

MAKING A GOOD RECORD OF YOUR IEP MEETING

By: ELENA M. GALLEGOS

WALSH, ANDERSON,
GALLEGOS, GREEN
and TREVIÑO, P.C.

ATTORNEYS AT LAW

www.WalshAnderson.com

505 E. Huntland Drive Suite 600 Austin, TX 78752 (512) 454-6864	100 N.E. Loop 410, Suite 900 San Antonio, TX 78216 (210) 979-6633	105 Decker Court Suite 600 Irving, TX 75062 (214) 574-8800
500 Marquette Ave., N.W. Suite 1360 Albuquerque, NM 87102 (505) 243-6864	105 East 3rd St. Weslaco, TX 78596 (956) 647-5122	10375 Richmond Avenue Suite 750 Houston, TX 77042 (713) 789-6864

The IDEA requires schools to ensure parent participation in an IEP meeting. Courts have held that predetermination before the meeting or a closed mind during the meeting violates a parent's right to participate in the IEP meeting. The proposals and refusals that take place in an IEP meeting trigger the duty to provide Prior Written Notice. This presentation will address how to make a good record of your IEP meeting including through structured IEP minutes of the proposals and refusals to meet the requirements of Prior Written Notice.

1. How should we approach the development of our IEP?

We think you should have a written agenda that follows the regulatory content requirements in a logical sequence that tracks the regulations.

I. INTRODUCTION

II. STUDENT PROFILE

34 C.F.R. § 300.324(a)(1). In developing each child's IEP, the IEP Team must consider—

- (i) The strengths of the child;
- (ii) The concerns of the parents for enhancing the education of their child;
- (iii) The results of the initial or most recent evaluation of the child; and
- (iv) The academic, developmental, and functional needs of the child.

III. CONSIDERATION OF SPECIAL FACTORS

34 C.F.R. §300.324(a)(2)

- A. For children whose behavior impedes learning
- B. For children with limited English proficiency
- C. For children who are blind or visually impaired
- D. Communication needs including for children who are deaf or hard of hearing
- E. Assistive Technology needs

IV. TRANSITION SERVICES

34 C.F.R. § 300.320(B)

V. PRESENT LEVELS OF PERFORMANCE

34 C.F.R. § 300.320(a)(1)

VI. MEASURABLE ANNUAL GOALS

34 C.F.R. § 300.320(a)(2)

VII. HOW PROGRESS WILL BE MEASURED AND WHEN PERIODIC REPORTS OF PROGRESS WILL BE PROVIDED

34 C.F.R. § 300.320(a)(3)

VIII. SUPPLEMENTARY AIDS AND SERVICES (ACCOMMODATIONS/MODIFICATIONS)

34 C.F.R. § 300.320(a)(3)

IX. SPECIAL EDUCATION

34 C.F.R. § 300.320(a)(3)

X. RELATED SERVICES

34 C.F.R. § 300.320(a)(3)

XI. EXPLANATION OF EXTENT, IF ANY, TO WHICH THE STUDENT WILL NOT PARTICIPATE WITH NONDISABLED STUDENTS

34 C.F.R. § 300.320(a)(4)

XII. STATE AND DISTRICTWIDE ASSESSMENT

34 C.F.R. § 300.320(a)(5) and 34 C.F.R. § 300.320(a)(6)

XIII. PROJECTED DATE FOR BEGINNING OF SERVICES, FREQUENCY, LOCATION AND DURATION OF SERVICES

34 C.F.R. § 300.320(a)(7)

XIV. TRANSFER OF RIGHTS AT AGE OF MAJORITY

34 C.F.R. § 300.320(c)

XV. SIGNATURES AND PRIOR WRITTEN NOTICE

34 C.F.R. § 300.503

2. *Why is an agenda important?*

In *Kirby v. Cabell County Board of Education*, 46 IDELR 156 (S.D. W.Va. 2006), the school district's failure to include present levels data in the student's IEP led the court to conclude that the student's IEP was not reasonably calculated to provide FAPE. The court stated:

This deficiency goes to the heart of the IEP; the child's level of academic achievement and functional performance is the foundation on which the IEP must be built. Without a clear identification of Robert's present levels, the IEP cannot set measurable goals, evaluate the child's progress, and determine which educational and related services are needed."

