LEA, in a private preschool or a private elementary or secondary school because the parents believe the child was not receiving a FAPE from the LEA, a court or special education due process hearing officer may require the agency to reimburse the parents for the cost of that enrollment only if the hearing officer makes both of the following findings:

1. The LEA did not make a FAPE available to the child in a timely manner before the private school enrollment; and
2. The private school placement made by the parents is appropriate to meet the needs of the child.

A court or special education due process hearing officer may find that a private school placement by the parents is appropriate for a child although that placement does not meet state standards that apply to special education and related services which are required to be provided by the LEA.

A court or special education due process hearing officer may deny or reduce any reimbursement for private school placement by the parents, if the court or special education due process hearing officer makes any of the following findings:

- o At the most recent IEP meeting that the parents attended before making the private school placement, the parents did not inform the IEP team that they were rejecting the services or placements proposed by the LEA to provide a FAPE to their child, including a statement of their concerns and their intent to enroll their child in a private school at public expense; or at least 10 business days, including any holidays that occur on a business day, before removal of the child from LEA, the parents did not give written notification to the LEA that they were rejecting the services or placements proposed by the LEA to provide a FAPE to their child, including a statement of their concerns and their intent to enroll their child in a private school at public expense;
- o Before the parents' removal of the child from LEA, the LEA provided PWN to the parents of its intent to evaluate the child, including a statement of the purpose of the evaluation that was appropriate and reasonable, but the parents did not make the child available for the evaluation; or
- o The actions of the parents in removing the child from the LEA were unreasonable.

A court or special education due process hearing officer must not deny or reduce reimbursement of the cost of a private school placement for failure to provide the notification to the LEA, if the court or special education due process hearing officer makes any of the following findings:

- o Compliance with the notification requirement would likely have resulted in physical harm to the child.
- o The LEA prevented the parents from providing the required notification.
- o The LEA did not inform the parents of their requirement to notify the school of their intent to remove their child.

A court or special education due process hearing officer, at its discretion, may allow a parent full or partial reimbursement of the costs of a private school placement even though the parent failed to provide the notice required, if the court or hearing officer finds either of the following:

- o the parent cannot read or write in English, or
- o compliance with the prior notice requirement would likely have resulted in serious emotional harm to the child.

The LEA must be given an opportunity to offer a FAPE to the child before tuition reimbursement can become an issue. However, the special education due process hearing officers and courts retain their authority under prior case law to award appropriate relief when an LEA fails to provide a FAPE for a child who has not yet received special education and related services. Federal regulations (34 CFR § 300.403) address this issue.

C. CHILD FIND FOR CHILDREN VOLUNTARILY ENROLLED IN PRIVATE SCHOOLS BY THEIR PARENTS

When children are enrolled by their parents in private schools, the LEA has continuing responsibility for child find and must locate, evaluate, identify, and reevaluate children with disabilities in private schools just as they do in the LEAs. The IDEA requires the LEA where the private school is located to conduct child find activities to locate children with disabilities attending private elementary and secondary schools that are located in the jurisdiction of the LEA. This includes children with disabilities who reside in another state but attend a private school that is located within the boundaries of an LEA.

In meeting the child find obligation with regard to children with disabilities attending private schools within the LEA boundaries, the LEAs must consult with appropriate representatives of private schools and parents of private school children with disabilities to determine how best to conduct child find activities. The methods chosen to locate, identify, and evaluate must be comparable to methods used for children in LEAs. Additionally, they will determine how parents, teachers, and private school officials will be informed of the process.

The activities undertaken to carry out the child find responsibility must meet the following criteria:

- o Be similar to the activities undertaken for exceptional children enrolled in the LEAs;
- o Provide for the equitable participation of private school children;
- o Provide for an accurate count of children with disabilities enrolled in the private schools; and
- o Be completed in a time period comparable to the time for these activities in the LEAs.

There may be times when parents request that both the LEA where they reside and the LEA where the private school is located evaluate their child under child find requirements. Parents may request that the

LEA where the family resides conduct an evaluation under its responsibility for the provision of a FAPE at the same time that they request that the LEA where the private school is located evaluate the child. In this situation, the LEAs would need to work with the parents to ensure their understanding of the problems concerning trying to conduct two separate evaluations at the same time.

If the parent of a child who is voluntarily placed in a private school does not provide consent for the initial evaluation or the reevaluation, or the parent fails to respond to a request to provide consent, the school may not use the consent override procedures of mediation or due process, and the school is not required to consider the child as eligible for special education services.

If a child is enrolled, or is going to enroll in a private school that is not located in the parent's LEA of residence, parental consent must be obtained before any personally identifiable information about the child is released between officials in the LEA where the private school is located and officials in the LEA of the parent's residence (34 CFR § 300.622(a)(3)).

D. FEDERAL REQUIREMENTS FOR CHILDREN VOLUNTARILY ENROLLED IN PRIVATE SCHOOLS BY THEIR PARENTS AND HOMESCHOOLED CHILDREN

The IDEA requires that children with disabilities in private schools (K–12) receive an opportunity for participation in special education services. The IDEA makes it clear that a child with a disability in a private school has no individual right to special education or related services. Rather, the public LEA where the private school is located must ensure that a proportionate share of federal funding is used to provide services to this population of children. Therefore, under federal law, in almost all cases, the public LEA where the private school is located would not be obligated to provide any or all special education and related services to every child with a disability enrolled in a private school located within its boundaries. All requirements for parentally placed private school children also apply to homeschooled children in South Carolina.

1. Consultation Requirements

Each LEA must annually consult with private school representatives and representatives of parents of parentally-placed private school children and homeschooled children with disabilities attending private schools within the LEA during the design and development of special education and related services for parentally-placed children and before making decisions regarding the following:

- The child find process, including:
 - How parentally-placed private school children suspected of having a disability can participate equitably; and
 - How parents, teachers, and private school officials will be informed of the process.
- The determination of the proportionate share of federal funds available to serve parentally-placed private school children and homeschooled children with disabilities including the determination of how the proportionate share of those funds was calculated.
- The consultation process among the LEA, private school officials, and representatives of parents of parentally-placed private school children and homeschooled children with disabilities, including how the process will operate throughout the school year to ensure that parentally-placed children with disabilities identified through the child find process can meaningfully participate in special education and related services.
- How, where, and by whom special education and related services will be provided for parentally-placed private school and homeschooled children with disabilities, including a discussion of:
 - The types of services, including direct services and alternate service delivery mechanisms; and

- How special education and related services will be apportioned if funds are insufficient to serve all parentally-placed private school and homeschooled children; and
- How and when those decisions will be made; and how, if the LEA disagrees with the views of the private school officials on the provision of services or the types of services (whether provided directly or through a contract), the LEA will provide to the private school officials a through a contract.

Consultations with appropriate representatives of private schools and parents of private school and homeschooled children with disabilities should occur in a timely manner before decisions are made that affect the ability of children in a private school to participate in services. These representatives of private schools and parents of the private school children with disabilities must have the opportunity to express their views and have meaningful input into the special education process.

The process for allocating the proportionate share of funds and provision of special education parentally placed private school children under federal requirements is described below.

2. Calculating the Allocation of Proportionate Share of Funds

The IDEA describes the minimum amount of funds that must be expended to provide services for children enrolled in private schools by their parents. That amount is calculated by determining the number of children with disabilities who are enrolled in private schools by their parents within the LEA, and have been identified as a child with a disability by the public LEA, **whether or not they are receiving services**. This count must be reported in the application for the Part B federal funds received for children ages 3 to 21 and 3 through 5 preschool funds.

To meet federal requirements, a public LEA must have an accurate count of the number of children with disabilities voluntarily enrolled by their parents in private schools located within the LEA. This count includes children attending private schools and homeschooled in the LEA that are identified as eligible for special education services and related services by the LEA, whether or not they are receiving any special education services. The LEA must consult with appropriate representatives of private schools and representatives of parents of private school children and homeschooled children with disabilities in deciding how to conduct the annual count of children with disabilities in private schools. The annual private school child count is to be used by the public LEA for planning the level of services to be provided to private school children and determining the proportionate share of funds to be used in the subsequent school year. This count will be included in the annual child count.

The cost of carrying out the child find activities, including an evaluation, cannot be included in determining if the LEA has met its obligation to provide a proportionate share of funds for private school children. If all funds allocated for special education and related services to private school children are not expended during the school year, the funds must be carried over to provide services to children who are in private schools and homeschooled in the next subsequent school year.

The IDEA regulations at 34 CFR § 300.133(a) clarify that the LEA where a private school is located is responsible for spending a proportionate amount of its subgrant under Part B on special education and related services for children enrolled by their parents in private schools located in the LEA. There is no exception for out-of-state children with disabilities attending a private school located in the LEA. Therefore, out-of-state children with disabilities must be included in the group of parentally-placed children with disabilities whose needs are considered in determining which parentally-placed private school children with disabilities the LEA will serve and the types and amounts of services the LEA will provide. The LEA providing the services may not charge for child find and equitable services even if the child with a disability resides in another state.

The South Carolina definition of private school only addresses settings for children beginning at kindergarten. Therefore, the proportionate share of funds under the preschool federal allocation would be calculated for five-year-old children voluntarily enrolled in a private school K–12.

See Federal Regulations: Appendix B to Part 300—Proportionate Share Calculation for an example of calculation of proportionate share.

Each LEA must expend, during the grant period, on the provision of special education and related services for the parentally-placed private school children and homeschooled children with disabilities enrolled in private elementary schools and secondary schools located and homeschooled within the LEA an amount that is equal to—

(1) A proportionate share of the LEA’s subgrant under section 611(f) of the Act for children with disabilities aged 3 to 21.

This is an amount that is the same proportion of the LEA’s total subgrant under section 611(f) of the Act as the number of parentally placed private school children with disabilities aged 3 to 21 enrolled in private elementary schools and secondary schools located in the LEA is to the total number of children with disabilities enrolled in public and private elementary schools and secondary schools located in the LEA aged 3 to 21; and

(2) A proportionate share of the LEA’s subgrant under section 619(g) of the Act for children with disabilities aged 3 through 5.

This is an amount that is the same proportion of the LEA’s total subgrant under section 619(g) of the Act as the total number of parentally-placed private school children with disabilities aged 3 through 5 enrolled in private elementary schools located in the LEA is to the total number of children with disabilities enrolled in public and private elementary schools located in the LEA aged 3 through 5.

Consistent with section 612(a)(10)(A)(i) of the Act and 34 CFR § 300.133 of the IDEA, annual expenditures for parentally-placed private school children with disabilities are calculated based on the total number of children with disabilities enrolled in public and private elementary schools and secondary schools located in the LEA eligible to receive special education and related services under Part B, as compared with the total number of eligible parentally-placed private school children with disabilities enrolled in private elementary schools located in the LEA. This ratio is used to determine the proportion of the LEA’s total Part B subgrants under section 611(f) of the Act for children aged 3 to 21, and under section 619(g) of the Act for children aged 3 through 5, that is to be expended on services for parentally-placed private school children and homeschooled children with disabilities enrolled in private elementary schools and secondary schools located in the LEA.

3. Services Provided with a Services Plan

After the LEA determines the amount of funds that must be allocated for providing services to children with disabilities in private schools and homeschooled located within the LEA, the LEA, in consultation with appropriate representatives of private schools and representatives of parents of children with disabilities voluntarily enrolled in private schools and homeschooled, must determine how the funds will be allocated, how and where services will be provided and by whom. The LEA, however, must ultimately determine the types and levels of services to be provided.

If a child with a disability, who is voluntarily enrolled by his or her parents in a private school or homeschooled, receives services offered by the LEA where the private school is located, with its proportionate share of funds according to the agreement reached in the consultation, the school would develop a services plan for the child. The regulations refer to this plan as a services plan to avoid confusing it with an IEP. An IEP is an inherent component of a FAPE. A "services plan" is to be used because it is clear under federal and state laws and regulations that these children in private schools and children who are homeschooled do not have an individual right to receive a FAPE. The parents of children served with a services plan do not have any due process rights beyond issues related to child find which includes evaluation/reevaluation. Parents may file a complaint with the SCDE if they feel that the LEA has failed to meet its obligations under the federal and state law and regulations.

The services plan describes the specific special education and/or related services to be provided to the child as a result of the consultation with appropriate representatives of private schools and representatives of the parents of private school and homeschooled children. To the extent appropriate, the services plan includes all of the IEP components. The elements in each child's services plan may vary depending on the services to be provided. Like an IEP, the services plan must be reviewed and revised on an annual basis, and as necessary.

Many children's services plans will include:

- o The child's present level of academic achievement and functional performance;
- o The measurable annual goals, including benchmarks or short-term objectives, if appropriate;
- o A statement of the special education, related services, supplementary aids and services and modifications;
- o A statement of the program accommodations, or supports;
- o The projected date for the beginning of the services and modifications, and the amount, anticipated frequency, location and duration of the services and modifications; and
- o A statement of how the child's progress toward the measurable annual goals will be measured and how the parents will be regularly informed of their child's progress.

4. Location of Services for Children with a Services Plan

Under federal law, the location where services will be provided should be determined in consultation with appropriate representatives of private schools and with representatives of parents of children with disabilities enrolled in private schools and homeschooled. The location of services will impact the amount to be expended to provide services to children with disabilities in private schools and homeschooled. There are options available for the location of the delivery of services to children with disabilities in private schools and homeschooled. Some of the services may be provided in LEAs throughout the LEA or at a central location in the LEA. The public LEA may decide that only some services will be provided at the private school setting. When services are provided in the private school, they may take place at a central location rather than each attendance site.

However, while permitting services to be provided at a parochial school site, the federal law does not require that services be provided in that setting. An offer to provide services at the LEA site generally meets a LEA's obligations, even if parents refuse the services at that site.

5. Transportation

The IDEA requires transportation to be provided to a child with a disability in a private school if transportation is necessary for the child to benefit from or participate in the services provided. The LEA is

not required to provide transportation outside of its boundaries. Transportation costs may be figured into the proportionate amount of funds expended for services.

6. Restrictions On Use of Federal and State Funds for Private Schools

Schools may not use funds to:

- o create separate classes organized on the basis of school enrollment or religion of children if the classes are at the same site; and the classes include children enrolled in LEAs and children enrolled in private schools ;
- o finance the existing level of instruction at a private school or otherwise benefit the private school; or
- o meet the needs of the private school or the general needs of children enrolled in the private school

Additionally, federal and state regulations restrict the use of property, equipment, and supplies in serving children with disability in private schools. Property, equipment, or supplies used on private school premises for providing special education services must remain in the control of the LEA and be removed from the private school when they are no longer needed to provide the services. They must also be removed to avoid unauthorized use. Federal funds cannot be used for repair, remodeling, or construction at a private school site. Therefore, state regulations require that LEAs ensure that any equipment or supplies be placed in a private school in a manner that allows removal without the necessity of remodeling the private school.

(Please see additional Guidance in Q & A form at the end of this document)

E. PRESCHOOL CHILDREN ENROLLED IN PRIVATE SETTINGS

The requirement in the IDEA for each LEA to provide equitable participation in special education and related services to parentally-placed private school children attending private schools within the LEA's boundaries through a services plan only applies to elementary and secondary school children. South Carolina's statutory definition of "elementary school" does not include preschool programs; therefore, preschool children with disabilities attending private day care programs should not be treated as private school children and service plans should not be offered. These children are entitled to a FAPE.

Federal and state regulations require that child find activities including evaluation, if appropriate, be conducted for all children whose parents live within the LEA. Due process rights, including the receipt of appropriate notifications and IEP meetings, apply to all children who qualify as preschool children with disabilities within an LEA. If the LEA in which the child resides agrees the child's placement in the LEA's preschool program is not appropriate for a particular preschool child with a disability, the LEA must locate and offer an appropriate program, which may be the private day care or private preschool program. The LEA may have to pay for either a portion of the cost or the entire private day care program when it does not have an appropriate placement. Regardless of whether a preschool child with a disability is placed in a public preschool program or a private preschool program when the LEA does not have an appropriate program, the LEA must ensure the provision of a FAPE to the child and must pay for all cost associated with the provision of special education and related services in the LRE as stated in the child's IEP.

On the other hand, if the LEA where the child lives convenes an IEP team and the team believes that it can provide the child a FAPE through its preschool program, but the child's parents opt instead to place the child in a private day care or preschool program, the LEA of residence is not responsible for developing an IEP or a services plan. If the child attends a private preschool or day care program in another LEA, unlike elementary and secondary school-age children, the LEA where the private program is located is not responsible for the provision of any special education or related services

F. MEDIATION AND DUE PROCESS RIGHTS FOR PRIVATE SCHOOL CHILDREN

Parents of children voluntarily enrolled in private schools or homeschooled and receiving services under a services plan cannot seek due process or mediation regarding the LEA's alleged failure to meet the requirement of providing services to these children. Rather, the parents may request a meeting to review and revise the child's services plan, or utilize the state formal complaint process concerning alleged child find violations. However, parents can request mediation or due process if the parents believe the school has failed to properly evaluate and identify their child.

A private school official has the right to file a complaint with the SEA that the LEA did not engage in consultation that was meaningful and timely, or did not give due consideration to his or her views. The private school official must provide the basis for his or her belief that the LEA did not comply with these consultation requirements. As part of this complaint process, the LEA must forward appropriate documentation related to the private school official's complaint to the SEA. If the private school official is dissatisfied with the decision of the SEA, he or she may submit a complaint to the U.S. secretary of education. The complaint should provide the basis of the official's belief that the LEA did not comply with the consultation requirements, and the SEA must forward the appropriate documentation to the secretary. The complaint process is available to parents (or another individual or organization), even if services provided in a private school are on a services plan, and not an IEP. However, this right is limited to child find activities only. Regulations addressing due process, mediation, and formal complaints are found at 34 CFR § 300.140 and are addressed in a later chapter.

G. QUESTIONS AND ANSWERS ABOUT PRIVATE SCHOOLS

1. How is the LEA to meet the requirement to "consult with representatives of private school children and representatives of parents of private school and homeschooled children with disabilities" regarding various situations identified in the law?

The public LEA must consult annually with representatives of private schools and representatives of parents of voluntarily placed private school and homeschooled children with disabilities regarding the provision of special education and related services needs of children with disabilities enrolled in the private schools located within the LEA boundaries. This consultation must be conducted in a timely and meaningful way, and provide a genuine opportunity for the representatives of the private schools and representatives of parents of children with disabilities in private schools and homeschooled to express their views regarding child find, child count, how the proportionate share of funds will be used to deliver services and what services will be delivered.

To meet the consultation requirement, the LEA could propose a plan to meet the requirements of the law and request input from the appropriate representatives, or the school could invite representatives to attend a meeting to provide input into the plan.

2. What qualifications must the staff meet that provides special education services when the LEA serves a parentally-placed child in a private school?

The special education services provided to parentally-placed private school children with disabilities must be provided by personnel meeting the same standards as personnel providing such services in LEAs. The LEA may use state and federal funds to make personnel available at the private school to the extent necessary to provide special education and related services to children enrolled by their parents in private schools, if those services are not normally provided by the private schools. The LEA may use special education funds to pay for the services of an employee of a private school to provide special education and related services for children if both of the following conditions are met:

- o The employee performs the services outside of the employee's regular work hours.
- o The employee meets the definition of a highly qualified teacher under SCDE regulations; and the employee performs the services under public supervision and control.

3. Are children who are voluntarily placed by their parents in private schools or homeschooled entitled to special education services in South Carolina?

The IDEA is clear that children enrolled in a private school by their parents or homeschooled have no individual entitlement to special education and related services. If children are part of a group agreed upon to receive services, they may receive the services offered by the LEA under a services plan, but there is no requirement for any particular child to receive any services.

4. Who is responsible for the IEPs of children with disabilities who are placed in private schools by a LEA IEP team?

Before placing a child with a disability in a private school or facility, the LEA must conduct a meeting and develop an IEP. The IEP team may place a child in a private school as the result of the initial IEP meeting or as the result of a meeting to review an existing IEP. However, at the meeting in which a child is placed in a private school, the LEA must ensure that a representative of the private school is present at the meeting or participates in the meeting through other means, such as individual or conference telephone call. After the initial IEP meeting, subsequent meetings to review the IEP may be conducted by the private

school. A representative of the LEA must attend these subsequent IEP meetings. Although the services are provided at the private school, the LEA remains responsible for assuring that the IEP is implemented.

5. Is a parentally-placed child with an IEP in a private school entitled to both general education and special education services from the LEA?

No. LEAs are required to provide special education and related services, but not to provide classes in the general curriculum for the private school child at the LEA. For example, if parents request that in addition to receiving physical therapy at the LEA, their child also be allowed to take physics, the LEA is not obligated to allow the child to take physics. Instead, the child would be required to enroll in the LEA as a full-time student in order to receive general education services.

6. Are children enrolled in or placed in private schools required to take the district-wide and state assessments?

If a child is placed in a private school by the LEA or public agency, the child is required to take the appropriate district-wide and state assessments. If the child has been enrolled in the private school by the parents, the child would follow the requirements of the private school. That may mean that he or she would not take the district-wide or state assessment if the private school was not in the South Carolina State Assessment system.

7. Who makes the final decision regarding the location of the delivery of special education or related services to a child with a disability enrolled in a private school?

The LEA, in consultation with the private school and the parents, makes the final decision about the location of the delivery of services. Ultimately, the decision rests with the LEA.

8. Must a general education teacher in the private school participate in developing, reviewing, and revising a child's IEP or services plan?

A meeting to develop, review, and revise an IEP or a services plan must include all of the participants required for an IEP team meeting, including at least one general education teacher of the child (if the child is or may be participating in the general education environment). The general education teacher in the private school would meet the requirement for a general education teacher.

