

Utah Institute on Special Education Law

Documentation...How Much???

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I. Introduction

- A. When the IDEA was last authorized by the Congress in 2004, one of the IDEA's stated purposes, as articulated by the Congress, included:
1. "focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results" and
 2. "teachers, schools, LEAs and States should be relieved of irrelevant and unnecessary paperwork burdens that do not lead to improved educational outcomes."
(20 U.S.C. Section 1400 (c)(5)(G) and (9)).
- B. This presentation will review the documentation legally required to support the major decisions that school and parents make regarding the provision of special education services to students with disabilities. Best practice recommendations will also be incorporated.

II. Evaluations

- A. Notice for evaluation (34 CFR 300.304)
1. Written notice of initial evaluation

Prior written notice must be provided to the parents when the LEA (local education agency) is proposing to change or refusing to change the child's identification or evaluation. (See IDEA Regulation 300.503 (a)). A copy of the procedural safeguards must be given to the parents upon the initial referral or parent request for an evaluation. (300.504 (a)).

Best Practice Recommendation: Document that the parent has been provided a copy of the procedural safeguard when their child has been first referred for a special education evaluation or the parent has requested the evaluation.

If the LEA does not agree with the parent's request for an initial evaluation since it does not suspect that the child has a disability and is in need of special education, the LEA may refuse to conduct the evaluation. In that instance, the LEA must provide the parents with written notice of its decision and the parents have procedural safeguards available including the right to request a due process hearing. Letter to Anonymous, 19 IDELR 498 (OSEP 1992) and Comments to the Federal Regulations, Page 46636 of the Federal Register

2. Notice of a Re-evaluation (300.305)
 - a. The IDEA permits the IEP Team and other qualified individuals to review the existing evaluation data to determine the scope of the evaluation without a Team meeting required.
 - b. The parent must receive written notice of any evaluations (beyond existing information) that the Team determines is necessary for a re-evaluation.
 - c. If the IEP Team and other qualified professionals determine that no additional data is needed to confirm continued eligibility, the LEA shall provide notice to parents of that determination and the reasons for that determination. In addition, the parent shall be notified of their right to request additional assessments.
3. Written Notice (34 CFR 300.503)
 - a. Parents must receive prior written notice whenever the agency proposes to or refuses to change:
 1. identification
 2. evaluation
 3. educational placement; or
 4. provision of a free appropriate public education
 - b. The notice must:

1. be in parent's native language, unless it is clearly not feasible to do so
2. describe the action
3. explain why the agency is proposing/refusing such action
4. description of other options considered
5. evaluations and other information used as a basis for the action
6. other relevant factors
7. how a copy of the procedural safeguards can be obtained
8. resources to assist parents

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

1. Consent means that the parents have been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication; the parent understands and agrees in writing to carry out the activity and that the granting of consent is voluntary and may be revoked at any time although the revocation is not retroactive.
2. Parental consent is not required before reviewing existing data as part of an evaluation or administering a test/evaluation administered to all children.
3. If the child is a ward of the state (which does not include a child who has a foster parent) and not residing with a parent, reasonable efforts shall be made to obtain parent consent. No parental consent is required if the parent cannot be found, parental rights have been terminated, or a judge has appointed an individual with educational authority.

Note: It is important to document the date that parental consent is received by the LEA since the time period for conducting the initial evaluation under Utah rules is within forty-five (45) school days of receiving parental consent for the evaluation.

C. Consent for Re-evaluations (34 CFR 300.300)

1. A LEA must seek parental consent for a re-evaluation which consists more than a review of existing information.

2. A LEA may conduct the re-evaluation without consent if it has taken reasonable measures to obtain consent and the parent has not responded. The IDEA requires that the LEA have a record of its attempts in requesting consent for re-evaluation in meeting the reasonable measure requirement.
3. The three year re-evaluation may be waived by agreement of the LEA and the parents. In addition, a re-evaluation need not be conducted more than once per year unless the parents and the LEA both agree.

D. Independent Educational Evaluations (300.502)

1. Parents have the right to obtain an Independent Educational Evaluation (IEE). Upon requesting an IEE, the public agency shall provide to the parents information about where an IEE may be obtained and the agency criteria applicable for IEEs.
2. The independent educational evaluation must be considered by the LEA in any decision made with respect to FAPE if the IEE meets the agency criteria.

The Team's consideration of the IEE should result in written notice sent to the parent if the Team determines that a change or refusal to change the identification, evaluation, educational placement or provisions of FAPE occurs.

III. Eligibility

- A. The LEA shall provide a copy of the evaluation report and documentation of the determination of eligibility at no cost to the parent. (300.306(a)(2)).

The report should address whether the student's evaluation data shows that the student meets one or more of the disability categories in Utah rules, whether there is an adverse effect on the student's educational performance and whether the student is in need of special education.