In *P.C. v. Milford Exempted Village Schools*, 60 IDELR 129 (S.D. Ohio 2013), the court held that the district denied FAPE by engaging in predetermination, thus depriving the parents of meaningful participation in the process. The ALJ and state reviewing officer ruled for the school, but the district court reversed, granting summary judgment for the parents. The court held that the district predetermined placement in its reading program and failed to involve the parents in the discussion of what reading methodology would be used. The court held that the Team had decided placement "and then began to decide on what goals to pursue and which methodologies to try." The court noted that placement must be based on the IEP, and therefore, the content of the IEP should be decided before the placement discussion takes place. This decision supports the notion that schools should have an agenda and follow the agenda.

3. *Can I prepare a draft of the IEP ahead of time?*

The U.S. Department of Education cautions regarding drafts, as follows:

We do not encourage public agencies to prepare a draft IEP prior to the IEP Team meeting, particularly if doing so would inhibit a full discussion of the child's needs. However, if a public agency develops a draft IEP prior to the IEP Team meeting, the agency should make it clear to the parents at the outset of the meeting that the services proposed by the agency are preliminary

recommendations for review and discussion with the parents. The public agency also should provide the parents with a copy of its draft proposals, if the agency has developed them, prior to the IEP Team meeting so as to give the parents an opportunity to review the recommendations of the public agency prior to the IEP Team meeting, and be better able to engage in a full discussion of the proposals for the IEP. 71 Fed. Reg. 46678 (August 14, 2006).

But courts look to the facts and circumstances before determining that a draft was improper. In *Grant by Sunderlin v. Independent Sch. Dist. No. 11, Anoka-Hennepin*, 43 IDELR 219 (D. Minn. 2005), the court stated, “Neither the IDEA nor its regulations prohibit a district from coming to an IEP meeting with suggestions to facilitate the development of a proposed IEP.” The court was persuaded by the evidence that the document was a genuine draft for parent input:

Ryberg, the Student’s case manager, testified that, consistent with the school’s practice, she explained the document was a “draft” when she distributed it at the start of the meeting. During the meeting Ryberg consistently referred to the document as a draft....In [the parents’ presence], Ryberg wrote “Draft” across the top corner of each page. [The parents’] copy also includes the words “rough draft” on the second page....Based on this evidence, the Court concludes...the...document was a “draft” IEP.

4. *I know predetermination is not permissible. What is predetermination?*

In *H.B. v. Las Virgenes USD*, 48 IDELR 31 (9th Cir. 2007), the Ninth Circuit has described predetermination as a particular “intent or state of mind [of the School District] prior to and during the IEP meeting.” The court described the intent or state of mind as follows:

[P]redetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives. ...Thus, “[a] school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification.” [Citations omitted.]

...

... Although an educational agency is not required to accede to parents’ desired placement, it must maintain an open mind about placement decisions and be willing to consider a placement proposed by the parents, as well as its own proposed placement.

When the *Las Virgenes* case was remanded back to the district court to determine whether predetermination had occurred, the district court found there was predetermination and the Ninth Circuit agreed. *H.B. v. Las Virgenes USD*, 52 IDELR 163 (C.D. Cal. 2008); affirmed at 54 IDELR 73 (9th Cir. 2010). The district court’s

analysis largely hinged on statements from the assistant superintendent at the start of the meeting:

Okay, so what we'll be doing today is going through the assessment results and then we will talk about those goals and objectives. And we'll talk about how we can meet those goals and objectives, program services—that discussion—then we'll talk about a transition plan.

The court noted:

The option of keeping H.B. at the Elliott Institute was not discussed. ... It was clear to the District that H.B.'s parents desired for him to stay at the Elliott Institute. At the IEP meeting of August 20, his parents expressed their concern that the District was unable to provide H.B. with a FAPE. However, there is no evidence that H.B.'s parents' concerns were ever addressed.

