

AASB BOARDMANSHIP SERIES

DEVELOPING EXCELLENT SCHOOL BOARD LEADERS THROUGH
QUALITY TRAINING, ADVOCACY AND SERVICES



Special Education Law Basics for School Board Members

FIRST EDITION
2019



ALABAMA
ASSOCIATION OF
SCHOOL BOARDS

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**AASB
BOARDMANSHIP
SERIES**

Special Education Law Basics
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Foreword

All over the country, special education litigation has continued to grow. The law's programs and procedures are complex and confusing. School board members should be generally familiar with the law's requirements, understand their financial and educational responsibilities to serve students with disabilities and appreciate the importance of special education programs.

We hope this edition of the AASB Boardmanship Series helps board members understand the basics of special education law, but as always, this should only be used as a general reference tool. It is not intended to be a substitute for a local school board attorney's advice in individual situations.

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INTRODUCTION

In 1975, Congress passed landmark civil rights legislation that guaranteed a free appropriate public education known as “FAPE” to all public school students with disabilities in the United States. In addition, both the U.S. Department of Education (“U.S. DOE”) and individual states have adopted regulations designed to implement the law.

Since its passage, the federal law has been amended several times, often making it more burdensome and complicated for school systems to implement. As a result, school systems have faced more informal and formal disputes with parents of students with disabilities. In general, most of the litigation that occurs requires application of the law to the individual student’s circumstances. This makes general application of the law difficult. For these reasons, this guide should be used only as a tool for gaining a general understanding of some of the basic legal requirements related to educating students with disabilities. Obviously, it is important that all school officials consult with their local board attorney when a decision needs to be made with respect to a specific situation.

THE LAW AND OTHER LEGAL GUIDANCE

There are other laws that apply to the education of students with disabilities, but the primary focus of this guide will be on the federal law that applies to students with an Individualized Education Program (“IEP”) who are in need of or are receiving special education and related services. Currently, this law is known as the Individuals with Disabilities Education Act.¹ Additionally, it is important to note that while academically gifted students also fall under the special education umbrella, this guide will focus on students with disabilities.

THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

Congress first addressed educational services for students with disabilities when it amended the Elementary and Secondary Education Act of 1965 and later adopted the Education for the Handicapped Act, Part B.² In an effort to improve services to students with disabilities, the law was amended multiple times, ultimately resulting in the Individuals with Disabilities Education Act, commonly known as “IDEA”, notably eliminating the use of the politically incorrect word “handicap” in favor of the “persons-first” language used today. The most recent amendments to the IDEA were signed into law in 2004.

IDEA REGULATIONS

In addition to the IDEA itself, the U.S. DOE has adopted regulations designed to clarify provisions of the law.³ IDEA’s regulations add extensive requirements that states and school systems must meet. Each time the law has been amended, the U.S. DOE has

issued a revised set of regulations. The U.S. DOE has even adopted additional IDEA regulations without amendments to the law.

ALABAMA LAW

States are required to have a system in place that ensures that federal requirements are met. The Alabama Exceptional Child Education Act and the Alabama Administrative Code (“AAC”) set forth Alabama’s requirements for educating students with disabilities and reflect Alabama’s efforts for ensuring IDEA requirements are met.⁴ With some minor exceptions, the AAC generally contains the same requirements as IDEA for ensuring the education of students with disabilities.

SPECIAL EDUCATION CASE LAW

Because of IDEA’s focus on the individual educational needs of every student and the fact that those educational needs are all very different, countless court decisions exist interpreting the IDEA and other federal and state laws that apply in any given situation. Of course, the most important decisions are those that come from the U.S. Supreme Court, some of which will be discussed and cited in this guide.

SECTION 504 OF THE REHABILITATION ACT

Section 504 of the Rehabilitation Act of 1973 (“Section 504”) is another federal civil rights law that impacts students with disabilities. Section 504 prohibits disability discrimination by agencies that receive federal funds, including school systems.⁵ Section 504 is intended to provide students with disabilities an equal opportunity to access and benefit from all school system programs, services and activities to the same degree as students without disabilities. Obviously, Section 504’s non-discrimination provisions apply to all students with disabilities under IDEA.

Section 504’s regulations assume that some students with disabilities who are not eligible for special education and related services under IDEA may need educational accommodations pursuant to a “504 Plan.” Section 504’s provisions are complex and often misinterpreted and are generally beyond the scope of this guide, except to the extent that its non-discrimination provisions apply to all students with disabilities under IDEA.

FREE APPROPRIATE PUBLIC EDUCATION

IDEA’S DEFINITION OF “FAPE”

The ultimate goal of IDEA is to ensure the provision of FAPE to all public school students with disabilities. IDEA and its regulations define FAPE as special education and related services that:

- Are provided at public expense, under public supervision and direction and without charge to the parents;
- Meet state standards, as determined by the Alabama State Department of Education;
- Include an appropriate preschool, elementary school or secondary school education in the state; and
- Are provided in conformity with the student’s IEP.⁶

DEFINITION OF “SPECIAL EDUCATION”

As part of the definition of FAPE, IDEA defines “special education” as specially designed instruction, at no cost to parents, that meets the unique needs of a student with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions and in other settings. It also includes instruction in physical education.⁷ IDEA further defines “specially designed instruction” as adapting the content, methodology or delivery of instruction based on the student’s needs to ensure access to the general curriculum, so that the student can meet the educational standards that apply to all of a school system’s students.⁸

DEFINITION OF “RELATED SERVICES”

IDEA also broadly defines “related services” that may be required as part of FAPE. Related services include developmental, corrective and other supportive services that “may be required to assist a child with a disability to benefit from special education.” IDEA lists examples of related services that include, *but are not limited to*:

- transportation;
- speech-language pathology and audiology services;
- interpreting services;
- psychological services;
- physical and occupational therapy;
- recreation, including therapeutic recreation;
- social work services;
- school nurse services designed to enable a student to receive FAPE;
- counseling services, including rehabilitation counseling;
- orientation and mobility services;
- early identification and assessment of disabling conditions in children; and
- medical services (except that medical services are limited to those that are for diagnostic and evaluation purposes).

The term does not include a medical device that is surgically implanted (like a cochlear implant), or the replacement of the device.⁹

Because the definition of “related services” is so broad, many other things might be considered a related service if deemed necessary for the student to benefit from special

education. For example, the regulations add other things like school health services and parent counseling and training. In addition, the U.S. Supreme Court has ruled that services such as clean intermittent catheterization and full-time nursing services are “related services” under IDEA and, therefore, are the responsibility of school systems to provide.¹⁰

COURT DEFINITION OF THE “FAPE STANDARD”

The IDEA does not clearly define FAPE. As a result, determining whether a student with a disability has received FAPE is generally left to due process hearing officers and courts on an individual, case-by-case basis. In 1982, however, the Supreme Court provided some guidance on this issue in *Board of Education of the Hendrick Hudson Central School District v. Rowley* (“*Rowley*”).¹¹

Amy Rowley was a child with a hearing impairment who performed well in regular education classes with limited special education services and speech therapy. Her parents requested an interpreter to be with Amy during all of her academic classes, but the district refused. The parents argued that the legal standard for FAPE requires school districts to provide students with disabilities the best education possible. The *Rowley* Court disagreed and held that the law requires school districts to provide an educational program that provides “*some educational benefit*.” Because Amy was performing above average educationally, the Court ruled that she was not denied FAPE when the school district refused to provide her with the requested interpreter services.

Between 1982 and 2017, federal courts came up with various interpretations of the *Rowley* “some educational benefit” standard for FAPE. While some courts continued to use the “some educational benefit” language, others used “meaningful educational benefit” language, while still others indicated that “some educational benefit” meant “more than trivial educational benefit” or something that was “merely more than *de minimis* educational benefit.”

Given the inconsistencies in circuit court decisions across the country, the Supreme Court agreed to review a case known as *Endrew F. v. Douglas County School District* (“*Endrew F.*”) in 2016.¹² Endrew was a student diagnosed with autism who had significant behavioral and social/emotional issues. The lower courts ruled that the school district had afforded Endrew with FAPE under the “merely more than *de minimis* benefit” standard.

In 2017, the Supreme Court unanimously rejected the “merely more than *de minimis* benefit” standard as one that set the bar too low, noting that “[w]hen all is said and done, a student offered an educational program providing ‘merely more than *de minimis*’ progress from year to year can hardly be said to have been offered an education at all.” The Court then set forth an updated legal standard for FAPE:

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.

The Court also noted that it would “not attempt to elaborate on what ‘appropriate’ progress will look like from case to case. It is the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances for whom it was created.” Finally, the Court stated that “any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal.”¹³

The Supreme Court did not decide whether Endrew actually received FAPE. Rather, the Court sent the case back to the trial court to analyze Endrew’s case under the new FAPE standard. In light of the Supreme Court’s decision, the trial court ultimately ruled that the school district had not provided Endrew with FAPE.¹⁴ In essence, the trial court held that while the “minimal progress” Endrew made in the school district’s educational program may have been sufficient under the old standard, it was clearly not sufficient in light of the new one.

For most circuits across the country, the *Endrew F.* decision did not result in a significant change in later cases addressing the provision of FAPE. In fact, the legal standard that had been used by Alabama’s federal circuit court—the Eleventh Circuit Court of Appeals—was close to the *Endrew F.* standard. As one example, in *Phyllene W. v. Huntsville City Board of Education*, the Eleventh Circuit noted in 2015 that “some educational benefit” means “adequate benefit based on surrounding and supporting facts” and “the child’s individual needs.”¹⁵

While the *Endrew F.* decision did not change what Alabama school systems need to consider in providing FAPE, the emphasis must continue to be on whether the individual student is making *appropriate progress in light of his circumstances*, which includes the nature and severity of the student’s disability. Alabama school systems must be prepared to show that their students with disabilities are making progress on their IEP goals and other educational goals, and if it appears that a student is not making appropriate progress, service providers are making timely, good faith attempts to address the problems through appropriate changes to IEPs and/or reevaluation of students.

WHO IS A “STUDENT WITH A DISABILITY”?

In Alabama, students with disabilities age 3 to 21 (or until they graduate from high school with a regular diploma—whichever is sooner) are eligible to receive FAPE. This includes students with disabilities who have been suspended or expelled from school. FAPE must also be provided to students who have been placed in private or other schools by the school system.

To be eligible for FAPE, a student must meet IDEA’s definition of a “child with a disability.” This includes a student with one or more of the following disabilities who, by reason of that disability, needs special education and related services:

- Intellectual Disability (ID);
- Hearing Impairment, including Deafness (HI);
- Speech or Language Impairment (SLI);
- Visual Impairments, including Blindness (VI);
- Serious Emotional Disturbance (referred to as “Emotional Disability”/ED in Alabama);
- Orthopedic Impairment (OI);
- Autism (AUT);
- Traumatic Brain Injury (TBI);
- Other Health Impairment (OHI);
- Specific Learning Disability (SLD); or
- Developmental Delay for preschool aged children (DD).¹⁶

State and federal regulations also include the disability categories of Deaf-Blindness (DB) and Multiple Disabilities (MD) and they also provide specific definitions and criteria for establishing eligibility for each disability category.¹⁷

HOW STUDENTS WITH DISABILITIES ARE IDENTIFIED

CHILD FIND: THE REFERRAL AND EVALUATION PROCESS

School systems must follow detailed procedures to ensure that all students with disabilities within their jurisdiction who need special education and related services are located, evaluated and identified.¹⁸ This is referred to as “Child Find”. When school personnel suspect or have sufficient reason to suspect that a student has a disability and needs special education and related services, IDEA requires the school system to conduct a full evaluation of the student.