- B. For a student suspected of having a specific learning disability, the team's documentation of that determination must contain a statement of:
1. Whether the student has a specific learning disability;
 2. The basis for making the determination;

3. The relevant behavior, if any, noted during the observation of the student and the relationship of that behavior to the student's academic functioning;
4. The educationally relevant medical findings, if any;
5. Whether the student:
 - (a) Does not achieve adequately for the student's age or to meet State-approved grade-level standards; and
 - (b) Does not make sufficient progress to meet age or State-approved grade-level standards (RtI); or
 - (c) Obtains scores that demonstrate that a severe discrepancy exists between the student's achievement and intellectual ability in one or more of the areas of specific learning disability (Discrepancy);or
 - (d) Exhibits a combination of (b) and (c) above.
6. The determination of the team concerning the effects of a visual, hearing, or motor disability; intellectual disability; emotional disturbance; cultural factors; environmental or economic disadvantage; or limited English proficiency on the student's achievement level; and
7. If the student has participated in a process that assesses the student's response to scientific, research-based intervention as part of determining if the student has a specific learning disability:
 - (a) The instructional strategies used and the student-centered data collected; and
 - (b) The documentation that the student's parents were notified about:
 - (1) The State's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided (the team must refer to the USOE Specific Learning Disability Eligibility Guidelines when using this method);

- (2) Strategies for increasing the student's rate of learning; and
 - (3) The parents' right to request an evaluation; or
 - 8. If the team is using a severe discrepancy between the student's achievement and intellectual ability as part of its process to determine if the student has a specific learning disability, the team must document:
 - (a) The student's performance on a standardized, norm-referenced, individually administered achievement measure in the area of the suspected disability, and
 - (b) That the student scored above the intellectual disability range on a standardized, norm-referenced, individually administered measure of intellectual ability, and
 - (c) The comparison of the standard scores on the tests of achievement and intellectual ability:
 - (1) Must produce a report that states that the team can be 93 percent confident there is a severe discrepancy between the student's expected achievement score and the obtained achievement score, based on the Utah Estimator software, or
 - (2) Must produce a report that shows a significant discrepancy, based on a commercial software program that employs a clearly specified regression formula that considers the relationship between the intelligence and achievement tests as well as the tests' reliability.
 - 9. Each team member must certify in writing whether the report reflects the member's conclusion. If it does not reflect the member's conclusion, the team member must submit a separate statement presenting the member's conclusions.
- C. The IDEA does not establish a timeframe for providing the evaluation report or documentation of eligibility to the parents. It is important, however, that parents have the information they need to meaningfully

participate in the IEP meeting. (See the Comments to the IDEA Regulations, Page 46645 of the Federal Register)

IV. IEP Development and Implementation

A. Notice of the IEP Meeting

1. The parents must receive notice of the purpose, time, location of the meeting, and who will be in attendance (including whether the student will be invited). In addition, they must be informed of their right to bring other individuals with knowledge or expertise. The IEP meeting may be held by using alternate means such as a video conference or conference call if the parents and LEA agree.

In the event that the parent does not attend, the agency must have a documented record of its attempts to arrange a mutually agreed on time and place for the meeting.

B. IEP Team Members (300.3210)

1. It is highly recommended that the LEA document who was in attendance at the IEP Team meeting. Such documentation can include the signatures of those attending, IEP meeting minutes or other forms of documentation.
2. An IEP Team member may be excused from attending the IEP Team meeting, in whole or in part, if the parents and LEA agree in writing because the area of the curriculum or related service is not being modified or discussed. The agreement must be in writing.

An IEP Team member may be excused from attending the IEP Team meeting even if their curricular area or related service area is being discussed by the written agreement and consent of the parent and the LEA. The IEP Team member shall submit their input to the Team in writing prior to the meeting.

3. If transition services are being discussed, representatives of other agencies who are likely to be responsible for paying for or providing transition services must be invited.

To the extent appropriate, with the consent of the adult student or parents, the public agency shall invite representatives of other agencies likely to be responsible for providing or paying for transition services.

Consent must be obtained prior to each IEP meeting if the public agency proposes to invite representatives of other agencies. Therefore, it is not permissible to obtain the consent of the parents or adult student only one time or annually before the transition process is initiated. Letter to Gray 50 IDELR 198 (United States Department of Education, Office of Special Education Programs (2008)).

- C. Amendments to the IEP Without an IEP Team Meeting (300.324(a)(4)(ii))
1. The IEP may be amended between the annual IEP meetings without the necessity of calling a new IEP meeting if agreed to by the parents and the LEA. The amendment or modification to the IEP shall be in writing. Upon request, the parents shall be provided a revised copy of the IEP with the amendments incorporated.

