What Parents Should Know . . . About Special Education In South Dakota

SECOND EDITION

Introduction

Welcome to “What Parents Should Know...About Special Education in South Dakota.” This book was created with the deep belief that knowledge is power, especially when it comes to advocating for the rights and needs of children with disabilities within the educational system. The first publication of this book was in 2007 and has had only minor changes since then. This version is the official Second Edition containing updated content, a new look, and layout.

Parenting a child with a disability is a journey that often leads families into the world of special education. This world can be complex, overwhelming, and at times, confusing. The laws, regulations, and terminology can feel like a maze, leaving parents feeling lost and unsure of how to advocate effectively for their child. The purpose of this book is to serve as a light in that maze. It is a comprehensive book designed to empower parents, guardians, and education professionals with the knowledge, tools, and resources they need to navigate the special education system with confidence and clarity.

At the heart of this book lies the Individuals with Disabilities Education Act (IDEA), which is a federal law that has been in effect since 1975. IDEA requires public schools to provide a free and appropriate public education (FAPE) to eligible student with disabilities ages three to twenty-one. IDEA also provides legal protections for these students and their parents. This book provides detailed explanation of current federal special education law and includes several references to the current Administrative Rules of South Dakota (ARSD) where they differ from the federal requirements.

Throughout the book, there is a format consistently followed to assist in understanding the information. This book includes frequently used definitions and acronyms along with additional chapters dedicated to various topics related to special education. The topics within each chapter include language taken directly from the federal regulations, a section that helps explain what that regulation language means, and a section describing what parents should specifically know about it for practical use. In some instances, the differences have been highlighted between the Administrative Rules of South Dakota and the federal regulations. highlighted. Finally, there are tips included to provide extra information to help with the application of the information in that section.

As parents continue their journey through special education, it is our hope that the information in this book will provide the guidance, support, and encouragement needed to advocate fiercely for their child. With the knowledge gained through reading this book, the goal is that parents can embrace their journey with courage, determination, and hope.

The July 2024 printing of 5,000 copies of this publication by Sisson Printing, Inc. was made possible through a generous grant from the South Dakota Council on Developmental Disabilities. Thank you for helping us provide this information to parents in South Dakota.

South Dakota Council on Developmental Disabilities

Acknowledgements

We would like to thank the following agencies and individuals who contributed their time and talents to the Second Edition of "What Parents Should Know . . . About Special Education in South Dakota." This book was developed to help parents be stronger advocates for the services and supports to further their child's success.

Disability Rights South Dakota (DRSD) is a non-profit legal services agency and the State's designated Protection and Advocacy System.

It's mission is dedicated to protecting and advocating for the rights and inclusion of South Dakotans with disabilities. DRSD provides services to eligible persons with disabilities ranging from information and referral to case advocacy and legal representation. DRSD consists of nine component programs, each serving a distinct population based on federal legislative mandates and program priorities.

Disability Rights South Dakota's contribution to this book was funded in part by grants from the US Department of Health and Human Services, the US Department of Education, and Social Security Administration. Although Social Security reviewed this book for accuracy, it does not constitute an official SSA communication. This communication is produced, published, or printed and disseminated at US taxpayer expense.

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The committee recognizes and gives a special thank you to John Hamilton, who has worked on all aspects of this book since prior to its first publication in 2007. He has remained a strong leading force in providing this information to help families understand their rights and become more effective advocates for their child's needs at school.

John has a B.S. in Business Administration, USD; J.D., USD School of Law; MBA, USD School of Business. Prior to working at DRSD, John was a Law Clerk in the Northern Hills for one year.

John has been part of many committees and has received many awards. John recently received the Governor's Distinguished Service Award in 2022. John has been part of the Minnehaha County Juvenile Justice Collaborative Committee since 2013, Minnehaha County Juvenile Detention Alternatives Initiative (JDAI) Facility Inspection Team, Co-Team Lead, 2012, 2022), SD Voices for Children's Champion for Children Award, 2009, South Dakota Parent Connection Board of Directors, 2000-2006 (President 2001-03), Liberty Center/Here4YOUth Board of Directors, 1999-2008, 2009-2014 (President 2003-07), and South Dakota Advisory Panel for Children with Disabilities, 1988-1994 (Chairman 1992-93). John has also been involved in many significant court cases over the years.

South Dakota Parent Connection, Inc. is a non-profit organization, South Dakota's Parent Training and Information Center since 1985, and South Dakota's Family to Family Health Information Center since 2005.

It's mission has been connecting families who care for individuals birth to age 26 with disabilities or special health care needs to information, training, and resources in an environment of support, hope, and respect.

For more than 40 years, South Dakota Parent Connection has helped families and professionals by providing indivdualized assistance, developing specialized programs, creating printed and electronic publications, and connecting families to other organizations that can help meet their unique needs.

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The Center for Disabilities has served as South Dakota's University Center for Excellence in Developmental Disabilities Education, Research, and Service (UCEDD) for the state of South Dakota since 1971.

Over this time, the Center has partnered with individuals with disabilities, their families, and numerous healthcare, education, human service, employment, and community-based organizations to improve the lives of individuals with disabilities and their families. The Center conducts diverse yet integrated activities through direct services including clinical services, pre-service training and continuing education, technical assistance, research/evaluation, and information dissemination.

The Center's activities reflect state-of-the-art knowledge, and are based on data-driven strategic planning and measured by the improvements in the quality of lives of people with disabilities. With special focus on capacity building and systems change, the provision of person-centered and family-centered, culturally responsive approaches are central in all we do. The Center strives to bridge these programs to the broader community, especially for underserved, underrepresented, rural, frontier, and Tribal communities.

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Resources

The resources listed below can be found at www.sdparent.org.

Dare to Dialogue...Reach YES!
As a parent, do you sometimes wonder what your role is, what questions to ask, or what to do when seeking the best education for your child? This resource is for families of children receiving special education to assist in advocating for their child's right to an appropriate education.

What Parents Should Know...About Evaluation and Reevaluation
As a parent, you may have concerns about your child's behavior, school performance, or attention span. Your child's teacher may also have concerns. You or your child's teacher may request an evaluation for your child.,This resource describes some benefits of having your child evaluated.

Understanding School Testing and Test Scores...School Evaluation Data Analytics for Parents
Understanding data helps everyone see what students know, what they should know, and what can be done to meet their academic needs. This resource provides information to help parents better understand the data collected in their child's evaluation so they can become stronger advocates for their child's needs.

What Parents Should Know...About Extended School Year
How does a child "qualify" for extended school year services? This is a common question and different factors play a role in how this decision is made every year for all students with disabilities in the IEP process. This resource provides answers to how this decision is made, and how parents contribute valuable information in this process.

Preparing for the Future...Understanding Guardianship and Alternatives
Parents will have questions on how to best support their children as they enter adulthood. This resource assists families, professionals, and young adults to help everyone better understand when guardianship may be needed and when lesser restrictive alternatives will provide sufficient supports.

Exiting IEP Services and Supports...A Guide for Families and Graduating Students
A child's IEP Team has made the decision that a child no longer qualifies for services and supports through special education. This resource provides valuable information about transition supports that may be helpful as the child gets older and begins planning for life beyond high school.

Folder of Information and Life Experiences (FILE)
Parents of children with disabilities interact with multiple systems and providers. Keeping all the important information organized is essential. The FILE system helps you organize this information so it is easy to access and share with others along the way.

High School Graduation Requirements...How the Changes Impact Your Student
If you have a child entering high school, do you understand the different graduation requirements for the route your child is taking? This resource describes the different paths, requirements, and the significance of a modified curriculum that could impact the type of diploma your child may receive.

When Behavior is a Concern
Do you have concerns about your child's behavior or experience disciplinary issues and wonder how you can work with the school in determining how to provide effective supports and services to improve the behavior? This resource includes information for parents to better advocate for appropriate services, supports, and responses to concerns about behavior at school, and describes your child's rights in the disciplinary process.

Chapter 1: Definitions and Acronyms

Accommodation - Techniques and materials used to help make learning easier and help children share what they know. The student is still expected to know the same material and answer the same questions as fully as the other students.

The Act - The Individuals with Disabilities Education Improvement Act of 2004 (IDEA). "Act" may also refer to the Family Educational Rights and Privacy Act (FERPA) if such is the context of the section.

ADA - Americans with Disabilities Act.

ADHD - Attention Deficit Hyperactivity Disorder.

Adult Services - Services pertaining to independent living, vocational development, pre-employment services, or employment services designed for persons 16 years of age or older. ARSD 24:05:13.01(1).

Approved Program - A written description of a school district's, state agency's, special education school's, or community support provider's policies and procedures for implementing its special education program that is found by the department to comply with this article. ARSD 24:05:13:01(2).

ARSD - Administrative Rules of South Dakota.

AT - Assistive Technology (See Chapter 9).

At No Cost - "At no cost" means that all specially designed instruction and related services are provided without charge but does not preclude incidental fees that are normally charged to students without disabilities or their parents as a part of the general education program. Sec. 300.39(b)(1).

Behavioral Intervention Plan (BIP) - Sometimes called Behavioral Support Plan or Positive Behavior Intervention Plan, this is a plan that teaches replacement skills and manages consequences by positively reinforcing desired behaviors (see Chapter 12).

Business Day - means Monday through Friday, except for Federal and State holidays (unless holidays are specifically included in the designation of business day in a given regulation). Sec. 300.11(b).

CFR - Code of Federal Regulations. The IDEA Part B regulations are contained at 34 C.F.R. Sec. 300.1 through 300.818.

Child with a Disability - The term means a child evaluated … as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), serious emotional disturbance (referred to in this part as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, an other health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. Sec. 300.8(a)(1). South Dakota's Administrative Rules switch the order and add, "which adversely affects educational performance" prior to "and who, by reason thereof, needs special education and related services." ARSD 24:05:24.01:01 (see Chapter 5).

Commensurate - Corresponding in size or degree; proportionate (for example, a salary commensurate with her performance).

Consent - Also referred to as "informed consent" and "parental consent," it means that the parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other 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; and 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). If the parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent. Sec. 300.9.

Day - means calendar day unless otherwise indicated as a business day or school day. Sec. 300.11(a).

Day School Program - is a specialized program provided in a facility, a school district, or a cooperative center that a child attends during the day, returning home at night. ARSD 24:05:13:01(11).

DOE - Department of Education. DOE could refer to the federal Department of Education, or the South Dakota Department of Education, depending on the context.

DRS - South Dakota Division of Rehabilitation Services.

Due Process - is a legal term referring to procedures that protect a person's rights. In special education, being provided due process means that the required procedural safeguards are followed, and also describes the administrative hearing process (*i.e.*, "Due Process Complaint" and "Due Process Hearing").

Due Process Complaint - is the document that parents must send to the school district and the State Department of Education (SEA) to file for a due process hearing. It contains information on the child, a description of the alleged violation relating to the identification, evaluation, or educational placement of a child, or the provision of a free appropriate public education (FAPE), and a proposed resolution. The complaint places the school district on notice that the parent is requesting a hearing to resolve the issues at hand. If a school files for due process, it similarly must file a Due Process Complaint with the parents and the State. Sec. 300.508 (see Chapter 13).

Due Process Hearing - is when a party files a Due Process Complaint for a hearing under IDEA, it is referred to as a "due process hearing."

ED - Emotional Disturbance or Emotional Disability. The federal regulations use the term, "Emotional Disturbance." South Dakota's Administrative Rules use the term, "Emotional Disability," to mean the same thing.

ESA - Educational Service Agency. An ESA is a regional public multiservice agency: authorized by State law to develop, manage, and provide services or programs to LEAs; recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary schools and secondary schools of the State; includes any other public institution or agency having administrative control and direction over a public elementary school or secondary school; and includes entities that meet the definition of intermediate educational unit…. Sec. 300.12. In South Dakota, ESAs would be educational cooperatives.

ESSA - Every Student Succeeds Act of 2015.

ESY – Extended School Year. Special education and/or related services provided when school is not in session for all students, such as during summer or other school breaks (see Chapter 6).

Evaluation - means procedures used in accordance with §§ 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. Sec. 300.15.

Every Student Succeeds Act of 2015 - is commonly known as ESSA, it is a federal law that was signed on December 10, 2015, to reauthorize the Elementary and Secondary Education Act of 1965 (ESEA). It replaces the No Child Left Behind Act. It made numerous changes to the prior law. Generally, it gave more authority and flexibility to States in determining accountability standards/ goals and in the accountability systems the States utilize. It removed the "highly qualified teacher" requirements. It caps the number of students receiving alternative tests at one percent of all students (about 10 percent of students receiving special education). South Dakota's Accountability Plan serves as the framework for all ESSA efforts in the State. ESSA implementation began in the 2017-18 school year.

FAPE - Free Appropriate Public Education.

FBA - Functional Behavioral Assessment.

FERPA - Family Educational Rights and Privacy Act. It is contained at 34 C.F.R. Part 99.

Free Appropriate Public Education - the term "Free Appropriate Public Education" or "FAPE" means special education and related services that: are provided at public expense, under public supervision and direction, and without charge; meet the standards of the SEA…; include an appropriate preschool, elementary school, or secondary school education in the State involved; and are provided in conformity with an individualized education program (IEP)…. Sec. 300.17.

Functional Behavioral Assessment - a process for gathering information to understand the function (purpose) of behavior to write an effective behavior intervention plan (see Chapter 12).

GED - General Educational Development credential or General Equivalency Diploma. This is testing students can take as an alternative to completing high school and receiving a regular high school diploma.

Habilitation - Services focused on providing a person with the skills and/or abilities to qualify or enable that person for a position or role.

IAES - Interim Alternative Educational Setting.

IDD or I/DD - Intellectual or Developmental Disability.

IDEA - Individuals with Disabilities Education Improvement Act of 2004.

IEE - Independent Educational Evaluation.

IEP - Individualized Education Program. The document parents jointly develop at least annually with school personnel that contains services provided to a child with a disability (see Chapter 6).

IEP Team - The group of individuals who make decisions regarding a child with a disability's identification, evaluation, placement, and provision of a free appropriate public education and who develop, review, and revise the child's IEPs (see Chapter 6).

IFSP - Individualized Family Service Plan. This document contains the services provided to children from birth to age 3 under Part C of IDEA.

Include - In IDEA, "include" means that the items named are not all the possible items that are covered, whether like or unlike the ones named. Sec. 300.20. For example, the regulation defining Related Services states that it "includes" and then lists several types of possible related services. Use of the term, "includes," means that the list of types of related services is not intended to be an exhaustive list.

Independent Educational Evaluation - is an evaluation obtained by a parent at public expense (paid for by the school district) from an evaluator independent of (outside) the local school district because the parent disagrees with an evaluation conducted or obtained by the school district (see Chapter 13).

Interim Alternative Educational Setting - A placement different from that called for in the child's IEP wherein the child must continue to have access to the general education curriculum and receive services that allow the child to progress toward meeting the child's annual IEP goals. A child is placed in an interim alternative educational setting in situations involving discipline (see Chapter 14).

Intelligence Quotient (IQ) - This is a number representing a person's reasoning ability (measured using problem-solving tests) as compared to the statistical norm or average for their age, taken as 100.

LEA - Local Educational Agency, such as a school district.

LRE - Least Restrictive Environment. A learning environment for a child with a disability that includes, to the maximum extent appropriate, children without disabilities (see Chapter 10).

Mediation - A voluntary process in special education bringing parties together with an impartial mediator to work with each other to attempt to resolve a disagreement. Parents and school districts may utilize mediation at any time to attempt to resolve a disagreement. Sec. 300.506 (see Chapter 13).

Modification - Changes made to the curriculum content, whent he expections are beyond the student's ability.

Native Language - when used with respect to an individual who is limited English proficient, means the following: The language normally used by that individual, or, in the case of a child, the language normally used by the parents of the child…; In all direct contact with a child (including evaluation of the child), the language normally used by the child in the home or learning environment. For an individual with deafness or blindness, or for an individual with no written language, the mode of communication is that normally used by the individual (such as sign language, Braille, or oral communication). Sec. 300.29.

O&M - Orientation and Mobility services are services provided to students who are blind or visually impaired by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments.... Sec. 300.34(c)(7) (see Chapter 7).

OT - Occupational Therapy are services provided by a qualified occupational therapist; and includes improving, developing, or restoring functions..., Improving ability to perform tasks for independent functioning..., Preventing, through early intervention, initial or further impairment or loss of function. Sec. 300.34(c)(6) (see Chapter 7).

Parent - means a biological or adoptive parent of a child; 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; 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); 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 a surrogate parent who has been appointed. Sec. 300.30(a).

Except as provided [below], the biological or adoptive parent, when attempting to act as the parent under this part and when more than one party is qualified under paragraph (a) of this section to act as a parent, must be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.

If a judicial decree or order identifies a specific person or persons under paragraphs (a)(1) through (4) of this section to act as the "parent" of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the "parent" for purposes of this section. Sec. 300.30(b).

Part B - is the portion of IDEA applying to services provided to children with disabilities ages 3 through 21. Part B is what is addressed in this book.

Part C - is the portion of IDEA applying to services provided to children from birth to age three.

Participating Agency - is an outside public agency, such as vocational rehabilitation, independent living, employment, etc., that is invited to participate in a child's transition IEP meeting.

Personally Identifiable Information (PII) - means information that contains the name of the child, the child's parent, or other family member; the address of the child; a personal identifier, such as the child's Social Security number or student number; or a list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty. Sec. 300.32 (see Chapter 13).

Physical Education - is part of the definition of "special education," which means the development of physical and motor fitness; fundamental motor skills and patterns; and skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports); and includes special physical education, adapted physical education, movement education, and motor development. Sec. 300.39(b)(2).

PLAAFP - Present Levels of Academic Achievement and Functional Performance.

Positive Behavioral Supports/Interventions - are individualized approaches to support students experiencing behavioral difficulties in school, home, and community environments. It is a process that incorporates goal setting, functional behavioral assessment, plan design, implementation, and evaluation.

Procedural Safeguards - are protections required by the Individuals with Disabilities Education Act (IDEA). They are often referred to as "parental rights" and include things such as the right to review records, independent educational evaluations, prior written notice, transfer of rights, and more. Procedural safeguards do not spell out what services or accommodations should be in an IEP. Instead, they describe the ground rules for how you will work with the school (see Chapter 13).

PT - Physical Therapy (see Chapter 7).

Public Agency - includes the SEA, LEAs, ESAs, nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities. Sec. 300.33. In most situations in South Dakota, it means the local school district (LEA).

Record - Any information recorded in any way, including handwriting, print, videotape, audiotape, or electronically stored documentation.

Related Services - This means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education. Sec. 300.34. The list of related services contained in the federal regulations is non-inclusive, meaning not limited to those specifically listed (see Chapter 7).

Residential School Program - is an approved specialized program provided in a facility that a child attends 24 hours a day. ARSD 24:05:13:01(31).

Resolution Meeting - is a legally required meeting between the parents and relevant IEP Team members to discuss the basis of a Due Process Complaint, so that the school has the opportunity to resolve the dispute before a hearing occurs. This meeting need not be held if both the school and parents agree to waive it. Sec. 300.510 (see Chapter 13).

Response to Scientific, Research-based Intervention - is a method for determining the existence of a Specific Learning Disability. It may also be referred to as "Response to Intervention," or "RtI" (see Chapter 4).

RtI - Response to Intervention, is short for "response to scientific, research-based intervention."
SBVI - Services to the Blind and Visually Impaired.

School Day - means any day, including a partial day that children are in attendance at school for instructional purposes. School day has the same meaning for all children in school, including children with and without disabilities. Sec. 300.11(c).

SDCL - South Dakota Codified Laws.

SDSBVI - South Dakota School for the Blind and Visually Impaired.

SEA - State Educational Agency, means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools. Sec. 300.41. In South Dakota, SEA could refer to the State Department of Education or State Board of Education.

Section 504 of the Rehabilitation Act - this is from the Rehabilitation Act of 1973, "Section 504" states that no program or activity receiving federal funds can exclude, deny benefit to, or discriminate against any person on the basis of disability. Section 504 is contained at 29 U.S.C. Section 794(a) (see Chapter 12).

Self-Contained Program - is a specialized instructional environment for eligible children in need of special education or special education and related services who require intensive instructional procedures. ARSD 24:05:13:01(34).

Services Plan - means a written statement that describes the special education and related services the LEA will provide to a parentally-placed child with a disability enrolled in a private school who has been designated to receive services, including the location of the services and any transportation necessary, consistent with § 300.132, and is developed and implemented in accordance with §§ 300.137 through 300.139. Sec. 300.37 (see Chapter 11).

SLD - Specific Learning Disability. (See Chapter 4 for a description of the evaluation of a child suspected of having a specific learning disability).

Special Education - is specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings, and instruction in physical education. Special education also includes each of the following: speech-language pathology services, or any other related service, if the service is considered special education rather than a related service under State standards; travel training; and vocational education. Sec. 300.39(a).

Specially Designed Instruction - means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability; and to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children. Sec. 300.39(b)(3).

ST/SLT - Speech Therapy/Speech-Language Therapy (see Chapter 7).

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 children without disabilities to the maximum extent appropriate in accordance with the LRE requirements of IDEA. Sec. 300.42.

Transition Services - is a coordinated set of activities for a child with a disability that (1) is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation; (2) is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes: Instruction; related services; community experiences; the development of employment and other post-school adult living objectives; and if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. Sec. 300.43(a).

Transition services for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education. Sec. 300.43(b). (See Chapter 8).

Travel Training - is the part of the definition of special education, "Travel Training" means providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction, to enable them to develop an awareness of the environment in which they live; and learn the skills necessary to move effectively and safely from place to place within that environment (*e.g.*, in school, in the home, at work, and in the community). Sec. 300.39(b)(4).

USC - United States Code. IDEA is located at 20 U.S.C. Section 1400 *et seq*.

Vocational Education - means organized educational programs that are related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree. Sec. 300.39(b)(5).

VR - Vocational Rehabilitation are services provided by the South Dakota Division of Rehabilitation Services and the South Dakota Services to the Blind and Visually Impaired.

Ward of the State - is a child who, as determined by the State where the child resides, is (1) a foster child; (2) a ward of the State; or (3) in the custody of a public child welfare agency. Ward of the State does not include a foster child who has a foster parent who meets the definition of a parent in Sec. 300.30. Sec. 300.45.

NOTES

Chapter 2: Purposes and Applicability of Part B to State and Local Educational Agencies

What is the purpose of Part B of IDEA? How does it apply to the work of state and local educational agencies?

What the Federal Regulations Say . . .

Purposes - The purposes of this part are:

a) To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.

b) To ensure that the rights of children with disabilities and their parents are protected.

c) To assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities; and

d) To assess and ensure the effectiveness of efforts to educate children with disabilities. Sec. 300.1.

Applicability of Part B to State and local agencies - States - This part applies to each State that receives payments under Part B of the Act, as defined in Sec. 300.4. Sec. 300.2(a).

Public agencies within the State - The provisions of this part:

1. apply to all political subdivisions of the State that are involved in the education of children with disabilities, including:
   (i) The State educational agency (SEA);
   (ii) Local educational agencies (LEAs), educational service agencies (ESAs), and public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA;
   (iii) Other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for children with deafness or children with blindness);
   (iv) State and local juvenile and adult correctional facilities; and
2. are binding on each public agency in the State that provides special education and related services to children with disabilities, regardless of whether that agency is receiving funds under Part B of the Act. Sec. 300.2(b).

Private schools and facilities – Each public agency in the State is responsible for ensuring that the rights and protections under Part B of the Act are given to children with disabilities:

1. referred to or placed in private schools and facilities by that public agency; or
2. placed in private schools by their parents under the provisions of Sec. 300.148. Sec. 300.2(c).

What the Regulations Mean . . .

The purposes of IDEA result from extensive Congressional findings. Prior to enactment of the first version of IDEA, the Education for All Handicapped Children Act of 1975 (Public Law 94-142), the educational needs of millions of children with disabilities were not being fully met because the children did not receive appropriate educational services, they were excluded entirely from the public school system and from being educated with their peers, their disabilities went undiagnosed and prevented them from having a successful educational experience, or there was a lack of resources within the public school system, forcing families to find services elsewhere.

The initial Congressional emphasis was on access to schools and providing children with disabilities an appropriate education. Over the years, Congress has determined that IDEA has been impeded by low expectations.

With the 2004 Amendments, Congress stated that 30 years of research and experience has demonstrated that education for children with disabilities can be more effective by having high expectations for children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to:

1. meet developmental goals.
2. to the maximum extent possible, meet the challenging expectations established for all children.
3. be prepared to lead productive and independent adult lives, to the maximum extent possible.

Congress listed numerous ways in which education of children with disabilities can be made more effective at 20 U.S.C. §1400(c). Some of those topics included: Strengthening the role and responsibility of parents; supporting high-quality, intensive preservice preparation and professional development for all school personnel who work with children with disabilities to ensure they have the skills and knowledge necessary to improve children's academic achievement and functional performance; supporting the use of technology to maximize accessibility; and being more responsive to both minority groups and children with limited English proficiency.

IDEA broadly applies to numerous educational agencies. It not only applies to the SEA (State Educational Agency) and LEAs (Local Educational Agencies), but it also applies to Educational Services Agencies, special State schools for children who are deaf or blind, State Departments of Corrections and Mental Health, and charter schools for those states that have charter schools.

What Parents Should Know . . .

One of the purposes of IDEA is to ensure all children with disabilities receive a Free Appropriate Public Education (FAPE). IDEA is not a "one size fits all" law or program. Instead, each decision made on behalf of a child with a disability must be based on that child's unique needs, whether that be the evaluations performed to determine eligibility and/or the services the child requires, the measurable annual goals, the special education services a child requires, whether the child requires any related services, and when the services will begin, the frequency of the services, the duration of the services, and the location where services will be provided, etc.

Within the purposes of IDEA is the clear mandate that “appropriate services” means not only the provision of special education and related services to meet academic needs, but also to meet a child’s functional needs and to be sufficient to prepare the child for further education, employment, and independent living. Congress has thus placed a much greater emphasis on “transition services,” meaning a level of services to allow the child to seamlessly move from the public school to employment, various post-secondary education opportunities, independent living, adult services, and/or community participation. IDEA has come a long way from its initial emphasis on simply getting children with disabilities inside the school doors, to that of achieving specific outcomes by the time the child leaves the public school.

NOTES

Chapter 3: Child Find Services

What is Child Find and how does it apply to families and schools?

What the Federal Regulations Say . . .

General Requirement - The State must have in effect policies and procedures to ensure that all children with disabilities residing in the State, including children with disabilities who are homeless children 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, are identified, located, and evaluated. Sec. 300.111(a)(1)(i); See also, Sec. 300.131(a).

Out-of-State Children - Each LEA in which private, including religious, elementary schools and secondary schools are located must, in carrying out the child find requirements in this section, include parentally-placed private school children who reside in a State other than the State in which the private schools that they attend are located. Sec. 300.131(f).

What the Regulations Mean . . .

"Child Find" means schools are responsible for locating all children with disabilities in the school district. School districts have policies and procedures for how they will find children with disabilities in their districts. Child Find is often done through newspaper announcements, flyers in public places, or mailings to doctors and hospitals in the area. Most districts also have scheduled screening programs.

Schools must also evaluate those children suspected of having a disability to see if they need special education services. This includes children with disabilities attending private schools (including children whose residence is in another state), children who are homeschooled, and children not yet of mandatory school age.

What Parents Should Know . . .

Schools must locate children who have disabilities and find out if they need special education. Parents can get a copy of the school's Child Find policies by asking the principal or administrator for them. It is best to ask for it by writing a letter. The School's Child Find responsibilities exist for children from birth through age 21. (See "FAPE" in Chapter 12).

In South Dakota . . .

Each school district shall develop and utilize a system for the identification, location, and evaluation of children in need of special education or special education and related services. The system must include all children residing within the jurisdiction of the district who are ages birth through 21 regardless of the severity of their disability, including children in all public and private agencies and institutions, private schools, including religious schools, and children receiving alternative instruction under SDCL 13-27-3 within the legal boundaries of the district. The requirements of this section apply to:

1. wards of the state, and highly mobile children with disabilities such as migrant, and homeless children; and
2. children who are suspected of being children with disabilities; even though they are advancing from grade to grade. ARSD 24:05:22:01.

Tip . . .

Child Find responsibilities include ALL children within a district, including children who are home schooled and who attend private schools within school district boundaries, regardless of the parents' actual in-state or out-of-state residence.

NOTES

Chapter 4: Evaluation and Reevaluation

What is the process of referral for an evaluation if the family or the school has concerns?

What the Federal Regulations Say . . .

Request for initial evaluation - Consistent with the consent requirements in Sec. 300.300, either a parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability. Sec. 300.301(b).

What the Regulations Mean . . .

Any State educational agency, local school district, or any other state agency that thinks a child might have a disability can make a referral to a local school district for an initial evaluation. Parents can also make referrals if they have concerns about the development of their child.

School staff are required, because of their “Child Find” responsibilities, to make a referral when they suspect a child may have a disability. School teachers and other school professionals should receive training so that they know what to look for in terms of a child possibly having a qualifying disability under IDEA.

What Parents Should Know . . .

If your child’s doctor tells you that your child has developmental delays or a specific condition, parents should consider referring their child to the local school district for an evaluation to determine if the child qualifies for special education services.

Some schools have a referral form. If parents choose to write a letter to the school to ask the school to evaluate the child, they should write the date at the top of the letter and sign it. Parents should keep a copy of the signed letter. Schools will not start the evaluation process until parents provide them with signed consent.

Parents can ask the school for a copy of the procedural safeguards for the special education process, although the school must provide it when a referral occurs.

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In South Dakota . . .

Referral - Referral includes any written request which brings a student to the attention of a school district administrator (building principal, superintendent, or special education director) as a student who may need special education. A referral made by a parent may be submitted verbally, but it must be documented by a district administrator. Other sources of referrals include the following:

1. Referral through screening.
2. Referral by classroom teacher.
3. Referral by other district personnel.
4. Referral by other public or private agencies.
5. Referral by private schools, including religious schools. ARSD 24:05:24:01.

Duties of a district after referral - Upon receiving a referral the school district shall conduct an informal review or may proceed with the evaluation process. An informal review includes a conference, if appropriate and necessary, either in person or by telephone, with the person making the referral and a review of the student's school record. ARSD 24:05:24:02.

Duties of a district after informal review - If, after an informal review arising from a parental referral, the district determines that no evaluation is necessary, the district shall inform the parents of its decision and the reasons for the decision. It shall also inform the parents of their due process rights. If after informal review, the district determines that further evaluation is necessary, the district shall conduct a full and individual evaluation with the consent of the parents. ARSD 24:05:24:03.

Documentation of referrals not evaluated - All referrals of students that do not result in evaluation must be documented by the district. ARSD 24:05:24:04.

Tip . . .

Since there is no timeframe for responding to a referral, sometimes schools are slow or fail to respond during the referral process, losing what could be invaluable time for a child. Parents may need to follow-up as needed to obtain a response. If a school does not respond in a timely manner, parents may utilize the State Complaint process. See Chapter 13.

Does the school need parental consent prior to an evaluation being conducted?

What the Federal Regulations Say . . .

Parental consent for initial evaluation - The public agency proposing to conduct an **initial evaluation** to determine if a child qualifies as a child with a disability … must, after providing notice…, obtain informed consent ... from the parent of the child before conducting the evaluation. Parental consent for initial evaluation must not be construed as consent for initial provision of special education and related services. Sec. 300.300(a)(1).

Refusal - If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation…, or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards [*i.e.*, mediation, due process hearing], if appropriate, except to the extent inconsistent with State law relating to parental consent. Sec. 300.300(a)(3)(i).

Parental consent for reevaluations - Each public agency must obtain informed parental consent … prior to conducting any **reevaluation** of a child with a disability. If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures.... Sec. 300.300(c)(1).

The informed parental consent … need not be obtained if the public agency can demonstrate that it made reasonable efforts to obtain such consent; and the child's parent has failed to respond. Sec. 300.300(c)(2).

A public agency may not use a parent's refusal to consent to one service or activity under paragraphs (a) or (d)(2) of this section to deny the parent or child any other service, benefit, or activity of the public agency, except as provided in this part. Sec. 300.300(d)(3).

To meet the reasonable efforts requirement ... the public agency must document its attempts to obtain parental consent using the procedures in Sec. 300.322(d). See page 50, Sec. 300.300(d)(5).

What the Regulations Mean . . .

The school cannot evaluate a child until it has the parent's written permission (consent). This permission is for initial evaluation/reevaluation only, not for receiving special education services.

The school must tell the parents in writing (provide written notice) about all evaluations. If new testing is needed, the school must also tell the parents who will do the testing (if known), their title and qualifications, and what kind of testing they will do. Parents must be a part of the team deciding which evaluations the child requires. While parents have input on areas to be evaluated, the school selects the specific test instruments and the staff who will give them.

If the parent refuses to give consent for the evaluation or reevaluation, the school has two options; do nothing and the process stops; or file for a due process hearing to attempt to get a hearing officer to order an evaluation.

When parents refuse to allow their child to be evaluated, the school has to decide how important it is to test the child. The main issue is for the child to receive a Free Appropriate Public Education (FAPE).

The school must be able to show the ways that it tried to get the consent of any parent who does not respond to the school's request for consent to an initial or reevaluation. (See "Parent Participation" in Chapter 6). With a reevaluation only, the school can go ahead with the testing if a parent does not respond to the request for consent.

What Parents Should Know . . .

Parents must give written consent before a school can conduct evaluations. **The timeline for conducting evaluations does not begin until the school receives written consent, so it is important for parents to provide written consent to the school as soon as possible**. Parents can ask the school to explain the purpose of the evaluations and answer any other questions before giving permission.

Parents have the right to refuse consent for initial evaluations and reevaluations. If parents refuse to consent to evaluations and the school still feels the child should be evaluated, the school may file for a due process hearing to attempt to get a hearing officer to require that the child be evaluated.

When a school seeks parental consent for reevaluation, and the parent does not want to consent, the parent must let the school know. If the parent simply does not respond to the school's requests for a reevaluation, the school can evaluate the child without the parents' permission. See Chapter 13 on informed consent.

Tip . . .

The timeline for conducting evaluations does not begin until parents provide written consent. In the case of **reevaluations only**, if parents fail to respond to the school's request for permission to reevaluate, the school may go ahead with the testing without first obtaining parental consent. For further information on parental consent, see Chapters 5 and 13.

NOTES

What is the procedure for the initial evaluation and what is the timeframe for completion?

What the Federal Regulations Say . . .

Each public agency must conduct a full and individual initial evaluation, in accordance with Secs. 300.305 and 300.306, before the initial provision of special education and related services to a child with a disability under this part. Sec. 300.301(a).

Procedures for initial evaluation - The initial evaluation must be conducted within 60 days of receiving parental consent for the evaluation; or if the State establishes a timeframe within which the evaluation must be conducted, within that time frame; and must consist of procedures to determine if the child is a child with a disability…; and to determine the educational needs of the child. Sec. 300.301(c).

Exception - The timeframe … does not apply to a public agency if the parent of a child repeatedly fails or refuses to produce the child for the evaluation; or a child enrolls in a school of another public agency after the relevant timeframe … has begun, and prior to a determination by the child's previous public agency as to whether the child is a child with a disability. The exception … applies only if the subsequent public agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent public agency agree to a specific time when the evaluation will be completed. Sec. 300.301(d).

What the Regulations Mean . . .

The term, "multidisciplinary evaluation," has been replaced in IDEA 2004 by "full and individual evaluation." Children suspected of having a qualifying disability under IDEA must be thoroughly evaluated before the child can be found eligible for special education services and thus, before special education services may be provided.

What Parents Should Know . . .

Parents are part of the team that will decide what evaluations need to be completed.

In South Dakota . . .

Pre-placement evaluation. Before any action is taken concerning the initial placement of a child with disabilities in a special education program, a full and individual initial evaluation of the child's educational needs must be conducted. Initial evaluations must be completed **within 25 school days** after receipt by the district of signed parent consent to evaluate unless other timelines are agreed to by the school administration and the parents.

Written evaluation reports, determination of eligibility, and conducting an IEP Team meeting must be completed within 30 calendar days starting on day 26 after the 25-school day evaluation timeline. If another timeline for completing the evaluation process is agreed to by the parent and school administration, the written evaluation reports, determination of eligibility, and conducting an IEP Team meeting must be completed within 30 days from the end of the agreed upon evaluation timeline. ARSD 24:05:25:03.

How many evaluations are completed to make sure the school gets an accurate assessment of my child?

What the Federal Regulations Say . . .

In conducting the evaluation, the public agency must not use any single measure or assessment as the sole criterion for determining whether a child is a "child with a disability" and for determining an appropriate educational program for the child. Sec. 300.304(b)(2).

The public agency must ensure 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. Sec. 300.304(c)(4).

What the Regulations Mean . . .

Schools must use more than one test or evaluation procedure to decide if a child qualifies for special education and to decide the child's program. IEP Team members, or other qualified professionals, do the testing, watch the child's behaviors, and may ask people outside of school such as the child's doctor, etc. about the child's strengths and needs. The team uses all of this information to help decide if the child qualifies for special education. The child must be tested or evaluated in all areas of a suspected disability. The evaluation must be broad enough to find all the child's special education needs.

What Parents Should Know . . .

The IEP Team must look at many things before determining whether a child has a disability. Parents should tell the IEP Team about their child at home, with family, and in the community. Parents may also give the IEP Team information from the child's doctors, therapists, or others.

Schools are responsible for providing or otherwise paying for all evaluations required for a particular child, in areas such as intelligence, achievement, behavioral/emotional, physical therapy, occupational therapy, speech therapy, vision, hearing, transition, etc. Schools are also responsible for paying for all medical evaluations required for determining a child's medically-related disability that results in the child's need for special education and related services. For example, if the school determines a child needs a medical evaluation for purposes of diagnosing ADHD, the school is responsible for paying for that medical evaluation.

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Will the evaluation process include evaluations from more than one source and why?

What the Federal Regulations Say . . .

The public agency must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, including information provided by the parent, that may assist in determining whether the child is a child with a disability ... 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 a preschool child, to participate in appropriate activities). Sec. 300.304(b)(1).

The public agency must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.
Sec. 300.304(b)(3).

What the Regulations Mean . . .

The IEP Team will get information about the child from many sources. The information can come from parents, tests, observations, the child's doctors, or therapists. The information will be used to decide if the child qualifies for special education. The information will also help the team write the IEP so that the child can participate in the general education curriculum to the greatest extent possible. The IEP Team will gather information to understand the whole child. School staff must use tests that give accurate information.

What Parents Should Know . . .

Parents may be asked to write down information about their child for, or meet with, the evaluators. Sometimes, such as when emotional/behavioral evaluations are conducted, parents will take an active role by filling out questionnaires on their child. Parents must understand that a diagnosis from the child's doctor alone does not make the child eligible for special education services. (See Chapter 5 on Eligibility).

Parents may ask to see information about the tests their child will take. Parents should ask the school staff to explain the tests. Parents can look at their child's answer sheet, but evaluators are not allowed to show parents the test kit itself.

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How do I know if the assessments or testing procedures used were applicable and non-discriminatory?

What the Federal Regulations Say . . .

Each local education agency shall ensure: that assessments and other evaluation materials used to assess a child are selected and administered so as not to be discriminatory on a racial or cultural basis; are 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 so provide or administer; are used for purposes for which the assessments or measures are valid and reliable; are administered by trained and knowledgeable personnel; and are administered in accordance with any instruction provided by the producer of the assessments. Sec. 300.304(c)(1).

Each public agency must ensure: Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient [IQ score]; assessments are 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 test 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).
Sec. 300.304(c)(3).

Each public agency must ensure in evaluating each child with a disabiliy..., the evaluation is sufficiently comprehensive to identify all the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.
Sec. 300.304(c)(6).

Each public agency must ensure that assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided. Sec. 300.304(c)(7).

Each public agency must ensure that assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, consistent with Sec. 300.301(d)(2) and (e), to ensure prompt completion of full evaluations. Sec. 300.304(c)(5).

What the Regulations Mean . . .

The tests used must not discriminate because of a child's race or culture. As much as possible, the tests must be given in the language the child normally uses. For example, the school may use qualified interpreters when children do not speak English or use sign language. Children may also use communication boards or other communication tools.