5. *So when is preparation not predetermination?*

It always helps the school's case when the IEP Team makes changes to the draft or proposals at the meeting in response to the parents' input. This is perhaps the strongest evidence a school can offer to show that it has not "predetermined" the outcome. In a predetermination case the parents have the burden of proving that the school approached the IEP Team meeting with a closed mind, not even considering other ideas and possibilities. When the IEP Team adopts some parental recommendations, the parents' argument of predetermination loses steam.

In *Thompson R2-J School Dist. v. Luke P.*, 540 F.3d 1143 (10th Cir. 2008), the Tenth Circuit reversed the hearing officer and lower courts and found that the school district did confer a FAPE despite the student's lack of generalization. The Tenth Circuit described the IEP process as follows: "And while not mandating what their content should be, Congress emphasized the need for a careful and open process in the creation of IEPs..." With respect to Luke's IEP, the Court observed:

Moreover, given IDEA's emphasis on the importance of the process by which IEPs are created...the fact that the school district incorporated into the new IEP virtually every one of the substantive goals recommended by Luke's parents and their experts—many of which expressly relate to improving Luke's generalization skills—is telling...

In *K.K. v. Alta Loma School District*, 60 IDELR 159 (C.D. Cal. 2013), the court denied claims of predetermination based on evidence that the school made changes at IEP meetings and thoughtfully considered IEEs and parent input.

6. *How do we document the dynamics of an IEP meeting?*

We think the dynamics of an IEP meeting (proposals/refusals/alternative considerations) should be reflected in a combination of two important written documents: the IEP and Prior Written Notice.

7. *When is prior written notice required?*

Prior written notice must be given to a parent:

[A] Reasonable time before the public agency—

- (i) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
- (ii) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. 34 C.F.R. § 300.503(a).

Prior written notice must also be given to a parent following the parent's written revocation of consent for special education services, as follows:

If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency—

- (i) May not continue to provide special education and related services to the child, but must provide prior written notice in accordance with §300.503 before ceasing the provision of special education and related services. 34 C.F.R. §300.300(b) (4) (i).

8. *What must be included in the prior written notice?*

The prior written notice must include:

- (1) A description of the action proposed or refused by the agency;
- (2) An explanation of why the agency proposes or refuses to take the action;
- (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- (5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;
- (6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and
- (7) A description of other factors that is relevant to the agency's proposal or refusal. 34 C.F.R. § 300.503(b).

9. *Is the prior written notice given before a decision is contemplated or before a decision is acted upon?*

According to the U.S. Department of Education (USDE), in its discussion of the regulations, prior written notice must be provided a reasonable time before a decision is acted upon:

A public agency meets the requirements in §300.503 so long as the prior written notice is provided a reasonable time before the public agency implements the proposal (or refusal) described in the notice. 71 Fed. Reg. 46691.

10. *Aren't FAPE and placement what we determine in an IEP meeting?*

Yes. And for that reason, your IEP Team decisions trigger a duty to provide prior written notice.

Letter to Lieberman, 52 IDELR 18 (OSEP 2008). “Under 34 CFR § 300.17(d), FAPE means, among other things, special education and related services that are provided in conformity with an IEP that meets the requirements of §§ 300.320 through 300.324.”

11. *So how specific do we have to be regarding IEP Team actions? For example, does "provision" of FAPE refer to the type/amount/location of the services?*

Yes, it appears that FAPE encompasses the elements of the IEP. *Letter to Lieberman*, 52 IDELR 18 (OSEP 2008). “[A] proposal to revise a child's IEP, which typically involves a change to the type, amount, or location of the special education and related services being provided to a child, would trigger notice under 34 CFR § 300.503.”

12. *We always send a notice before the IEP meeting, is that the same thing?*

There are two types of notices that must be given to the parent in connection with an IEP meeting.

First, there is a notice of the IEP meeting that serves as an invitation to the meeting and is designed to ensure the parent's participation.