2. If changes are made to the child's IEP as a result of an agreement with the parent outside the IEP Team meeting process, the child's IEP Team must be informed of those changes.

Although the IDEA does not specify how the IEP Team receives notices of the changes made to the IEP, the LEA must maintain records to show compliance with the IDEA requirements. Questions and Answers on IEPs, Evaluations, and Reevaluations, Question C-7 (OSERS (2007)).

3. If the IEP is amended without convening an IEP Team as agreed to by the parents and LEA, the LEA is still required to provide the parent with prior written notice of any proposed or refused changes to the identification, evaluation, educational placement or the provision of FAPE to the child. Questions and Answers on IEPs, Evaluations, and Reevaluations, Question C-9 (OSERS (2007)).

D. IEP Issues

1. The Court held that the offer of a free appropriate education (FAPE) is restricted to the written document itself and a Court should not

consider proposals or offers made by the school officials at subsequent meetings. Systema v. Academy School District No. 20 538 F.3d 1306, 50 IDELR 213 (United States Court of Appeals, 10th Circuit (2008)).

2. Placement in the Least Restrictive Environment. The IEP must include an explanation of the extent, if any, to which the child will not participate in class and extracurricular and non-academic activities with nondisabled children.
3. Prior written notice under the IDEA is required a reasonable time before the public agency proposes or refuses to initiate or change the identification, evaluation, educational placement or the provision of FAPE. This written notice requirement applies even if the agency agrees with the change being proposed by the parent at the meeting. A proposal to change the provision of FAPE requiring written notice involves a change to the type, amount or location of the special education and related services being provided the child under their IEP. Letter to Lieberman 52 IDELR 18 (United States Department of Education, Office of Special Education Programs (2008)).

If the parents and relevant members of the IEP Team cannot reach consensus on whether the behavior was a manifestation of the child's disability, the LEA must make a determination and provide the parent with prior written notice of its decision. Questions and Answers on Discipline Procedures, Question F-1 (OSERS (2009))

4. The public agency shall give the parent a copy of the IEP at no cost. The parent need not request a copy. (300.322(f))
5. Each service provider must be informed of his/her specific responsibilities related to implementing a child's IEP. The IDEA does not have specific requirements for public agencies to document that a child has been provided with a FAPE in accordance with their IEP. However, other federal regulations (Education Department General Administrative Regulations (EDGAR)) require that a state and subgrantee, such as a LEA, must keep records to show compliance with federal legal requirements for three years. A State determines the form of documentation deemed sufficient to demonstrate compliance. Letter to Brousaides 56 IDELR 108 (United States Department of Education, Office of Special Education Programs (2010)).

6. The IEP must include a description of how progress toward the IEP goals will be measured and when periodic progress reports will be provided to the parent.

Note: If the IEP Team determines that the parent will be informed of their child's progress through nonwritten means such as staff conferences or verbal reports, it would be essential for the LEA to maintain documentation of the information provided the parent.

E. Consent for Services (300.300)

1. Consent is required for the initial provision of special education.

The LEA must make reasonable efforts in seeking the informed consent from the parent before providing special education and related services. There is no override provision in the event the parent does not provide informed written consent. In such an instance, the LEA cannot be charged with a violation of failure to provide a FAPE to the student.

If no consent for services is received, the LEA is not required to convene an IEP meeting or develop an IEP for the special education and related services for which the LEA is requesting consent.

In order to meet the "reasonable effort" requirement, the LEA must document its attempts to obtain parental consent.

The Comments to the regulations clarify that "initial provision of services" means the first time a parent is offered special education and related services after the child has been evaluated and found eligible. (Page 46633 of the Federal Register)

The Comments also clarify that "fully informed" means that a parent has been given an explanation of what the special education and related services are and the types of services that might be found to be needed for their child, rather than the exact program of services that would be included in an IEP. (Page 46634 of the Federal Register)

2. Parents have the right to revoke consent for continued IEP services in their entirety for their child at any time. The revocation must be in writing and the school district must respond by providing parents with written notice acknowledging the revocation of services and

specifying when all special education and related services will be terminated. The parents' right to terminate their child's IEP services is not subject to challenge in a due process hearing. (300.300(b)(4))

Best Practice Recommendation: Although the contents of the LEA's response to the parent's revocation is not specifically addressed in the regulations, it is recommended that the notice also include notice to the parents that their child will no longer be protected by the IDEA's disciplinary provisions and that their child may be deemed covered by Section 504.

3. An agency must obtain written informed consent from the parents each time public or private insurance will be used to fund IEP services. Parents must be informed that the IEP services will be provided regardless if the parents use their insurance.

V. Discipline

A. A change of placement occurs if –

1. The removal is for more than 10 consecutive school days; or
2. The child is subjected to a series of removals that constitute a pattern because they cumulate to more than 10 school days in a school year and because of factors such as the length of each removal, the total amount of time the child is removed, the proximity of the removals to one another and whether the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals.