In Alabama, before a child can be referred for a special education evaluation (or as part of an evaluation), appropriate intervention strategies must be attempted in the student’s general education program. Those strategies must be monitored by a Problem-Solving Team (“PST”) for an appropriate period of time (at least eight weeks) and be determined unsuccessful. The PST process can be waived for the following:

- students with severe problems requiring immediate attention;
- three, four and five-year-old children who have not been in kindergarten;
- students with articulation, voice or fluency problems only;
- students with a medical diagnosis of traumatic brain injury; and
- students who have been referred by their parents for an evaluation.¹⁹

In cases where a referral is deemed appropriate, the school system must obtain written consent from the parent for the special education evaluation and conduct and complete the evaluation within 60 days of receiving consent.²⁰

PARENT CONSENT REQUIREMENTS

As mentioned previously, school systems must obtain written informed parent consent prior to conducting an initial evaluation for special education. Written consent is also required before initial placement or the initial provision of special education and related services to a student with a disability.²¹

While most parents will provide the necessary consent for special education evaluations and placement, some will not. If the parents do not provide consent for an initial evaluation or do not respond to a school system's request to provide consent, the school system *may* pursue the initial evaluation of a student by using mediation or due process procedures (discussed later), but the school system is not required to do so.²²

Where parents refuse to consent to initial special education services, the school system *cannot* pursue placement by using mediation or due process procedures and is not allowed to implement an IEP or otherwise provide any special education to the student. However, when a parent refuses special education or fails to respond to a request to provide consent, the school system cannot be held in violation of the requirement to make FAPE available to the student.²³

In 2008, the U.S. DOE added a provision to IDEA's regulations allowing parents who have previously consented to special education to later revoke their consent in writing at any time. If consent is properly revoked, the school system must stop providing special education to the student and cannot seek mediation or use due process procedures to override the parents' decision. Again, if the parent revokes consent to services, the school system cannot later be held liable for the failure to provide FAPE to the student.²⁴

DETERMINING ELIGIBILITY

Once the initial evaluation has been completed, the AAC requires an appropriate "eligibility committee," including the student's parent(s), to meet within 30 days and determine whether the student is eligible for special education and related services.²⁵ The requirements for making and documenting the eligibility determination are extensive with the goal of not over- or under-identifying students.

In determining eligibility, courts have ruled that eligibility teams will generally ask and answer the following questions:

- Based upon all evaluation data collected, does the student meet Alabama's eligibility criteria for a category (or categories) of disability?
- Does the disability adversely affect the student's educational performance?
- Does the disability adversely affect educational performance to the degree that the student needs special education and related services in order to successfully access and participate in the general curriculum?

If the answer to all three questions is "yes," then the student is eligible for special education. If the answer to any one of the questions is "no," the student is not eligible.

The issue of eligibility for special education under IDEA is one that is often the subject of legal disputes. Eligibility disputes usually arise when the school members of the eligibility committee determine that a student is not eligible for special education and related services and the parents disagree.

Case law makes it clear that when addressing “adverse effect on educational performance,” school personnel may not rely solely on the fact that a student is gifted, making good grades and/or is advancing from grade to grade in deciding that the student is not eligible for special education. This is particularly the case in Alabama, where the definition of “educational performance” is not limited to academic performance, but also includes performance in the areas of social/emotional and/or communication skills.²⁶

Another typical IDEA “eligibility dispute” involves a situation where the student has a disability that, in some way, adversely affects educational performance, but the school members of the committee do not believe the student *needs* special education and related services in order to successfully participate in the general curriculum or meet educational standards. Courts have consistently ruled that the *need for special education* must be demonstrated in order for a student to be eligible under IDEA, even where a condition exists that may adversely affect educational performance in some way.²⁷ Typical examples of this kind of case include students diagnosed with autism and/or ADHD who are gifted but do not need special education to make progress in the general curriculum.

THE REQUIREMENT FOR AN IEP

If the evaluation and eligibility process result in a determination that special education services are necessary, a properly-comprised team is required to meet and develop an Individualized Education Program (“IEP”) for the student within 30 days of determining that the student is eligible for special education. For students who remain eligible, school systems are required to have an IEP in effect at the beginning of every subsequent school year and to conduct reevaluations at least once every three years or earlier when warranted.²⁸

The IEP is an important legal document that is generally defined as a written program for every student with a disability that is developed, reviewed and revised in accordance with the law.²⁹ As such, the Supreme Court has referred to the IEP document as the “vehicle,” “centerpiece” and “modus operandi” through which a school system provides FAPE, and in legal situations where FAPE is challenged, the appropriateness of the IEP is the focus of the court or due process hearing officer.

THE COMPONENTS OF AN IEP

In Alabama, school systems are required to use web-based forms and processes developed by the ALSDE, including the IEP form and all other forms related to providing FAPE to Alabama’s students with disabilities. The IEP has many components, but it must contain the following:

- a statement of the student’s present levels of academic achievement and functional performance;
- a statement of measurable annual goals, including academic and functional goals designed to meet the student’s needs and to enable the student to be involved in and progress in the general curriculum; and
- a statement of the special education and related services and supplementary aids and services that the school system will provide to the student.³⁰

To illustrate what an IEP may look like, a sample IEP can be found in the Appendix.

THE IEP TEAM

IDEA requires that all decisions about a student’s IEP placement/services are made by an IEP Team at a formal IEP Team meeting. The law lists the required members of a typical IEP Team as follows:

- The student’s parents;
- At least one of the student’s regular education teachers (if the student is, or may be, participating in the regular education environment);
- At least one of the student’s special education teachers, or where appropriate, special education provider;
- A school system representative who (i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of students with disabilities; (ii) is knowledgeable about the general education curriculum; (iii) is knowledgeable about the availability of resources of the school system; and (iv) in Alabama, has the authority to commit agency resources and is able to ensure that IEP services will be provided;
- An individual who can interpret the instructional implications of evaluation results, who may be a member of the team already listed;
- At the discretion of the parent or the school system, other individuals who have knowledge or special expertise regarding the student, including related services personnel as appropriate; and
- Whenever appropriate, the student.³¹

IEP MEETINGS

The IEP Team is responsible for developing the IEP and making educational decisions to benefit the student. School systems are responsible for conducting meetings for the purpose of developing, reviewing and revising IEPs for all of their students with disabilities. IEP Teams must meet at least once a year to determine whether the student is making progress on the annual goals in the IEP and that the special education and related services are appropriate.³² In Alabama, annual meetings to review and revise IEPs typically occur in the spring of every school year.

Although the law requires annual IEP meetings, it may be that more meetings are needed throughout the year for a particular student. Under IDEA, IEP Teams should meet to review the IEP to address:

- any lack of expected progress toward the annual goals and in the general education curriculum;
- the results of any reevaluation conducted;
- information about the student provided to, or by, the parents;
- the student’s anticipated needs; or
- “other matters.”³³

In Alabama, if a parent or teacher has reason to suspect that an IEP needs revision, an IEP meeting may be requested at any time, and the school system must conduct the IEP meeting within 30 days of receipt of the request.³⁴

PARENT PARTICIPATION IN IEP TEAM MEETINGS

As mentioned above, parents must be part of the IEP Team and many take an active role in this process. Unfortunately, many parents do not attend IEP meetings, even when given the notices as required by law. Whether parents take an active role or not, IDEA requires school systems to hold annual IEP meetings for all special education students and to take steps to ensure that one or both of the parents are present at each IEP Team meeting or are at least given the opportunity to participate. This includes notifying parents in writing of a meeting early enough to so they can make arrangements to attend and scheduling the meeting at a mutually agreeable time and place.³⁵

The written meeting notice must indicate the purpose, time and location of the meeting and who will be in attendance. It must also, among other things, inform the parents of their right to invite other individuals to the meeting who have knowledge or special expertise about the student.³⁶

If neither parent can attend a scheduled IEP Team meeting but wishes to participate, the IDEA requires the school system to use other methods to ensure parent participation, including video or telephone conference calls. If the school system is not able to convince the parents that they should attend or otherwise participate in an IEP meeting, the school system may conduct it without a parent in attendance. In this case, the school system must keep a record of its attempts to arrange a mutually agreeable time and place, such as detailed records of telephone calls made or attempted and the results, copies of correspondence sent, detailed records of visits to the home or workplace, etc.³⁷

DETERMINING WHETHER AN IEP IS LEGALLY APPROPRIATE

As previously discussed, the Supreme Court in *Rowley*—later clarified in *Endrew F.*—set forth the legal standard for the provision of FAPE to students with disabilities. *Rowley* is also known for establishing a more specific, two-part legal inquiry for courts and due process hearing officers to use in deciding whether an IEP offers FAPE to a particular student:

- In the development of the IEP, has the school system complied with the procedures set forth in IDEA?
- Is the IEP reasonably calculated to enable the student to receive educational benefits or—as clarified by the *Endrew F.* decision—to make progress appropriate in light of the student’s circumstances?

PROCEDURAL COMPLIANCE IN IEP DEVELOPMENT

Based on the two-part test used to determine whether the IEP is appropriate, many courts and due process hearing officers have found a denial of FAPE based *solely* upon procedural errors made in the development of the IEP itself. In other words, where the answer to the first question above is “no,” FAPE has been denied whether or not the IEP sets forth a program that would enable the student to make appropriate progress.

Because so many courts were finding a denial of FAPE based only on IEP process mistakes and technicalities (even when they were not shown to be harmful), Congress amended IDEA in 2004 to incorporate a “no harm/no foul” standard when IEP process mistakes or violations occur in the development of an IEP. Specifically, IDEA regulations provide that a decision made by a due process hearing officer “shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.”³⁸ Thus, in matters alleging a procedural violation, a hearing officer may find that a student did not receive FAPE only if the procedural inadequacies:

- Impeded the student’s right to FAPE;
- Significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or
- Caused a deprivation of educational benefits.³⁹

As discussed previously, parent participation in decision-making about their child’s education is vital under IDEA. IEP process mistakes that significantly impede the parents’ opportunity to participate in the process are still considered to be a denial of FAPE in and of themselves, even when the content of the IEP or the substance of the student’s program is appropriate for the student.

While the *Endrew F.* Court was primarily focused on the substantive legal standard for FAPE, the Court emphasized that schools must draft the IEP in compliance with IDEA procedures that “emphasize collaboration among parents and educators and require careful consideration of the child’s individual circumstances.” Where parents can demonstrate that

decisions were made outside of the IEP Team process or otherwise without meaningful opportunity for and consideration of their input, courts are very likely to find a denial of FAPE without regard to the actual quality of the special education program provided.⁴⁰

SUBSTANTIVE IEP COMPLIANCE

As mentioned previously, the substantive part of the IEP inquiry requires a hearing officer or court to decide whether the IEP is “reasonably calculated” to enable the student to make progress appropriate in light of the individual student’s unique needs and abilities, as well as other relevant circumstances. Therefore, the quality of the IEP will be based upon comprehensive data regarding the student’s needs, as well as other formal and informal data.

Often, school system recommendations for IEP content are challenged on the basis that they are not focused on the individual student’s needs. Common examples include situations where an IEP Team has proposed a “one size fits all” program for a particular set of students or where the Team has based its recommendation on how much services cost, rather than what the individual student actually needs in order to receive FAPE. Dangerous statements such as “our school board said we can’t offer that;” “we don’t have that here;” “we don’t do that here in our system;” “that would cost too much” or “that’s what we do for all of our preschoolers with autism,” are likely to lead to a finding that the IEP’s content is not individualized and that the school system has not provided FAPE.

Educators must be prepared to show that the special education and related services in a student’s IEP are designed to help that student to make progress. For this reason, IEPs must be implemented with fidelity and service providers must continuously monitor the progress of their students. When annual goal progress reports indicate that a student’s progress is not as expected or it is clear that the IEP’s annual goals will not be met, service providers should seriously consider whether the IEP needs revision or additional evaluative or other information needs to be obtained.

Though the *Andrew F.* and *Rowley* Courts are clear that IDEA does not guarantee a particular level of education or promise any particular educational outcome, courts do expect that school personnel will be able to demonstrate good faith, reasonable efforts to help students make appropriate progress. In case law, common indicators of FAPE include things like evidence of academic, behavioral and functional advancement in the form of improved behavior, grades or advancement from grade to grade; other data showing successful use of research-based instruction and intervention; improved standardized test scores and other test results; and student achievement of annual IEP goals and short-term objectives/benchmarks.