The notice of the meeting must contain the following elements:

- (A) The notice required under paragraph (a) (1) of this section must—
 - (i) Indicate the purpose, time, and location of the meeting and who will be in attendance; and
 - (ii) Inform the parents of the provisions in §300.321(a) (6) and (c) (relating to the participation of other individuals on the IEP Team who have knowledge or special expertise about the child), and §300.321(f) (relating to the participation of the Part C service coordinator or other representatives of the Part C system at the initial IEP Team meeting for a child previously served under Part C of the Act).

- (B) For a child with a disability beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, the notice also must—
 - (i) Indicate—
 - (1) That a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the child, in accordance with §300.320(b); and
 - (2) That the agency will invite the student; and
 - (ii) Identify any other agency that will be invited to send a representative. 34 C.F.R. §300.322(b).

Second, there is prior written notice of the decisions that are made in the meeting.

The prior written notice is not given to the parent until after the IEP Team has made its decisions. The prior written notice serves to inform the parent of the IEP Team's decisions.

U.S. Dept. of Educ. Discussion of the Federal Regulations, 71 Fed. Reg. 46691 (August 14, 2006). “Providing prior written notice in advance of meetings could suggest, in some circumstances, that the public agency’s proposal was improperly arrived at before the meeting and without parent input. Therefore, we are not changing §300.503 to require the prior written notice to be provided prior to an IEP Team meeting.”

13. *I thought we only have to provide prior written notice when the IEP Team does not reach consensus.*

The Office of Special Education Programs, U.S. Department of Education, is clear that prior written notice is not limited to non-consensus IEP meetings.

Letter to Lieberman, 52 IDELR 18 (OSEP 2008). “Nothing in the statute or regulations indicates that the notice is related to a parent's attitude toward any changes proposed or refused by the public agency.”

Letter to Lieberman, 52 IDELR 18 (OSEP 2008). “If, during an IEP meeting, the team, including the parent, agrees to a change in the, child's services, the public agency must provide written notice in accordance with 34 CFR § 300.503. Providing such notice following an IEP Team meeting where such a change is proposed -- or refused -- allows the parent time to fully consider the change and determine if he/she has additional suggestions, concerns, questions, and so forth.”

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

Letter to Lieberman, 52 IDELR 18 (OSEP 2008). “Yes. Under 34 CFR § 300.503, public agencies are required to give the parents of a child with a disability written notice, that meets the requirements of 34 CFR § 300.503(b), a reasonable time before the public

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

15. *What happens if we don't reach consensus in the IEP meeting? Can we proceed forward without the parent's agreement?*

The school district makes the final decision and then gives prior written notice. In *K.A. by F.A. and A.A. v. Fulton County Sch. Dist.*, 59 IDELR 248 (N.D. Ga. 2012), the court rejected the notion that the parent had to agree with the changes to an IEP. In this case, what was at issue was a placement change. The court explained:

Other courts have held that 20 U.S.C. § 1414(d)(3)(F) does not require the entire IEP team to agree to the change for the IEP to be validly changed. Parents play a "significant role" in the process, and "the concerns parents have for enhancing the education of their child must be considered by the team." *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 524 (2007) (internal quotations omitted), *citing Schaffer v. Weast*, 546 U.S. 49, 53 (2005). But the school is not required to obtain the parents' seal of approval to implement an IEP change. In *Rosinsky v. Green Bay Area Sch. Dist.*, 667 F. Supp. 2d 964 (E.D. Wis. 2009), the plaintiff argued that she did not consent to changes made to her child's IEP at the IEP team meeting, and thus the changes were invalid. The court disagreed, reasoning that "[t]he problem with plaintiff's assertion that she was not part of the consensus arrived by the IEP team is that IEP team consensus does not require parental agreement in order to satisfy the IDEA." *Id.* at 984, *citing Hjortness v. Neenah Joint Sch. Dist.*, 507 F.3d 1060, 1065-66 (7th Cir. 2007). In *B.B. v. State of Hawaii, Dep't of Educ.*, 483 F. Supp. 2d 1042 (D. Hawaii 2006), the court also agreed with FCSD's interpretation of 20 U.S.C. § 1414(d)(3)(F), holding that "[t]he IDEA does not explicitly vest within parents a power to veto any proposal or determination made by the school district or IEP team regarding a change in the student's placement. Rather, the IDEA requires that parents be afforded an opportunity to participate in the IEP process and requires the IEP team to consider parental suggestions." *Id.* at 1050-51, *citing McGovern v. Howard Cnty. Pub. Sch.*, No. AMD 01-527, 2001 U.S. Dist. LEXIS 13910 (D. Md. Sept. 6, 2001). The Second Circuit Court of Appeals has held that "[t]here is no requirement in the IDEA that the parties must reach consensus on all aspects of an IEP before it is valid. Rather, the proper recourse for parents who disagree with the contents of their child's IEP is to request a due process hearing, as did the parents here." *A.E. v. Westport Bd. of Educ.*, 251 Fed. Appx. 685, 687 (2d Cir.