The LEA must also ensure that a representative of the private school attends each meeting to develop or revise a child's services plan. If the representative cannot attend, the LEA must use other methods to assure a representative's participation, including individual or conference telephone calls. The participation of the child's private school teacher could meet this requirement.

9. Are children who are receiving special education or related services from the LEA with a services plan counted on the LEA's Annual Child Count?

Yes. All parentally-placed children in private school and homeschooled receiving services through a services plan are to be counted on the LEA's Annual Child Count.

Also, all children for whom the LEA provides services through a contract with a private school or other agency or institution are counted on the LEA's annual enrollment count.

10. What happens to the proportionate share of funds when the only child in a private school or the only homeschooled child receiving services moves, and there are no more identified children to utilize the funds?

The amount of funds may be carried over for one additional year. If it appears there are no children in a private school or homeschooled in need of special education or related services, the remaining funds may be reallocated.

11. What happens when the LEA where the private school is located has used its entire proportionate share of funds and a nonresident child is found to be a child with a disability and the parent requests services?

The LEA where the private school is located is not obligated to provide any services to a nonresident child with a disability once it has expended the required proportionate share of funds. The parent of the nonresident child retains the right to enroll the student in the resident LEA and request a FAPE. The LEA of residence can offer services in the resident LEA, but if the parent refuses, the resident LEA has met its obligation to make a FAPE available.

12. When would an LEA use a services plan and not an IEP for services to parentally placed private school children?

A services plan would be used when the LEA where the private school is located is providing services according to the agreement from the consultation with representatives of private schools and representatives of parents of children with disabilities attending private schools and homeschooled using its proportionate share of funds to serve a nonresident child.

CHAPTER 10: DISCONTINUING SPECIAL EDUCATION SERVICES

INTRODUCTION

There are times when a child's eligibility for special education and related services ends or when the parent or student chooses to end the provision of special education services. This chapter discusses several instances in which students currently receiving special education services "discontinue" or exit from their special education program. Such circumstances include the following:

- A. [No Longer Eligible for Services](#)
- B. [Graduation](#)
- C. [Services to Age 21](#)
- D. [Summary of Performance](#)
- E. [Student Drops Out of School](#)
- F. [Prior Written Notice and Request for Consent](#)
- G. [Questions and Answers about Discontinuation of Services](#)

A. NO LONGER ELIGIBLE FOR SERVICES

When a parent or school personnel suspect that a child is no longer eligible for special education services and related services, a reevaluation must be conducted prior to the child's dismissal from the program to determine if the child is no longer a child with a disability. As part of the reevaluation, the IEP team will review existing data and determine whether they need to conduct any additional assessments (See Chapter 7, Reevaluation.).

If it is determined by the IEP team through a reevaluation that the child is no longer a child with a disability, the LEA will provide the parents with PWN of this decision. Typically, if the IEP team determines that a child is no longer eligible, the reason is that the child no longer has a need for special education and related services to benefit from his or her educational program. For example, a child who was identified with speech and language delays as a young child has benefited from speech/language services, met the exit criteria determined by the IEP team, and no longer needs such services. Services may be discontinued if the IEP team determines that the data support that the child no longer has a need for special education services.

B. GRADUATION

All students receiving special education services will receive a regular high school diploma at the completion of their secondary program if they meet graduation requirements of the state. A regular high school diploma does not include an alternative diploma that is not fully aligned with the state's academic standards, such as a certificate of attendance, an occupational diploma/certificate, or General Educational Development Tests (GED) (Federal Register, August 14, 2006, p. 46580). If a modified or differentiated diploma or certificate is used for students receiving special education services; however, such diplomas or certificates do not end eligibility for special education services.

When the student enters high school, progress toward graduation must be monitored annually and recorded on an official transcript of credits. Some students may require services through age 20 to meet IEP goals. The LEA's obligation to provide special education services ends (a) when the student meets graduation requirements and receives a regular high school diploma, (b) at the end of the school year in

which the child reaches age 21, or (c) when an evaluation shows that the child is no longer eligible for special education services.

Students with disabilities must be afforded the same opportunity to participate in graduation ceremonies as students without disabilities even if the IEP team determines that services will continue after the student has met all of the required credits (but an official diploma has not been awarded). A student may require services through age 20 to meet IEP goals or because he or she has not obtained all of the required credits for graduation. In either case, however, the student may be allowed to participate in graduation ceremonies with his or her classmates. Schools may have a policy regarding participation in graduation ceremonies; however, it must apply equally to all students in the LEA, not just for students with disabilities.

No reevaluation is required prior to exiting a student due to graduation (34 CFR § 300.305(e)(2)). However, before the student completes the last semester of high school in which she/he is expected to graduate, the LEA must provide the student (if over age 18) and the parents with PWN of the discontinuation of services at the end of the school year. The PWN will clearly state that the student will no longer be entitled to receive special education services from the LEA after graduation. Parental consent is not required when a child graduates with a regular diploma (34 CFR § 300.102(a)(3)(iii)).

C. SERVICES TO AGE 21

The LEA must make a FAPE available to any student who has not graduated with a regular high school diploma until the end of the school year in which the student turns 21. The school must provide the student age 18 and over and the parents with PWN that the services will be discontinued at the end of the school year; however, parental consent is not required. A reevaluation is also not required when a student ages out of eligibility for services upon turning age 21 (34 CFR § 300.305(e)(2)).

Even when the student or parent states that he or she does not intend to return to school for the next school year, the IEP team must provide the student with notice that he or she is eligible to continue receiving services through age 20 and develop an IEP for the student.

If a student turns age 21 after September 1 of the school year, the LEA must permit the student to enroll and complete the school year if the student will graduate or exit with either a state-issued high school diploma, certificate of attendance, district diploma, or district certificate. If a student turns age 21 on or prior to September 1, the LEA is not required to permit the student to enroll.

D. SUMMARY OF PERFORMANCE

A summary of performance (SOP) is required under the reauthorization of the IDEA for a child whose eligibility for special education services terminates due to graduation with a regular diploma, or due to exceeding the age of eligibility. The LEA must provide the child with a summary of the child's academic achievement and functional performance which must include recommendations on how to assist the child in meeting the child's postsecondary goals (34 CFR § 300.305(e)(3)). The purpose of the SOP is to transfer critical information that leads to the student's successful participation in postsecondary settings. It includes a summary of the achievements of the student with current academic, personal, and career/vocational levels of performance. Information may be included as part of the summary based on assessment findings and team input. Assessment data and accommodations included in the summary should be written in functional terms easily understood by the student. Any supporting documents are to be appropriately referenced and included with the summary. Signatures by the student and IEP team members are encouraged as verification that the contents of the summary have been explained but are not required.

The SOP must, at a minimum, address the following:

- o Academic achievement: Information on reading, math, and language grade levels, standardized scores, or strengths.
- o Functional performance: Information on learning styles, social skills, independent living skills, self-determination, and career/vocational skills.
- o Recommendations: Team suggestions for accommodations, assistive services, compensatory strategies for postsecondary education, employment, independent living, and community participation.

The SOP is intended to assist the student in transition from high school to higher education, training and/or employment. This information is helpful under Section 504 and the Americans with Disabilities Act (ADA) in establishing a student's eligibility for reasonable accommodations and supports in postsecondary settings. It is also useful for the Vocational Rehabilitation Comprehensive Assessment process. However, recommendations in a student's SOP do not assure that an individual who qualified for special education in high school will automatically qualify for accommodations in a postsecondary education or employment setting. Post secondary settings will continue to make ADA and Section 504 eligibility decisions on a case-by-case basis based on their criteria.

Since the SOP must be provided to the student with a disability whose eligibility terminates due to graduation or age, it is reasonable to conclude that the SOP must be completed and provided to the student by the end of the final year of a student's high school education. That does not mean that it cannot be completed and provided to the student prior to graduation. The timing of completion of the SOP may vary depending on the student's postsecondary goals. If a student is transitioning to higher education, the SOP may be necessary as the student applies to a college or university. Likewise, this information may be necessary as a student applies for services from state agencies such as vocational rehabilitation. In some instances, it may be most appropriate to wait until the spring of a student's final year to provide an agency or employer the most updated information on the performance of the student.

E. STUDENT DROPS OUT OF SCHOOL

Under S.C. Code Ann. § 59-65-30 (2010), students are allowed to drop out of school at age 17 and may at some point obtain a GED. If a student with a disability drops out of school, documentation to that effect must be placed in the student's confidential file. The LEA must inform the parents that special education services continue to be available to the student through age 20. Best practice recommends that the LEA send a letter to the parents, stating that the LEA remains ready to provide special education services to their child. If the student reenrolls, the previous IEP must be implemented until a new IEP is developed. The new IEP should be developed as soon as possible after the student reenrolls.

If a student drops out of school, the LEA is obligated to consider the student's FAPE entitlement very carefully. The LEA has an obligation to report the student's truancy to the proper authorities if the student is younger than age 17. The school may want to consult with the LEA's attorney on this issue as well.

If a student drops out of school, no PWN, consent, or reevaluation is required. However, reevaluation may be needed if the student was to reenroll and a new IEP may need to be developed.

F. PRIOR WRITTEN NOTICE AND REQUEST FOR CONSENT

For some situations discussed within this chapter, parents must receive PWN. The following chart may be useful to LEAs in determining when a reevaluation, PWN and parent consent, as well as an SOP are needed:

Figure 3: Discontinuation of Services

Reason for Discontinuing Services	Reevaluation Required	Prior Written Notice Required	SOP Required
No longer eligible for special education services and related services	Yes	Yes	No
Graduation	No	Yes	Yes
Reached age 21	No	Yes	Yes
Drops out of school	No	No	No

G. QUESTIONS AND ANSWERS ABOUT DISCONTINUING SPECIAL EDUCATION SERVICES

1. What if the student no longer requires special education services?

The IEP team must determine whether the student no longer requires special education services based on data from a reevaluation. If, after a reevaluation, the team determines that the student is no longer eligible for special education services it must give parents PWN of that determination and that the team is proposing to end services. If the parent disagrees with the decision, the parent may access mediation or due process. The IEP team may also determine that the student qualifies as a student with a disability under Section 504 and refer the student to the Section 504 team, which would write a Section 504 plan for him or her.

2. What is required when the student graduates from high school?

The LEA must provide the student, if age 18 or older, and the parents with PWN that clearly states that the student will no longer be entitled to receive special education services from the LEA after graduation. Informed parent consent is not required. Additionally, the school must provide the student with an SOP.

3. May a student participate in graduation exercises with his or her classmates, if she or he is not actually graduating?

Yes, the student may participate in graduation exercises unless a local policy would not allow it. However, if there is such a policy, it must apply to **all** students and not just students receiving special education services. This would apply even if a student has met all of the requirements for graduation, but the IEP team determines that additional services are needed. Some students may require services until age 21 to meet IEP goals, which should be addressed within the student's transition plan. In either case, the student could participate in graduation exercises with his or her class, but not actually receive a diploma at that time.

4. Are students who drop out of school and later begin working on a GED eligible for special education services and related services?

A student who drops out of school and later enrolls in a program to obtain a GED shall have special education services available to him or her. The student may be entitled to receive services until the age of 21. Obtaining a GED does not end a student's eligibility for special education services (34 CFR § 300.102(a)(3)(iv)).

5. What if the IEP team decides that the child is no longer eligible for special education services, but the parents disagree?

The team should continue to try to reach consensus with the parent. If parents continue to disagree, then the parent could request mediation and/or a due process hearing.

6. What if a child who has exited from special education services is referred again?

An initial evaluation would be conducted to reestablish whether the child is a child with a disability who has a need for special education and related services, thus making the child eligible once again for special education services. The school would provide PWN and request consent from the parents or adult student before beginning the evaluation.

7. What happens if a student who becomes 21 years of age during the school year would no longer be eligible for services after the end of the school year?

If a student turns age 21 after September 1 of the school year, the LEA must permit the student to enroll and complete the school year if the student will graduate or exit with either a state-issued high school diploma, certificate of attendance, district diploma, or district certificate. If a student turns age 21 on or prior to September 1, the LEA is not required to permit the student to enroll.

CHAPTER 11: CONFIDENTIALITY

INTRODUCTION

Confidentiality of educational records is a basic right shared by all students in LEAs and their parents. These fundamental rights are described in the Family Educational Rights and Privacy Act (FERPA) of 1974, as amended (2011).

Confidentiality regulations apply to the State, to all LEAs and to private schools that accept federal funds. In addition, all school personnel (including contracted employees) are governed by confidentiality requirements of the IDEA, which apply to students with disabilities.

Confidentiality is one of the rights afforded to parents and is included in the Parent Rights document. All people involved in special education should be aware of the laws and regulations ensuring that all records and information will be kept secure and remain confidential.

This chapter provides specific information about confidentiality requirements for schools:

- A. [Federal and State Requirements](#)
- B. [Access to Records](#)
- C. [Transfer of Records](#)
- D. [Release of Information](#)
- E. [Amendment of Records](#)
- F. [Destruction of Records](#)
- G. [Age of Majority](#)
- H. [Test Protocols](#)
- I. [Discipline Records](#)
- J. [Questions and Answers on Confidentiality](#)

A. FEDERAL AND STATE REQUIREMENTS

Each school shall annually notify parents of their rights under FERPA. The notice must inform parents or adult students that they have the right to:

- o Inspect and review the student's education records;
- o Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;
- o Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that § 99.31 of FERPA authorize disclosure without consent; and
- o File a complaint under §§ 99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of FERPA.

The LEA must also inform parents of:

- o The procedure for exercising the right to inspect and review education records.
- o The procedure for requesting amendment of records.

The LEA may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights. The LEA shall effectively notify parents who have a primary or home

language other than English. (34 CFR § 99.7) This notice should adequately inform parents prior to any identification, location, or evaluation activity taking place.

Generally, most private and parochial schools at the elementary and secondary levels do not receive funds under any program administered by the Department of Education funds and are, therefore, not subject to FERPA. However, if a student is placed in a private school under IDEA, the placing public agency (typically the LEA) remains responsible under FERPA for that specific student's records and compliance with FERPA.

Definitions of terms used are as follows (34 CFR § 300.32):

Personally identifiable means information includes information such as the name of the child, child's parents, or other family member; address; personal identifier such as the child's social security number or student number; or list of personal characteristics or other information that would make it possible to identify the child.

Destruction means physically destroying the medium on which information is recorded or removing all personal identifiers from the information so no one can be identified.

Educational records means any document or medium on which information directly related to one or more students is maintained by a participating agency.

Participating agency means any educational agency or institution that collects maintains or uses personally identifiable student information to provide special education and related services to children with disabilities.

In addition to these federal requirements, the SCDE is obligated to establish policies and procedures to ensure that confidentiality requirements are in place at every participating agency. The SCDE does this by having each public agency accessing funds sign assurances and adopt or establish local policies and procedures consistent with confidentiality requirements.

B. ACCESS TO RECORDS

The FERPA and federal and state special education laws and regulations require schools to have reasonable policies in place to allow parents to review and inspect their child's records. An education record means those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution.

Educational records may include, but not limited to:

- o academic work completed and level of achievement
- o attendance data
- o scores and test protocols of standardized intelligence, aptitude, and psychological tests
- o interest inventory results
- o health data
- o family background information
- o information from teachers or counselors
- o observations and verified reports of serious or recurrent behavior patterns
- o IEPs
- o documentation of notice and consent

Under certain circumstances, a teacher's working file would not be considered to be part of the child's record. FERPA regulation 34 CFR § 99.3, states that the term "education records" does not include records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.

The LEA must prevent the disclosure to any unauthorized person of personally identifiable information pertaining to all students. Disclosure is the release, transfer or other communication of records, or the personally identifiable information contained in those records, to any party, by any means, including oral, written, or electronic.

The FERPA allows parents to inspect and review all education records of their children maintained by an educational agency that receives federal funds. This includes all LEAs and private schools that accept federal funds. The school must comply with a request to inspect records within a reasonable time, not to exceed 45 calendar days. The **IDEA regulations stipulate, “(a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution sessions § 300.510, and in no case more than 45 days after the request has been made.”**

The FERPA regulations allow some exceptions to the requirement to obtain parent consent before releasing records. All of these exceptions also apply to the confidentiality requirements in the federal special education regulations (34 CFR § 300.622(a)). For example, FERPA allows the school to release records to authorized individuals, such as:

- o other school officials, including teachers at the school where the student attends, who have a legitimate educational interest (34 CFR § 99.31(a)(1));
- o officials of another school, LEA, or postsecondary educational institution where the student is enrolled or seeks or intends to enroll, If (a) the LEA's annual notice included a notice that the LEA forwards education records to other agencies that request records and in which the student seeks or intends to enroll; or (b) the LEA makes a reasonable attempt to notify the parents or the student of the disclosure at the last known address (34 CFR § 99.31(a)(2)), however no notice is required if the disclosure is initiated by the parent or adult student;
- o authorized representatives of the US Comptroller General, US Secretary of Education, and State Educational Agencies in connection with an audit or evaluation of Federal or State supported programs, or for the enforcement or compliance with Federal legal requirements related to those programs (34 CFR § 99.31(a)(3));
- o disclosure in connection with financial aid for which the student has applied or received to determine eligibility, amount, or conditions of the aid or to enforce the terms and conditions of the aid (34 CFR § 99.31(a)(4));
- o disclosure to State and local officials to whom the information is specifically allowed to be reported pursuant to State statute (34 CFR § 99.31(a)(5));
- o disclosure to organizations conducting studies for educational agencies to develop, validate or administer predictive tests; administer student aid programs; or improve instruction, but only if the study does not allow personal identification of parents and students to anyone other than representatives of the organization conducting the study, and if the information is destroyed when no longer needed for the purposes for which the study was conducted (34 CFR § 99.31(a)(6));
- o disclosure to accrediting organizations to carry out their functions (34 CFR § 99.31(a)(7));
- o disclosure to a parent of a student who qualifies as a dependent under section 152 of the Internal Revenue Service Code (34 CFR § 99.31(a)(8));

- o disclosure of relevant educational records to a court in a legal action initiated by the LEA against a parent. Also, disclosure to comply with a judicial order or subpoena. However, these disclosures may be made only if the LEA makes a reasonable effort to notify the parents or eligible student of the order or subpoena in advance of compliance with the order or subpoena, unless the order or subpoena states that the existence or contents of the order or subpoena not be disclosed (34 CFR § 99.31(a)(9));
- o disclosure in connection with a health or safety emergency, if knowledge of the information is necessary to protect the health or safety of the student or other individuals (34 CFR § 99.31(a)(10));
- o disclosure of directory information. This is information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most previous educational agency or institution attended (34 CFR § 99.31(a)(11));
- o disclosure to the adult student or student of any age if attending a postsecondary school, or to the parents of a student who has not reached 18 years of age and is not attending an institution of postsecondary education (34 CFR § 99.31 (a)(12)); and
- o disclosure of the results of any disciplinary proceeding conducted by an institution of postsecondary education against an alleged perpetrator to an alleged victim of any crime of violence, as defined by § 16 of Title 18, United States Code (34 CFR § 99.31 (a)(13)); or
- o disclosure to a parent of a student attending an institution of post secondary education regarding the illegal use of alcohol (34 CFR § 300.622(a)).

To ensure protection of education records, the LEA must:

1. Obtain written consent before disclosing personally identifiable information to unauthorized individuals. A parent must provide consent if the child is under 18 years of age (unless one of the exceptions listed above applies).
2. Designate and train a records manager to assure security of confidential records for students with disabilities.
3. Keep a record or log of all parties obtaining access to education records, including the name of the party, the date access took place, and the purpose of the authorized use.
4. Maintain for public inspection a current listing of names and positions of employees who may have access to personally identifiable information.
5. Ensure the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.
6. Ensure that, if any education record includes information on more than one student, a parent of a child must have the right to inspect and review only the information relating to his or her child, or to be informed of that specific information.
7. Ensure that each person collecting or using personally identifiable information receives training or instruction regarding the policies and procedures governing confidentiality of personally identifiable information. The LEA must maintain a record of the training provided, the person or persons providing the training, dates of the training, those attending, and subjects covered.
8. Provide a parent, upon request, a list of the types and locations of records collected, maintained, or used by the LEA.
9. Respond to any reasonable request made by a parent for an explanation and interpretation of a record.
10. Provide a parent, upon request, access to the child's records, and under certain circumstances, a copy of the records (34 CFR § 300.613). Most LEAs copy records for parents without charge. However, the law does allow for fees for copies of records made for a parent if the fee does not

prevent a parent from exercising the right to inspect and review those records. A fee may not be charged to search for or retrieve information.

C. TRANSFER OF RECORDS

Education records include personally identifiable information, and may not be released to another agency or organization without parent consent. However, when a student transfers to another LEA, education records may be forwarded without student or parent consent if the annual FERPA notice to parents includes a statement that these records will be forwarded to the receiving school. Schools are permitted to disclose a student's education records to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll. Immunization records are included in the educational records (under the annual notification exception) that may also be shared with a receiving school without student or parent consent. By sharing such information between schools, the unnecessary immunization of children can be avoided.

South Carolina schools may NOT withhold records because of fines or other such reasons. The sending LEA is to transfer the original school record to the requesting LEA. The sending LEA should maintain a copy of the educational record that is sent. In addition, South Carolina special education regulations require the sending LEA to immediately transfer the IEP, and any additional educationally relevant information regarding a child with a disability, to the receiving LEA. If the school's annual FERPA notification does not contain a statement that the school sends educational records to a receiving school, it must make a reasonable attempt to notify the parent at the last known address of the parent.