OTHER SPECIAL EDUCATION RIGHTS FOR PARENTS

In addition to the right to give prior written consent to initial evaluation and placement and to participate in eligibility/IEP decision-making about their child, the IDEA provides an elaborate system of parent rights. School systems must provide written notice

of these rights to all parents of students with disabilities at least one time per school year and upon parent request.⁴¹

While a full discussion of all of the parent rights and safeguards is beyond the scope of this guide, further information can be found by referring to Alabama’s “*Special Education Rights*” form, which can be found on ALSDE’s website and in the Appendix of this guide. This document contains a full explanation of all IDEA parent rights. While school systems may post the Rights form on their websites, they must still provide a hard copy of the Rights form to the parents at least once per school year. Parents may also elect to receive all required notices by electronic mail, if the school system has that option available.⁴²

DISPUTE RESOLUTION OPTIONS UNDER IDEA

When parents and school personnel disagree about an issue regarding identification, evaluation, placement or the provision of FAPE to a particular student under IDEA, there are several options available to resolve the dispute. These options include filing a complaint with the ALSDE (“State Complaint”), initiating mediation, or filing a request for a due process hearing or a subsequent lawsuit. While school systems will sometimes initiate dispute resolution, usually the parents will initiate the process.

STATE COMPLAINT

Parents of students with disabilities and organizations have the right to file a Complaint with the ALSDE when they believe that the school system is violating IDEA. Even organizations and individuals from another state may also initiate the State Complaint process.⁴³

To initiate the State Complaint process in Alabama, a signed written Complaint must be sent to the State Superintendent of Education. While there is a sample form that can be used for filing a State Complaint on ALSDE’s website, the sample form is not required as long as the complaint meets the requirements set forth under the AAC. These requirements include, among other things, an alleged violation of IDEA that occurred not more than one year prior to the date that the Complaint is received by ALSDE; a statement that a school system has violated IDEA; the facts upon which the statement is based; and the signature and contact information for those filing the Complaint. In addition, where the Complaint involves a specific student, it must contain the name and address of the student and the name of the school the student attends. The Complaint must also describe the nature of the student’s problem, including facts relating to the problem, and must propose a resolution to the problem.

A party filing a State Complaint must send a copy of it to the school system at the same time it is filed with ALSDE and, in turn, the school system must provide a copy of the Special Education Rights if this is the first State Complaint filed by the parent in a particular school year. Once the Complaint is received by the State Superintendent, a staff

member will review it to determine if it is a valid Complaint. If the Complaint states a possible violation of IDEA or its regulations, the Complaint is processed, and the school system is officially notified of the identity of the complainant and the nature of the Complaint.

In response, the school system must submit a written resolution statement, plan of action or statement of position that addresses the claims in the Complaint. The complainant may respond with additional information and, if necessary, ALSDE may conduct an on-site investigation with the school system. Once review and investigation activities are completed, ALSDE will issue a written decision addressing each allegation and provide findings of fact and conclusions that set forth the reasons for its decision. ALSDE may also set forth any technical assistance activities, negotiations and/or corrective actions or remedies that may be necessary. ALSDE's State Complaint decision is final and cannot be appealed.

IDEA requires that the entire State Complaint process, including the letter of findings, be completed within 60 calendar days from ALSDE's receipt of the Complaint. An extension of time may be granted only when exceptional circumstances warrant a delay, or the parent and the school system have agreed to extend the time to engage in mediation.

MEDIATION

IDEA strongly supports mediation as a way to resolve special education disputes short of formal litigation. Mediation can be requested at any time a dispute exists whether or not a formal complaint of some kind has been filed.⁴⁴ While IDEA requires all states to offer mediation as an option for resolving special education disputes, it is only an option if both parties agree to it.

In Alabama, the State Superintendent makes the option of mediation available at no cost, and either party may request it in writing. If both parties agree, a mediation session will be scheduled in a location that is convenient to the parties.⁴⁵

Mediation sessions are conducted by qualified and impartial mediators who have been trained in mediation techniques and who are knowledgeable about special education. The mediator cannot be an employee of the school system or agency involved in the student's education or care or have a personal or professional interest in the matter. Additionally, discussions that occur during the mediation process are confidential and cannot be used as evidence in any subsequent due process hearing or civil court proceeding.⁴⁶

If the parties are able to resolve their dispute through the mediation process, they will sign a written agreement that sets forth the terms of the resolution. The parent and a representative of the school system with the authority to bind the system must sign the mediation agreement, and the agreement will be enforceable in state or federal court. In addition, ALSDE allows the use of other options (e.g., a State Complaint, mediation or a due process hearing) to enforce mediation agreements, but those alternatives are not mandatory and cannot delay or deny a party the right to seek enforcement of the mediation in court.⁴⁷

DUE PROCESS HEARINGS AND COURT ACTION

Typically, IDEA civil actions are brought in federal district court, but parents are required to first go through the due process proceedings before filing a lawsuit regarding the provision of FAPE to their child. Obviously, the State Complaint and mediation options are faster and less costly than the due process hearing option. While there are many due process hearing requests in Alabama every school year, most of them are resolved short of formal litigation, either through mediation or the due process hearing's resolution meeting process. However, there are some disputes where formal litigation is needed.

Under the IDEA, states must offer an impartial due process hearing system for addressing disputes.⁴⁸ The hearing process and procedures set forth under the law are too detailed and extensive to include in this guide, but it is important to highlight some key features.

When a parent or school system disagrees with any matter relating to the identification, evaluation, educational placement or provision of FAPE to a student, a due process hearing may be requested. In Alabama, the party requesting the hearing must do so within two years after the parent or school system knew or should have known about the action that forms the basis of the hearing request.⁴⁹

To initiate a hearing in Alabama, the parent/attorney/other designated representative or school system official will submit to the State Superintendent a confidential, signed written request for hearing with a copy to the other party. While a sample Request for Due Process Hearing form can be found on ALSDE's website, the use of the form is not required, as long as the document submitted meets the law's requirements. These requirements include the student's name, address and school; a description of the student's problem; and a proposed resolution of the problem to the extent known and available to the party at the time. No hearing can occur until an appropriate request for a due process hearing is submitted.⁵⁰

When ALSDE receives a request for a due process hearing, important timelines begin to run. In addition, ALSDE will immediately appoint a hearing officer to preside over the hearing and to ensure that hearing rights are afforded to the parties. The IDEA requires that due process hearing officers be impartial attorneys who have the knowledge and ability 1) to understand the provisions of IDEA federal and state regulations and legal interpretations of IDEA by courts; 2) to conduct hearings in accordance with appropriate, standard legal practice; and 3) to render and write decisions in accordance with appropriate, standard legal practice.⁵¹

When a parent requests a hearing, the school system must convene a "resolution meeting" within 15 calendar days of receiving the parent's hearing request, unless both parties agree in writing to waive the meeting. This meeting must include the parent and relevant members of the student's IEP Team who have specific knowledge of facts identified in the due process hearing request and a representative of the school system who

has decision-making authority on behalf of the system. However, the school board attorney cannot attend the meeting unless the parent is accompanied by an attorney.⁵²

If agreement is reached on the issues at a resolution meeting, IDEA requires both the parent and school system representative to sign a legally binding agreement. Once signed, the resolution agreement is enforceable in any state or federal court, except that a party may void the agreement within three business days of the agreement's execution.⁵³

If the parties cannot resolve the dispute within 30 calendar days of the due process hearing request, the hearing may proceed and the hearing officer's timeline for issuing a final hearing decision, which is generally 45 calendar days, begins.⁵⁴ Generally, the hearing process should be concluded within 75 days, but that very rarely happens because the parties usually request extensions of time and additional opportunities to resolve the matter. Despite this tendency, disputes related to special education and related services should be resolved as quickly as possible so the best interests of the child may be served.

Due process decisions are final, unless a party decides to bring a lawsuit seeking court review of the decision within 30 days of receiving it. If a lawsuit is filed, the court will receive the records of the hearing proceedings; hear additional evidence at the request of a party; and grant relief that the court deems appropriate.

IDEA'S "STAY-PUT" PROVISION

One important procedural safeguard under IDEA is its "stay-put" provision. While a due process hearing or any subsequent lawsuit is pending, the student at issue must remain in his or her "current educational placement," unless the school system and parents agree otherwise. The purpose of this requirement is to maintain stability and continuity for the student while the dispute is being resolved. Essentially, this means that the school system cannot implement any change to the student's current program—the one in place when the hearing was requested—while a due process hearing and/or subsequent litigation is pending.

REMEDIES FOR VIOLATIONS OF IDEA

When a school system does not provide FAPE to a student with a disability, parents can seek and recover several different kinds of remedies. Courts and hearing officers have the authority to "grant such relief as [they] determine is appropriate."⁵⁵ Most of the time, the overall relief being sought by the parents is a change in the program or services provided to the student. However, there are other remedies that may be awarded.

COMPENSATORY EDUCATION

Compensatory education generally takes the form of an order for the school system to provide a student with extra services—over and above what a student may already be receiving during the regular school day or year—to correct a past denial of FAPE. The

general purpose of compensatory education is to elevate the student to where the student would have been had FAPE been provided in the first place.

Like much of IDEA, compensatory education awards are fact-specific and sometimes may include a “tit for tat” approach, especially in cases where a student was suspended for too many days or was denied a necessary service. Most of the time, compensatory services are ordered to be provided to the student before or after the school day or during summer breaks. In addition, courts have awarded compensatory services to an adult student over the state’s eligibility age of 21 for past IDEA violations that occurred when the student was attending public school. Of course, those kinds of cases must still be brought within the two-year statute of limitations period, as discussed above.

PRIVATE SCHOOLS OR OTHER OUTSIDE SERVICES

Another common remedy is reimbursement or prospective funding for placement in a private school or for other private special education and/or related services. This remedy was first established by the Supreme Court in 1985 in the case of *Burlington School Committee v. Massachusetts Department of Education*⁵⁶ and was later incorporated into the IDEA in 1997.

Under IDEA, parents are entitled to reimbursement of or future funding for private school tuition if they can show that the school system’s educational placement for the student was inappropriate at the time the parents chose to place the child in the private setting. Parents must also show that the private school placement they seek is appropriate.⁵⁷ As with other cases, these kinds of cases are highly fact-specific, and the outcome will depend upon the individual educational needs and circumstances of the student at issue.

MONEY DAMAGES

It is well-settled in the Eleventh Circuit that personal injury-type money damages (i.e., money for pain and suffering, emotional distress, punitive damages, etc.) are not available in IDEA cases. In *Ortega v. Bibb County School District*,⁵⁸ the Eleventh Circuit joined other circuits in holding that the IDEA was intended to ensure that students receive FAPE, not to serve as a “tort-like mechanism for compensating personal injury.” The Court emphasized that the appropriate remedy in an IDEA case should be educational in nature and should seek to make changes to the student’s educational program or other relief, such as restitution for expenses and compensatory education.

In closing, the *Ortega* Court did note that while IDEA cannot be used as an avenue for seeking money damages for personal injuries to students with disabilities, there are other laws, such as Section 504 and the Americans with Disabilities Act, that may serve as possible avenues for recovering them. Indeed, the Eleventh Circuit has held that Section 504 can clearly be used to seek money damages for intentional discrimination, which could include the failure to provide FAPE if the school system or a school administrator is aware of the failure but is “deliberately indifferent” to it.⁵⁹

ATTORNEYS' FEES

Attorney's fees for parents of students with disabilities is an important remedy to consider. IDEA provides that a court may order a school system to pay the parents' reasonable attorney's fees if the parent prevails in an IDEA due process or court proceeding, but federal special education funds cannot be used to pay attorneys' fees or litigation costs for due process proceedings or lawsuits.⁶⁰ Fees for a parents' attorney in a special education dispute can be very expensive, even if the parents "prevail" in a settlement prior to a hearing. This is why school personnel must be diligent in timely addressing parent concerns about their child's special education needs and be especially attentive when addressing those concerns.

In 2004, IDEA was amended to allow for prevailing school systems to also recover their fees against parents and/or the parents' attorney, but only in rare instances where the parents' case was brought for an "improper purpose," such as to harass, cause unnecessary delay or needlessly increase the cost of litigation. Fees could also be awarded to a prevailing school system if the system can show that the action brought by the parents was frivolous, unreasonable or without foundation.⁶¹ While IDEA contemplates this, it is very rare that a school system is able to show what is necessary to recover fees under this provision.