Best Practice Recommendation: The LEA needs to establish a process to document the number of cumulative days of suspension in a given school year. That information needs to be provided to the administrators who are responsible for disciplining students in the school.

B. Change of Placement for disciplinary reasons

1. On the date which the decision is made to make a removal that constitutes a change of placement due to a violation of the code of student conduct, the LEA must notify the parents of that decision and provide a copy of their procedural rights statement.

C. Manifestation Determination (34 CFR 300.530 (e))

1. Required if the school is considering removing the child with a disability from their educational placement for more than 10 school days in a given school year when it is deemed a change in placement or placing the student in an Interim Alternative Educational Setting.
 2. Manifestation Standard
 - a. Considerations
 1. all relevant information in the student's file
 2. relevant information supplied by the parents
 3. teacher observations of the student
 4. IEP and placement
 - b. Whether the behavior was caused by, or had a direct and substantial relationship to the disability, or was the direct result of the failure to implement the IEP.
 - c. If the parents and relevant members of the IEP Team cannot reach consensus on whether the behavior was a manifestation of the child's disability, the LEA must make a determination and provide the parent with prior written notice of its decision. Questions and Answers on Discipline Procedures, Question F-1 (OSERS (2009))
 - d. Although the IDEA does not have any specific documentation requirement under the manifestation provision, it is essential that the LEA maintain documentation of both the process and decision made.

VI. Exiting Special Education (34 CFR 300.305(e))

- A. An LEA shall reevaluate a child with a disability before determining that the child is no longer eligible for special education services. The parent is provided written notice of the reevaluation. The Team needs to document its decision that the student no longer meets the state's eligibility standards.
- B. A re-evaluation is not required due to a termination of eligibility resulting from graduation with a regular high school diploma or exceeding the State's age eligibility for FAPE. Note that graduation with a regular diploma constitutes a change of placement requiring prior written notice.

- C. When a student exits from special education as a result of earning a diploma or aging out, the LEA shall provide the student with a summary of their academic achievement and functional performance along with recommendations how to assist the student in meeting their post-secondary goals. State and local officials have the flexibility to determine the appropriate content to be included based on the student's individual needs and postsecondary goals.
Questions and Answers on Secondary Transition, Question B-2 (OSERS (2009))

VII. Notice of Procedural Safeguards (34 CFR 300.504)

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

Best Practice Recommendation: It would be deemed essential best practice to have documentation how and when the parent was provided a copy of the procedural safeguard statement.

VIII. Miscellaneous

- A. Private School Students/Service Plans
 - 1. The LEA shall consult with private school representatives and representatives of parents who place their children in private schools regarding: the child find procedures; determination of the proportionate share of Federal funds; how the consultation process will operate throughout the year; how, where and by whom special education and related services will be provided; types of services; methods of delivering services; and how and when

decisions will be made. The LEA shall get written affirmation of their participation.

The LEA must provide private school representatives with a written explanation if the LEA disagrees with the private school on the provision and types of services.

2. To the extent consistent with their number and location in the State, amounts expended by a school district in providing services must be equal to a proportional amount of Federal special education funds. The proportionate share must include both Section 611 grants (ages 3-21) and Section 619 grants (ages 3-5).

The proportionate share is based on the proportion of the number of parentally placed private school children with disabilities to the total number of children with disabilities in the district. Numbers are based on eligible private school children with disabilities not just the numbers of such children being provided services under a service plan. Evaluation costs are not considered part of the service expenditures.

3. Service plans must be developed for a private school child who receives services at a meeting with the IEP Team and representative of the private school.
4. LEAs need to maintain data on how they engaged in the consultation process, determined the pro-rated amount of Federal funds to be used to provide private school students services and how they determined what services that it would provide.
5. The LEA shall provide the SEA data on the number of children evaluated in private schools, the number of children found eligible for special education and the number of children served.

B. Confidentiality/Educational Records

1. The parents have the same rights as parents of nondisabled students under the Family Educational Rights and Privacy Act (FERPA) to access and to challenge alleged inaccurate or misleading information in their child's education record.
2. Parental consent must be obtained before personally identifiable information is released between officials in the LEA where the private school is located and officials in the LEA of the parent's residence (300.622 (a)) if a special evaluation is warranted.

C. Early Intervening Services (300.226)

1. If the LEA uses Part B funds to provide EIS, the LEA must annually report to the SEA on: the number of students serviced with EIS, the number of the students receiving EIS who subsequently received special education services during the preceding two year period.

D. State Performance Plans/Annual Performance Reports

1. The States must collect valid and reliable data from the LEAs to annually report to the Secretary and the public on the State's performance on 20 indicators under the State Performance Plan

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