D. RELEASE OF INFORMATION

As discussed in previous sections, consent from the parent or adult student is required before education records may be released (34 CFR § 300.622). Some examples of when parent consent is required include:

- o If a child is enrolled, or is going to enroll in a private school that is not located in the parent's LEA of residence, parental consent must be obtained before any personally identifiable information about the child is released between officials in the LEA where the private school is located and officials in the LEA of the parent's residence (34 CFR § 300.622(a)(3)).
- o Parental consent must be obtained before personally identifiable information is released to officials of participating agencies providing or paying for transition services according to an IEP.
- o Additionally, parent consent is required when a school accesses reimbursement from Medicaid or private insurance for special education services. To bill Medicaid, the school must release to the Medicaid billing agency personally identifiable information, such as the student's name, social security or other student number, category of disability, and other pertinent information.
- o Consent for use of private insurance and Medicaid: The district must obtain a one-time written consent from the parent, after providing written notification of the intent to bill, but 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., Department of Health and Human Services). 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.

- o In addition to the requirement to provide written notification prior to 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, the district must continue to provide written notification annually to the child's parents before accessing the public benefits or insurance.
- o The written notification must explain all of the protections available to parents under Part B of the IDEA, as described in 34 C.F.R. § 300.154(d)(2)(v) to ensure that parents are fully informed of their rights before a public agency can access their or their child's public benefits or insurance to pay for services under the IDEA. The notice must be written in language understandable to the general public and in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

Consent is not needed to disclose information under the following conditions:

1. The disclosure is to other school officials, including teachers, within the agency or institution whom the agency or institution has determined to have legitimate educational interests.
2. A contractor, consultant, volunteer, or other party to whom an agency or institution has outsourced institutional services or functions may be considered a school official under this paragraph provided that the outside party—
 - o Performs an institutional service or function for which the agency or institution would otherwise use employees;
 - o Is under the direct control of the agency or institution with respect to the use and maintenance of education records; and
 - o Is subject to the requirements of § 99.33(a) governing the use and redisclosure of personally identifiable information from education records.
3. The disclosure is, subject to the requirements of § 99.34, to officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled so long as the disclosure is for purposes related to the student's enrollment or transfer.

An educational agency or institution must use reasonable methods to ensure that school officials obtain access to only those education records in which they have legitimate educational interests. An educational agency or institution that does not use physical or technological access controls must ensure that its administrative policy for controlling access to education records is effective and that it remains in compliance with the legitimate educational interest requirement.

E. AMENDMENT OF RECORDS

Parents have the right to request that their child's education records be changed if something is inaccurate, misleading, or in violation of the student's rights of privacy. For example, if a child is evaluated and is identified with a disability or health condition that later is determined to be wrong, the parents may ask that the school remove the records relating to the inaccurate diagnosis.

If the school does not agree that the education records should be changed, staff must provide an opportunity for a hearing, following FERPA requirements. The hearing officer would be the school's hearing officer, not a special education due process hearing officer (34 CFR § 300.618).

F. DESTRUCTION OF RECORDS

Federal auditing requirements necessitate the availability of education records for identified students for 5 years after they exit from special education services. After that period of time, LEAs may destroy records. However, before destroying special education records, the LEA must notify the parent (or the adult student) that the information is no longer needed to provide services to the student and that the school is proposing to destroy them.

The requirement to notify the parent or the adult student before records are destroyed may be problematic, if the student moves from the address last known to the LEA. In such cases, the LEA is advised to send a certified letter to the student at the last known address. If that letter is returned to the LEA, that return becomes the documentation of the LEA's attempt to inform the student of the proposed destruction of records. In such cases, the LEA may publish a public notice to students who graduated or left school five years previously. The notice should be addressed to students and guardians, advising them of the proposed destruction of records and asking them to contact the LEA if they object to the destruction.

Many LEAs inform parents via public notice of when the special education records of their child will be destroyed with a statement in the LEA's handbook. The following statement is an example:

“NOTICE OF DESTRUCTION OF SPECIAL EDUCATION RECORDS: Special education records for each child with a disability are maintained by the LEA until no longer needed to provide educational services to the child. This notice is to inform you that the special education records for this student will be destroyed after five (5) years following program completion or graduation from high school, unless the student (or the student's legal guardian) has taken possession of the records prior to that time.”

Parents may also ask that their child's records be destroyed. However, a permanent record of the following information may be maintained without time limitation:

- o A student's name, address, and phone number;
- o His or her grades;
- o Attendance record;
- o Classes attended;
- o Grade level completed; and
- o Year completed.

G. AGE OF MAJORITY

In South Carolina, the age of majority is 18. Students who are 18 years or older, unless they have a guardian appointed under State law, have the right to grant or withhold consent, have access to records, to amend records, and to file a complaint, etc. (See Chapter 1, Parent Rights In Special Education, for additional information on age of majority.) When a student turns 18 years old, or enters a postsecondary institution at any age, the rights under FERPA transfer from the parents to the student, and he or she is known as an “eligible student” under FERPA.

H. TEST PROTOCOLS

Some individualized testing involves the use of test protocols. Test protocols commonly refer to written instructions on how a test must be administered and the questions posed. Generally, these test protocols are original creations of independent authors and/or organizations. Therefore, they may be protected by the U.S. Copyright Act of 1976, the Digital Millennium Copyright Act of 1988, as well as other State, Federal, and international acts and conventions. If a given test protocol is copyrighted, it may not be reproduced, transmitted, distributed, publicly displayed, nor may a derivative work be created therefrom, without express permission from the copyright owner, unless such use is allowed under the Fair Use Doctrine.

The Office of Special Education and Rehabilitative Services (OSERS) has noted that if a document is copyrighted, the IDEA's inspection and review rights generally do not implicate copyright law. Since IDEA and FERPA generally do not require the distribution of copies of an education record, but rather parental access to inspect and review, Federal copyright law generally should not be implicated under these regulations. *However, when a test protocol contains personally identifiable information directly related to a particular student, that protocol is an education record.*

Requests for test protocols occur in varying contexts. Sometimes, parents ask to inspect or photocopy protocols maintained by LEAs or their personnel. Occasionally, LEAs want to review or copy protocols of the parents' independent educational evaluators. The variables here are whether one seeks to inspect the protocols or to copy them.

"A test protocol or question booklet which is separate from the sheet on which a student records answers and which is not personally identifiable to the student would not be part of his or her 'education records'." Analysis, 64 Fed. Reg. at 12641. When a child's information is integrated throughout the test protocol, it contains child-specific information that is factual, personally identifiable information, and reflects the child's level of functioning, it becomes an educational record.

When a student with a disability is the subject of a court or administrative hearing, parents may have additional legal tools for accessing test protocols. These tools include pretrial discovery, subpoenas, and the right to question witnesses about their records. Also, the U.S. Department of Education has advised that a parent's FERPA right to inspect test protocols may include a right to copy them if ordered by a special education due process hearing officer or a judge in a legal proceeding.

If failure to provide a copy of a requested protocol would effectively prevent the parent from exercising the right to inspect and review their child's educational records, the LEA may be required to provide a copy to the parent. In a situation where a copyrighted document has been made part of a child's education record because it includes child-specific information, the LEA may wish to contact the copyright holder to discuss whether a summary or report of the child's evaluation and assessment results can be prepared that can be provided to the parents as part of the child's education record, in lieu of providing a copy of the copyrighted document. Such a summary or report would provide parents with the necessary and pertinent information regarding their child's developmental functioning and areas of strengths and need.

Separately, we note that the LEA must provide parents with an explanation of the results of their child's evaluation and assessment as part of the notice that must be provided to before the agency proposes or refuses to initiate or change the identification, evaluation, or placement their child, or the provision of appropriate early intervention services to the child and the child's family. This notice must provide an explanation of the child's evaluation and assessment results in a manner that would adequately inform the parent about how and in what areas the child was evaluated and assessed, and include the child's data or performance against such measures in order to explain the basis of the child's eligibility determination. A summary or report may both meet this requirement.

I. DISCIPLINE RECORDS

LEAs reporting a crime are allowed to forward the student's special education and disciplinary records to the appropriate authorities only if they have parent consent or if one of the FERPA exceptions to the consent requirement applies (34 CFR § 300.535(b)). See Section A of this chapter, and also Chapter 13 for more information about release of discipline records to law enforcement.

In addition, other federal and state requirements are as follows:

- o When LEAs send records of students to other LEAs, they are also required to include the discipline records.
- o If LEA employees are required to make a report to a law enforcement agency, they may be charged with failure to report if they do not comply.
- o If LEA employees report a crime, the LEA may not impose sanctions on them.
- o If LEA employees report a crime in good faith, they have immunity from civil liability.

J. QUESTIONS AND ANSWERS ABOUT CONFIDENTIALITY

1. What must an LEA do to provide parents reasonable access to their child's records?

Records should be in a location that parents can find, maintained during normal business hours, and not in a physically inaccessible area (downstairs or upstairs, with no elevator available). Upon request, someone who can interpret the records should be available to the parents. Parents may also request that copies of their child's education records be made for them. However, an LEA is required to provide copies of educational records only if failure to provide those copies would effectively prevent the parent from exercising the right to review and inspect the records. If copies are provided LEAs may charge a reasonable fee and may take a reasonable time to provide the copies to the parents. In cases where failure to provide copies of records would effectively prevent a parent from exercising the right to inspect and review education records, and the parents are unable to pay the fee, the LEA must provide the records without charge. The IDEA regulations stipulate, "(a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to § 300.507 or §§ 300.530 through 300.532, or resolution sessions § 300.510, and in no case more than 45 days after the request has been made."

2. Are LEA personnel required to provide parents access to their working files and anecdotal records?

The FERPA and the IDEA include definitions of "education records." These definitions, while expansive, do not include the staff's working files and anecdotal records. FERPA regulation 34 CFR § 99.3 states that the term "education records" does not include "records that are kept in the sole possession of the maker of the record, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record."

3. Only a limited amount of information is needed to bill Medicaid (not the entire education record). May this limited information be released without parent consent to the Medicaid billing agency in order to access reimbursement for special education services?

No. Parent consent is required by FERPA, because the information being released is personally identifiable (student's name, social security or other student number, category of disability, etc.). In addition, LEAs must obtain parental consent to access public insurance such as Medicaid, at least annually for the specific services, and duration of those services identified in the child's IEP. The LEA must obtain parental consent to access Medicaid for any change in a service or amount of a service.

4. When a student is in a private school and receives special education services from the LEA, who keeps the student's educational record?

If the student receives special education services through the LEA, the LEA is responsible for maintaining the student's educational record. The private school may also have records, or copies of the LEA records, including the student's IEP, if appropriate.

5. What should the LEA do if during a due process hearing, the parents request a copy of their child's test protocol?

According to the U.S. Department of Education, under FERPA, if the protocol contains personally identifiable information, parents have the right to inspect test protocols, which may include a right to copy them if ordered by a special education due process hearing officer or a judge in a hearing. Due to concerns about violating the test publisher's copyright rules, the LEA may want to consult with their attorney.

However, LEAs are required to provide copies of the records if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records (34 CFR § 300.613(b)(2)).

6. How long must an LEA retain special education records for children with disabilities?

Federal auditing requirements mandate the availability of education records for identified students for 5 years after they exit from special education services. After that period of time, LEAs may destroy records. However, before destroying special education records, the LEA must notify the parent (or the adult student) that the information is no longer needed to provide services to the student and that the school is proposing to destroy them.

Statutory authority

On 24 June 1994, the General Assembly approved the school district general schedules as Regulation 12-901 through 12-906.6. Additions/revisions to the school district general schedules were approved by the General Assembly as Regulation 12-901 through 12-906.16 and became effective on May 23, 2003.

12-906.2. Special Education Records (Local School District Program Scholastic Records For Handicapped Students)

A. Description: Documents a handicapped student's participation and progress in a special education program. Information includes handicapped/psychological needs, placement forms, record of staffing, individual educational programs, confidential education reports, and least restrictive environment verification papers.

B. Retention: Until no longer needed to provide educational services to the student or for the necessary school district purposes such as auditing or monitoring, then notify the parents that they have a right to have these records destroyed. If the parents so request, the records must be destroyed. If the parents do not request destruction, the school district may retain these records permanently or destroy them at their discretion. In all instances of destruction, the parents of the student must be notified 45 calendar days prior to destruction that they have a right to request and be provided a copy of any personally identifiable data which has been obtained or used while providing educational services for their children. Documentation of the notification of parents must be retained permanently. (Note: This retention does not apply to the permanent record of a student's name, address, telephone number, grades, attendance record, classes attended, grade level completed, and year of completion.)

7. Destruction of records – Are letters of invitation (notification) and responses included as special education records?

Yes. Because the letters of invitation and responses include personally identifiable information and are maintained by the LEA these documents are education records.

8. If a child has HIV infection does the school have the right to know?

Because the disclosure of HIV infection has resulted in discrimination, harassment, and isolation for far too many people and the transmission risks are extremely low in school, a person's confidentiality about his or her HIV status is protected by law. If a minor has Acquired Immunodeficiency Syndrome (AIDS) or is infected with Human Immunodeficiency Virus (HIV), and is attending a South Carolina public school, the Department of Health and Environmental Control (DHEC) must notify the superintendent of the school district and the nurse or other health professional assigned to the school the minor attends (S.C. Code Ann. § 44-29-135(e)). This information must be kept strictly confidential by the school superintendent, school nurse,

or other health professional assigned to the public school and should only be revealed to public school personnel who have a bona fide need to know. All persons receiving the information must keep the information strictly confidential (S.C. Code Ann. Regs. §61-11 G(3)). If a parent/guardian discloses the child's HIV status to specific school staff, staff may not legally disclose the child's HIV infection status to other school staff, students, or parents without informed written consent.

9. If a child has health issues such as hepatitis or MRSA, who at the school has a right to know?

FERPA prohibits schools from disclosing personally identifiable information from students' education records without the consent of a parent or eligible student, unless an exception to FERPA's general consent rule applies. In some situations, the FERPA permits schools to disclose to health agencies personally identifiable information on students without consent under the "health or safety emergency" exception, if knowledge of the information is necessary to protect the health or safety of students or other individuals. An emergency does not include the threat of a possible or eventual emergency for which the likelihood of occurrence is unknown. Under the health or safety emergency provision, the appropriate personnel within the school district are responsible for making a determination of whether to make a disclosure of personally identifiable information on a case by case basis, taking into account the totality of the circumstances pertaining to the threat. If the school district or school determines that there is an articulable and significant threat to the health or safety of the student or other individuals and that certain parties need personally identifiable information from education records to protect the health or safety of the student or other individuals, it may disclose that information to such appropriate parties without consent. 34 C.F.R. § 99.36. School districts must make sure that there is a rational basis for decisions about the nature of the emergency and the appropriate parties to whom information should be disclosed. (The burden is on the school district to defend the release of information.)

School district personnel, however, must within a reasonable period of time after a disclosure is made, record in the student's education records the articulable and significant threat that formed the basis for the disclosure and the parties to whom information was disclosed. 34 C.F.R. § 99.32(a)(5). This is required as evidence of why the decision was made to release the information and is necessary in the event that the parent or eligible student files a complaint regarding the release of personally identifiable information without consent. Before releasing personally identifiable information, school district personnel should be mindful that oftentimes threats to health or safety can be fully addressed by sharing appropriate information regarding such threats with parents, the health department, or others in a manner that does not identify particular students.

CHAPTER 12: DISPUTE RESOLUTION

INTRODUCTION

Dispute resolution options include informal approaches, mediation, due process complaints or hearings, expedited due process hearings in disciplinary situations, and state complaints. The purpose of these dispute resolution options is to allow the parties involved to continue working together after the disagreement is resolved in order to ensure the child with a disability has a FAPE available.

As mentioned previously, the procedural safeguards notice was expanded by the reauthorized the IDEA to include a full explanation of the procedural safeguards relating to the availability of mediation and an opportunity to present and resolve complaints through the due process complaint and state complaint procedures. This explanation must include the time period in which to file a complaint; the opportunity for the agency to resolve the complaint; and the difference between the due process complaint and the state complaint procedures (jurisdiction of each procedure, what issues may be raised, filing and decision timelines, and relevant procedures). LEAs must also provide parents with information about free or low cost legal and other relevant services if parents request that information or if the parent or LEA files a due process complaint. These resources might include the state's Parent Training and Information Center (Pro Parents) and Protection and Advocacy agency.

This chapter provides information related to informal and formal dispute resolution methods:

A. Informal Approaches to Dispute Resolution

B. Mediation

1. Mediation Process
2. Mediation Requests
3. Mediation Participants
4. Special Education Mediators
5. Mediation Results
6. Questions and Answers about Mediation

C. State Complaint

1. Filing a Formal Complaint
2. Investigating the Complaint
3. Following up on the Complaint
4. Questions and Answers about Complaints

D. Due Process Complaint

1. Filing the Due Process Hearing Request
2. Assigning a Special education Due Process Hearing Officer
3. Resolution Process
4. Pre-hearing Requirements
5. Conducting a Due Process Hearing
6. Reaching a Decision
7. Appealing the Due Process Hearing Decision
8. Stay-Put
9. Civil Actions
10. Attorney Fees
11. Expedited Due Process Hearings
12. Questions and Answers about Due Process Hearings

A. Informal Approaches to Dispute Resolution

IEP Review

One of the first options for dispute resolution should be a review of the child's IEP. The parents and LEA may be able to resolve issues about a child's program by conducting a review of the IEP and amending it, as appropriate, without even convening the entire IEP team. This process of amending IEPs has already been discussed. If the parent and LEA agree, an amendment to the IEP can be written and incorporated into the IEP.

If a parent has concerns about his or her child's program, it might be appropriate for the parent to request an IEP meeting. At the meeting, the team can hopefully work toward a solution that is agreeable to all. The solution does not have to be permanent. It might be a temporary compromise to try a particular form of instruction or classroom placement for a specified time period. During the time period, the team would monitor the child's progress and determine how well the compromise addressed the concern. The trial period may help the parents and LEA personnel come to a comfortable consensus on how to help the child. It is in everyone's best interest (and especially that of the child) for the IEP team to work together in a communicative, respectful, and honest manner. Remember that in many cases, the team will be working together for many years.

IEP Facilitation

A facilitated IEP meeting includes an impartial facilitator who is not a member of the IEP team, but rather has been trained to help keep the IEP team focused on developing the child's program while addressing conflicts. The facilitator's job is to promote open, respectful communication and listening among IEP team members and to help work toward resolving differences of opinion. The facilitator does not impose a decision on the team, but rather helps to clarify points of agreement and disagreement. Most importantly, the facilitator ensures that the meeting remains focused on the child.

For more information on this process, contact PRO Parents at 652 Bush River Road, Suite 203, Columbia, South Carolina. PRO Parents may also be contacted via telephone at 800-759-4776 or email at PROParents@proparents.org. The web address is www.proparents.org. Additional information may be obtained from the Consortium for Appropriate Dispute Resolution in Special Education's (CADRE) website at www.directionservice.org/cadre/facilitatediep.cfm.

B. Mediation

Mediation is one of three formal methods of resolving disputes in special education at the local level. Other methods are state complaint and due process hearing. To begin the process of mediation, both parties must agree to mediate. Either the parents or LEA may suggest this option initially by asking the other party if they are willing to mediate the disputed issues. The cost of mediation is borne by the state since the LEA uses the IDEA funds to cover the cost; there are no costs to either the parents or the LEA.

Forms to request mediation should be available in each LEA. Copies of these forms are available on the OEC website.

1. Mediation Process

The SCDE has established mediation procedures to allow LEAs and parents to resolve any matter regarding special education, including matters arising prior to the filing of a due process complaint. Federal regulations at 34 CFR § 300.506 set forth the following provisions for special education mediation:

- o The mediation process is voluntary for both the parents and the LEA.
- o Mediation may not be used to deny or delay a parent's right to a due process hearing, or any other parent right.
- o Mediation is conducted by a qualified, impartial mediator who is trained in effective mediation techniques.
- o The SCDE is responsible for the costs of mediation. This cost is handled by the state's paying directly for the training of all mediators and by the flow through of the IDEA funds that may be used by the LEA for all aspects of the mediation process, including the costs of meetings to encourage mediation.
- o Mediation must be provided in a timely manner and at a location that is convenient for both parties in the dispute.
- o Agreements reached during mediation must be in writing and must include the resolution of each issue for which agreement was reached. Every mediation agreement must also include a statement that:
 - Discussions during mediation must be kept confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings;
 - Each party understands that the agreement is legally binding upon them; and
 - The agreement may be enforced in state or federal court of competent jurisdiction.

The goal of the parties in mediation is to reach an agreement that is workable for all. If an agreement is reached it is put in writing by the mediator and signed by both parties. If issues prove to be irresolvable, the mediator will declare that an impasse has been reached and the mediation will be terminated.

2. Mediation Requests

When parents or LEA personnel disagree about a special education issue, either party may request mediation. However, both parties must agree to use this process. Therefore, the first step in initiating special education mediation is to ask the other party if it is willing to mediate the disputed issue. Mediation may be requested even after a due process hearing request has been filed. This is one reason that the timeline for mediation is short. Mediation must be completed within the due process timeline, and mediation may not be used to delay the parents' right to due process. However, the due process hearing timeline may be extended by the due process hearing officer for a specific period of time during the mediation process if requested by the parties (34 CFR § 300.515(c)).

Mediation is often viewed as a win-win situation, a positive process that may often avoid potential litigation. At a minimum, mediation must be available to resolve disputes relating to the following issues:

- o Identification,
- o Evaluation,
- o Placement, and
- o Provision of a FAPE to the child.

Once both parties agree in writing to mediation (the sample Mediation Request Form may be used), the mediation session should typically occur within fourteen calendar days. The LEA selects a mediator on a random or rotational basis. If the mediator is not selected on a random or rotational basis, both parties must be involved in and agree to the selection of the mediator. If the LEA and parents do not agree on the assignment of the mediator, the LEA or parents should contact the Office of General Counsel at the SCDE so that a mediator can be appointed by the SCDE from the approved list. The SCDE maintains this list of qualified mediators who are knowledgeable in laws and regulations relating to the provision of special education and related services.