OTHER IMPORTANT IDEA PROVISIONS

There are many, many more important IDEA provisions not covered by this guide. However, there are two additional IDEA provisions that must be addressed in order to understand what special education law is all about. These two issues are Least Restrictive Environment ("LRE") and discipline of students with disabilities.

LEAST RESTRICTIVE ENVIRONMENT (LRE)

Under IDEA, students with disabilities must be provided FAPE, to the maximum extent appropriate, in a regular school and in a regular classroom setting. This is known as the law's "least restrictive environment" ("LRE") mandate. Specifically, IDEA requires that every school system ensure the following:

- To the maximum extent appropriate, students with disabilities, including those in public or private institutions or other care facilities, are educated with students without disabilities; and
- Special classes, separate schooling or other removals of students with disabilities from the regular educational environment occur 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.⁶²

The decision about what is the LRE for a student is an important part of FAPE and is an essential part of any individualized placement determination. Obviously, like all other program/placement decisions, the student’s IEP Team makes the decision about what is the LRE for each individual student.

When making the LRE decision, priority must be given to placement of a student with a disability in the regular classroom with any necessary supplemental aids and services to make that placement successful. Only after the regular education placement is considered and properly rejected should IEP Teams consider or implement placement in a more restrictive setting.⁶³

While IDEA creates a strong presumption that students with disabilities will be educated in the regular classroom, IDEA does not mandate “full inclusion” for all, because that is not individualized. In order to meet the needs of all students, IDEA requires that school systems have a “continuum of alternative placements” available that includes, among other things, instruction in regular classes, special classes, special schools, home instruction and instruction in hospitals and institutions.⁶⁴ The less a placement resembles a regular classroom, the more restrictive it is deemed. Also, separate schools and other segregation for students with disabilities is frowned upon. Indeed, it has been the U.S. DOE’s longstanding position that students with disabilities may not be placed in separate schools merely because of the non-availability of placement options, administrative convenience or institutional barriers. Again, such placements must be based upon their individual needs.⁶⁵

DISCIPLINE OF STUDENTS WITH DISABILITIES

School administrators know that the process of disciplining students with disabilities is a complex and confusing issue. Under IDEA, the process for disciplining students with disabilities is much different than the process for students without disabilities. Because the process is so complex, an analysis of all of the nuances of IDEA and its regulations regarding the issue of disciplinary removal is well beyond the scope of this guide. However, a review of the IDEA’s basic disciplinary provisions is essential.⁶⁶

DEFINITION OF “DISCIPLINARY CHANGE OF PLACEMENT”

To make sense of IDEA’s rules of discipline, it is important to remember, as emphasized throughout this guide, that all educational placement decisions about a student must be made by the student’s IEP Team and through the placement process. This includes removal of a student for disciplinary reasons where the removal constitutes a “change of placement” for the student.

IDEA defines a disciplinary removal of a student with a disability as a “change of placement” when:

- The removal is for more than 10 consecutive school days; or
- The student 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 student’s behavior is substantially similar to the student’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.

Because of the unclear language of this “pattern of removals” language, it has generally become practice in Alabama and across the country to think of a disciplinary removal of a student with a disability for more than 10 days total in a school year as a likely change of placement that will trigger IDEA’s disciplinary procedures.

THE MANIFESTATION DETERMINATION

A number of IDEA requirements are triggered when a disciplinary change of placement may occur. First and foremost is the requirement to make the “manifestation determination.” Within 10 days of the decision to make a disciplinary change of placement because of the student’s violation of the code of student conduct, relevant members of the student’s IEP Team (including the parent) must determine whether the student’s misbehavior was a “manifestation” of the student’s disability.

In making the manifestation determination, IDEA requires the Team to review all relevant information in the student’s file, including the IEP, any teacher observations and any relevant information provided by the parents to answer the following two questions:

1. Was the conduct in question caused by, or did it have a direct and substantial relationship to, the student’s disability; or
2. Was the conduct in question the direct result of the school system’s failure to implement the student’s IEP.

If the answer to either question above is “yes,” the conduct must be determined to be a manifestation of the student’s disability. In addition, if the answer to the second question is “yes,” the school system must take immediate steps to remedy the failures.

When it is determined that the student’s disciplinary violation *was* a manifestation of the student’s disability, the IEP Team must:

- Conduct a “functional behavioral assessment” (“FBA”) of the student (unless the system already conducted one before the behavior occurred) and implement a behavioral intervention plan (“BIP”) for the student; or
- If a BIP has already been developed for the student, review it and modify it, as necessary, to address the behavior; and
- Return the student to the educational program/placement from which the student was removed, unless the parent and school system agree to a change of placement as part of the modification of the BIP.

THE REQUIREMENT TO CONTINUE FAPE DURING REMOVAL

If the violation of the student code of conduct *was not* a manifestation of the student's disability, school personnel may discipline that student in the same manner as students without disabilities. However, the student must continue to receive a form of FAPE during the disciplinary removal period. IDEA defines this continued FAPE as educational services that will enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP. In addition, the student will receive, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications designed to address the code violation so that it does not recur. Because students with disabilities must continue to receive FAPE even when appropriately disciplined, there is no such thing as true "expulsion" of a student with a disability.

It is also important to note that IDEA requires the school system to continue to provide FAPE when a student with a disability has been removed for disciplinary reasons from the current placement for more than 10 days in the same school year. However, the system is not required to provide services during periods of removal that total 10 school days or less in that school year, unless the school system would provide services to a student without a disability under the same circumstances.

"SPECIAL CIRCUMSTANCES" FOR DANGEROUS STUDENTS

While the IDEA's incredibly complicated disciplinary procedures must be followed, Congress has carved out three "special circumstances" if a student with a disability has committed a weapon, drug or serious bodily injury offense at school. Specifically, school personnel may immediately remove the student to an interim alternative educational setting ("IAES") for not more than 45 school days without regard to whether the behavior is a manifestation of the student's disability if the student:

- Carried a weapon to or possessed one at school, on school premises or to or at a system function;
- Knowingly possessed or used illegal drugs or sells or solicits the sale of a controlled substance at school, on school premises or at a system function; or
- Has inflicted serious bodily injury upon another person at school, on school premises or at a system function.

It is important to note that these are the only "special circumstances" that allow immediate removal of a student with a disability and that threatened behavior will not suffice. In addition, while a student is in an IAES, the school system must still provide FAPE to the student as discussed above.

REGULAR EDUCATION STUDENTS AND IDEA PROTECTIONS

Even regular education students who have not been determined eligible for special education may assert IDEA's special disciplinary protections if the school system had knowledge that the student had a disability before the behavior that precipitated the

disciplinary action occurred. IDEA provides that a school system will be deemed to have knowledge that a student has a disability if, before the behavior that precipitated the disciplinary action occurred:

- The student’s parent expressed concern in writing to supervisory or administrative system personnel, or a teacher of the student, that the student is in need of special education and related services;
- The student’s parent requested an evaluation under IDEA; or
- The student’s teacher or other system personnel expressed specific concerns about a pattern of behavior demonstrated by the student directly to the system’s special education director or to other supervisory system personnel.

A school system would not be “deemed to have knowledge” if the parent of the student has not allowed an evaluation of the student or has refused services offered under IDEA.

EQUAL ACCESS AND OPPORTUNITY

As mentioned previously, Section 504’s antidiscrimination and equal opportunity provisions apply to all students identified with a disability under IDEA. IDEA and the AAC also contain their own antidiscrimination provisions regarding the provision of noneducational services to students with disabilities. School systems are required to take steps, including the provision of supplementary aids and services determined appropriate and necessary by a student’s IEP Team, to provide nonacademic and extracurricular services and activities in a manner necessary to afford students with disabilities an equal opportunity for participation in those services and activities. Nonacademic and extracurricular services and activities of the school system include all such services and activities that are available to students without disabilities, including counseling services, athletics, transportation, health services, recreational activities, and special interest groups or clubs sponsored by the school system.⁶⁷

THE ROLE OF SCHOOL BOARD MEMBERS

It is extremely important for school board members to be aware of their proper roles and responsibilities as it relates to the school system’s provision of special education services to its students with disabilities. Clearly, it is *not* the role of a school board member to:

- Get involved in any individual child matters regarding decisions, such as evaluation, eligibility, programming or placement;
- Question or overrule any determinations and/or recommendations of an IEP Team;
- Change the placement of a student with a disability for disciplinary purposes or attempt to make or question manifestation determinations.

It is the role of a school board member to:

- Examine the school system's overall achievement and placement data and ascertain whether its students with disabilities are progressing overall academically and behaviorally;
- Seriously consider the Superintendent's requests for funding and personnel necessary to provide services to the system's students with disabilities;
- Determine what community and/or business relationships or partnerships might assist the system to better meet the needs of its students with disabilities and ensure the services are provided that they need;
- Present questions to the Superintendent, CFSO and Special Education Coordinator that relate to key concepts contained in this guide—e.g., how are the legal requirements in special education being met via services, funding, integration and professional development?
- Employ safeguards to ensure that special education funds are being used only for special education purposes;
- Approve requested expenditures/contracts determined necessary by IEP Teams and school system administration (e.g., behavior specialists, related service providers, additional special education teacher units, preschool services).

ENDNOTES

¹ 20 U.S.C. §1400, *et seq.*

² Pub. L. 89-750, 80 Stat. 1204 (1966); Pub. L. 91-230, 84 Stat. 175 (1970); *see also* Education for All Handicapped Children Act of 1975, Pub. L. 94-142 (1975); Pub. L. 99-457 (1986); Pub. L. 101-476; Pub. L. 105-17.

³ The IDEA, Part B regulations are found at 34 C.F.R. Part 300.

⁴ *Ala. Code* §16-39-1, *et. seq.* and *Ala. Admin. Code* Chapter 290-8-9.

⁵ 29 U.S.C. §794(a).

⁶ 20 U.S.C. §1402(9).

⁷ 20 U.S.C. §1402(29).

⁸ 34 C.F.R. §300.39(b)(3).

⁹ 20 U.S.C. §1402(26)(A) and (B).

¹⁰ *Irving Indep. Sch. Dist. v. Tatro*, 104 S. Ct. 3371 (1984) [CIC is a related or school health service rather than a medical service under the law]; *Cedar Rapids Comm. Sch. Dist. v. Garrett F.*, 119 S.Ct. 992 (1999) [continuous one-on-one nursing care during the school day is a related service. While school districts are not required to provide treatment or other medical services *by a physician*, they are “responsible for providing services necessary to maintain the health and safety of a child while the child is in school.” Since full-time nursing care does not require a physician to be present, it is a related service, not an excluded medical service under the law.].

¹¹ *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

¹² *Andrew F. v. Douglas Co. Sch. Dist.*, 798 F.3d 1329 (10th Cir. 2015).

¹³ *Andrew F. v. Douglas Co. Sch. Dist.*, 137 S. Ct. 988 (2017).

¹⁴ *Andrew F. v. Douglas Co. Sch. Dist. RE-1*, 291 F.Supp.3d 1175 (D. Colo. 2018).

¹⁵ *Phyllene W. v. Huntsville City Bd. of Educ.*, 66 IDELR 179 (11th Cir. 2015, unpublished).

¹⁶ 20 U.S.C. §1402(3).

¹⁷ 34 C.F.R. §300.8.

¹⁸ 34 C.F.R. §300.111(c).

¹⁹ *Ala. Admin. Code* 290-8-9-01(4).

²⁰ For further information about the detailed and extensive special education referral and evaluation processes and requirements, *see* 34 C.F.R. §§300.304-311 and the *Ala. Admin. Code* 290-8-9-.01 through 290-8-9-.03. In addition, the Alabama State Department of Education’s Office of Student Learning, Special Education Services, has developed an essential guide to Alabama’s special education process called “*Mastering the Maze*.” The current edition of this document can be found on ALSDE’s website.

²¹ *See generally*, 34 C.F.R. §300.300.

²² 34 C.F.R. §300.300(a).

²³ 34 C.F.R. §300.300(b)(3).

²⁴ 34 C.F.R. §300.300(b)(4).