2007) (internal citations omitted). The Eighth Circuit Court of Appeals has held that "the IDEA does not require that parental preferences be implemented, so long as the IEP is reasonably calculated to provide some educational benefit." *Bradley ex rel. Bradley v. Arkansas Dep't of Educ.*, 443 F.3d 965, 975 (8th Cir. 2006). This Court finds that K.A.'s parents were not required to consent to the amendment made to K.A.'s placement at the IEP team meetings in September and October 2010.

16. *Can we use the IEP as the prior written notice?*

U.S. Dept. of Educ. Discussion of the Federal Regulations, 71 Fed. Reg. 466691 (August 14, 2006). "There is nothing in the Act or these regulations that would prohibit a public agency from using the IEP as part of the prior written notice so long as the document(s) the parent receives meet all the requirements in §300.503."

Letter to Lieberman, 52 IDELR 18 (OSEP 2008). "Written notice required under 34 CFR § 300.503 must meet the content requirement in 34 CFR § 300.503(b). The Analysis of Comments and Changes to the regulations indicate that nothing in the IDEA or the regulations would prohibit a public agency from using the IEP as part of the prior written notice so long as the document(s) the parent receives meets all the requirements in 34 CFR § 300.503."

17. *How important is it that everything appears on the face of the IEP document?*

In *N.S. v. District of Columbia*, 54 IDELR 188 (D.C.D.C. 2010), the court held that the IEP failed to meet IDEA standards, thus reversing the decision of the hearing officer. The district acknowledged several deficiencies in the IEP, such as the absence of a statement of present levels or a description of the supplementary aids and services, but argued that these were technical defects that did not deprive the student of a FAPE. The court disagreed. The court noted that the hearing officer's decision was largely based on the testimony from the teacher about what could be provided to the student—rather than what services the IEP actually called for. The court explained the importance of the document:

Defendants contend that as long as [the school] was "willing and able" to provide N.S. with appropriate services to meet his educational needs, any errors or deficiencies in the IEP are harmless. However, the IDEA requires that a school district do more than simply provide services adequate to meet the needs of disabled students; it requires school districts to involve parents in the creation of individualized education programs tailored to address the specific needs of each disabled student.

In *R.E. ex rel. J.E. v. New York City DOE*, 112 LRP 46921 (2d Cir. 2012), *Petition for certiorari* denied on June 10, 2013, the Second Circuit resolved three separate appeals. In these three cases, parents of children with autism declined school placements offered by the DOE and placed their children into private schools then sought reimbursement

claiming the public school placement was inadequate. The Second Circuit described one of the issues on appeal as follows:

In each case, the SRO relied in part on testimony from Department personnel about the educational program the student would have received if he or she had attended public school. The parents challenge the appropriateness of relying on such testimony, which for ease of reference we refer to in shorthand as "retrospective testimony."