The school selects the appropriate tests to measure the child's needs. The professionals giving the tests must be properly trained and follow the test's directions.

Tests must be selected that can accurately measure what the test intends to measure, taking into consideration any impaired sensory, manual, or speaking skills. For example, one obviously would not give a child who is blind or visually impaired a test in written form (unless the purpose of the test is to determine visual ability).

Schools must evaluate children so that all special education and related services needs are determined. For example, if the child is on an IEP for a specific learning disability, but also has emotional or physical impairments, the school must evaluate all areas of concern, not just the child's specific learning disability. The evaluation results must provide information to help determine the child's educational needs.

What Parents Should Know . . .

Parents may ask why the school used one test instrument instead of another one. Parents may ask the school to use a particular test, but the school makes the final decision on which test instrument it will use. Parents are often asked to provide information about their child to help the evaluators determine the child's educational needs.

A child's scores on evaluations can vary from day-to-day due to a number of factors. Some such factors could include:

- the child's mood or cooperation with attempting to answer questions to the best of his/her ability;
- effects of medication;
- illness or recent illness;
- how the child and evaluator got along; and
- time of day.

Testing must be fair to children of all cultures and languages. Parents should tell the school how their child communicates best. Parents should make sure the school uses their child's communication methods for the testing, whether that be a language other than English, or another mode of communication.

If parents disagree with the results of evaluations, they have the right to an "Independent Educational Evaluation." (See Chapter 13).

Will previous or outside evaluations or data be considered in the evaluation process?

What the Federal Regulations Say . . .

Review of Existing Evaluation Data - As part of an initial evaluation (if appropriate) and as part of any reevaluation under Part B of the Act, the IEP Team and other qualified professionals, as appropriate, must review existing evaluation data on the child, including evaluations and information provided by the parents of the child; current classroom-based, local, or State assessments and classroom-based observations; and observations by teachers and related services providers.

On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine whether the child is a child with a disability … and the educational needs of the child; or, in case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child; the present levels of academic achievement and related developmental needs of the child; whether the child needs special education and related services; or in the case of a reevaluation of a child, whether the child continues to need special education and related services; 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. Sec. 300.305(a).

Conduct of Review - The group … may conduct its review without a meeting. Sec. 300.305(b).

Source of Data - The public agency must administer such assessments and other evaluation measures as may be needed to produce the data ... Sec. 300.305(c).

Requirements if Additional Data are Not Needed - If the IEP Team and other qualified professionals, as appropriate, determine 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 public agency shall notify the child's parents of that determination and the reasons for the determination; and 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 … unless requested to do so by the child's parents. Sec. 300.305(d).

What the Regulations Mean . . .

In determining which evaluations are needed to decide if a child qualifies or still qualifies for special education services, the IEP Team, which includes the parents and people appointed by the school district, must examine all the current information available on the child from various sources, including information from the child's parents.

The IEP Team will look at all the child's previous evaluations and records, including medical, attendance, behavioral, State and districtwide testing information, etc. The IEP Team will look at anything that has been tried to enhance the child's education and look to see if those special things that were tried helped or hindered the child's education in any way. The IEP Team will be looking at how the child learns and participates in regular education classes and other activities in the school.

Based on this review, the IEP Team, which includes the parents, decides whether more testing is needed, and if so, what kind of testing. The school must tell the parents, in writing, about this decision. If the IEP Team decides no additional testing is needed in some or all areas, the school must also explain in the notice to parents why it decided not to do the testing. However, parents retain the right to require the additional testing for a reevaluation, if they think it is needed.

The IEP Team answers the questions: Does the child have a disability or continue to be a child with a disability? What are the child's educational needs? Does the child need special education and related services?

The IEP Team looks at how well the child is performing at the present time and determines what special education and related services the child may need to have provided. The IEP Team decides the extent and how the child will participate in the general curriculum.

What Parents Should Know . . .

Parents should write down their ideas about what their child needs and gather information from other sources, such as doctors, therapists, etc. They should provide it to the IEP Team before the IEP Team meeting. This will help the IEP Team decide what evaluations are needed and help the school in doing the evaluation. Parents can give the names of other people who have knowledge of the child. These other people may also be part of the IEP Team.

Parents are active participants in the process of determining the areas in which the child requires evaluations. As part of the IEP Team, parents help decide what other information is needed to answer the following questions:

- Does the child have a disability or continue to be a child with a disability?
- What are the educational needs of the child?
- How is the child doing right now? and
- What special education and related services does the child need?

Parents should ask the school personnel how they used or disregarded the information provided by them.

Sometimes the IEP Team will feel more testing is not needed and must tell the parents why. However, in this situation, the parents still have a right to have further testing done by the school in the areas the team felt testing was not needed. **Parents should make their request in writing.**

When will my child be reevaluated and who decides that?

What the Federal Regulations Say . . .

A public agency must ensure that a reevaluation of each child with a disability is conducted … if the public agency determines that the educational 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 … may not occur more than once a year, unless the parent and public agency agree otherwise; and must occur at least every three years, unless the parent and the public agency agree that a reevaluation is unnecessary.
Sec. 300.303.

What the Regulations Mean . . .

The school must reevaluate the child at least every three years or more frequently if warranted (but not more often than once a year unless the parent and school agree). A reevaluation prior to three years should be strongly considered when a child's disability has clearly worsened or where significant progress has been made. A parent or teacher may ask for a reevaluation at any time. When a reevaluation is considered, the IEP Team reviews existing information and decides whether new tests are needed.

What Parents Should Know . . .

The IEP Team will do a reevaluation (sometimes referred to as a "3-year evaluation") to determine how a child's needs have changed. This reevaluation may show the child requires new goals, additional, different, or fewer services, or that the child no longer requires special education services.

If parents believe their child's needs have changed, they may ask for a reevaluation at any time, but if at least a year has not passed since the last evaluation, the school would have to agree to the reevaluation.

In South Dakota . . .

Reevaluations must be completed within 25 school days after receipt by the district of signed consent to reevaluate unless other time limits are agreed to by the school administration and the parents, consistent with ARSD 24:05:25:03 (written evaluation reports, determination of continuing eligibility, and conducting IEP Team meeting must be completed within 30 calendar days starting on day 26 after the 25-school day reevaluation timeline). ARSD 24:05:25:06.

Tip . . .

The provisions above in no way affect a parent's right to an independent educational evaluation (IEE), should the parent disagree with evaluations conducted by the school (see Chapter 13).

Does the school have to reevaluate before determing my child is no longer eligible for special education services?

What the Federal Regulations Say . . .

A public agency must evaluate a child with a disability … before determining that the child is no longer a child with a disability. The evaluation … is not required before the termination of a child's eligibility … due to graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for FAPE under State law. Sec. 300.305(e)(1), (2).

For a child whose eligibility terminates under circumstances described in paragraph (e)(2) … a public agency must provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's post-secondary goals. Sec. 300.305(e)(3).

What the Regulations Mean . . .

A determination that the child is no longer eligible to receive special education, or related services must be based on reevaluation, not simply observation or opinion.

What Parents Should Know . . .

A determination that a child no longer requires special education services cannot be made without first conducting a reevaluation, except for when the child graduates with a regular diploma or ages out of the system. In other words, schools cannot take the child off an IEP without valid justification based on new evaluations.

When a student's eligibility terminates due to graduation or aging-out of services, the student will receive a "summary of the child's academic achievement and functional performance." This summary should assist those students planning on further education, as it will include recommendations on how to assist the child in meeting the child's post-secondary goals.

How does my child qualify under the category of Specific Learning Disability?

What the Federal Regulations Say . . .

A State must adopt, consistent with Sec. 300.309, criteria for determining whether a child has a specific learning disability as defined in Sec. 300.8(c)(10). In addition, the criteria adopted by the State

1. must not require the use of a severe discrepancy between intellectual ability and achievement for determining whether a child has a specific learning disabilit;
2. must permit the use of a process based on the child's response to scientific, research-based intervention; and
3. may permit the use of other alternative research-based procedures for determining whether a child has a specific learning disability.... Sec. 300.307(a).

A public agency must use the State criteria adopted in determining whether a child has a specific learning disability. Sec. 300.307(b).

Specific Learning Disability is defined as: a disorder in one or more of the basic psychological process involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Sec. 300.8(c)(10)(i).

Disorders not included - Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of intellectual disabilities, of emotional disturbance, or of environmental, cultural, or economic disadvantage. Sec. 300.8(c)(10)(ii).

Additional group members - The determination of whether a child suspected of having a specific learning disability is a child with a disability as defined in Sec. 300.8, must be made by the child's parents and a team of qualified professionals, which must include:

1. the child's regular teacher; or
2. if the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or
3. for a child of less than school age, an individual qualified by the SEA to teach a child of his or her age;

and at least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.
Sec. 300.308.

What the Regulations Mean . . .

Prior to the 2004 amendments to IDEA, specific learning disabilities were determined based solely on use of the "severe discrepancy between intellectual ability and achievement" model. IDEA 2004 requires States to adopt criteria that allows for additional methods for determining whether a child has a specific learning disability. School districts, in turn, must follow the criteria developed by the State. When determining the existence of a specific learning disability, IDEA requires that certain individuals be part of the group making that determination.

What Parents Should Know . . .

The definition of specific learning disability has not changed, but the 2004 Amendments allowed for school districts to use the "response to scientific, research-based intervention" (RtI) method for determining the existence of a specific learning disability instead of the "severe discrepancy" method. Since 2004, very few school districts in South Dakota have an approved plan for using RtI for identification of students with specific learning disabilities. When a school district uses RtI, it is important for parents to understand it is to be used only to determine whether a student has a specific learning disability; it should not be used as a basis for evaluating other disabilities.

Dyslexia is a common type of specific learning disability most commonly associated with reading. Students with Dyslexia may have deficits in other areas, such as writing (Dysgraphia), math (Dyscalculia), and motor skills/developmental coordination (Dyspraxia). The South Dakota Department of Education, Special Education Programs, has a useful booklet on its website, *"The Dyslexia Handbook in South Dakota"*.

In South Dakota . . .

South Dakota's administrative rules regarding the evaluation and determination of the existence of a specific learning disability are contained at ARSD 24:05:24.01:18 and 24:05:24.01:19; and 24:05:25:07 through 24:05:25:13.01. (See page 36 for South Dakota's rules, where they differ from the federal regulations).

What are the different ways to determine if my child has a specific learning disability?

What the Federal Regulations Say . . .

Criteria for determining the existence of a specific learning disability - The group may determine that a child has a specific learning disability … if:

1. 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:
    a. oral expression,
    b. listening comprehension,
    c. written expression,
    d. basic reading skill,
    e. reading fluency skills,
    f. reading comprehension,
    g. mathematics calculation,
    h. mathematics problem solving.
2. the child does not make sufficient progress to meet age or State-approved grade-level standards in one or more of the [above] areas … 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, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments; and
3. the group determines that its findings are not primarily the result of:
    a. a visual, hearing, or motor disability;
    b. intellectual disability;
    c. emotional disturbance;
    d. cultural factors;
    e. environmental or economic disadvantage; or
    f. limited English proficiency. Sec. 300.309(a).

To ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider, as part of the evaluation …

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 to the child's parents. Sec. 300.309(b).

The public agency must promptly request parental consent to evaluate the child to determine if the child needs special education and related services and must adhere to the timeframes described in Secs. 300.301 and 300.303, unless extended by mutual written agreement of the child's parents and a group of qualified professionals …

1. if, prior to a referral, a child has not made adequate progress after an appropriate period of time when provided instruction, as described in paragraphs (b)(1) and (b)(2) of this section; and
2. whenever a child is referred for an evaluation. Sec. 300.309(c).

What the Regulations Mean . . .

The existence of a "specific learning disability" used to be made solely by comparing scores on achievement tests in the eight areas listed with full-scale scores on intelligence or "IQ" tests (unless there was a wide variance between verbal and performance scores, in which case the higher score was used). If the achievement score was significantly lower than the intelligence score (a severe discrepancy) in one or more areas, the team would determine whether, as a result, the child requires special education services.

Now, another method, called the child's "response to scientific, research-based intervention" (RtI), may also be used.

The IEP Team must determine that its findings of underachievement are not primarily the result of other disabilities, or cultural, environmental, or economic factors, or limited English ability. If they are, or if the child's underachievement is due to previous failure to appropriately teach the child in reading or math, the child will not be found to have a specific learning disability.

The school must **promptly** request parental consent to evaluate if the child is referred for evaluation or following a determination that appropriate instruction had been provided and data-based documentation showed lack of achievement. The timelines for evaluating a child for a specific learning disability are the same as with other disabilities. Therefore, if parents request that their child be evaluated, the school cannot use RtI as a basis for extending the evaluation timeline or for denying evaluations.

What Parents Should Know . . .

The regulations list eight separate areas in which a student may be found to have a specific learning disability. If a student is evaluated and found to have specific learning disabilities, the student could be found eligible in anywhere from one to all eight areas.

Parents should ask questions when the RtI method is used if they do not understand what the IEP Team members have told them in regard to what was considered, how it was applied, and how the conclusion was reached regarding their child's eligibility determination. Parents may also ask the school personnel what training they have received in using RtI.

Since there are different ways to determine a specific learning disability, how does the IEP Team make the final decision?

What the Federal Regulations Say . . .

Observation - The public agency must ensure that the child is observed in the child's learning environment (including the regular classroom setting) to document the child's academic performance and behavior in the areas of difficulty. Sec. 300.310(a).

The group…, in determining whether a child has a specific learning disability, must decide to:

1. use information from an observation in routine classroom instruction and monitoring of the child's performance that was done before the child was referred for an evaluation; or
2. have at least one member of the group … conduct an observation of the child's academic performance in the regular classroom after the child has been referred for an evaluation and parental consent is obtained. Sec. 300.310(b).

In the case of a child of less than school age or out of school, a group member must observe the child in an environment appropriate for a child of that age. Sec. 300.310(c).

Specific Documentation for the Eligibility Determination - For a child suspected of having a specific learning disability, the documentation of the determination of eligibility, as required in Sec. 300.306(a)(2), must include a statement of:

- whether the child has a specific learning disability;
- the basis for making the determination, including an assurance that the determination has been made in accordance with Sec. 300.306(c)(1);
- the relevant behavior, if any, noted during the observation of the child and the relationship of that behavior to the child's academic functioning;
- the educationally relevant medical findings, if any;
- whether the child does not achieve adequately for the child's age or to meet State-approved grade-level standards consistent with Sec. 300.309(a)(1); and the child does not make sufficient progress to meet age or State-approved grade-level standards consistent with Sec. 300.309(a)(2)(i); 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 consistent with Sec. 300.309(a)(2)(ii);
- The determination of the group concerning the effects of a visual, hearing, or motor disability; intellectual disability; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency on the child's achievement level; and
- if the child has participated in a process that assesses the child's response to scientific, research-based intervention, 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; strategies for increasing the child's rate of learning; and the parents' right to request an evaluation. Sec. 300.311(a).

Each group member must certify in writing whether the report reflects the member's conclusion. If it does not reflect the member's conclusion, the group member must submit a separate statement presenting the member's conclusions. Sec. 300.311(b).

What the Regulations Mean . . .

Part of the process for determining whether a child has a specific learning disability is classroom observation. The IEP Team will determine whether to use previous observations, if any, or conduct a new observation as part of the evaluation process.

When a child is determined to have a specific learning disability, the IEP Team must document its decision, including the basis for that determination, any behaviors observed, any educationally-relevant medical findings, the method used to determine the existence of the specific learning disability and the determination the group made, the determination of the group regarding the effects of any other disability or other factors, and if the school used the response to scientific, research-based intervention (RtI), the data collected and the documentation provided to the parents.

Each team member needs to certify in writing whether they agree with the report's determination, and if not, must submit a separate statement of their conclusions.

What Parents Should Know . . .

The determination of a child's eligibility to receive services as a student with a "specific learning disability" must be made by team consensus after having been provided and discussing the evaluation and observation information. If any team member disagrees with the conclusions of the majority of the team, they must submit a statement documenting their own conclusions. This process is used only with specific learning disabilities. Parents may challenge the team's decision through the due process procedures. (See Chapter 13).

In South Dakota . . .

South Dakota's administrative rules contain differences from the federal regulations that parents, educators, and other professionals should be aware of, in ***bold italics*** below.

South Dakota uses the term, "***Cognitive Disability***," in place of the term, "Intellectual Disability," which is used in the federal regulations. In the area of specific learning disabilities, this difference in terms is found at ARSD 24:05:24.01:18 (Specific Learning Disability Defined); 24:05:24.01:19(3) (Criteria for Specific Learning Disability); and 24:05:25:12(6) (Written Documentation of Eligibility for Specific Learning Disabilities).

South Dakota also uses ***"Emotional Disability"*** in place of "Emotional Disturbance," which is used in the Federal Regulations.

Observation for specific learning disabilities - The ***school district shall*** ensure that the child is observed in the child's learning environment (including the regular classroom setting) to document the child's academic performance and behavior in the areas of difficulty.

The group, in determining whether a child has a specific learning disability, must decide to:

1. use information from an observation in routine classroom instruction and monitoring of the child's performance that was done before the child was referred for an evaluation, ***as in a response to intervention model***; or
2. have at least one member of the group conduct an observation of the child's academic performance in the regular classroom after the child has been referred for an evaluation and parental consent is obtained, ***as in a discrepancy model***. ARSD 24:05:25:11.

Written Documentation of eligibility for specific learning disabilities - For a child suspected of having a specific learning disability, the documentation of eligibility should also consider the following additional points:

- ***If using the discrepancy model, the group finds that the child has a severe discrepancy of 1.5 standard deviations between achievement and intellectual ability in one or more of the eligibility areas, the group shall consider regression to the mean in determining the discrepancy; and***
- ***If using the response to intervention model for eligibility determination, the group shall demonstrate that the child's performance is below the mean relative to age or state approved grade level standards.*** ARSD 24:05:25:12.

Response to intervention model - School districts that elect to use a response to intervention model as part of the evaluation process for specific learning disabilities shall submit to the state for approval a formal proposal that at a minimum addresses the provisions in 24:05:25:12. ARSD 24:05:25:13.01.

What Parents Should Know . . .

When the discrepancy model is used, South Dakota requires use of a statistical "regression formula" chart to determine whether the required standard deviation exists. Unless there is a difference of more than one standard deviation between Verbal and Performance IQ scores, in which case the higher of the two scores is used, the Full-scale IQ score is used for the comparison.

NOTES

Chapter 5: Eligibility

After the evaluation, who determines if my child is eligible for special education services?

What the Federal Regulations Say . . .

Upon completion of the administration of assessments and other evaluation measures, a group of qualified professionals and the parent of the child determines whether the child is a "child with a disability" … and the educational needs of the child; and the public agency provides a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent. A child must not be determined to be a child with a disability … if the determinant factor for that determination is lack of appropriate instruction in reading…; lack of appropriate instruction in math; or limited English proficiency; and the child does not otherwise meet the eligibility criteria. Sec. 300.306(a), (b).

What the Regulations Mean . . .

Once the evaluations are completed, a group of individuals (typically those who would be on the IEP Team), including the parents, decides if the child qualifies for special education services. The team will use State rules to decide if the child qualifies for special education. The team cannot decide the child has a disability if the child's delays are caused by poor or limited instruction in basic subjects or because the child has limited English skills.

What Parents Should Know . . .

Parents are a part of the decision-making team and help in the process of determining eligibility. Parents must receive a copy of all evaluation reports regarding their child. Parents should ask to receive a copy of evaluation reports to review before the meeting to assist them in actively participating in the meeting. Children can be determined eligible for services based on one or multiple categories. Parents should be wary of schools improperly using the criteria for specific learning disability to deny services to children who would be eligible in a different category.

In South Dakota . . .

For purposes of determining eligibility, South Dakota defines and/or provides criteria for determining the existence of autism spectrum disorder, deaf-blindness, deafness, hearing loss, cognitive disability, multiple disabilities, orthopedic impairment, other health impairments, emotional disability, specific learning disabilities, speech or language impairments, traumatic brain injury, or vision loss including blindness. ARSD Chapter 24:05:24.01.

Included within this Chapter are definitions of "Prolonged Assistance" (24:05:24.01:15) and "IEP Team Override" (24:05:24.01:31).

Prolonged assistance defined - Children from birth through two may be identified as needing prolonged assistance if, through a full and individual evaluation, they score two standard deviations or more below the mean in two or more of the following areas: cognitive development, physical development including vision and hearing, communication development, social or emotional development, and adaptive development. ARSD 24:05:24.01:15.

The South Dakota Department of Education, Special Education Programs, website contains a technical assistance guide for determining eligibility in South Dakota, *"Eligibility Guide".*

How is it determined if my child qualifies as a "child with a disability?"

What the Federal Regulations Say . . .

"Child with a disability" means a child evaluated … as having an intellectual disability, a hearing impairment (including deafness), a speech or language impairment, a visual impairment (including blindness), a serious emotional disturbance (referred to in Part B as "emotional disturbance"), an orthopedic impairment, autism, traumatic brain injury, another health impairment, a specific learning disability, deaf-blindness, or multiple disabilities, and who, by reason thereof, needs special education and related services. Sec. 300.8(a)(1).

If it is determined, through an appropriate evaluation..., that a child has one of the disabilities identified in … this section, but only needs a related service and not special education, the child is not a child with a disability under this part. Sec. 300.8(a)(2)(i).

Children aged three through nine experiencing developmental delays - Child with a disability for children ages three through nine (or any subset of that age range, including ages three through five), may, subject to the conditions described in Sec. 300.111(b), include a child who is experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in one or more of the following areas: Physical development, cognitive development, communication development, social or emotional development, or adaptive development; and who, by reason thereof, needs special education and related services.
Sec. 300.8(b).

What the Regulations Mean . . .

IDEA eligibility is described as requiring a child to meet the following two-part criteria: a child must have a disability that fits into one or more of the above categories; and as a result of the disability, the child must require special education services.

While the federal law and regulations set out this two-prong test for eligibility, it is often referred to as a three-prong test, adding as a second step that there must be a determination that the child's disability adversely affects the child's education (prior to determining if the child requires special education services as a result of the disability). South Dakota includes "which adversely affects educational performance" as a second prong in its administrative rules at ARSD 24:05:24.01:01. Whether a school uses a two-prong or three-prong test for eligibility, the analysis is the same because the added second prong is redundant; a child would not need special education services as a result of the child's disability if there was not a negative or adverse impact on the child's education.

If evaluations demonstrate a child requires only a related service, the child is not a “child with a disability” and would not be eligible for services under IDEA.

Children may also be found eligible because of having a developmental delay. The federal regulations describe eligibility for each category in Sec. 300.8(c).

What Parents Should Know . . .

The term “child with a disability” is a *term of art* in special education. When this term is used, it means that a child meets eligibility criteria under IDEA. Simply having one of the listed disabilities is insufficient for eligibility. The child must also need special education (specially-designed instruction) as a result of the disability. If not, the child would not be eligible for any services under IDEA. However, if the child requires only a related service, such as physical therapy, the child may be eligible to receive that service from the school under Section 504 of the Rehabilitation Act. (See Chapter 12).

In South Dakota . . .

South Dakota defines its eligibility criteria for each of the disability categories at ARSD 24:05:24.01.

South Dakota defines **developmental delay** as children at least three years of age and less than nine years of age, who are determined to have a disability listed in 24:05:24.01:01 or who experience a severe delay (two or more standard deviations below the mean in one area or 1.5 standard deviations below the mean in two or more areas) in cognitive development, physical development, communication development, social or emotional development, and adaptive development. A district is not required to adopt and use the term developmental delay for any students within its jurisdiction. If a district uses the term developmental delay, the district must conform to both the department’s definition of the term and to the age range that has been adopted by the department. ARSD 24:05:24.01:09.

South Dakota has an **IEP override process** in place that allows the IEP Team to determine that a student is eligible for special education or special education and related services because the student has a disability and needs special education, even though the student does not meet the specific definitions/ criteria set out in the rules. The IEP Team must document:

1. The record must contain documents that explain why the standards and procedures that are used with the majority of students resulted in invalid findings for the student;
2. The record must indicate what objective data were used to conclude that the student has a disability and needs special education. These data may include test scores, work products, self-reports, teacher comments, previous tests, observational data, and other developmental data;
3. Since the eligibility decision is based on a synthesis of multiple data and not all data are equally valid, the team must indicate which data had the greatest relative importance for the eligibility decision; and
4. The IEP Team override decision must include a sign-off by the IEP Team members agreeing to the override decision. If one or more IEP Team members disagree with the override decision, the record must include a statement of why they disagree signed by those members.

The district director of special education shall keep a list of students on whom the IEP Team override criteria were used to assist the State in evaluating the adequacy of student identification criteria. ARSD 24:05:24.01:31.

Is parental consent required for special education services?

What the Federal Regulations Say . . .

A public agency that is responsible for making FAPE available to a child with a disability must obtain informed consent from the parent of the child before the initial provision of special education and related services to the child. Sec. 300.300(b)(1).

The public agency must make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child. Sec. 300.300(b)(2). (See page 50).

If the parent of a child fails to respond or refuses to consent to services under paragraph (b)(1) of this section, the public agency may not use the procedures in subpart E of this part (including the mediation procedures under Sec. 300.506 or the due process procedures under Secs. 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child. Sec. 300.300(b)(3).

If the parent of the child refuses to consent to the initial provision of special education and related services, or the parent fails to respond to a request to provide consent for the initial provision of special education and related services, the public agency will not be considered to be in violation of the requirement to make available FAPE to the child for the failure to provide the child with the special education and related services for which the public agency requests consent; and is not required to convene an IEP Team meeting or develop an IEP under Secs. 300.320 through 300.324 for the child for the special education and related services for which the public agency requests such consent. Sec. 300.300(b)(4).

What the Regulations Mean . . .

Once a child is determined to be a "child with a disability," parents may choose to refuse special education services. Written consent is required before the initial provision of special education services. While schools must make reasonable attempts to get parental consent, schools **may not** use the procedural safeguards to require services (unlike where they are available if parents refuse evaluations). Furthermore, schools are immune from later litigation if parents specifically refuse consent or simply refuse to respond to the school's attempts to get their consent and are not required to develop an IEP.

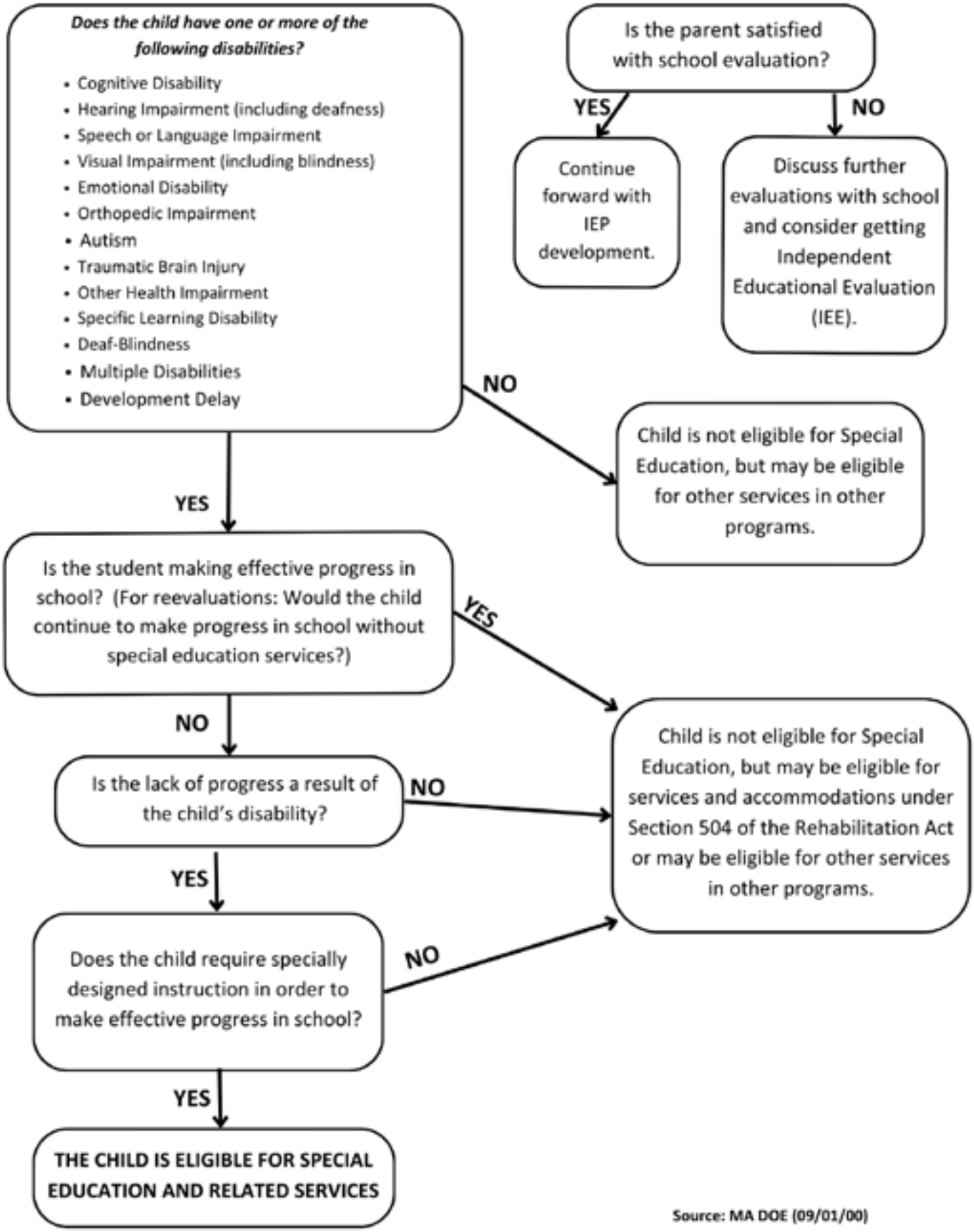
What Parents Should Know . . .

If parents do not consent to the initial provision of special education services, parents cannot later claim they did not know better and sue a school for compensatory education services. Refusing services should be done only after careful consideration of the implications.

Tip . . .

The only IEP requiring parental consent prior to implementation is the very first IEP (when a child is first found eligible for special education services). Signature lines on the first page of the IEP are not there to indicate agreement; they are there only to document who was in attendance at the meeting. At all IEP Team meetings following the very first one, parental consent (or agreement) is not legally required. The school district will propose an IEP and provide prior written notice that the IEP will be implemented after five days (unless parents waive the five-day notice). Parents may challenge proposed IEPs through the due process procedures discussed in Chapter 13.

Eligibility / Initial and Reevaluation Determination Diagram



Source: MA DOE (09/01/00)

Chapter 6: IEP Process and the IEP Team

Who will participate on my child's IEP Team?

What the Federal Regulations Say . . .

The public agency must ensure that the IEP Team for each child with a disability includes: 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 educational environment); not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child; a representative of the public agency…; an individual who can interpret the evaluation results…; at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child…; and, whenever appropriate, the child with a disability.
Sec. 300.321(a).

[Each of these participants are fully described on the following pages].

The determination of knowledge or special expertise of any individual must be made by the party (parents or public agency) who invited the individual to be a member of the IEP Team.
Sec. 300.321(c).

What the Regulations Mean . . .

The school decides who will be the school staff on the IEP Team and sends parents an invitation to the IEP Team meeting. The invitation will list the names or position of the people who represent each of the categories who must be on the IEP Team, as well as any other individuals invited by the school district. Parents are equal participants on the team and can invite other people of their choice to be a part of the IEP Team. School professionals should listen to the information presented by parents and anyone the parents invite to the meeting.

What Parents Should Know . . .

Upon receipt of the meeting invitation (notice), parents should review the list of invited participants and notify the school of any other individuals they believe should be at the meeting. For example, parents may want their child's aide to attend. Parents should tell the school that they are coming to the IEP Team meeting. While not legally required, parents should tell the school who they are bringing along as a child expert or for support. If parents intend to bring an attorney to an IEP meeting, they should inform the school because some schools may refuse to meet unless the school attorney is also present.

The parents should make sure all required people are present at the meeting to help make the decisions. If all participants cannot attend, unless specifically excused, parents should ask that the meeting be rescheduled. Parents are equal partners on the IEP Team.

Will a regular education teacher be on my child's IEP Team?

What the Federal Regulations Say . . .

Parents - The parents of the child. Sec. 300.321(a)(1).

Regular Education Teacher - Not less than one regular education teacher of the child (if the child is, or maybe, participating in the regular education environment). Sec. 300.321(a)(2).

Requirement with respect to regular education teacher - A regular education teacher of a child with a disability, as a member of the IEP Team, must, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports and other strategies for the child; and supplementary aids and services, program modifications, and supports for school personnel…. Sec. 300.324(a)(3).

What the Regulations Mean . . .

Parents, as the term is defined in IDEA, are part of the IEP Team.
(See definition in Chapter 1).

If the child is or might be participating in any regular education classroom or activity for any part of the day, a regular education teacher must be a part of the IEP Team. The regular education teacher helps write the IEP for the child, and helps to decide the services, program modifications, and what support will be needed for school personnel to help the child succeed in the regular education classroom. The school will decide which regular education teacher(s) will be at the meeting.

What Parents Should Know . . .

Parents should attend all IEP Team meetings. They should notify the school if they cannot attend the IEP Team meeting. They can ask for the meeting to be held on a different date and/or at a different time.

A regular education teacher is an important part of the IEP Team whenever a child will be participating even part-time in regular classes or activities. The IEP Team, which includes the parent, decides if the child will be in regular education classrooms or programs for all or part of the child's school day. Therefore, unless a decision has somehow been made prior to the meeting that the child will not participate at all in the regular education environment, the regular education teacher should be a member of the IEP Team. Parents can help the IEP Team plan for the child to be successful when with his or her peers, in classrooms, or in special activities.

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What are the roles of the special education teacher and the school representative on my child's IEP Team?

What the Federal Regulations Say . . .

Special Education Teacher or Provider - Not less than one special education teacher of the child, or if appropriate, not less than one special education provider of such child. Sec. 300.321(a)(3).

LEA Representative - A representative of the public agency who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; is knowledgeable about the general education curriculum; and is knowledgeable about the availability of resources of the public agency. Sec. 300.321(a)(4).

What the Regulations Mean . . .

There must be a special education teacher or provider on the IEP Team who is licensed/certified according to State requirements. Schools should make sure teachers keep up-to-date in their skills by sending them to teacher training events.

The school district representative may be a superintendent, principal, special education director, teacher, or any other school district person who has been designated to fill this role. The school chooses the LEA (Local Education Agency) representative. This person must know about the regular education curriculum and the school district's resources. **The school representative must have the authority to make decisions on behalf of the district, commit any school resources needed, and be able to ensure that whatever services are included in the IEP will actually be provided,** whether that be evaluations, provision of additional staff, related services, and/or any particular placement a child may require, etc. 71 Fed. Reg. 46,670 (2006).

What Parents Should Know . . .

If not sure, parents should ask who the school district representative is at an IEP meeting. The district representative may serve more than one role on the IEP Team. If the district representative is not at the meeting, or attends but does not, in fact, have the authority to commit whatever resources are deemed necessary for the child, it is not a legally-constituted IEP Team. If there is no district representative who has authority to commit resources, parents should ask that the meeting be rescheduled at a time when a district representative can participate.

Tip . . .

Only the IEP Team can make decisions regarding the services required and placement needed for a child. These decisions cannot be deferred to another school committee or to the school board. In other words, another committee, other school administrators, and the school board have no authority to veto an IEP Team's decision, whether that be provision of a specific service, the need to provide (hire) a certain staff member (like an aide or therapist), or an out-of-district placement, etc.

What other participants may be at my child's IEP meeting?

What the Federal Regulations Say . . .

Someone to Explain Tests - An individual who can interpret the instructional implications of evaluation results. Sec. 300.321(a)(5).

Other Participants - At the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel, as appropriate. Sec. 300.321(a)(6).

The Child - Whenever appropriate, the child with a disability. Sec. 300.321(a)(7).

What the Regulations Mean . . .

Somebody on the IEP Team must be able to explain what the evaluation scores, findings and recommendations mean in plain language or in the language the parents normally use. This person may also be one of the other participants.

The school or parents may bring other people to the IEP Team meeting. The law says these people must have "knowledge or special expertise." The party doing the inviting makes the decision about this person's "knowledge or special expertise." The school must consider information from others whom the parent brings to the meeting.

Parents may have their child with a disability attend and participate in IEP meetings at any age. However, the school must invite the child whenever transition services are being discussed.

What Parents Should Know . . .

Parents can ask to have evaluation results explained if they do not understand them. Parents can bring other people with knowledge or special expertise to the IEP Team meeting. Examples may include a friend, relative, neighbor, another parent, doctor, therapist, babysitter or childcare provider, member of a parent support group, advocate, or attorney. While parents are under no legal obligation to inform the school whom they are inviting to the meeting, it is best practice that they do so. If parents bring an attorney without informing the school ahead of time, schools may refuse to meet and require rescheduling the meeting so that the school attorney can also be present.

Parents may choose to have their child attend the IEP Team meeting at any age. The child should participate as much as possible. Starting with the IEP to be in effect at age 16, the child must be invited and should be actively involved in the development of the IEP.

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Do all the IEP Team members need to attend every meeting?

What the Federal Regulations Say . . .

A member of the IEP Team … is not required to attend an IEP Team meeting, in whole or in part, if the parent of a child with a disability and the public agency 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. Sec. 300.321(e)(1).

A 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 the parent, in writing, and the public agency consent to the excusal; and the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting. Sec. 300.321(e)(2).

What the Regulations Mean . . .

IDEA allows parents to waive attendance of certain IEP Team members under two circumstances. First, if a team member's area is not going to be discussed or changed at a meeting, the parent and school can agree, in writing, to dismiss that member for part or all of the meeting. Second, even where a team member's area will be discussed and potentially changed, the parent and school can consent to waive attendance for part or all of the meeting if the team member submits a written report/recommendations to the school and parents prior to the meeting. Parents must consent to such excusals in writing.

What Parents Should Know . . .

While dismissing IEP Team members may be the right thing to do at times, parents should do so with caution. The problem with allowing individuals whose area is not going to be discussed to be excused, or even worse, with allowing individuals to simply file a report in an area that will be discussed, is that these actions take away from the collaborative team process. If questions arise for the dismissed team member, or if they would have had input on a topic discussed, no immediate input would be available. When a team member simply files a report or recommendations, obviously that team member would not be available to answer questions.

If team members cannot attend in person, parents may request that members participate through other methods, such as virtual conferencing or through conference calls, rather than dismiss them from the meeting altogether. Repeated absences of team members will potentially destroy the collaborative nature of the team process. Parents should proceed with caution when consenting to excuse team members.

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How are parents notified of their child's IEP meeting and is it important that they participate?

What the Federal Regulations Say . . .

Public agency responsibility - Each public agency shall take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including:

1. Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and
2. Scheduling the meeting at a mutually agreed on time and place. Sec. 300.322(a).

Information provided to parents - The notice required under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting and who will be in attendance; and inform the parents of the provisions in Sec. 300.321(a)(6) and (c) (relating to the participation of other individuals on the IEP Team who have knowledge or special expertise about the child), and Sec. 300.321(f) (relating to the participation of the Part C service coordinator or other representatives of the Part C system at the initial IEP Team meeting for a child previously served under Part C of the Act). For a child with a disability beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, 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 and that the agency will invite the student; and identify any other agency that will be invited to send a representative. Sec. 300.322(b).

Other methods to ensure parent participation - If neither parent can attend an IEP Team meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls…. Sec. 300.322(c).

Conducting an IEP meeting without a parent in attendance - A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on time and place, such as:

1. Detailed records of telephone calls made or attempted and the results of those calls;
2. Copies of correspondence sent to the parents and any responses received; and
3. Detailed records of visits made to the parent's home or place of employment and the results of those visits. Sec. 300.322(d).

Use of Interpreters or other action, as appropriate - The public agency must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English. Sec. 300.322(e).

Parent copy of the Child's IEP - The public agency must give the parent a copy of the child's IEP at no cost to the parent. Sec. 300.322(f).

What the Regulations Mean . . .

Schools must arrange IEP Team meetings at a time and place that both the parents and school agree is okay. Schools must make sure parents are provided written notice about every IEP Team meeting. If parents cannot attend the meeting in person, they may be given another way to participate, such as by conference call, video conferencing, etc.