²⁵ *Ala. Admin. Code* 290-8-9-.04.

²⁶ *Ala. Admin. Code* 290-8-9-.00(4).

²⁷ *See, e.g., Durbrow v. Cobb Co. Sch. Dist.*, 72 IDELR 1, 887 F.3d 1182 (11th Cir. 2018) [student with ADHD is not a student with a disability because he did not demonstrate a need for special education services. A student is unlikely to need special education if, *inter alia*: (1) the student meets academic standards; (2) teachers do not recommend special education for the student; (3) the student does not exhibit unusual or alarming conduct warranting special education; and (4) the student demonstrates the capacity to understand course material].

²⁸ *Ala. Admin. Code* 290-8-9.02(6).

²⁹ 20 U.S.C. §1402(14).

³⁰ 34 C.F.R. §300.320 and *Ala. Admin. Code* 290-8-9-.05.

³¹ 20 U.S.C. §1414 (d)(1)(B) and *Ala. Admin. Code* 290-8-9-.05(3).

³² *See generally* 34 C.F.R. §300.324.

³³ 20 U.S.C. §1414(d)(3).

³⁴ *Ala. Admin. Code* 290-8-9-.05(11).

³⁵ 34 C.F.R. §300.322(a).

³⁶ 34 C.F.R. §300.322(b).

³⁷ 34 C.F.R. §300.322 (c) and (d).

³⁸ 34 C.F.R. §300.513(a).

³⁹ 34 C.F.R. §300.513(b).

⁴⁰ *R.L. v. Miami-Dade Co. Sch. Bd.*, 757 F.3d 1173 (11th Cir. 2014) [to avoid a finding of predetermination of placement, a school district must show that it came to the IEP meeting with an open mind and that it was “receptive and responsive” to the parents’ position at all stages. While some district team members seemed ready to discuss placement of the student in a small setting at the high school as requested by the parents, the LEA Representative running the meeting “cut this conversation short” and told the parents that they would have to pursue mediation if they disagreed with the district’s placement offer. “This absolute dismissal of the parents’ views falls short of what the IDEA demands from states charged with educating children with special needs.”].

⁴¹ 34 C.F.R. §300.504.

⁴² *Ala. Admin. Code* 290-8-9.08(6).

⁴³ *Ala. Admin. Code* 290-8-9.08(9).

⁴⁴ *See generally* 34 C.F.R. §300.506 and *Ala. Admin. Code* 290-8-9.08(9)(b).

⁴⁵ *Ala. Admin. Code* 290-8-9-.08(9)(b).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *See generally* 34 C.F.R. § 300.507 and *Ala. Admin. Code* 290-8-9.08(9)(c).

⁴⁹ *Ala. Admin. Code* 290-8-9.08(9)(c).

⁵⁰ *Ala. Admin. Code* 290-8-9.08(9)(c)(1)(i).

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- ⁵¹ *Ala. Admin. Code* 290-8-9.08(9)(c)(5).
- ⁵² *Ala. Admin. Code* 290-8-9.08(9)(c)(3).
- ⁵³ *Ala. Admin. Code* 290-8-9.08(9)(c)(3)(vi).
- ⁵⁴ *Ala. Admin. Code* 290-8-9.08(9)(c)(3)(ii).
- ⁵⁵ 34 C.F.R. §300.516(c)(3) and *Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 105 S. Ct. 359 (1985)
- ⁵⁶ *Burlington, supra*; see also *Florence Co. Sch. Dist. 4 v. Carter*, 114 S. Ct. 361 (1993).
- ⁵⁷ 34 C.F.R. §300.148.
- ⁵⁸ *Ortega v. Bibb Co. Sch. Dist.*, 397 F.3d 1321 (11th Cir. 2005).
- ⁵⁹ See e.g., *J.S. v. Houston Co. Bd. of Educ.*, 877 F.2d 979 (11th Cir. 2017).
- ⁶⁰ 34 C.F.R. §300.517 (a)(1)(i).
- ⁶¹ 34 C.F.R. §300.517(a)(1)(iii).
- ⁶² 34 C.F.R. §300.114(a).
- ⁶³ *Letter to Cohen*, 25 IDELR 516 (OSEP 1996) and *OSEP Memorandum 95-9*, 21 IDELR 1152 (OSEP 1994).
- ⁶⁴ 34 C.F.R. §300.115(a) and (b).
- ⁶⁵ *Letter to Johnson*, 213 IDELR 182 (OSERS 1988).
- ⁶⁶ IDEA's extensive disciplinary provisions are found at 34 C.F.R. §§300.530-300.536. The AAC's provisions, which essentially mirror those of IDEA, can be found at *Ala. Admin. Code* 290-8-9-.09.
- ⁶⁷ 34 C.F.R. §300.107 and *Ala. Admin. Code* 290-8-9.07(3).

APPENDIX

IEP FORM

INDIVIDUALIZED EDUCATION PROGRAM

STUDENT'S NAME							
DOB	SCHOOL YEAR		--	GRADE	--		
IEP INITIATION/DURATION DATES		FROM		TO			
<p>This IEP will be implemented during the regular school term unless noted in extended school year services.</p>							
STUDENT PROFILE – WILL INCLUDE GENERAL STATEMENTS REGARDING:							
<p>Strengths of the student – Include information regarding the student's strengths in academic and functional areas.</p>							
<p>Parental concerns for enhancing the education – Include all information regarding the parental concerns for enhancing the education of their child.</p>							
<p>Student Preferences and/or Interests – This area includes information obtained from parent, teachers, and the student regarding preferences and interests. Include all information concerning student preferences and/or interests including transition information.</p>							
<p>Results of the most recent evaluations – Include all information concerning evaluation results. This information should be written in meaningful terms so that the parent and service providers have a clear understanding of the evaluation results.</p>							
<p>The academic, developmental, and functional needs of the student – Include all information concerning how the student's disability affects his/her involvement and progress in the general education curriculum, and, for preschool age children, how the disability affects his/her participation in age-appropriate activities.</p>							
<p>Other – Include any information pertinent to the development of the IEP that was not included anywhere else on the Student Profile page.</p>							
<p>For the child transitioning from EI to Preschool, justify if the IEP will not be implemented on the child's 3rd birthday – This should only be completed if the child is not being served under IDEA on the child's third birthday. (e.g., if a child's birthday is during the summer or holiday(s) justification is required).</p>							

INDIVIDUALIZED EDUCATION PROGRAM

STUDENT'S NAME: _____

DOB: _____

SPECIAL INSTRUCTIONAL FACTORS

Items checked "YES" will be addressed in this IEP:

	YES	NO
• Does the student have behavior which impedes his/her learning or the learning of others?	<input type="checkbox"/>	<input type="checkbox"/>
• Does the student have a Behavioral Intervention Plan?	<input type="checkbox"/>	<input type="checkbox"/>
• Does the student have limited English proficiency?	<input type="checkbox"/>	<input type="checkbox"/>
• Does the student need instruction in Braille and the use of Braille?	<input type="checkbox"/>	<input type="checkbox"/>
• Does the student have communication needs?	<input type="checkbox"/>	<input type="checkbox"/>
• Does the student need assistive technology devices and/or services?	<input type="checkbox"/>	<input type="checkbox"/>
• Does the student require specially designed P.E.?	<input type="checkbox"/>	<input type="checkbox"/>
• Has the IEP Team determined the student meets the participation criteria for the Alabama Alternate Assessment and will be taught the alternate achievement standards?	<input type="checkbox"/>	<input type="checkbox"/>
• Are transition services addressed in this IEP?	<input type="checkbox"/>	<input type="checkbox"/>

TRANSPORTATION

Student's mode of transportation:

Regular bus Bus for special needs Parent contract Other: _____

Does the student require transportation as a related service? YES NO

If Yes is checked for related service, a representative from the transportation department was either included in the meeting or in discussions prior to the meeting about the transportation needs for this student. Personnel have been informed of his/her specific responsibilities for IEP implementation.

Check any transportation needs:

Day assistance Adult support Medical support

Preferential seating If checked, describe: _____

Behavioral Intervention Plan

Wheelchair lift

If checked, select one Transfer to bus seat Wheelchair restraint system

Restraint system

If checked, specify type: _____

Other, specify: _____

NONACADEMIC and EXTRACURRICULAR ACTIVITIES

Will the student have the opportunity to participate in nonacademic/extracurricular activities with his/her nondisabled peers?

YES

YES, with supports. Describe: _____

NO. Explanation must be provided: _____

METHOD/FREQUENCY FOR REPORTING PROGRESS OF ATTAINING GOALS TO PARENTS

Annual Goal Progress reports will be sent to parents each time report cards are issued (2-3-07) _____ (weeks).

INDIVIDUALIZED EDUCATION PROGRAM
ANNUAL TRANSITION GOAL(S)

STUDENT'S NAME: _____ DOB: _____

PRESENT LEVEL OF ACADEMIC ACHIEVEMENT AND FUNCTIONAL PERFORMANCE:

Based on the student's strengths, preferences, interests, and needs related to the postsecondary goals (include a description of age-appropriate transition assessments).

(Link to Transition Standards)

MEASURABLE ANNUAL POSTSECONDARY TRANSITION GOALS:

Academic areas may be written separately or embedded within the transition goal. Address transition services, activities, and person(s)/agency involved for each goal area. (If more than one goal is needed in any one goal area below, additional goal pages can be added.)

Postsecondary Education/Training Goal _____ Date of Completion/Mastery: _____

*Transition Service(s): _____

Transition Activities:

(Enter a numbered list of all activities to assist the student in achieving his/her long-term Postsecondary Education/Training goal.)

1.
2.

Person(s)/Agency Involved: _____

Employment/Occupation/Career Goal _____ Date of Completion/Mastery: _____

*Transition Service(s): _____

Transition Activities:

(Enter a numbered list of all activities to assist the student in achieving his/her long-term Employment/Occupation/Career goal.)

1.
2.

Person(s)/Agency Involved: _____

Community/Independent Living Goal _____ Date of Completion/Mastery: _____

*Transition Service(s): _____

Transition Activities:

(Enter a numbered list of all activities to assist the student in achieving his/her long-term Community/Independent Living goal.)

1.
2.

Person(s)/Agency Involved: _____

***Transition Services:** Consider these service areas:

Vocational Evaluations (VE), Community Experiences (CE), Personal Management (PM), Transportation (T), Employment Development (ED), Medical (M), Postsecondary Education (PE), Living Arrangements (LA), Linkages to Agencies (LTA), Advocacy/Guardianship (AG), Financial Management (FM), and if appropriate, Functional Vocational Evaluation (FVE).

Page ____ of ____

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INDIVIDUALIZED EDUCATION PROGRAM

STUDENT'S NAME: _____ DOB: _____

Transition: Beginning not later than the first IEP to be in effect when the student is 16, or earlier if appropriate, and updated annually thereafter. For all students entering 9th grade regardless of their age, transition must be addressed.

- This student was invited to the IEP Team meeting on _____ via _____
- After prior consent of the parent or student (Age 19) was obtained, other agency representatives were invited to the IEP Team meeting.
- Transition services based on the student's strengths, preferences, and interests that will reasonably enable the student to meet the postsecondary goals are addressed on the transition goal page in this IEP.

Age-appropriate Transition Assessments:

(Select the assessment(s) used to determine the student's measurable postsecondary transition goal.)

- | | | |
|--|--|--|
| <input type="checkbox"/> Student Interview | <input type="checkbox"/> Career Awareness | <input type="checkbox"/> Interest Inventory |
| <input type="checkbox"/> Parent Interview | <input type="checkbox"/> Student Portfolio | <input type="checkbox"/> Interest Learning Profile |
| <input type="checkbox"/> Student Survey | <input type="checkbox"/> Vocational Assessment | <input type="checkbox"/> Career Aptitude |
| <input type="checkbox"/> Other _____ | | |

Enter the assessment(s) used to determine the student's selected long-term postsecondary transition goal:

Postsecondary Education/Training Goal

Assessment: _____ Date: _____
 Assessment: _____ Date: _____

Long-Term Goal: _____

If Other is selected, specify: _____

Employment/Occupation/Career Goal

Assessment: _____ Date: _____
 Assessment: _____ Date: _____

Long-Term Goal: _____

If Other is selected, specify: _____

Community/Independent Living Goal

Assessment: _____ Date: _____
 Assessment: _____ Date: _____

Long-Term Goal: _____

If Other is selected, specify: _____

- This student is in a middle school course of study that will help prepare him/her for transition.