The LEA provides parents with information concerning the mediation process and information identifying the mediator. The mediator provides parents with his or her contact information and notifies both parties as to the date, time, location, and purpose for mediation. The location must be convenient to the parties and should be acceptable to everyone. A neutral location is preferred. In some cases where neutral sites are not readily available, mediations can be held on LEA property. The mediator also answers any questions about the process and may request additional information from the parties.

3. Mediation Participants

Mediation is an informal process that includes discussion of the issues and proposed resolutions. Generally, discussions include the mediator, the parents, and an LEA representative.

Generally, the likelihood of reaching an agreement is enhanced by keeping the number of participants to a minimum. However, either the parents or the LEA representative may ask an outside advocate to attend. If the parents are not able to participate fully and need assistance (because of reasons such as not speaking English, having a disability themselves, or not fully understanding the issues or procedures), the parents may wish to have an advocate assist them. The mediator makes the final decision as to who attends the mediation session.

4. Special Education Mediators

In order to be considered trained and qualified, mediators must fulfill the following requirements:

1. Be knowledgeable in laws and regulations relating to the provision of special education and related services;
2. May not be an employee of the SCDE, any state agency that provides a FAPE for children with disabilities, or the LEA that is involved in the education or care of the child; and
3. Must not have a personal or professional interest that conflicts with the person's objectivity.

5. Mediation Results

During mediation, the mediator will work with both parties to reach an agreement. If mediation discussions result in both parties' reaching agreement, the mediator records the results in a written mediation agreement, which is signed by both parties. When the issues in mediation involve IEP decisions, the mediation agreement may become part of the student's IEP if agreed to by the parties. The actions agreed upon in the mediation should be implemented immediately, unless the mediation agreement specifies otherwise.

If the IEP is changed by adding the mediation agreement, the IEP team may write a new IEP or amend the existing IEP to reflect the mediation agreement. The LEA is responsible for following up with the required notice and consent forms. The revised IEP is then implemented. If the mediation agreement is not part of the IEP the LEA must ensure that any person responsible for implementing the agreement is

informed of their responsibilities. If the mediation is not successful, the mediator may declare that the mediation is at impasse and suggest that both parties consider other methods for dispute resolution, such as filing a complaint or requesting a due process hearing.

The LEA must maintain copies of any forms or other formal written documentation generated by the mediation process. The LEA must send a copy of the mediation request form and of the written agreement reached by the parties to the Office of General Counsel. A sample mediation request form may be found on the OEC website.

6. QUESTIONS AND ANSWERS ABOUT MEDIATION

1. How are mediators selected to conduct special education mediation?

The LEA chooses a mediator on a random or rotational basis from a list of trained and qualified mediators. The parties may also agree to the selection of a specific mediator. If the parties cannot agree on the selection of a mediator, the LEA or parents should contact the Office of General Counsel so that a mediator may be appointed.

2. What are the qualifications of a special education mediator?

Mediators must have successfully completed a training program designed for special education mediators and provided by the SCDE. The mediator must:

- o Have received formal training in the mediation process and in federal and state laws and regulations regarding special education;
- o Be on an approved list of qualified mediators at SCDE;
- o Have no personal or professional interest that would conflict with his or her objectivity;
- o Have no prior involvement in any decisions regarding the student's identification, evaluation, special education program, or educational placement;
- o Be professional, impartial; and
- o Be able to complete the required duties and responsibilities.

3. What is the role of the mediator?

The mediator helps the parents and LEA representative clarify issues in disagreement and find solutions that satisfy both parties. The mediator:

- o contacts the parties to arrange for the mediation;
- o informs the parties about the mediation process and other conflict resolution procedures including due process hearings;
- o uses communication and facilitation strategies to be certain that each party is fully heard in the mediation;
- o replaces or reframes communication so that both parties are understood and received;
- o probes issues and confirms understandings;
- o suggests procedures for making progress in mediation including consultations with others;
- o offers options for consideration, stimulates new perspectives, and offers the IDEAs for consideration; and
- o reduces the agreement to writing and obtains signatures of both parties.

4. How long does mediation take?

Many mediation sessions have been successfully completed in half a day depending on the complexity of the issues, but mediations may take a full day. The mediator will determine whether progress is being made or whether additional time is needed for resolution. The mediator is required to issue a formal written extension of the 14-day timeline and submit the order of the extension to the Office of General Counsel.

5. Is special education mediation binding?

If both parties sign the mediation agreement, it is binding on both parties, and is enforceable in a state or federal court of competent jurisdiction.

6. When can mediation be requested?

Mediation can be requested when it is believed that an impasse has been reached on any matter involving the identification, evaluation, placement, or the provision of a FAPE to the child. Either the parents or the LEA representative should discuss mediation as an option with the other party and should ask for mediation as early as possible. Mediation can occur before or after a special education due process hearing has been requested or when a hearing concerning an IAES is being considered. Mediation cannot be used to deny or delay an impartial special education due process hearing once it has been requested.

7. How soon is mediation scheduled after the parties request it?

A mediation session should be scheduled as soon as possible after the parties have agreed to participate in mediation. SBE policy requires that the mediation session take place within 14 days of the date the parties agree to mediation. The meeting must be in a place that is convenient for both parties.

One of the reasons time is so critical is that mediation may be requested even if a special education due process hearing has been filed, but the mediation process may not delay the parents' right to due process. If the mediation request has occurred in conjunction with a request for a due process hearing, the mediation session must occur within 15 days of the mediation request.

8. Who pays for mediation?

The state bears the cost of the mediation process. This cost is handled by the state's paying directly for the training of all mediators and by the flow through of the IDEA funds that may be used by the LEA for all aspects of the mediation process, including the costs of meetings to encourage mediation.

C. STATE COMPLAINT

The complaint process is one of the methods parents or others have to resolve special education disagreements with the LEA. Although most differences are successfully resolved at the local level, three state processes are available to parents, if they are at impasse with the LEA:

- State complaint,
- Mediation, and
- Due process hearing.

The complaint process is one of the parent rights (procedural safeguards, see Chapter 1) afforded under federal and state regulations (34 CFR §§ 300.151 through 300.153). The SCDE is mandated to make available an opportunity for individuals or organizations to file formal complaints against the LEA.

This chapter outlines the steps involved in the complaint process:

- 1. Filing a Complaint**
- 2. Investigating the Complaint**
- 3. Following Up on the Complaint**

1. Filing a Complaint

Any individual or organization may file a complaint if they believe that the LEA is not complying with federal or state laws or regulations relating to special education. The complaint must allege a violation that has occurred not more than one year prior to the date the complaint is received by the SCDE.

The complaint must be in writing and signed by the person or representative of the organization making the complaint. The complaint must include a statement that the LEA is not complying with the requirements of the IDEA and/or the SBE special education regulation, 43-243, and it must give the facts upon which that statement is based. The signature and contact information for the complainant and if alleging violations with respect to a specific child:

- the child's name and address of residence, or other contact information if the child is a homeless child or youth;
- contact information for the person filing the complaint;
- the name of the school the child is attending;
- a description of the nature of the problem involving the child, including facts related to the problem; and
- a proposed resolution to the problem, if a possible resolution is known and available to the complainant.

The party filing the complaint must forward a copy of the complaint to the LEA against which the allegations are made at the same time the complaint is filed with the Office of General Counsel. The OEC website includes a sample form that may be used, but is not required, to file a complaint.

If a complaint is received that is part of a due process hearing, or the complaint contains multiple issues of which one or more are part of such a hearing, the state must set aside the complaint, or any part of the complaint, that is being addressed in the due process hearing until the hearing is over. Any issue in the complaint that is not a part of the due process hearing must be resolved through the complaint process.

2. Investigating the Complaint

The complaint investigator at the SCDE must resolve a complaint within 60 calendar days from the date the complaint is received by both parties unless exceptional circumstances exist or the parents and LEA agree to extend the time to engage in mediation or in other alternative means of dispute resolution. During the 60 days, the complaint investigator must carry out an independent investigation, including an on-site investigation if necessary; give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint; provide the LEA with the opportunity to respond to the complaint; review all relevant information and make an independent determination as to whether the LEA is violating a requirement of the IDEA, the applicable state and federal regulations, or state or LEA policies and procedures; and issue a written decision.

The complaint investigator may contact the person making the complaint and the special education director to clarify the issue(s), review all relevant records and documents, and determine whether or not the facts stated in the complaint are correct and, if so, whether they substantiate a violation of the requirements of federal or state special education laws or regulations or the state's or LEA's policies and procedures. The investigator will contact the LEA against which the complaint is filed to allow the LEA to respond to the complaint with facts and information supporting its position, offer a proposal to resolve the complaint, or offer to engage in mediation to resolve the complaint. Both parties can provide additional information to the investigator that is relevant to the issue. It is left to the complaint investigator to review and determine the relevance of any additional information.

After the investigation, the complaint investigator issues a written decision addressing each of the allegations in the complaint. The written decision includes: (a) findings of fact and conclusions; (b) the reasons for SCDE's final decision; and (c) any corrective action or actions that are required including the specific period of time within which each corrective action must be completed. The written decision is final and not subject to appeal although both parties retain all rights to mediation and/or due process hearing to further pursue the matter. There is no reconsideration of a decision rendered during the state-level complaint investigation process.

3. Following up on the Complaint

When the corrective actions are completed by the LEA, the complaint investigator sends a letter of completion to the LEA with a copy to the person making the complaint. At that point, the complaint file is closed. The Office of General Counsel maintains a database to assist in the management of timelines regarding complaints, responses, written decisions, and corrective actions. Issues identified in complaints are discussed with the Program and General Supervision Units in order to identify and verify individual and systemic findings of noncompliance and to assist in the provision of targeted technical assistance to LEAs.

4. QUESTIONS AND ANSWERS ABOUT COMPLAINTS

1. Who can file a complaint?

Parents, individuals, or organizations who believe that the LEA has violated federal or state laws or federal or state regulations relating to special education may file a complaint. This includes, but is not limited to, parents, parent advocates, the student if age 18, grandparents, foster parents, other IEP team members, a state agency when the child is in the custody of the state, another individual, or an organization.

2. How long does the investigation of a complaint take?

The complaint must be investigated and a report written with the findings of the complaint investigator within 60 calendar days of the date the complaint was received by both parties.

3. May parents of parentally placed private school children receiving special education services file a complaint?

Yes. The complaint process is available to parents (or another individual or organization), even if services provided in a private school are on a services plan, and not an IEP. However, this right is limited to child find activities only.

4. May a private school official file a complaint?

Yes, a private school official has the right to file a complaint with the SEA that the LEA did not engage in consultation that was meaningful and timely, or did not give due consideration to his or her views. The private school official must provide the basis for his or her belief that the LEA did not comply with these consultation requirements. As part of this complaint process, the LEA must forward appropriate documentation related to the private school official's complaint to the SEA. If the private school official is dissatisfied with the decision of the SEA, he or she may submit a complaint to the U.S. Secretary of Education. The complaint should provide the basis of the official's belief that the LEA did not comply with the consultation requirements, and the SEA must forward the appropriate documentation to the secretary.

5. Does filing a complaint waive the parents' right to file for a due process hearing?

No. Parents may file a complaint before, at the same time, or after filing a due process hearing request. However, if the issue in the complaint is the same as the issue in the due process hearing request, the complaint investigation process will be suspended until the due process hearing is resolved.

D. DUE PROCESS HEARINGS

INTRODUCTION

Due process is a set of procedures that seeks to ensure fairness of educational decisions and accountability, both for parents and for educational professionals. Due process rights begin when educational professionals or the parents request an initial evaluation to determine whether or not a student is eligible and needs special education and related services. The due process hearing provides a forum where disagreements about the identification, evaluation, educational placement, and provision of a FAPE for students with disabilities may be resolved.

Usually parents and LEA personnel work together regarding the education of children with disabilities and have little or no difficulty in reaching mutual agreement about the initiation, continuation, or termination of special education services. When disagreements arise, federal and state law allow either party to request a due process hearing to resolve issues in dispute. Ultimately, the intent of federal and state special education due process requirements is to protect the rights of children from inappropriate actions by LEAs or by parents.

Every special education due process hearing and review must be provided at no cost to the child or the parent of the child. The costs of the initial hearing must be paid for by the LEA except for parent's attorney fees and expert witnesses unless the parent substantially prevails and requests reimbursement from the federal court.

Other avenues to resolve disagreements include mediation and the complaint process. Only as a last resort should the legal method of a special education due process hearing and appeal procedure be used. The special education due process hearing procedures are somewhat complicated. This chapter describes these procedures, but it is not a substitute for competent legal advice.

Forms can be found at <http://ed.sc.gov> on the OEC Website under Forms and Applications. See also Parent Rights (Procedural Safeguards), for additional information about other rights of parents.

Topics addressed within this chapter are:

- 1. Filing the Due Process Hearing Request**
- 2. Assigning a Special education Due Process Hearing Officer**
- 3. Resolution Process**
- 4. Pre-hearing Requirements**
- 5. Conducting a Due Process Hearing**
- 6. Reaching a Decision**
- 7. Appealing the Due Process Hearing Decision**
- 8. Stay-Put**
- 9. Civil Actions**
- 10. Attorney Fees**
- 11. Expedited Due Process Hearings**

1. Filing the Due Process Hearing Request

The LEA, the parents of a child with a disability, or the student (if the student is age 18 or older) has the right to file a due process hearing complaint. A special education due process hearing may be initiated to resolve differences about a child's identification, evaluation, educational placement, or provision of a FAPE. The due process complaint must allege a violation that occurred not more than two years before the date the

parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint. There are two exceptions to this timeline including when an LEA has misrepresented that it has resolved the problem or the LEA has withheld information that it was legally required to give to the parent (34 CFR § 300.507(a)(2)).

To request a due process hearing, the party filing the complaint sends a copy of the due process hearing request to the other party and to the Office of General Counsel. This notice is confidential and must contain the following information:

- o name of the child;
- o address of the child's residence (or in the case of a homeless child or youth, available contact information for the child);
- o name of the school the child is attending;
- o description of the nature of the problem and the facts that form the basis of the complaint; and
- o a proposed resolution of the problem.

When the LEA receives this request for a due process hearing, LEA personnel are required to:

- o inform parents about mediation;
- o inform parents of free or low-cost legal services; and
- o provide a copy of the Parent Rights document for the first due process complaint in the school year (34 CFR § 300.504).

2. Assigning a special education due process hearing officer

The LEA's responsibility is to maintain a current list of trained, qualified special education due process hearing officers. This list must include the names and qualifications of the special education due process hearing officers who are available.

The LEA will also have hearing officers to resolve other matters not related to special education, such as the LEA's disciplinary hearing officer. For special education due process hearings, however, a special education due process hearing officer is required. This person is trained and qualified to conduct special education due process hearings. To differentiate between hearing officers, the complete term "special education due process hearing officer" will be used in this section.

The LEA is responsible for conducting due process hearings in accordance with all federal and state requirements, including assigning special education due process hearing officers. The LEA is required to appoint a special education due process hearing officer within 10 calendar days of receiving or initiating a hearing request. A special education due process hearing officer can have no personal or professional interest that would conflict with his or her objectivity. The special education due process hearing officer may not be an employee or former employee (an officer, agent, LEA board official) of the LEA that is responsible for the child's education. The special education due process hearing officer must have knowledge and understanding of the IDEA and legal interpretations pertaining to law; have knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and have knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice. The special education due process hearing officer must be at least 21 years of age and be a high school graduate (or hold an equivalent credential). Only persons who have been trained by the SCDE may be special education due process hearing officers. If a special education due process hearing officer does not adhere to the federal and state regulations or policies and procedures, including all timelines, he or she will be removed from the list of qualified hearing officers.

Parents or attorneys representing the parents have the right to raise an objection as to the special education due process hearing officer appointed by the LEA on the basis of a potential bias or personal or professional conflict. If the determination is made by the special education due process hearing officer that a potential bias or conflict exists, he or she must remove himself/herself and the LEA must go to the next name of the list of persons qualified to serve as special education due process hearing officers.

3. Resolution meeting

When the parent has requested a due process hearing, the LEA must schedule a resolution meeting to occur within 15 calendar days of receiving the due process requests. The LEA must convene a resolution meeting with the parent, the member or members of the IEP team who have specific knowledge of the facts identified in the complaint, and a representative of the LEA who has the authority to make binding decisions on behalf of the LEA. The parent and the LEA determine which members of the IEP team will attend the meeting. The LEA may not include their attorney unless the parents bring their attorney. If the LEA fails to conduct the resolution session within the required 15 calendar days (7 calendar days if the hearing is expedited) and the parties have not agreed in writing to waive the resolution sessions or the parents have not requested mediation in lieu of the resolution session, this is an issue of noncompliance and the SCDE must issue a written finding of noncompliance relative to this matter.

The purpose of this meeting is for the parent of the child to discuss and explain the complaint, including the facts that form the basis of the complaint. The LEA then has an opportunity to resolve the complaint. If the meeting results in a resolution of the complaint, the parties develop a legally binding written agreement that both the parent and the representative of the LEA signs. The agreement is, by law, enforceable in any state or federal court of competent jurisdiction. However, the law also permits either party to void the agreement within 3 business days of the date the agreement was signed. The resolution agreement must be signed by the parent and a representative of the LEA that has the authority to bind the LEA.

If a resolution of the complaint is not reached at the meeting and the LEA has not resolved the complaint to the satisfaction of the parent within 30 calendar days of the LEA's receipt of the complaint, the due process hearing procedures will be implemented and all of the applicable timelines for a due process hearing will commence. This includes the issuance of a written decision within 45 calendar days after the end of the resolution period. If no resolution is reached during the resolution session and the parties do not believe they can reach a mutually agreeable resolution, the parties may contact the special education due process hearing officer to request the timeline start prior to the end of the 30-day resolution period.

The parent's failure to participate in a resolution meeting when he or she has not waived the resolution process or requested to use mediation will delay the timelines for the resolution process and due process until the meeting is held (34 CFR § 300.510(b)(3)). In addition, if the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented) the LEA may, at the conclusion of the 30 day resolution period, request that the special education due process hearing officer dismiss the parents' due process complaint (34 CFR § 300.510(b)(4)).

If an LEA fails to hold and participate in a resolution meeting within 15 days of receiving a due process complaint, the parent may request the special education due process hearing officer to begin the due process hearing and commence the 45 day timeline for its completion (34 CFR § 300.510(b)(5)).

A resolution meeting, however, is not required if the parent and the LEA agree, in writing, to waive the resolution meeting, or they agree to use mediation to attempt to resolve the complaint. If no resolution is reached at during the session, the parties may contact the special education due process hearing officer and request the timeline start.

4. Prehearing requirements

The party receiving a due process hearing request must send the party filing the request a response that specifically addresses the issues raised in the complaint within 10 calendar days of receiving the complaint.

If either the LEA or the parent believes that a due process complaint it has received does not meet the legal notice requirements (see Section 1 of this chapter for the requirements), the party may submit to the special education due process hearing officer a sufficiency challenge. The sufficiency challenge must be submitted within 15 calendar days of the date of the party's receipt of the due process complaint. The special education due process hearing officer has up to 5 calendar days from the receipt of the sufficiency challenge to determine whether or not the original complaint notice is sufficient. The special education due process hearing officer shall immediately notify the parents and the LEA in writing of his or her decision.

If the LEA has not sent a PWN to the parent regarding the problem described in the parent's due process complaint notice, the LEA, within 10 days of receiving the complaint, must send to the parent a response that includes: (1) an explanation of why the agency proposed or refused to take the action raised in the complaint; (2) a description of other options that the IEP team considered and the reasons why those options were rejected; (3) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and (4) a description of the other factors that are relevant to the agency's proposed or refused action (34 CFR § 300.508(e)(1)).

A party may amend its due process complaint notice only if: (a) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a resolution meeting; or (b) the special education due process hearing officer grants permission not less than 5 days before a due process hearing occurs. When a complaint is amended the timelines start over.

Within 5 business days prior to a hearing, each party must disclose to the other party any evidence the party plans to use at the hearing, including all evaluations and recommendations based on the evaluation that they intend to use at the hearing. Failure to provide this evidence to the other party in a timely fashion gives the other party a right to request that the special education due process hearing officer prohibit the introduction of the evidence at the hearing.

If the LEA and the parent agreed to the resolution meeting but have not resolved the issues within 30 days of the date the due process complaint was received, the hearing may begin. Note that the meeting is required unless the parent and the LEA agree to waive it. Also, note that, if both parties agree in writing to waive the resolution meeting, the 45 calendar day timeline to complete the due process hearing begins the day after the written agreement is signed.

5. Conducting a due process hearing

The due process hearing must be held at a time and place reasonably convenient to the parent of the child and must be a closed hearing, unless the parent requests an open hearing. The parties shall be notified in writing of the time and place of the hearing at least 5 days prior to the hearing. Both parties have the right to be present at the hearing, as well as be accompanied and advised by legal counsel and people who have special knowledge about children with disabilities.

Parties have the right to confront and cross-examine witnesses who appear in person at the hearing, either voluntarily or as a result of a subpoena by the special education due process hearing officer. Under S. C. Code Ann. § 59-33-90 (2004), special education due process hearing officers have the authority to issue subpoenas related to meeting the requirements set forth in the IDEA. Each party may present witnesses in

person or present their testimony by affidavit if the due process hearing officer agrees, including expert medical, psychological or educational testimony. Each party has a right to prohibit the other party from raising any issue at the hearing that was not raised in the due process complaint notice or in a prehearing conference held prior to the hearing.

Both parties have the right to have a written or, at the option of the parent, an electronic, verbatim record of the hearing. They also have the right to a written, or at the option of the parent, electronic decision, including the findings of facts and conclusions. Both the record of the hearing and the decision of the special education due process hearing officer must be provided at no cost to the parents.