The written notice of the meeting must include not only the time and place, but also the purpose of the meeting and who will be attending. The school must also inform the parents that they may bring people to the meeting.

If the purpose of the IEP Team meeting is to address transition services, the school must include that in the notice, as well as what outside agencies will be invited. The notice must also inform parents that the child with a disability will be invited to participate.

If the child's parents require an interpreter to participate in an IEP Team meeting, the school must provide (pay for) an interpreter.

The school must give the parents a copy of the completed IEP. Schools can conduct IEP Team meetings without parents only when the school has made and documented several attempts to get the parents to participate, such as by phone call, written correspondence, and in-person contacts.

What Parents Should Know . . .

Parents should make plans to attend all IEP Team meetings. If they cannot attend the meeting, parents may ask to reschedule or attend the meeting by videi conferencing or conference call. If parents refuse to attend an IEP Team meeting or ignore a school's attempts to contact them, the school may hold the meeting without the parents' participation.

When the parents receive their copy of their child's IEP, they should keep it in a safe place, presumably along with that child's previous IEPs, evaluations, etc. As records accumulate, keeping an orderly file becomes vital (see "Parent Recordkeeping Tips" in Chapter 12).

If the school has people attend an IEP meeting who were not listed in the meeting notice, parents have the option to refuse or allow the individual's attendance.

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What are the different components of an IEP?

What the Federal Regulations Say . . .

The IEP for each child with a disability must include:

- Present levels of academic achievement and functional performance;
- Measurable annual goals;
- Statement of how progress is measured and when parents are informed of progress toward goals;
- Special education and related services, supplementary aids and services, program modifications, and supports for school personnel;
- Least restrictive environment;
- Participation in State or districtwide assessments;
- Beginning date, frequency, location, and duration of services and modifications;
- Transition services;
- Transfer of rights at age of majority. Sec. 300.320.

[Each of the above IEP components are described in more detail on the following pages]

Requirement that program be in effect - At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in Sec. 300.320. Sec. 300.323(a).

What the Regulations Mean . . .

The school must make sure that the IEP for each child who qualifies for special education services meets the requirements of the law and is up-to-date and ready for the beginning of the school year.

What Parents Should Know . . .

School staff must make sure all parts of the IEP are up-to-date. Parents should review their child's IEP at the beginning of the school year to make sure that all parts of the IEP fit the new school year. If the child or educational setting has changed in some way that requires a change in the IEP, the parents may ask for an IEP Team meeting to review and revise the IEP.

When a child is moving from one building to another (*e.g.*, elementary school to middle school, middle school to high school), individuals from both schools should participate in an IEP Team meeting to ensure a smooth transition.

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Who will have access to my child's IEP?

What the Federal Regulations Say . . .

Each public agency must ensure that the child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and other service provider who is responsible for its implementation; and each teacher and provider … is informed of his or her 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.
Sec. 300.323(d).

The public agency must give the parent a copy of the child's IEP at no cost to the parent.
Sec. 300.322(f).

What the Regulations Mean . . .

The school must make sure all of the child's teachers and service providers can look at or get a copy of the IEP.

The school must make sure all of the child's teachers and service providers know their specific responsibilities for implementing the IEP and what services, accommodations, modifications, and supports they each must provide. This would also include specific responsibilities included in a child's behavior plan. The school must give a final copy of the IEP to the child's parents.

What Parents Should Know . . .

Parents will get a copy of the new IEP every year, as well as any amendments to the IEP. Parents can give copies of the IEP to anybody they want. Parents should keep copies of the IEP in their file and check it to see if the goals are being met. When parents get their copy of the IEP, they should read it carefully. If parents have questions, they should contact the school. They may ask for an IEP Team meeting at any time if they believe the IEP should be changed. Parents should follow up with all of the child's teachers to be sure the teachers know the child is on an IEP and their responsibilities.

If school personnel do not provide the services, accommodations, modifications or supports contained in the IEP, the school is out of compliance with the IDEA. When a school is not following an IEP, parents may request an IEP Team meeting to address the issue or may choose to utilize IDEA's procedural safeguards (State Complaint, Mediation, Due Process Complaint).

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What are the "present levels of academic achievement and functional performance" (PLAAFP), and how are they used in my child's IEP?

What the Federal Regulations Say . . .

The IEP 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 *(i.e*., the same curriculum as for nondisabled children); or for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities. Sec. 300.320(a)(1).

What the Regulations Mean . . .

The IEP must provide information on how the child is currently performing, which provides a baseline to later determine whether the child is making sufficient progress to meet annual goals. The child's present levels of academic achievement and functional performance should describe each area of need. The present levels of academic achievement and functional performance are a clear, descriptive statement of how the child is performing in specific areas of need as found through evaluations, observations, and parent input. The statement should include the child's strengths, interests, and needs, in areas of both academic achievement and functional performance. The information for this statement is gathered from parents, teachers, assessments, etc.

There are two parts to the present levels of academic achievement and functional performance. First, the IEP will say how the child's participation in the general curriculum or other activities is affected by the disability. Second, it will also describe how the child performs in both academic and nonacademic areas of need.

What Parents Should Know . . .

Information from the parents is helpful to the school in planning for the child's educational needs. Parents should share with the IEP Team how the child's disability affects everyday activities such as homework, play, and self-care. They can share information about the child's interests and activities, and also provide information about the child's strengths and areas of need. It is also helpful if parents provide any information about outside services and information from those providers. The PLAAFP is used to develop other components of the IEP.

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Do the annual goals in my child's IEP need to be measurable so that the IEP Team can see if my child is making progress?

What the Federal Regulations Say . . .

The IEP must include a statement of measurable annual goals, including academic and functional goals designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum and meet each of the child's other educational needs that result from the child's disability.
Sec. 300.320 (a)(2)(i).

For children with disabilities who take alternate assessments aligned to alternate achievement standards, [the IEP must include] a description of benchmarks or short-term objectives.
Sec. 300.320(a)(2)(ii).

What the Regulations Mean . . .

Each area of need, both academic and functional, will have a measurable annual goal. IDEA 2004 removed the requirement that each annual goal include benchmarks or short-term objectives to help measure the progress in meeting the goal, except in the case of students who take alternate assessments. Measurable annual goals are to help the child be involved in and make progress in the general education curriculum and participate in other activities at school. Annual goals cover what the child can be expected to achieve within one year and must include not only what the child is expected to achieve academically but must also address how the child's disability affects the functional aspects of the child's education. For example, if a child's behavior is affecting the child's education, it may be appropriate to include a functional goal in the child's IEP to address that behavior.

What Parents Should Know. . .

Parents should take an active role in helping the rest of the IEP Team understand what they expect of their child in the general education curriculum and other activities. Parents should take an active role in participating in the development of annual goals (and benchmarks and/or short-term objectives when required).

Parents should insist that measurable annual goals are included in non-academic areas wherein the child's disability results in functional limitations. When in place, parents should ask questions about how the short-term objectives, and/or benchmarks, will help achieve the annual goal. In other words, if the objectives/ benchmarks are met, will the child be able to perform the task at the level identified in the annual goal?

While no longer legally required, the IEP Team may still use short-term objectives in the child's IEP, especially if there is concern for lack of student's progress on annual goals.

How will I know if my child is making sufficient progress toward the annual IEP goals?

What the Federal Regulations Say . . .

The IEP must include a description of how the child's progress toward meeting the annual goals … will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided. Sec. 300.320(a)(3).

What the Regulations Mean . . .

The IEP must include a statement of how the school will measure the child's progress toward the annual goals. The IEP must also include a statement of when and how the parents will be told about that progress. The regulations provide an example of "quarterly or other periodic reports, concurrent with the issuance of report cards," but do not place any limits on more frequent reports.

What Parents Should Know . . .

With the removal of short-term objectives/benchmarks from the federal law, periodic reports become the only way parents have of tracking their child's progress. Parents should make sure they get reports about their child's progress on the annual goals of the IEP at the frequency agreed upon in the IEP. If parents have questions about the report, they should ask the school staff to explain it in plain language.

The frequency of the reports, what they will be based upon, and the form in which they will be given to parents, must be contained in the child's IEP. If the child is not making sufficient progress to meet one or more annual goals, the IEP Team should reconvene to determine if the child needs additional services.

How will my child's IEP describe the special education, related services, and other supports my child will receive, including the frequency, location, and duration of those services?

What the Federal Regulations Say . . .

The IEP must include a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child: to advance appropriately toward attaining the annual goals; to be involved in and make progress in the general education curriculum … and to participate in extracurricular and other nonacademic activities; and to be educated and participate with other children with disabilities and nondisabled children in the activities described in this section. Sec. 300.320(a)(4).

The IEP must include the projected date for the beginning of the services and modifications described in paragraph (a) (4) of this section, and the anticipated frequency, location, and duration of those services and modifications. Sec. 300.320(a)(7).

What the Regulations Mean . . .

The IEP Team will decide which special education services, and which related services, as well as modifications, accommodations and other services, the child will need to be part of the general curriculum and other activities and advance toward attaining the annual goals. The IEP Team decides how the program will be changed for the child and what kinds of help school staff need so the child can:

1. make progress toward annual goals;
2. have as much success as possible in the general education curriculum; and
3. participate in other school activities.

The IEP must specifically describe the beginning date, the frequency, location and duration of services and modifications.

What Parents Should Know . . .

Parents are part of the IEP Team. They work with the rest of the IEP Team to decide what services the child needs. The team's decisions are included in the IEP. The IEP Team must document clearly when services begin, where they are provided, and how often and for how long they will be provided. The extent of a school's responsibility must be clearly set out in the IEP. Parents should not allow language such as "as needed," "when necessary," or "at teacher discretion" in the IEP.

Tip . . .

This is an opportunity for parents and school personnel to include in the IEP any specialized or additional training the child's teachers need in order to appropriately educate the child.

How will the IEP describe my child's least restrictive environment, including participation with nondisabled peers?

What the Federal Regulations Say . . .

The IEP must include an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section. Sec. 300.320(a)(5).

What the Regulations Mean . . .

The 1997 amendments to IDEA changed the language of this requirement. Instead of the IEP documenting how much the child with a disability will participate with children without disabilities, IEP Teams since have been required to determine how much the child with a disability will not participate with children without disabilities. This change shifted the presumption for IEP Teams- that the IEP Team is to presume the child will participate in the general education curriculum in the regular classroom and in other activities unless the IEP Team determines that is not appropriate.

If participation in the regular classroom or general curriculum is not right for the child, the IEP must explain why the child would not participate in regular classes or other school activities. This decision is made after reviewing all of the information regarding the needs of the child.

What Parents Should Know . . .

The IEP Team needs to begin with the presumption that the child with a disability belongs and will be educated in the regular classroom.

Parents need to understand if, when, and why their child will not be in the regular classroom with children who do not have disabilities. Parents also need to understand if, when, and why their child will not participate with children without disabilities in extracurricular and other nonacademic activities. The IEP will provide this information.

TIP . . .

See additional information on Least Restrictive Environment (LRE) in Chapter 10.

Do children with disabilities have to participate in the school's State and districtwide assessments?

What the Federal Regulations Say . . .

The IEP must include a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments …; and if the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or districtwide assessment of student achievement, a statement of why: the child cannot participate in the regular assessment; and the particular alternate assessment selected is appropriate for the child. Sec. 300.320(a)(6).

What the Regulations Mean . . .

The IEP Team will decide what kind of help the child may need for taking State and districtwide tests.

The IEP Team decides if the child cannot do the regular State or districtwide tests. The team will state in writing why the child will not participate. For those few children who do not take the regular State or districtwide tests, an alternative assessment must be provided that is appropriate for the particular child. Districts must develop alternate tests for children who need them.

What Parents Should Know . . .

Parents, as part of the IEP Team, help decide what assistance, if any, their child may need to take the State or districtwide tests.

Parents also help decide when alternate tests are necessary. Alternate testing can be different kinds of tests. They might not be written tests.

Children with disabilities who take alternate State or districtwide tests must have short-term objectives and/or benchmarks included for each annual goal on the child's IEP.

What must be in my child's IEP regarding Transition Services?

What the Federal Regulations Say . . .

Beginning no later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and the transition services (including courses of study) needed to assist the child in reaching those goals. Sec. 300.320(b).

What the Regulations Mean . . .

Beginning with the IEP in effect when a child turns age 16, the IEP must include measurable postsecondary goals and specific transition services the student requires to achieve one or more determined outcomes by the time the student graduates or ages-out of special education services from the school district. The IEP must also include what agencies, besides the school district, are responsible for providing transition services to the student and what services these agencies, if any, will provide. Like other IEP services, a student's transition services must be reviewed at least every year and revised as needed to meet the student's individualized needs.

To help determine a child with a disability's postsecondary goals and needed transition services, schools must conduct transition assessments in areas of training, education, employment, and, if appropriate, independent living skills.

What Parents Should Know . . .

"Transition Services" addresses preparing for life as an adult. Parents and their child with a disability will discuss with the rest of the IEP Team what the child wants for life beyond high school, so that appropriate postsecondary goals can be determined and classes and services can be selected to meet those goals. When it comes time for children to receive transition services, the child must receive appropriate transition evaluations to determine his or her transition needs.

While transition services must be included in a child's IEP in effect at age 16, consideration must be made as to whether they should begin sooner.

TIP . . .

See Chapter 8 for more detailed information regarding transition services.

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What must be in my child's IEP regarding transfer of rights at age 18?

What the Federal Regulations Say . . .

Beginning not later than one year before the child reaches the age of majority under State law, the IEP must include a statement that the child has been informed of the child's rights under Part B of the Act, if any, that will transfer to the child on reaching the age of majority under Sec. 300.520. Sec. 300.320(c).

What the Regulations Mean . . .

The age of majority in South Dakota is age 18. Before a child turns 17 years old, the school must tell the child that he or she will be an adult in the eyes of the law when the child turns 18 years old. The school must document in the IEP in effect when the child turns age 17 that the child has been informed of the transfer of rights that will occur when the child turns age 18.

When a child with a disability reaches the age of 18, all rights under special education law transfer to that adult student, unless the child has been determined by a court to require a legal guardian. The school must notify both the adult student and the parents of the transfer of rights. (See additional information on transfer of rights in Chapter 13).

What Parents Should Know . . .

Children with disabilities may need some form of additional support in making decisions upon turning age 18. There is a continuum of levels of support that parents and students can consider. On an individual basis, if a student is not ready to make decisions independently, alternatives such as Power of Attorney or Supported Decision-making may be an appropriate alternative. Some children may need a partial or full guardianship because of their disability.

Guardianship is a legal process. Parents need to consult an attorney for help with the process. Only a court can appoint a guardian. Guardians are appointed for people who are unable to make decisions about things in their life, such as education, health, finances, and well-being.

As a reminder, at age 18 the student is legally an adult. When rights transfer, schools will send meeting notices and consent forms to only the adult students. Parents should inform the school if their student has a power of attorney, or they are in the process of filing for guardianship or need more information about it.

TIP . . .

Your child's IEP can include instruction so that your child learns about his or her rights under IDEA as an adult upon reaching age 18.

South Dakota Parent Connection and Disability Rights South Dakota have created a guide, *"Preparing for the Future...Understanding Guardianship and Alternatives,"* to help you and your young adult start discussions and take actions for age 18 and beyond. This resource can be found on the South Dakota Parent Connection website at www.sdparent.org.

What are Extended School Year (ESY) services, and how does my child qualify for ESY services?

What the Federal Regulations Say . . .

Each public agency must ensure that extended school year services are available as necessary to provide FAPE.... Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with Secs. 300.320 through 300.324, that the services are necessary for the provision of FAPE to the child. In implementing the requirements of this section, a public agency may not limit extended school year services to particular categories of disability; or unilaterally limit the type, amount, or duration of those services.

Definition - As used in this section, the term extended school year services means special education and related services that are provided to a child with a disability beyond the normal school year of the public agency; in accordance with the child's IEP; and at no cost to the parents of the child; and meet the standards of the SEA. Sec. 300.106.

What the Regulations Mean . . .

The school must give extended school year services to children who need them to receive a FAPE. ESY is special education and/or related services beyond the regular school year. The school may give ESY services during summer or other long school breaks. ESY services must be provided free of charge to parents. The IEP Team decides annually if a child needs ESY services. This may require a separate meeting.

ESY is not just for children with certain disabilities. A child may need ESY services one year and not the next. The IEP Team considers whether the child's gains made during the regular school year are threatened if the school does not provide ESY services. Each child is unique. The IEP Team should look at:

- the extent of the disability,
- the likelihood of significant regression,
- the probable time needed to relearn skills,
- resources available to the parents,
- how quickly the child learns,
- whether lack of services over summer months will halt a student's progress toward developing critical life skills,
- whether the child is at a critical breakthrough period of a skill,
- if lack of services will intensify "interfering behavior" such as aggression or self-injury,
- other resources available to the child and family, and
- other appropriate factors.

ESY services are:

- Provided in order to prepare the child for the next school year.
- Given in a variety of places, such as home, school, or community.
- Sometimes limited to related services such as occupational therapy or physical therapy.

The IEP Team writes the extended school year services into the IEP. If ESY services are needed for any of the reasons listed above in order for the child to receive FAPE, the IEP Team must determine the length of the school day, number of days per week, and the duration of the ESY services based on the individual needs of the child.

What Parents Should Know . . .

ALL SCHOOLS must be prepared to provide ESY services if the children within the district are determined to require such services. In other words, a school district cannot simply decide not to provide ESY services to its children with disabilities. Similarly, schools cannot choose to limit ESY services to children with specific disabilities or limit ESY services to specific services (*e.g.*, only provide speech therapy).

Parents should share relevant information about their child that may help the IEP Team decide whether their child needs ESY services. Parents should request an IEP Team meeting to discuss ESY services if the IEP Team has not previously addressed that issue.

The amount of services provided per day and the duration of the services during the ESY period must be based on the individual needs of the child, **not the convenience or set schedule of the district**. Thus, decisions on whether a particular child requires ESY services, and if so, what those services will consist of, must be individualized. Once it is determined a child requires ESY services, the IEP Team must then determine when those services will start, how many hours per day/days per week the child will receive the services, and the duration of the services (*e.g.*, four weeks, eight weeks, all summer). Again, these decisions must be based on the individual needs of the child, not administrative convenience.

TIP . . .

ESY services must be discussed and addressed annually, and should be determined early enough to:

1. allow sufficient time for the school to develop the program; and
2. allow parents sufficient time to challenge the school's decision through the due process procedures prior to the time ESY services should begin.

Extended school year services are not limited to the summer break. Consideration can also be given to other school breaks. ESY determinations are made by the IEP Team.

The same teacher qualifications for services being provided during the school year apply to ESY services (see pages 120-121).

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What all is considered when developing my child's IEP and when does it go into effect?

What the Federal Regulations Say . . .

Development of IEP - In developing each child's IEP, the IEP Team must consider the strengths of the child; the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluation of the child; and the academic, developmental, and functional needs of the child. Sec. 300.324(a).

Initial IEPs - Each public agency must ensure that a meeting to develop an IEP for a child is conducted within 30 days of a determination that the child needs special education and related services; and as soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP. Sec. 300.323(c).

What the Regulations Mean . . .

The IEP Team will write down the child's strengths, not just needs, in the IEP. The IEP Team will listen to any concerns the parents have about their child's education. The IEP Team will look at all of the latest evaluations and write the child's IEP from that information. In determining the services a child requires, the IEP Team must consider not just a child's academic needs, but a child's developmental and functional needs as well.

Once a child is determined eligible for special education services, the initial IEP must be developed within 30 calendar days, and once developed, must be implemented "as soon as possible." Note: As discussed below, South Dakota does not follow this federal timeline.

What Parents Should Know . . .

Parents play an integral part in planning their child's IEP. The school personnel should solicit information about the child from the parent. Parents should also be prepared to ask questions and make suggestions at IEP Team meetings.

Typically, the initial IEP is developed at the same time as when the IEP Team meets to determine initial eligibility, although IEP development could occur at a separate meeting within the State's timeline as set out below.

In South Dakota . . .

Determination of eligibility and the initial IEP Team meeting, as well as an IEP Team meeting following a reevaluation, must be held within 30 calendar days of completion of the 25 school day period from conducting the evaluation/reevaluation. ARSD 24:05:27:02.

Tip . . .

An IEP is like a contract. If a school fails to comply with its terms, it is out of compliance with IDEA. If a school fails to provide services contained in an IEP because a provider is attending a training or another child's IEP Team meeting, or is out sick or on parental leave, those services must be made up. The only legitimate reason for not providing the IEP services is if the child is not in school. When a school fails to comply with the IEP, parents may file a State Complaint or for a due process hearing to seek compensatory services for those that were not provided (see Chapter 13).

After the IEP is written, is the school accountable for providing the services included in my child's IEP?

What the Federal Regulations Say . . .

Purpose - To ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. Sec. 300.1(a).

Free Appropriate Public Education - Free appropriate public education or FAPE means special education and related services that are provided at public expense, under public supervision and direction, and without charge; … and are provided in conformity with an individualized education program (IEP) that meets the requirements of Secs. 300.320 through 300.324. Sec. 300.18(a), (d).

A free appropriate public education must be available to all children residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in Sec. 300.530(d). Sec. 300.101(a).

Consistent with Sec. 300.323(c), the State must ensure that there is no delay in implementing a child's IEP, including any case in which the payment source for providing or paying for special education and related services to the child is being determined. Sec. 300.103(c).

What the Regulations Mean . . .

IDEA requires the provision of FAPE, which means, among other things, the provision of special education and related services according to the child's IEP. Once an IEP is written, the school is obligated to provide all the services contained in the IEP in the manner described therein. For example, if an IEP calls for the related service of physical therapy three times per week for 20 minutes per session, then the school must provide the service in that manner.

Schools may not delay in providing special education or related services while waiting to find out if a third party will pay for the services. Such a delay is a violation of IDEA.

What Parents Should Know . . .

If a school fails to comply with the terms of an agreed upon IEP, it is out of compliance with IDEA. At that point, parents may want to consider reconvening the IEP Team, filing a State Complaint, requesting mediation, or filing for a due process hearing to seek compensatory services for the services the school had not provided.

The only legitimate reason for a school's failure to provide the services contained in the IEP is if the parents do not make the child available, whether that be due to going on a family vacation or because the child is kept home due to illness. Absent teachers or providers is not a valid reason for not complying with the IEP, as schools are supposed to have substitutes available or make up for any missed services.

How and when must positive behavior interventions and limited English proficiency needs be supported in the IEP?

What the Federal Regulations Say . . .

The IEP Team must, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. Sec. 300.324(a)(2)(i).

The IEP Team must, in the case of a child with limited English proficiency, consider the language needs of the child as those needs relate to the child's IEP. Sec. 300.324(a)(2)(ii).

What the Regulations Mean . . .

If a child has behavior problems that interfere with the child's learning or interfere with other children's learning, the IEP Team will look at what affects a child's behavior and must think about what positive behavioral interventions and supports, and other strategies, will be used to improve the child's behavior. The team will plan and direct how the school will manage specific behaviors, such as through a Behavior Intervention Plan (see Chapter 12).

The IEP Team must consider the special language needs of a child who has difficulties understanding and speaking English. The team must take these needs into consideration when writing the child's IEP.

What Parents Should Know . . .

When a child's behavior is interfering with the child's academic or functional performance, parents should ask that a Functional Behavioral Assessment (FBA) be completed, and once completed, that a Behavioral Intervention Plan (BIP) be put in place that addresses the behaviors through appropriate positive interventions and supports. Parents often have good information for the IEP Team to consider regarding the behaviors they see at home and other settings.

If the child does not speak or understand English well, the parents should make sure the school knows this. The IEP Team will make sure the special language needs are documented and addressed in the services provided in the IEP.

Tip . . .

If parents do not speak or understand English very well, they have the right to have the school provide an interpreter or translator so they can be equal partners on the IEP Team.

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Is Braille an option to be provided in school if my child has limited vision or is blind?

What the Federal Regulations Say . . .

The IEP Team must, in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille 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.
Sec. 300.324(a)(2)(iii).

What the Regulations Mean . . .

The IEP Team must look at the need for providing Braille instruction and teaching the use of Braille to a child who has a visual impairment. The school will test the child's reading and writing skills. The IEP Team will determine whether the child would benefit, now or in the future, from the use of Braille. If the IEP Team does not feel instruction in Braille or the use of Braille is appropriate, that decision should be documented in the IEP.

What Parents Should Know . . .

If the child has blindness or a visual impairment, the parents should be prepared to discuss the use of Braille, Braille instruction, and other options with the IEP Team. If the child requires Braille instruction, the school must ensure that a qualified instructor is provided. Sometimes this may require the school to hire additional personnel. As an alternative to educating the child in the local school district, the IEP Team may consider placement at the South Dakota School for the Blind and Visually Impaired (SDSBVI) in Aberdeen.

If the school fails or refuses to provide instruction in Braille and the use of Braille when appropriate for a child, or fails or refuses to provide a qualified instructor in Braille, parents may challenge the school's position by filing a State Complaint or a Due Process Complaint to have a hearing officer rule on the issue (See Chapter 13).

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How will my child's special communication needs be supported in the IEP?

What the Federal Regulations Say . . .

The IEP Team must consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode.
Sec. 300.324(a)(2)(iv).

What the Regulations Mean . . .

The IEP Team must look at the communication needs of the child. If the child is deaf or has a hearing impairment, the IEP Team must consider the child's:

- language;
- communication needs;
- opportunities for direct communication with peers and professional personnel;
- language and communication mode;
- academic level;
- full range of needs; and
- opportunities for direct instruction in the child's language and mode of communication.

What Parents Should Know . . .

Sometimes children have special communication needs as a result of their disability. Parents should tell the IEP Team about how their child communicates best with friends and family. They should help the IEP Team understand how the child communicates with others.

If the child is deaf or has a hearing impairment, the parent and IEP Team should look at options to determine which placements will allow for direct communications with peers and professional personnel in the child's language and communication mode. The IEP Team should also look for opportunities for the child to have teachers who can provide direct instruction in the child's language and communication mode. If a child who is deaf uses sign language as the primary mode of communication, schools should attempt to provide teachers who are proficient in the type of sign language the child uses and who can sign the lessons directly so that an interpreter is not required. The child should also receive instruction in sign language at appropriate levels throughout the child's schooling so that the child can learn to sign grade-level vocabulary and effectively participate in classes.

Because South Dakota no longer has a School for the Deaf where peers and professionals can directly communicate without an interpreter, if it is determined the child would benefit from direct instruction in classes and direct peer communication, the IEP Team may consider an out-of-state placement for the child to receive an appropriate education.

How will the IEP Team determine if my child needs assistive technology at school?

What the Federal Regulations Say . . .

The IEP Team must consider whether the child needs assistive technology devices and services. Sec. 300.324(a) (2)(v).

What the Regulations Mean . . .

The purpose of assistive technology devices and services is to make sure the child gets a Free Appropriate Public Education (FAPE). The IEP Team must decide whether the child needs assistive technology devices and services in general education classrooms or special education settings.

The IEP Team should consider any device (from a simple pencil grip to computerized equipment) that may help the child learn. The team may need information from an assistive technology specialist to help determine the child's needs. The IEP Team chooses services to help the child get and use assistive technology devices. For example, the IEP Team would talk about evaluating the child in the child's learning setting, getting equipment, and choosing, customizing, and repairing devices. The Team would talk about providing training on using the device. Any assistive technology services or devices agreed upon must be written in the IEP.

What Parents Should Know . . .

The IEP Team must determine at least annually whether a child needs assistive technology devices and services. Parents can tell the IEP Team about what the child can do at home and in the community. (See Chapter 9 for more information on assistive technology devices and services).

Tip . . .

For information on specific items of assistive technology, contact:

DakotaLink
1161 Deadwood Avenue, Suite 5, Rapid City, SD 57702
(800) 645-0673

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How often or when will the IEP be reviewed and revised?

What the Federal Regulations Say . . .

Each public agency must ensure that … the IEP Team reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and revises the IEP as appropriate to address any lack of expected progress toward the annual goals … and in the general education curriculum, if appropriate; the results of any reevaluation conducted…; information about the child provided to, or by, the parents…; the child's anticipated needs; or other matters. Sec. 300.324(b)(1).

Consideration of Special Factors - In conducting a review of the child's IEP, the IEP Team must consider the special factors described in paragraph (a)(2) of this section. Sec. 300.324(b)(2).

Requirement with respect to regular education teacher - A regular education teacher of the child, as a member of the IEP Team, must, consistent with paragraph (a)(3) of this section, participate in the review and revision of the IEP. Sec. 300.324(b)(3).

What the Regulations Mean . . .

The IEP Team must reexamine and revise a child's IEP at least once a year. The IEP Team must determine whether the child's annual goals are being accomplished. Because schools will report to parents at least quarterly on the child's progress toward meeting IEP annual goals and in the general education curriculum, information will be readily available on whether sufficient progress is being made. If the child is not making sufficient progress, the IEP Team must reconvene at that time to revise the IEP.

The IEP Team must also meet more often than annually if there are new evaluation results, or to consider new information provided by the parents, and revise the IEP as appropriate. Each time the IEP Team meets to review a child's IEP, the special factors contained at Sec. 300.324(a)(2) (see previous four pages) must be considered by the IEP Team.

What Parents Should Know . . .

As a member of the IEP Team, parents help review and revise the IEP. They should tell the IEP Team about changes they see in their child. They should help the IEP Team decide what needs to be worked on during the next school year. Parents can ask questions and bring suggestions to the team.

If a parent believes that sufficient progress is not being made toward their child's annual goals, they should request an IEP Team meeting. If the child is not making sufficient progress to achieve the IEP goals, and the school does not hold a meeting to revise the IEP, the school is in violation of IDEA.

Tip . . .

Signing the IEP's cover page indicates attendance only; parents should not refuse to sign that they attended an IEP meeting. As described on page 42, only the initial IEP requires parental consent prior to implementation. Thus, there is no legal requirement that parents sign consent for subsequent IEPs to be implemented. Parents will receive prior written notice (see page 42) stating the IEP will be implemented after five days. Parents may waive this five-day notice so that the IEP can be implemented right away.

If my child's IEP needs to be changed between annual meetings, what is the process?

What the Federal Regulations Say . . .

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 public agency 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. Sec. 300.324(a)(4)(i).

If changes are made to the child's IEP in accordance with paragraph (a)(4)(i) of this section, the public agency must ensure that the child's IEP Team is informed of those changes.
Sec. 300.324(a)(4)(ii).

Changes to the IEP may be made either by the entire IEP Team or, as provided in paragraph (a)(4) of this section, by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated.
Sec. 300.324(a)(6).

To the extent possible, the local educational agency shall encourage the consolidation of reevaluation meetings for the child and other IEP Team meetings for the child. Sec. 300.324(a)(5).

What the Regulations Mean . . .

Amendments to the annual IEP do not require a full team meeting; instead, the parent and a school team member may meet and revise the IEP. Such change may be written as an IEP amendment, rather than redrafting the entire IEP. However, if parents request a new copy of the entire IEP that includes the amendments, the school must provide the parent a copy of the IEP in that form.

What Parents Should Know . . .

Parents must alwaysbe involved when an IEP is changed. After the annual IEP Team meeting, IDEA 2004 allows for just the parent and a school person to meet to amend the IEP without having an official IEP Team meeting (without the full team in attendance). The law does not state who the school person must be, but the person would need to have authority to commit school funds. Any changes made would have the same effect as with any other IEP Team meeting, meaning they would be legally-binding on the part of the school. This means that school officials who did not attend the meeting when the amendment was created would not have the right to veto or otherwise deny the changes made through the amendment process.

When an IEP is amended, parents have the right to request that the entire IEP document be redrafted to incorporate the amendments, rather than simply tacking an amendment page onto the original annual IEP document.

While the law encourages consolidation of meetings to review reevaluation results and the subsequent changes in the IEP, parents may still request IEP Team meetings as frequently as needed based on their child's unique needs.

Amending the IEP without the full IEP Team can be beneficial because it can be done more quickly than if convening the entire team. However, doing so loses the team input. If the changes impact other IEP Team members, the changes must be communicated with staff to ensure the changes are implemented. Parents should proceed with caution to make sure they are not talked into a change that could be detrimental to their child.

How can I prepare for my child's IEP meeting?

Before the IEP Team Meeting . . .

1. Request a copy of any assessment and/or evaluation reports and ask to have them at least one week before the IEP Team meeting. If you do not understand something within the report(s), call the teacher or person who administered the assessment and ask for clarification.
2. Review your child's current IEP.
3. Write a list of your child's strengths and needs.
4. Write a list of the goals that you would like your child to accomplish and also the goals your child wants to accomplish.
    - Think about what has worked or has not worked in the last year.
    - What are your child's interests?
    - What medical or physical needs should be considered?
    - Are there any behaviors that need to be addressed?
    - What are your main concerns for your child right now?
    - What goals are necessary for your child to receive an appropriate education and also move the child forward with his or her education?
5. It can be intimidating to go to an IEP meeting by yourself. If needed, ask someone who knows your child to come to the meeting with you for support. It is always best to notify the school that you are bringing an additional person.
6. Organize your materials. Include a note pad and a something to write with.
7. Write down any questions you may have.
8. Go to the meeting with a positive attitude!

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At the Meeting . . .

1. Openly and objectively listen to your child's Present Levels of Academic Achievement and Functional Performance and give your input.
2. Develop measurable annual goals, including both academic and functional goals.
3. Make sure you know how often you will receive progress reports.
4. Examples of topics to discuss:
    - grading
    - credits
    - transportation
    - adaptive devices
    - curriculum
    - staff
    - facilities
    - methods
    - assistive technology
    - State and districtwide assessments
5. Ask how much of the day your child will be with peers that do not have disabilities. Discuss what supports your child needs in order to be further integrated and included in opportunities provided to all children.
6. Have a clear understanding of how often related services will be provided, such as OT, PT, ST, etc.
7. Discuss ESY services and whether they are appropriate for your child.
8. Discuss transition for students ages 16-21, or younger if appropriate.
9. Obtain a copy of the new IEP at the meeting, even if it is a draft. When the "final" IEP is provided a few days later, parents can compare the "draft" to the "final" to ensure everything was included.

After the Meeting . . .

1. If, after the meeting, you have a concern about a decision that was made by the IEP Team, call or schedule a time to meet with the case manager. Small changes can be made without reconvening the whole team. However, if needed, the IEP Team can be called together for a follow-up meeting to discuss any concerns.
2. Monitor your child's progress. Keep the lines of communication open with the teachers and case manager. Visit with them on a regular basis to find out how things are going for your child.
3. Keep all your child's records organized in a file for easy access.

Some information was taken from "ND P&A Project-Handout 2 (NDRN Conference 1.07)"

NOTES

Chapter 7: Related Services

What are "Related Services," and do they need to be included in my child's IEP?

What the Federal Regulations Say . . .

"Related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification, and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training. Sec. 300.34(a).

Exception; services that apply to children with surgically implanted devices, including cochlear implants - Related services does not include a medical device that is surgically implanted, the optimization of that device's functioning (*e.g.*, mapping), maintenance of that device, or the replacement of that device. Sec. 300.34(b)(1).

Nothing in paragraph (b)(1) … limits the right of a child with a surgically implanted device to receive related services … that are determined by the IEP Team to be necessary for the child to receive FAPE; limits the responsibility of a public agency to 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 school or is at school; or prevents the routine checking of an external component of a surgically implanted device to make sure it is functioning properly…. Sec. 300.34(b)(2).

What the Regulations Mean . . .

The federal law provides a non-inclusive (not intended to be complete) list of related services that may be provided to a child with a disability. IEP Teams may include other services not on the list if the child needs them to receive FAPE. In deciding whether a child with a disability will receive any related services, the IEP Team will, through the evaluation process, determine whether such services are needed to assist the child to benefit from the child's special education program.

A child must first be determined eligible for special education services under IDEA before a child may receive a related service. With the exception of speech-language pathology, related services cannot "stand alone" without a special education program under IDEA. If a student does not qualify for services under IDEA, but would benefit from a related service, those services could be provided under Section 504 of the Rehabilitation Act, as related services can "stand alone" under Section 504.

What Parents Should Know . . .

All agreed-upon related services must be included in the child's IEP, which must specifically state the type and amount of services, and the frequency, location, and duration of the services. Once included in the IEP, the school has a legal duty to provide those services (see Tip, page 63 and 64).

Other types of developmental, corrective, or supportive services have also been provided for children with disabilities as related services. Some examples include a one-on-one aide, assistive technology devices/services, music therapy, vision therapy, and hippotherapy (specialized therapeutic horseback riding).

What types of audiology services may be included in an IEP?

What the Federal Regulations Say . . .

Audiology includes identification of children with hearing loss; determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing; provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation; creation and administration of programs for prevention of hearing loss; counseling and guidance of children, parents, and teachers regarding hearing loss; and determination of children's needs for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification. Sec. 300.34(c)(1).

What the Regulations Mean . . .

After parents and school professionals (IEP Team) have determined through evaluations that the child requires audiology services, those services must be included in the child's IEP, which must specifically state the type and amount of services, and the frequency, location, and duration of the services, as well as specific annual goals if appropriate for the audiology services being provided. Once included in the IEP, the school has a legal duty to provide those services. (See Tip, page 63; page 64). The school's duty to provide these services exists even if the audiology services are not currently available within the school system. If not available within the school system, the school must contract with outside professionals to provide the services.

What Parents Should Know . . .

The South Dakota School for the Deaf completes hearing tests for all children birth through 21 who are residents of South Dakota at no cost to parents. For more information, contact the South Dakota School for the Deaf at (605) 367-5200.

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In South Dakota . . .

The following is a partial listing of Audiology resources:

Communication Services for the Deaf (CSD) provides a wide variety of services throughout the State. Contact them at (833) 682-7630 (Video Phone).

Center for Disabilities DeafBlind Program provides technical assistance, training and resources to families and service providers of children birth to 21 with varying levels of both hearing and vision loss. Contact them by calling (605) 357-1439 or (800) 658-3080 (Voice/TTY).

South Dakota School for the Deaf provides quality educational programs and support services for deaf and hard of hearing children and their families. The school's mission includes consultation to families and educational teams statewide and comprehensive student evaluations including audiology and hearing screening. It serves as a resource for families and local schools by providing a specialist in the education of deaf and hard of hearing children as a member of the educational team. Contact them by calling (605) 367-5200 (Voice/TTY) or (605) 496-9058 (Video Phone).

What types of counseling services can be included in an IEP?

What the Federal Regulations Say . . .

Counseling services means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel. Sec. 300.34(c)(2).

Parent counseling and training means assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP. Sec. 300.34(c)(8).

Rehabilitation counseling services means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to a student with a disability by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended, 29 U.S.C. §701 *et seq.* Sec. 300.34(c)(12).

What the Regulations Mean . . .

IEP Teams should determine whether the child requires counseling services and/or rehabilitation counseling services. If a child requires counseling services to benefit from the child's special education program, the service must be contained in the IEP and specify who will provide it, the type and amount of counseling services, and the frequency, location, and duration of the services, as well as specific annual goals if appropriate for the counseling services being provided. Once included in the IEP, the school has a legal duty to provide those services. (See Tip, page 63; page 64). Based on the child's unique needs, the child may require counseling from a school counselor, a licensed professional counselor, a psychologist, and/or a rehabilitation counselor. The school must contract with outside professionals to provide the service if necessary.

Sometimes parents may need training in understanding their child's disability and/or allowing them to support implementation of the IEP. These training experiences must be included in the child's IEP and provided at no cost to the parents.

What Parents Should Know . . .

If the IEP Team determines, based on evaluation results, that a child needs some form of counseling services to benefit from the child's IEP (such as for a child with an emotional disturbance, but certainly not limited to that disability), it is the school's responsibility to pay for those services. Parents can receive counseling/training in the child's disability and in how to support the child's IEP at home. If the school does not have the service available in the school system, the school must contract with (pay) outside professionals to provide the service if necessary to meet a child's unique needs. Rehabilitation Counseling may be an important component of a child's Transition Services.

How early can my child be identified as a child with a disability? What medical services are part of the IEP process?

What the Federal Regulations Say . . .

Early identification and assessment of disabilities in children means the implementation of a formal plan for identifying a disability as early as possible in a child's life.
Sec. 300.34(c)(3). (See Chapter 3 on "Child Find").

Medical services means 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.
Sec. 300.34(c)(5).

What the Regulations Mean . . .