Anticipated Date of Exit: Month: _____ Year: _____

Selected Pathway to the Alabama High School Diploma:

- General Education Pathway (Intended to prepare student for college and career)
- Essentials Pathway (Intended to prepare student for a career/competitive employment)
- Alternate Achievement Standards Pathway (AAS) (Intended to prepare students for supported competitive employment)

Program Credits to be Earned (Complete for students in grades 9-12)				
For each course taken indicate program credits to be earned next to the appropriate pathway.	ENGLISH	MATH	SCIENCE	SOCIAL STUDIES
General Education Pathway				
Essentials Pathway				
Alternate Achievement Standards Pathway				

Elective(s) _____ (enter total number of electives)

Page _____ of _____

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INDIVIDUALIZED EDUCATION PROGRAM

STUDENT'S NAME _____ DOB: _____

SPECIAL EDUCATION AND RELATED SERVICE(S) (Special Education, Supplementary Aids and Services, Program Modifications, Accommodations Needed for Assessments, Related Services, Assistive Technology, and Support for Personnel.)

Special Education

Service(s)	Anticipated Frequency of Service(s)	Amount of time	Beginning/Ending Duration Dates	Location of Service(s)
			(b)	
			(c)	

Related Services **Needed** **Not Needed**

Service(s)	Anticipated Frequency of Service(s)	Amount of time	Beginning/Ending Duration Dates	Location of Service(s)
			(b)	
			(c)	

Supplementary Aids and Services **Needed** **Not Needed**

Service(s)	Anticipated Frequency of Service(s)	Amount of time	Beginning/Ending Duration Dates	Location of Service(s)
			(b)	
			(c)	

Program Modifications **Needed** **Not Needed**

Service(s)	Anticipated Frequency of Service(s)	Amount of time	Beginning/Ending Duration Dates	Location of Service(s)
			(b)	
			(c)	

Accommodations Needed for Assessments **Needed** **Not Needed**

Service(s)	Anticipated Frequency of Service(s)	Amount of time	Beginning/Ending Duration Dates	Location of Service(s)
			(b)	
			(c)	

Assistive Technology **Needed** **Not Needed**

Service(s)	Anticipated Frequency of Service(s)	Amount of time	Beginning/Ending Duration Dates	Location of Service(s)
			(b)	
			(c)	

Support for Personnel **Needed** **Not Needed**

Service(s)	Anticipated Frequency of Service(s)	Amount of time	Beginning/Ending Duration Dates	Location of Service(s)
			(b)	
			(c)	

INDIVIDUALIZED EDUCATION PROGRAM

STUDENT'S NAME: _____ DOB: _____

TRANSFER OF RIGHTS

(Beginning not later than the IEP that will be in effect when the student reaches 18 years of age.)

Date student was informed that the rights under the IDEA will transfer to him/her at the age of 19 _____

EXTENDED SCHOOL YEAR SERVICES (ESY)

The IEP Team has considered the need for extended school year services. Yes No

LEAST RESTRICTIVE ENVIRONMENT

Does this student attend the school (or for a preschool-age student, participate in the environment) he/she would attend if nondisabled? Yes No

If no, explain:

Does this student receive all special education services with nondisabled peers? Yes No

If no, explain (explanation may not be solely because of needed modifications in the general curriculum):

14-21 YEARS OF AGE

13-5 YEARS OF AGE

Least Restricted Environment:

COPY OF IEP

Was a copy of the IEP given to parent/student (age 19) at the IEP Team meeting?

Yes No

If no, date sent: _____

COPY OF SPECIAL EDUCATION RIGHTS

Was a copy of the *Special Education Rights* given to parent/student (age 19) at the IEP Team meeting?

Yes No

If no, date sent: _____

Date copy of amended IEP provided/sent to parent/student (age 19): _____

THE FOLLOWING PEOPLE ATTENDED AND PARTICIPATED IN THE MEETING TO DEVELOP THIS IEP.

Position	Signature	Date
Parent		
Parent		
General Education Teacher		
Special Education Teacher		
LEA Representative		
Someone Who Can Interpret the Instructional Implications of the Evaluation Results		
Student		
Career/Technical Education Representative		
Other Agency Representative		

INFORMATION FROM PEOPLE NOT IN ATTENDANCE

Position	Name	Date

SPECIAL EDUCATION RIGHTS UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

To _____	Date Provided _____						
<p>You are receiving a copy of <i>Special Education Rights</i> (procedural safeguards) for the following reason(s):</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%;"><input type="checkbox"/> Required annual copy</td> <td style="width: 50%;"><input type="checkbox"/> Parental request</td> </tr> <tr> <td><input type="checkbox"/> Initial referral/Parental request for evaluation</td> <td><input type="checkbox"/> 1st State complaint filed</td> </tr> <tr> <td><input type="checkbox"/> Disciplinary action resulting in change of placement</td> <td><input type="checkbox"/> 1st Request for due process hearing</td> </tr> </table>		<input type="checkbox"/> Required annual copy	<input type="checkbox"/> Parental request	<input type="checkbox"/> Initial referral/Parental request for evaluation	<input type="checkbox"/> 1 st State complaint filed	<input type="checkbox"/> Disciplinary action resulting in change of placement	<input type="checkbox"/> 1 st Request for due process hearing
<input type="checkbox"/> Required annual copy	<input type="checkbox"/> Parental request						
<input type="checkbox"/> Initial referral/Parental request for evaluation	<input type="checkbox"/> 1 st State complaint filed						
<input type="checkbox"/> Disciplinary action resulting in change of placement	<input type="checkbox"/> 1 st Request for due process hearing						
<p>If you have questions or need further assistance in understanding these rights, please contact:</p> <p style="text-align: center;">at</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%; border-bottom: 1px solid black;">Name</td> <td style="width: 50%; border-bottom: 1px solid black;">Telephone Number</td> </tr> </table>		Name	Telephone Number				
Name	Telephone Number						

Federal and state laws create specific rights for those eligible for special education services. A copy of those rights must be given to parents only one time a year, except that a copy must also be given to the parents upon initial referral or parental request for evaluation, upon the first State complaint in a school year and upon the first request for a due process hearing in a school year, when a decision is made to the disciplinary action that constitutes a change of placement, and upon request by a parent. The following is an explanation of those rights. If you would like a further explanation of any of these rights, you may contact the individual named above; your school principal; the special education coordinator in your school system; or your superintendent of schools. If you want another copy of your rights, have any questions, or wish to arrange a conference, please contact the individual named above.

PRIOR WRITTEN NOTICE

Your education agency must provide you with prior written notice within a reasonable time before it proposes or refuses to initiate or change the identification, evaluation, educational placement, or the provision of a free appropriate public education (FAPE). The notice must include a full explanation of all of the procedural safeguards available to you; a description of the action proposed or refused by the education agency; an explanation of why your education agency proposes or refuses to take the action; a description of other options considered by the Individualized Education Program (IEP) Team and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report the education agency used as a basis for the proposal or refusal; a description of any other factors which are relevant to the education agency's proposal or refusal; sources to contact to obtain assistance in understanding the rights for special education; a statement indicating that you have protection under the procedural safeguards; and if the notice sent to you is not the first referral for evaluation, the way by which you may obtain a copy of the procedural safeguards. The written notice must be understandable to the general public and provided in your native language or other mode of communication, unless it is clearly not feasible to do so. If your native language or other mode of communication is not a written language, your education agency must take steps to ensure that the notice is translated orally or by other means to you in your native language or other mode of communication; that you understand the content of the notice; that you are provided sources to contact

to obtain assistance in understanding the information; and that there is written evidence that these requirements have been met. If your education agency offers parents the choice of receiving documents by e-mail, you may choose to receive prior written notice by e-mail. Written notice must be provided to you when your child graduates from high school with a regular diploma or exits because he or she has exceeded the age of eligibility for a free appropriate public education.

PARENTAL CONSENT

Your education agency must obtain your informed written consent before conducting an initial evaluation, before the initial provision of special education and related services, or before obtaining additional data as part of a reevaluation. Your consent to an initial evaluation must not be construed as consent for initial provision of special education services and related services. The education agency may, but is not required to use the State procedures for mediation and due process hearings to determine whether initial evaluations or reevaluations may be conducted when you have refused informed written consent. If the hearing officer upholds your education agency, the education agency may evaluate subject to your rights to appeal the decision and the child must remain in the current educational placement awaiting the decision of the appeal unless you and the education agency agree otherwise. If the parent of a child refuses to give consent to the initial provision of special education and related services, or fails to respond to a request for consent, the education agency shall not provide special education and related services to the child by utilizing due process hearing or mediation procedures. In this instance, the education agency will not be considered to be in violation of the requirement to make available a free appropriate public education to the child and is not required to convene an IEP Team meeting or develop an IEP for the child. The same applies if, subsequent to the initial provision of special education and related services, the parent revokes consent in writing and the public agency provides prior written notice before ceasing services. If the parent revokes consent in writing after the initial provision of services, the public agency is not required to amend the child's education record to remove any references to the child's receipt of special education and related services because of the revocation of consent.

Your education agency must obtain your informed consent before it reevaluates your child, unless your education agency can demonstrate that it took reasonable steps to obtain your consent for your child's reevaluation and you did not respond. If you refuse to consent to your child's reevaluation, the education agency may, but is not required to, pursue your child's reevaluation by using the mediation and/or due process hearing procedures to seek to override your refusal to consent to your child's reevaluation. As with initial evaluations, your education agency does not violate its obligations under Part B of the *Individual With Disabilities Education Act* (IDEA) if it declines to pursue the reevaluation in this manner. However, if after at least two attempts to obtain your consent for reevaluation you have not responded, the education agency may proceed with the reevaluation. Your consent is not required before your education agency may review existing data as part of your child's evaluation or a reevaluation, or give your child a test or other evaluation that is given to all children unless, before that test or evaluation, consent is required from all parents of all children. An education agency may not use a parent's refusal to consent to one service or activity regarding initial evaluation for special education services to deny the parent or child any other service, benefit, or activity offered by the education agency for all children, except as required by this part. If you are the parent of a child who is home schooled or placed in a private school at your own expense, and you do not provide your informed written consent for your child's initial evaluation or your child's reevaluation, or you fail to respond to a

request to provide your informed written consent, the education agency shall not use its consent override procedures and it is not required to consider your child as eligible to receive equitable services. Your informed written consent or the informed written consent of an eligible child who has reached the age of majority (Age 19), must be obtained prior to an IEP Team meeting before representatives of participating agencies who may be responsible for providing or paying for transition services may be invited to the IEP Team meeting.

TRANSFER OF PARENTAL RIGHTS AT AGE OF MAJORITY

When a child with a disability reaches the age of majority under State law (Age 19) that applies to all children (except for a child with a disability who has been determined to be incompetent under State law) the education 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 IDEA transfer to the child; all rights accorded to parents under Part B of the IDEA transfer to children who are incarcerated in an adult or juvenile, State or local correctional institution; and whenever the rights have been transferred, the agency must notify the child and the parents of the transfer of rights.

INDEPENDENT EDUCATIONAL EVALUATION

You have the right to an independent educational evaluation at public expense if you disagree with an evaluation obtained by your education agency. However, your education agency may request a due process hearing to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, you still have the right to an independent educational evaluation, but not at public expense. If you obtain an independent educational evaluation at private expense, the results of the evaluation must be considered by your education agency (if it meets agency criteria) in any decision made with respect to the provision of a free appropriate public education and may be presented as evidence at a due process hearing. If a due process hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation will not be at your expense. Each education agency shall provide you, on request, information about where an independent educational evaluation may be obtained and the criteria for the independent educational evaluation. Whenever an independent educational evaluation is at public expense, the standards under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the standards that the education agency uses when it conducts an 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.