6. Reaching a decision

The 45 day timeline for completion of a due process hearing starts on the day after *one* of the following events occurs:

- o both parties to the due process proceedings agree, in writing, to waive the resolution meeting;
- o the parties begin a resolution meeting or a mediation but agree, in writing, that resolution of their dispute is not possible before the end of the 30 day resolution period; or
- o both parties agreed, in writing, to continue to engage in mediation beyond the end of the 30 day resolution period, but later, one, or both, of the parties withdraws from the mediation.

A special education due process hearing officer may grant extensions of time upon request of either party unless the due process hearing is an expedited hearing. The request must be in writing. Extensions should only be granted for good cause. The concept of good cause does not include negligence, inconvenience, or lack of preparation on the party of the parties. The special education due process hearing officer must notify the parties in writing of the decision to grant or deny the extension request. If the request is granted, the decision must also include a definite date for the timeline to resume.

After the close of the special education due process hearing, the special education due process hearing officer must render a decision on the matter, including findings of fact and conclusions, within 10 calendar days. The decision must be written or, at the option of the parent, must be an electronic decision. Any action of the special education due process hearing officer resulting from a due process hearing shall be final, subject to appeal and review.

A written decision of the result of any hearing must be provided to the LEA and must be sent by certified mail to the parent or attorney of the child. In addition, the special education due process hearing officer must delete personally identifiable information from the report and send a copy to the Office of General Counsel, which must make the decision available to the Special Education Advisory Council. (34 CFR § 300.509(d))

7. Appealing the due process decision

If the LEA or the parents are dissatisfied with the decision of the special education due process hearing officer, either party may file a notice of appeal with the Office of General Counsel not later than 10 calendar days after the date of the receipt of the written decision. A request for an extension to file an appeal (beyond the 10-day time limit) must be made in writing to the Office of General Counsel within 5 days of the receipt of the local decision. Within ten business days of receiving a request for an extension to file an appeal, the state-level review officer may grant the request for good cause shown. The concept of “good cause” may not include negligence or a matter of low priority in filing the request for appeal. In no event will the state-level review officer grant an extension of more than 20 days beyond the original 10-day timeline.

The appeal should include a statement of the decision of the local due process hearing officer, the specific points being appealed, copies of all items entered as evidence, and the names and addresses of the parents if the LEA is appealing the decision. The appealing party may also include written arguments. When parents appeal the decision, the LEA must provide a statement of the decision and copies of all items entered as evidence. The LEA must also provide a written transcript of the local due process hearing to the Office of General Counsel. The Office of General Counsel must appoint a state-level hearing officer and submit to the state-level hearing officer the request for appeal, the transcript, and any other relevant documentation.

The state-level due process hearing officer must conduct an impartial review of the hearing and make an independent decision based on the review. The review officer must conduct the review according to the following requirements:

- o Examine the entire hearing record; an audiotape of the hearing must be made. The LEA must have court reporter to record the proceedings. The LEA is responsible for ensuring that the transcript of the proceedings will be available as required by the state appeal procedures; this includes the provision of advance notice to the court reporter concerning the appeal timelines and the possible need for a quick turnaround time in producing the transcript.
- o Ensure that the procedures at the hearing were consistent with the requirements of due process;
- o Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in 34 CFR § 300.512 apply; and
- o Afford the parties an opportunity for oral or written arguments, or both, at the discretion of the reviewing official.

The decision of the state-level review officer is final unless either party chooses to bring a civil action in either state or federal district court of competent jurisdiction. Personally identifiable information is also deleted from the report, and is made available to the Special Education Advisory Council and to the public by the Office of General Counsel.

8. Stay-put

While the due process hearing is pending, the student involved in the complaint must remain ("stay-put") in the current educational placement, unless:

- o The parents and the LEA agree to a different placement.
- o The proceedings arise in connection with the initial admission of the child to school, in which case the child will be placed in the appropriate regular education classroom or program, unless otherwise directed by a special education due process hearing officer because a child's behavior is substantially likely to result in injury to the student or to others.
- o The student is in an IAES for disciplinary reasons. (34 CFR § 300.533)

See Chapter 8 about suspension and expulsion of students with disabilities for a more complete explanation of stay-put requirements under disciplinary actions. These provisions are addressed in federal regulations (34 CFR § 300.533).

If the due process hearing involves an evaluation or initial services under Part B for a child who is transitioning from Part C services to Part B services and is no longer eligible for Part C services because the child has turned age three, the LEA is not required to provide the Part C services that the child was receiving. However, if the child is found eligible for special education services and related services under Part B, and the parent consents to the initial provision of special education and related services, then the

LEA must provide those special education and related services that are not in dispute between the parent and the LEA.

9. Civil action

After a local due process hearing, or an appeal of that hearing, is completed either the parents or the LEA may pursue a civil action through a state or federal court for reimbursement of attorneys' fees. Federal and state regulations allow the civil action by either party. (34 CFR § 300.516).

10. Attorney's fees

If the parents prevail in the due process hearing or upon appeal, a court may award some or all of the attorney's fees parents have paid in conjunction with the due process hearing. Only a court can award attorney fees to the parents and only if the parents are the prevailing party. Although the special education due process hearing officer has no authority to order attorney's fees, the hearing officer must find that the party seeking attorney's fees is a prevailing party in the action. There may be limitations, however, on the amount of attorney fees ordered by the court. For example, if the court finds that the parents prolonged the process or if the fees charged are more than the hourly rate usually charged, the judge has the authority to reduce the award requested by the parents.

The LEA may be awarded attorney fees if a parent files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation. The LEA may be awarded attorney fees if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation. In determining the amount of the reimbursement of attorney fees, the judge must follow the IDEA regulations (34 CFR § 300.517).

11. Expedited due process hearings

Whenever a due process hearing is requested by a parent to appeal a decision regarding placement for disciplinary reasons, a manifestation determination, or a decision concerning extended school year services or when the hearing is requested by an LEA that believes maintaining the current placement of a child is substantially likely to result in injury to that child or to others, the hearing is considered to be expedited. The LEA is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed. The hearing officer must make a determination within 10 school days after the hearing.

Unless the parents and LEA agree in writing to waive the resolution meeting or agree to use the mediation process a resolution meeting must occur within 7 days of receiving notice of the due process complaint; and the due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint.

The decisions from expedited due process hearings are appealable consistent with 34 CFR § 300.514. When an appeal is made by either the parents or the LEA, the child must remain in the IAES pending the decision of the special education due process hearing officer or until the expiration of the time period (period of disciplinary removal if the behavior is not a manifestation of the disability or period due to removal for special circumstances – drugs, weapons, or serious bodily injury), whichever occurs first, unless the parent and LEA agree otherwise.

12. QUESTIONS AND ANSWERS ABOUT DUE PROCESS HEARINGS

1. May the parents object to the assignment of the special education due process hearing officer by the LEA?

Yes, if the parent has reason to believe the special education due process hearing officer is biased. The special education due process hearing officer would then determine whether or not there were grounds upon which to recuse himself or herself.

2. Do the parents have the right to an attorney at the due process hearing at public expense?

No. However, if the parents are the prevailing party, they may request the court to order attorney fees be reimbursed by the LEA. The law provides for exceptions and limitations as appropriate.

3. May the parents or the LEA ask that their request for a special education due process hearing be withdrawn or dismissed?

Yes. A party that has requested a special education due process hearing may, subsequently, request the action be dismissed.

4. May the special education due process hearing officer award attorney fees?

No. Only a court has the authority to award attorney fees.

5. What if either party disagrees with the decision of the special education due process hearing officer?

If either party wishes to appeal a decision of the due process hearing officer, LEA personnel or the parents may appeal to the Office of General Counsel at the South Carolina Department of Education. If an appeal to the SCDE is unsuccessful, either party may pursue further action through a civil proceeding in a state or federal court of competent jurisdiction.

6. What are some alternatives to due process hearings?

Parents and LEA personnel should always try to resolve differences at the local level. If they wish to use the process of mediation, an impartial third party is assigned to serve as a facilitator in reaching an agreement at no cost to either party. If the parents or an organization wishes to file a complaint alleging the LEA has violated a special education law or regulation, they may do so.

7. When would a complaint be filed instead of requesting a due process hearing?

A complaint would be considered if the parents or any other person or organization wishes to have their complaint against the LEA investigated. Complaints are filed with the SCDE. The complaint must allege a violation of special education law or regulation. The SCDE does not have authority to consider complaints regarding differences of opinion or judgments that do not allege a violation of special education law, federal or state regulation, or policies and procedures (34 CFR § 300.153).

A due process hearing request is usually the last resort. Hopefully, the parties have first attempted all other forms of negotiation or mediation in an attempt to resolve their differences. If all these methods fail, either the parents or the LEA may file a due process hearing request.

8. If a parent or the LEA brings in an “expert witness” can they be reimbursed for this expense by a court of law?

The United States Supreme Court case, *Arlington Central School Dist. v. Murphy*, 126 S. Ct. 2455, 45 IDELR 267 (S.C. 2006), decided that the IDEA attorney’s fees provision did not include any provision for the awarding of expert witness fees. Therefore, a court cannot award recovery of expert witness fees in an IDEA case.

9. How do the timelines for dispute resolution activities differ?

Figure 4

	Mediation	Due Process Complaint	Resolution Period	State Complaint
What is the timeline for resolving the issues?	SBE policy requires mediation sessions be held within 14 days of the date both parties sign the written agreement to engage in mediation.	45 days from the end of the 30-day resolution period unless adjustments made to the timeline	30 days from receipt of parent’s due process complaint unless parties agree otherwise; the first meeting must occur within 15 calendar days of the LEA’s receipt of the due process hearing request	60 days from receipt of complaint by both parties unless an extension is granted

Sample Forms:

Prior Written Notice when parent revokes consent for special education services

Prior Written Notice Under Part B of the IDEA

- Description of the action that the LEA proposes or refuses to take:

The student will no longer receive special education, related, and transition services, such as but not limited to (may state specific services here such as applied behavior analysis (ABA), speech-language, and physical therapy). The student will no longer receive any of the protections of the IDEA, including disciplinary procedures if the student violates the LEA's code of conduct.

- Explanation of why the LEA is proposing or refusing to take that action:

Parent submitted written revocation of consent for special education, related, and transition services.

- Description of each evaluation procedure, assessment, record, or report the LEA used in deciding to propose or refuse the action:

Parent submitted written revocation of consent for special education, related, and transition services to the LEA.

- Description of any other choices that the individualized education program (IEP) team considered and the reasons why those choices were rejected:

NA due to parent request for revocation

- Description of other reasons why the LEA proposed or refused the action:

NA due to parent request for revocation

- Resources for the parents to contact for help in understanding Part B of the IDEA:

Add LEA resources here, including PRO-Parents contact information.

- If this notice is not an initial referral for evaluation, how the parent can obtain a copy of a description of the procedural safeguards:

Refer parent here to resources.

SAMPLE Prior Written Notice for various situations SAMPLE

Prior Written Notice Under Part B of the IDEA

- Description of the action that the LEA proposes or refuses to take: (SOME EXAMPLES INCLUDE)

The district proposes to conduct an individual evaluation to determine the student's initial eligibility for special education services.

The evaluation team recommends that the student be identified as having a disability to receive special education services under the disability classification of autism.

The IEP team recommends that the student receive special education services reflected in the IEP as written (see attached IEP).

The IEP team proposes to cease (stop) providing special education services to the student at the end of the school year .

The IEP team does not agree that it is appropriate to change the student's disability classification from 'Emotional Disturbance' to 'Other Health Impaired.'

The IEP team has refused the parent's request for an independent educational evaluation at public expense.

The IEP team has refused the parent's request to recommend extended school year services.

The school proposes to administer additional assessments to Jane in order to determine why she is not progressing satisfactorily in learning to read.

Joshua has been making steady progress in meeting the annual goals set by the IEP team over the past year. It is now time to look at the skills he has learned in the general curriculum and set new target skill for him to obtain.

This notice is to inform you that Keisha is on track to graduate with a South Carolina diploma. We would like to meet to discuss and develop a summary of performance that Keisha will have for future use along with discussion of student transitioning off the IEP. She is scheduled to graduate on (date) at which time the district will no longer be responsible for Keisha's educational program.

Consent for re-evaluation was sent to you by the district on (date) and again on (date). The notice requests your signature (consent) to initiate reevaluation procedures for Samuel. Should you have any questions or concerns regarding the request please contact (teacher) at (phone number). If we have not received the signed consent form from you by (date), the district evaluation team will begin to conduct the evaluations as indicated below.

Per our conversation on (date), we reviewed and agreed the IEP developed in the (transferring school district) will be implemented as written. Comparable services will be provided in the area of articulation. (30 minutes once per week instead of 15 minutes two times per week.) All other services will remain the same.

- Explanation of why the LEA is proposing or refusing to take that action:

The student was evaluated in this area three months earlier.

The student's hypersensitivity to noise and visual distractions cannot be accommodated in a general education class.

The IEP team determined that the student's delay in reading is attributed to a lack of instruction in reading rather than a disability in this area.

The evaluation data indicate that the student does not meet the eligibility criteria for a child with a disability.

The evaluation team reviewed existing information about Jane's past reading instruction and

performance as provided by her teacher, the school reading specialist, and you (her parents). The team feels it needs additional information before making a decision about special education eligibility and appropriate interventions.

In order to determine if Joshua continues to be a student with a disability and continues to require special education, , we need to conduct a comprehensive reevaluation. As discussed on the phone, (date), you requested the district to conduct additional behavior evaluations. After discussing this request with Joshua's teachers and reviewing further discipline data, there was no evidence of interfering behaviors in the educational setting; therefore, we cannot support the need for additional evaluation in this area. However, your concerns regarding behavior will be discussed at the IEP meeting.

Lindsay will be exiting (aging out) of the districts educational program on June 30, 20-- at which time the district will no longer be responsible for Lindsay's educational program. We would like to meet to discuss and develop a summary of performance that Lindsay will have for future use along with discussion of student transitioning off the IEP.

In discussing your request with Brittany's teachers, the team could see no beneficial reason for moving her from the general classroom setting to the resource room for math as requested. She currently in working at grade level (4.2) and is receiving C+ for the quarter. She has some difficulty with fractions, but is provided a conversion chart to use as a guide. Brittany is very willing to ask for assistance from the paraprofessional and/or teacher when having difficulty. The district team has determined it would not be in Brittany's best interests to remove her from her peers at this time.

Due to the results of a recent district wide screening, and the importance of early intervention services, the district feels there is a need for further testing to determine possible eligibility for special education services. Anthony is currently enrolled and attending our district's general education preschool program and Mrs. Smith, his teacher, also has concerns dealing with his possible developmental delays. Our district must receive your signed permission in order to conduct this evaluation.

- Description of each evaluation procedure, assessment, record, or report the LEA used in deciding to propose or refuse the action:

The IEP team recommends that the student receive special education services based on the results of a reevaluation of his speech/language skills which included an assessment of articulation and fluency, an oral-motor assessment and a hearing test.

The recommendation for a behavioral intervention plan (BIP) and the addition of counseling as a related service is based on the results of a functional behavioral assessment (FBA) which included behavioral observations, parent and student interviews, a psychological evaluation and data collected on the student's behaviors in each of his academic classrooms over a three-day period.

The recommendation for services was based on a reevaluation of the student, which included a psychological evaluation, educational assessments, progress reports and observations of the student in English, math and science classes and an independent evaluation of learning disabilities dated 9/12 provided by the parent.

For an Initial or Reevaluation - Description of the Proposed Initial or Reevaluation and the Uses to be Made of the Information:

Prior written notice for an initial or reevaluation must include a description of the proposed evaluation/reevaluation and uses to be made of the information. Examples include:

A FBA will be completed to ascertain the physical, mental, behavioral and emotional factors which contribute to the student's suspected disabilities. The FBA will assist the IEP team in determining if a BIP should be developed in order to address any of the student's behaviors that impede his/her learning or that of others .

A vocational assessment that includes a review of school records, teacher assessments and parent and student interviews will be completed in order to determine vocational skills, aptitudes and interests of the student. This information will assist the IEP team in identifying the student's post-secondary goals and transition activities needed to prepare the student to meet those goals.

The team considered using only existing data, but determined that it lacked critical information that could have an impact on the eligibility and intervention decisions.

The following assessments will be administered to Jane: a test of academic achievement, a phonemic awareness test, and a test of general aptitude.

Description of any other choices that the individualized education program (IEP) team considered and the reasons why those choices were rejected:

A resource room program was considered but not recommended because of Richard's need for intensive specialized instruction to address his difficulties with verbally presented information.

Consultant teacher services were considered but not recommended due because Pedro's need for specially designed instruction throughout the school day to address his problems processing verbally presented information and his inability to recall information.

Placement in a special education class was considered but not recommended as Anne has been able to maintain her attention to task and to progress in general education classes when provided with written notes to accompany the teacher's instruction.

Results of the evaluation indicate that the student's needs can be met with supplemental support services in the general education classroom.

The district evaluation team considered administering a new ability test for use in determining continued eligibility. However, the scores from the two previous evaluations were very consistent and we do not feel another evaluation is necessary.

Many strategies have been implemented at school to assist Johnny. He has a stabilizing chair in the classroom, has attended reading recovery and receives direct instruction to develop his reading skills. One to one assistance is provided to Johnny to understand and complete his classroom assignment.. Johnny continues to struggle with academic and speech despite the use of these strategies. The team will discuss

new strategies or additional strategies needed for Johnny to show progress.

- Description of other reasons why the LEA proposed or refused the action:

Marci's age and physical limitations were considered in the Team's recommendation.

Donny's parents expressed concern that he needs peers who model socially- appropriate behavior.

Classroom observations confirm that Donny often mimics behaviors of other students.

Sandra expressed that she feels embarrassed when a one-to-one aide works with her in the classroom.

Cassandra is reading at grade level.

The IEP Team offered to hold another meeting to review your concerns.

At the last IEP team meeting, it was determined that the student was benefiting from special education and progressing in the general curriculum in all subjects except math. The Team proposed additional goals and services to address this area of need.

- Resources for the parents to contact for help in understanding Part B of the IDEA:

Add LEA resources here, including PRO-Parents and/or other outside organizations contact information.

- If this notice is not an initial referral for evaluation, how the parent can obtain a copy of a description of the procedural safeguards:

Refer parent here to resources.

SAMPLE Prior Written Notice of Agreement to Amend IEP without a meeting

In making changes to a child's IEP after the annual team meeting for a school year, the parent of a child with a disability and the school may agree not to convene an IEP team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP. 34 C. F. R. § 300.324(a)(4)(i). The requirements of prior written notice apply even if the IEP is revised without convening an IEP Team meeting.

Prior Written Notice Under Part B of the IDEA

- Description of the action that the LEA proposes or refuses to take:

_____ (Parent) and _____ (District) conferred on _____ by telephone and agreed to amend (Student)'s IEP without a meeting as permitted by 34 C. F. R. § 300.324(a)(4)(i). the District proposed the following actions (amended IEP):

**insert changes*

- Explanation of why the LEA is proposing or refusing to take that action:

**insert reasons*

- Description of each evaluation procedure, assessment, record, or report the LEA used in deciding to propose or refuse the action:

**List all data. There must be some data to support the change.*

- Description of any other choices that the individualized education program (IEP) team considered and the reasons why those choices were rejected:

** List all alternate choices and why rejected.*

- Description of other reasons why the LEA proposed or refused the action:

In making changes to a child's IEP after the annual team meeting for a school year, the parent of a child with a disability and the school may agree not to convene an IEP team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP. 34 C. F. R. § 300.324(a)(4)(i). The annual IEP meeting was held on _____ and is still current. These amendments modify or amend the child's current IEP.

The person responsible for informing the IEP team and those responsible for implementing the IEP changes is _____.

(Insert other factors)

- Resources for the parents to contact for help in understanding Part B of the IDEA:

Add LEA resources here, including PRO-Parents contact information.

- If this notice is not an initial referral for evaluation, how the parent can obtain a copy of a description of the procedural safeguards:

Refer parent here to resources.

Appendix A: Surrogate Parent Guide

Surrogate Parents



South Carolina Department of Education Office of Exceptional Children

Mick Zais, Ph.D.
State Superintendent of Education

October 2011

INTRODUCTION

Under the mandates of the Individuals with Disabilities Education Act (IDEA), the South Carolina Department of Education (SCDE) is responsible for all education programs for children with disabilities administered within the state. Specifically, the SCDE is charged with the responsibility of ensuring that all school districts/agencies providing special education and related services for students with disabilities not only carry out the mandates of the IDEA but also meet all additional requirements imposed by the state of South Carolina (34 C.F.R. § 300.149).

The IDEA was enacted to protect the rights of children with disabilities and ensure they receive a free appropriate public education (FAPE). The role of parents in the planning and delivery of services to students with disabilities is critical. A student who does not have a parent or guardian to represent his or her interests in the special education process and make educational decisions for the student, has the right to have a surrogate parent appointed to ensure the child's rights are represented. This guidance document reflects the updated requirements of the IDEA with regard to surrogate parent eligibility and appointment. It also outlines the responsibilities of surrogate parents and school districts/agencies.

DEFINITIONS AND EXPLANATIONS

A-1. How does South Carolina law define “parent”?

South Carolina law defines “parent” as a biological parent, adoptive parent, step-parent, or a person with legal custody.

A-2. How does the Individuals with Disabilities Education Act (IDEA) define “parent”?

The IDEA defines “parent” as:

- (1) A biological or adoptive parent of a child;
- (2) A foster parent, unless state law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;
- (3) A guardian generally authorized to act as the child’s parent, or authorized to make educational decisions for the child (but not the state if the child is a ward of the State);
- (4) An individual acting in the place of a biological 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
- (5) A surrogate parent who has been appointed in accordance with the IDEA regulations at 34 C.F.R. § 300.519 or section 639(a)(5) of the IDEA.

A-3. What is a surrogate parent?

A surrogate parent is an adult, other than a child’s parent, appointed to represent the educational interests of a student who may be or who has been determined eligible for special education and related services.

A-4. To whom does the right to have a surrogate parent apply?

The IDEA affords students with disabilities the right to have a surrogate parent appointed.

A-5. Are students who have not yet been determined to qualify for special education and related services entitled to a surrogate parent?

A student who is suspected of having a disability that qualifies him or her for special education and related services may have a surrogate parent appointed for him or her during the evaluation process. The surrogate parent may represent the student in all matters relating to education, including identification and evaluation.

SURROGATE PARENT QUALIFICATIONS

B-1. What are the qualifications of a surrogate parent?

A surrogate parent must have knowledge and skills that ensure adequate representation of the child.

A surrogate parent may not be an employee of the state educational agency (SEA), the local educational agency (LEA), or any other agency that is involved in the education or care of

the child. In addition, the surrogate parent may not have any personal or professional interest that conflicts with the interest of the child the surrogate parent represents.

B-2. What constitutes a conflict of interest?

A qualified surrogate parent may not be an employee of either the school district/agency or any public and private agency involved in the education or care of the child. An otherwise qualified surrogate parent should have no other interests that conflict with the interest of the child represented. An individual may have a conflict of interest if he or she is also responsible for other children who may have competing interests or if he or she holds a position that might restrict or bias the ability to act on behalf of the child's best interests.

B-3. Can an employee of the South Carolina Department of Social Services (DSS) serve as a surrogate parent?

No. The IDEA explicitly excludes employees of any agency that is involved in the education or care of the child from serving as the child's surrogate parent.

B-4. Can a group home or residential treatment facility (RTF) staff member serve as a surrogate parent?

No. Operators and staff of group homes and residential treatment facilities may not serve as surrogate parents because of the requirement that surrogate parents have no interest that conflicts with the interest of the child represented. Persons who are employees of a group home or residential treatment facility are involved in the care of the child and are thus not eligible to serve as surrogate parents.

B-5. Can a foster care or therapeutic foster care parent serve as a surrogate parent?

Yes. A foster parent is not considered an agency employee involved in the care of a child solely because he or she receives payment for the child cared for in the foster home. However, if the foster parent meets the definition of a parent under the IDEA, it is not necessary for the foster parent to be appointed as a surrogate parent. Note: If the foster parent does not have an "ongoing, long-term parental relationship" with the child or is unwilling to represent the child's educational interests, the school district/agency may need to appoint a surrogate parent to do so.

B-6. Can an individual appointed as a guardian *ad litem* serve as a surrogate parent?

The role of a guardian *ad litem* is typically to represent the best interests of a child in court proceedings. The comments to the IDEA regulations issued on August 14, 2006, clarify that guardians *ad litem* may have limited appointments that do not qualify them to act as a parent of the child generally or to make educational decisions for the child. The comments further clarify that what is important is the legal authority granted to the individual by the court, rather than the term used to identify the individual. Thus, a school district/agency should only consider a guardian *ad litem* as the parent if s/he generally is authorized to act

as the child's parent or specifically is authorized to make educational decisions for the child.

Whether a guardian *ad litem* should be appointed as the surrogate parent is a question that must be answered on a case-by-case basis after reviewing court documents related to the terms of appointment and after determining whether the individual meets the criteria for serving as a surrogate parent as outlined in the IDEA.

B-7. Can a surrogate parent reside outside the school district/agency involved in the education of the child?

A surrogate may live outside the school district/agency involved in the educational process of the child as long as he or she meets the requirements for serving as a surrogate parent.

SURROGATE PARENT RESPONSIBILITIES AND RIGHTS

C-1. What are the duties of a surrogate parent?

A surrogate parent represents the child in all matters relating to the identification, evaluation, and educational placement of the child and the provision of a FAPE. Examples of activities that surrogate parents may be involved in include, but are not limited to, giving or refusing consent for the initial evaluation, reevaluations, and initial placement of the child in special education; reviewing all educational records and reports related to the child; participating in and contributing to the child's evaluation, eligibility determination, and placement; participating in the development, review, and revision of the child's individualized education program (IEP); and initiating dispute resolution proceedings (e.g., filing a written complaint or requesting mediation or a due process hearing) when disputes arise concerning the identification, evaluation, placement, or provision of a FAPE.

A surrogate parent should meet the student and his or her teachers; become familiar with the child's background, abilities, and needs; become familiar with the school district's/agency's procedures for providing services to students with disabilities with disabilities and the procedural safeguards available to parents; participate in all educational meetings regarding the student; and help to make educational decisions for the child.

The duties of a surrogate parent are limited to matters related to the provision of a FAPE.

C-2. What rights does a surrogate parent have in the special education process?

A surrogate parent has the same rights and procedural safeguards as a parent of a student with disabilities. The surrogate parent has the right to receive notice of, give consent to, and participate in educational decisions and proceedings.

CIRCUMSTANCES REQUIRING THE APPOINTMENT OF A SURROGATE PARENT

D-1. When must a surrogate parent be assigned to a child?

A surrogate parent must be appointed when no parent or guardian can be identified; the school district/agency, after reasonable efforts, cannot locate a parent; the child is a ward of the state under the laws of the state of South Carolina; or the child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)).

D-2. Do students with disabilities who live with foster parents need surrogate parents? See previous comment.

No. If the foster parent meets the definition of “parent” under the IDEA, it is not necessary to appoint the foster parent as a surrogate parent. Note a foster parent is not considered to be an employee of an agency providing education or care to the child solely because he or she receives payment for a child cared for in the foster home. (...and if the foster parent does not meet the definition of a parent?)

D-3. Can a foster parent who is employed by the same school district/agency in which the foster child attends school still make educational decisions for the child?

Yes. Employees of state and local educational agencies are only barred from serving as surrogate parents. They are not barred from acting as the parent of a child in their care.

D-4. Do students with disabilities who reside in group homes or residential treatment facilities need surrogate parents?

If the parent or guardian of a student residing in a group home or residential treatment facility has retained the rights to make educational decisions for the student, a surrogate parent would not be appointed. If, however, a student residing in a group home or RTF is in the custody of the state and the student’s parent or guardian is prohibited by court order from making educational decision for the student, a surrogate parent must be appointed.

In the case of a child who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs may be appointed as temporary surrogate parents without regard the requirements, until a surrogate parent can be appointed that meets all of the requirements. The school district/agency must make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after determining that the child needs a surrogate parent.

D-5. Do students with disabilities who reside with grandparents or other relatives need surrogate parents?

No. Children who live with their grandparents or other relatives may be represented in educational matters by these individuals. Therefore, surrogate parents are not required.

D-6. Can a parent or legal guardian request the appointment of a surrogate parent?

In cases where a parent is unresponsive, lives a great distance from their child's school, or is incarcerated, the school district/agency may obtain written authorization from the parent to appoint a surrogate parent to represent the child after the initial consent for placement is obtained or after the decision for placement to take effect is made by a hearing officer. (What does this mean? Special education due process hearing officers can no longer order students into a special education program if the parent refuses placement or fails to respond. Is this wording referencing another scenario and placement?) Parent permission for the appointment of a surrogate must be voluntary and explicitly authorized in writing and is revocable at any time. The surrogate, once appointed, may then represent the child until such time as the parent revokes authorization.

D-7. Does a student need a surrogate parent after reaching the age of majority?

No. When a student reaches the age of majority (18 years of age in South Carolina) parental rights in the special education process transfer to the student. However, if the student is determined incompetent under state law to make educational decisions, and parental rights have therefore not transferred to the student, or to another named guardian, a surrogate parent must be appointed.

APPOINTMENT AND OVERSIGHT OF SURROGATE PARENTS

E-1. Who may file a request for the assignment of a surrogate parent?

- Any employee of a school district/agency or public agency,
- Any employee of the SCDE, or a residential school or hospital,
- any physician, judicial officer,
- or other person whose work involves the education or treatment of children
- and who knows a child needing special education services
- **and** who knows that the parents or guardians are either not known or cannot be located or that the child is a ward of the state,

may file a request for assignment of a surrogate parent. This request must be made to the school district/agency involved in the child's educational process.

E-2. Who is responsible for appointing a surrogate parent?

The school district/agency involved in the child's educational process is required to appoint a surrogate parent. Surrogate parents will be selected by the school district/agency superintendent or chief administrative officer or his/her designee. School districts/agencies must have a method for determining whether a child needs a surrogate parent and for assigning a surrogate parent to the child. The school district/agency must maintain a list of people eligible to serve as surrogate parents.

In the case of a child who is a ward of the state, the surrogate parent may be appointed by the judge overseeing the child's case, as long as the surrogate meets the requirements of a surrogate parent.

E-3. What is the timeline for appointing a surrogate parent?

The IDEA requires that the SEA make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after there is a determination by a school district/agency that the child needs a surrogate.

E-4. Must the request for the appointment of a surrogate parent be in writing?

Although there is no requirement in state or federal law that the request for the appointment of a surrogate parent be made in writing, the submission of a written request is best practice.

E-5. If a student with a surrogate parent transfers to another school district/agency, can the surrogate parent continue to serve the student?

Yes. As long as the school district/agency determines that the surrogate parent can still adequately represent the student, the surrogate parent may continue in the appointment.

E-6. May a surrogate parent represent more than one student?

Yes. Depending on the availability, ability, and interest of the surrogate parent to serve more than one.

E-7. May a school district/agency pay a surrogate parent to represent a student?

Yes. The school district/agency may compensate or make arrangements for the compensation of surrogate parents when they are utilized. A surrogate parent is not an employee of the school district/agency solely because he/she is paid to serve as a surrogate.

E-8. Who provides oversight of surrogate parent appointments and representation?

Each school district/agency is responsible for providing oversight to ensure that the appointment of a surrogate parent is appropriate and that the representation provided by a surrogate parent is adequate. Also, both the SCDE and the school district/agency is responsible for providing oversight to ensure that school districts/agencies comply with both federal and state requirements related to surrogate parents.

E-9. What are a school district's/agency's responsibilities to a surrogate parent?

Each school district/agency should ensure that surrogate parents meet the necessary qualifications; are properly trained; and actively participate in the special education decision-making process.

E-10. How should a surrogate parent be matched to a student?

To the extent possible, the school district/agency should appoint a surrogate parent who is capable of understanding the cultural and linguistic background of the child.

E-11. How should a school district/agency document the appointment of a surrogate parent?

The appointment of a surrogate parent must be in writing. School districts/agencies may elect to develop their own form for making appointments or use the sample form available from the Office of Exceptional Children.

RECRUITMENT AND TRAINING

F-1. Who is responsible for recruiting and training surrogate parents?

The school district/agency is responsible for recruiting, training, and appointing surrogate parents.

F-2. How often should training for surrogate parents be provided?

School districts/agencies should conduct training for surrogate parents as often as necessary to ensure the adequate representation of children in need of surrogate parents. Similarly, school districts/agencies should recruit surrogate parents as often as necessary to ensure that there is a sufficient number of surrogate parents available for children in need of surrogate parents.

F-3. What topics should be addressed by surrogate parent training?

School districts/agencies are responsible for designing their own surrogate parent training program. In light of the surrogate parent's responsibilities to represent the child in all matters related to the identification, evaluation, and educational placement of the child and the provision of a FAPE to the child, training topics should include an overview of South Carolina's criteria for determining a student's entry into a special education program; the IEP development, review, and meeting process; least restrictive environment (LRE); FAPE; procedural safeguards; dispute resolution options; and the confidentiality of student records.

F-4. How does a person become a surrogate parent?

Each school district/agency should have procedures for recruiting and training qualified individuals to serve as surrogate parents. Individuals interested in serving as a surrogate parent should contact the special education director for the school district/agency.

TERMINATION

G-1. What is the length of a surrogate parent's appointment?

A surrogate parent continues in his/her appointed role until the child is determined to be no longer eligible for special education and related services; the legal guardianship of the child is assigned to a person who is able to assume the role of parent; either the identity or the whereabouts of the parent that was previously unknown becomes known; the child reaches the age of majority and rights transfer to the student; or a need to appoint a different surrogate parent arises.

G-2. Can a surrogate parent's appointment be terminated?

Yes. The appointment of a surrogate parent can be terminated under any of the circumstances referenced in G-1 or when a surrogate parent is determined to no longer be adequately representing the child or requests termination of his or her appointment.

G-3. What is the process for terminating a surrogate parent appointment?

As with the appointment of a surrogate parent, the termination of a surrogate parent's appointment must be in writing and should identify the reason(s) for the termination.

SAMPLE FORM

**DETERMINATION OF NEED/ASSIGNMENT
FOR SURROGATE PARENT**

School District/Agency: _____

Date of Request: _____

Name of Child: _____ DOB: _____

A surrogate parent must be appointed based on one of the findings below:

_____ The child is a ward of the state.

_____ The child is an unaccompanied homeless youth as defined in Section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434 a (6)).

_____ No parent or guardian can be identified or located.

_____ The child's parent(s) requests that a surrogate be appointed to represent the child in educational decisions.

Based on the above findings, _____, has been assigned as a surrogate parent for this child to represent him or her in all matters relating to the identification, evaluation, placement, and the provision of a free appropriate public education to the child. This person certifies that he or she:

- Has no personal or professional interest that conflicts with the interests of the child.
- Has knowledge and skills that ensure adequate representation of the child.
- Is capable of becoming thoroughly acquainted with the child's educational needs.
- Is capable of understanding the cultural and linguistic background of the child.
- Is not an employee of the SCDE, the school district/agency, or any other agency (public or private) involved in the education or care of the child.
- Is not an employee of the school district/agency solely because he or she is paid to serve as a surrogate parent.

Date Sent: _____ To _____

Sent By: _____

Please review the following statements prior to signing below.

Revised March 2013

I certify that I meet all the requirements of a surrogate parent and that I have received training from the school district/agency to serve as a surrogate parent.

I agree to serve as surrogate parent for:

Name of Child

Signature

Date Signed

Appendix B: When a Child Grows Up: The Legal Effects of Becoming an Adult

Example of Information to Provide to Parents at Age of Majority provided by Protection and Advocacy for People with Disabilities, Inc.



3710 LANDMARK DRIVE, SUITE 208, COLUMBIA, SC 29204
(803) 782-0639; FAX (803) 790-1946
IN STATE TOLL FREE: 1-866-275-7273 (VOICE) AND 1-866-232-4525 (TTY)
E-mail: info@pandasc.org
Website: www.pandasc.org

P&A FACT SHEET

WHEN A CHILD GROWS UP

THE LEGAL EFFECTS OF BECOMING AN ADULT

When a child turns 18, he or she becomes entitled to the legal rights and duties of an adult. Generally, it does not matter whether the person has a disability. At age 18, a person is considered to be capable of making his or her own decisions unless a court has decided that the person is incompetent. This information sheet describes some of the legal effects of becoming 18, as well as some adult rights that apply even before age 18.

1. AGE OF MAJORITY IS 18:

The South Carolina Constitution, Article XVII Sec. 14, states that individuals become legal persons at 18. Generally, adult citizens have the right to: vote, serve on juries, enter into contracts, decide where to live, make health care decisions and make a will. (This does not include the right to purchase alcoholic beverages until age 21)

2. SPECIAL EDUCATION:

a. Maximum age 21: The right to be in public school continues until age 21. Generally, if the 21st birthday occurs after school starts, a student can enroll and finish that school year. If the 21st birthday occurs prior to the start of the new school year, the student is not eligible to enroll that year. SC Code Ann 59-63-20 (2) states that when a student is in the graduating class and becomes 21 before graduation, the student is allowed to stay in school and graduate. Based on this law, students with disabilities who have not graduated may continue to receive special education until the end of the school year in which they turn 21.¹

¹ SC Code Ann 59-33-10 states that education for children with disabilities will be provided in public schools between the ages designated in §59-63-20.

b. IDEA rights transfer to student at 18: At age 18, the right to make decisions about special education transfers to the student from the parents.² For example, when a student turns 18 he or she starts signing the Individualized Education Program (“IEP”) plan. Parents still keep their right to receive notices from the school and to have access to the student’s school records.³ A student who is 18 or over may sign a power of attorney giving parents or another adult the authority to exercise the student’s education rights. If a student who is age 18 or over has a court-appointed guardian, the guardianship order may include authority to make educational decisions for the student. At least one year before a student turns eighteen; schools must notify the student and parents about the upcoming transfer of rights to the student. The transfer of rights is further described in The Parent Guide to Special Education Services in South Carolina. The Guide is available at the “Parent Resource” section of the website of the SC Department of Education: <http://www.ed.sc.gov/agency/Standards-and-Learning/Exceptional-Children/>

c. Transition services prior to age 18: At age 18 many students leave high school to go to work or college. So, beginning at age 13 in South Carolina, special education IEPs must include goals and services needed to transition the student from school to later life. Post-high school activities may include post-secondary education (college), vocational training, employment, and independent living skills.⁴ For example, the IEP team may do transition planning to decide if the student will take classes leading to a regular high school diploma or an alternative diploma (e.g. employment diploma). Transition planning can begin earlier than age 13 if the IEP team determines it is appropriate. The school must invite the student to attend IEP meetings where transition services are discussed and identify any other agency being invited to attend the IEP meeting (such as the Department of Vocational Rehabilitation).

d. Rights to school records: The Family Educational Records and Privacy Act of 1974 and its regulations give parents the right to access school records, the right to confidential treatment of records, and the right to seek correction of records. These rights pass to the student at age 18. Parents continue to have access to records of a student who is still their income tax dependent.⁵

3. HEALTH CARE DECISIONS:

² Individuals with Disabilities Education Act (IDEA), 20 U.S. Code 1415 (m); 34 Code of Federal Regulations Section 300.520; and SC Code Ann. Regulation 43.243 V 21

³ The Family Educational Rights and Privacy Act (FERPA) 20 U.S. Code 1232g et seq., also provides parents with access to student records if the student continues to be a dependent of the parent for tax purposes.

⁴ IDEA: 20 US Code § 1414 d(1)(A)(i)(VIII), and SC Code Ann. Regulation 42.243 IV D 3 (b)(2)

⁵ 34 Code of Federal Regulations Part 99

- a. Age 16. A child is able to consent to all his/her own health care decisions except operations.⁶
- b. Age 18. As an adult, a person makes all his/her own health care decisions, unless incapable because: (1) a court has previously declared the person incapacitated and appointed a guardian OR (2) under the South Carolina Adult Health Care Consent Act, two physicians⁷ (in emergency circumstances just one) have determined the person is unable to consent. Then health care decisions for the person are made either by (a) someone who holds a medical power of attorney from the person or (b) family members in the order named in the law. Unless a single person has adult children, the person's parents continue to be primary decision makers.⁸

4. GUARDIANSHIP/CONSERVATORSHIP:

If person of any age is unable to make decisions about personal affairs OR about property, a court can declare the individual an "incapacitated person" (incompetent).

- a. Guardianship relates to personal affairs, such as health care decisions or where to live. It can also include the right to make educational decisions. If guardianship is ordered, the person is called a "ward" and the person exercising authority is called the "guardian." The court cannot give more authority to the guardian than is actually necessary.⁹
- b. Conservatorship: If a person is unable to take care of business/financial affairs, a court may appoint a "conservator." A person who has a conservator is called a "protected person."
- c. Procedure: Both guardianship and conservatorship are handled in probate court. Both involve examination by two persons, including at least one physician. The examiners then testify whether they believe person is or is not incapacitated. The person has the right to an attorney. The court can order either or both guardianship/conservatorship depending on what is needed. If a person has a guardian, but not a conservator, the guardian has basic authority to handle the person's financial matters.
- d. Legal settlements over \$25,000: Must be approved by circuit court to ensure they are in the best interest of any incapacitated person. Example: motor vehicle accident settlement with insurance company, even if the case is otherwise being settled "out of court."

5. SOCIAL SECURITY:

- a. After age 18, only a person's own income/resources affect eligibility: Many children with disabilities are not eligible to get Supplemental Security Income (SSI), because

⁶ SC Code Ann. 20-7-280

⁷ Or just one physician in emergency circumstances

⁸ SC Code Ann. 44-66-20 and following.

⁹ SC Code Ann 62-5-101; 62-5-304; and 62-5-503 and following.

eligibility depends on (1) having a disability and (2) having only limited income and property. Until age 18, a part of the parents' income/property is counted as belonging to their child. Unless the parents have very low income/property, a child may be disqualified. An 18 year old should apply for SSI as an adult. In 2009, the SSI benefit was \$674 per month and in South Carolina automatically qualifies a person for Medicaid health coverage.

Note: An adult can work and earn some income without losing SSI. Complex formulas exist that exclude some earnings and even allow some income to be "saved" for education or transportation expenses. Individuals should get advice about how working could affect the amount of SSI they get. The Social Security Administration has free counselors known as Community Work Incentive Coordinators (CWICs). You can find one of them by checking the P&A fact sheet "Community Work Incentive Coordinators." It is available in the News and Resources section of the P&A website: www.pandasc.org

b. Reduction of SSI for adults living rent free: If a person on SSI is living rent free in someone else's home, Social Security may reduce the SSI payment up to 1/3. This includes an adult child who continues to live with his/her parents. However, if the person pays reasonable rent to parents, there will be NO reduction in SSI. When child becomes 18, consider setting up a lease. Money paid as rent can be used to benefit the SSI recipient for anything other than food, clothing or shelter. It can be used for medical expenses, travel etc. without causing problems. Small household or personal items can also be given without affecting SSI. Caution: rent paid to the parents may count as income on their tax return.

c. Representative Payee: If a child under 18 receives SSI, it is payable to his/her parent or guardian. Once a person is 18, it is payable directly to him/her. If a physician determines that the person is incapable of handling SSI, Social Security allows a representative payee to be appointed. A court order is not necessary. A parent/family member is the most common person designated as a representative payee. It can be a private organization or the Department of Social Service in some counties. The "Rep payee" receives the SSI check and controls how it is spent. If a physician later determines the person IS capable of handling his/her own SSI check, Social Security can be notified and the check can start going directly to the individual with the disability.