Generally, schools are not required to pay for "medical services," which means services that must be provided by a physician. The lone exception is where a child requires an evaluation by a physician to help determine the child's disability for purposes of determining the child's eligibility or continuing eligibility and/or determining services that the child requires as a result of the child's disability.

What Parents Should Know . . .

During the course of the evaluation process, if the school or IEP Team finds that a medical evaluation is needed to determine the existence of (diagnose) a particular disability, or the services a child requires, the school is responsible for paying for that evaluation.

For example, if the IEP Team suspects a child may have ADHD and believes a diagnosis is required from a medical doctor to validate the IEP Team's concerns, the school must pay for that evaluation. Medical evaluations may also be required in instances of a child with an emotional disability to determine the nature of the child's emotional impairments (*e.g.*, depression, anxiety, etc.) and to determine services the child may require.

Many of the conditions that fall under the category of “other health impairment” may require a medical diagnosis in order to determine the existence of the disability and/or determine what services the child may require. In these instances, the school district should pay for the medical evaluation to diagnose the child’s disability. The school is not responsible for paying for a child’s ongoing medical treatment, including medication.

Tip . . .

Remember, a medical diagnosis alone does not qualify a student for special education services. The student must meet the two-pronged test for eligibility discussed in Chapter 5.

What interpreting services can be included in my child’s IEP?

What the Federal Regulations Say . . .

Interpreting services includes the following, when used with respect to children who are deaf or hard of hearing: 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 Type-Well; and special interpreting services for children who are deaf-blind. Sec. 300.34(c)(4).

What the Regulations Mean . . .

Children who are deaf or hard of hearing must be provided with interpreting services based on the unique needs of each child, if needed to benefit from the child’s special education program. Interpreting services must be included in the IEP, which must specifically state the type and amount of services, and the frequency, location, and duration of the services. Once included in the IEP, the school has a legal duty to provide those services. (See Tip, page 63; page 64).

What Parents Should Know . . .

While interpreting services, which can consist of a wide variety of services based on the child’s unique communication needs, is now listed in the law as a related service, the IEP Team must also consider the requirements listed previously (in Chapter 6) for children with special communication needs. The IEP Team must consider opportunities for direct communications with peers and professional personnel in the child’s language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child’s language and communication mode.

While parents should always insist on teachers, other providers, and evaluators who can provide direct instruction, at the very least a child who is deaf or hard of hearing must be provided with appropriate interpreting services by personnel qualified to effectively interpret given a child’s cognitive level and current signing abilities. For example, if a child’s signing abilities are at a higher level than the interpreter’s, there would certainly be a question as to the appropriateness of the interpreting services and the appropriateness of the education the child was receiving.

What are occupational therapy services and when can they be provided in my child's IEP?

What the Federal Regulations Say . . .

Occupational therapy means services provided by a qualified occupational therapist; and includes improving, developing or restoring functions impaired or lost through illness, injury, or deprivation; improving ability to perform tasks for independent functioning if functions are impaired or lost; and preventing, through early intervention, initial or further impairment or loss of function. Sec. 300.34(c)(6).

What the Regulations Mean . . .

Part of a child's right to an appropriate education is the receipt of related services necessary for him/her to benefit from special education.

Once it is determined through the evaluation process that a child needs occupational therapy services to benefit from special education, it must be included in the IEP. The IEP must specifically state the type and amount of services, and the frequency, location, and duration of the services, as well as specific annual goals. Once included in the IEP, the school system has a legal duty to provide those services. (See Tip, page 63; page 64). This duty exists even if occupational therapy services are not currently available within the school system. If a student needs occupational therapy to benefit from the program, the school system would have to provide these services by contracting with outside professionals.

What Parents Should Know . . .

Occupational therapy (OT) is generally oriented toward the development and maintenance of functions and skills necessary for daily living. An OT in school programs attempts to prevent deterioration of those functions and helps remediate deficits that impair performance. Occupational therapists often have special expertise in prescribing and constructing adaptive devices (especially for fine motor activities) and in conducting mealtime activities for individuals with physical or sensory involvement.

In South Dakota . . .

A student may be identified as needing occupational therapy as a related service if the student has a disability and requires special education, needs occupational therapy to benefit from special education, and the student demonstrates performance on a standardized assessment instrument that falls at least 1.5 standard deviations below the mean in one or more of the following areas: fine motor skills, sensory integration, and visual motor skills. ARSD 24:05:27:23.

Tip . . .

Make sure the tests are administered by a licensed/registered occupational therapist. Ask him/her questions about the test and how it is scored and how it assesses skills.

What orientation and mobility services can be included in the IEP for a child who is blind or visually impaired?

What the Federal Regulations Say . . .

Orientation and mobility services means services provided to blind or visually impaired children by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community; and includes teaching children the following, as appropriate: spatial and environmental concepts and use of information received by the senses (such as sound, temperature and vibrations) to establish, maintain, or regain orientation and line of travel *(e.g.*, using sound at a traffic light to cross the street); to use the long cane or a service animal to supplement visual travel skills or as a tool for safely negotiating the environment for children with no available travel vision; to understand and use remaining vision and distance low vision aids; and other concepts, techniques, and tools.
Sec. 300.34(c)(7).

What the Regulations Mean . . .

While always assumed to be a related service, orientation and mobility services were officially added to IDEA with the 1997 amendments and 1999 regulations.

What Parents Should Know . . .

IEPs for children who require orientation and mobility services should be very specific as to what services the child will receive. The IEP should include the type and amount of orientation and mobility services, the location, frequency, and duration of the services to be provided, and the person or persons responsible for providing the services, as well as specific annual goals. This service should be provided by a trained professional. Once included in the IEP, the school system has a legal duty to provide those services (see Tip, page 63 and 64).

Children with disabilities OTHER THAN blindness or visual impairments who require assistance in developing an awareness of the environment and learning skills necessary to move effectively and safely from place to place (in school, at home, at work, in the community), should have “Travel Training” contained in their IEPs as a form of special education (see definition of “Travel Training” in Chapter 1).

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What are physical therapy services and when can they be provided in my child's IEP?

What the Federal Regulations Say . . .

Physical therapy means services provided by a qualified physical therapist. Sec. 300.34(c)(9).

What the Regulations Mean . . .

Part of a child's right to an appropriate education is the receipt of related services necessary for him/her to benefit from instruction.

Once the parents and school professionals have determined through the evaluation process that a student needs physical therapy services to benefit from special education, it must be included in the IEP, which must specifically state the type and amount of services, and the frequency, location, and duration of the services, as well as specific annual goals. Once included in the IEP, the school system has a legal duty to provide those services. (See Tip, page 63; page 64). This duty exists even if physical therapy services are not currently available within the school system. If a child is determined to need physical therapy services, the school would then have to provide these services by contracting with outside professionals.

What Parents Should Know . . .

The physical therapist (PT) is trained to prescribe and supervise the following types of activities: gross motor activity and weight-bearing, positioning, range of motion, relaxation, stimulation, postural drainage, and other physical manipulation and exercise procedures. The physical therapist often provides information and direct instruction to team members on appropriate positioning and handling and on the use and construction of adaptive equipment.

In South Dakota . . .

Physical therapy, as a related service, includes gross motor development; mobility; use of adaptive equipment; and consultation and training in handling, positioning, and transferring students with physical impairments. ARSD 24:05:27:24.

A student may be identified as needing PT if the student has a disability and requires special education services, needs physical therapy to benefit from special education, and demonstrates a delay of at least 1.5 standard deviations below the mean on a standardized motor assessment instrument. ARSD 24:05:27:25.

Tip . . .

Make sure the tests are administered by a registered/licensed physical therapist, and ask him/her questions about how the test assesses the skills and how it is scored.

When and how can psychological services be provided in my child's IEP?

What the Federal Regulations Say . . .

Psychological services includes administering psychological and educational tests, and other assessment procedures; interpreting assessment results; obtaining, integrating, and interpreting information about child behavior and conditions relating to learning; consulting with other staff members in planning school programs to meet the special education needs of children as indicated by psychological tests, interviews, direct observation, and behavioral evaluations; planning and managing a program of psychological services, including psychological counseling for children and parents; and assisting in developing positive behavioral intervention strategies.
Sec. 300.34(c)(10).

What the Regulations Mean . . .

Psychological services are delivered as a related service when necessary to help eligible students with disabilities benefit from their special education. In some schools, these services are provided by a school psychologist, but some services are also appropriately provided by other trained personnel, including school social workers and counselors. IDEA requires that, in the case of a child whose behavior impedes his or her learning or that of others, IEP Teams consider the use of positive behavioral interventions and supports and other strategies to address that behavior. The interventions may focus on the results of an absent, inadequate, inconsistent, or negative behavior that interferes with learning. Or, they may focus on curricular instructional issues that may trigger problem behaviors. Positive behavioral interventions and supports involve a comprehensive set of strategies aimed at providing students with a disability an improved lifestyle that includes reductions in problem behaviors, changes in social relationships, expansion of appropriate social skills, and an increase in school and community inclusion.

What Parents Should Know . . .

While school psychologists, social workers, and/or counselors may be involved in assisting in developing a positive behavioral intervention plan, parents can and should also be involved in creating behavioral strategies. It is also important for parents to remember that other appropriate professionals in a school district may play a role in positive behavioral intervention plans.

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When can recreation service be included in my child's IEP?

What the Federal Regulations Say . . .

Recreation includes assessment of leisure function; therapeutic recreation services; recreation programs in schools and community agencies; and leisure education. Sec. 300.34(c)(11).

What the Regulations Mean . . .

Recreation services generally are intended to help students with disabilities learn how to use their leisure and recreation time constructively. Through these services, students can learn appropriate and functional recreation and leisure skills. According to IDEA, recreation activities may fall into one or more of the following classifications:

1. physical, cultural, or social;
2. indoor or outdoor;
3. formal or informal;
4. spectator or participant;
5. independent, cooperative, or competitive; or
6. sports, games, hobbies, or toy play.

Recreational activities may be provided during the school day or in after-school programs in a school or a community environment. Districts have made collaborative arrangements with local parks and recreation programs or local youth development programs to provide recreational services. As part of providing this related service, persons qualified to provide recreation carry-out activities such as:

- assessing a student's leisure interests and preferences, capacities, functions, skills, and needs;
- providing therapeutic recreation services and activities to develop a student's functional skills;
- providing education in the skills, knowledge, and attitudes related to leisure involvement;
- helping a student participate in recreation with assistance and/or adapted recreation equipment;
- providing training to parents and educators about the role of recreation in enhancing educational outcomes;
- identifying recreation resources and facilities in the community; and
- providing recreation programs in schools and agencies.

What Parents Should Know . . .

It is important for parents to remember that recreational services may be provided through IDEA. Goals regarding leisure-time activities should be included in the IEP when deemed appropriate by the student's IEP Team. If the IEP Team determines that a student needs recreation services, it must be included in the IEP, which must specifically state the type and amount of services, and the frequency, location, and duration of the services, as well as specific annual goals if appropriate for the recreation services being provided. Once included in the IEP, the school system has a legal duty to provide those services (seeTip, page 63; and 64).

What are school health services and school nurse services, and how can they be provided in an IEP?

What the Federal Regulations Say . . .

School health services and school nurse services means health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person. Sec. 300.34(c)(13).

What the Regulations Mean . . .

While "medical services" provided by a school are narrowly defined as evaluations performed by a medical doctor, "school health services and school nurse services" is a very broad term.

School health services/school nurse services includes a number of services that can be provided by someone who is not a physician, such as a school nurse, LPN, or other qualified person. They can include a variety of different services, from providing a child with medications (if the child must take them during school hours), to the provision of a full-time nurse to monitor and assist a child with severe health conditions throughout the school day. They could include the availability of a nurse, or training for staff, to assist a child who has a seizure disorder or other medical conditions.

What Parents Should Know . . .

All school health services that are needed to assist a child with a disability to benefit from special education must be included with sufficient detail in the child's IEP, which must specifically state the type and amount of services, and the frequency, location, and duration of the services. Once included in the IEP, the school system has a legal duty to provide those services (see Tip, page 63 and 64).

The school nurse can help with the well-being of children with disabilities. This can cover a range of needs, from seizures to medications to emergency first aid. Nurses and teaching staff can help with students who require specialized procedures such as catheterizations, suctioning, and tube feeding, as well as routine procedures, such as skin care and cast care. Assistance can be provided through direct service, or through training of other staff.

Schools must hire or contract with qualified nurses or other personnel as is necessary to meet the unique needs of the student.

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When can social work services in schools be included in my child's IEP?

What the Federal Regulations Say . . .

Social work services in schools includes preparing a social or developmental history on a child with a disability; group and individual counseling with the child and family; working in partnership with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and assisting in developing positive behavioral intervention strategies. Sec. 300.34(c)(14).

What the Regulations Mean . . .

Issues or problems at home or in the community can adversely affect a student's performance at school, as can a student's attitudes or behaviors in school. "Social work services in schools" may become necessary in order to help a student benefit from his or her educational program. Social work services should be carried out by a licensed social worker.

If the IEP Team determines a child requires "social work services in schools" in order to benefit from the child's special education program, the services needed must be detailed in the child's IEP and provided at no cost to the parents. The IEP must specifically state the type and amount of services, and the frequency, location, and duration of the services. Once included in the IEP, the school system has a legal duty to provide those services (see Tip, page 63 and 64).

What Parents Should Know . . .

The need for social work services should be included in the student's IEP as determined by the IEP Team. If social work services are determined appropriate by the IEP Team, the school must hire or contract for those services if the school does not have such individuals on staff. If parents believe a child requires social work services in school and the school denies the service, parents may request mediation or file a Due Process Complaint to have the issue addressed at a due process hearing.

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What are speech-language pathology services and when can they be included in my child's IEP?

What the Federal Regulations Say . . .

Speech-language pathology services includes identification of children with speech or language impairments; diagnosis and appraisal of specific speech or language impairments; referral for medical or other professional attention necessary for the habilitation of speech or language impairments; provision of speech and language services for the habilitation or prevention of communicative impairments; and counseling and guidance of parents, children, and teachers regarding speech and language impairments. Sec. 300.34(c)(15).

What the Regulations Mean . . .

Speech-language professionals and speech-language assistants, in accordance with State regulations, provide speech-language pathology services. These services address the needs of children and youth with communication disorders.

If a child with a disability requires speech-language therapy as a related service, it must be detailed in the child's IEP, including the type and amount of services, and the frequency, duration, and location of the services, as well as specific annual goals. Once included in the IEP, the school system has a legal duty to provide those services (see Tip, page 63 and 64).

Speech-language pathology services can also "stand alone" as a child with a disability's special education program, so long as the services are considered special education rather than a related service. Sec. 300.39(a)(2)(i).

What Parents Should Know . . .

As part of the IEP Team, parents, along with the rest of the student's IEP Team, should determine whether a child with a disability requires speech-language services in order to benefit from the child's special education program. If a child is determined to need speech-language services, they must be included in the child's IEP.

Speech-Language Pathology is the only related service that can also be deemed special education. As a result, a child who has only a need for speech-language pathology services can be found eligible for special education services.

In South Dakota . . .

After defining Speech-Language Disorder, South Dakota further defines and provides eligibility criteria for Articulation Disorder, Fluency Disorder, Voice Disorder, and Language Disorder. ARSD 24:05:24.01:19-28.

When can transportation services be included as a related service in my child's IEP?

What the Federal Regulations Say . . .

Transportation services includes travel to and from school and between schools; travel in and around school buildings; and specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.
Sec. 300.34(c)(16).

What the Regulations Mean . . .

A child may be determined to require the related service of transportation if the child needs transportation (or some specialized form of transportation) to get to and from school in order to benefit from special education. For example, transportation may be needed as a related service if the child cannot safely walk to school or ride a regular school bus as a result of the child's disability.

It can also include transportation to and from a related service. For example, if a child with a disability needs to be transported to a different school building or to a private provider for physical therapy, that transportation would need to be provided by the school district and included in the child's IEP.

It can include transporting a child to and from a residential placement, including trips home on weekends/holidays as appropriate. It can also include trips for the parents to visit the child, including the cost of room and board. The number of trips home for the child and/or the number of trips for the parents to the residential placement must be determined by the IEP Team.

Transportation must also be provided for out-of-town evaluations paid for by the school. If parents are asked and agree to provide this related service for the school district, transportation costs would include reasonable room and board for parents if the distance involved or length of the evaluation would require an overnight stay.

What the Parents Should Know . . .

If a child with a disability is determined to require the related service of transportation, a school can never require that the parents provide the service. A school may "ask" the parents to provide the service and reimburse them, but cannot require that the parents provide the service as part of the child's IEP. If the parents agree to provide the transportation, they may negotiate the rate, but it must be at least the current State rate. **Given the fluctuation in gas prices, reimbursement at the minimum State rate may well result in the service not being provided "free of charge" to parents; thus a reason for parents to seek a higher rate than the State rate.**

If the school offers appropriate transportation and the parents turn down that offer and wants to transport the child, the parents may choose to provide the transportation, but would not be entitled to reimbursement.

Transportation arrangements must be specifically stated in the child's IEP. The IEP must specifically state the type and amount of transportation services, and the frequency, location, and duration of the services. IDEA's LRE requirements apply to transportation services. (See Chapter 10). Once included in the IEP, the school system has a legal duty to provide those services. (See Tip, page 63; page 64).

In South Dakota . . .

If transportation is required for the child to benefit from the special education program, transportation shall be written in the IEP and provided at no cost to the parent. A district may not require that a parent provide transportation; however, if both parties agree that the parent will provide the transportation, it shall be noted on the IEP and the parent shall be reimbursed by the district in accordance with SDCL 13-30-3 and 13-37-8.9. ARSD 24:05:27:07.

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Chapter 8: Transition Services

What are Transition Services and how does the IEP Team determine what Transition Services my child needs?

What the Federal Regulations Say . . .

Transition services means a coordinated set of activities for a child with a disability that is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation; is based on the individual child's needs, taking into account the child's strengths, preferences and interests; and includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. Sec. 300.43(a).

Transition services for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education. Sec. 300.43(b).

What the Regulations Mean . . .

Transition services provided by the school and/or other participating agencies must be carried out in a coordinated manner that does not duplicate services.

Transition planning must include specific anticipated outcomes that the student will achieve by the time the student graduates, ages out of, or otherwise leaves the public school system. Thus, unlike annual goals in the IEP, transition goals may extend for several years through age 21. Transition services should provide the student a seamless transition from school to post-school activities. One or more post-school activities may be appropriate.

In determining transition services for a student, it is imperative that the services provided be based on the student's strengths, preferences, and interests. The student's transition goals, based on his/her strengths, preferences, and interests, should be the first matter discussed at an IEP Team meeting addressing a student's transition needs.

In each outcome area, *i.e.,* postsecondary education, employment, etc., the child's IEP should include instruction, related services, community experiences, the development of employment, and other post-school adult living objectives, and if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation. Appropriate annual and long-term goals must be developed based on the child's unique transition needs.

Appropriate linkages to services and supports the student will need when finished with school should be in place before he/she leaves the school setting and documented in the IEP.

What Parents Should Know . . .

In each area of post-school activities appropriate for a student (postsecondary education, vocational training, integrated employment, supported employment, continuing and adult education, adult services, independent living, and/or community participation), the school or other participating agency ***must*** provide instruction (special education), related services (if needed to benefit from the instruction), community experiences, the development of employment, and other post-school adult living objectives, and if appropriate, acquisition of daily living skills and a functional vocational evaluation.

Transition services must be included in the IEP that is in place when the child turns age 16 (or younger if determined appropriate) and continuing until the student is no longer eligible for special education services. The IEP Team must:

- actively involve the child in his or her IEP development;
- base the IEP on the child's strengths, preferences, and interests;
- determine the child's post-school goals;
- determine needed transition services; and
- ensure the transition services the student requires in order to meet the student's postsecondary goals are provided.

The components of the IEP - the present levels of academic achievement and functional performance (PLAAFP), transition services, least restrictive environment, related services, participation in general education curriculum, annual goals (including short-term objectives/benchmarks when required), etc. - are interrelated and connected. Beginning no later than development of the IEP to be in place when the child turns 16 **(or younger if appropriate)**, the IEP should be heavily influenced by transition planning and services to prepare the student for adult life.

If transition planning is to be effective, all of the discussion and decision-making in the IEP Team meeting must result in a comprehensive, coordinated program that brings the parts of the IEP together to prepare young people for the adult world.

Tip . . .

The IEP for every student, beginning no later than the IEP in place when the student turns 16 years of age **(or younger if determined appropriate)**, should become future-directed, goal-oriented, and based upon the student's strengths, preferences, and interests. The student should be actively involved in planning his or her transition goals and services and participating in all meetings. The postsecondary goals should be those of the student's, not the teachers' or parents'.

More information on the topics addressed in the Transition section of the IEP are included in the State Department of Education *"Individual Education Program (IEP) Technical Assistance Guide"*.

When will my child start receiving Transition Services and how often will they be reviewed?

What the Federal Regulations Say . . .

Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and the transition services (including courses of study) needed to assist the child in reaching those goals. Sec. 300.320(b).

What the Regulations Mean . . .

When a child with a disability turns age 16, **or even younger if the IEP Team determines appropriate**, it is mandatory as part of the transition plan that the child's IEP contains measurable postsecondary goals and for the IEP to include specific transition services based on transition evaluations and the student's strengths, preferences, and interests.

The transition services the child requires must be designed to progress toward and achieve the student's desired postsecondary goals by the time the student graduates or ages out of special education services from the school district. As with other IEP services, students' transition services must be reviewed at least every year and revised as needed to meet their individualized needs.

In many instances, it will be important to address and provide transition services to children at age 14 or younger, such as children with disabilities deemed "at risk" of dropping out of school or children who need to make decisions regarding their academic track. As a child moves through the public school system, there are certain dates or deadlines when decisions must be made regarding the child's academic path. This is usually done in 7th or 8th grade. Prior to a child with a disability reaching that point, it would be appropriate for transition services to begin, if they are not already in place.

What Parents Should Know . . .

Transition services are the culmination of a child with a disability's public school education. Everything the school has provided prior to the actual transition services should have been leading in that direction, as a purpose of IDEA is to prepare a child for further education, employment, and independent living.

Schools must conduct evaluations to help determine a child's needs in the area of transition services. Then, the services provided should be dictated by what the child wants for life beyond high school, such as employment, independent living, and/or further education, etc. The student's classes and special education services should be sufficient to prepare the student for those outcomes.

Parents should insist that transition services be provided when they believe it to be appropriate for their child.

Other than the IEP Team members, who else can be invited to attend a transition IEP meeting for my child?

What the Federal Regulations Say . . .

The public agency must invite a child with a disability to attend the child's IEP Team meeting if a purpose of the meeting will be the consideration of the postsecondary goals for the child and the transition services needed to assist the child in reaching those goals…. Sec. 300.321(b)(1).

If the child does not attend the IEP Team meeting, the public agency must take other steps to ensure that the child's preferences and interests are considered. Sec. 300.321(b)(2).

To the extent appropriate, with the consent of the parents or a child who has reached the age of majority, in implementing the requirements of paragraph (b)(1) of this section, the public agency also must invite a representative of any participating agency that is likely to be responsible for providing or paying for transition services. Sec. 300.321(b)(3).

What the Regulations Mean . . .

If a purpose of an IEP Team meeting is to consider a student's postsecondary goals or transition services, the school must invite the student to be a part of the IEP Team. The student's preferences and interests are paramount to appropriate transition planning. If the student does not attend an IEP Team meeting, the school must take whatever steps are necessary to make sure the student's preferences and interests are known and considered by the IEP Team. It would do little good for the rest of the IEP Team to attempt to determine a student's postsecondary goals and needed transition services without the student's input.

Transition services may require services beyond what can be provided by a school, such as vocational rehabilitation services, independent living services, employment, etc. The school must make sure that a representative from other agencies that may be responsible for providing transition services is invited to be part of the student's IEP Team. The parents or child (if of age of majority) must consent to such participating agency's participation. If the representative from a participating agency cannot attend, the school must take other steps to ensure the agency's participation at the IEP Team meeting, such as through virtual or conference calls, written reports, or other means.

What Parents Should Know . . .

Parents should encourage their child to attend IEP Team meetings. If parents want the school to invite a representative from another agency to an IEP Team meeting, they should let the school know in advance of the meeting and be sure to provide written consent for that person to attend.

For students to effectively participate in IEP Team meetings and discuss his or her "strengths, preferences, and interests," students should receive training ahead of time on how IEP Team meetings work, the student's role, and the importance of the student's participation. Ideally, many students will then have the ability to effectively run their transition IEP Team meetings.

What happens if a participating agency fails to provide the transition services set out in my child's IEP?

What the Federal Regulations Say . . .

Failure to meet transition objectives - Participating agency failure. If a participating agency, other than the public agency, fails to provide the transition services described in the IEP in accordance with Sec. 300.320(b), the public agency must reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP. Nothing in this part relieves any participating agency, including a State vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to students with disabilities who meet the eligibility criteria of that agency. Sec. 300.324(c).

What the Regulations Mean . . .

Responsibilities for providing transition services may be assigned to different participants (school personnel, agency representatives of state, local, and private agencies) at the IEP Team meeting, but the school district has ultimate and overall responsibility for ensuring the services have been provided. Where participating agencies are providing transition services, the school should have ongoing communication with such agencies to make sure the services are being provided, such as through written progress reports or other means of communication, or by contacting the parent or student, or conducting a review of the IEP.

The IEP must document which participating agencies, in addition to the district, are responsible for providing or paying for transition services to the child and what specific services those agencies will provide.

If a participating agency fails to provide agreed-upon services, the district must initiate an IEP Team meeting as soon as possible to identify alternative strategies. Possible alternative strategies might be: referral to another agency, identifying another funding source, or for the school itself to provide the needed service. Schools should not, however, automatically bear the cost of transition services that should be borne by another agency. For example, if a public agency other than the school district is obligated under federal or state law to provide or pay for transition services, that public agency must fulfill that obligation, either directly or through contract or other arrangement.

What Parents Should Know . . .

The child's school district is responsible for ensuring that the child receives a FAPE. This includes planning and coordination of transition services through development of an IEP.

Parents/students may be assigned specific transition services activities, such as visiting college campuses, adult residential placements, etc. However, the ultimate responsibility for ensuring tasks are completed falls on the school.

Tip . . .

Parents should be wary of schools that refuse to invite appropriate participating agencies and should insist on their participation.

Chapter 9: Assistive Technology (AT)

What are assistive technology devices and how do I get assistive technology devices on my child's IEP?

What the Federal Regulations Say . . .

Assistive Technology Device means any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. The term does not include a medical device that is surgically implanted, or the replacement of such a device. Sec. 300.5.

Each public agency must ensure that assistive technology devices or assistive technology services, or both … are made available to a child with a disability if required as a part of the child's special education…; related services…; or supplementary aids and services…. On a case-by-case basis, the use of school-purchased assistive technology devices in a child's home or in other settings is required if the child's IEP Team determines that the child needs access to those devices in order to receive FAPE. Sec. 300.105.

The IEP Team must consider whether the child needs assistive technology devices and services. Sec. 300.324(a)(2)(v).

What the Regulations Mean . . .

"Assistive Technology Device" includes thousands of items, from a simple pencil grip to expensive communication devices. IDEA is designed to ensure that children with disabilities receive the assistive technology (AT) devices and services (see page 98) they require in order to receive FAPE. The need for AT devices or services must be considered at each IEP Team meeting. Depending on the type of AT device or service the IEP Team determines a child needs, the IEP Team will determine if it falls under special education, related services, or supplementary aids and services, and document it in the IEP accordingly.

What Parents Should Know . . .

The need for AT devices and services is usually determined through specific evaluations. If it is believed a child may need some form of AT device or service, the IEP Team should determine what evaluations should be completed. A child determined to need AT devices or services must be provided with that device or service and it must be documented in the child's IEP. The school can pay for the equipment, utilize other resources to pay for it, or cooperatively fund it, but may not delay in providing the needed device.

A parent's private health insurance and/or Medicaid may be used to pay for AT devices or services, so long as the parents give written permission, there is no cost to the parent, and no impact on future insurance benefits (see Chapter 12). If parents purchase the device, it belongs to the parent and is meant for the exclusive use of the student.

Assistive technology purchased by the school can be used in the child's home or other settings if required to ensure a FAPE. This must be documented in the IEP. If the school purchases the equipment, it belongs to the school. An AT device purchased by the school may be shared if each child who needs it has access to it when needed as set out in each child's IEP.

What are assistive technology services and how are they included in my child's IEP?

What the Federal Regulations Say . . .

Assistive technology service means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. The term includes:

- the evaluation of the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;
- purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;
- selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;
- coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;
- training or technical assistance for a child with a disability or, if appropriate, the child's family; and
- training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that child. Sec. 300.6.

What the Regulations Mean . . .

An evaluation of a child with a disability's assistive technology (AT) needs, which may include a functional evaluation in the school setting, is an AT service.

When the IEP Team has determined a child with a disability requires an AT device, the IEP Team next must determine what, if any, AT services are needed.

The IEP should state, if appropriate, how the AT device will be acquired. If it is the type of AT device that must be specially designed, fitted, customized, and/or adapted for the particular child, that should be detailed in the IEP. The IEP should indicate, if appropriate, how the device will be maintained, repaired, or replaced, including providing the child with a back-up device while the child's regular device is being serviced, repaired, or replaced, so as to comply with the IEP.

The IEP should include how AT devices will be used in conjunction with other therapies and services, and indicate when the child will use the AT device during the course of the day.

The IEP should also include all specific training the child will require in learning how to use the AT device, as well as any training the child's parents may require to assist the child to use the AT device (such as if the AT device is one the child brings home at night). Finally, the child's IEP should also include, if appropriate, training for any professionals or other appropriate individuals (such as employers) in the use of the child's AT device.

What Parents Should Know . . .

Assistive technology (AT) should be one of the areas considered when a student is being assessed to determine eligibility or continued eligibility for special education. Once eligible, AT services and devices must be considered as an option for every student on an IEP at each IEP Team meeting. Consideration should be given if the AT device or AT service is necessary for the student to achieve educational or social goals, benefit from education, or make reasonable progress in the least restrictive environment.

The IEP Team should analyze what is required of students without disabilities of the same age and determine how many of these requirements could be fulfilled partially or completely by the student with a disability who is being assessed if that student had access to appropriate assistive technology.

Assistive Technology devices and services can be special education, related services, or supplementary aids and services that allow the child to be educated in the regular classroom. For example, training for the child in use of an AT device could be "special education," and an annual goal developed. Use of a particular device could be a related service if it assists the child to benefit from special education. If provision of AT devices or services will allow the child to be educated in the regular classroom, the AT device and/or service would be a supplementary aid or service. Ultimately, however, how a device or service is categorized is less important than ensuring the device and services are documented somewhere in the IEP.

Parents should make sure the IEP contains all AT services needed. This should include provision for back-up devices and all other AT services appropriate based on the particular AT device or devices the child requires.

While schools can look to other funding sources to pay for AT devices and services, it may not delay in providing the device/service while waiting for payment from another source.

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Chapter 10: Placement / Least Restrictive Environment (LRE)

What are the IDEA's requirements for LRE?

What the Federal Regulations Say . . .

Each public agency 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; and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Sec. 300.114(a)(2).

The IEP must include an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(4) of this section. Sec. 300.320(a)(5).

What the Regulations Mean . . .

IDEA carries a strong presumption that most children with disabilities will be educated in regular education classrooms with other children their own age. The IEP Team must talk about modifications, if needed, to the general curriculum. It must determine whether there are supplementary aids and services that will allow a child with a disability to be educated in the regular classroom.

Children with disabilities can be removed from the regular classroom when the child's needs are so great that they cannot be met in the regular classroom, even with extra support and modifications. If, for example, a one-on-one aide or the provision of assistive technology would allow the child to be educated in the regular classroom, those services must be provided and contained in the IEP.

What Parents Should Know . . .

After the IEP Team determines the annual goals and special education and related services, it must determine what is the least restrictive placement in which the child's IEP can be implemented. The legal presumption is that such placement will be in the regular classroom unless, due to the severity of the child's disability and even with the provision of supplementary aids and services, the child cannot receive FAPE.

However, it is not an "all or nothing" proposition. Some children may receive services in a resource room or self-contained classroom for part of the school day and participate in the regular classroom for other parts of the school day.

Schools must make genuine efforts to try to educate children with disabilities in the least restrictive placement that will allow the child to receive a FAPE. This may include attempting all reasonable supplementary aids and services prior to proposing a more restrictive placement.

What is the continuum of alternative placements the IEP Team must consider? Does the LRE requirement apply to nonacademic and extracurricular activities?

What the Federal Regulations Say . . .

Continuum of alternative placements - Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

The continuum required … must include the alternative placements listed in the definition of special education under Sec. 300.38 (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. Sec. 300.115.

Nonacademic settings - In providing or arranging for the provision of nonacademic and extracurricular services and activities set forth in Sec. 300.107, each public agency must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The public agency 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 nonacademic settings. Sec. 300.117.

Nonacademic services - The State must ensure the following: Each public agency must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.

Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities, and employment of students, including both employment by the public agency and assistance in making outside employment available. Sec. 300.107.

What the Regulations Mean . . .

The school must be able to provide services in a variety of settings based on the child's needs, from regular classroom placement to a hospital, institutional, or home setting. The IEP Team must begin with the premise that the child will be educated in the regular classroom.

The purpose of requiring schools to have a continuum of placements available is so that if a child's needs are such that the child cannot be educated in, for example, the regular classroom (even with the provision of supplementary aids and services), then the IEP Team would consider the next more restrictive placement along the continuum until it is determined the child can receive a FAPE. If the IEP Team determines the LRE is a placement other than the regular classroom setting, it should be justified in the IEP. The LRE requirements in IDEA apply equally to nonacademic and extracurricular settings, including transportation.

What Parents Should Know . . .

It is the school's responsibility to ensure that each child with a disability is being educated in the LRE appropriate for that particular child. If the IEP Team determines an out-of-district day program or residential placement is the least restrictive setting required for the child to receive FAPE, the school must make sure the placement is at no cost to the parents and the IEP Team would need to address the related service of transportation.

How does the IEP Team determine my child's educational placement?

What the Federal Regulations Say . . .

In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency 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; and is made in conformity with the LRE provisions ...; the child's placement is determined at least annually; is based on the child's IEP; and is as close as possible to the child's home; unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled; in selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and a child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general curriculum. Sec. 300.116.

What the Regulations Mean . . .

The IEP Team must place the child at the school the child would attend if the child did not have a disability, unless it determines the child requires a different placement. Placement decisions must be made only after the rest of the IEP is developed. In other words, once the child's "present levels," annual goals, special education, related services, and other modifications and supports are determined, then the question becomes "what is the least restrictive environment where the IEP can be implemented?" The IEP team must determine at least annually the least restrictive setting in which the child can be successfully educated (receive FAPE).

In deciding a child's placement, the team must consider potential harmful effects on the child in both lesser and more restrictive settings. Children should not be forced into a lesser restrictive placement if the child cannot receive an appropriate education in that setting. Conversely, a child may not be placed in a more restrictive setting based on the convenience of the district. A school cannot remove a child from the regular classroom just because the child needs to have the curriculum modified.

What Parents Should Know . . .

Placements should be made based on the unique needs of the child, not administrative convenience. For example, a child should not be placed in a more restrictive setting because the school has neglected to provide training to its staff. A child should not be placed in a more restrictive setting because the school "does not want to" try to educate a child in a lesser restrictive setting.

What are the IEP requirements when the IEP Team places a child in a private school or facility?

What the Federal Regulations Say . . .

Each SEA must ensure that a child with a disability who is placed in or referred to a private school or facility by a public agency:

1. is provided special education and related services in conformance with an IEP … and at no cost to the parents;
2. is provided an education that meets the standards that apply to education provided by the SEA and LEAs including the requirements of this part, except for Sec. 300.156(c) (qualifications of special education teachers); and
3. has all the rights of a child with disability who is served by a public agency. Sec. 300.146.

Developing IEPs - Before a public agency places a child with a disability in, or refers a child to, a private school or facility, the agency must initiate and conduct a meeting to develop an IEP for the child…. The agency must ensure that a representative of the private school or facility attends the meeting. If the representative cannot attend, the agency shall use other methods to ensure participation by the private school or facility, including individual or conference telephone calls. Sec. 300.325(a).

Reviewing and Revising IEPs - After a child with a disability enters a private school or facility, any meetings to review and revise the child's IEP may be initiated and conducted by the private school or facility at the discretion of the public agency. If the private school or facility initiates and conducts these meetings, the public agency shall ensure that the parents and an agency representative are involved in any decision about the child's IEP; and agree to any proposed changes in the IEP before those changes are implemented. Sec. 300.325(b).

Responsibility - Even if a private school or facility implements a child's IEP, responsibility for compliance with this part remains with the public agency and the SEA. Sec. 300.325(c).

What the Regulations Mean . . .

Sometimes IEP Teams will determine children with disabilities require placement outside of the public school setting, such as at a private school, a residential facility, or an institution. IDEA applies the same standards to the quality of education in a private placement as it does to the public school, with the exception of the "qualifications for special education teachers" requirements. A private placement by the IEP Team in no way diminishes a parent's rights under IDEA.

IEPs must be a joint effort between the parents, public school, and private school or facility. If the private placement fails to provide an appropriate education, the public school is deemed legally responsible for having denied FAPE.

What Parents Should Know . . .

If your child is placed in a private school or facility by the IEP Team, you remain a part of the team that determines the services the child will receive.

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Chapter 11: Private (Including Religious) School Placement by Parents Where FAPE is Not an Issue

What are parentally-placed private school children with disabilities?

What the Federal Regulations Say . . .

Parentally-placed private school children with disabilities means children with disabilities enrolled by their parents in private, including religious, schools or facilities that meet the definition of elementary school in Sec. 300.13 or secondary school in Sec. 300.36, other than children with disabilities covered under Secs.300.145 through 300.147. Sec. 300.130.

What the Regulations Mean . . .

Many parents place their children with disabilities in private schools because they prefer a private school over the public school, even if the public school has offered a free appropriate public education (FAPE). The contents of this and the following pages pertain to those children placed in private (including parochial) schools where FAPE is ***not*** at issue. In other words, the parents agree with (or at least do not contest) the IEP offered by the public school, but for personal reasons have placed their child at a private school.

What Parents Should Know . . .

The decision to place a child with a disability in a private school (when FAPE is not at issue) is sometimes done so the child with a disability can attend the same school as his or her siblings. Perhaps the parents attended the private school. Maybe the private school is a parochial school aligned with the particular church the family attends. Maybe the parents heard the child would receive a better education than at the public school.

Whatever their reason for the private placement, parents who have a child with a disability need to fully understand the legal consequences of a private placement. IDEA ensures a FAPE only for children who attend public schools. As the following pages explain, children with disabilities placed in private schools by their parents may receive some, none, or all of the special education and related services the child would have received in the public school system.

Parents should be aware, however, that if the private school receives federal funds, Section 504 of the Rehabilitation Act would apply, which may require the private school to provide special education and/or related services for the child.

Are public schools responsible for "child find", even if my child is enrolled in a private school?

What the Federal Regulations Say . . .

General - 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, in accordance with paragraphs (b) through (e) of this section, and Secs. 300.111 and 300.201. Sec. 300.131(a).

Child find design - The child find process must be designed to ensure:

1. the equitable participation of parentally-placed private school children; and
2. an accurate count of those children. Sec. 300.131(b).

Activities - In carrying out the requirements of this section, the LEA, or, if applicable, the SEA, must undertake activities similar to the activities undertaken for the agency's public school children. Sec. 300.131(c).

Cost - The cost of carrying out the child find requirements in this section, including individual evaluations, may not be considered in determining if an LEA has met its obligation under Sec. 300.133. Sec. 300.131(d).

Completion period - The child find process must be completed in a time period comparable to that for students attending public schools in the LEA consistent with Sec.300.301. Sec. 300.131(e).

Out-of-State children - Each LEA in which private, including religious, elementary schools and secondary schools are located must, in carrying out the child find requirements in this section, include parentally-placed private school children who reside in a State other than the State in which the private schools that they attend are located. Sec. 300.131(f).

What the Regulations Mean . . .

The "Child Find" portion of IDEA pertains equally to those children who attend private schools. The public school must have a plan in place to ensure that children who may have disabilities who attend private schools are identified and evaluated to determine eligibility for special education services.

Local schools cannot use money they are required to spend on children enrolled by parents in private schools on Child Find activities, including evaluations.

What Parents Should Know . . .

The Child Find requirement is perhaps the only true safeguard that children have who are placed in private schools by their parents where FAPE is not at issue. If a child suspected of having a disability attends a private school, the public school must ensure that such child receives appropriate evaluations to determine whether the child would be entitled to special education services if the child attended the public school. If the evaluations show the child would be eligible for services under IDEA, the parent must then choose whether to keep the child at the private school or enroll the child at the public school.

How much money are public schools required to spend on parentally-placed children with disabilities who attend private schools?

What The Federal Regulations Say . . .

Formula - To meet the requirement of Sec. 300.132(a), each LEA must spend the following on providing special education and related services (including direct services) to parentally-placed private school children with disabilities.

For children aged 3 and through 21, an amount that is the same proportion of the LEA's total subgrant under section 611(f) of the Act as the number of private school children with disabilities aged 3 through 21 who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, is to the total number of children with disabilities in it jurisdiction aged 3 through 21. Sec. 300.133(a)(1).

For children aged three through five, an amount that is the same proportion of the LEA's total subgrant under section 619(g) of the Act as the number of parentally-placed private school children with disabilities ages three through five who are enrolled by their parents in a private, including religious, elementary school located in the school district served by the LEA, is to the total number of children with disabilities in its jurisdiction aged three through five. Sec. 300.133(a)(2)(i).

Calculating proportionate amount - In calculating the proportionate amount of Federal funds to be provided for parentally-placed private school children with disabilities, the LEA, after timely and meaningful consultation with representatives of private schools under Sec. 300.134, must conduct a thorough and complete child find process to determine the number of parentally-placed children with disabilities attending private schools located in the LEA. Sec. 300.133(b).

Supplement, not supplant - State and local funds may supplement and in no case supplant the proportionate amount of Federal funds required to be expended for parentally-placed private school children with disabilities under this part. Sec. 300.133(d).

What the Regulations Mean . . .

Public schools must spend a proportionate amount of federal IDEA funding on children with disabilities who attend private schools. For example, if 100 children with disabilities resided in a school district, and six were placed in private schools by their parents, the district would be required to spend 6% of its federal special education funds on those six children. School districts may spend additional state or local funds, but are not required to do so. The amount spent on Child Find activities cannot count toward the proportionate amount.

What Parents Should Know . . .

Parents should ***not*** place their child with a disability in a private school with the expectation that the public school will provide services, let alone provide services at the level the child was previously receiving at the public school.

How does a public school determine how equitable services are provided among children in private schools?

What the Federal Regulations Say . . .

No individual right to special education and related services - No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school. Sec. 300.137(a).

Decisions - Decisions about the services that will be provided to parentally-placed private school children with disabilities under Secs. 300.130 through 300.144 must be made in accordance with paragraph (c) of this section and Sec. 300.134(c). The LEA must make the final decisions with respect to the services to be provided to eligible parentally-placed private school children with disabilities. Sec. 300.137(b).

Services plan for each child served under Secs. 300.130 through 300.144 - If a child with a disability is enrolled in a religious or other private school by the child's parents and will receive special education or related services from an LEA, the LEA must initiate and conduct meetings to develop, review, and revise a **services plan** for the child, in accordance with Sec. 300.138(b); and ensure that a representative of the religious or other private school attends each meeting. If the representative cannot attend, the LEA shall use other methods to ensure participation by the religious or other private school, including individual or conference telephone calls. Sec. 300.137(c).

What the Regulations Mean . . .

No child placed in a private school when FAPE is *not* at issue has an individual right to special education services from the public school. After consulting with private school personnel as to the needs of children placed in private schools, the public school will decide which children will be offered services. For example, if five children attend private schools, the public school may serve just one or up to all five of the children, spending the same or different amounts on each child the public school chooses to receive services.

What Parents Should Know . . .

When parents place their child in a private school, the child is **no longer entitled to a FAPE** from the public school. Parents who place their child at a private school should be aware that the child may no longer receive any services from the public school.

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What does equitable services mean for a child with a disability? What is a "services plan" for a child who attends a private school?

What the Federal Regulations Say . . .

The services provided to parentally-placed private school children with disabilities must be provided by personnel meeting the same standards as personnel providing services in the public schools, except that private elementary school and secondary school teachers who are providing equitable services to parentally-placed private school children with disabilities do not have to meet the special education teacher qualification requirements of Sec. 300.156(c).
Sec. 300.138(a)(1).

Parentally-placed private school children with disabilities may receive a different amount of services than children with disabilities in public schools. Sec. 300.138(a)(2).

Services provided in accordance with a services plan - Each parentally-placed private school child with a disability who has been designated to receive services under Sec. 300.132 must have a services plan that describes the specific special education and related services that the LEA will provide to the child in light of the services that the LEA has determined, through the process described in Secs. 300.134 through 300.137, it will make available to parentally-placed private school children with disabilities. The service plan must, to the extent appropriate, meet the requirements of Sec. 300.320, or for a child ages three through five meet the requirements of Sec. 300.323(b) with respect to the services provided; and be developed, reviewed, and revised consistent with Secs.300.321 through 300.324. Sec. 300.138(b).

What the Regulations Mean . . .

Public schools must use qualified teachers and other personnel when providing services to children with disabilities who attend private schools, although they do not need to meet the "special education teacher qualification" requirements. While children with disabilities who attend public schools are entitled to FAPE, children placed in private schools by their parents are not. Children placed by their parents in private schools when FAPE is not at issue who are selected to receive services from the public school must have those services detailed in a "**services plan**."

What Parents Should Know . . .

If the public school chooses to provide special education services to a particular child enrolled at a private school (where FAPE is not at issue), the services offered by the public school may differ greatly from what the child was offered had the child attended the public school. If services are provided, the child will have a "services plan" (not an IEP). Once in place, the public school must comply with the services plan.

Public schools must make sure that money spent on children attending private schools benefits the children with disabilities only, not the private school or the instruction provided at the private school.

Where are services provided and when is transportation included for my child who I placed in a private school?

What the Federal Regulations Say . . .

Services on private school premises - Services to parentally-placed private school children with disabilities may be provided on the premises of private, including religious, schools, to the extent consistent with the law. Sec. 300.139(a).

Transportation - If necessary for the child to benefit from or participate in the services provided under this part, a parentally-placed private school child with a disability must be provided transportation from the child's school or the child's home to a site other than the private school; and from the service site to the private school, or to the child's home, depending on the timing of the services. LEAs are not required to provide transportation from the child's home to the private school. Sec. 300.139(b)(1).

Cost of transportation - The cost of transportation described in paragraph (b)(1)(i) of this section may be included in calculating whether the LEA has met the requirement of Sec.300.133. Sec. 300.139(b)(2).

What the Regulations Mean . . .

Public schools can choose whether to serve children placed in private schools by their parents at a public school (or other location) or at the private school. If the children are served at a public school (or other location), the public school must transport the child to the public school (from the child's home or the private school, depending on the time of day the services are provided) and back to the private school (or the child's home, depending on the time of day the services are provided). The cost of such transportation may be included in the total expenditures the public school spends on private school children. If the public school chooses to provide services at a private parochial school, services may be limited to the extent that public school funds cannot be used to promote religion.

What Parents Should Know . . .

For those private school children with disabilities the public school determines it will serve, parents have no say in where the services will be provided. That decision is up to the public school. However, if the public school chooses to provide the services at the public school or a setting other than at the private school, the public school is responsible for transporting the child to and from those services.

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When I place my child with a disability in a private school, do I still have the right to file a Due Process Complaint or State Complaint?

What the Federal Regulations Say . . .

Due process not applicable, except for child find - Except as provided in paragraph (b) of this section, the procedures in Secs. 300.504 through 300.519 do not apply to complaints that an LEA has failed to meet the requirements of Secs. 300.132 through 300.139, including the provision of services indicated on the child's services plan. Sec. 300.140(a).

Child Find complaints to be filed with the LEA in which the private school is located - Procedures in Secs. 300.504 through 300.519 apply to complaints that an LEA has failed to meet the child find requirements in Sec. 300.131, including the requirements in Secs. 300.300 through 300.311.

Any due process complaint regarding the child find requirements (as described in paragraph (b)(1) of this section) must be filed with the LEA in which the private school is located and a copy must be forwarded to the SEA. Sec. 300.140(b).

State complaints - Any complaint that an SEA or LEA has failed to meet the requirements in Secs. 300.132 through 300.135 and 300.137 through 300.144 must be filed in accordance with the procedures described in Secs. 300.151 through 300.153. A complaint filed by a private school official under Sec. 300.136(a) must be filed with the SEA in accordance with the procedures in Sec. 300.136(b). Sec. 300.140(c).

What the Regulations Mean . . .

The procedural safeguards of IDEA, including the right to a due process hearing, DO NOT apply to complaints that the public school failed to comply with the regulations and provide services to children attending private schools (when FAPE is not at issue).

The procedural safeguards of IDEA, including the right to a due process hearing, DO apply only to complaints that the public school failed to provide Child Find and evaluations of children with disabilities who attend private schools. Parents can use the "State Complaint" procedures (described in Chapter 13) if they believe a violation of the laws pertaining to children who attend private schools when FAPE is not at issue has occurred.

What Parents Should Know . . .

If parents place their child in a private school (when FAPE is not at issue), they forfeit their rights to most procedural safeguards contained in IDEA, including the right to a due process hearing regarding the services being provided. In this situation, the only matters parents can contest through a due process hearing are those of Child Find and evaluations. This makes sense because Child Find and evaluations are the only services mandatory for all children with disabilities who attend private schools.

If parents believe the public school is not complying with the legal requirements for children who are parentally-placed at a private school when FAPE is not at issue, parents can file a State Complaint with the Special Education Programs office, at (605) 773-3678.

Chapter 12: Special Topics

What is the process to transition my child from Early Intervention Services (Part C) to preschool services (Part B)?

What the Federal Regulations Say . . .

The State must have in effect policies and procedures to ensure that children participating in early intervention programs assisted under Part C of the Act, and who will participate in preschool programs assisted under Part B of the Act, experience a smooth and effective transition to those preschool programs…; by the third birthday of a child…, an IEP or … an IFSP, has been developed and is being implemented for the child…; and each affected LEA will participate in transition planning conferences arranged by the designated lead agency…. Sec. 300.124.

Initial IEP Team meeting for child under Part C - In the case of a child who was previously served under Part C of the Act, an invitation to the initial IEP Team meeting must, at the request of the parent, be sent to the Part C service coordinator or other representatives of the Part C system to assist with the smooth transition of services. Sec. 300.321(f).

What the Regulations Mean . . .

There must be a smooth transition from "Birth to 3" (Part C) programs to school programs if the child is eligible to receive special education services under Part B of the Act. This occurs two ways:

- First, public school personnel should be invited to any transition planning meetings occurring prior to the child turning age three; and
- Second, with parent permission, the Birth to 3 program coordinator or other personnel must be invited to the child's initial IEP Team meeting.

The IEP Team will look at existing data and determine if additional evaluations are needed to determine eligibility. This should occur early enough so that following parental consent, the evaluations can be completed and, if the child is found eligible, an IEP developed prior to the child's third birthday. The school must have an IEP in place no later than the child's third birthday if the child is eligible for special education.

What Parents Should Know . . .

Some children get special services from birth to age three under Part C of IDEA, with services set out in an Individualized Family Service Plan (IFSP). For those children receiving services under Part C who will be transitioned to services under Part B, the school must have an IEP in place no later than the child's third birthday. Parents should make sure both Part C and Part B personnel work together to ensure a smooth transition. If parents believe their child will need special education services when turning age three, they should make sure the Birth to 3 program makes a referral.

If the required timelines for transition from Early Intervention (Part C) to a Preschool (Part B) program are not met, or if a child receiving Part C services is found not eligible under Part B, parents can assert their rights by using the State Complaint, mediation, and/or due process procedures.

Why is it important for parents to keep their child's special education records?

It is important to keep records for three main reasons:

- **First**, records provide a historical perspective of what your child's needs have been, what services have been provided, and the gains the child has made.
- **Second**, the most recent records are used to determine the child's present levels of academic achievement and functional performance, measurable annual goals, and services needed in the current and future IEPs, and are useful to parents in preparing for and attending IEP Team meetings.
- **Third**, if parents find themselves in a situation where they want to file for a due process hearing, their attorney may request to review records, sometimes going back several years, and may wish to use those records as evidence at the hearing.

It is important that parents keep **all** their child's educational records. This means that parents, at a minimum, should keep a copy of all their child's IEPs, evaluations, consent forms, meeting notices, correspondence to and from school personnel, disciplinary records, report cards, notes from telephone calls, prior written notices, etc. If parents have more than one child with a disability, it is important to **keep each child's records separate**. Parents should keep their child's records in a location where they know they can find them.

An organized system will aid parents when preparing for and attending meetings, reviewing progress, meeting with an advocate, Navigator, or other professionals, and preparing for a due process hearing.

Parents should never write on their "official" or "permanent" copy of their child's records. If parents want to write on a document, a copy should be made to write on, leaving a "clean" copy for the child's file. If parents find themselves needing to enclose documents when filing a complaint or needing to admit records at a due process hearing or in court, the copies should be free of writing beyond what was originally intended to be on the document. One option for putting personal notes on a document without making a separate copy is through the use of self-adhesive sticky notes.

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How will my child's IEP be implemented if we transfer to a new school during the school year?

What the Federal Regulations Say . . .

Each public agency must ensure that assessments of children with disabilities who transfer from one public agency to another public agency in the same school year are coordinated with those children's prior and subsequent schools, as necessary and as expeditiously as possible, consistent with Sec. 300.301(d)(2) and (e), to ensure prompt completion of full evaluations. Sec. 300.304(c)(5).

IEPs for children who transfer to public agencies in the same state - If a child with a disability (who had an IEP that was in effect in a previous public agency in the same state) transfers to a new public agency in the same state, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either adopts the child's IEP from the previous public agency; or develops, adopts, and implements a new IEP that meets the applicable requirements in the Secs. 300.320 through 300.324. Sec 300.323(e).

IEPs for children who transfer from another state - If a child with a disability (who had an IEP that was in effect in a previous public agency in another state) transfers to a public agency in a new state, and enrolls in a new school within the same school year, the new public agency (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 public agency), until the new public agency conducts an evaluation pursuant to Secs. 300.304 through 300.306 (if determined to be necessary by the new public agency); and develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in Secs. 300.320 through 300.324. Sec. 300.323(f).

Transmittal of records - To facilitate the transition for a child described in paragraphs (e) and (f) of this section, the new public agency 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 public agency in which the child was enrolled, pursuant to 34 C.F.R. 99.31(a)(2); and the previous public agency in which the child was enrolled must take reasonable steps to promptly respond to the request from the new public agency. Sec. 300.323(g).

What the Regulations Mean . . .

When parents move to a new district during the school year, the new school must begin providing special education services immediately, providing services "comparable" to those contained in the child's IEP until the new district either adopts the existing IEP or develops a new one. The same rule applies whether the child has moved in-state or from another state, with the exception of a reference to evaluating the child first, if necessary, when the child is from another state.

What Parents Should Know . . .

When parents move to a new school district, the new district is responsible for "promptly" attempting to obtain records from the old school district. The old district, in turn, must promptly respond to the request.

What are a Functional Behavioral Assessment (FBA) and a Behavioral Intervention Plan (BIP)?

What the Federal Regulations Say . . .

Consideration of special factors (from development, review, and revision of IEP) - The IEP Team must, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of *positive behavioral interventions and supports,* and other strategies to address that behavior. Sec. 300.324(a)(2).

Services (from "Authority of school personnel" in Discipline) - A child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section must continue to receive educational services, as provided in Sec. 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 the goals set out in the child's IEP; and receive, as appropriate, a *functional behavioral assessment*, and *behavioral intervention services and modifications*, that are designed to address the behavior violation so that it does not recur. The services required by paragraph (d)(1), (d)(3), (d)(4), and (d)(5) of this section may be provided in an interim alternative educational setting. Sec. 300.530(d).

Determination that behavior was a manifestation (from "Manifestation Determination" in Discipline). If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must either conduct a *functional behavioral assessment*, unless the LEA 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; and except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan. Sec. 300.530(f).

Functional Behavioral Assessment

A Functional Behavioral Assessment (FBA) is a means of discovering the function or purpose of the child's behaviors. The child is observed by a few members of the IEP Team (or other school staff) and data is recorded. This data can enlighten the team as to the reasons for the behavior.

- Is the behavior a way for the child to communicate the child's needs?
- Is the behavior exhibited a way to escape an activity directed by an adult?
- Does the child want someone's attention and exhibit negative behaviors in order to receive that attention?
- Is the academic work too hard, which can cause frustration, or too easy, which can lead to boredom?
- Are the problem behaviors displayed mostly in the morning?
- Are they displayed with a certain teacher?
- Are they displayed on a certain day of the week?

There can be a variety of reasons for why children exhibit behaviors. The key factor in conducting a functional behavioral assessment is to figure out what the child is trying to communicate and what supports and strategies the IEP Team can develop in order to assist the child so that his/her learning or that of others is not as greatly affected by the behavior. Once the team knows the reason(s) for the behaviors, a behavioral intervention plan can be developed with positive behavioral supports and strategies.

Behavioral Intervention Plan
An effective Behavioral Intervention Plan (BIP) is written as a detailed procedure to reduce and or eliminate problem behaviors. A BIP should include:

- the student's problem behaviors,
- the function or purpose of the behavior (which should be determined by completing an FBA),
- behavior goals,
- methods of teaching the desired replacement behaviors,
- accommodations to assist the student in displaying the replacement behaviors, and
- positive reinforcements for displaying the desired replacement behaviors.

Behavior Intervention Plans should not be used in a negative way or used to punish the child. For example, if an IEP Team writes a BIP to indicate that a child will only get recess if he does not exhibit the problem behaviors, the team is not writing an effective BIP. If the BIP indicates that the child will receive in-school suspension or has to go to the principal's office every time he exhibits the problem behaviors, the BIP is not written appropriately. The purpose of a BIP is to teach appropriate replacement behaviors and reward the child when those replacement behaviors are exhibited. The IEP Team should figure out what the problem behavior is, how and with what the child should be taught to replace the problem behavior, and what the child could be rewarded with for displaying the appropriate behaviors. The key word in "positive behavioral support plan" is the word *positive*.

If a manifestation determination meeting is taking place, it means that a change of placement is being considered. If a child's behaviors are found to be a manifestation of the disability, the IEP Team must conduct a functional behavioral assessment if one has not already been completed on the child before the behavior occurred that prompted the school to seek a change in placements.

Tip . . .
Ideally, IEP Teams will act proactively to recognize the child's behaviors early on and conduct an FBA and implement a BIP before the behaviors reach a level to where a change of placement would be considered.

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Does my child's special education teacher have to meet specific qualifications?

What the Federal Regulations Say . . .

General - The State Education Agency (SEA) must establish and maintain qualifications to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities. Sec. 300.156(a).

Qualifications for Special Education Teachers - The qualifications described in paragraph (a) of this section must ensure that each person employed as a public school special education teacher in the State who teaches in an elementary school, middle school, or secondary school:

- has obtained full State certification as a special education teacher, including certification obtained through an alternate route to certification as a special educator, if such alternate route meets minimum requirements described in 34 CFR 200.56(a)(2), as such section was in effect on November 28, 2008), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher, except that when used with respect to any teacher teaching in a public charter school, the teacher must meet the certification or licensing requirements, if any, set forth in the State's public charter school law;
- has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and
- holds at least a bachelor's degree. Sec. 300.156(c)(1).

A teacher will be considered to meet the standard in paragraph (c)(1)(i) of this section if that teacher is participating in an alternate route to special education certification program under which the teacher:

- receives high-quality professional development that is sustained, intensive, and classroom focused in order to have a positive and lasting impact on classroom instruction, before and while teaching;
- participates in a program of intensive supervision that consists of structured guidance and regular ongoing support for teachers or a teacher mentoring program;
- assumes functions as a teacher only for a specified period of time not to exceed three years; and
- demonstrates satisfactory progress toward full certification as prescribed by the state;

and the state ensures, through its certification and licensure process, that the provisions in paragraph (c)(2)(i) of this section are met. Sec. 300.156(c)(2).

Policy - In implementing this section, a State must adopt a policy that includes a requirement that LEAs in the State take measurable steps to recruit, hire, train, and retain personnel who meet the applicable requirements described in paragraph (c) of this section to provide special education and related services under this part to children with disabilities. Sec. 300.156(d).

Rule of Construction - Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this part shall be construed to create a right of action on behalf of an individual student or a class of students for the failure of a particular SEA or LEA employee to meet the applicable requirements described in paragraph (c) of this section, or to prevent a parent from filing a complaint about staff qualifications with the SEA as provided for under this part. Sec. 300.156(e).

What the Regulations Mean . . .

IDEA requires that teachers who want to teach special education obtain a minimum of a bachelor's degree, pass a State special education teacher licensing exam, and hold a license that shows they are certified to teach within their particular State.

Teachers may also become qualified by participating in an alternative route to special education certification program by receiving high-quality professional development before and while teaching in the classroom, receiving intense supervision from another certified special education teacher, assuming functions of a teacher for a specific period of time not to exceed three years, and demonstrating progress toward full State certification.

Parents are not allowed to file for a due process hearing because of a school's failure to provide a qualified teacher. On the other hand, parents can use the State Complaint process to address a school's failure to provide a qualified teacher for a student or a group of students.

What Parents Should Know . . .

If parents question whether their child's special education teacher is qualified, they should bring their concern to the principal or superintendent at the child's school. The administrator should be able to tell the parent if the teacher is qualified or if the teacher is in the process of obtaining special education certification to become qualified. If a parent is not satisfied with the administrator's answer, a State Complaint may be filed with the SEA.

Teachers hired by private schools are not covered under the qualified teacher requirements. They also do not apply to teachers hired or contracted by LEAs to provide equitable services to parentally-placed private school children.

While parents cannot file a Due Process Complaint directly on the issue of a district's failure to provide a qualified teacher, if a child's teacher is not qualified, it may bear directly on whether the district is providing appropriate services (FAPE) based on the child's unique needs. Parents may utilize the State Complaint procedures.

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How are paraprofessionals used in the education setting?

What the Federal Regulations Say . . .

The SEA must establish and maintain qualifications to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities. Sec. 300.156(a).

Related Services personnel and Paraprofessionals - The qualifications under paragraph (a) … must include qualifications for related services personnel and paraprofessionals that:

- are consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services; and
- ensure that related services personnel … allow paraprofessional and assistants who are appropriately trained and supervised, in accordance with State law, regulation, or written policy, in meeting the requirements of this part to be used to assist in the provision of special education and related services … to children with disabilities. Sec. 300.156(b)(1), (2)(iii).

What the Regulations Mean . . .

Paraprofessionals may be used by schools to assist special education teachers and related services personnel in providing services to children with disabilities. They must meet minimum requirements, work within defined roles, and be provided sufficient training and supervision in order to provide appropriate services to children with disabilities.

Paraprofessionals cannot develop or write IEPs, or sign IEPs as a special education teacher. They cannot assess (test) students with disabilities as required for initial evaluations and reevaluations, or write lesson plans or other plans for instruction. They can, however, follow plans developed by a qualified teacher and must meet regularly with their supervising teacher / provider to monitor and discuss student progress, and must be supervised by a qualified special educator as they instruct students.

What Parents Should Know . . .

The amount or type of training and supervision paraprofessionals / assistants require will depend on the role defined by the position and the needs of the child. For example, paraprofessionals assisting teachers with children with autism may require more, or at least different, training and supervision than one assisting a therapist. Specific training needs, based on a child's unique needs, can be addressed in the IEP under "supports for school personnel."

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In South Dakota . . .

Paraprofessionals and Assistants. Paraprofessionals and assistants who are appropriately trained and supervised in accordance with this section may be used to assist in the provision of special education and related services to children with disabilities under Part B of the Individuals with Disabilities Education Act. At a minimum, the following standards must be met:

1. paraprofessionals must have a high school diploma or GED;
2. paraprofessionals must work within defined roles and responsibilities as identified by the school district;
3. paraprofessionals must work under the supervision of, and be evaluated by, certified staff; and
4. school districts must describe the training to be provided to paraprofessionals in the staff development component of the district's comprehensive plan under § 24:05:16:05. ARSD 24:05:16:16.01.

Can the school mandate that children with disabilities take medication as a condition for providing services?

What the Federal Regulations Say . . .

General - The SEA must prohibit State and LEA personnel from requiring parents to obtain a prescription for substances identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)) for a child as a condition of attending school, receiving an evaluation under Secs. 300.300 through 300.311, or receiving services under this part. Sec. 300.174(a).

Rule of Construction - Nothing in paragraph (a) of this section shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services under Sec. 300.111 (related to child find). Sec. 300.174(b).

What the Regulations Mean . . .

A school can never prohibit a child from attending school, receiving an evaluation, receiving special education services, receiving related services, or otherwise condition services if a parent refuses to put their child on medication. It is the parents' decision, along with the advice of the child's physician, whether a child will be placed on medication. The school has no say in this matter. However, the school personnel may discuss a child's particular behaviors and academic and functional performance with the parents, and the need for evaluations for special education and related services.

What Parents Should Know . . .

Many times, parents are placed in a tough spot regarding their child and medication. Parents should not feel bullied by the school district into placing their child on medication. While schools may find it easier to deal with a medicated child, some parents are strongly against this practice and cannot be forced to go against their beliefs of what they feel is best for their child and family. Schools must take children "as is" (medicated or not), and provide appropriate services based on the child's needs. There are pros and cons of medication use that should be discussed with a physician.

When can the school use my child's private insurance or public benefits to pay for the services it provides?

What the Federal Regulations Say . . .

Children with disabilities who are covered by public benefits or insurance - A public agency may use the Medicaid or other public benefits or insurance programs in which a child participates to provide or pay for services required under this part, as permitted under the public benefits or insurance program, except as provided in paragraph (d)(2) of this section.
Sec. 300.154(d)(1).

With regard to services required to provide FAPE to an eligible child under this part, the public agency:

- may not require parents to sign up for or enroll in public benefits or insurance programs in order for their child to receive FAPE under Part B of the Act;
- may not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to this part, but pursuant to paragraph (g)(2) of this section, may pay the cost that the parents otherwise would be required to pay;
    - may not use a child's benefits under a public benefits or insurance program if that use would decrease available life-time coverage or any other insured benefit;
    - result in the family paying for services that would otherwise be covered by the public benefits or insurance program and that are required for the child outside of the time the child is in school;
    - increase premiums or lead to the discontinuation of benefits or insurance; or
    - risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures; and

Prior to accessing a child's or parent's public benefits or insurance for the first time, and after providing notification to the child's parents consistent with paragraph (d)(2)(v) of this section, must obtain written, parental consent that—

- Meets the requirements of § 99.30 of this title and § 300.622, which consent must specify the personally identifiable information that may be disclosed (*e.g.*, records or information about the services that may be provided to a particular child), the purpose of the disclosure (*e.g.*, billing for services under part 300), and the agency to which the disclosure may be made *(e.g.*, the State's public benefits or insurance program (*e.g.*, Medicaid)); and
- Specifies that the parent understands and agrees that the public agency may access the parent's or child's public benefits or insurance to pay for services under part 300.

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Prior to accessing a child's or parent's public benefits or insurance for the first time, and annually thereafter, must provide written notification, consistent with § 300.503(c), to the child's parents, that includes—

- A statement of the parental consent provisions in paragraphs (d)(2)(iv)(A) and (B) of this section;
- A statement of the "no cost" provisions in paragraphs (d)(2)(i) through (iii) of this section;
- A statement that the parents have the right under 34 CFR part 99 and part 300 to withdraw their consent to disclosure of their child's personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (*e.g.*, Medicaid) at any time; and
- A statement that the withdrawal of consent or refusal to provide consent under 34 CFR part 99 and part 300 to disclose personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (*e.g.*, Medicaid) does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents. Sec. 300.154(d)(2).

Children with disabilities who are covered by private insurance - With regard to services required to provide FAPE to an eligible child under this part, a public agency may access the parents' private insurance proceeds **only if the parents provide consent consistent with Sec. 300.9.** Each time the public agency proposes to access the parents' private insurance proceeds, the agency must obtain parental consent in accordance with paragraph (e)(1) of this section; and inform the parents that their refusal to permit the public agency to access their private insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents. Sec. 300.154(e).

Use of Part B funds - If a public agency is unable to obtain parental consent to use the parents' private insurance, or public benefits or insurance when the parents would incur a cost for a specified service required under this part, to ensure FAPE the public agency may use its Part B funds to pay for the service. To avoid financial cost to parents who otherwise would consent to use private insurance, or public benefits or insurance if the parents would incur a cost, the public agency may use its Part B funds to pay the cost that the parents otherwise would have to pay to use the parents' benefits or insurance (*e.g.*, the deductible or co-pay amounts). Sec. 300.154(f).

What the Regulations Mean . . .

LEAs are permitted to fund related services by tapping into a child's private insurance or public benefits, such as Medicaid, **so long as the parent's permission (consent) is obtained**. However, districts cannot require a parent to sign up or enroll for a public benefit program or to access private insurance in order for their child to receive FAPE under Part B. A school also cannot require a parent to pay any out-of-pocket expenses, such as a deductible, co-insurance, or co-pay amount for filing a claim under their private insurance or public assistance, and may use Part B funds to reimburse parents if these charges occur. The LEA may not use a child's benefits if that use would decrease the child's available lifetime coverage, increase premiums, discontinue benefits or insurance, cause parents to have to pay for services outside of school that otherwise would have been covered, or affect the child's eligibility for home and community-based waivers. LEAs must obtain parental consent to tap into these benefits and also notify the parents that if they refuse to allow access to a child's benefits, it in no way affects the services the school is required to provide. Therefore, regardless of parental consent, the school must provide services to the child that the IEP Team finds necessary.

What Parents Should Know . . .

Sometimes parents are reluctant to give out the child's Medicaid number or private insurance information to the school. However, if there is no chance of negatively affecting the child's coverage and parents are not required to pay any out-of-pocket expenses, giving out the information can only help a child receive the services he or she needs. Schools are always in need of more funding. Sometimes they need a little extra help from third parties to assist with funding the needed services.

The regulations are very detailed regarding the consent process in terms of the information the school district must provide to parents when a school district seeks to obtain consent to use a child's public benefits or insurance, or private insurance. Even if parents consent to use of public benefits or insurance or private insurance, parents may revoke that consent at any time. If parents refuse to consent or revoke consent, the school district is still responsible for providing the services that would have been, or were (in the case of consent being revoked), paid for by the public benefit or insurance or private insurance.

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What is a Section 504 of the Rehabilitation Act of 1973 and how can it help support my child with a disability?

What the Federal Regulations Say . . .

No otherwise qualified individual with a disability in the United States … shall, solely by reason of her or his disability, be excluded from participation in, be denied the benefit of, or be subject to discrimination under any program or activity receiving federal financial assistance….
29 U.S.C. Sec. 794(a).

Section 504's detailed regulations pertaining to educational services are contained at 34 C.F.R. Sec. 104.1 *et seq.*

What the Regulations Mean . . .

Section 504 is an anti-discrimination law that applies to any recipient of federal funds. Because school districts receive federal IDEA funds, they must comply with the requirements of Section 504. Schools do not receive funding for Section 504, so services provided must be paid for with general funds.

To be eligible, a child must have a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is treated as having such an impairment. This is the same definition used in the Americans with Disabilities Act. This is a broader definition than IDEA, so children who do not qualify for services under IDEA may qualify under Section 504.

The Section 504 regulations pertaining to elementary and secondary education require that children receive a FAPE, but FAPE under Section 504 means receiving services that are equal to that of children without disabilities. It prohibits certain practices as discriminatory and requires schools to take affirmative steps to ensure an appropriate education. Section 504 addresses discrimination in services provided and access to education. It requires either special or regular education services. It requires related services, with or without the child also receiving special education services. It requires comparable facilities, meaning that if a classroom for children with disabilities is located in a separate building, the facilities must be comparable in quality.

While not nearly as detailed as IDEA, Section 504 contains requirements for evaluations, least restrictive environment, and many procedural safeguards similar to IDEA, including the right to a hearing.

What Parents Should Know . . .

If a child is found not to qualify for special education services, parents should insist that the determination be made as to whether the child qualifies for services under Section 504. Section 504 does not require a written plan, but parents should insist that Section 504 services be put in writing in a "504 Plan" so that the school's commitment is in writing.

Parents who believe the school is discriminating against their child, *i.e.*, violating Section 504, can file a complaint with the Office for Civil Rights or request a hearing.

What are Early Intervening Services and what children may receive them?

What the Federal Regulations Say . . .

General - An LEA may not use more than 15 percent of the amount the LEA receives under Part B of the Act for any fiscal year, less any amount reduced by the LEA pursuant to Sec. 300.205, if any, in combination with other amounts (which may include amounts other than education funds), to develop and implement coordinated, early intervening services, which may include interagency financing structures, for students in kindergarten through grade 12 (with a particular emphasis on students in kindergarten through grade three) who are not currently identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment. Sec. 300.226(a).

Activities - In implementing coordinated, early intervening services under this section, an LEA may carry out activities that include:

1. professional development (which may be provided by entities other than LEAs) for teachers and other school staff to enable such personnel to deliver scientifically based academic and behavioral interventions, including scientifically based literacy instruction, and, where appropriate, instruction on the use of adaptive and instructional software; and
2. providing educational and behavioral evaluations, services, and supports, including scientifically based literacy instruction. Sec. 300.226(b).

Construction - Nothing in this section shall be construed to either limit or create a right to FAPE under Part B of the Act or to delay appropriate evaluation of a child suspected of having a disability. Sec. 300.226(c).

Reporting - Each LEA that develops and maintains coordinated, early intervening services under this section must annually report to the SEA on:

1. the number of children served under this section who received early intervening services; and
2. the number of children served under this section who received early intervening services and subsequently receive special education and related services under Part B of the Act during the preceding two year period. Sec. 300.226(d).

Coordination with ESEA - Funds made available to carry out this section may be used to carry out coordinated, early intervening services aligned with activities funded by, and carried out under the ESEA if those funds are used to supplement, and not supplant, funds made available under the ESEA for the activities and services assisted under this section. Sec. 300.226(e).

What the Regulations Mean . . .

IDEA 2004 allows districts to use up to 15 percent of federal IDEA funds to provide *Early Intervening Services* to children NOT on IEPs who are having academic or behavioral difficulties, emphasizing grades K to 3. The money allocated can be spent on staff development and services to children.

If children are receiving Early Intervening Services, they have no right to FAPE under IDEA and no right to procedural protections under IDEA. However, Early Intervening Services **cannot be used to delay an initial evaluation of a child under IDEA.**

What Parents Should Know . . .

If a child receives *Early Intervening Services*, no rights under IDEA apply. These are simply general education students receiving extra help, with the intent that the extra help may prevent the child from needing special education services.

There is no timeline on Early Intervening Services, meaning the school is under no timeline to refer for special education services if Early Intervening Services are tried. However, the “Child Find” requirements of IDEA still apply. A child suspected of having a qualifying disability must be evaluated (with parental consent) so that such determination can be made. Parents, of course, can make a referral for an initial evaluation at any time.

While Early Intervening Services cannot be used to delay an initial evaluation and, if determined eligible, provision of special education services, parents of children receiving Early Intervening Services should be vigilant to make sure schools do not use these services as a delaying tactic.

Parents should also thoroughly evaluate the amount and type of services or individual attention/ instruction their child is receiving as Early Intervening Services before either requesting an initial evaluation for special education services or consenting to the provision of special education services. Depending on the amount or type of Early Intervening Services provided, the possibility exists that a child could receive less services if on an IEP. Parents should ask for a meeting to discuss this and evaluate the benefits of each program for their child.

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What is the age range for my child to be eligible to receive a FAPE through the school district?

What the Federal Regulations Say . . .

General - A free appropriate public education must be available to all children residing in the state between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school, as provided for in Sec. 300.530(d). Sec. 300.101(a).

FAPE for children beginning at age 3 - Each State must ensure that the obligation to make FAPE available to each eligible child residing in the State begins no later than the child's third birthday; and an IEP or an IFSP is in effect for the child by that date, in accordance with Sec. 300.323(b). If a child's third birthday occurs during the summer, the child's IEP Team shall determine the date when services under the IEP or IFSP will begin. Sec. 300.101(b).

Children advancing from grade to grade - Each State must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade. Sec. 300.101(c)(1).

What the Regulations Mean . . .

The right to a free appropriate public education (FAPE) under Part B extends from age 3 through 21. Children who are suspended or expelled from school are also entitled to a FAPE. (See Chapter 14).

A child who has been evaluated and determined eligible under Part B prior to the child's third birthday must have an IEP (or IFSP when allowed) in place no later than the child's third birthday; however, if the child's third birthday occurs during the summer, the IEP Team will determine when services will begin *(i.e.*, prior to summer, during the summer, or when school starts in the fall).

A child does not need to be failing in school or does not have to have been retained at least one grade in order to be found eligible for special education services.

What Parents Should Know . . .

The 2006 regulations make it clear that a child does not have to fail or be retained in order to be found eligible for services. When a child is advancing from grade to grade, the question is whether the child nonetheless needs special education services.

The term, "appropriate," is not easily defined. In 1982, the United States Supreme Court defined it as "reasonably calculated to enable the child to receive educational benefits." However, the Court did not set out a specific standard indicating how much "benefit" is enough to meet the "appropriateness" standard. In 2017, the Court held, "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." Rather than attempt to set an all-encompassing standard, the Court stated, "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." Because what is appropriate is an individualized determination based on the unique needs of each child, it will always be a source of potential debate.

In South Dakota . . .

A child's eligibility for special education or special education and related services continues from age three through completion of an approved public or nonpublic school secondary program or through age 21, as designated in that child's IEP. ARSD 24:05:22:04.01.

A student who is enrolled in school and becomes 21 years of age during the fiscal year shall have free school privileges during the school year. ARSD 24:05:22:05.

Each school district shall provide special education or special education and related services for children less than three years of age who are in need of prolonged assistance. ARSD 24:05:22:04.

"Prolonged Assistance" is defined at ARSD 24:05:24.01:15 (see Chapter 5).

How can graduation requirements differ for my child who is receiving special education services?

What the Federal Regulations Say . . .

The obligation to make FAPE available to all children with disabilities does not apply with respect to the following: … children with disabilities who have graduated from high school with a regular high school diploma. Sec. 300.102(a)(3)(i).

The exception in paragraph (a)(3)(i) of this section does not apply to children who have graduated from high school but have not been awarded a regular high school diploma. Sec. 300.102(a)(3)(ii).

Graduation from high school with a regular high school diploma constitutes a change in placement, requiring written prior notice in accordance with Sec.300.503. Sec. 300.102(a)(3)(iii).

As used in paragraphs (a)(3)(i) through (iii) of this section, the term regular high school diploma means the standard high school diploma awarded to the preponderance of students in the State that is fully aligned with State standards, or a higher diploma, except that a regular high school diploma shall not be aligned to the alternate academic achievement standards described in section 1111(b)(1)(E) of the ESEA. A regular high school diploma does not include a recognized equivalent of a diploma, such as a general equivalency diploma, certificate of completion, certificate of attendance, or similar lesser credential. Sec. 300.102(a)(3)(iv).

What the Regulations Mean . . .

Children with disabilities who graduate with a regular high school diploma lose their eligibility for special education services from the local school district. For a child to lose his or her eligibility for FAPE, the diploma **must** be a regular high school diploma, **NOT** an alternative type of degree, certificate, etc., and not a certificate of attendance or something similar.

Graduation with a regular high school diploma is a "change in placement," which means that parents (or a child who has reached age of majority) must receive written notice that when the child graduates, his or her eligibility for special education services will end.

What Parents Should Know . . .

Because graduation with a regular high school diploma is a change in placement, in that all services from the district end, the school must provide sufficient written notice that this will occur. In South Dakota, the school must inform parents (or the child if of age of majority and rights have transferred) at least one year in advance that the child will graduate and the school's responsibility will end. Typically, this will be done at an IEP Team meeting and documented in the child's IEP. If a school does not provide such notice at least one year prior to graduation, the school cannot legally graduate a child with a disability if the parents or student contest the graduation.

For those students who do not receive a regular high school diploma, their eligibility for special education services continues. For example, if a child with a disability has dropped out of school or otherwise completed a GED, that student is still eligible to receive special education services from the school through age 21.

Allowing students with disabilities who will not receive a regular diploma to participate in graduation ceremonies with their class is a local decision.

In South Dakota . . .

Graduation requirements - Completion of an approved secondary special education program with a regular high school diploma signifies that the student no longer requires special education services. A regular high school diploma does not include an alternative degree that is not fully aligned with the state's academic standards, such as a certificate or a general educational development credential (GED). Graduation from high school with a regular high school diploma constitutes a change in placement requiring written prior notice in accordance with this article.

The instructional program shall be specified on the individual educational program. The individual educational program shall state specifically how the student in need of special education or special education and related services will satisfy the district's graduation requirements. The IEP team may modify the specific units of credit described in § 24:43:11:02. Parents must be informed through the individual educational program process at least one year in advance of the intent to graduate their child upon completion of the individual educational program and to terminate services by graduation.

For a student whose eligibility terminates under the above graduation provisions, or due to exceeding the age eligibility for a free appropriate public education, a school district shall provide the student with a summary of the student's academic achievement and functional performance, which shall include recommendations on how to assist the student in meeting the student's postsecondary goals. ARSD 24:05:27:12.

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Chapter 13: Procedural Safeguards

What rights do I have to review my child's education records?

What the Federal Regulations Say . . .

The parents of a child with a disability must be afforded … an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. Sec. 300.501(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 Sec. 300.507 or Secs. 300.530 through 300.532, or resolution session pursuant to Sec. 300.510, and in no case more than 45 days after the request has been made. Sec. 300.613(a).

The right to inspect and review education records under this section includes:

1. the right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;
2. the right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and
3. the right to have a representative of the parent inspect and review the records. Sec. 300.613(b).

An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce. Sec. 300.613(c).

What the Regulations Mean . . .

Parents may see all of their child's educational records relating to identification, evaluation, placement, and provision of FAPE. This right would broadly encompass most everything, including behavior reports and notes that were kept and shared with others. Section 300.613 more broadly refers to the right to "inspect and review any educational records relating to their children."

Teachers do not need to show classroom notes to parents so long as the teacher never shares the record with anyone else, including other teachers. If the teacher shares the record with others, then parents also have the right to read it. When requested, the school must tell parents where all of their child's records are located.

Schools do not have to provide immediate access. They have up to 45 calendar days unless the request is made prior to an IEP Team meeting, resolution meeting, or due process hearing.

What Parents Should Know . . .

The right to "inspect and review" does not necessarily mean the right to "receive a copy." The school may charge a reasonable fee for copies. Parents may ask the school to waive the fees for copies if the parent cannot afford to pay for them. Schools should keep the child's confidential records in a locked file. A child's records may be located in more than one location. Parents should look at their child's records to see if everything is in order. Parents can ask to have records explained and have the right to ask the school to remove information from the file if the parent thinks it is wrong. However, the school may refuse to revise or remove such record. Parents can challenge the school's decision as discussed on pages 173-179.

What meetings do I have the right to attend for my child's IEP?

What the Federal Regulations Say . . .

The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. Sec. 300.501(b)(1).

Each public agency must provide notice consistent with Sec. 300.322(a)(1) and (b)(1) to ensure that parents of children with disabilities have the opportunity to participate in meetings described in paragraph (b)(1).... Sec. 300.501(b)(2).

A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of 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. Sec. 300.501(b)(3).

What the Regulations Mean . . .

Parents do not have the right to attend informal meetings and IEP preparatory meetings conducted by school personnel. Such meetings are not considered "official" meetings under IDEA. Parents DO have the right to participate in all meetings related to the identification, evaluation, placement, and provision of a free appropriate public education of their child.

What Parents Should Know . . .

Decisions regarding a child's special education program cannot be made during an informal meeting amongst school personnel. School personnel may meet prior to an IEP Team meeting to discuss the services or placement to be proposed. School personnel may also meet without the parent present to develop a draft IEP, so long as it is clear that the document is only a draft, a starting point for IEP discussions.

If schools do develop a draft IEP prior to the meeting, it is best practice for the school to send it to the parents to review before the meeting. Schools should inform parents that what they have been sent is a "draft" open to discussion and changes at the IEP Team meeting. If the school does not send its draft IEP, parents should be sure to request a copy prior to the meeting to review. Along with draft IEPs, parents should also request a copy of any new evaluation reports to review prior to the meeting.

Tip . . .

If school personnel meet to develop a draft IEP with the intent of presenting it to parents as a finished document to approve, the district has essentially held the IEP Team meeting without parent participation in violation of IDEA. No changes can legally be made to the IEP unless they are made at an IEP Team meeting where the parent is invited to participate or with parent participation through amendment (See Chapter 6).

Do parents have the right to attend meetings where decisions on their child's placement is being discussed?

What the Federal Regulations Say . . .

Each public agency shall ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child. Sec. 300.501(c)(1).

If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency shall use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing. Sec. 300.501(c)(3).

A placement decision may be made by a group without the involvement of a parent, if the public agency is unable to obtain the parents' participation in the decision. In this case, the public agency must have a record of its attempt to ensure their involvement. Sec. 300.501(c)(4).

The public agency must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English. Sec. 300.322(e).

What the Regulations Mean . . .

Schools must ensure that parents attend meetings where decisions will be made regarding placement of their child. If parents cannot attend, schools must take other steps to ensure parental participation. The only times a school may make placement decisions without parental participation are when parents refuse to participate or when parents cannot be located.

What Parents Should Know . . .

Schools must notify parents of IEP Team meetings early enough to ensure that they have an opportunity to attend. Schools must schedule meetings at a mutually agreed upon time and place. If parents cannot attend in-person on the date/time scheduled, they could attend via conference call or video conference. If the parents prefer to attend in-person, the meeting should be rescheduled at a mutually agreed upon time and place. If parents refuse to attend or otherwise participate in meetings, schools can make placement and other decisions without parental involvement.

If parents will need an interpreter at an IEP Team meeting, they should inform the school in advance to allow the school time to make arrangements. If parents disagree with the placement proposed by the school (or the school refuses to place the child in the setting the parents propose), they can contest the placement through a due process hearing.

How and when can parents get an Independent Educational Evaluation (IEE) for their child?

What the Federal Regulations Say . . .

The parents of a child with a disability have the right under this part to obtain an independent educational evaluation (IEE) of the child…. Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations…. "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and "public expense" means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent. Sec. 300.502(a).

Parent right to evaluation at public expense - A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency…. If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either file for a due process hearing to show that its evaluation is appropriate; or ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing … that the evaluation obtained by the parent did not meet agency criteria. If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense. If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation. A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees. Sec. 300.502(b).

Parent-initiated evaluations - If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and may be presented by any party as evidence at a hearing on a due process complaint … regarding that child. Sec. 300.502(c).

Requests for evaluation by hearing officers - If a hearing officer requests an independent educational evaluation as part of a hearing on a due process complaint, the cost of the evaluation must be at public expense. Sec. 300.502(d).

Agency Criteria - If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation to the extent those criteria are consistent with the parent's right to an independent educational evaluation. Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense. Sec. 300.502(e).

What the Regulations Mean . . .

While the regulation refers to a parental "request" for an Independent Educational Evaluation (IEE), the IEE is a right, not a request that can be denied by the school. The right to an IEE can be invoked only if parents disagree with one or more evaluations completed by or on behalf of the school. If parents inform a school of their intent to have an IEE completed, or if parents have an IEE conducted without informing the school ahead of time, at that point the school's only options are to pay for the evaluation(s) or initiate a due process hearing to attempt to show that the school's evaluation was appropriate (and to do one or the other without "unnecessary delay"). A school can also initiate a hearing to demonstrate the IEE the parents obtained did not meet school criteria.

Parents are entitled to only **one** independent evaluation in the area(s) in which they disagree with a school's evaluation. For example, if a school conducted intelligence, achievement, physical therapy, and speech therapy evaluations, the parent could have one independent evaluation completed at school expense in each area if the parent disagreed with each evaluation conducted by the school. If the parent then disagrees with the results of the IEE, the parent cannot have further IEEs done at school expense. The right to an IEE comes back into play whenever the school has a new evaluation conducted (so long as the parent disagrees with that evaluation).

What Parents Should Know . . .

The school can set criteria for an IEE, such as location and examiner qualifications. However, the criteria must be flexible enough to allow for individual circumstances. Otherwise, schools could set the criteria to be so restrictive as to effectively eliminate a parent's right to an IEE.

Parents may disagree with an evaluation conducted by the school for any of several reasons:

- disagreement with the results or findings of the evaluation;
- disagreement with the evaluation instrument used;
- disagreement with the qualifications of the evaluator; or
- disagreement because the school refused to evaluate in an area of concern.

Parents always have the right to have independent evaluations conducted at their own expense. Any such evaluations shared with the IEP Team must be considered in developing the child's IEP, so long as the evaluation meets the school's criteria.

Parents do not have to inform the school ahead of time that they are having an IEE conducted. They can simply submit the bill to the school for payment. However, because parents will want to make sure the independent evaluation meets school criteria, in most situations it is best practice for parents to inform the school they are exercising their right to the IEE. When parents inform the school, the school must provide the parents information on where an IEE can be obtained and the school criteria, if any. While the school may ask parents why they disagree with the school's evaluation, parents do not have to provide their reason(s).

When should parents expect to receive a Prior Written Notice from their child's school district?

What the Federal Regulations Say . . .

Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency: proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. Sec.300.503(a).

What the Regulations Mean . . .

Parents must be provided detailed written notice whenever the school proposes to initiate or change the identification (determining eligibility, categorizing) of a child, an evaluation, the child's placement, or the services in the IEP. Similarly, if a school denies a parent's request, it must do so in writing.

What Parents Should Know . . .

Parents should insist that schools provide them with prior written notice when a school proposes to begin or change, or refuses a parent's request to begin or change, the identification, evaluation, placement, or provision of FAPE, if the school has not already done so. While the provision of written notice is legally required, sometimes schools need prodding to comply.

If a school refuses to provide prior written notice to a parent when legally-required to do so, parents may wish to address this violation through the State Complaint process or through a due process hearing.

In South Dakota . . .

Prior notice - Written notice which meets the requirements of §24:05:30:05 must be given to parents five days before the district proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child. The five-day notice requirement may be waived by the parents. ARSD 24:05:30:04.

South Dakota has thus defined a "reasonable time" as five calendar days. This means that at the end of an IEP Team meeting, or shortly thereafter, or following a decision by a district that did not occur at an IEP Team meeting, the district must provide parents with written notice describing what the district proposed or refused. Parents then have five calendar days **from receipt of the notice** (with the day of receipt counting as the first day according to the South Dakota Department of Education) to consider the proposal or refusal. The district will implement the changes on the sixth day. Parents have the right to waive the five-day notice so that changes can begin sooner. (See page 169).

TIP . . .

Remember, parents are supposed to receive a Prior Written Notice for **ANY** action involving their child, not only those resulting from meetings.

What information must be contained in a Prior Written Notice?

What the Federal Regulations Say . . .

The notice required under paragraph (a) of this section must include: a description of the action proposed or refused by the agency; an explanation of why the agency proposes or refuses to take the action; a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; a statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; sources for parents to contact to obtain assistance in understanding the provisions of this part; a description of other options that the IEP Team considered and the reasons why those options were rejected; and a description of other factors that are relevant to the agency's proposal or refusal. Sec. 300.503(b).

Notice in understandable language - The notice required under paragraph (a) of this section 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 public agency 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 the requirements in … this section have been met. Sec. 300.503(c).

What the Regulations Mean . . .

IDEA requires that parents be provided with very detailed written notice whenever a school proposes or refuses an action. For example, if parents requested a specific service and the school refused, the school must provide written notice detailing the basis for its refusal.

If a school refuses or fails to provide parents with prior written notice that contains all the details required in the regulation, the school is in violation of IDEA and parents may wish to address such procedural violations through the State Complaint process.

What Parents Should Know . . .

When parents receive written notice, it must be in language understandable to the general public. If parents communicate in other than English or not in written language, schools must take steps to translate and make sure parents understand the content.

In South Dakota . . .

The three sources listed on the State Special Education Programs office website for parents to contact to obtain assistance in understanding their rights are:

- Special Education Programs (SEA) - (605) 773-3678
- South Dakota Parent Connection - (800) 640-4553; and
- Disability Rights South Dakota - (800) 658-4782

When must parents receive a copy of the procedural safeguards?

What the Federal Regulations Say . . .

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only one time a school year, except that a copy shall also be given to the parents: upon initial referral or parent request for evaluation; upon receipt of the first State complaint under Secs. 300.151 through 300.153 and upon receipt of the first due process complaint under Sec.300.507 in a school year; in accordance with the discipline procedures in Sec. 300.530(h); and upon request by a parent. Sec. 300.504(a).

Internet Website - A public agency may place a current copy of the procedural safeguards notice on its website if a website exists. Sec. 300.504(b).

Notice in Understandable language - The notice required under paragraph (a) of this section must meet the requirements of Sec. 503(c). Sec. 300.504(d).

What the Regulations Mean . . .

Schools must provide parents a copy of their procedural safeguards at least once a year. It is the school's responsibility to ensure the parents understand the contents of the procedural safeguards if written English is not their native language or mode of communication**.**

What Parents Should Know . . .

Parents must be provided a copy of the school's procedural safeguards whenever they request a copy. Parents should carefully study the procedural safeguards document so that they become familiar with their procedural rights under IDEA. If they have questions about their rights, parents should contact their school, South Dakota Parent Connection, Disability Rights South Dakota, or the State Special Education Programs office for answers.

The procedural safeguards must be provided in the parents' native language or other mode of communication. If parents' native language or mode of communication is not a written language, the school must make sure the procedural safeguards are translated, which may require reading them to the parents, and make sure the parents understand the content.

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What rights must a school include in the Procedural Safeguards Notice?

What the Federal Regulations Say . . .

The procedural safeguards notice must include a full explanation of all the procedural safeguards available under Sec. 300.148, Secs. 300.151 through 300.153, Sec. 300.300, Secs. 300.502 through 300.503, Secs. 300.505 through 300.518, Sec. 300.520, Secs.300.530 through 300.536, and Secs. 300.610 through 300.625 relating to:

- independent educational evaluations;
- prior written notice;
- parental consent;
- access to education records;
- opportunity to present and resolve complaints through the due process complaint and State complaint procedures, including 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, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures;
- the availability of mediation;
- the child's placement during the pendency of any due process complaint;
- procedures for students who are subject to placement in an interim alternative educational setting;
- requirements for unilateral placement by parents of children in private schools at public expense;
- hearings on due process complaints, including requirements for disclosure of evaluation results and recommendations;
- state-level appeals (if applicable in the State);
- civil actions, including the time period in which to file those actions; and
- attorneys' fees. Sec. 300.504(c).

What the Regulations Mean . . .

The notice (listing) of procedural safeguards parents receive must thoroughly describe all the items listed in the regulation. It must be in language understandable to the general public.

What Parents Should Know . . .

Parents should carefully read the listing of procedural safeguards provided by the school, and reread it as needed until reaching the point of understanding. If parents have questions, in addition to asking school personnel, parents may contact South Dakota Parent Connection, Disability Rights South Dakota, or the State Special Education Programs office.

What does it mean to grant "consent" to the school, and what information is considered "personally identifiable"?

What the Federal Regulations Say . . .

"Consent" means that: the parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other 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; and 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). Sec. 300.9.

"Personally identifiable" means information that contains: the name of the child, the child's parent, or other family member; the address of the child; a personal identifier, such as the child's social security number or student number; or a list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty. Sec. 300.32.

What the Regulations Mean . . .

Parental consent must be in writing and can be given only after being fully informed about why consent is sought and what will occur as a result of providing or refusing to consent. Parents have the right to change their mind regarding their consent at any time, but revoking consent does not change any decisions or actions already made between signing and revoking consent. Personally identifiable information cannot be released without a parent's consent. Personally identifiable information is that where one could identify the child based on the content of the records.

What Parents Should Know . . . .

Parents should fully understand what it is they are agreeing to before giving their consent. If parents do not understand something, they should ask questions.

Parental consent is granted in writing so a record of it is created. Consent can be granted through a letter signed by the parents, or through signing a consent form provided by the school. Information regarding the consent should be provided in the parents' native language or other form of communication.

Consent to release records must include the names of the parties who may receive the records. The timeline for completing evaluations does not begin until parents provide consent.

Tip . . .

Parents should always keep a copy of consent documents in case they need to prove consent was provided.

What are the situations where parental consent is required, and what happens when parents refuse to grant consent?

What the Federal Regulations Say . . .

Parental consent for initial evaluation

The public agency proposing to conduct an **initial evaluation** to determine if a child qualifies as a child with a disability … must, after providing notice…, obtain informed consent … from the parent of the child before conducting the evaluation. Parental consent for initial evaluation must not be construed as consent for initial provision of special education and related services. Sec. 300.300(a)(1).

If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for **initial evaluation**…, or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards … (mediation and due process procedures), if appropriate, except to the extent inconsistent with State law relating to parental consent. Sec. 300.300(a)(3)(i).

Parental consent for reevaluations

Each public agency must obtain informed parental consent … prior to conducting any **reevaluation** of a child with a disability. If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures…. Sec. 300.300(c)(1)(i), (ii).

The informed parental consent … need not be obtained if the public agency can demonstrate that it made reasonable efforts to obtain such consent; and the child's parent has failed to respond. Sec.300.300(c)(2).

Parental consent for services

A public agency that is responsible for making FAPE available to a child with a disability must obtain **informed consent** from the parent of the child **before the initial provision of special education and related services** to the child. Sec. 300.300(b)(1).

The public agency must make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child. Sec. 300.300(b)(2).

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

1. may not use the procedures in subpart E of this part (including the mediation procedures under Sec. 300.506 or the due process procedures under Secs. 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child;
2. will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with the special education and related services for which the parent refuses to or fails to provide consent; and
3. is not required to convene an IEP Team meeting or develop an IEP under Secs. 300.320 and 300.324 for the child. Sec. 300.300(b)(3).

A public agency may not use a parent's refusal to consent to one service or activity under paragraphs (a), (b), (c), or (d)(2) of this section to deny the parent or child any other service, benefit, or activity of the public agency, except as provided in this part. Sec. 300.300(d)(3).

To meet the reasonable efforts requirement … the public agency must document its attempts to obtain parental consent using the procedures in Sec. 300.322(d). Sec. 300.300(d)(5). (See Page 50).

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

1. may not continue to provide special education and related services to the child, but must provide prior written notice in accordance with Sec. 300.503 before ceasing the provision of special education and related services;
2. may not use the procedures in subpart E of this part (including the mediation procedures under Sec. 300.506 or the due process procedures under Secs. 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child;
3. will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services; and
4. is not required to convene an IEP Team meeting or develop an IEP under Secs. 300.320 and 300.324 for the child for further provision of special education and related services. Sec. 300.300(b)(4).

If the parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent. Sec. 300.9(c)(3).

What the Regulations Mean . . .

Parental consent must be in writing and is required before an ititial evaluation, before any reevaluation, and before a child begins receiving special education services for the first time. Parental consent is also required to authorize release of records.

Informed Consent means that the parent understands and agrees in writing to the carrying out of the activity for which consent is sought. Granting parental consent is voluntary and may be revoked at any time.

If a parent refuses to have his or her child evaluated, and the school believes the child should receive an initial evaluation or reevaluation, the school can file for a due process hearing to attempt to get a hearing officer to issue an order that the child be evaluated.

With reevaluations only, if a school has made attempts to contact a parent to get consent and the parent has failed to respond (*e.g.*, failed to call the school back, failed to respond to mail, etc.), the school may go ahead and conduct the reevaluations without the parent's consent.If a parent refuses to consent to one service, the school cannot use that refusal to deny all services. For example, a school cannot condition continued services upon parents consenting to a reevaluation.

Once a child has received an initial evaluation and been determined eligible for services, parents must provide written consent before the initial provision of special education services. If parents refuse consent for services, the process stops and the school has no further responsibility for offering an IEP and cannot take parents to a hearing to get a hearing officer to order services be provided.

Similarly, if a parent of a child who is already receiving special education services revokes consent for services, the school must provide prior written notice, cease providing services, and cannot use the due process procedures to attempt to get an agreement or ruling ordering services. The school's responsibility ends and it will not be in violation of IDEA for failing to serve the child. Parents must revoke consent in writing. When parents revoke consent for services, the school is not required to remove references in the child's records to the child's past receipt of special education services.

What Parents Should Know . . .

The timeline for conducting evaluations does not begin until the school receives written consent, so it is important for parents to provide written consent to the school as soon as possible when any evaluations are involved.

Schools typically may seek to have parents sign consent on a specific school form. Legally, signing on a school form is not required. A letter signed by the parents giving permission to conduct an evaluation or begin services should suffice.

If parents refuse to consent to an evaluation, the school may initiate a due process hearing to attempt to get a hearing officer to order that the child be evaluated.

If the school is seeking to conduct a reevaluation and the parent does not want to consent to a reevaluation, the parent must affirmatively refuse. When a parent ignores mail or phone calls from the school regarding a reevaluation, the school is allowed to proceed with the reevaluation without consent.

If a parent signs his/her consent to the initial evaluation, another consent must be signed before a child may begin to receive services. Thus, following initial evaluations, if parents do not consent to services beginning, no services will be provided and schools cannot force such services to occur through the due process procedures.

Once a child is receiving special education services, parents may later revoke consent (withdraw from special education services), but must do so in writing. The school's responsibility ends unless or until the parents later seek special education services and the child is found to still have a qualifying disability (and provided the child is not over age 21 or has not graduated). The initial evaluation process would begin again.

When parents revoke consent for services for a child receiving special education services, they may request that the school remove records from the file referencing the child's past receipt of special education services, but the school is not required to remove such records.

What process must parents follow if they believe the school has failed to provide FAPE and want to get reimbursed for placing their child in a private school setting?

What the Federal Regulations Say . . .

This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. However, the public agency must include that child in the population whose needs are addressed consistent with Secs. 300.131 through 300.144. Sec. 300.148(a).

Disagreements about FAPE – Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures of Secs. 300.504 through 300.520. Sec. 300.148(b).

Reimbursement for private school placement – If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs. Sec. 300.148(c).

Limitation on reimbursement - The cost of reimbursement described in this section may be reduced or denied if:

1. at the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or at least ten business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section; Sec. 300.148(d)(1);
2. if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in Sec. 300.503(a)(1), 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; Sec. 300.148(d)(2); or
3. upon a judicial finding of unreasonableness with respect to actions taken by the parents. Sec. 300.148(d)(3).

Exception - Not withstanding the notice requirements in paragraph (d)(1) of this section, the cost of reimbursement must not be reduced or denied for failure to provide the notice if:
the school prevented the parents from providing the notice;

1. the school prevented the parents from providing the notice;
2. the parents had not received notice, pursuant to Sec. 300.504, of the notice requirement in paragraph (d)(1) of this section; or
3. compliance with paragraph (d)(1) of this section would likely result in physical harm to the child; and may, in the discretion of the court or hearing officer, not be reduced or denied for failure to provide this notice if:
    - the parents are not literate or cannot write in English; or
    - compliance with paragraph (d)(1) of this section would likely result in serious emotional harm to the child. Sec. 300.300.148(e).

What the Regulations Mean . . .

IDEA '97 codified previous United States Supreme Court and other federal court decisions to create these provisions. IDEA 2004 separated the exceptions into mandatory and discretionary exceptions.

If parents believe the public school is not providing FAPE to their child and place the child privately for services, a court or hearing officer can order the public school to reimburse the parents for the cost of the private program if the court or hearing officer:

1. finds the public school failed to offer or provide the child with a FAPE in a timely manner; and
2. determines the private placement to be appropriate.

In order to succeed in a claim for reimbursement, the law sets forth specific requirements parents must meet prior to placing their child privately. **The parent must give the public school notice, either at an IEP Team meeting or in writing at least 10 business days prior to removing the child, of their dissatisfaction with the proposed placement, their concerns, and their intent to place the child privately. Reimbursement may be reduced or denied if this notice is not given unless a specific exception applies.**

Reimbursement may also be reduced or denied if, after receiving notice from the parents of their dissatisfaction with the school's proposed or the child's current placement and their intent to place their child privately, the public school provides the parents written notice of its intent to evaluate the child and the parents fail to make their child available for evaluation.

The law also provides that parents who are found to have acted unreasonably may have reimbursement reduced or denied.

There are exceptions to the notice requirement. Parents need not have given the public school notice prior to placing their child privately if:

1. the school somehow prevented the parents from giving notice (such as refusing to hold an IEP Team meeting or refusing to accept the parents' written notice);
2. the parents had not received notice of the notice requirement (such as if the school failed to give parents a copy of their procedural safeguards); or
3. continued placement would likely result in physical harm to the child ("likely" is not defined, but clearly a child who is suicidal or otherwise a threat to harm him/herself would qualify, as would a situation where the child is in danger from other students).

Further, at a court's discretion, reimbursement *may* not be reduced or denied if parents fail to give the school required notice if:

1. the parent is illiterate and cannot write in English; or
2. continued placement would likely result in serious emotional harm to the child (again, "likely" is not defined, nor is "serious emotional harm").

What Parents Should Know . . .

The notice requirement should be contained within the procedural safeguards parents routinely receive. Therefore, parents are expected to know the process they must follow if they intend to place their child privately and attempt to seek reimbursement from the public school for that placement. In order to be reimbursed, unless a public school simply agrees to reimburse the parents, parents must file a Due Process Complaint and prevail at a due process hearing or on appeal into State or federal court.

At the due process hearing, the parents will need to present evidence that the school's placement failed to provide FAPE to the child. Parents must also present evidence proving that the private placement was appropriate for the child.

If parents successfully prove their case, a court or hearing officer may require the public school to reimburse the parents for the entire cost of the private placement, as well as reasonable travel expenses to and from that placement.

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What is mediation, and how can it help me work with the school to reach an agreement?

What the Federal Regulations Say . . .

Each public agency must ensure that procedures are established and implemented to allow parties to disputes involving any matter under this part, including matters arising prior to the filing of a due process complaint, to resolve disputes through a mediation process. Sec. 300.506(a).

Requirements - The procedures must meet the following requirements:

1. The procedures must ensure that the mediation process is voluntary on the part of the parties; is not used to deny or delay a parent's right to a hearing on the parent's due process complaint, or to deny any other rights afforded under Part B of the Act; and is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.
2. A public agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with an appropriate alternative dispute resolution entity, or a parent training and information center or community parent resource center in the State…; and who would explain the benefits of, and encourage the use of, the mediation process to the parents.
3. The State must maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services. The SEA must select mediators on a random, rotational, or other impartial basis.
4. The State must bear the cost of the mediation process, including the costs of meetings described in paragraph (b)(2) of this section.
5. Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.
6. If the parties resolve a dispute through the mediation process, the parties must execute a legally binding agreement that sets forth that resolution and that states that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding; and is signed by both the parent and a representative of the agency who has the authority to bind such agency.
7. A written, signed mediation agreement under this paragraph is enforceable in any State court of competent jurisdiction or in a district court of the United States.

Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any Federal court or State court of a State receiving assistance under this part. Sec. 300.506(b).

Impartiality of Mediator - An individual who serves as a mediator under this part may not be an employee of the SEA or the LEA that is involved in the education or care of the child; and must not have a personal or professional interest that conflicts with the person's objectivity. A person who otherwise qualifies as a mediator is not an employee of an LEA or State agency … solely because he or she is paid by the agency to serve as a mediator. Sec. 300.506(c).

What the Regulations Mean . . .

When a parent (or school) files for a due process hearing, the State will offer mediation to the parties as a way of attempting to settle an issue prior to going to the hearing. Mediation is voluntary. It cannot be used to delay timelines for due process hearings. The mediator is an impartial individual who will attempt to facilitate a settlement of the area(s) of disagreement. The mediator makes no decision, but will work with the parties to try to get them to reach an agreement. If a settlement is reached on some or all issues, a written agreement is created and signed by the parties. Any issues not resolved will go on to the hearing. Mediation is different from a Resolution Meeting (discussed later in this chapter) for two reasons: First, with mediation there is an impartial facilitator; and second, all discussions and offers by either party are confidential and cannot be used as evidence at the due process hearing or in a court appeal.

Mediation is also available to parents and schools at any time prior to a party filing a Due Process Complaint.

What Parents Should Know . . .

Mediation is an excellent opportunity for parties to come together with an impartial facilitator to attempt to resolve their differences short of going to a due process hearing. It can be requested even in situations where a hearing has not been requested. Any conversations at the mediation are confidential and cannot be used as evidence should the matter proceed to a due process hearing.

Mediation is voluntary for both the parents and the school. Thus, either party can refuse mediation. The law has always stated that mediation cannot delay a parent's right to a due process hearing, but the 2006 federal regulations do exactly that by including mediation within the 30-day time period for Resolution Meetings (addressed later in this chapter). In other words, if parties agree to waive a Resolution Meeting and agree to mediation, the federal Department of Education has interpreted the 30-day resolution period to apply to mediations; thus, the 45-day time period for completion of the due process hearing proceeding would be delayed for up to 30 days when the parties agree to mediate (see page 158).

If mediation is successful, the process is well worth it. If mediation is not successful, the right to a due process hearing is delayed typically up to 30 days.

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When and on what issues may parents file a Due Process Complaint?

What the Federal Regulations Say . . .

A parent or a public agency may file a due process complaint on any of the matters described in Sec. 300.503(a)(1) and (2) (relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to the child). Sec. 300.507(a)(1).

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, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in Sec. 300.511(f) apply to the timeline in this section. Sec. 300.507(a)(2).

Information for parents - The public agency must inform the parent of any free or low-cost legal and other relevant services available in the area if the parent requests the information; or the parent or the agency files a due process complaint under this section. Sec. 300.507(b).

What the Regulations Mean . . .

When parents and schools cannot come to an agreement on issues related to the identification, evaluation, placement, or the provision of FAPE, either party has the right to file for a due process hearing. A “Due Process Complaint” must be filed within two years of the date a party knew or should have known of a violation.

What Parents Should Know . . .

A due process hearing before an impartial hearing officer is similar in many ways to going to trial before a judge. The due process hearing is the trial level for special education cases. While not required, it is advisable that parents have legal counsel represent them at the hearing.

Congress created a two-year statute of limitations for bringing IDEA actions in the 2004 Amendments. The two years begins when the party bringing the action knew or should have known of the violations.

In South Dakota . . .

South Dakota uses a one-tier hearing system. This means that the hearing officer’s decision is not open to State-level review. It is a “final decision” upon which either party can appeal into court. ARSD 24:05:30:11.

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What are the requirements when filing a Due Process Complaint?

What the Federal Regulations Say . . .

The public agency must have procedures that require either party, or the attorney representing a party, to provide to the other party a due process complaint (which must remain confidential). The party filing a due process complaint must forward a copy of the due process complaint to the SEA. Sec. 300.508(a).

Content of complaint - The due process complaint required in paragraph (a)(1) of this section must include:

1. the name of the child;
2. the address of the residence of the child;
3. the name of the school the child is attending;
4. in the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child, and the name of the school the child is attending;
5. a description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and
6. a proposed resolution of the problem to the extent known and available to the party at the time. Sec. 300.508(b).

Notice required before a hearing on a due process complaint - A party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements of paragraph (b) of this section. Sec. 300.508(c).

What the Regulations Mean . . .

The 1997 Amendments to Part B of IDEA added the requirement that parents or their attorney submit a “Due Process Complaint” containing certain information when filing for a due process hearing. The 2004 Amendments clarified that this requirement applies to schools as well, and that the hearing will not occur if the moving party failed to file a sufficient complaint. The Due Process Complaint provides “notice” of the child’s name, address, school, issue(s)/problem(s) (with supporting facts), and proposed resolution, if known.

What Parents Should Know . . .

The State Special Education Programs office has developed a model Due Process Complaint form, which can be accessed at: https://doe.sd.gov/sped/complaints.aspx. A party filing for a due process hearing does not have to use the State form, so long as the Due Process Complaint otherwise contains the required items. If the party bringing the hearing fails to provide a sufficient Due Process Complaint, the hearing will not occur.

What is the process for contesting the sufficiency of a Due Process Complaint and for amending a Due Process Complaint?

What the Federal Regulations Say . . .

Sufficiency of complaint - The due process complaint required by this section must be deemed sufficient unless the party receiving the due process complaint notifies the hearing officer and the other party in writing, within 15 days of receipt of the due process complaint, that the receiving party believes the due process complaint does not meet the requirements in paragraph (b) of this section.

Within five days of receipt of notification under paragraph (d)(1) of this section, the hearing officer must make a determination on the face of the due process complaint of whether the due process complaint meets the requirements of paragraph (b) of this section, and must immediately notify the parties in writing of that determination.

A party may amend its due process complaint only if the other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting held pursuant to Sec. 300.510; or the hearing officer grants permission, except that the hearing officer may only grant permission to amend at any time not later than five days before the due process hearing begins.

If a party files an amended due process complaint, the timelines for the resolution meeting in Sec. 300.510(a) and the time period to resolve in Sec. 300.510(b) begin again with the filing of the amended due process complaint. Sec. 300.508(d).

What the Regulations Mean . . .

The party receiving the Due Process Complaint can contest the sufficiency of the content by notifying the hearing officer in writing within 15 days of receiving the complaint. The hearing officer will review the complaint and make a determination within five days as to whether it complies with the content requirements.

The moving party can amend the Due Process Complaint if the other party consents and is allowed to resolve the amended Due Process Complaint at a Resolution Meeting, or if the hearing officer grants permission. However, amending the Due Process Complaint starts timelines over again.

What Parents Should Know . . .

Filing for a due process hearing requires filing a Due Process Complaint. It is important that the complaint meets the requirements of the law, as all timelines start over if it becomes necessary to later amend the complaint. If a school contests the sufficiency of a due process complaint and the hearing officer agrees it is insufficient, the parents will need to amend the complaint or file a new Due Process Complaint before the matter will be allowed to proceed through the hearing process.

When a parent (or school) files a Due Process Complaint, does the school (or parent) need to file a response?

What the Federal Regulations Say . . .

LEA response to a due process complaint - If the LEA has not sent a prior written notice under Sec. 300.503 to the parent regarding the subject matter contained in the parent's due process complaint, the LEA must, within 10 days of receiving the due process complaint, send to the parent a response that includes an explanation of why the agency proposed or refused to take the action raised in the due process complaint; a description of other options that the IEP Team considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and a description of the other factors that are relevant to the agency's proposed or refused action.

A response by an LEA under paragraph (e)(1) of this section shall not be construed to preclude the LEA from asserting that the parent's due process complaint was insufficient, where appropriate. Sec. 300.508(e).

Other party response to a due process complaint - Except as provided in paragraph (e) of this section, the party receiving a due process complaint must, within 10 days of receiving the due process complaint, send to the other party a response that specifically addresses the issues raised in the due process complaint. Sec. 300.508(f).

What the Regulations Mean . . .

A parent's filing of a Due Process Complaint does not relieve the school of providing written notice (discussed previously) as to the basis for its proposal or refusal regarding the issue(s) addressed in the parent's Due Process Complaint. Therefore, if the school had not already done so, the school must provide written notice within 10 days of receipt of the Due Process Complaint. Providing the prior written notice does not prevent the school from asserting that the parent's Due Process Complaint is insufficient.

Regardless of which party filed the Due Process Complaint, the party receiving the complaint must send a response to the allegations within 10 days of receipt of the Due Process Complaint. However, if the school had not provided Prior Written Notice regarding the issues in a parent's Due Process Complaint prior to the parent filing the Complaint, providing Prior Writen Notice in response to the parent's Due Process Complaint meets the "response" requirement.

What Parents Should Know . . .

Parents are always entitled to prior written notice when a school proposes or refuses a change in the identification, evaluation, placement, or provision of FAPE.

If a school files a Due Process Complaint, parents must submit a written response to the school within 10 days of their receipt of the complaint.

What is a Resolution Meeting and when does it take place following a Due Process Complaint?

What the Federal Regulations Say . . .

Resolution meeting - Within 15 days of receiving notice of the parent's due process complaint, and prior to the initiation of a due process hearing under Sec. 300.511, the LEA must convene a meeting with the parent and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process complaint that includes a representative of the public agency who has decision-making authority on behalf of that agency; and may not include an attorney of the LEA unless the parent is accompanied by an attorney. Sec. 300.510(a)(1).

The purpose of the meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint. Sec. 300.510(a)(2).

The meeting described in paragraph (a)(1) and (2) of this section need not be held if: The parent and the LEA agree in writing to waive the meeting; or the parent and the LEA agree to use the mediation process described in Sec. 300.506. Sec. 300.510(a)(3).

The parent and the LEA determine the relevant members of the IEP Team to attend the meeting. Sec. 300.510(a)(4).

Resolution period - If the LEA has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur. Except as provided in paragraph (c) of this section, the timeline for issuing a final decision under Sec. 300.515 begins at the expiration of this 30-day period. Sec. 300.510(b)(1), (2).

Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding paragraphs (b)(1) and (2) of this section, the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held. Sec. 300.510(b)(3).

If the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented using the procedures in Sec. 300.322(d)), the LEA may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint. Sec. 300.510(b)(4).

If the LEA fails to hold the resolution meeting specified in paragraph (a) of this section within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline. Sec. 300.510(b)(5).

Adjustments to 30-day resolution period - The 45-day timeline for the due process hearing in Sec. 300.515(a) starts the day after one of the following events:

1. Both parties agree in writing to waive the resolution meeting.
2. After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible.
3. If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process. Sec. 300.510(c).

Written settlement agreement - If a resolution to the dispute is reached at the meeting described in paragraphs (a)(1) and (2) of this section, the parties must execute a legally binding agreement that is: Signed by both the parent and a representative of the agency who has the authority to bind the agency; and enforceable in any State court of competent jurisdiction or in a district court of the United States, or, by the SEA, if the State has other mechanisms or procedures that permit parties to seek enforcement of resolution agreements, pursuant to Sec. 300.537. Sec. 300.510(d).

Agreement review period - If the parties execute an agreement pursuant to paragraph (c) of this section, a party may void the agreement within three business days of the agreement's execution. Sec. 300.510(e).

What the Regulations Mean . . .

The requirement of a Resolution Meeting was added in the 2004 Amendments. When a parent files a Due Process Complaint, the school must convene a Resolution Meeting within 15 days of receipt of the parent's complaint. The purpose of this meeting is to allow the school the opportunity to hear the parent's concerns and resolve them short of going to hearing. The school then has until the end of 30 days from receipt of the complaint to resolve the issue(s).

The Resolution Meeting does not need to take place if both the parent and the school agree to waive the meeting, or if they agree to utilize mediation. However, if parents refuse to attend a Resolution Meeting, the school can seek to have the parent's Due Process Complaint dismissed following the end of the 30-day period. If the school fails to schedule or participate in a Resolution Meeting within the 15 days, parents can contact the hearing officer and request the time period for the due process hearing to begin.

The 30-day time period can be reduced or extended. The 45-day period for the due process hearing can begin prior to the end of 30 days if the parties agree to waive the Resolution Meeting or they agree after the Resolution Meeting or mediation that agreement cannot be reached. It can begin later than the 30 days if the parties agree to continue the mediation process beyond the 30-day period.

If the Resolution Meeting results in a settlement, it must be put in writing and signed by both parties. It is voidable for three business days. It is enforceable in State or federal court.

What Parents Should Know . . .

The Resolution Meeting is essentially a meeting of the IEP Team. The school cannot have its attorney attend unless the parents have their attorney attend.

The Resolution Meeting generally delays the beginning of the 45-day time period for a due process hearing for up to 30 calendar days. The regulations also applied this 30-day time period to mediation. Either process provides the opportunity for a quick resolution of the parent's issue(s). However, if parents believe the chance for settlement through either process is slim, they may want to consider seeking to waive the Resolution Meeting and going straight to hearing. However, if the school does not agree to waive the Resolution Meeting, the parents must attend or face dismissal of their complaint. If settlement is reached through the Resolution Meeting, but the school fails to follow the agreement, parents can enforce it in court.

Unlike the mediation process, there is no requirement with Resolution Meetings that the conversations be kept confidential, and thus they may be used as evidence at a subsequent due process hearing or in court.

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What are the requirements to be a hearing officer when a due process complaint has been filed?

What the Federal Regulations Say . . .

Whenever a due process complaint is received under Sec. 300.507 or Sec. 300.532, the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing, consistent with the procedures in Secs. 300.507, 300.508, and 300.510. Sec. 300.511(a).

Agency responsible for conducting the due process hearing - The hearing described in paragraph (a) of this section must be conducted by the SEA or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the SEA. Sec. 300.511(b).

Impartial hearing officer - At a minimum, a hearing officer must:

1. not be an employee of the SEA or the LEA that is involved in the education or care of the child; or a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;
2. possess knowledge of, and the ability to understand, the provisions of the Act, Federal and State regulations pertaining to the Act, and legal interpretations of the Act by Federal and State courts;
3. possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and
4. possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

A person who otherwise qualifies to conduct a hearing under paragraph (c)(1) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer. Each public agency must keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons. Sec. 300.511(c).

What the Regulations Mean . . .

When a parent or school files a Due Process Complaint, the State agency will appoint a hearing officer. The hearing officer must be impartial, meaning not an employee of the state agency or school district, and one who has no personal or professional conflict of interest. The hearing officer also must have the ability to conduct the hearing and make decisions in conformance with IDEA.

What Parents Should Know . . .

South Dakota currently uses hearing officers from the State Office of Hearing Examiners to hear special education cases. Parents or their attorneys can contact the State Special Education Programs office to inquire into who that office uses for hearing officers and their qualifications.

What is the timeline (statute of limitation) for filing a Due Process Complaint?

What the Federal Regulations Say . . .

Subject matter of due process hearings - The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under Sec. 300.508(b), unless the other party agrees otherwise. Sec. 300.511(d).

Timeline for requesting a hearing - A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law. Sec. 300.511(e).

Exceptions to the timeline - The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to:

- specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or
- the LEA's withholding of information from the parent that was required under this part to be provided to the parent. Sec. 300.511(f).

What the Regulations Mean . . .

The purpose of the Due Process Complaint is to inform the other party of the issues being brought to hearing. Therefore, the moving party cannot bring up new issues at the hearing without permission from the other side.

IDEA has a two-year statute of limitations for bringing a Due Process Complaint, which begins when the moving party **knew or should have known** of the action forming the basis for the complaint. For example, if a school ceased providing PT services contained in the IEP at the beginning of the 2023-2024 school year, but the parents did not find out (and had no way of knowing) until February 1, 2025, they would have until February 1, 2027 to file a Due Process Complaint.

The two-year limitation can be extended under limited circumstances, such as when the school misrepresented that it had resolved an issue or withheld relevant information.

What Parents Should Know . . .

Parents must make sure they include all issues in their Due Process Complaint to prevent delays or having to file separate complaints/have separate hearings. Due Process Complaints typically fall under two types:

1. alleged ongoing (immediate) issues; and
2. past alleged violations wherein parents are seeking reimbursement or compensatory services (or both).

While parents have two years to file a Due Process Complaint from the time they found out, or should have found out, about their concern, often they will want to file their complaint without undue delay (such as for ongoing violations).

It is highly recommended that parents have legal representation. An attorney can assist with drafting the complaint and, after fully discussing the case and reviewing the file, may find additional violations to include in the complaint and have ideas of what to seek from the school to remedy the violations.

What are my rights at at Due Process Hearing?

What the Federal Regulations Say . . .

Any party to a hearing conducted pursuant to Secs. 300.507 through 300.513 or Secs. 300.530 through 300.534, … has the right to:

- be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities, except that whether parties have the right to be represented by nonattorneys at due process hearings is determined under State law;
- present evidence and confront, crossexamine, and compel the attendance of witnesses;
- prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;
- obtain a written, or, at the option of the parents, electronic, verbatim record of the hearing; and
- obtain written, or, at the option of the parents, electronic findings of fact and decisions.
  Sec. 300.512(a).

Additional disclosure of information - At least five business days prior to a hearing conducted pursuant to Sec. 300.511(a), each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing. A hearing officer may bar any party that fails to comply with paragraph (b)(1) of this section from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.
Sec. 300.512(b).

What the Regulations Mean . . .

Both parties to a due process hearing have certain rights set out in IDEA. One is the right to refuse to allow evidence to be included in the hearing record that was not shared by the other party at least five business days prior to the hearing.

What Parents Should Know . . .

A due process hearing is similar to a civil trial before a judge in many respects. While less formal, there are specific timelines for disclosing to the school who will be witnesses and what documentary evidence parents want the hearing officer to consider. Schools will almost always be represented at hearings by an attorney. While parents do not have to be represented by an attorney, it is highly recommended.

The Federal Rules of Evidence generally apply to these hearings, although not as strictly as in court proceedings. It is very helpful to have legal representation when presenting testimony, cross-examining witnesses, and admitting documentary evidence into the official record. Frequently, hearing officers will ask the parties to submit legal briefs (written statements supported by applicable law arguing in favor of a party's position). Parents have the right to receive a copy of the transcript of the testimony and a copy of the hearing officer's decision.

What other rights do parents have at Due Process Hearings and what timelines are involved? How does the Hearing Officer determine if my child has been denied FAPE?

What the Federal Regulations Say . . .

Parental rights at hearings - Parents involved in hearings must be given the right to:

- have the child who is the subject of the hearing present;
- open the hearing to the public; and
- have the record of the hearing and the findings of fact and decisions described in paragraphs (a)(4) and (a)(5) of this section provided at no cost to parents. Sec. 300.512(c).

Decision of hearing officer on the provision of FAPE - Subject to paragraph (a)(2) of this section, a hearing officer's determination of whether a child received FAPE must be based on substantive grounds. Sec. 300.513(a)(1).

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or caused a deprivation of educational benefit. Sec. 300.513(a)(2).

Nothing in paragraph (a) of this section shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under Secs. 300.500 through 300.536. Sec. 300.513(a)(3).

Separate request for a due process hearing - Nothing in Secs. 300.500 through 300.536 shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed. Sec. 300.513(c).

Finality of hearing decision - A decision made in a hearing conducted pursuant to Secs. 300.507 through 300.513 or Secs. 300.530 through 300.534 is final, except that any party involved in the hearing may appeal the decision under the provisions of … Sec. 300.516. Sec. 300.514(a).

Timelines and convenience of hearings and reviews - The public agency must ensure that not later than 45 days after the expiration of the 30 day period under Sec. 300.510(b), or the adjusted time periods described in Sec. 300.510(c): A final decision is reached in the hearing; and a copy of the decision is mailed to each of the parties. Sec. 300.515(a).

A hearing … officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party. Sec. 300.515(c).

Each hearing … involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved. Sec. 300.515(d).

What the Regulations Mean . . .

Parents may have their child with a disability who is the subject of the hearing attend the hearing. In certain circumstances, it may also be appropriate for the child to be a witness at the hearing. Parents may either have the hearing open to the public to view or may have the proceedings closed to the public. If parents wish to have a written transcript of the hearing, it must be provided to the parents free of charge.

The 2004 Amendments set out the requirement that a hearing officer cannot make a finding of a denial of FAPE on purely procedural grounds. For example, a hearing officer may not typically find a denial of FAPE if the school failed to provide written notice or committed some other procedural violation. Exceptions to this requirement apply if parents prove the procedural violations impeded the right to FAPE, significantly impeded the parent's right to participate in decisions, or caused a deprivation of educational benefit. For example, the failure to follow an IEP is a procedural violation, yet it directly impacts the right to FAPE.

What Parents Should Know . . .

The entire hearing process is supposed to take no more than 45 days, beginning at the end of the 30-day Resolution Process (or adjusted time period). Based on the timeline in the regulation, the hearing officer's decision must be sent out by the 45th day.

From a realistic standpoint, however, rarely is the hearing process completed in 45 days. A number of factors can contribute to delays, such as: The schedules of the parties, their attorneys, the hearing officer, and witnesses; the length of the hearing (if scheduling additional days is required); whether post-hearing briefs are submitted (which is almost always the case) and scheduling for those; and the time the hearing officer requires to write and issue the decision.

Often, hearings will be held at school buildings. However, if parents object to the hearing being held at a school building, the parents/parent attorney should notify the hearing officer and request it be held at a neutral site. The hearing officer should accommodate any reasonable request.

If parents discover additional issues following the filing of their Due Process Complaint, they can either seek to amend their initial complaint or file a separate complaint.

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What is the process for appealing Due Process Hearings decisions?

What the Federal Regulations Say . . .

Any party aggrieved by the findings and decision made under Secs. 300.507 through 300.513 or Secs. 300.530 through 300.534 … has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under Sec. 300.507 or Secs. 300.530 through 300.532. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. Sec. 300.516(a).

Time limitation - The party bringing the action shall have 90 days from the date of the decision of the hearing officer to file a civil action, or, if the State has an explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by that State law. Sec. 300.516(b).

Additional Requirements - In any action brought under paragraph (a) of this section, the court receives the records of the administrative proceedings; hears additional evidence at the request of a party; and basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate. Sec. 300.516(c).

Jurisdiction of District courts - The district courts of the United States have jurisdiction of actions brought under section 615 of the Act without regard to the amount in controversy. Sec. 300.516(d).

What the Regulations Mean . . .

If either party disagrees with the hearing officer's decision, that party has 90 days to appeal the case into either State or federal court (see In South Dakota below). State circuit courts and federal district courts act as appellate courts in most instances, meaning no new (or very limited) evidence is presented at that level and the court will base its decision on the administrative record, written briefs, and usually oral argument. In limited circumstances, a party will be allowed to submit additional documentary or testimonial evidence at the State or federal court level.

Courts use the "preponderance of the evidence" standard (also used by hearing officers), which means "more than half," to decide special education appeals. Courts have broad authority to grant different types of relief, depending on the issues in the case. Parties can continue to appeal the case through the State or federal systems.

What Parents Should Know . . .

The type of relief a parent can receive from a court (or hearing officer) is very broad. A court can award compensatory educational services or reimbursement for costs of services or placement paid for by parents. A court can order a school to comply with an IEP, order specific services, and otherwise correct deficiencies. The 8th Circuit Court of Appeals (applicable to South Dakota) has ruled that punitive damages are not available under IDEA.

In South Dakota . . .

South Dakota has set a different timeline for appealing a hearing decision. The party bringing the action has 30 days from the date of the decision to file a civil action. SDCL 13-37-1.4.

Can parents sue school districts under other laws? Is it possible to skip the due process procedures and take my complaint directly to court?

What the Federal Regulations Say . . .

Nothing in this part restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the Act, the procedures under Secs. 300.507 and 300.514 must be exhausted to the same extent as would be required had the action been brought under Sec. 615 of the Act. Sec. 300.516(e).

States' sovereign immunity - A State that accepts funds under this part waives its immunity under the 11th amendment to the Constitution of the United States from suit in Federal court for a violation of this part. In a suit against a State for a violation of this part, remedies (including remedies both at law and in equity) are available for such a violation in the suit against a public entity other than a State. Paragraphs (a) and (b) of this section apply with respect to violations that occur in whole or part after the date of enactment of the Education of the Handicapped Act Amendments of 1990. Sec. 300.177.

What the Regulations Mean . . .

IDEA prohibits a parent or school from bringing an action based on IDEA into court without first going through the due process hearing procedure. This requirement is referred to as "exhausting administrative remedies." Parents cannot circumvent the IDEA due process hearing exhaustion requirement by bringing a court action against a school under other laws, such as the Americans with Disabilities Act (ADA) or Section 504 of the Rehabilitation Act, if the parents are seeking relief from the court that would be available under IDEA. Schools and the SEA cannot assert sovereign immunity under the 11th Amendment in an IDEA action.

What Parents Should Know . . .

Many cases get dismissed by courts each year because parents fail to bring the matter to a due process hearing first. Parents may also use other laws (besides IDEA) in court to protect their child's rights, such as the Americans with Disabilities Act (ADA) or Section 504 of the Rehabilitation Act. However, in most instances, because relief requested under these laws will be the same as that available under IDEA, cases may well be dismissed if a parent has not gone through the administrative hearing process under IDEA before bringing an action in court.

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Who is responsible for attorney's fees for a due process hearing?

What the Federal Regulations Say . . .

In general - In any action or proceeding brought under section 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to:

1. the prevailing party who is the parent of a child with a disability;
2. to a prevailing party who is an SEA or LEA against the attorney of a parent who 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; or
3. to a prevailing SEA or LEA against the attorney of a parent, or against the parent, 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. Sec. 300.517(a).

Prohibition on use of funds - Funds under Part B of the Act may not be used to pay attorneys' fees or costs of a party related to any action or proceeding under section 615 of the Act and subpart E of this part. Paragraph (b)(1) of this section does not preclude a public agency from using funds under Part B of the Act for conducting an action or proceeding under section 615 of the Act.
Sec. 300.517(b)(1), (2).

Award of fees - A court awards reasonable attorneys' fees under section 615(i)(3) of the Act consistent with the following:

- Fees awarded under section 615(i)(3) of the Act must be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this paragraph. Sec. 300.517(c)(1).
- Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under section 615 of the Act for services performed subsequent to the time of a written offer of settlement to a parent if: The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins; The offer is not accepted within 10 days; and The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement. Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless the meeting is convened as a result of an administrative proceeding or judicial action, or at the discretion of the State, for a mediation described in § 300.506. A meeting conducted pursuant to § 300.510 shall not be considered a meeting convened as a result of an administrative hearing or judicial action; or an administrative hearing or judicial action for purposes of this section.

Notwithstanding paragraph (c)(2) of this section, an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer. Sec. 300.517(c)(3).

Except as provided in paragraph (5) of this section, the court reduces, accordingly, the amount of the attorneys' fee awarded under section 615 of the Act, if the court finds that:

1. the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;
2. the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;
3. the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or
4. the attorney representing the parent did not provide to the LEA the appropriate information in the due process request notice in accordance with Sec. 300.508. Sec. 300.517(c)(4).

The provisions of paragraph (c)(4) of this section do not apply in any action or proceeding if the court finds that the State or local agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of the Act. Sec. 300.517(c)(5).

What the Regulations Mean . . .

If parents prevail on any significant issue at a due process hearing or in court, a court may award the parents reasonable attorneys' fees based on the number of hours their attorney spent on the case, the attorney's level of experience and expertise, and hourly rates paid to attorneys in the community where the school is located. The 2004 Amendments added provisions where schools can receive attorneys' fees from parents or their attorney for bringing a frivolous action or bringing an action for an improper purpose.

If parents reject a settlement offer made at least 10 days prior to hearing and then do not receive any more relief from the hearing officer than was offered, fees would not be awarded for the time spent after the date of the settlement offer. Such fees may not be reduced if parents can demonstrate they were substantially justified in rejecting the offer.

Fees may also be reduced if parents unnecessarily prolonged the proceedings, if the attorney's hourly rate is too high or his/her hours spent are unreasonable, or if the attorney failed to provide the school the required written notice when filing the Due Process Complaint. On the other hand, fees may not be reduced if the school unnecessarily prolonged the proceedings or was found to have violated procedural safeguards.

Fees will not be awarded for attending an IEP Team meeting unless the meeting was ordered by the hearing officer or court. If a mediation is held prior to the filing of a due process hearing, fees typically would not be allowed for time spent attending that mediation.

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What Parents Should Know . . .

Typically, the parents and attorney sign a representation agreement. If it is agreed the attorney will get paid on a contingency fee basis, he or she would get paid only if the parents prevail. If the agreement is on an hourly basis, the attorney would be paid based on the number of hours worked regardless of the outcome.

If parents prevail at a due process hearing or on an appeal, fees can be awarded for the time spent on the case, as well as for costs incurred in the litigation, but not costs for an expert witness. Only a court can award attorneys' fees and costs.

If parents prevail at a due process hearing and there is no appeal, typically the parents' attorney would submit a bill to the school for fees and costs. If the school refuses to pay or a settlement on fees cannot be reached, parents must file a separate action in federal court for attorneys' fees.

What will be my child's "placement" during the Due Process Hearing?

What the Federal Regulations Say . . .

General Rule - Except as provided in section 300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under Sec. 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement. Sec. 300.518 (a).

Initial Admission to Public School - If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the processings. Sec. 300.518(b).

Transition from Part C - If the complaint involves an application for initial services under this part from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned three, the public agency is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services under Sec. 300.300(b), then the public agency must provide those special education and related services that are not in dispute between the parent and the public agency. Sec. 300.518(c).

Hearing Officer Decision in Parents' Favor - If the hearing officer in a due process hearing conducted by the SEA … agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section. Sec. 300.518(d).

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What the Regulations Mean . . .

IDEA protects children from a school's unilateral change in the child's placement. If a school proposes to change a child's placement and the parent disagrees and files for a due process hearing on the issue, the child will remain in his or her current placement (unless the parties agree otherwise) until the administrative or judicial proceedings are completed. This part of the law is commonly known as the "stay put" provision, meaning the child "stays put" in the current placement when a parent files for a hearing to dispute a proposed change in placement.

An exception to this rule occurs where a parent prevails at a due process hearing on a placement issue. In that situation, the placement ordered by the hearing officer becomes the new "stay put" placement during any further appeals. Separate rules apply in the area of discipline (see Chapter 14).

What Parents Should Know . . .

"Stay put" has been interpreted broadly to apply to other situations besides strictly placement issues. For example, "stay put" could apply where a school wants to reduce or discontinue a related service and a parent disagrees with such reduction and files for a due process hearing. **For "stay put" to apply, parents would need to file a Due Process Complaint before the district implements its proposal/refusal following parents' receipt of prior written notice** (see p. 140).

Who will act as the "parent" when no parent can be found, or a child is a ward of the State?

What the Federal Regulations Say . . .

Each public agency must ensure that the rights of a child are protected when:

- no parent (as defined in Sec. 300.30) can be identified;
- the public agency, after reasonable efforts, cannot locate a parent;
- the child is a ward of the State under the laws of that State; 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)). Sec. 300.519(a).

Duties of public agency - The duties of a public agency under paragraph (a) of this section include the assignment of an individual to act as a surrogate for the parents. This must include a method for determining whether a child needs a surrogate parent; and for assigning a surrogate parent to the child. Sec. 300.519(b).

Wards of the State - In the case of a child who is a ward of the State, the surrogate parent alternatively may be appointed by the judge overseeing the child's case, provided that the surrogate meets the requirements in paragraphs (d)(2)(i) and (e) of this section. Sec. 300.519(c).

Criteria for selection of surrogate parents - The public agency may select a surrogate parent in any way permitted under State law. Public agencies must ensure that a person selected as a surrogate is not an employee of the SEA, the LEA, or any other agency that is involved in the education or care of the child; has no personal or professional interest that conflicts with the interest of the child the surrogate parent represents; and has knowledge and skills that ensure adequate representation of the child. Sec. 300.519(d).

Non-employee requirement; compensation - A person otherwise qualified to be a surrogate parent under paragraph (d) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent. Sec. 300.519(e).

Surrogate parent responsibilities - 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 FAPE to the child. Sec. 300.519(g).

SEA responsibility - The SEA must make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after a public agency determines that the child needs a surrogate parent. Sec. 300.519(h).

What the Regulations Mean . . .

Surrogate parents are individuals appointed to act as the child's "parent" in situations where no parent can be found, no parent exists, or the child is a ward of the state or unaccompanied homeless youth. The superintendent or designee shall assign a surrogate parent in these circumstances. A surrogate parent must have no conflict of interest that would interfere with acting in the child's best interests, and must have "knowledge and skills" to adequately act as the parent.

What Parents Should Know . . .

Surrogate parents must be appointed only when a "parent" as defined in IDEA cannot be identified or located, or if the child is a ward of the State or an unaccompanied homeless youth. If one has questions regarding surrogate parents, contact the State Special Education Programs office at (605) 773-3678.

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What is "transfer of rights" and how does it affect my rights as the parent of a child with a disability?

What the Federal Regulations Say . . .

A State may provide that, when a child with a disability reaches the age of majority under State law that applies to all students (except for a child with a disability who has been determined to be incompetent under State law):

- the public agency must provide any notice required by this part to both the child and the parents; and all rights accorded to parents under Part B of the Act transfer to the child;
- all rights accorded to parents under Part B of the Act transfer to children who are incarcerated in an adult or juvenile, State, or local correctional institution; and
- whenever a State provides for the transfer of rights under this part pursuant to paragraph (a)(1) or (a)(2) of this section, the agency must notify the child and the parents of the transfer of rights. Sec. 300.520(a).

Special Rule - A State must establish procedures for appointing the parent of a child with a disability, or, if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of the child's eligibility under Part B of the Act if, under State law, a child who has reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child's educational program. Sec. 300.520(b).

Transfer of Rights - Beginning not later than one year before the child reaches the age of majority under State law, the IEP must include a statement that the child has been informed of the child's rights under Part B of the Act, if any, that will transfer to the child on reaching the age of majority under Sec. 300.520. Sec. 300.320(c).

What the Regulations Mean . . .

The rights of parents under IDEA transfer to the child with a disability when the child reaches the age of majority. Two exceptions exist in the law:

- first, if the child has been found by a court to be incompetent (guardian appointed) upon reaching age of majority, or thereafter when it occurs; and
- second, if the State has a law that allows for a determination that the child does not have the capacity to provide informed consent, despite not being determined incompetent by a court.

In situations where a student has been determined to be incompetent, the rights belong to the legal guardian appointed by the court.

Failure to inform the child of the transfer of rights and document it in the child's IEP at least one year prior to reaching the age of majority is a violation of IDEA. The student must be informed which rights transfer to him or her. The school must also inform the student and parents when the transfer of rights has occurred.

What Parents Should Know . . .

If parents have a child with a disability who they believe is not be capable to make educational decisions upon reaching the age of majority, they should take steps in advance to go to court to become the child's legal guardian when the child reaches the age of majority. Failure to take these steps results in the transfer of parental rights under IDEA to the student, regardless of the child's ability to make decisions on his or her own behalf.

When rights transfer to the child with a disability upon reaching age of majority, that means that parents no longer have those rights. The child becomes the "parent" described in IDEA for purposes of the procedural safeguards and other rights. Thus, parents lose the right to bring a due process hearing on behalf of their child. They lose the right to attend IEP Team meetings, request evaluations, provide consent, etc. However, nothing prohibits the child at age of majority from inviting his or her parents to attend and assist with IEP Team meetings, mediation, resolution meetings, or due process hearings. It becomes the student's choice. Once the rights transfer at age 18, students may also prohibit their parents from participating at IEP Team meetings, unless invited to the meeting by the school district.

In South Dakota . . .

In South Dakota, the age of majority is 18. If, consistent with State law, an eligible child is determined not to have the ability to provide informed consent with respect to the educational program of the child, the school district shall appoint the parent, or, if the parent is not available, another appropriate individual to represent the educational interests of the child throughout the child's eligibility under this article. ARSD 24:05:30:16.01. Note: South Dakota does not have a law allowing for this process.

What are my rights as a parent to access my child's school records?

What the Federal Regulations Say . . .

Access rights - 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 Sec. 300.507 or Secs. 300.530 through 300.532, or resolution session pursuant to Sec. 300.510, and in no case more than 45 days after the request has been made. Sec. 300.613(a).

The right to inspect and review education records under this section includes:

1. the right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;
2. the right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and
3. the right to have a representative of the parent inspect and review the records.
   Sec. 300.613(b).

An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.
Sec. 300.613(c).

What the Regulations Mean . . .

Parents have the right to see **all** educational records. Schools must comply with a parent's request "without unnecessary delay," but within no more than 45 calendar days. However, if an IEP Team meeting or due process hearing is pending, parents are entitled to such access "without unnecessary delay" prior to the meeting or hearing. For example, if an IEP Team meeting is scheduled in 10 days, schools must allow parents access to review records prior to the meeting if requested.

There is a presumption in the law that any parent has the right to inspect or review his or her child's records. A school may forbid a parent from reviewing records only if the school has been provided with a legal document stating that a particular parent does not have that right.

What Parents Should Know . . .

Parents, when reviewing or after having received a copy of records, have the right to have school personnel explain or interpret the contents of such records. Parents can sign a release form to allow a third party (*e.g.*, friend, family member, advocate, attorney, Navigator) to inspect and review the child's records.

How do I find out if anyone has accessed my child's school records? How do I find out where they are located, and is there a fee for copies?

What the Federal Regulations Say . . .

Record of access - Each participating agency must keep a record of parties obtaining access to education records collected, maintained, or used under Part B of the Act (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records. Sec. 300.614.

Records on more than one child - If any education record includes information on more than one child, the parents of those children have the right to inspect and review only the information relating to their child or to be informed of that specific information. Sec. 300.615.

List of types and locations of information - Each participating agency must provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency. Sec. 300.616.

Fees - Each participating agency may charge a fee for copies of records that are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records. A participating agency may not charge a fee to search for or to retrieve information under this part. Sec. 300.617.

What the Regulations Mean . . .

Schools must keep a record of any party, excluding parents and authorized school personnel, who have accessed a child's records. Schools must keep a list, and inform parents if they request, of the location of all educational records for their child.

What Parents Should Know . . .

If parents request a copy of educational records, the school may charge the parents a reasonable fee for copies. This fee may be waived if the parent cannot afford to pay. Because parents are entitled to a copy of their child's IEP and evaluation reports, schools may not charge for those documents (unless additional copies are requested).

If I believe my child's records are inaccurate or misleading, can they be amended or removed from the file?

What the Federal Regulations Say . . .

Amendment of records at parent's request - A parent who believes that information in the education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child may request the participating agency that maintains the information to amend the information. Sec. 300.618(a).

The agency must decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request. Sec. 300.618(b).

If the agency decides to refuse to amend the information in accordance with the request, it must inform the parent of the refusal and advise the parent of the right to a hearing under Sec. 300.619. Sec. 300.618(c).

What the Regulations Mean . . .

If parents find something in their child's file they believe to be inaccurate, misleading, or to violates their child's rights, they have the right to request that such information be amended or removed from the file. If the school disagrees with the parents' request, the parents have the right to a hearing on the matter.

What Parents Should Know . . .

Parents have the right to challenge the contents of their child's educational records, initially by requesting that they be amended. If the school refuses to amend the records, parents can challenge the contents of the records by requesting a hearing, as discussed on the following page. The hearing allowed to contest records, which is borrowed from the Family Educational Rights and Privacy Act (FERPA), is not as formal compared to all the requirements for a due process hearing under IDEA, and does not need to be heard by an impartial hearing officer.

If the school refuses to remove or amend my child's educational records, what happens when a hearing is requested?

What the Federal Regulations Say . . .

Opportunity for a hearing - The agency must, on request, provide an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child. Sec. 300.619.

Result of hearing - If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it must amend the information accordingly and so inform the parent in writing. Sec. 300.620(a).

If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it must inform the parent of the parent's right to place in the records the agency maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency. Sec. 300.620(b).

Any explanation placed in the records of the child under this section must:

- be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and
- if the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party. Sec. 300.620(c).

Hearing procedures - A hearing held under Sec. 300.619 must be conducted according to the procedures under 34 C.F.R. 99.22 [FERPA]. Sec. 300.621.

[The FERPA procedures state:]

The hearing required by Sec. 99.21 must meet, at a minimum, the following requirements:

- The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student.
- The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing.
- The hearing may be conducted by any individual, including an official of the educational agency or institution, who does not have a direct interest in the outcome of the hearing.
- The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under Sec. 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney.
- The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing.
- The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision. 34 C.F.R. Sec. 99.22.

What the Regulations Mean . . .

If a school refuses to remove or amend an educational record, parents may request a hearing. If a hearing results in the finding that the information in the child's records was inaccurate, misleading, or violated the child's rights, the record must be amended as necessary. If the hearing officer determines the record should remain in the file, parents have the right to include a statement in the file, indicating their reasons for disagreement. The parental statement must remain in the file and accompany the record in which there is disagreement, including if the record is disclosed to another party, for as long as that record is maintained by the school.

What Parents Should Know . . .

The school can have anyone act as a hearing officer, so long as the person does not have a "direct interest" in the outcome. The law does not provide a process for appeal.

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Can the school disclose my child's records without my consent and how does the school safeguard the records?

What the Federal Regulations Say . . .

Consent - Parental consent must be obtained before personally identifiable information is disclosed to parties, other than officials of participating agencies in accordance with paragraph (b)(1) of this section, unless the information is contained in educational records, and the disclosure is authorized without parental consent under 34 C.F.R. part 99. Sec. 300.622(a).

Except as provided in paragraphs (b)(2) and (b)(3) of this section, parental consent is not required before personally identifiable information is released to officials of participating agencies for purposes of meeting a requirement of this part. Sec. 300.622(b)(1).

Parental consent, or the consent of an eligible child who has reached the age of majority under State law, must be obtained before personally identifiable information is released to officials of participating agencies providing or paying for transition services in accordance with Sec. 300.321(b)(3). Sec. 300.622(b)(2).

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. Sec. 300.622(b)(3).

Safeguards - Each participating agency must protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages. One official at each participating agency shall assume responsibility for ensuring the confidentiality of any personally identifiable information. All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under Sec. 300.123 and 34 C.F.R. part 99. Each participating agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information. Sec. 300.623.

What the Regulations Mean . . .

Schools must get parental consent before disclosing personally identifiable information about a child to any individual or entity other than school officials allowed such access or entities where consent is not required.

What Parents Should Know . . .

Generally, schools may not disclose personally identifiable information about a child without parental consent. However, this rule is not absolute, as there are specific exceptions. Parents may ask to see the list of school personnel who have access to their child's records. Parents may ask who besides school personnel may access their child's records without consent.

Will I be notified if any of my child's records are destroyed, and does that change when my child turns 18?

What the Federal Regulations Say . . .

Destruction of Information - The Public agency must inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child. Sec. 300.624(a).

The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.
Sec. 300.624(b).

Children's rights - The SEA must have in effect policies and procedures regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability. Sec. 300.625(a).

Under the regulations for FERPA [Family Educational Rights and Privacy Act of 1974] in 34 C.F.R. 99.5(a), the rights of parents regarding education records are transferred to the student at age 18.
Sec. 300.625(b).

If the rights accorded to parents under Part B of the Act are transferred to a student who reaches the age of majority, consistent with Sec. 300.520, the rights regarding educational records in Secs. 300.613 through 300.624 must also be transferred to the student. However, the public agency must provide any notice required under Sec. 615 of the Act to the student and the parents.
Sec. 300.625(c).

What the Regulations Mean . . .

Schools must inform parents when their child's records become outdated and then destroy them upon the parents' request.

The rights regarding confidentiality of records discussed on the previous pages transfer to the child with a disability upon reaching age of majority, just as other IDEA rights transfer to the child at that time.

What Parents Should Know . . .

Personally identifiable information is information such as the student's name, the name of the student's parents or other family member or the student's or family's address. It also includes a personal identifier such as a Social Security number, student identification number, or any other information that would make the student's identity traceable. Schools are allowed to maintain specific personally identifiable information on a student, even if all other records become outdated and are destroyed.

What is a State Complaint and what solutions can the State Department of Education order if the school is found to be out of compliance with IDEA?

What the Federal Regulations Say . . .

Each SEA must adopt written procedures for:

- Resolving any complaint, including a complaint filed by an organization or individual from another State, that meets the requirements of Sec. 300.153 by providing for the filing of a complaint with the SEA; and at the SEA's discretion, providing for the filing of a complaint with a public agency and the right to have the SEA review the public agency's decision on the complaint; and
- Widely disseminating to parents and other interested individuals, including parent training and information centers, protection and advocacy agencies, independent living centers, and other appropriate entities, the State procedures under Secs. 300.151 through 300.153. Sec. 300.151(a).

Remedies for denial of appropriate services - In resolving a complaint in which the SEA has found a failure to provide appropriate services, an SEA, pursuant to its general supervisory authority under Part B of the Act, must address:

- the failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and
- the appropriate future provision of services for all children with disabilities. Sec. 300.151(b).

What the Regulations Mean . . .

The State Complaint process has been an alternative to a due process hearing, when applicable, since IDEA was created. It was not until the 1997 Amendments, however, that State agencies were given authority to order relief that was actually equal to the school's violation, such as compensatory services or reimbursement.

The availability of the State Complaint procedure is not limited to parents. Other individuals and organizations may also avail themselves to filing a State Complaint if they are aware of what is believed to be a violation of IDEA. Filing a State Complaint on one child has the potential for districtwide application, as the district, if found out of compliance, must typically demonstrate that it is correctly applying IDEA in the specific area of complaint to all children in the district.

What Parents Should Know . . .

One of the methods of legal recourse a parent has for resolving disputes with a school is through the State Complaint process (others include mediation and due process hearings). Complaints can address procedural or compliance-type issues (*e.g.*, whether the school violated a procedure, violated the law, or failed to follow an IEP). Substantive issues, such as whether a child requires a specific service and how much, are usually better addressed through mediation or a due process hearing. State Complaints are good to use where there are alleged systemic violations because the school, if not following IDEA, must demonstrate districtwide compliance. A group of parents with similiar issues can file a State Complaint together.

How is a State Complaint handled, and what is the timeline for the investigation?

What the Federal Regulations Say . . .

Time Limit; minimum procedures - Each SEA must include in its complaint procedures a time limit of 60 days after complaint is filed under Sec. 300.153 to:

1. carry out an independent on-site investigation, if the SEA determines that an investigation is necessary;
2. give the complainant the opportunity to submit additional information, either orally or in writing about the allegations in the compliant;
3. provide the public agency with the opportunity to respond to the complaint, including, at a minimum - at the discretion of the public agency, a proposal to resolve the complaint; and an opportunity for a parent who has filed a complaint and the public agency to voluntarily engage in mediation consistent with Sec. 300.506;
4. review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part B of the Act or of the this part; and
5. issue a written decision to the complainant that addresses each allegation in the complaint and contains findings of fact and conclusions and the reasons for the SEA's final decision. Sec. 300.152 (a).

Time extension; final decision; implementation - The SEA's procedures described in paragraph (a) of this section also must:

- Permit an extension of the time limit under paragraph (a) of this section only if (i) Exceptional circumstances exist with respect to a particular complaint; or (ii) The parent (or individual or organization, if mediation or other alternative means of dispute resolution is available to the individual or organization under State procedures) and the public agency involved agree to extend the time to engage in mediation pursuant to paragraph (a)(3)(ii) of this section, or to engage in other alternative means of dispute resolution, if available in the State; and
- Include procedures for effective implementation of the SEA's final decision, if needed, including (i) Technical assistance activities; (ii) Negotiations; and (iii) Corrective actions to achieve compliance. Sec. 300.152(b).

What the Regulations Mean . . .

The State agency has 60 days to complete its complaint investigation and issue its written findings of fact and conclusions for each complaint allegation. The State can extend this period only for exceptional circumstances.

The State may conduct the complaint investigation on-site, or may conduct the investigation with phone interviews. Both parents and school can submit additional information. State investigators will meet with the complainant and with school personnel separately, whether the investigation is conducted onsite or over the phone. The SEA must offer the parties mediation to resolve the issue(s).

What Parents Should Know . . .

If the issues presented by the parents (or other individual or agency) are found to be valid, the State will engage in technical assistance and negotiation, as well as require the school to do "corrective action" and demonstrate it has done so districtwide.

Can a Due Process Complaint and a State Complaint be filed at the same time, and does it matter if the two complaints address the same or different issues?

What the Federal Regulations Say . . .

Complaints filed under this section and due process hearings under Sec. 300.507 and Secs. 300.530 through 300.532 - If a written complaint is received that is also the subject of a due process hearing under Sec. 300.507 or Secs. 300.530 through 300.532, or contains multiple issues of which one or more are part of that hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action must be resolved using the time limit and procedures described in paragraphs (a) and (b) of this section. If an issue raised in a complaint filed under this section has previously been decided in a due process hearing involving the same parties - the due process hearing decision is binding on that issue; and the SEA must inform the complainant to that effect. A complaint alleging a public agency's failure to implement a due process hearing decision must be resolved by the SEA. Sec. 300.152(c).

What the Regulations Mean . . .

If parents file a Due Process Complaint and submit a State Complaint on the same issue or issues, the State Complaint will be set aside and the hearing process will take precedence. If a State Complaint is filed and a due process hearing is requested where some or all of the issues differ, each process proceeds independently and the State agency will conduct its complaint investigation on the issues not addressed in the Due Process Complaint.

There are no appeal rights from the State Complaint process. However, if an issue or issues have been addressed through the State Complaint process, either party may later address the same issue in a due process hearing. Regardless of the State's prior complaint findings, the hearing officer's decision will take precedence. The results of the State Complaint process may be used as evidence at the due process hearing. The opposite is not allowable, in that if an issue has been addressed at a due process hearing, the same issue cannot later be addressed through the State Complaint process.

What Parents Should Know . . .

While the State Complaint process typically would not address substantive issues, such as "how much" or "whether" a child requires a specific service, or eligibility issues, it became much more attractive for addressing situations where a school has failed to comply with an IEP because IDEA 1997 authorized the State to order compensatory education or reimbursement (where a parent has placed a child privately) if a school has been found out of compliance through the State Complaint process.

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What needs to be included in a State Complaint, and what is the timeline for filing it?

What the Federal Regulations Say . . .

Filing a complaint - An organization or individual may file a signed written complaint under the procedures described in Secs. 300.151 through 300.152. Sec. 300.153(a). The complaint must include:

- a statement that a public agency has violated a requirement of Part B of the Act or of this part;
- the facts on which the statement is based;
- the signature and contact information for the complainant; and
- if alleging violations with respect to a specific child:
    - the name and address of the residence of the child;
    - the name of the school the child is attending;
    - in the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child, and the name of the school the child is attending;
    - a description of the nature of the problem of the child, including facts relating to the problem; and
    - a proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed. Sec. 300.153(b).

The complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received in accordance with Sec. 300.151. Sec. 300.153(c).

The party filing the complaint must forward a copy of the complaint to the LEA or public agency serving the child at the same time the party files the complaint with the SEA. Sec. 300.153(d).

What the Regulations Mean . . .

IDEA 2004 formalized the State Complaint process by creating a checklist of what must be contained in it, similar to a Due Process Complaint. A State Complaint can be filed by a parent, other individual, or an organization. It can address a particular child or systemic issues. It must be signed by the person or entity filing the complaint. The complaint must state the alleged violations of the IDEA and the facts upon which the alleged violations occurred.

The statute of limitations for filing a State Complaint is one year from the date of the alleged violation. IDEA 2004 eliminated the exceptions extending the time period (to three years) that were contained in the previous version of IDEA (for continuing violations and seeking compensatory education).

What Parents Should Know . . .

State Complaints must be in writing, signed, and state both the alleged violation(s) of IDEA and the facts that support the violation(s). While citing specific laws or regulations believed to be violated is helpful, it is not required. However, parents are encouraged to consult with someone experienced in IDEA when needed, either in drafting the State Complaint or in answering questions. IDEA 2004 set a strict one-year time limit following occurrence of the alleged violation for filing State Complaints. The State must receive the Complaint within the one-year timeline.

Chapter 14: Discipline

What is a "Change of Placement"?

What the Federal Regulations Say . . .

For purposes of removals of a child with a disability from the child's current educational placement under Secs. 300.530 through 300.535, a **change of placement** occurs if:

- the removal is for more than 10 consecutive school days; or
- the child has been subjected to a series of removals that constitute a pattern because the series of removals total more than 10 school days in a school year; because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of 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. Sec. 300.536(a).

The public agency determines on a case-by-case basis whether a pattern of removals constitutes a change of placement. This determination is subject to review through due process and judicial proceedings. Sec. 300.536(b).

What the Regulations Mean . . .

A "change of placement" for disciplinary removals occurs when the student is removed for more than 10 consecutive school days (this automatically constitutes a change of placement). A "change of placement" also occurs when the student is subject to a **series of removals** that are found to **constitute a pattern**. In order to determine whether a pattern exists to constitute a "change of placement," the following factors must be considered:

- the series of removals must cumulate to more than 10 school days in a school year;
- the child's behavior must be substantially similar to the child's behavior in previous incidents that resulted in the series of removals;
- the length of each removal;
- the total amount of time the child is removed; and
- the proximity of the removals to one another.

What Parents Should Know . . .

Understanding the definition of a "change of placement" is the cornerstone to understanding the federal regulations related to discipline. More rights apply when a change of placement occurs. Schools generally are not allowed to change the placement of a child with a disability without the parents' input. Some exceptions apply in the area of discipline. That is why it is important to understand at what point a removal or series of removals may become a "change of placement." While one removal of more than 10 consecutive school days is clearly a change of placement, the law is very flexible as to when a "series of removals" achieves "change of placement" status. The school makes that determination, although parents can contest the decision at a due process hearing.

The regulations provide no guidance on how a school district weighs the factors, including how many short-term removals constitute a "series" and what "substantially similiar" behavior means.

Do schools have authority to remove my child with a disability for up to 10 consecutive school days for a violation of the code of student conduct, and must they provide services during such removals?

What the Federal Regulations Say . . .

Case-by-case determination - 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. Sec. 300.530(a).

General - School personnel under this section may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, 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 under Sec. 300.536). Sec. 300.530(b)(1).

After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section. Sec. 300.530(b)(2).

What the Regulations Mean . . .

As long as they would treat a child without disabilities in the same fashion, public schools have the authority to automatically remove (suspend or place in another setting) children with disabilities from the child's current placement for a violation of the school's code of student conduct.

Specifically, a child with a disability can be removed for up to 10 consecutive school days at a time for a violation of school rules. Schools can remove/suspend children with disabilities for additional violations of school rules for up to 10 consecutive school days per violation within the same school year, so long as the additional removals do not constitute a "change of placement" (see previous page). Once a child has been removed from his or her current placement for **more than 10 total school days in a school year**, the school must provide special education services to the child in a different setting.

The 2004 Amendments added a section allowing schools the flexibility to look at each situation on a case-by-case basis, rather than automatically applying the dictate of the law.

What Parents Should Know . . .

Regardless of the child's disability and how it affects the child, a school can remove a child with a disability from school or place the child in another setting without parental permission for up to 10 consecutive school days for a violation of school rules, so long as a child without a disability would be treated similarly for the same infraction. In this situation, it does not matter whether the child's behavior was a result of the child's disability.

The same rule applies to additional violations of school rules unless the school determines that a series of removals is a "change of placement." However, once the total days of removal in a school year exceed 10, the school must then serve the child in a different setting for each additional violation, with services that would enable the child to continue to participate in the general education curriculum and progress toward meeting the annual goals in the child's IEP.

What are the procedural requirements under IDEA if my child with a disability is removed from the current school placement for longer than 10 consecutive school days?

What the Federal Regulations Say . . .

For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (e) of this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section. Sec. 100.530(c).

Services - A child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section must continue to receive educational services, as provided in Sec. 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 the goals set out in the child's IEP; and receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. Sec. 300.530(d)(1).

The services required by paragraph (d)(1), (d)(3), (d)(4), and (d)(5) of this section may be provided in an interim alternative educational setting. Sec. 300.530(d)(2).

A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly removed. Sec. 300.530(d)(3).

After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under Sec. 300.536, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed, as provided in Sec. 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 the goals set out in the child's IEP. Sec. 300.530(d)(4).

If the removal is a change of placement under Sec. 300.536, the child's IEP Team determines appropriate services under paragraph (d)(1) of this section. Sec. 300.530(d)(5).

What the Regulations Mean . . .

If a school decides to remove (suspend or expel) a child with a disability from the child's current placement for over 10 consecutive school days, this removal constitutes a "change of placement" that triggers certain procedural requirements. Parents must be notified and provided with their procedural safeguards. A manifestation determination must be made within 10 school days. When the child's behavior is determined NOT to be a manifestation of the child's disability, the school must continue to serve the child in another location, such as an interim alternative educational setting, which would be selected by the IEP Team. The setting selected must allow the child to participate in the general educational curriculum and progress toward meeting the child's IEP goals. The school is further mandated to conduct a functional behavioral assessment, as appropriate, and once the assessment is completed, the IEP Team must reconvene to develop appropriate behavioral interventions, based on the functional behavioral assessment, that are designed to address the behavior so that it does not recur. The same requirement applies to children removed due to "special circumstances," and when there is a change of placement based on a series of removals.

In circumstances where a child has had removals in a school year totaling more than 10 school days, but where they have not been deemed to be a change of placement, the school determines the services to be provided to enable the child to continue to participate in the general education curriculum and progress toward meeting the child's IEP goals.

What Parents Should Know . . .

Part of the Congressional intent in setting up the discipline procedures is to require schools to take action to prevent future situations that would result in a student's removal. While IDEA does not define what constitutes a "functional behavioral assessment" (FBA), it is clear that the intent is for the child's behavior to be evaluated so that behavioral intervention services and interventions can be created and implemented. Thus, this assessment would focus on why a student behaves a certain way, given the nature of the student's disability and what is happening in the environment. If the FBA had already taken place prior to the behavior that resulted in the current removal, the IEP Team must meet to determine positive behavioral intervention services or review the existing plan (BIP) and make changes as necessary within the behavior intervention plan to attempt to prevent further behaviors from occurring (for further information on FBAs and BIPs, see Chapter 12).

For information on how South Dakota's State rules interplay with IDEA's requirements for long-term removals, see "In South Dakota" on page 193.

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How does the IEP Team determine if my child with a disability's behavior that results in suspension or removal from the current placement, is a manifestation of the child's disability?

What the Federal Regulations Say . . .

Manifestation determination - 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 child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine:

- if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- if the conduct in question was the direct result of the LEA's failure to implement the IEP.

  Sec. 300.530(e)(1).

The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met. Sec. 300.530(e)(2).

If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies. Sec. 300.530(e)(3).

Determination that behavior was a manifestation - If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must either conduct a functional behavioral assessment, unless the LEA 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; and except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan. Sec. 300.530(f).

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What the Regulations Mean . . .

Any time there is a change of placement contemplated, the IEP Team must make a determination whether the behavior in question was a "manifestation" of the child's disability. This determination must take place within 10 school days of a decision to remove a child for over 10 consecutive school days. A finding that the behavior **was** a manifestation can occur in two ways:

1. if the IEP Team determines the behavior was caused by or was substantially related to the child's disability; or
2. if the behavior was a "direct result" of the school's failure to implement the IEP.

If the behavior was determined to be a manifestation, the child cannot be removed for over 10 consecutive school days and must be returned to his or her current placement (unless "special circumstances" apply - see next topic), revise the IEP as appropriate, conduct a functional behavioral assessment if not already completed, and implement or revise a behavioral intervention plan (see Chapter 12).

If the IEP Team determines that the child's behavior **was not** a manifestation of the child's disability, schools may use the discipline policies applicable to all children except that the school must continue to provide services that allow the child to participate in the general curriculum and to progress toward meeting the child's IEP goals in another setting, such as an interim alternative educational setting.

What Parents Should Know . . .

IDEA requires that children with disabilities not be removed from school for extended periods of time (removals that would be a change of placement) if the behavior in question resulted from (or is caused by) the child's disability. Therefore, every time a school seeks to have a child with a disability removed for what would constitute a "change of placement," the IEP Team must conduct a "manifestation determination" to determine whether the child's behavior was a result of (a manifestation of) the child's disability.

When it is determined that a child's behavior **was** a manifestation of the child's disability, the child must be immediately returned to the child's current placement, regardless of whether the school administration or school board desires a long-term suspension or expulsion. The IEP must be revised as necessary, an FBA must occur if not already completed, and a behavioral intervention plan (BIP) must be created or revised (see Chapter 12). Again, the intent behind these requirements is that children with disabilities should not be punished for having a disability that causes inappropriate behaviors.

When the IEP Team meets following a determination that behavior was a manifestation of the child's disability, the parents and school may nonetheless want to consider a different placement when reviewing the IEP and BIP.

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When can my child may be placed in an interim alternative educational setting (IAES) even if the behavior is a manifestation of my child's disability, and what notice of disciplinary action must I receive?

What the Federal Regulations Say . . .

Special circumstances - School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, 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 an SEA or an 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 an SEA or an 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 an SEA or an LEA. Sec. 300.530(g).

Notification - 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, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in Sec. 300.504. Sec. 300.530(h).

Definitions - For purposes of this section, the following definitions apply:

1. 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)).
2. Illegal drug means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed healthcare professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.
3. Serious bodily injury has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.
4. Weapon has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.
   Sec. 300.530(i).

Determination of setting - The child's IEP Team determines the interim alternative educational setting for services under Sec. 300.530(c), (d)(5), and (g). Sec. 300.531.

What the Regulations Mean . . .

IDEA has set out three "special circumstances" where a school can remove a child with a disability to an interim alternative educational setting regardless of whether the behavior in question was a manifestation of the child's disability and without parental permission. These involve very serious behaviors related to possessing a weapon, using illegal drugs or selling/attempting to sell a controlled substance, or inflicting serious bodily injury on another person, either on school grounds or at a school function.

Schedules I to V of the Controlled Substance Act range from drugs which are illegal and have no current accepted medical use (Schedule I) to those with accepted medical use with decreasing levels of restrictions with each schedule (II to V). Drugs are illegal if on the controlled substance schedules unless prescribed (as allowed) by a licensed health care professional or otherwise possessed under legal authority.

The term “dangerous weapon” means a 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 2 1/2 inches in length.

“Serious bodily injury” means an injury that involves 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.

Like other removals that are a change of placement, the child must be placed in an interim alternative educational setting, determined by the IEP Team, where the child can receive sufficient appropriate services so as to allow the child to continue to progress in the general education curriculum **and** receive services and modifications contained in the child’s IEP that will enable the child to progress toward meeting the child’s IEP goals. The child must also receive a functional behavioral assessment and behavior intervention services and modifications designed to address the behavior so that it does not recur. A child with a disability can be placed in the interim alternative educational setting for no more than 45 school days when found to have committed one of the infractions constituting “special circumstances.”

What Parents Should Know . . .

Many children in South Dakota hunt and fish. Hunting/fishing knives, rifles, and shotguns are not excluded from coverage. If a child with a disability has such an item in his or her vehicle, even by accident, and parks it on school property or at a school function, the student may be suspended from school and placed in an interim alternative educational setting as discussed in this section. Children with disabilities alleged to have committed a “special circumstances” act or who are subject to a removal of over 10 consecutive school days under 300.530(c) are entitled to a hearing before the school board (see “In South Dakota …” on following page).

While not deemed a “dangerous weapon,” a child possessing a pocket knife with a blade less than 2 1/2 inches in length may well be in violation of school rules and subject to disciplinary action.

When a decision is made to remove a child with a disability where it constitutes a change of placement, the parents must be notified **on that date** and provided their procedural safeguards.

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What are South Dakota's adminstrative rules on removals of less than and more than 10 consecutive school days?

In South Dakota . . .

South Dakota has set out procedures for addressing discipline of all students in its administrative rules in Article 24:07 (Student Due Process). These general discipline rules apply to children with disabilities, but only to an extent. This page will initially address South Dakota's general discipline procedure for short-term suspensions (less than 10 school days), and then the State's procedure for long-term suspensions and expulsions (removals that would constitute a change of placement for a child with a disability).

Short-term suspension procedure - If a short-term suspension from a class, classes, or school is anticipated because of a pupil's violation of a policy, the principal or superintendent shall give oral or written notice to the pupil as soon as possible after discovery of the alleged violation, stating the facts that form the basis for the suspension. The pupil must be given the opportunity to answer the charges. If a pupil is suspended, the principal or superintendent shall give the parent oral notice, if possible, and shall send the parent or a pupil who is 18 years of age or older or an emancipated minor a written notice which provides information regarding the pupil's due process rights. A pupil who is an unemancipated minor may not be removed from the school premises before the end of the school day without contacting a parent unless the pupil's presence poses a continuing threat or danger, in which case the pupil may be immediately removed from the school and transferred into the custody of a parent or law enforcement. ARSD 24:07:02:01.

Remember, per Sec. 300.530(b), the school has the option of removing the child with a disability to another setting **or** suspension, and only to the extent the same would apply to children without disabilities.

If a school district seeks to remove a child with a disability for more than 10 consecutive school days or otherwise seeks a change of placement, the following general discipline rule is applicable.

Right to request hearing (Notice of hearing) - If the superintendent finds grounds for a long-term suspension from a class or classes, the superintendent may exclude the pupil from a class or classes by using the short-term suspension procedure in § 24:07:02:01. The superintendent shall give a written notice to the pupil's parent or to a pupil who is 18 years of age or older or an emancipated minor and may schedule a hearing. The notice shall contain the following minimum information:

- the policy allegedly violated;
- the reason for the disciplinary proceedings;
- notice of the right to request a hearing or waive the right to a hearing;
- a description of the hearing procedure;
- a statement that the pupil's records are available at the school for examination by the pupil's parent or authorized representative; and
- a statement that the pupil may present witnesses.

If a hearing is requested, the superintendent shall give notice to each school board member of an appeal to the board for a hearing. The superintendent shall set the date, time, and place for the hearing and send notice by first class mail to each school board member and by certified mail, return receipt requested, to the pupil's parent or to a pupil who is 18 years of age or older or an emancipated minor. If no hearing is requested or the hearing is waived, the action of the superintendent is final. ARSD 24:07:03:02.

Therefore, before any suspension of over 10 consecutive school days or expulsion can take place, the child with a disability and the child's parents are entitled to a hearing before the school board, which can be waived. Of course, if the child's behavior is determined to be a manifestation of the child's disability *and no special circumstances are involved*, any removal ordered by the school board would be essentially over-ruled by IDEA, as the child must then be immediately returned to the child's current placement.

South Dakota also has administrative rules within its special education rules on Suspension (ARSD Chapter 24:05:26) and Expulsion (ARSD Chapter 24:05:26.01) that both mirror the federal regulations and contain sections referencing and "borrowing" from Article 24:07 on Student Due Process.

Can parents appeal a manifestation determination or decisions made about placement during a removal? What authority does the hearing officer have when the parents or school appeal?

What the Federal Regulations Say . . .

General - The parent of a child with a disability who disagrees with any decision regarding placement under Secs. 300.530 and 300.531, or the manifestation determination under Sec. 300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to Secs. 300.507 and 300.508(a) and (b). Sec. 300.532(a).

Authority of hearing officer - A hearing officer under Sec. 300.511 hears and makes a determination regarding an appeal under paragraph (a) of this section.

In making the determination under paragraph (b)(1) of this section, the hearing officer may:

- return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of Sec. 300.530 or that the child's behavior was a manifestation of the child's disability; or
- order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

The procedures under paragraphs (a) and (b)(1) and (2) of this section may be repeated, if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others. Sec. 300.532(b).

What the Regulations Mean . . .

Parents can appeal decisions regarding a removal, the appropriateness of an IAES, and a manifestation determination by filing a Due Process Complaint. If a hearing officer determines that a child's behavior **did** result from a disability, a school cannot remove the child from the current educational placement for more than 10 consecutive school days or otherwise remove the student if it would constitute a change of placement (except in the case of "special circumstances").

However, a school can still have the student removed to an interim alternative educational setting for not more than 45 school days by filing for an “expedited due process hearing” and proving it would be a danger (substantially likely to result in injury to the child or others) for the child to remain in the child’s current placement.

For a school to accomplish this task, the level of proof is high. At a minimum, the hearing officer should consider the following factors:

- First, the hearing officer would have to find by “substantial evidence” (a higher standard of proof than a preponderance, which is used in other due process hearings) that the current placement is substantially likely to result in injury to the child or to others.
- Second, the hearing officer must consider the appropriateness of the current placement. If it is found the school has not made an appropriate education available to a child, a hearing officer would probably order the school to revise the IEP or provide the services contained in the IEP rather than order a removal.
- Third, the hearing officer must consider whether the school had made efforts to reduce the risk of harm in the current setting. If the school had not done so, the hearing officer should order the school to provide additional services in the current setting rather than order a removal.
- Finally, even if the school sufficiently demonstrated that the child was dangerous, that the IEP was appropriate and was being followed, and that the school had reasonably tried various methods to reduce the risk of harm (with no success), the hearing officer also would need to determine that the proposed interim alternative educational setting is appropriate.

When a hearing officer does order placement in an IAES based on a finding that maintaining the child in the current placement **is** substantially likely to result in injury to the child or others, the child **must return** to the child’s original placement following the removal period (up to 45 school days). However, a school can repeat this process if it believes the child continues to be a danger to him/herself or to others.

What Parents Should Know . . .

In situations when a school is attempting to have a hearing officer order that a child be placed in an interim alternative educational setting because of alleged dangerousness, there are several ways a parent can challenge such a placement. For example, a parent could argue:

- the child is not dangerous to him/herself or others;
- the IEP is not appropriate or is not being followed;
- the school has not sufficiently tried various alternatives short of a removal to a different setting; or
- the proposed interim alternative educational placement is not appropriate.

If a hearing officer orders a child to be placed in an interim alternative educational setting, such placement cannot be for more than 45 school days.

How does "stay put" apply during disciplinary appeals?

What the Federal Regulations Say . . .

When an appeal under Sec. 300.532 has been made by either the parent or the LEA, the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period specified in Sec. 300.530(c) or (g), whichever occurs first, unless the parent and the SEA or LEA agree otherwise. Sec. 300.533.

What the Regulations Mean . . .

The general "Stay Put" rule does not apply in discipline cases. If parents appeal an interim alternative educational setting (IAES) placement, the child remains in the IAES pending a hearing decision or the expiration of the IAES placement time limit (whichever comes first).

If, following a placement in an IAES, a school proposes to change the child's placement from what it was prior to the IAES placement and parents contest that change, the child must remain in the current placement (the placement prior to the IAES) through the regular due process procedure.

However, if the school believes returning the child to the setting where the child was placed prior to placement at the IAES is substantially likely to result in injury to the child or others, the school may request an expedited hearing (see page 197). In that case, the child would still remain in the placement prior to the IAES (assuming the 45-school day placement at the IAES has ended) during the course of the expedited hearing proceedings.

If a manifestation determination resulted in a finding that the child's behavior was a manifestation of the child's disability, requiring the child to remain in the child's current placement, and the school believes maintaining the current placement is substantially likely to result in injury to the child or others, the school can file for an expedited hearing. In this situation, the "stay put" rule for discipline cases seemingly does not apply, because the child would never have been placed in an IAES and thus could not remain there as the regulation suggests.

What Parents Should Know . . .

This section provides an exception to the general "stay put" provision. While generally a child must continue in the current (last agreed upon) placement if a due process hearing is requested (unless the parties agree otherwise), if a parent contests a child's placement in an IAES, the child must remain in that alternative setting pending the hearing officer's decision or the end of the 45 school days, whichever comes first.

However, if at the end of that placement in an IAES, the school wishes to continue to have the child placed there or in a different placement rather than return the child to the child's original placement (the placement prior to removal to the IAES), and the parents contest that placement, the general "stay put" rule would apply and the child would remain in the original placement through completion of the due process procedures.

The school can use the expedited due process hearing procedure if it believes returning the child to the placement prior to the IAES is substantially likely to result in injury to the child or others.

What are Expedited Due Process Hearings and how do they differ from other due process hearings?

What the Federal Regulations Say . . .

Whenever a hearing is requested under paragraph (a) of this section, the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of Secs. 300.507 and 300.508(a) through (c) and Secs. 300.510 through 300.514, except as provided in paragraph (c)(2) through (4) of this section.
Sec. 300.532(c)(1).

The SEA or 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. Sec. 300.532(c)(2).

Unless the parents and LEA agree in writing to waive the resolution meeting described in paragraph (c)(3)(i) of this section, or agree to use the mediation process described in Sec. 300.506: A resolution meeting must occur within seven 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. Sec. 300.532(c)(3).

A State may establish different State-imposed procedural rules for expedited due process hearings conducted under this section than it has established for other due process hearings, but, except for the timelines as modified in paragraph (c)(3) of this section, the State must ensure that the requirements in Secs. 300.510 through 300.514 are met. Sec. 300.532(c)(4).

The decisions on expedited due process hearings are appealable consistent with Sec. 300.514.
Sec. 300.532(c)(5).

What the Regulations Mean . . .

Expedited due process hearings must meet the “hearing rights” requirements of a regular due process hearing, except the hearing must occur within 20 school days of receipt of the due process complaint and the hearing officer’s decision must be issued within 10 school days of the hearing. No extensions are allowed. Also, unlike a regular due process hearing, a Resolution Meeting or mediation does not delay the start of the time period for holding the expedited hearing. Further, the party receiving the Due Process Complaint cannot contest its content, there is no requirement to respond to the Due Process Complaint or for the school to provide written notice if not previously provided, and the provisions for amending a Due Process Complaint do not apply. States may develop their own procedural rules, provided they are consistent with Secs. 300.510 through 300.514. The hearing officer’s decision may be appealed using the regular appeal procedures.

What Parents Should Know . . .

Due process hearings involving discipline will be “Expedited Due Process Hearings.” Expedited due process hearings are similar in most respects to regular due process hearings. The differences are in the timelines discussed above and the elimination of a few procedural steps (contesting Due Process Complaint, providing prior written notice if not previously provided, responding to the complaint, ability to amend Due Process Complaint). Because the purpose of an expedited hearing is to obtain as fast a resolution as possible, no exceptions or extensions to the time limits are allowed. Parents therefore should not waste any time in seeking legal representation.

When do children, who have not been determined eligible for special education, have protections under IDEA's disciplinary regulations?

What the Federal Regulations Say . . .

A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the public agency had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred. Sec. 300.534(a).

Basis of knowledge - A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred:

- 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 pursuant to Secs. 300.300 through 300.311; or
- The teacher of the child, or other personnel of the school, 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. Sec. 300.534(b).

Exception - A public agency would not be deemed to have knowledge under paragraph (b) of this section if:

- the parent of the child has not allowed an evaluation of the child pursuant to Secs. 300.300 through 300.311; or has refused services under this part; or
- the child has been evaluated in accordance with Secs. 300.300 through 300.311 and determined to not be a child with a disability under this part. Sec. 300.534(c).

Conditions that apply if no basis of knowledge - If a public agency does not have knowledge that a child is a child with a disability (in accordance with paragraphs (b) and (c) of this section) prior to taking disciplinary measures against the child, the child may be subjected to the disciplinary measures applied to children without disabilities who engage in comparable behaviors consistent with paragraph (d)(2) of this section.

If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under Sec. 300.530, the evaluation must be conducted in an expedited manner. Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency must provide special education and related services in accordance with this part, including the requirements of Secs. 300.530 through 300.536 and section 612(a)(1)(A) of the Act. Sec. 300.534(d).

What the Regulations Mean . . .

A student who is not on an IEP may assert the protections of the discipline section of IDEA if the school is deemed to "have knowledge" he or she was a "child with a disability" prior to the behavior in question.

A school will be "deemed to have knowledge" if:

- the parent had expressed concerns in writing that the child might need special education and related services;
- the parent had requested an evaluation; or
- a teacher or other personnel had expressed concern about a child's behavior directly to the special education director or other administrator.

A school will not be "deemed to have knowledge" if it had evaluated the child and determined the child was not eligible, or the parents had refused an evaluation or services.

If a school is not "deemed to have knowledge" that a student has a disability prior to the behavior resulting in disciplinary action, the student may be subjected to the regular discipline policies of the school. However, if a parent requests an evaluation during the disciplinary period, it must be expedited. Until the evaluation is completed, the student remains in the placement determined by the school authorities, which may well mean suspension or expulsion without services. If a student is then found to have a disability, the school must provide special education and related services as required by IDEA.

What Parents Should Know . . .

If parents have concerns that their child may have a disability and require special education services, they should bring those concerns to the school's attention in writing (dated, signed) and request an evaluation. Parents should keep a copy of all correspondence. Then, if the child engages in behavior subject to removal for over 10 consecutive school days and the evaluation has not yet occurred or the school refused to evaluate or had not followed through with the evaluations, the child will be protected (entitled to continuing services) because the school will be deemed to "have knowledge."

If a school "had knowledge" that a student may be a "child with a disability" but proceeds to suspend or expel that student without evaluating the child to make that determination, that student may assert the protections of the IDEA disciplinary rules as if the child had already qualified for services.

Even when a school does not have knowledge that a child is a "child with a disability" prior to taking disciplinary action, parents may request that the child be evaluated during the suspension/ expulsion and the school must then evaluate the child as soon as possible.

Tip . . .

If a school is found to "have knowledge" of a child's disability, but failed to provide the child with appropriate services under IDEA, essentially the school failed to provide FAPE and the student may be entitled to compensatory educational services.

Are schools allowed to report students with disabilities to law enforcement agencies?

What the Federal Regulations Say . . .

Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or prevents State law enforcement and judicial authorities from exercising their responsibilities regarding the application of Federal and State law to crimes committed by a child with a disability. Sec. 300.535(a).

Transmittal of records - An agency reporting a crime committed by a child with a disability must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime. An agency reporting a crime under this section may transmit copies of the child's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act. Sec. 300.535(b).

What the Regulations Mean . . .

While many violations of school rules do not constitute a potential violation of a State or federal criminal law, when a child with a disability's behavior is such that it may constitute criminal behavior, schools may report such behavior to appropriate law enforcement authorities. When a school does report a crime to law enforcement authorities, it must ensure that a copy of the child's special education and disciplinary records are provided for law enforcement authorities to take into consideration.

What Parents Should Know . . .

Being on an IEP does not make a child immune from criminal prosecution. If school personnel believe a child with a disability has committed what would be a criminal offense, they can contact law enforcement personnel and report the alleged crime.

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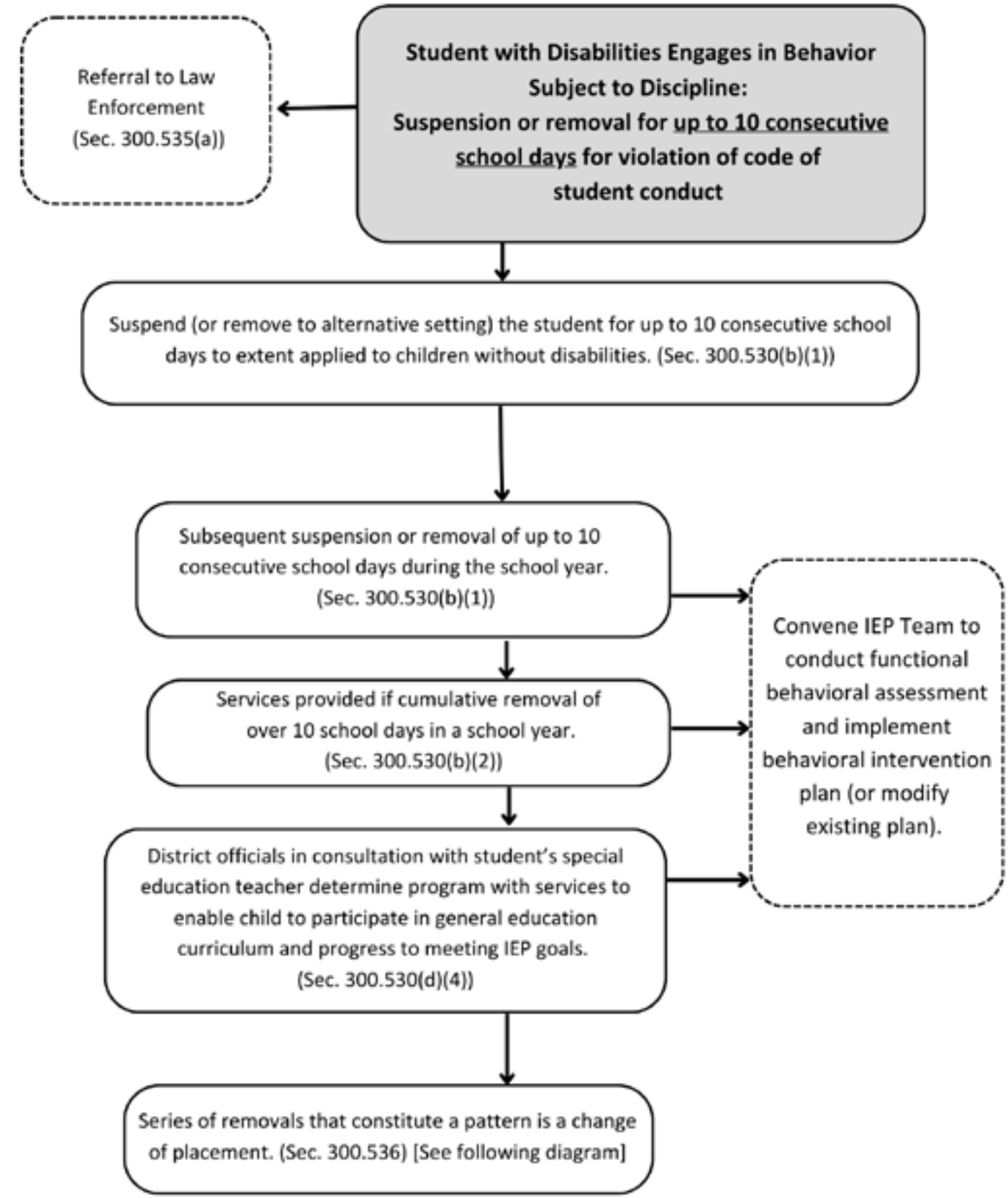
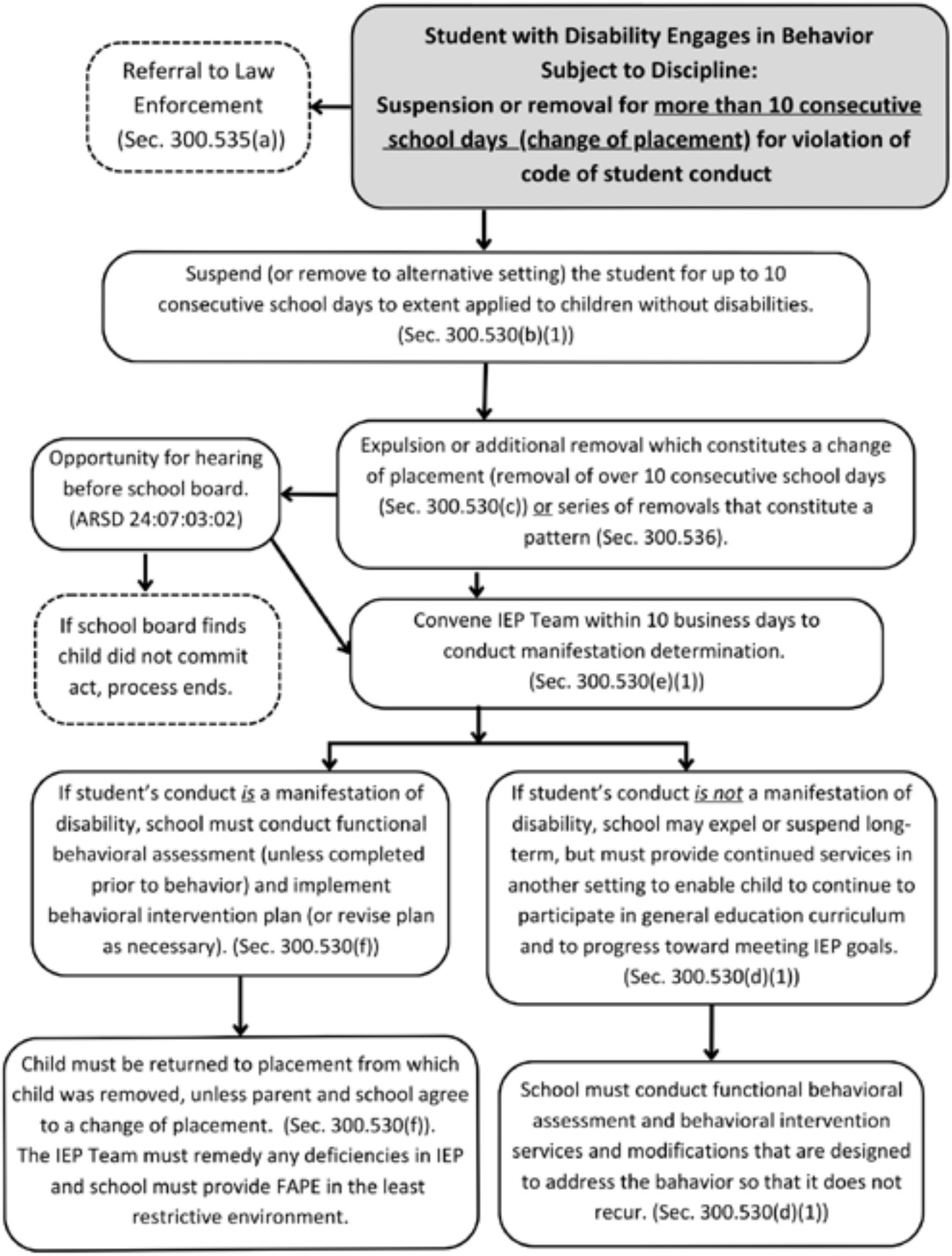
Discipline: Removal for up to 10 Consecutive School Days Diagram

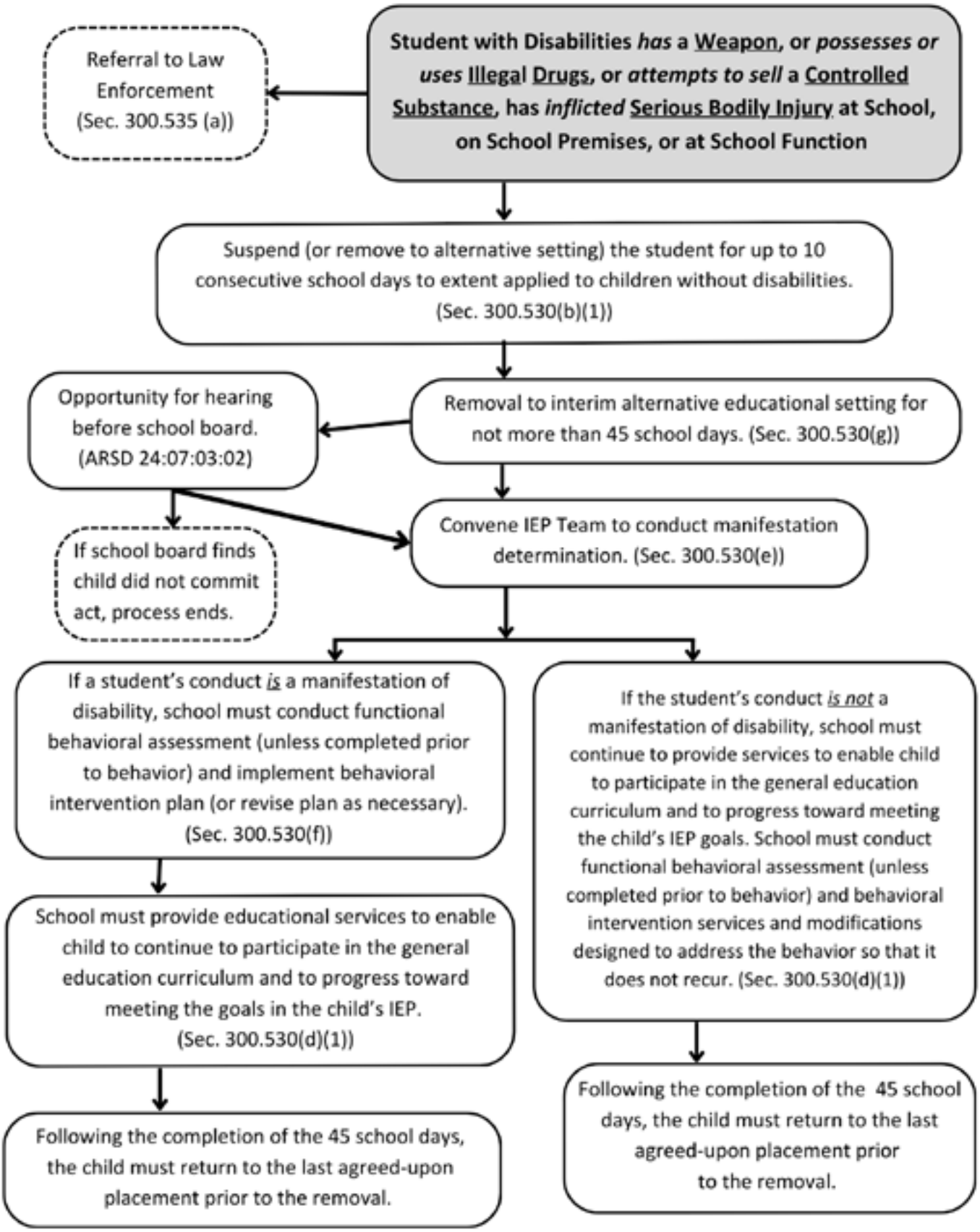
Note: For purposes of these charts, a solid box indicates action steps, and a dotted box indicates a discretionary action.



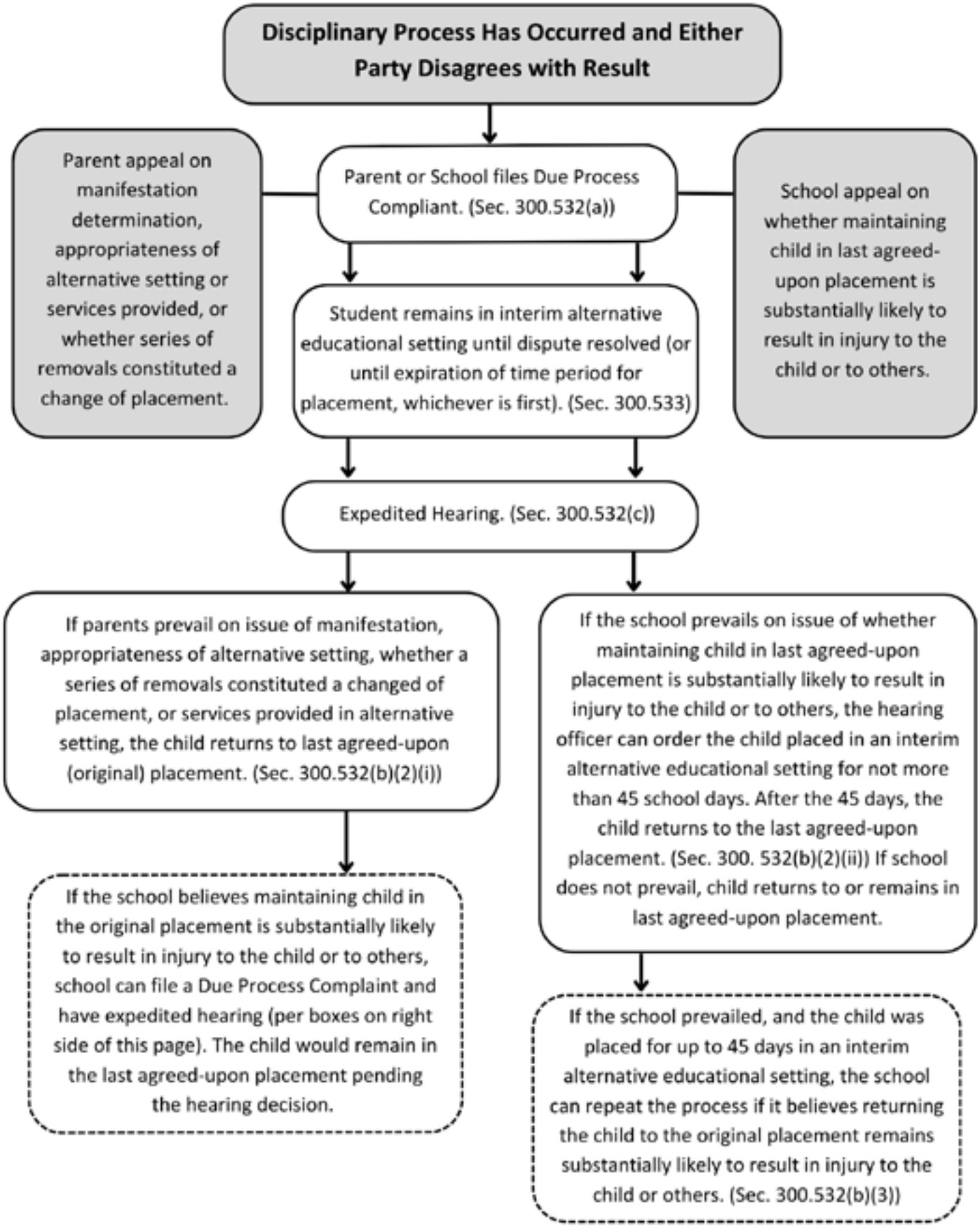
Discipline: Removal for More Than 10 Consecutive School Days Diagram



Discipline: Removal for More Than 10 Consecutive School Days due to Special Circumstances Diagram



Discipline: Appeal Process Diagram



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