DIFFERENCE BETWEEN STATE COMPLAINT AND DUE PROCESS HEARING PROCEDURES

The regulations for Part B of IDEA set forth separate procedures for State complaints and for due process hearings. As explained below, any individual or organization may file a State complaint alleging a violation of any Part B requirement by an education agency, the SDE, or any other public agency. Only you or an education agency may file a due process hearing request on any matter relating to a proposal or a refusal to initiate or change the identification, evaluation, or educational placement of a child with a disability, or the provision of a free appropriate public education to the child. While staff of the SDE generally must resolve a State complaint within a 60 calendar day timeline, unless the timeline is properly extended, an impartial due process hearing officer must hear a due process hearing (if not resolved through a resolution meeting or

through mediation) and issue a written decision within 45 calendar days after the end of the resolution period, unless the hearing officer grants a specific extension of the timeline at your request or the education agency's request.

STATE COMPLAINT PROCEDURES

Any individual or organization has a right to file a signed written complaint alleging that a school system has violated the IDEA or 34 CFR Part 300 and the facts on which the statement is based; to present allegation(s) that occurred not more than one year prior to the date that the complaint is received; to submit additional information either orally or in writing about the allegations in the complaint; to a written decision within 60 calendar days that addresses each allegation in the complaint and contains findings of fact and conclusions and the reasons for the final decision; to an extension of the time limit only if exceptional circumstances exist with respect to a particular complaint; and to procedures for effective implementation of the final decision, if needed, including technical assistance activities, negotiations, and corrective actions to achieve compliance. It is permissible for the timeline to be extended if the parent and the education agency agree to extend the timeline in order to participate in mediation to resolve the state complaint. The education agency will respond to the complaint allegations, at the discretion of the education agency, a proposal to resolve the complaint. An independent onsite investigation will occur as determined appropriate by the SDE, Special Education Services.

If requested, the SDE, Special Education Services, will provide you with a sample form for filing a State complaint.

You are not required to use the sample form, however your complaint must include: (1) A statement that a public agency has violated a requirement of Part B of the IDEA or of this part; (2) The facts on which the statement is based; (3) The signature and contact information for the complainant; and (4) If alleging violations with respect to a specific child: (a) The name and address of the residence of the child; (b) The name of the school the child is attending; (c) 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; (d) A description of the nature of the problem of the child, including facts relating to the problem; and (e) A proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed.

A party filing a complaint must send it to the SES section of the SDE. 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 SDE. If after reviewing the complaint, the SES determines that it includes all of the required information and is signed, the 60-day timeline begins on the workday that the SES received the complaint. A signature requirement is the same that a person would use for any other legal document such as a bank check or signing a contract. Exceptions may be made for persons without the ability to sign their name.

If a written complaint is received that is also the subject of a due process hearing, 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 required. 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.

STATE MEDIATION PROCEDURES

You have the right to participate in mediation to resolve disagreements under IDEA with an education agency, whether or not you have requested a due process hearing or have filed a State complaint. The voluntary mediation will be scheduled by the SDE at no cost to you. A qualified impartial mediator trained in effective mediation techniques and selected by rotation will be provided and each mediation session will be scheduled in a timely manner and held in a location convenient to the parties in the dispute. The SDE must have a list of qualified mediators and the mediators must be knowledgeable of the laws and regulations relating to special education and related services. The mediators may not be employees of the SDE or the education agency involved in the education or care of your child and must not have a personal or professional conflict of interest. You may participate without denial or delay of any other rights. If an agreement is reached, a legally binding written agreement that is signed by the parent and a representative of the education agency that has the authority to bind the education agency will state the resolution. All parties sign a confidentiality pledge prior to the beginning of the mediation process to assure confidentiality of mediation discussions and assurance that discussions may not be used as evidence in any later due process hearings or civil proceedings. The mediation agreement is enforceable in any State court of competent jurisdiction or in a district court of the United States. The education agency may develop procedures that offer an opportunity to meet with a disinterested party at a time and location convenient to you if you have chosen not to participate in mediation. The benefits of mediation will be explained by the disinterested party to encourage the use of mediation.

DUE PROCESS HEARING PROCEDURES

You may request a due process hearing regarding the education agency's proposal or refusal to initiate or change the identification, evaluation, educational placement, or the provision of a free appropriate public education. If you request a hearing, you or your attorney must provide a copy of the written request (that must be kept confidential) to the other party and to the SDE. If requested, the SDE, Special Education Services section, will provide you with a sample form for requesting a due process hearing.

You are not required to use the sample form, however your request must include: (1) The name of the child; (2) The address of the residence of the child or available contact information in the case of a homeless child; (3) The name of the school the child is attending; (4) A description of the nature of the problem including facts relating to the problem that occurred within two years of the date the parent or the education agency knew or should have known about the alleged action that is the basis for the hearing request; and (5) A proposed resolution of the problem to the extent known and available to you at the time you requested the hearing. The timeline shall not apply to a parent if the parent was prevented from requesting the hearing due to specific misrepresentations by the education agency that it had resolved the problem forming the basis of the written request; or the education agency's withholding of information from the parent that was required under this part to be provided to the parent. You or the education agency may not have a due process hearing until you (or your attorney), or the education agency, files a due process hearing request that includes all of the information listed above.

If after receiving the due process hearing request, and SES determines that it includes all of the required information and is signed, the due process hearing will be initiated and the timeline begins on the workday received. A signature requirement is the same that a person would use for any other legal document such as a bank check or signing a contract. Exceptions may be made for persons without the ability to sign their name.

The party requesting the hearing shall not be allowed to raise issues at the hearing that were not raised in the written request for a hearing unless the other party agrees otherwise.

The education agency must inform you of any free or low-cost legal and other relevant services available in the area if you request the information or if you or the education agency requests a hearing.

In order for a due process hearing to go forward, the request must be considered sufficient. The due process request will be considered sufficient (to have met the content requirements above) unless the party receiving the due process complaint (you or the education agency) notifies the hearing officer and the other party in writing, within 15 calendar days of receiving the complaint, that the receiving party believes that the due process complaint does not meet the requirements listed above. Within five calendar days of receiving the notification that the receiving party (you or the education agency) considers a due process request insufficient, the hearing officer must decide if the due process request meets the content requirements, and notify you and the education agency in writing immediately.

You or the education agency may make changes to the hearing request only if the other party approves of the changes in writing and is given the chance to resolve the due process request through a resolution meeting, or no later than five days before the due process hearing begins, the hearing officer grants permission for the changes. If the complaining party makes changes to the due process request, the timelines for the resolution meeting and the time period for resolution start again on the date the amended request is filed.

Within 10 calendar days of receiving a copy of your request for a hearing, the education agency will provide you written notice addressing the concerns of the request for hearing, if it has not previously done so. The response must include an explanation of why the education agency proposed or refused to take the action raised in the due process request, a description of other options that the child's IEP Team considered and the reasons why those options were rejected, a description of each evaluation procedure, assessment, record, or report the education agency used as the basis for the proposed or refused action, and a description of the other factors that are relevant to the educational agency's proposed or refused action. However, providing this information does not prevent the education agency from asserting that the due process request was insufficient.

If the education agency files the due process hearing request, you must, within 10 calendar days of receiving the request, send the education agency a response that specifically addresses the issues in the complaint.

Prior to the opportunity for a hearing, the education agency, within 15 calendar days of receiving the parents' request for a hearing, will convene a meeting with the parents and the relevant member or members of the IEP Team (as determined by the education agency and the parent), including a member who has decision-making authority on behalf of the education agency, and who have specific knowledge of the facts identified in the written request for a hearing. The education agency may not include an attorney of the education agency if an attorney does not accompany the parent. The purpose of the meeting is for the parents of the child to discuss their hearing issues and the facts that form the basis of the hearing request. The education agency is then provided the opportunity to resolve the hearing issues unless the parents and the education agency agree in writing to waive such meeting, or agree to use the mediation process. If a resolution is reached at the resolution meeting or mediation, the parties shall execute a legally binding agreement that is signed by both the parent and a representative of the education agency who has the authority to bind the education agency. This agreement is enforceable in any State court of competent jurisdiction or in a district court of the United States. If the parties execute such an agreement, a party may void such agreement within three business days of the agreement's execution. If the education agency has not resolved the hearing issues to the satisfaction of the parents within 30 days of the receipt of the written request for a hearing, the hearing may occur and all the applicable timelines for a hearing will commence. A final hearing decision will be reached within 45 calendar days after the hearing timeline commences (i.e., after the 30-day timeline to resolve the issues has expired) unless the hearing officer grants a specific extension at the request of either party. A copy of the decision is mailed to each of the parties.

Except where you and the education agency have both agreed to waive the resolution process or to use mediation, failure of the parent to participate in the resolution meeting will delay the timelines for the resolution process and the due process hearing until the parent's agree to participate in a meeting. If after making reasonable efforts and documenting such efforts, the education agency is not able to obtain the parent's participation in the resolution meeting, the education agency may, at the end of the 30 calendar day resolution period, request that a hearing officer dismiss your due process request. Documentation of such efforts must include a record of the education agency's attempts to arrange a mutually agreed upon time and place, such as detailed records of telephone calls made or attempted and the results of those calls; copies of correspondence sent and any responses received; and detailed records of visits made to the home or place of employment and the results of those visits. If the education agency fails to hold the resolution meeting within 15 calendar days of receiving notice of the parent's due process request or fails to participate in the resolution meeting, the parent may ask a hearing officer to order that the 45 calendar day due process hearing timeline begin.

If the parent and the education agency agree in writing to waive the resolution meeting, then the 45 calendar day timeline for the due process hearing starts the next day. After the start of mediation or the resolution meeting and before the end of the 30 calendar day resolution period, if the parent and the education agency agree in writing that no agreement is possible, then the 45 calendar day timeline for the due process hearing starts the next day. If the parent and the education agency agree to use the mediation process, at the end of the 30 calendar day resolution period, both parties can agree in writing to continue the mediation until an agreement is reached. However, if either party withdraws from the mediation process, then the 45 calendar day timeline for the due process hearing starts the next day.

At a minimum a hearing officer must not be an employee of the state education agency or the local education agency that is involved in the education or care of the child, or any person having a personal or professional interest that would conflict with his or her objectivity in the hearing. A person who otherwise qualifies to conduct a hearing is not an employee of the education agency solely because he or she is paid by the education agency to serve as a hearing officer. He or she must possess the knowledge and the ability to: understand the provisions of the IDEA, Federal and State regulations pertaining to the IDEA, and legal interpretations by Federal and State courts; conduct hearings in accordance with appropriate, standard legal practice; and render and write decisions in accordance with appropriate, standard legal practice.

Each education agency shall keep a list of the persons who serve as due process hearing officers. The list must include a statement of the qualifications of each of those persons.

Any party to a hearing 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 state law prohibits non-attorney representation; present evidence and confront, cross-examine, 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 electronic verbatim record of the hearing; and obtain written, or at the option of the parents, electronic findings of fact and decisions at no cost. In addition, you have the right to have the child present; open the hearing to the public; and have the hearing conducted at a time and place, which is reasonably convenient to you at no cost. At least five business days prior to the hearing, each party shall disclose to all other parties all evaluations completed by that date and the recommendations based on the offering party's evaluation that the party intends to use at the hearing. A hearing officer may prevent any party that fails to comply with this requirement from introducing the relevant evaluations or recommendations at the hearing without the consent of the other party.

CIVIL ACTION

The decision of the hearing officer is final except that any party aggrieved by the findings and decision made in a due process hearing has the right to bring a civil action in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. An aggrieved party must file a notice of intent to file a civil action with all parties to the hearing within 30 calendar days upon receipt of the decision of the hearing officer. A civil action in a court of competent jurisdiction must be filed within 30 days of the filing of the notice of intent to file a civil action.

A hearing officer's decision on whether the child received a free appropriate public education must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that the child did not receive free appropriate public education only if the procedural inadequacies interfered with the child's right to free appropriate public education, significantly interfered with the parent's opportunity to participate in the decision-making process regarding the provision of free appropriate public education to the child, or caused a deprivation of an educational benefit.

None of the provisions described above can be interpreted to prevent a hearing officer from ordering an education agency to comply with the procedural safeguards requirements.

Nothing in this part should be interpreted to prevent the parent from submitting a separate due process hearing request on an issue separate from a due process request already filed.

CHILD'S STATUS DURING PROCEEDINGS

During the pendency of the resolution period, a due process hearing, or judicial proceeding, unless you and the state or your education agency agree otherwise, the child must remain in his or her current educational placement. If the hearing officer agrees with the parent that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parent.

If the hearing involves an application for initial admission to public school, the child, with parental consent, must be placed in the public school until the completion of all the proceedings. If the hearing involves an application for initial services under Part B from a child transitioning from Part C to Part B and is no longer eligible for Part C services because the child turned three, the education agency is not required to provide the Part C services that the child was 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, then the educational agency must provide those special education and related services that are not in dispute. However, if a parent requests a due process hearing regarding a disciplinary action, placement remains in the alternative education setting pending the decision of the hearing officer or until the expiration of the time period unless the parent and the education agency agree otherwise. A request for expedited hearing for discipline matters must occur within 20 school days of the date the hearing is requested and the hearing officer must make a determination within 10 school days after the hearing.

STATE ENFORCEMENT MECHANISMS

For enforcement of a written agreement reached as a result of mediation or a resolution meeting, the State Education Agency (SEA) will allow other state enforcement mechanisms to seek enforcement of that agreement, provided that use of those mechanisms is not mandatory and does not delay or deny a party the right to seek enforcement of the written agreement in a State court of competent jurisdiction or in a district court of the United States.

AWARD OF ATTORNEYS' FEES

In any action or proceeding brought under Part B of the IDEA, the court may award reasonable attorneys' fees to a prevailing party who is the parent of a child with a disability; or to a prevailing party who is a state or local education agency against the attorney of a parent who files a hearing request or court case 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 to a prevailing State or local education agency against the attorney of a parent, or against the parent if the parent's request or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or needlessly increase the cost of litigation. The fee shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished.

Attorneys' fees may not be awarded and related costs may not be reimbursed for services performed subsequent to the time of a written offer of settlement to the parent if the offer is made to the parent 10 calendar days prior to the hearing; the offer is not accepted by the parent within 10 calendar days; and hearing officer or court finds that the hearing decision obtained by the parents was not more favorable to the parents than the offer of settlement. Also, fees may not be awarded for attendance at any IEP Team meeting unless the meeting is convened as a result of the hearing officer's decision or court action. However, 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. A resolution meeting is not considered an administrative hearing or court action for purposes of the attorney's fees provisions.

The amount of attorneys' fees awarded may be reduced if the parent or parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy; the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly prevailing rate in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience; the time spent and legal services furnished were excessive considering the nature of the action or proceedings; or the attorney representing the parent did not provide to the education agency the appropriate information in the due process hearing request. The preceding items will not apply in any action or proceeding if the court finds that the state or local education agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of these rules.

ACCESS TO RECORDS

Your education agency must permit you to inspect and review all education records of your child, that are collected, maintained, or used by the participating agency under Part B of the IDEA. The participating agency must comply with a request without unnecessary delay and before any meeting regarding an individualized education program, or hearing relating to the identification, evaluation, educational placement, or provision of a free appropriate public education, or resolution session is conducted and in no case more than 45 days after the request has been made. Your right to inspect and review records includes your right to a response from the participating agency to reasonable requests for explanations and interpretations of the records; to have your representative inspect and review the records; and to request that the participating agency provide copies of the records containing the information if failure to provide those copies would effectively prevent you from exercising your right to inspect and review the records. The participating agency may not charge a fee to search for or to retrieve information under this part, but may charge a fee for copies of records which are made for you under this part if the fee does not effectively prevent you from exercising your right to inspect and review those records. The agency may presume that you have authority to inspect and review records unless the agency has been advised that you do not have the authority under applicable State law governing such matters as guardianship, or separation, and divorce. If any education record includes information on more than one child, you may review only the information relating to your situation or be informed of that specific information. The participating agency must provide you, on request, a list of the types and locations of education records collected, maintained, or used by the participating agency. The participating agency must keep a record of parties obtaining access to education records collected, maintained, or used (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 review the records.

RIGHTS FOR CHILDREN

Education agencies must afford to the child, rights of privacy similar to those afforded to parents regarding records taking into consideration the age of the child and type and severity of the disability. Although the rights of parents under the IDEA transfer to the child at the age of majority (Age 19), the rights of parents regarding educational records under the *Family Educational Rights and Privacy Act* (FERPA) at 34 CFR Part 99 transfer to the child at age 18.

CONSENT FOR DISCLOSURE OF PERSONALLY IDENTIFIABLE INFORMATION

Your consent must be obtained before personally identifiable information is disclosed to parties other than officials of participating agencies. Except under the circumstances below, your consent is not required before personally identifiable information is released to officials of participating agencies for purposes of meeting a requirement of part B of the IDEA.

Your consent or the consent of an eligible child who has reached the age of 19 must be obtained before personally identifiable information is released to officials of participating agencies responsible for providing or paying for transition services.

Also, if your child is in, or is going to go to a private school that is not located in the same LEA you reside in, your consent must be obtained before any personally identifiable information about your child is released between officials in the LEA where the private school is located and officials in the LEA where you reside.

AMENDMENT OF RECORDS AT PARENT'S REQUEST

If you believe that information in your child's education records collected, maintained, or used under Part B of the IDEA is inaccurate, misleading, or violates the privacy or other rights of the child, you may request that the education agency that maintains the information amend the information. The participating agency must decide whether to amend the information in accordance with your request within a reasonable period of time of receipt of the request. If the participating agency decides to refuse to amend the information in accordance with the request, it must inform you of the refusal and advise you of your right to a hearing. The participating agency shall, on request, provide an opportunity for a hearing, which complies with FERPA procedures, to challenge information in your child's education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights. If, as a result of the hearing, it is determined that the information is inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, the participating agency must amend the information accordingly and so inform you in writing. If, as a result of the hearing, it is determined that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights, the participating agency must inform you of the right to place in the records it maintains on your child, a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the participating agency. Any explanation placed in the records must be maintained by the participating agency as part of the record as long as the record or the contested portion is maintained by the participating agency. If the records or the contested portion are disclosed by the participating agency to any party, the explanation must also be disclosed to the party.

DESTRUCTION OF INFORMATION

You must be informed by the public agency when personally identifiable information collected, maintained, or used under Part B of the IDEA is no longer needed to provide education services to your child. The information must be destroyed at your request. 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. Information must be destroyed in a manner that maintains confidentiality.

CHILDREN WITH DISABILITIES ENROLLED BY THEIR PARENTS IN PRIVATE SCHOOLS WHEN FREE APPROPRIATE PUBLIC EDUCATION IS AT ISSUE

Part B of the IDEA does not require an LEA to pay for the cost of education, including special education and related services, of your child with a disability at a private school or facility if the LEA made FAPE available to your child and you choose to place the child in a private school or facility. However, the public agency where the private school is located must include your child in the population whose needs are addressed under the Part B provisions regarding children who have been placed by their parents in a private school. Disagreements between the parents and the 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. 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 elementary 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 a free appropriate public education available to the child in a timely manner prior to that enrollment. The cost of reimbursement may be reduced or denied if at the most recent IEP meeting that the parents attended before removal of the child from the public agency, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or at least 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public agency, the parents did not give written notice to the public agency that they were rejecting the offered placement; or prior to the parents' removal of the child, the public agency informed the parents of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or a judicial finding of unreasonableness with respect to actions taken by the parents is found. **EXCEPTION:** The cost of reimbursement shall not be reduced or denied for a parent's failure to provide such notice if the school prevented the parent from providing such notice, the parent had not received this document, or compliance with this requirement would likely result in physical harm to the child; and may in the discretion of a court or hearing officer not be reduced or denied for failure to provide such notice if the parent is not literate and cannot write in English; or compliance would likely result in serious emotional harm to the child.

DISCIPLINE

Authority of School Personnel. 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.

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).

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 education agency must provide services to the child with a disability who is removed from the child's current placement. The child must continue to receive educational services, so as 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.

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, 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 that the child must continue to receive educational services. The educational services may be provided in an interim alternative setting.

An education 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.

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, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed 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.

If the removal is a change of placement, the child's IEP Team determines appropriate services.

Change of Placement Because of Disciplinary Removals. The child's IEP Team determines the interim alternative educational setting for services. For purposes of removals of a child with a disability from the child's current educational placement, a change of placement occurs if the removal is for more than 10 consecutive school days, including partial school days of a half day or more, 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 of misconduct 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. The education agency (a minimum of an administrator and the student's special education teacher) 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.

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 education agency must notify the parents of that decision, and provide the parents with a copy of the *Special Education Rights*.

Manifestation Determination.

1. 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 education agency, the parent, and relevant members of the child's IEP Team (as determined by the parent and the education agency) 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 education agency's failure to implement the IEP.

2. The conduct must be determined to be a manifestation of the child's disability if the education agency, the parent, and relevant members of the child's IEP Team determine that either condition is met.

3. If the education agency, the parent, and relevant members of the child's IEP Team determine that there was a failure to implement the IEP, the education agency must take immediate steps to remedy those deficiencies.

Determination that Behavior was a Manifestation. If the education agency, 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:

1. Conduct a functional behavioral assessment, unless the education agency had conducted a functional behavioral assessment during the previous 18 months before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child, or

2. If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior, and

3. Return the child to the placement from which the child was removed, unless the parent and the education agency agree to a change of placement as part of the modification of the behavioral intervention plan.

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:

1. Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of the Department of Education or an education agency,

2. Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of the Department of Education or an education agency, or

3. Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the Department of Education or an education agency.

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 health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

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.

Appeal. The parent of a child with a disability who disagrees with any decision regarding disciplinary placement or the manifestation determination, 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 due process hearing.

Authority of Hearing Officer. A hearing officer hears, and makes a determination regarding an appeal under this section. In making the determination, 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 disciplinary requirements, 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 may be repeated, if the education agency believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.

Expedited Due Process Hearing. Whenever a hearing is requested, the parents or the education agency involved in the dispute must have an opportunity for a due process hearing.

1. The Department of Education is responsible for arranging the expedited due process hearing due to disciplinary action, which must occur within 20 school days of the date the hearing request is filed. The hearing officer must make a determination within 10 school days after the hearing.

2. Unless the parents and education agency agree in writing to waive the resolution meeting, or agree to use the mediation process, a resolution meeting must occur within seven calendar days of receiving notice of the due process hearing request, and

3. The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 calendar days of the receipt of the due process hearing request.

4. The decisions on expedited due process hearings are appealable.

Placement During Appeals. When an appeal has been made by either the parent or the educational agency, 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, whichever occurs first, unless the parent and education agency agree otherwise.

Protections for Children Not Determined Eligible for Special Education and Related Services. 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 education agency had knowledge, as specified below, that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

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 if:

1. 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,
2. The parent of the child requested an evaluation of the child, or
3. The teacher of the child, or other personnel of the education agency, 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.

Exception. A public agency would not be deemed to have knowledge if the parent of the child has not allowed an evaluation of the child, or has refused services under this part, or the child has been evaluated and determined to not be a child with a disability under this part.

Conditions that Apply if No Basis of Knowledge.

1. If a public agency does not have knowledge that a child is a child with a disability 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.
2. If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures, 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.
3. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the education agency and information provided by the parents, the education agency must provide special education and related services in accordance with this part.

Referral to and Action by Law Enforcement and Judicial Authorities. Nothing in this part prohibits an agency from reporting an alleged crime committed by a child with a disability to appropriate authorities or prevents State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

Whenever law enforcement or judicial authorities are contacted by a public agency personnel reporting an alleged crime committed by a child with a disability, the IEP Team must, within two weeks of the child's return to school setting:

1. If a public agency does not have knowledge that a child is a child with a disability 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. Conduct a functional behavioral assessment unless the LEA has conducted a functional behavioral assessment during the previous 18 months before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child, or

2. If the behavioral intervention plan already has been developed, review the behavioral intervention and modify it, as necessary, to address the behavior.

Transmittal of Records. (1) An agency reporting an alleged 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. (2) An agency reporting an alleged 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.

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