For information, call Social Security (800) 772-1213 (voice) or 1-800-325-0778 (TTY) or go to their website at: www.ssa.gov

6. VOTING:

At age 18, a person is presumed eligible to vote. The SC Constitution, Article II, Section 4 states: "Every citizen of the United States and of this State of the age of eighteen and upwards who is properly registered is entitled to vote as provided by law" (emphasis added). Having a disability does not disqualify a person from voting (unless that person has been declared incompetent by a court). He/she can register at the local voter

registration board or at most public agencies (Department of Social Services, Department of Motor Vehicles etc.). When it comes time to vote, a person with a disability may vote at regular polling places. The voter may have an assistant help in the voting booth. A person may also vote in advance by requesting and then sending back an absentee ballot if the person has a disability or meets other requirements for using an absentee ballot.

7. SELECTIVE SERVICE (THE "DRAFT"):

Federal law requires ALL men between 18 and 26 to register for the draft. There is no exemption for physical or mental or cognitive conditions. However, if a man is hospitalized, institutionalized, homebound, or would not comprehend the nature of registration, evidence can be sent to Selective Service. The case will be reviewed to see if registration will be required.

Register by:

- (a) Returning a Selective Service card, if it is received in the mail;
- (b) Getting a Selective Service card at a post office and mailing it;
- (c) Signing up at high school;
- (d) Registering "on line."

Failure to register is a crime that could be prosecuted AND will result in being permanently barred from student financial assistance ("student loans"), federal job training programs, and most federal employment. Individuals may be excused from these penalties if they are later able to convince the Selective Service program that their failure to register was not "knowing and willful." See information available at <http://www.sss.gov/> or write to the Selective Service System at P.O. Box 94638, Palatine IL 60094-4638. Telephone: 847 688-6888 or 888 655 1825 (voice); 847 688-2567 (TTY)

8. MAKING A WILL:

Generally, anyone can make a will once he/she turns 18, even if the person has a disability. SC law states any person "who is of sound mind and who is not a minor....may make a will."¹⁰ Knowing if someone is "of sound mind" can be a difficult. Witnesses who sign their names to a will must be able to say they believe the person was "of sound mind." Whether a person was "of sound mind" is ultimately decided by the probate court. If the court decides the person was not "of sound mind" when the will was signed, the will is not valid. The deceased person's property is then be disposed of according to state law covering people who die without a will.¹¹

A disability that keeps a person from personally signing a will is not a problem. SC law allows a person to direct someone else to sign the person's name for him/her.

¹⁰ SC Code Ann 62-2-501. A "minor" is defined in SC Code Ann 62-1-201(24) as a person under age 18, except individuals under 18 are NOT minors if they are married or have been declared "emancipated" by a court order.

¹¹ SC Code Ann 62-2-101 and following

Because making a will correctly is so important, individuals with disabilities should always consult with an attorney when making a will.

This publication provides legal information, but is not intended to be legal advice. The information was based on the law at the time it was written. As the law may change, please contact P&A for updates.

This publication is funded by the US Department of Health and Human Services (Substance Abuse and Mental Health Services Administration and the Administration on Developmental Disabilities) and by the US Department of Education (Rehabilitation Services Administration). It does not necessarily represent the views of the funding authorities.

P&A does not discriminate on the basis of disability, race, gender, or national origin in the provision of its programs or services. Pete Cantrell is P&A's designated coordinator for Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act. October 2009-GENERAL

Appendix C: Non-regulatory Guidance on the Provision of Equitable Services to Parentally-Placed Private School and Home-Schooled Students with Disabilities

Purpose of this Guidance

The Individuals with Disabilities Education Act (IDEA) requires each local educational agency (LEA) to locate, identify, and evaluate all students with disabilities enrolled by their parents in private, including religious, elementary and secondary schools located in the LEA. In carrying out this requirement, each LEA must effect timely and meaningful consultation with private school representatives prior to implementing child find activities to determine the number of parentally-placed students with disabilities attending private schools located within the jurisdiction of the LEA. Because South Carolina treats students with disabilities in home schools in the same manner as parentally-placed students with disabilities in private schools, with regard to the provision of special education and related services, LEAs must also effect timely and meaningful consultation with representatives of home-school organizations and representatives of parents of students in home-school programs.

This guidance is intended to assist school districts, parents of students with disabilities in private and home-school programs, representatives of private and home schools, representatives of parents of parentally-placed private school and home-schooled students, and other entities in understanding LEAs' responsibilities in the provision of equitable services to eligible parentally-placed private and home-schooled students with disabilities.

What is the definition of parentally placed private school children with disabilities?

34 CFR §300.130 defines parentally placed private school children with disabilities as children with disabilities enrolled by their parents in private, including religious, schools or facilities that meet the definition of elementary school in §300.13 or secondary school in §300.36, other than children with disabilities covered under §§300.145 through 300.147 (those sections refer to students with disabilities in private schools placed or referred by public agencies.)

What is a private school?

South Carolina defines a private school as: "a school established by an agency other than the State or its subdivisions which is primarily supported by other than public funds, and the operation of whose program rests with other than publicly elected or appointed officials" (S.C. Code Ann. § 59-1-110 (2004)). *The definition of private schools includes parochial schools and home-school programs.*

Additionally, South Carolina defines elementary and secondary schools as follows: (1) "Elementary school" means any public school which contains grades no lower than kindergarten and no higher than the eighth. (2) "Secondary school" means either a junior high school or a high school. (3) "High school" means any public school which contains grades no lower than the seventh and no higher than the twelfth. (4) "junior high school" shall be considered synonymous with the term "high school" (S.C. Code Ann. § 59-1-150 (2004)).

IDEA at 34 CFR §300.13 defines "elementary school" as a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education under State law.

IDEA at 34 CFR §300.36 defines “secondary school” as a nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education under State law, except that it does not include any education beyond grade 12.

South Carolina’s statutory definition of “elementary school” does not include preschool programs. Charter schools in South Carolina are considered part of the LEAs and are not private schools.

A. Consultation

Consultation involves communication and discussions between LEAs and private and home-school representatives and representatives of parents of parentally-placed private and home-schooled students on key issues relevant to the proportionate share of federal funds set aside to serve parentally-placed private and home-schooled students with disabilities. Meaningful consultation provides a genuine opportunity for all parties to express their views, to have their views seriously considered, and to discuss viable options for ensuring the provision of equitable services to parentally-placed and home-school students with disabilities. Adequate notice of such consultation is critical in ensuring meaningful consultation and the likelihood that those involved are well prepared with the necessary information and data for making decisions about the design and development of equitable special education and related services for parentally-placed private and home-schooled students with disabilities. Successful consultation establishes positive and productive working relationships, makes planning effective, and ensures that the services provided meet the needs of eligible students.

1. Who is responsible for initiating the consultation process?

The obligation to initiate the consultation process lies with the LEA that is responsible for providing equitable services.

2. When does consultation between public and private school officials occur?

Consultation between the LEA and private and home-school representatives and representatives of parents of parentally-placed private and home-schooled students must occur before the LEA makes any decision (such as ordering materials or hiring staff) that affects the provision of equitable services for private and home-schooled students. To ensure timely consultation, LEAs should begin the consultation process early enough in the decision-making process to allow for the provision of special education and related services to eligible students at the start of each school year. Therefore, the LEA should engage in a process of timely and meaningful consultation with private and home-school representatives and representatives of parents of parentally-placed private and home-schooled students and provide them with information related to the projected and/or final funding amounts for programs and services. The LEA should also develop a process for determining mutual expectations for implementation and assessment of programs. To meet the requirements for timely and meaningful consultation, it is recommended that LEAs begin consultation for the following school year in late-winter to early spring of the school year prior to the year covered by the plan.

S.C. Code Ann. §§ 59-65-45 and 59-65-47 (2004) require that by January thirtieth of each year, the South Carolina Association of Independent Home Schools and other home-school associations shall report the number and grade level of children home-schooled through the association to the children's respective

school districts. If the organizations do not contact the LEA, the LEA should contact the South Carolina Department of Education Office of General Counsel.

3. How does an LEA begin the consultation process?

An LEA should begin the consultation process each year by contacting representatives of private schools and home-school organizations and representatives of parents of parentally-placed private and home-schooled students located within its boundaries. One way to accomplish this is for the LEA to extend an invitation to officials of the private schools and home-school organizations and convene a meeting with them during which LEA officials describe the special education and related services and allowable activities available to private and home-schooled students with disabilities; explain the roles of public, private, home-school officials; address the specific needs of private and home-schooled students with disabilities; and provide opportunities for the private and home-school officials to ask questions and offer suggestions. An LEA simply sending a letter to private school and home-school officials explaining the purpose of equitable services under the IDEA is not adequate. Likewise, a letter describing the services that an LEA intends to provide for parentally-placed private and home-schooled students with disabilities, without any prior consultation, is not sufficient to meet the consultation requirement set forth in the IDEA.

4. What topics should be discussed during the consultation process between public, private, and home-school officials?

The IDEA regulations at 34 C.F.R. § 300.134 requires LEAs to consult with appropriate representatives on such issues as:

- the child find process, including
 - how parentally-placed private and home-schooled students suspected of having a disability can participate equitably and
 - how parents, teachers, and private school officials will be informed of the process;
- the determination of the proportionate share of federal funds available to serve parentally-placed and home-schooled students with disabilities;
- how the consultation process will operate throughout the school year;
- how students with disabilities identified in the child find process can meaningfully participate in special education and related services;
- how, where, and by whom special education and related services will be provided including
 - the types of services, including direct services and alternative service delivery mechanisms;
 - how special education and related services will be apportioned if funds are insufficient to serve all parentally-placed private and home-schooled students; and
 - how and when those decisions will be made; and
- how, if the LEA disagrees with the views of private school officials on the provision of services, the LEA will provide to the private school officials a written explanation of the reasons why the LEA chose not to provide services directly or through a contract.

5. Does an offer of services from an LEA meet the requirement of consultation?

No. An offer of services by an LEA without an opportunity for timely and meaningful consultation does not meet the requirement of the IDEA. Only after discussing key issues relating to the provision of services, identifying the needs of the students, and receiving input from the representatives of parentally-placed private and home-schools and parents of parentally-placed private and home-schooled students, does an LEA make its final decisions with respect to the services and benefits it will provide to meet the needs of eligible parentally-placed private and home-schooled students with disabilities.

6. What is meant by “timely and meaningful” consultation?

Timely and meaningful consultation is required to ensure the participation of representatives of parentally-placed private and home-school organizations and parents of private and home-schooled students in the design and development of equitable special education and related services. Timely consultation begins early enough for the entire process of program design and development to be completed, for exploring the option of third-party providers, and for services to begin by the start of the school year. Timely consultation requires that LEAs provide advance notice of consultation meetings to private and home-school officials. Meaningful consultation covers all required topics (see question 4) and affords private school officials a genuine opportunity to express their views. Effective consultation is ongoing, two-way communication and discussion of the best ways to meet the needs of parentally-placed private and home-schooled students with disabilities. Consultation is significantly enhanced when public school officials provide an agenda of consultation topics, along with information about the proportionate share of federal funds available for services, in advance of any consultation meeting, to allow representatives of parentally-placed private and home-school organizations and parents of private and home-schooled students the opportunity to adequately prepare for discussions.

7. Must an LEA use an affirmation with private and home-school officials to verify that timely and meaningful consultation occurred?

Yes. According to 34 C.F.R. § 300.135, the LEA must obtain a written affirmation signed by the representatives of participating private schools. Because South Carolina treats students with disabilities in home schools in the same manner as parentally-placed private school students with disabilities, the LEA must also obtain a written affirmation from representatives of home-school organization. If the representatives do not provide the affirmation within a reasonable period of time, the LEA must forward documentation of the consultation process to the SCDE. To avoid delays in obtaining the signed affirmation, it is advisable to have the participants sign the affirmations prior to leaving the meeting.

8. May an LEA request that private and home-school officials provide relevant documentation to identify the students who are in need of special education services and related services or child find?

Yes. An LEA may request documentation, as needed, from private and home-school officials that enable the LEA to identify students who are eligible under the IDEA and the appropriate services that meet the needs of parentally-placed private and home-schooled students. Such documentation might include, but is not limited to, data indicating the academic needs of students. The request for documentation or the private or home-school official's failure to provide the requested documentation will not constitute an administrative barrier that relieves the LEA of its responsibility to ensure the delivery of equitable special education and related services to students with disabilities.

If a child is enrolled, or is going to enroll in a private school that is not located in the LEA of the parent's residence, parental consent must be obtained before any personally identifiable information about the child is released between officials in the LEA where the private school is located and officials in the LEA of the parent's residence. [34 C.F.R. § 300.622(b)(3)] [20 U.S.C. §§ 1412(a)(8) and 1417]

9. Should an LEA keep minutes or notes of consultation meetings?

Meeting notes and minutes are good ways of documenting that timely and meaningful consultation occurred. The LEA, private school, and home-school officials are encouraged to keep notes of consultation meetings that include information about issues addressed and decisions made during and as a result of the process. These notes may be used as a reference or documentation if there are questions, concerns, or complaints about the consultation and decision-making processes.

10. Should an LEA contact representatives of private schools and home-school organizations and parents of private and home-schooled students every year even if the representatives declined services in the past?

Yes. On an annual basis, the LEA must contact representatives of private schools and home-school organizations and parents of private and home-schooled students and inquire as to whether the private or home-school organizations' students will participate in the provision of services available to their students with disabilities. If the private school does not allow the LEA personnel to come on campus to deliver services, the LEA must propose another location for the delivery of services.

11. In designing and developing programs for parentally-placed private and home-school students with disabilities, how should the LEA assess the needs of these students?

The LEA's assessment of the needs of the parentally-placed private and home-schooled students with disabilities is the foundation for designing programs to serve these students within the parameters of the IDEA and state statutes and regulations. During the consultation process, the LEA must discuss the needs of these students and how best to meet those needs.

12. Should consultation between the LEA and representatives of private and home-school organizations and parents of private and home-school students be ongoing?

Yes. To help ensure effective design, development, and implementation of programs, consultation between the LEA and representatives of parentally-placed private and home-school organizations and parents of private and home-schooled students should be ongoing throughout the school year. If issues arise concerning the delivery of services and the implementation of eligible students' services plans, notifying the private or home-school officials provides the means for adequately addressing these issues in a timely and efficient manner. The LEA and representatives of private and home-school organizations should discuss how the consultation process will operate throughout the school year to ensure that parentally-placed children with disabilities identified through the child find process can meaningfully participate in special education and related services.

LEAs are reminded that child find activities should be continuous during the year. Child find is an ongoing process. Therefore, if a child who enters a private school without having been previously identified as a child with a disability is suspected of having a disability during the school year, the LEA where the private school is located is responsible for ensuring such a child is identified, located, and evaluated. In addition, it is possible that a child who was previously evaluated and determined not eligible for special education and related services by another LEA, may in fact be determined eligible for special education and

related services at a later time through the child find process conducted by the LEA where the private school is located. Child Find activities also include out-of-state children.

13. Are there requirements for representatives of private and home-school organizations and parents of parentally-placed private and home-school students in the consultation process?

Although the IDEA does not include any requirements for representatives of parentally-placed private or home-school organizations and parents of parentally-placed private and home-schooled students, the only way to ensure that consultation is timely and meaningful is for these representatives to participate actively in the consultation meetings. By participating, these representatives will have an opportunity to provide input in the development of a timeline for consultation; provide data and information about the needs of their students; offer suggestions regarding program design, implementation, and evaluation; address the use of third-party providers, if appropriate; and complete any appropriate forms needed by the LEA to ensure the delivery of equitable services.

14. Does the meeting with for representatives of private and home-school organizations and parents of parentally-placed private and home-school students replace Child Find responsibilities?

No. The LEA still has the responsibility for ongoing child find for children residing within its jurisdiction. No matter what time of the year the request for services occurs, the LEA must consider the request for services if the proportionate share is not spent due to minimal requests for services. The consultation process does not end at a yearly meeting but continues throughout the year as changes in services are requested or provided.

15. If a representative of private and home-school organizations and parents of parentally-placed private and home-school students request that certain services be delivered through a third party and the LEA chooses not to do so, what should the LEA include in the written explanation as to the reasons why it chose not to grant that request?

If the LEA disagrees with representatives of private and home-school organizations or parents of parentally-placed private and home-school students on the provision of services, whether provided directly or through a contract, the LEA will provide a written explanation to representatives of private and home-school organizations or parents of parentally-placed private and home-schooled students of the reasons why the LEA chose not to provide services directly or through a contract. The written explanation should not simply reiterate the LEA's decision but also provide reasons for the decision.

16. What is the responsibility of the LEA if the private school associations and home-school associations do not respond or fail to participate in the consultation process?

The LEA should forward notices of child find clinics and other child find materials to the private schools and home-school organizations and ask the schools and organizations to post the notices and to provide the notices to parents relative to child find activities.

B. Eligibility

Parentally-placed private school students with disabilities means students with disabilities placed by their parents in private, including religious, schools or facilities that meet the definition of elementary school in 34 C.F.R. § 300.13 or secondary school in 34 C.F.R. § 300.36, or other than children with disabilities covered under 34 C.F.R. §§ 300.145 through 300.147.

Each LEA must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private and home schools located within the boundaries served by the LEA.

1. Are students who are home schooled eligible to receive equitable services under the IDEA?

Because South Carolina treats home-schooled students with disabilities in the same manner as parentally-placed private students with disabilities, home-schooled students are eligible to receive the benefits and services provided to private school children with disabilities under the IDEA.

2. Is the residency of a private school student a factor that must be considered when determining whether a student is eligible to receive services?

Parentally-placed students with disabilities who are enrolled in private nonprofit elementary and secondary schools that are located in areas served by an LEA are eligible to receive equitable services. A student's residency is not a factor, even if a student resides in a state that is different from the state in which the private school is located. If a student with a disability who lives in Georgia is parentally-placed in a private school in South Carolina, the South Carolina LEA where the private school is located is responsible for the determination and provision of equitable services.

3. Are students with disabilities who are publically-placed in private schools by their LEA of residence as a means of ensuring the provision of a free appropriate public education (FAPE) under the IDEA eligible to receive services under the IDEA?

Students placed in private schools by public agencies are entitled to the provision of a FAPE by the school district that placed the student. If the student is an out-of-state student placed by a public agency, the out-of-state school district or the previous SEA remains responsible for the provision of a FAPE to the student. A student placed in or referred to a private school or facility by a public agency is provided special education and related services in conformance with an IEP; at no cost to the parents, and has all the rights of a child with a disability who is served by a public agency.

4. Are LEAs responsible for three year re-evaluations for parentally-placed private and home-school students with disabilities?

Yes. LEAs must conduct re-evaluations of parentally-placed private and home-school students with disabilities in order to determine continued eligibility and need for special education and related services. This applies to all students even if they currently are not receiving services through a services plan.

5. May an LEA require a private school to implement a response to intervention (RTI) process before evaluating parentally placed private school children?

No. The IDEA and its implementing regulations in 34 CFR §§300.301–300.311 establish requirements with which LEAs must comply when conducting an initial evaluation to determine if a child qualifies as a child with a disability under Part B; these requirements do not apply to private schools. IDEA requires States to adopt criteria for determining whether a child has a specific learning disability, as defined

in 34 CFR §300.8(c)(10), and these criteria must permit, among other things, the use of a process based on the child's response to scientific, research-based intervention (known as RTI). 34 CFR §300.307(a)(2). Thus, although IDEA permits the use of RTI in evaluating children suspected of having learning disabilities, it does not require LEAs to use RTI. Even if a State's criteria permit LEAs to use RTI in evaluating children suspected of having learning disabilities, IDEA does not require an LEA to use RTI for parentally placed children attending private schools located in its jurisdiction. It would be inconsistent with the IDEA evaluation provisions in 34 CFR §§ 300.301-300.311 for an LEA to delay the initial evaluation because a private school has not implemented an RTI process with a child suspected of having learning disabilities and has not reported the results of that process to the LEA.

6. Is it possible for a parent to request evaluations from the LEA where the private school is located as well as the district where the child resides?

The Department recognizes that there could be times when parents request that their parentally placed child be evaluated by different LEAs if the child is attending a private school that is not in the LEA in which the child resides. For example, because most States generally assign the responsibility for making FAPE available to the LEA in which the child's parents reside, and because that could be an LEA that is different from the LEA in which the child's private school is located, parents could ask two different LEAs to evaluate their child for different purposes at the same time. The Department, however, does not encourage this practice.

Note that a new requirement in 34 CFR §300.622(b)(3) requires parental consent for the release of information between LEAs about parentally placed private school children. Therefore, as a practical matter, one LEA may not know that a parent also requested an evaluation from another LEA. However, the Department does not believe that the child's best interests would be served if parents request evaluations of their child by the resident LEA and the LEA where the private school is located, even though these evaluations are conducted for different purposes. Subjecting a child to repeated testing by separate LEAs in close proximity of time may not be the most effective or desirable way to ensure that the evaluations are meaningful measures of whether a child has a disability, or of obtaining an appropriate assessment of the child's educational needs. Although the Department discourages parents from requesting evaluations from two LEAs, if the parent chooses to request evaluations from the LEA responsible for providing the child FAPE and from another LEA that is responsible for considering the child for the provision of equitable services, both LEAs are required to conduct an evaluation.

C. Delivery of Services

A services plan must be developed and implemented for each parentally-placed private or home-schooled student with a disability, who is designated as able to receive services, by the LEA in which the private school is located to receive special education and related services. Each LEA must maintain in its records, and provide the South Carolina Department of Education (SCDE), the number of private and home-schooled students evaluated, the number determined to be students with disabilities, and the number of students served.

1. Who has the responsibility for services when a third party contract is used?

If an LEA contracts with a third-party to provide services and benefits to eligible parentally-placed private and home-schooled students with disabilities, the LEA remains responsible for ensuring that these students receive services and the requirements of the IDEA statute and regulations are met.

2. What are some service delivery mechanisms that an LEA may use to provide equitable services?

An LEA may provide equitable services to parentally-placed private and home-schooled students with disabilities through an employee of the LEA or through a contract with a third-party provider, an individual, an education institution, or some other agency that, in the provision of those services, is under the control and supervision of the LEA and is otherwise independent of the private school and any religious organization.

3. May an LEA hire and pay private school teachers to provide special education and related services separate from their contract hours with the private school?

Yes. An LEA may hire and pay private school teachers to provide special education and related services to parentally-placed private school students, but time spent providing such services must be separate from their contract hours with the private school. During the time they are employed by the LEA, the private school teachers must be independent of the private schools and any religious organizations, must be qualified to deliver the services, and must be under the LEA's direct supervision and control.

4. May an LEA establish a blanket rule that precludes parentally-placed private and home-schooled students with disabilities from receiving certain services?

No. In carrying out its responsibility to provide equitable services, an LEA may establish policies that, for reasons of effectiveness, quality, cost, or other relevant factors, favor certain kinds of services and programs that the IDEA authorizes and that meet the needs of private school students and teachers. An LEA, however, may not establish a blanket rule that precludes certain services and programs that meet the needs of parentally-placed private and home-schooled students.

5. Do parentally-placed private and home-schooled students with disabilities have a right to a FAPE under the IDEA?

No. Parentally-placed private and home-schooled students with disabilities have no individual right to receive all or some of the special education and related services that the student would receive if enrolled in public school. Parentally-placed private school and home-schooled students with disabilities may receive a different amount of services than students with disabilities in public schools.

6. How does the LEA document the services provided to parentally-placed private and home-schooled students?

Equitable services for a parentally-placed private school and home-schooled students with disabilities must be provided in accordance with a services plan. A services plan must describe the specific special education and related services that will be provided to a parentally-placed private school or home-schooled student with disabilities designated to receive services.

7. What is the difference between an individualized education program (IEP) and a services plan?

Children with disabilities enrolled in public schools or who are publicly placed in private schools are entitled to a FAPE and must receive the full range of services under Part B of the IDEA. These services are determined by the child's IEP team and are necessary to meet the child's individual needs and provide FAPE. The IEPs for these children generally will be more comprehensive than services plans developed for parentally placed private school children with disabilities who are designated to receive services. This is

because parentally placed children do not have an individual entitlement to any or all of the services that the children would receive if enrolled in a public school. Further, a services plan should reflect only the services offered to a parentally placed private school child with a disability designated to receive services. In addition, a services plan is required to meet the IEP content requirements described in section 614(d) of the IDEA, or, when appropriate, for children aged three through five, the Individualized Family Service Plan (IFSP) requirements described in section 636(d) of the IDEA, to the extent appropriate, and only in relation to the services that are to be provided.

8. How often must a services plan be written?

The IDEA and its implementing regulations do not specify how often a services plan must be written. As provided in 34 C.F.R. § 300.138(b)(2)(ii), a services plan must, to the extent appropriate, be developed, reviewed, and revised in accordance with the IEP requirements in 34 C.F.R. §§ 300.321 through 300.324. The regulations at 34 C.F.R. § 300.324(b)(1) require that a student's IEP be reviewed periodically and not less than annually, to determine whether the annual goals for the student are being achieved; and to be revised as appropriate. The U.S. Department of Education, therefore, believes that generally a services plan should be reviewed annually and revised, as appropriate.

9. Must the parent of a parentally-placed private school student participate in the development of a services plan?

As provided in 34 C.F.R. § 300.138(b)(2)(ii), a services plan must, to the extent appropriate, be developed, reviewed and revised in accordance with the requirements in 34 C.F.R. §§ 300.321 through 300.324. Therefore, to the extent appropriate, the meeting to develop a services plan should be conducted in accordance with 34 C.F.R. §300.321. Under 34 C.F.R. § 300.321(a)(1), the parents of the student are required participants. Given the emphasis on parent involvement in the IDEA, the U.S. Department of Education believes that parents should participate in the meeting to develop the services plan for their child.

10. Does the LEA have to transport parentally-placed private and home-schooled students with disabilities to receive services?

If necessary for the students to benefit from or participate in the services, a student with a disability may be transported from the student's school or home to a site other than the private or home-school program, and from the service site to the private school or the home depending on the timing of services. The LEA is not required to provide transportation from the child's home to the private school. The transportation costs may be included in the proportionate share of federal funds.

11. Can an LEA require another LEA to pay for the services of a parentally-placed private school child with a disability from another state?

Section 300.133(a) clarifies that the LEA where a private school is located is responsible for spending a proportionate amount of its subgrant under Part B on special education and related services for children enrolled by their parents in private elementary and secondary schools located in the LEA. There is no exception for out-of-state children with disabilities attending a private school located in the LEA. Therefore, out-of-state children with disabilities must be included in the group of parentally-placed children with disabilities whose needs are considered in determining which parentally-placed private school children with disabilities will be served and the types and amounts of services to be provided. Another LEA may not be charged for child find and equitable services even if the child with a disability resides in another State.

Nothing in IDEA precludes an LEA from contracting with a third party to fulfill its obligations to ensure equitable participation. This includes contracting with a student's LEA of residence as a third party provider.

D. Expenditures

To meet the requirement of the IDEA, each LEA must spend a proportionate share of its IDEA allocation on the provision of services to parentally-placed private and home-schooled students with disabilities.

1. How much money must be set aside for equitable services?

For children aged three through twenty-one, an amount that is the same proportion of the LEA's subgrant under § 611(f) of the IDEA statute as the number of private and home-schooled students with disabilities aged three through twenty-one who are enrolled by their parents in private and home schools located in the LEA as to the total number of students with disabilities in the LEA aged three through twenty-one.

For children aged three through five, an amount that is the same proportion of the LEA's subgrant under § 619(g) of the IDEA statute as the number of private and home-schooled students with disabilities aged three through twenty-one who are enrolled by their parents in private and home schools located in the LEA as to the total number of students with disabilities in the LEA aged three through five.

2. What happens if the LEA has not expended the proportionate amount of funds?

If an LEA has not expended the proportionate amount of funds by the end of the fiscal year, the LEA must obligate the remaining funds for special education and related services to parentally-placed private and home-schooled students with disabilities during a carry-over period of one year.

3. What about paying for equipment or supplies?

The LEA must control and administer the funds used to provide special education and related services and hold title to and administer materials, equipment, and property purchased with IDEA funds. The LEA may place equipment and supplies in the private school for the period of time needed for special education and related services. The LEA must ensure, however, that the equipment and supplies are only used for purposes consistent with the IDEA and can remove the equipment if necessary to avoid unauthorized use of the equipment and supplies. No funds may be used for repairs, minor remodeling, or construction of private school facilities.

4. Under what circumstances may a parent file a complaint under the parentally-placed private school student provisions?

As provided in 34 C.F.R. § 300.140(b), a parent of a child enrolled by that parent in a private school has the right to file a due process complaint regarding the child find requirements in 34 C.F.R. § 300.131, including the requirements in 34 C.F.R. §§ 300.300 through 300.311. Such a complaint must be filed with the LEA in which the private school is located and a copy forwarded to the SEA. The due process provisions in section 615 of the IDEA statute and 34 C.F.R. §§ 300.504 through 300.519 of the regulations do not apply to issues regarding the provision of services to a particular parentally-placed private school or home-schooled student with disabilities an LEA has agreed to serve, because there is no individual right to services for parentally-placed private school and home-schooled students under the IDEA. Disputes that arise concerning the procedures for the development of a services plan; the calculation and expenditure of the

proportionate amount of federal funds to be provided for the provision of equitable services; timely and meaningful consultation; written affirmations; and the use of the proportionate share of federal funds, personnel, property, equipment, and supplies; are, however, properly subject to the state complaint procedures in 34 C.F.R. §§ 300.151 through 300.153. As provided in 34 C.F.R. § 300.140(c), a parent, private school, or home-school organization may file a signed written complaint in accordance with the state complaint procedures alleging that an SEA or LEA has failed to meet the private school provisions, such as the failure to properly conduct the consultation process.

5. What specific child count information must the LEA maintain and report to the SEA?

The regulations in 34 CFR §300.132(c) require the LEA to maintain in its records and provide to the SEA the number of parentally placed private school children evaluated, the number of parentally placed private school children determined to be children with disabilities under Part B of the IDEA, and the number of children who are provided equitable services.

6. May an LEA use Part B funds that are required to be expended on equitable services to make payments directly to a private school?

No. Part B funds for equitable services may not be paid directly to a private school. Under 34 CFR §300.144(a), a public agency must control and administer the funds used to provide special education and related services to parentally placed private school children with disabilities. Under 34 CFR §300.141, an LEA may not use Part B funds to finance the existing level of instruction in a private school, and such funds may not be used for meeting the needs of a private school or the general needs of the students enrolled in the private school. The LEA must use the proportionate share of Federal Part B funds to meet the special education and related services needs of parentally placed private school children with disabilities.

7. Must children whose parents decline special education and related services be included in a school district's proportionate share calculation?

Yes. As specified in 34 CFR §300.131(a), each LEA must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA. The number of parentally placed private school children with disabilities is used to determine the amount that the LEA must spend on providing special education and related services to parentally placed private school children with disabilities in the next subsequent fiscal year. Under 34 CFR §300.300(d)(4), if a parent of a home-schooled or parentally placed private school child declines to consent to the initial evaluation or the reevaluation, the public agency may not use the consent override procedures to seek to conduct the evaluation and, thus, may not include the child in the annual count of the number of parentally placed private school children with disabilities.

If the LEA evaluates a parentally placed private school child and determines the child eligible under the IDEA, but the parent declines the offer of special education and related services, the LEA must include this child in the annual count of the number of parentally placed private school children with disabilities. Thus, an LEA must include in its proportionate share calculation eligible children with disabilities, including those children whose parents decline all publicly funded services and place them in a private school at their own expense, provided those children are enrolled by their parents in a private, including a religious, elementary school or secondary school located in the school district served by the LEA.

Sample Consultation Checklist for Local Educational Agencies

- ☐ Send notice about IDEA services (and *Intent to Participate* form) to representatives of private schools and home-school organizations and parents of parentally-placed private and home-schooled students asking if they are interested in having their students participate the provision of equitable special education and related services.
- ☐ Schedule a consultation meeting with representatives of private schools and home-school organizations and parents of parentally-placed private and home-schooled students and provide information about the IDEA-related services available to eligible students, allowable activities, and the appropriate roles of public, private, and home-school officials.
- ☐ Obtain from private schools and home-school organizations a list of names, roles, and level of authority of private school and home-school officials who should be included in the consultation process.
- ☐ Discuss how the needs of eligible private and home-schooled students will be assessed.
- ☐ Discuss the type of services that are available.
- ☐ Discuss how, where, and by whom the services will be provided.
- ☐ Address the size and scope of the services to be provided.
- ☐ Discuss how much funding is available for programs and services and how the amount was determined.
- ☐ Discuss the use of third-party providers and thoroughly consider the views of representatives of private schools and home-school organizations and parents of parentally-placed private and home-schooled students. If a request for a third-party provider is declined, provide a written explanation as to the reasons why a contractor was not chosen.
- ☐ Inform representatives of private schools and home-school organizations and parents of parentally-placed private and home-school students about how and when the LEA will make decisions about the delivery of services and how and when the LEA will inform them of such decisions.
- ☐ Inform representatives of private schools and home-school organizations and parents of parentally-placed private and home-schooled students about policies, procedures, and forms related to programs, services, equipment, and materials for their students and teachers.
- ☐ Provide contact information to the representatives of private schools and home-school organizations and parents of parentally-placed private and home-schooled students.

Note: This is not an official SCDE document. Adapted with permission from *NCLB Private School Services, Local Education Agency Resource Guide, A Handbook for District Administrators*, Orange County, Calif., Department of Education, 2006. The form is for sample purposes only and should not be considered as a required document.

Sample Consultation Meeting Attendance Form

CONSULTATION MEETING ATTENDANCE SIGN-IN SHEET				
<i>Insert Date</i>				
<i>Insert Location</i>				
NAME	TITLE	SCHOOL NAME AND ADDRESS	PHONE #	E-MAIL

Note: This is not an official SCDE document. It is provided for sample purposes only and should not be considered as a required document.

Revised March 2013

Sample Intent to Participate Form—Attached to an invitation letter.

Sample School District

IDEA Intent to Participate Form

School Year

Date: _____

Private School Name: _____

Address: _____

Phone: _____ **Fax:** _____ **E-mail:** _____

Private School Administrator: _____

IDEA Programs Contact Person: _____

Phone: _____ **E-mail:** _____

Enrollment: Pre-K_____ K_____ 1_____ 2_____ 3_____ 4_____ 5_____ 6_____ 7_____

8_____ 9_____ 10_____ 11_____ 12_____ **Total**_____

Administrator's Signature: _____ **Date Signed:** _____

Mail, Fax or E-mail this completed document to:

If you have questions, please contact *Sample Director* at phone #.

This form must be returned by:

Note:
This
is not
an

official SCDE document. The form is for sample purposes only and should not be considered as a required document.

SAMPLE FORM

Affirmation of Consultation with Private School

Special Education Services for Parentally Placed Private School Students

IDEA 2004 requires school districts to engage in timely and meaningful consultation with representatives of private schools and with parents about the provision of special education and related services for parentally placed private school students attending private schools within the district's jurisdiction. The consultation process must include specific discussion of the following topics:

IDEA 2004 requires that school districts ask private school officials to provide written affirmations of a satisfactory consultation process. Private school officials are not required to provide a written statement if they believe the process to be unsatisfactory.

Consultation may include individual or group meetings, interviews, or other effective and efficient strategies. The law does not require use of a specific strategy.

- a. The child find process, including how resident and non-resident students suspected of having a disability can participate equitably. Child find includes evaluations, eligibility determinations, and reevaluations.
- b. How parents, teachers, and private school officials will be informed of the child find process;
- c. The determination of the proportionate amount of federal funds to be expended and how the proportionate share was calculated;
- d. The consultation process and how the consultation process will operate through the year to ensure that students identified through the "child find process" can meaningfully participate in special education and related services;
- e. How, where, and by whom special education and related services will be provided, including a discussion of types of services and services delivery mechanisms;
- f. How such services will be apportioned if funds are insufficient to serve all students, and how and when these decisions will be made;
- g. How, if the District disagrees with the views of the private school officials about the provision of services or the types of services, the District shall provide a written explanation of the reasons why the LEA chose not to provide services.

I, the undersigned authorized representative of

Name of Private School

affirm that timely and meaningful consultation about items a-g above occurred with XX School District.

<i>Printed/Typed Name and Title of Authorized Representative of the Private School:</i>	
<i>Signature:</i>	<i>Date:</i>

Note: This is not an official SCDE document. The form is for sample purposes only and should not be considered as a required document.

Services Plan for Private School/Homeschooled Students (Sample)

Student's Full Name: _____

Date of Birth: _____ **Sex:** _____ **Grade:** _____

Primary Disability: _____ **Name of Private School:** _____

Meeting Date: _____ **3 year Reevaluation Date:** _____

Service Plan Initiation Date: _____ **Service Plan Ending Date:** _____

Present Levels of Academic Achievement and Functional Performance:

Supplementary Services:

Annual Goal(s):

Special Education Services:

Area of Service	Describe Instructional Delivery	Minutes	Frequency	Location of Service

Committee Members The individuals listed below have attended the meeting and participated as equal members in the development of this Service Plan.

Signature

Position

Date

Note: This is not an official SCDE document. Adapted with permission from Horry County *Services Plan for Private School/Homeschooled Students*, 2011. It is provided for sample purposes only and should not be considered as a required document.

APPENDIX D: Model Notification of Rights under FERPA for Elementary and Secondary Schools

The Family Educational Rights and Privacy Act (FERPA) affords parents and students who are 18 years of age or older ("eligible students") certain rights with respect to the student's education records. These rights are:

1. The right to inspect and review the student's education records within 45 days after the day the [Name of school ("School")] receives a request for access.

Parents or eligible students should submit to the school principal [or appropriate school official] a written request that identifies the records they wish to inspect. The school official will make arrangements for access and notify the parent or eligible student of the time and place where the records may be inspected.

2. The right to request the amendment of the student's education records that the parent or eligible student believes are inaccurate, misleading, or otherwise in violation of the student's privacy rights under FERPA.

Parents or eligible students who wish to ask the [School] to amend a record should write the school principal [or appropriate school official], clearly identify the part of the record they want changed, and specify why it should be changed. If the school decides not to amend the record as requested by the parent or eligible student, the school will notify the parent or eligible student of the decision and of their right to a hearing regarding the request for amendment. Additional information regarding the hearing procedures will be provided to the parent or eligible student when notified of the right to a hearing.

3. The right to provide written consent before the school discloses personally identifiable information (PII) from the student's education records, except to the extent that FERPA authorizes disclosure without consent.

One exception, which permits disclosure without consent, is disclosure to school officials with legitimate educational interests. A school official is a person employed by the school as an administrator, supervisor, instructor, or support staff member (including health or medical staff and law enforcement unit personnel) or a person serving on the school board. A school official also may include a volunteer or contractor outside of the school who performs an institutional service or function for which the school would otherwise use its own employees and who is under the direct control of the school with respect to the use and maintenance of PII from education records, such as an attorney, auditor, medical consultant, or therapist; a parent or student volunteering to serve on an official committee, such as a disciplinary or grievance committee; or a parent, student, or other volunteer assisting another school official in performing his or her tasks. A school official has a legitimate educational interest if the official needs to review an education record in order to fulfill his or her professional responsibility.

[Optional] Upon request, the school discloses education records without consent to officials of another school district in which a student seeks or intends to enroll, or is already enrolled if the disclosure is for purposes of the student's enrollment or transfer. [NOTE: FERPA requires a school district to make a reasonable attempt to notify the parent or student of the records request unless it states in its annual notification that it intends to forward records on request.]

4. The right to file a complaint with the U.S. Department of Education concerning alleged failures by the [School] to comply with the requirements of FERPA. The name and address of the Office that administers FERPA are:

Family Policy Compliance Office
U.S. Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

[NOTE: In addition, a school may want to include its directory information public notice, as required by §99.37 of the regulations, with its annual notification of rights under FERPA.]

[Optional] See the list below of the disclosures that elementary and secondary schools may make without consent.

FERPA permits the disclosure of PII from students' education records, without consent of the parent or eligible student, if the disclosure meets certain conditions found in §99.31 of the FERPA regulations. Except for disclosures to school officials, disclosures related to some judicial orders or lawfully issued subpoenas, disclosures of directory information, and disclosures to the parent or eligible student, §99.32 of the FERPA regulations requires the school to record the disclosure. Parents and eligible students have a right to inspect and review the record of disclosures. A school may disclose PII from the education records of a student without obtaining prior written consent of the parents or the eligible student –

- To other school officials, including teachers, within the educational agency or institution whom the school has determined to have legitimate educational interests. This includes contractors, consultants, volunteers, or other parties to whom the school has outsourced institutional services or functions, provided that the conditions listed in §99.31(a)(1)(i)(B)(1) - (a)(1)(i)(B)(2) are met. (§99.31(a)(1))
- To officials of another school, school system, or institution of postsecondary education where the student seeks or intends to enroll, or where the student is already enrolled if the disclosure is for purposes related to the student's enrollment or transfer, subject to the requirements of §99.34. (§99.31(a)(2))
- To authorized representatives of the U. S. Comptroller General, the U. S. Attorney General, the U.S. Secretary of Education, or State and local educational authorities, such as the State educational agency in the parent or eligible student's State (SEA). Disclosures under this provision may be made, subject to the requirements of §99.35, in connection with an audit or evaluation of Federal- or State-supported education

programs, or for the enforcement of or compliance with Federal legal requirements that relate to those programs. These entities may make further disclosures of PII to outside entities that are designated by them as their authorized representatives to conduct any audit, evaluation, or enforcement or compliance activity on their behalf. (§§99.31(a)(3) and 99.35)

- In connection with financial aid for which the student has applied or which the student has received, if the information is necessary to determine eligibility for the aid, determine the amount of the aid, determine the conditions of the aid, or enforce the terms and conditions of the aid. (§99.31(a)(4))
- To State and local officials or authorities to whom information is specifically allowed to be reported or disclosed by a State statute that concerns the juvenile justice system and the system's ability to effectively serve, prior to adjudication, the student whose records were released, subject to §99.38. (§99.31(a)(5))
- To organizations conducting studies for, or on behalf of, the school, in order to: (a) develop, validate, or administer predictive tests; (b) administer student aid programs; or (c) improve instruction. (§99.31(a)(6))
- To accrediting organizations to carry out their accrediting functions. (§99.31(a)(7))
- To parents of an eligible student if the student is a dependent for IRS tax purposes. (§99.31(a)(8))
- To comply with a judicial order or lawfully issued subpoena. (§99.31(a)(9))
- To appropriate officials in connection with a health or safety emergency, subject to §99.36. (§99.31(a)(10))
- Information the school has designated as "directory information" under §99.37. (§99.31(a)(11))