The Second Circuit reversed the decision below that had relied on retrospective testimony. The Court explained:

Among the legal conclusions we reach, we conclude that the use of retrospective testimony about what would have happened if a student had accepted the Department's proposed placement must be limited to testimony regarding the services described in the student's individualized educational program ("IEP"). Such testimony may not be used to materially alter a deficient written IEP by establishing that the student would have received services beyond those listed in the IEP.

18. *Can we use our minutes as the prior written notice?*

Some states discourage minutes. In states where minutes are an acceptable practice, we think that well-written minutes may provide much of the information required in a prior written notice. However, you must ensure that the document(s) the parent receives meets all the requirements of prior written notice. Therefore, we recommend that instead of drafting minutes during the meeting AND preparing a prior written notice following the meeting, you consider drafting structured minutes that satisfy the elements of prior written notice.

In *K.A. by F.A. and A.A. v. Fulton County Sch. Dist.*, 59 IDELR 248 (N.D. Ga. 2012), the court determined that the school district provided adequate prior written notice. The court observed:

Following the meetings of September 2, 2010 and October 1, 2010, K.A.'s parents received copies of the meeting minutes and additional educational records. (Radford Aff. ¶ 8.) These IEPs and educational record documents received by K.A.'s parents explain the proposed action, provide notes of the discussions that were held in the parents' presence and explain the rationale for the proposed amendment. (Id. at ¶¶ 6, 8, 9; Def.'s Br., at Exs. D & F.) The October 1, 2010 IEP and corresponding meeting minutes describe FCSD's concerns about K.A.'s placement, discuss the team's rationale, the reasons why they believed that the current IEP setting was not appropriate, and the factors that the team considered when FCSD made its recommendation for the IEP amendment. (Id. at ¶¶ 6, 8, 9; Def.'s Br., at Exs. D & F.)

19. Do you have a sample form?

The New Mexico Public Education Department, Special Education Bureau has developed a form that is designed to be completed during the IEP Team meeting and provided to the parent at the conclusion of the meeting. That form is part of the Department’s Technical Assistance Manual: Developing Quality IEPs (Revised August 2010) located at: <http://www.ped.state.nm.us/SEB/technical/DevelopingQualityIEPs.pdf>.

The form begins with a description of each evaluation procedure, assessment, record, or report the IEP Team used as a basis for the proposed (“accepted”) or refused (“rejected”) action. The proposals and refusals are documented using the following format:

All Items Proposed All Options Considered	Proposed By	Accept (√)	Reject (√)	Reason for Acceptance or Rejection (Must include a description of each evaluation procedure, assessment, record or report used as a basis for the proposed or refused action)

The U.S. Department of Education also has a sample form. *See attached.* You can also locate this form at: <http://idea.ed.gov/static/modelForms>.

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Part B PRIOR WRITTEN NOTICE

Under 34 CFR §300.503(a), the school district must give you a written notice (information received in writing), whenever the school district: (1) Proposes to begin or change the identification, evaluation, or educational placement of your child or the provision of a free appropriate public education (FAPE) to your child; or (2) Refuses to begin or change the identification, evaluation, or educational placement of your child or the provision of FAPE to your child. The required content under 34 CFR §300.503(b) is listed below in this model form. The school district must provide the notice in understandable language (34 CFR §300.503(c)).

This model form provides a format that States and/or school districts may choose to adopt to construct the form that they will use to provide that notice. The school district will need to insert the required child- and situation-specific information, and must inform parents, as part of the notice, that they have protection under the procedural safeguards of Part B of the IDEA.

PRIOR WRITTEN NOTICE UNDER PART B OF THE IDEA

- Description of the action that the school district proposes or refuses to take:

- Explanation of why the school district is proposing or refusing to take that action:

- Description of each evaluation procedure, assessment, record, or report the school district used in deciding to propose or refuse the action:

- Description of any other choices that the Individualized Education Program (IEP) Team considered and the reasons why those choices were rejected:

- Description of other reasons why the school district proposed or refused the action:

- Resources for the parents to contact for help in understanding Part B of the IDEA:

- If this notice is not an initial referral for evaluation, how the parent can obtain a copy of a description of the procedural safeguards: