

# **Special Education: An Advocate's Manual**

A Publication of  
Michigan Protection & Advocacy Service, Inc.

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Revised: October 2017

## **Mission**

The mission of Michigan Protection & Advocacy Service, Inc. (MPAS) is to advocate and protect the legal rights of people with disabilities.

## **Publications**

MPAS is the federally mandated protection and advocacy system for Michigan. MPAS receives part of its funding from the Administration on Intellectual and Developmental Disabilities, the Center for Mental Health Services-Substance Abuse and Mental Health Services Administration, the Rehabilitation Services Administration, and the Social Security Administration.

The contents of this publication are solely the responsibility of MPAS and do not necessarily represent the official views of the federal agencies listed above.

Alternative formats available upon request.

This publication is funded 100% by federal appropriations and grants.

Total copies: 250

Total cost: \$4,001.93

## **Introduction**

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School services and supports for students with disabilities is a reality today because of the commitment of parents, associations, and professionals to educational opportunity for students with disabilities. Education for students with disabilities is now required by law, but only with informed and vigilant advocacy will students with disabilities continue to be assured an education that meets their unique needs.

Special Education: An Advocate's Manual was written as a reference manual for everyone from parents entering the special education process for the first time to attorneys. It is a synthesis of federal and state special education statutes and regulations, combined with advocacy techniques and approaches.

The manual is divided into sections to help you work through the special education process logically. You will notice that it first covers essential background information -- such as definitions, contacts, and relevant laws -- and then moves to the actual process.

The text is meant to be a non-legal explanation of special education law. Actual statutes and regulations, however, are crucial to effective advocacy because the ability to point to the relevant legal language will be more persuasive than referring to a restatement of the law. The manual provides full legal citations so you can look up the laws or regulations yourself. Just take the manual to your local bar association library or other law library and ask the librarian for assistance in looking up the law or regulation you need.

This manual is not intended to answer all of your questions about special education. Many questions can only be addressed individually. MPAS provides other written information, advocacy services and referrals to assist with individual questions.

The information contained in this manual is for informational purposes only and does not constitute legal advice. Neither the information contained in the manual nor its use by a visitor creates a contract or an attorney-client relationship. Although we strive to be as accurate as possible, there is no promise or warranty as to the accuracy, completeness, adequacy, timeliness, or relevance of the information contained in the materials. If these materials contain links to websites or other resources, MPAS is not responsible for the content of those websites or resources.

## **Acknowledgments**

Special Education: An Advocate's Manual was written by Laura Petrovello and Nancy Sullivan in 1984. MPAS expresses appreciation to Charles Mange, Ph.D., Lynwood E. Beekman, Esq., Harrold Spicknall, Ph.D., Sandra McClenen, Ph.D., Lutie Papesh, M.A., and Caroline Campbell, M.A., for reviewing and commenting on the initial version. The manual was revised in 1987, 1989, 1993, 2000, 2005, 2007, 2010, 2012, 2014, 2016, and 2017.

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# **Chapter 1**

## **THE LEGAL BASIS FOR SPECIAL EDUCATION**

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### **What This Chapter Is About**

Until the 1970s, students with disabilities were often excluded from public school. Courts, Congress, and the Michigan Legislature have addressed this exclusion.

The federal and state laws that help students with disabilities attend school include the U.S. and state constitutions, the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act and the Michigan Mandatory Special Education Act. Each of these laws independently protects students with disabilities.

The Elementary and Secondary Education Act Amendments of 2001, formerly known as “No Child Left Behind,” affects students with disabilities, but does not create any rights that parents or students can enforce.

For each law, there are rules that explain what the law means. Michigan also empowers intermediate school districts to develop plans for providing services that can define how and where services are provided.

In order to understand your rights, you should know how to interpret laws and legal citations. This chapter includes a simple guide to understanding legal citations.

### **Advocacy Hints in Chapter 1**

- ◆ If your child’s rights under IDEA are affected, look to the U.S. or state constitution to get what your child needs (Page 2).
- ◆ Use the Michigan Administrative Rules for Special Education (MARSE) to learn the details about what schools must provide students in Michigan (Page 4).
- ◆ Ask why, if a school says they “cannot” or “have to” do something (Page 5).
- ◆ Contact the Parent Advisory Committee (PAC) at your local intermediate school district (ISD) to learn about the ISD plan and any requests for waivers or deviations from the state law made by your school district (Page 6).
- ◆ Use the Government Printing Office’s “GPO Access” web site to get free access to all federal laws (Page 8).
- ◆ Use the Michigan Legislature and Center for Educational Networking web sites to get free access to all state laws (Page 9).

## Constitutional Law

The United States has a long history of providing students with a public education. Students with disabilities, however, have often been excluded from the classroom and denied educational opportunities. Although the U.S. Constitution does not specifically give students a federal right to education, it does give students some protection against arbitrary or discriminatory treatment.

In the early 1970s, parents and advocates filed lawsuits to establish the right of students with disabilities to a public education. These lawsuits were important steps in obtaining legal rights to education and became part of the national trend toward including people who have disabilities in the mainstream of society.

In *Pennsylvania Association for Retarded Citizens v Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971), a federal court found that public schools must provide education and training for all students in Pennsylvania with mental retardation. The court also ordered the schools to provide notice, opportunity for hearing, and periodic reevaluation of changes in a student's educational status.

*Mills et al v Board of Education of the District of Columbia*, 348 F.Supp. 866 (D.D.C. 1972), was filed because students who had disabilities and lived in the District of Columbia were denied a public education. The court found that these students had the right to a suitable education, and ruled that each student had the right to a hearing **before** exclusion from, termination of, or placement into a special program. Detailed due process safeguards were also included in the court decree.

A similar case was also filed in Michigan. In *Harrison v State of Michigan*, 350 F. Supp. 846 (E.D. Mich. 1972), a group of parents filed a federal lawsuit alleging denials of equal protection and due process. The court noted that the parents' claims were valid but found that the recent enactment of the Michigan Mandatory Special Education Act was likely to resolve the parents' concerns more effectively.

► **Advocacy Hint: It's the Constitution.** Although constitutional claims have not been used much in recent years because of the passage of federal and state laws, the constitutional rights of students with disabilities still exist. Given that the current laws are amended often, it's a good idea to remember that there are constitutional guarantees to individual services and due process. Also, the Michigan Supreme Court has ruled that the state law gives students the enforceable right to special education supports. *Durant v. State*, 566 N.W.2d 272, 280 (Mich. 1997). Even if the federal law is weakened, students may assert their rights under state law.

## Individuals with Disabilities Education Act (IDEA)

In response to these and other federal court cases, Congress enacted Public Law 94-142, the "Education of All Handicapped Students Act of 1975." P.L. 94-142 has been amended several times, most recently in 2004. In 1990, the name of the Act was changed to the Individuals with Disabilities Education Act (IDEA). The legal citation to IDEA is **20 USC 1400 et seq.**

IDEA directs each state to provide the necessary programs and services to ensure that students with disabilities receive an appropriate education. It also provides a variety of procedures that students and their parents can use to safeguard their rights. In return, the states receive federal funds for special education.

Congress directed the United States Department of Education to issue rules to further define the meaning of IDEA. The most recent rules were issued in August 2006. The legal citation to the rules is **34 CFR Part 300**.

## **Section 504 of the Rehabilitation Act**

Section 504 of the federal Rehabilitation Act of 1973, P.L. 93-112, states that any program receiving federal funds (such as public schools) shall not discriminate against an individual solely because of his or her disability. The legal citation to Section 504 is 29 USC 794. This Act is often referred to as “Section 504” or 504.”

Section 504 requires that school districts act to find students with disabilities and to provide services and accommodations that allow the student to fully participate in district programs and activities. Virtually all special education students also qualify for accommodations, services, and protections under Section 504.

In addition to providing protection from discrimination, Section 504 is also important because the definition of a “child with a disability” is broader than it is in IDEA. Children who do not qualify for special education services under IDEA may qualify for accommodations and other assistance and protections under Section 504.

Just as with IDEA, the U.S. Department of Education has issued rules to implement Section 504 in schools. The legal citation for these rules is **34 CFR Part 104**.

## **The Americans With Disabilities Act**

The Americans with Disabilities Act (ADA) is a federal law modeled that extends the protections of Section 504 to most public and private programs. Its legal citation is **42 USC 12101 et seq.** The U.S. Department of Justice has issued rules to implement the ADA. The legal citation for these rules is **28 CFR Part 35**.

The rules issued under Title II of the ADA, which cover public schools and other government services, include the following requirements:

- ◆ Public schools must complete a self-evaluation to determine if their programs and services are accessible, including barrier-free access for persons with mobility impairments. **28 CFR 35.105(a)**.
- ◆ Public schools with more than 50 employees must also develop a “transition plan” if any buildings require structural changes to become accessible. This plan, which is available for public inspection, should list all the structural changes needed to achieve accessibility and the deadlines for completion of the changes. **28 CFR 35.150(d)**.

Public schools and other government agencies also must provide services in the “most integrated setting appropriate to the needs of qualified individuals with disabilities.” **28 CFR 35.130(d)**. This so-called “integration directive” has been upheld by the U.S. Supreme Court in *L.C. v Olmstead*, 527 U.S. 581 (1999), and there may be future implications for special education students. For example, is providing vocational or instructional services in segregated centers attended only by persons with disabilities the “most integrated setting appropriate?”

The ADA and other antidiscrimination laws have implications for students with disabilities attending private schools. Generally, private entities are covered by Title III of the ADA regardless of whether they receive federal financial assistance (as Section 504 requires). However, the ADA exempts religious schools from coverage, **42 USC 12187**. Such schools may be covered by Michigan’s Persons with Disabilities Civil Rights Act (MPDCRA) if the religious schools accept applications from the general public. **MCL 37.1303**.

## **Elementary and Secondary Education Act**

Although it does not give individual students the right to seek services from schools, the federal Elementary and Secondary Education Act (ESEA) is important to students with disabilities. ESEA requires schools to make adequate yearly progress toward proficiency standards set by the state, not only for all of its students but for specific subgroups, including students with disabilities. In addition, ESEA mandates that schools must test all students, including students with disabilities, either with a standardized state achievement test or with an alternate assessment available to a small percentage of students with the most significant challenges.

## **Michigan Mandatory Special Education Act (MMSEA)**

Michigan’s Mandatory Special Education Act (MMSEA) states that schools must provide an education designed to develop the maximum potential of every eligible student with a disability. The legal citation to the MMSEA is **MCL 380.1701 et seq.**

The State Board of Education is directed to write rules implementing this Act. These rules, usually referred to as the “Michigan Administrative Rules for Special Education (MARSE),” are found in the Michigan Administrative Code. The legal citation to these rules is **R 340.1700**.

**►Advocacy Hint: State law has more.** The Michigan law has protections for students that go beyond those in the federal law in some cases. For example, students may be eligible for special education services in Michigan from birth to age 26. Also, Michigan law addresses some issues that are not covered in the federal law, such as class size and residency. When thinking about a student’s rights, make sure to consider the protections under state law as well as federal law.

**How to choose?** Determining which law applies may be confusing. In education, federal law sets the minimum standard each state must meet to continue receiving federal money. If the state sets higher standards than the federal law, schools in the state must follow the higher standards. When state law does not meet the minimum standards of the federal law, the federal law must be

followed.

**A word about funding.** Schools receive federal, state, and local funds. Most of these funds have restrictions on their use. Although school districts must adhere to funding rules, they cannot use such rules to limit or determine the location of services in violation of IDEA's least restrictive environment provisions. **20 USC 1412(a)(5); 34 CFR 300.114.**

## **Local and District Policies**

Generally, all schools must comply with both the federal and state statutes and the rules and judicial decisions interpreting these laws. **R 340.1701.** Schools do not have authority to deviate from federal law. Under certain circumstances, however, the State Board of Education may waive a state rule, or a school may receive limited permission to deviate from part or all of a rule.

► **Advocacy Hint: When you hear “have to” or “cannot”...** Many schools and school districts have several written and unwritten policies and procedures for doing business. Sometimes school personnel assert these policies as reasons why they “have to” do something or “cannot” do something to support a student. If you hear this, ask for the basis of the statement to find out if it is grounded in the law.

## **Intermediate School District (ISD) Plans**

Michigan's school districts are served by 56 intermediate school districts (ISDs). (These are sometimes also known as educational service agencies (ESAs) or districts (ESDs). ISDs are county-level education agencies, either individual counties or two or more counties operating jointly. These districts do not, in most cases, enroll students directly, but they provide several different kinds of special education services. In addition, under state law, ISDs have critical planning and enforcement roles. Each ISD must submit a plan to the state describing how the full range of special education services in their area will be provided and describing compliance with other parts of the law, such as outreach, administrative responsibility, staff qualifications, transportation, distribution of funds, and parent advisory committee support. **R 340.1832.** Unless a local school district, public school academy, or parent advisory committee objects under **R 340.1836**, the plan may be approved and then remains in effect until the ISD submits changes or the state orders changes. **R 340.1831.**

## **Waivers**

The State Board of Education sometimes allows school districts to obtain “waivers” from one or more of the MARSE. There is a process for application and review of the waiver by the State Board of Education. Waivers allow any of those agencies to disregard a state education rule or other state regulation if the agency can meet the intent of the rule more efficiently, effectively, or economically, or if the waiver is necessary to stimulate student performance. **MCL 380.1281(3).**

## **Deviations**

A deviation from a rule is granted only on the basis of specific conditions and terms. The deviation cannot extend beyond the end of the school year. It can be approved only if it serves the best interests of the students. In addition, the deviation cannot be generalized to other situations. **R 340.1734.** Finally, the school must comply with the law until a deviation request is approved by the State Board of Education.

**► Advocacy Hint: The PAC knows.** The Parent Advisory Committee (PAC) of the ISD receives a copy of any deviation request made by that ISD or by any of the school districts within the ISD. The PAC also is one of the three organizations that can object to an ISD plan. To get more information on ISD plans, waivers, or deviations within a district or ISD, the PAC is a good place to start.

## **Understanding Citations**

To be most effective, advocates should understand how to use legal materials and quote legal references. Although using and quoting laws may appear overwhelming at first glance, they are easy to learn. When a person refers to a specific section of law, it is called "citing the law." The numbers and letters used to denote the section are called citations. Citations, abbreviated as "cites," simply tell you where, in the books in which laws are published, you can find that particular section of the law.

The State of Michigan has a law library that is open to the public. In addition, law school and university libraries usually have the needed law books, as may large public libraries. The State of Michigan's law library has several services that assist people in finding legal information, and you may contact that library at (517) 373-0630, by e-mail at [lmlawlib@michigan.gov](mailto:lmlawlib@michigan.gov), or through their web site at [http://www.michigan.gov/mde/0,4615,7-140-54504\\_50206\\_18639---,00.html](http://www.michigan.gov/mde/0,4615,7-140-54504_50206_18639---,00.html).

The state publishes a guide to commonly used legal citations in Michigan law. See [http://www.michigan.gov/documents/mde/ATJ\\_Common\\_Legal\\_Citations\\_and\\_Where\\_to\\_Find\\_Them\\_335880\\_7.pdf](http://www.michigan.gov/documents/mde/ATJ_Common_Legal_Citations_and_Where_to_Find_Them_335880_7.pdf).

## **Federal Statutes: The United States Code (USC)**

All federal statutes are called Public Laws, abbreviated as "P.L." Statutes are first introduced into Congress as bills. The first number of the public law identifies which particular Congress enacted the bill. The second number identifies the order in which the bill was enacted. The cite for IDEA is:

<b>P.L. 101- 476</b>	
<b>P.L.</b>	Public Law
<b>101</b>	101 <sup>st</sup> Congress
<b>476</b>	476 <sup>th</sup> bill enacted

P.L. 101-476 is found with other federal statutes in the United States Code (USC). After the bill is enacted, the legal citation changes from “P.L.” to a “USC” cite. The correct legal citation for P.L. 101-476 is 20 USC 1400 *et seq.* *Et seq.* means “and subsequent sections.” P.L. 101-476 is in Title 20, the education title; 1400 is the first section of P.L. 101-476.

<b>20 USC 1400 et seq.</b>	
<b>20</b>	Title 20
<b>USC</b>	United States Code
<b>1400</b>	Section 1400
<b>et seq</b>	subsequent sections

The correct legal citation for Section 504 is 29 USC 794. This means that Section 504 is in Section 794 of Title 29 of the United States Code.

### Federal Regulations: The Code of Federal Regulations (CFR)

Federal regulations are compiled in the Code of Federal Regulations (CFR). IDEA and Section 504 regulations for educational programs are found in Title 34 of the CFR. IDEA regulations begin at Section 300.1. The full citation for these regulations is **34 CFR 300.1 et seq.** Recent changes in federal regulations are reported daily in the Federal Register.

<b>34 CFR 300.1 et seq.</b>	
<b>34</b>	Title 34
<b>CFR</b>	Code of Federal Regulations
<b>300.1</b>	First Section Number
<b>et seq</b>	and subsequent sections

<b>71 Fed.Reg. 46540 (8/14/06)</b>	
<b>71</b>	Volume 71
<b>Fed. Reg.</b>	Federal Register
<b>46540</b>	First page number of entry
<b>8/14/16</b>	Date of publication

Section 504 regulations begin at Section 104.1 of Title 34. The Section 504 regulations regarding special education begin at Section 104.31. The full legal citations for these regulations are **34 CFR 104.1 et seq.** and **34 CFR 104.31 et seq.**, respectively.

► **Advocacy Hint: Find Federal law for free.** The U.S. Government Printing Office maintains web sites for all of the federal laws, including the United States Code and the Code of Federal Regulations. The web site address for the electronic Code of Federal Regulations is <http://ecfr.gov>. Selected sections of the federal law may also be found in the combined MARSE document on the Center for Educational Networking website, [www.cenmi.org](http://www.cenmi.org) (see next page).

### State Statutes: The Michigan Compiled Laws(MCL)

In Michigan when a bill is enacted, it is called a Public Act (PA), not a public law. For instance, 1976 PA 451 is cited as follows:

<b>1976 P.A. 451</b>	
<b>1976</b>	Year of the bill
<b>P.A.</b>	Public Act
<b>451</b>	451 <sup>st</sup> bill enacted

Just as federal statutes are compiled in the United States Code, Michigan Public Acts are compiled in the Michigan Compiled Laws, abbreviated as "MCL." The "School Code of 1976" begins at Section 380.1 of the MCL. The "Mandatory Special Education Act" begins at Section 380.1701 of the School Code. The full legal citation for the School Code of 1976 is MCL 380.1 *et seq.* The full legal citation for the Mandatory Special Education Act is MCL 380.1701 *et seq.*

<b>MCL 380.1701 et seq.</b>	
<b>MCL</b>	Michigan Compiled Laws
<b>380.1701</b>	First Section of law
<b>et. Seq</b>	and subsequent sections

## State Rules: The Administrative Code

PA 451 directed that rules be enacted to implement the law, and the Michigan Administrative Rules for Special Education were passed in 1979. The rules are in the Michigan Administrative Code, which has all of the rules implementing various state laws. The Michigan Administrative Rules for Special Education begin at **R 340.1701**.

► **Advocacy Hint: Find Michigan law for free.** The Michigan Legislature maintains a web site that provides free access to Michigan laws. The web site address is <http://www.legislature.mi.gov>. The Center for Educational Networking (CEN) maintains a web site for the state rules and also has information about educational resources, including a statewide directory of special education personnel. The CEN web site address is <http://www.cenmi.org>.

## Court Cases

Courts issue opinions which interpret both state and federal laws and regulations and have the force of law themselves. Court opinions are indexed by the names of the parties, the legal citation (which includes the name of the case reporting series, the volume number, and the page number), the deciding court, and the year of the decision. The citation makes these cases easy to find in any law library. For example, **Durant v State, 566 N.W.2d 272, 280 (Mich. 1997)**, is as follows:

<b><i>Durant v State, 566 N.W.2d 272, 280 (Mich. 1997)</i></b>	
<b>Durant v State</b>	The names of the parties
<b>566</b>	The volume number of the reporter (book) where the decision is found
<b>N.W.2d</b>	Case reporter (recent Michigan cases are reported in the “North West Reporter”— this is part of a series of regional case reporters which cover all state cases reported in the United States. Federal cases are reported in the Supreme Court Reports, the Federal Reporters or the Federal Supplements.)
<b>272, 280</b>	Page numbers— the first number is the beginning page, while the second number is the page at which the point of law appears (a “spot cite”)
<b>Mich.</b>	The court which decided the case (in this case, the Michigan Supreme Court)
<b>1997</b>	The year in which the case was decided

Sometimes cases are so recent that they are not yet in a case reporter, such as:

<b><i>L.C. v Olmstead, No. 98-536 (U.S. 1999)</i></b>	
<b>L.C. v Olmstead</b>	Names of the parties (names of minors or individuals under guardianship are sometimes shown only as initials.)
<b>No. 98-536</b>	The case number used by the court
<b>U.S. 1999</b>	The deciding court (in this case, the United States Supreme Court), and the year of decision

## Responsible Agencies

### Federal Agencies

The U.S. Department of Education is responsible for implementing federal laws regarding education. Under this Department, the Office of Special Education and Rehabilitative Services (OSERS) assumes responsibility for all educational and vocational services provided to people who have disabilities. Included in the Office of Special Education and Rehabilitative Services are the Office of Special Education Programs (the arm of OSERS that implements IDEA), the Rehabilitation Services Administration (RSA), and the National Institute on Disability and Rehabilitation Research. The federal Department of Education also assumes the educational and vocational responsibilities of the Office of Civil Rights (which enforces Section 504).

## **State Agencies**

The State Board of Education sets state education policy and assures that special education services are provided by local and intermediate school districts. Policy made by the Board is carried out by the Michigan Department of Education. The Department has the day-to-day responsibility for overseeing all education programs and services provided in Michigan. The special education services division of the Department has specific responsibility for all special education instruction, programs, and services.

## **Contact Information**

- ◆ If you believe the state has violated its obligations under IDEA, you may contact the U.S. Department of Education, Office of Special Education Programs (OSEP), 400 Maryland Ave., S.W., Washington, DC 20202-7100, or call (202) 245-7459.
- ◆ If you believe a school district or intermediate school district has violated IDEA, you may contact the Michigan Department of Education, Office of Special Education, 608 W. Allegan St., P.O. Box 30008, Lansing, MI 48909, or call (517) 373-0923.
- ◆ If you believe the state, school district, or intermediate school district has violated Section 504, you may contact the U.S. Office for Civil Rights, 1350 Euclid Ave, Suite 325, Cleveland, OH 44115, (216) 522-4970. You may also contact the Washington, DC, office of OCR through the OSEP address above, or call (800) 421-3481.

## **Chapter 2**

# **SPECIAL EDUCATION SERVICES AND SUPPORTS**

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### **What This Chapter Is About**

All of the laws that help students with disabilities attend public school share common themes. The intention behind these laws is to help students with disabilities overcome the historical barriers to attending school. Public schools must provide services and supports that:

- ◆ Are free of charge;
- ◆ Are designed following the proper process and take into account information from all people who know the student; and,
- ◆ Are reasonably calculated to help the student learn.

The school's duty to provide services in this way is known as a "free appropriate public education" or FAPE. This chapter will describe FAPE and the different kinds of services and supports that schools must consider when providing it.

"Special education" is available to students with disabilities who need special programs or supports to succeed in school. "Related services" include transportation and any developmental, corrective, and other supportive services required to help a student benefit from special education.

In Michigan, special education and related services are sometimes provided in "categorical" programs (based on certain types or "categories" of disability) apart from the general education program. Special education and related services must also be provided in charter schools, alternative schools, juvenile detention and juvenile justice programs, and private schools in some situations.

### **Advocacy Hints in Chapter 2**

- ◆ Assert your right to give informed written consent before the school district bills Medicaid or your private insurance for a service provided at school (Page 3).
- ◆ Make sure your child has access to the general curriculum (Page 4).
- ◆ Ask for special education services if your child needs them, even if he or she is making passing grades and moving from grade to grade (Page 4).
- ◆ Request supplementary aids and services to help meet your child's disability-related educational needs in a general classroom setting (Page 5).

- ◆ Check your ISD's waivers if your child is attending a class that has a mandatory school year that is longer than the year for general education schools (Page 8).
- ◆ Your child does not have to attend a categorical program just because he or she has a particular disability, and has the right to be with students without disabilities even when attending a categorical program (Page 11).
- ◆ If your child uses an assistive technology device, that device should be available for use at home if necessary to help your child learn (Page 13).
- ◆ Ask for specialized transportation in your child's IEP if he or she is having trouble with the school district's general transportation (Page 13).
- ◆ Ask for a functional assessment of behavior and a behavior support plan when your child needs it, not just in cases of expulsion or long-term suspension (Page 14).

Federal and state laws require schools to provide services and supports to students with disabilities. What level of service is required? This chapter answers that question and describes the range of services and supports available under the law.

## **Free Appropriate Public Education(FAPE)**

Federal law requires schools to provide a free appropriate public education and defines this as special education and related services that:

- ◆ have been provided at public expense under public supervision and direction, and without charge;
- ◆ meet the standards of the state educational agency;
  - include an appropriate preschool, elementary, or secondary school education in the state involved; and
  - are provided in conformity with the individualized education program (IEP). **34 CFR 300.17.**

### **“Free”**

“Free” means at no charge. The school must provide special education and related services, including evaluations, at no cost to parents.

May a school district bill Medicaid or private insurance for services provided in school? The answer is yes, under certain conditions. A district may not:

- ◆ require a parent to sign up for public benefits or insurance programs;
- ◆ limit services only to those covered by Medicaid or insurance;

- ◆ require parents to incur expenses such as co-payments or deductibles;
- ◆ use services in such a way that decreases lifetime benefits or takes away from services needed outside of school;
- ◆ use services in such a way that increases the parents' premiums, leads to cancellation of coverage, or makes the child ineligible for other programs; or,
- ◆ seek reimbursement without parental consent. **34 CFR 300.154(d).**

► **Advocacy Hint: Consent is written and informed.** The requirement that schools seek consent to bill Medicaid or private insurance is a new requirement added by the 2004 IDEA Amendments. "Consent" under IDEA means knowing and written consent. **34 CFR 300.9.**

A free education does not mean there will be no expense at all to parents. As with students who do not have disabilities, there are incidental fees that are normally charged during the school year, such as lab fees, field trip charges, charges for special events, plays, or football games.

#### Appropriate Education

Historically, an "appropriate" education was defined using a two-prong standard developed by the U.S. Supreme Court in Board of Education of Hendrick Hudson Central School Dist. Westchester County v. Rowley, 102 S.Ct. 3034 (1982). Under Rowley, a program was appropriate if it was:

- ◆ Designed using the IEP process; and,
- ◆ Reasonably calculated, based on the student's individual needs, to confer educational benefit.

The Supreme Court's March 2017 decision in Endrew F. v. Douglas County School District, 137 S.Ct. 988 (2017) announced a new and more demanding standard for educating students with disabilities.

The Court's unanimous decision, authored by Chief Justice Roberts, requires that:

- ◆ Schools must provide students with disabilities capable of keeping up with (or catching up to) their non-disabled peers with the special education that will enable them to meet the academic standards that apply to all children and to advance from grade to grade.
- ◆ Schools must provide the small group of students with the most significant cognitive disabilities, who are not able to meet generally applicable academic standards, with the instruction and services they need to meet ambitious and challenging goals.

The Supreme Court emphasized that schools must be held to a “markedly more demanding” standard for providing education to a child with a disability. The Court declared that the special education that schools provide to students with disabilities must be “reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” For students being educated in regular classrooms with their non-disabled peers, the special education provided must be reasonably calculated to allow the child to meet academic standards and advance from grade to grade. The Court assumed that students would be “fully integrated” in regular classrooms if they were capable of meeting academic standards and advancing from grade to grade. For children whose disabilities prevent them from being “fully integrated” in regular classrooms, the Court said, their special education must be “appropriately ambitious” and enable the child to meet “challenging objectives.”

When is a program appropriate? Here are some factors to consider:

- ◆ the program is based on a multidisciplinary evaluation, not just to determine eligibility, but to suggest suitable programs and services for the student;
- ◆ the program contains specially designed instruction to meet the unique needs of the student rather than a “one size fits all” approach;
- ◆ the program offers services that increase the student’s opportunity to benefit from education based on need rather than availability;
- ◆ the program is designed to help the student attain self-sufficiency and make progress in the general curriculum;
- ◆ the program offers meaningful benefit gauged in relation to the child’s potential;
- ◆ the program has specific goals and can be measured by meaningful criteria;
- ◆ the program is periodically reevaluated; and,
- ◆ the program is in the appropriate and least restrictive educational setting.

**►Advocacy Hint: Linked to curriculum.** IDEA now links special education to the general curriculum. Services and supports that are not designed to help students progress in the general curriculum (whether they help students in their academic achievement or their functional capabilities) may no longer be sufficient to meet the “appropriate” standard. **34 CFR 300.320(a). See Appendix 2-2**

“Appropriate” is not the best possible education, nor does it give parents the right to demand a particular school, classroom, teacher, or teaching methodology in most cases. In some situations, however, when the program chosen by the school district has not worked or obviously will not work, parents might be able to challenge the school’s choice of setting or staff as not being appropriate.

## Special Education

IDEA defines special education as:

*. . . specially designed instruction, at no cost to parents, to meet the unique needs of a student with a disability, including (i) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (ii) instruction in physical education. 34 CFR 300.39.*

In order to be eligible for special education, an IEP team must decide that a student needs services or supports to succeed in school because of a disability. If the student does not need services or supports in school, the student is not eligible for special education even though the student has a disability. For example, if a student with a physical disability does not need specially designed instruction, but fits into the available general classroom without any extra support, the student is not eligible for special education. In contrast, a student who is deaf or hard of hearing may be totally integrated into a general classroom, with the exception of one hour per week with a resource teacher. This student does need specially designed instruction - the instruction provided by the resource teacher. This student is eligible for all appropriate special education programs and services. The important point to remember is that any student who needs specially designed instruction to meet his or her unique needs is eligible for special education and related services.

**►Advocacy Hint: It's not just about grades.** Sometimes schools will tell parents that their children do not qualify for special education because they are receiving passing grades. The 2006 federal rule changes clarified that a child who is making passing grades or moving from grade to grade may still have needs that qualify him or her for special education services. **34 CFR 300.101(c); 71 Fed.Reg. 46580 (8/14/06).**

**Transition.** Special education also includes transition services to address the needs of students 16 and older. Transition services are:

*Activities . . . designed within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate movement from school to post-school activities, including post-secondary education, vocational training, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation. 34 CFR 300.43.*

**Extended school year.** Special education also includes “extended school year” (ESY) services which are provided “beyond the normal school year of the public agency.” **34 CFR 300.106(b).** Extended school year services must be provided to individual students who need them to receive a free appropriate public education. For example, if a student regresses each summer and does not recoup his skills within a reasonable time, or if he needs supports to ensure development of an emerging skill, extended school year services may be necessary to ensure an appropriate education.

The Michigan Rules currently provide extended school year services automatically to students in certain classes, such as classes for students with severe cognitive impairment or severe multiple impairments. **R 340.1738; R 340.1748.** School districts cannot unilaterally

## **Supplementary Aids and Services**

One way to provide special education is to supplement the educational program provided in a general education classroom. The extra support provided to a student in a general education program is a supplementary aid or service. IDEA defines “supplementary aids and services” as:

*. . . aids, services, and other supports that are provided in regular education classes or other education-related settings to enable students with disabilities to be educated with nondisabled students to the maximum extent appropriate. **34 CFR 300.42.***

► **Advocacy Hint: Appropriate for the student, not others.** There is sometimes confusion about what it means to integrate students with disabilities into the general education classroom “to the maximum extent appropriate.” It may be helpful to add “appropriate for the student with the disability” to the end of the statement so the intent is clear; any time away from general education must benefit the student with the disability, not necessarily the other students in the class, the teacher, or the school district. Time in a resource room is a benefit to a student with a disability because it offers additional help on academic subjects beyond the usual help the students get in the general education classroom. Likewise, time spent in speech therapy benefits the student because it increases success in communication in all aspects of general school life.

OSEP has provided a summary of the support services the courts have found to be required for specific students under the umbrella of “supplementary aids and services.”

They include:

- ◆ modification to the general class curriculum;
- ◆ assistance of a resource room teacher on a periodic basis;
- ◆ special training for the general education teacher;
- ◆ provision of note takers and instructional aides;
- ◆ computer devices and other technological aids;
- ◆ co-teaching or teacher consultant services; and,
- ◆ social work services. **OSEP Memorandum 95-9, 21 IDELR 1152 (1994).**

It may be possible that the services that help a student to be successful in general education classes can be provided in that setting as well. These are sometimes referred to as “push in” services, as opposed to “pull out” services which would be provided outside of the general education setting.

Students with disabilities must also have an equal opportunity to participate in school-related or - sponsored nonacademic and extracurricular activities, including:

- ◆ counseling services;
- ◆ athletics and recreational activities;
- ◆ transportation;
- ◆ health services;
- ◆ special interest groups or clubs sponsored by the educational agency;
- ◆ referrals to agencies that provide assistance to people with disabilities; and
- ◆ employment of students, both by the educational agency and assistance in making outside employment available. **34 CFR 300.107(b).**

IDEA requires schools to provide appropriate and necessary supplementary aids and services to allow children with disabilities to participate in these activities. **34 CFR 300.107(a).** Section 504 also states that nonacademic and extracurricular activities must be accessible to all students with disabilities, and requires that students with disabilities be permitted to participate with other students in those activities to the maximum extent appropriate. **29 USC 794.**

## Categorical Special Education Programs

Federal law directs the states to provide special education programs and services in conformity with each eligible student's IEP. Federal law, however, leaves decisions regarding the actual methods for delivery of special education and services to the state. In Michigan, the state rules state that an intermediate school district, local school district, or other agency must meet general requirements for all programs and services for students with disabilities. **R 340.1733.** Some of these are:

- ◆ **Classrooms** — The size, light, ventilation and heat in special education classrooms must be equal to that of classrooms or areas where related services are provided for students who do not have disabilities. **R 340.1733(a).**
- ◆ **Supplies and Equipment** — Special education students must be provided supplies and equipment equal to those provided for general education students. In addition, supplies and equipment necessary to implement the IEP must be provided. **R 340.1733(g).**

- ◆ **Transition Services** — Transition services must be available to special education students. Transition services must be provided in accordance with a worksite based learning plan that is signed by the parents, school, and employer. **R340.1733(i)**. The plan must identify standards of attainment, job activities, time and duration of the program, and wages to be paid the student. A staff person must be designated to visit the student's job site at least once every 30 calendar days to monitor the student's progress and assess the placement in terms of health, safety and welfare of the student.
- ◆ **Age Range of Students in the Classroom** — The rules governing age ranges are complex and governed by **R 340.1733**:
  - Special education classrooms located in separate facilities attended only by students under 16 years of age who have disabilities shall not exceed a four-year age span, except for students with severe cognitive impairments or severe multiple impairments.
  - The age range standards for special education classrooms located in general education buildings are different. When students under 16 attend special education classes in a general education building, age ranges may not exceed six years or the age span of the other students in the building, whichever is less.
  - When special education classrooms are located in high school buildings, the age range may not exceed the age range of the other students attending the school. There is an exception for general education high schools. Students with disabilities may be served in such high schools through age 26.
  - The maximum age range for classrooms for students with severe cognitive impairments or severe multiple impairments under 16 years of age is six years regardless of whether the classroom is located in a separate facility or in a general education building.
  - Special education classrooms for students with moderate or severe cognitive impairments or severe multiple impairments may exceed permissible age ranges only when there are a small number of such students, the class is part of the ISD plan, and it is necessary for feasibility and student needs.

## **Specific Requirements for Categorical Programs**

The Michigan Administrative Rules for Special Education provide requirements for certain categories of programs. The most important requirements are listed below.

### **Programs for Students with Severe Cognitive Impairment, **R 340.1738**:**

These must have at least one teacher and two aides for a maximum of 12 pupils. The maximum number of students may total 15 if an additional aide is assigned. At a minimum, a program must have one full-time teacher and one full-time aide. The school year must consist of a minimum of 230 days and 1,150 hours of instruction. Teachers are responsible for the instruction and must coordinate the activities of aides and other personnel. A

registered nurse must be available.

► **Advocacy Hint: Waivers at work.** Many ISDs have obtained waivers of the 230-day requirement while keeping the instructional hour requirement. As a result, students in these programs often attend school for fewer, but longer, days in the summer.

**Programs for Students with Moderate Cognitive Impairment, R 340.1739:**

There must be one teacher and one aide for a maximum of 15 students. There must be one lead teacher with a maximum of three aides to serve up to 30 pupils.

**Programs for Students with Mild Cognitive Impairment, R 340.1740:**

Elementary programs for students with mild cognitive impairment must serve no more than 15 different students. When an elementary program for students with mild cognitive impairment has 12 or more students in the room at one time, an aide must be assigned to the program. Secondary programs for students with mild cognitive impairment must have not more than 15 different students in the classroom at any one time, and the teacher must be responsible for the educational programming for no more than 15 different students.

**Programs for Students with Emotional Impairment (EI), R 340.1741:**

There must be no more than ten students in the class at any one time; no more than 15 students can be the responsibility of one teacher.

**Programs for Students who are Deaf or Hard of Hearing (HI), R 340.1742:**

A special class with one teacher must have no more than seven students in the class. Group amplification devices deemed necessary by the IEPT must be provided. The school must ensure that the devices work properly.

**Programs for Students with Visual Impairment (VI), R 340.1743:**

Class size must be determined on the basis of severity of disability. In no case may a teacher serve more than eight students in one class, or have responsibility for the educational programming for more than ten students. Low vision aids, excluding prescription eyeglasses, must be available and functioning properly.

**Programs for Students with Physical/Other Health Impairments, R 340.1744:**

Programs for the physically and otherwise health impaired must not have more than ten students in the classroom at any one time, and the teacher must be responsible for the educational programming for no more than 15 different students.

**Programs for Students with Speech/Language Impairments (SLI), R 340.1745:**

The extent of instructional services must be based on the student's individual needs as determined by the IEPT. Size and composition of groups are determined by the service provider, in conjunction with the district director of special education and the building principal. They must take the severity and multiplicity of the disabilities of the students into account to allow adequate time for all of the following: diagnostics, report writing, consulting with parents and teachers, IEPT meetings, and travel. In no case may the individual provider's caseload exceed 60 pupils. An authorized provider is a teacher of SLI or a person otherwise credentialed under **R 340.1792**.

**Homebound and Hospitalized (HH) Programs, R 340.1746:**

Homebound services must be initiated WITHIN 15 SCHOOL DAYS after verification of a medical disability that requires a student to remain at home. Hospital services for a student who cannot attend school for a physical or medical disability must be initiated when it is determined that it is medically feasible to do so. A teacher providing home or hospital instruction must be responsible for no more than 12 pupils at any one time. Students must receive a **MINIMUM** of two nonconsecutive hours of instruction per week. Therapists may supplement but not substitute for a teacher's time. To the extent possible, the homebound/hospitalized program must have the same curriculum content as the program the student regularly attends.

**Programs for Students with Learning Disabilities, R 340.1747:**

There must not be more than ten students in the classroom at any one time, and the teacher must not be responsible for the educational programming of more than 15 different students.

**Programs for Students with Severe Multiple Impairments (SXI), R 340.1748:**

One full-time teacher and two aides are required for a maximum of nine pupils. At least one teacher and one full time aide must be employed by every program. The school year must be AT LEAST 230 SCHOOL DAYS and 1,150 INSTRUCTIONAL HOURS. A registered nurse must be reasonably available.

**Resource Programs, R 340.1749a(2)(a)(b), R 340.1749b(2)(a)(b):**

Resource Programs may not serve more than 10 students at a time and not more than 18 (elementary) or 20 (secondary) different students. The resource room teacher may either provide direct instruction to the students on their caseload, or provide support to the general education classroom teachers serving the students on the resource room teacher's caseload.

If the special education teacher (resource room teacher) to whom the student is assigned does not have an endorsement in the area which matches the student's disability, the IEPT shall determine if a teacher consultant with such credentials is needed to provide consultation, resources, and support services to the resource teacher. **R 340.1749a(5); R 340.1749b(4)**.

**Early Childhood Special Education Programs, R 340.1754:**

An early childhood special education program with an approved teacher may be provided for students from-birth through five years of age as specified by the IEP Team. The program must be available for a minimum of 360 clock hours and 144 days of instruction. The program must not have more than 12 students for one teacher and 1 aide at any one time and the teacher must not be responsible for the educational programming of more than 24 different students. Early

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childhood special education programs must also have a parent education component.

### **Early Childhood Special Education Services, R 340.1755:**

Non-classroom services must be provided at a minimum of two hours per week, for no less than 72 clock hours within 180 school days. Services may be provided in a school or a home setting by a teacher or related services provider. The program shall include a parent participation and education component.

### **Programs for Students with Severe Language Impairments, R 340.1756:**

This program serves only young children with disabilities or developmental delay, or elementary students who are determined to have a severe disability in the comprehension or expression of language. The program must not have more than 10 students at one time, and the teacher must be responsible for the education programming for no more than 15 different students.

### **Programs for Students with Autism Spectrum Disorder, R 340.1758:**

Specific requirements for programs for students with autism shall be met using either of the following alternatives:

- ◆ Programs that consist of one classroom program for students with autism. These programs shall have no more than five students and shall be served by a teacher of students with autism spectrum disorder. Programs that have more than one classroom may have more than five students in a room, if the average student-to-teacher-and-aide ratio does not exceed five students to one teacher and one aide. A classroom with three or more students shall have one aide.
- ◆ Programs described in the intermediate school district plan and approved by the State Board of Education as assuring the provision of educational programming for students with autism spectrum disorder.

**►Advocacy Hint: A person is not a label.** A student does not have to attend a program which corresponds to his or her qualifying disability. For example, a student who is eligible under the learning disability category is not limited to attending school in a learning disabled program.

## **Related Services**

Under federal law “related services” are available to every student who has a disability and is eligible for special education. Related services include transportation and any developmental, corrective, and other supportive service that may be required to help a student benefit from special education.

Federal law lists some of the specific related services that a student may receive, including:

- ◆ audiology;
- ◆ counseling services;
- ◆ early identification and assessment;

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- ◆ interpreting services;
- ◆ medical services for evaluation purposes;
- ◆ occupational therapy;
- ◆ orientation and mobility;
- ◆ parent counseling and training;
- ◆ physical therapy;
- ◆ psychological services;
- ◆ recreation;
- ◆ rehabilitation counseling;
- ◆ school health and school nurse services;
- ◆ social work;
- ◆ speech and language therapy; and
- ◆ transportation. **34 CFR 300.34.**

This list is not exhaustive and does not include all the services that may be necessary. If the student requires a service in order to benefit from special education, that service must be provided even though it is not specifically mentioned in IDEA. A list of related services is in an Appendix at the end of this chapter.

Although related services do not usually include physician services, they do include such services provided to determine a child's medically related disability that results in the child's need for special education and related services. **34 CFR 300.34(c)(5).** Related services include many important and useful services. The key to eligibility for a specific related service is that the IEP Team must determine that the service is necessary to allow the student to benefit from special education. For example, an emotionally impaired student might not be able to concentrate on studies without the benefit of counseling to help resolve problems and control inappropriate behavior. Counseling, then, is a related service that *must* be offered to that student.

## **Assistive Technology Devices and Services**

Schools must provide the assistive technology devices and services necessary to improve the functional capabilities of students with disabilities and ensure that students benefit from their education. These devices and services can be considered special education, related services, or supplementary aids and services to students placed in general classrooms. **34 CFR 300.105(a).**

According to Federal law, an "assistive technology device" is any item, piece of equipment or product system whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. **34 CFR 300.5.** Assistive technology devices are those items such as computers or wheelchairs, which are used to improve the functions of the student affected by the disability.

### **300.6.**

An “assistive technology service” means any service that directly assists an individual with a disability in the selection, acquisition, or use of an assistive technology device. This includes:

- ◆ evaluation and functional evaluation in the individual’s customary environment;
- ◆ purchasing, leasing, or otherwise providing for the acquisition of devices;
- ◆ selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, and replacing the devices;
- ◆ coordinating and using other therapies, interventions, or services with the technology devices such as those associated with existing education and rehabilitation plans and programs;
- ◆ training or technical assistance for a student with a disability, or if appropriate, the family of an individual with a disability; and
- ◆ training or technical assistance for professionals including individuals providing education and rehabilitation services, employers, or other individuals who provide services to employ, or are otherwise substantially involved in the major life functions of individuals with disabilities. **34 CFR 300.6.**

At the very least, at the request of the parents or school staff, schools must provide an evaluation to see if the student requires assistive technology. The need for assistive technology devices and services is determined for each student at the student’s IEP team meeting. If the team determines that the student is in need of assistive technology or services as special education or a related service, a statement of the nature and amount should be included in the IEP.

**►Advocacy Hint: What about homework?** If a student’s IEP team determines that home use of a device is necessary to provide FAPE for the student, the student must be allowed to use the device at home. **34 CFR 300.105(b).**

## **Physical Education**

IDEA regulations state that “each student with a disability must be afforded the opportunity to participate in the regular physical education program available to other students unless:

- ◆ the student is enrolled full-time in a separate facility; or
- ◆ the student needs specially designed physical education as prescribed in the student’s individualized education program.” **34 CFR 300.108(b).**

If a student needs specially designed physical education, and it is prescribed as part of the student’s educational program, the agency responsible for the student’s education must provide those services directly or make arrangements to provide them through other agencies. **34 CFR 300.108(c).**

## Transportation

General transportation is available to all students, including special education students, who qualify as determined by local school board policy. If general transportation meets the needs of a student with a disability, it is not a related service in the student's IEP.

Specialized transportation, defined as travel to and from school and specialized equipment (such as special or adapted buses, lifts, and ramps), is a related service. **34 CFR 300.34(c)(16)**. Specialized transportation must be provided to special education students at no charge if identified in the IEP.

Each intermediate school district must coordinate or provide for additional or specialized services as determined by IEP specifications. The plan for providing services must be included in each ISD's plan for delivery of special education programs and services. **R 340.1832(i)**.

► **Advocacy Hint: Ask for specialized transportation.** If your child's disability makes it difficult to ride the general transportation school bus, ask that specialized transportation be written into the IEP as a related service.

## Behavior Planning and Supports

Related services include evaluations and services necessary to provide behavior supports required to help students with disabilities benefit from special education. For example, the definition of "psychological services" includes "assisting in developing positive behavioral intervention strategies." **34 CFR 300.34(c)(10)(vi)**. The definition of "social work services in schools" includes the same service. **34 CFR 300.34(c)(14)(v)**. Finally, the list of services in the Federal rules is not exhaustive, and the Office of Special Education Programs noted in the comments to the new rules that behavior support planning and services is not limited just to work performed by psychologists or school social workers. **71 Fed.Reg. 46569 (8/14/06)**.

► **Advocacy Hint: Behavior support when needed.** Some schools mistakenly deny a parent's request for a functional assessment of behavior or a behavior support plan in situations where a student has not been out of school for 10 days or more. The Federal rules and their interpretation clarify that behavior support planning and services are related services that can be the subject of evaluations and can be included in IEPs as related services.

## **Services and Supports in Charter Schools**

Charter schools are public schools. Each charter school has all the responsibilities and functions of a school district. Students in charter schools have the same rights under IDEA and Michigan special education law as do students in other public schools. The charter schools have Student/Child-Find responsibilities, must evaluate students, hold IEP team meetings, and develop and implement IEPs for their students. They must provide special education and related services, including behavior supports, and may suspend and expel special education students only in the ways prescribed in IDEA and the Michigan Administrative Rules for Special Education.

They must also provide due process hearings when requested by parents and are accountable through the complaint and monitoring processes.

## **Services and Supports in Alternative Schools**

Alternative education programs are usually provided by school districts or by a group of districts to serve general education high school students (very occasionally middle school age students) who have behavioral or other issues that appear to preclude the students from remaining in the general education setting. Some alternative schools are set up and monitored by family courts. Some are even set up as charter schools.

Most of the students in these programs are at high risk for dropping out of school. They may also serve students who have been suspended, or in some cases, expelled from the general education setting. Classes are usually small and often have a significant behavior support component. Students may return to the general education setting after some specific accomplishment or may finish out their high school years in the alternative education programs.

The majority of teachers in alternative education programs are general education teachers. Few alternative programs have certified special education teachers.

Occasionally a decision will be made by the general education administration, based on issues not related to the student's disability, to place an eligible special education student in an alternative education setting. When this occurs, the student retains all special education rights, and special education services on the student's IEP continue to be provided. This includes specialized instruction, related services including behavioral services, and consultative services. In 1993, the Office for Civil Rights investigated the Comstock Park (MI) Public School and determined that the

alternative school did not offer special education services to students with disabilities, thereby denying these individuals a FAPE in violation of Section 504 at **34 CFR 104.33(a) and (b)**, and **34 CFR 104.35**.

## **Special Education in Juvenile Justice Facilities**

Special education students who are held in a juvenile detention facility are also entitled to FAPE. Students who enter the juvenile justice system must begin receiving educational programming within 5 calendar days of admission. If the student who is admitted is suspected of having a disability, the procedures that are outlined elsewhere in this manual for evaluating and identifying students as special education eligible must be followed.

Within 5 days of admission to the facility, the superintendent of the student's district of residence must be notified of the educational placement of the student. Education reports must be sent by certified mail to the superintendent of the district of residence by certified mail, with parent consent, within 5 days from the date of release from the facility. **R 340.1757**.

Additionally, Michigan Rehabilitation Services has an obligation to assist older students with disabilities who will be transitioning from the juvenile justice facility back into the community, by helping prepare a plan for discharge which may include job preparation, further education, and/or the coordination of agencies that will be involved with the student upon discharge.

## **Services and Supports in Nonpublic Schools**

IDEA now has extensive provisions regarding the role of public schools in providing special education and related services to private school students. In general, the private school student's rights depend on whether the student was placed there by his or her parents for personal reasons or whether the student was placed at the private school in order to receive a free appropriate public education.

Under IDEA, there are three ways a student can end up in private school seeking special education services.

First, the parents can simply choose the private school for their own reasons, without challenging the appropriateness of the public school's program. This is sometimes called a unilateral parental placement, and the student's rights in such a situation are very limited. Such a student does not have a legally enforceable right to a FAPE or the services to which he or she would be entitled if enrolled in public school. **34 CFR 300.137(a)**. Instead, the public school system must determine the percentage of students enrolled in private school and devote a similar percentage of services to these students in general, and not as a result of the individual needs of specific students. **34 CFR 300.133**.

Second, the IEP team can decide that the student requires a private school placement to provide all or part of a free appropriate public education. For example, an IEPT can decide that a preschool student needs extensive interaction with non-disabled peers and place the student part-time in a private preschool at the school's expense, since the public school does not operate a general education preschool program. If the student is placed or referred to private school by the public school, then the student is entitled to a FAPE and has all the rights a public school student has. **34 CFR 300.146**.

Third, the parents may choose to place the student in private school not for personal reasons, but because the parents feel that the public school is not offering a FAPE and/or a program in the

## **Michigan Protection & Advocacy Service, Inc.**

least restrictive environment. In such a case, IDEA places upon the parents the duty to first provide the public school with notice of the intent to place the student in private school, either by raising their concerns and intent at the most recent IEP meeting or by providing written notice of their intent to place the student in private school at least ten business days prior to removing the student from public school. If the parents do not provide this notice, they may later lose their right to tuition reimbursement if a hearing officer or court finds that the public school failed to offer a FAPE in the LRE. **34 CFR 300.148(c)**. If the parents do provide the required notice, initiate a hearing, and prove the public school's failure to offer a FAPE, the parents are entitled to reimbursement of tuition and associated costs of the private school placement. **34 CFR 300.148(b)**.

Sometimes, a student will already be attending private schools. The parents may choose to place the student in private school not for personal reasons, but because the parents feel that the public school is not offering a FAPE and/or a program in the least restrictive environment. In such a case, IDEA places upon the parents the duty to first provide the public school with notice of the intent to place the student in private school, either by raising their concerns and intent at the most recent IEP meeting or by providing written notice of their intent to place the student in private school at least ten business days prior to removing the student from public school. If the parents do not provide this notice, they may later lose their right to tuition reimbursement if a hearing officer or court finds that the public school at the time the parents or teacher believe the student may have a disability. In this case, the parents or the school may contact the public school district in which the parents live to have the student evaluated. **34 CFR 300.131**.

## **Services and Supports in Home Schools**

In Michigan, home schools can either be registered or non-registered. The Nonpublic School Act, PA 302 of 1921, permits the Superintendent of Public Instruction to inquire into the records of enrollment, teacher qualifications, and course of study of a registered nonpublic (home) school, usually by requiring that the parents complete a Nonpublic School Membership Report.

Registered home schools are treated under the law as private or other non-public schools and are entitled to all the benefits of these schools. Students in non-registered home schools, usually called Exemption "F" schools, **MCL 380.1561(3)(f)**, are not entitled to services, but may attend non-core courses in the public school.

## Appendix 2-1

### IDEA Related Services – 34 CFR 300.34.

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

**(b) Individual related services terms defined.** The terms used in this definition are defined as follows:

**(1) Audiology** includes —

- Identification of children with hearing loss;
- Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;
- Provision of rehabilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;
- Creation and administration of programs for prevention of hearing loss;
- Counseling and guidance of children, parents, and teachers regarding hearing loss; and
- Determination of children's needs for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

**(2) Counseling services** —

- Means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

**(3) Early identification and assessment of disabilities in children** —

- Means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

**(4) Interpreting services** includes —

- The following, when used with respect to children who are deaf or hard of hearing: Oral transliteration services, cued language transliteration services, sign language transliteration and interpreting services, and transcription services, such as communication access real-time translation (CART), C-Print, and TypeWell; and
- Special interpreting services for children who are deaf-blind.

**(5) Medical services** —

- Means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

**(6) Occupational therapy —**

- Means services provided by a qualified occupational therapist; and
- Includes —
  - A. Improving, developing, or restoring functions impaired or lost through illness, injury, or deprivation;
  - B. Improving ability to perform tasks for independent functioning if functions are impaired or lost; and
  - C. Preventing, through early intervention, initial or further impairment or loss of function.

**(7) Orientation and mobility services —**

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

**(8) Parent counseling and training —**

- Means assisting parents in understanding the special needs of their child;
- Providing parents with information about child development; and
- Helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP.

**(9) Physical therapy —**

- Means services provided by a qualified physical therapist.

**(10) Psychological services include —**

- Administering psychological and educational tests, and other assessment procedures;
- Interpreting assessment results;
- Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning;
- Consulting with other staff members in planning school programs to meet the special educational needs of children as indicated by psychological tests, interviews, direct observation, and behavioral evaluations;
- Planning and managing a program of psychological services, including psychological counseling for children and parents; and
- Assisting in developing positive behavioral intervention strategies.

**(11) Recreation** includes —

- Assessment of leisure function;
- Therapeutic recreation services;
- Recreation programs in schools and community agencies; and
- Leisure education.

**(12) Rehabilitation counseling services** —

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

**(13) School health services and school nurse services** —

- Means health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person.

**(14) Social work services in schools** includes —

- Preparing a social or developmental history on a child with a disability;
- Group and individual counseling with the child and family;
- Working in partnership with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school;
- Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and
- Assisting in developing positive behavioral intervention strategies.

**(15) Speech-language pathology services** includes —

- Identification of children with speech or language impairments;
- Diagnosis and appraisal of specific speech or language impairments;
- Referral for medical or other professional attention necessary for the habilitation of speech or language impairments;
- Provision of speech and language services for the habilitation or prevention of communicative impairments; and
- Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

**(16) Transportation** includes —

- Travel to and from school and between schools;
- Travel in and around school buildings; and
- Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

## **Appendix 2-2**

**UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES**

November 16, 2015

Dear Colleague:

Ensuring that all children, including children with disabilities, are held to rigorous academic standards and high expectations is a shared responsibility for all of us. To help make certain that children with disabilities are held to high expectations and have meaningful access to a State's academic content standards, we write to clarify that an individualized education program (IEP) for an eligible child with a disability under the Individuals with Disabilities Education Act (IDEA) must be aligned with the State's academic content standards for the grade in which the child is enrolled.<sup>1</sup> Research has demonstrated that children with disabilities who struggle in reading and mathematics can successfully learn grade-level content and make significant academic progress when appropriate instruction, services, and supports are provided.<sup>2</sup> Conversely, low expectations can lead to children with disabilities receiving less challenging instruction that reflects below grade-level content standards, and thereby not learning what they need to succeed at the grade in which they are enrolled.

The cornerstone of the IDEA is the entitlement of each eligible child with a disability to a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet the child's unique needs and that prepare the child for further education, employment, and independent living. 20 U.S.C. §1400(d)(1)(A). Under the IDEA, the primary vehicle for providing FAPE is through an appropriately developed IEP that is based on the individual needs of the child. An IEP must take into account a child's present levels of academic achievement and functional performance, and the impact of that child's disability on his or her involvement and progress in the general education curriculum. IEP goals must be aligned with grade-level content standards for all children with disabilities. The State, however, as discussed

<sup>1</sup>The Department has determined that this document is a "significant guidance document" under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007), available at [www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507\\_good\\_guidance.pdf](http://www.whitehouse.gov/sites/default/files/omb/fedreg/2007/012507_good_guidance.pdf). The purpose of this guidance is to provide State and local educational agencies (LEAs) with information to assist them in meeting their obligations under the IDEA and its implementing regulations in developing IEPs for children with disabilities. This guidance does not impose any requirements beyond those required under applicable law and regulations. It does not create or confer any rights for or on any person. If you are interested in commenting on this guidance or if you have further questions that are not answered here, please e-mail [iepgoals@ed.gov](mailto:iepgoals@ed.gov) or write to us at the following address: U.S. Department of Education, Office of Special Education and Rehabilitative Services, 550 12th Street SW., PCP Room 5139, Washington, DC 20202-2600.

<sup>2</sup>For a discussion of this research see *Improving the Academic Achievement of the Disadvantaged: Assistance to States for the Education of Children With Disabilities*, Final Rule, 80 Fed. Reg. 50773, 50776 (Aug. 21, 2015).

on page five, is permitted to define alternate academic achievement standards for children with the most significant cognitive disabilities.<sup>3</sup>

**Application of Provisions in the Elementary and Secondary Education Act of 1965 to Children with Disabilities**

Since 2001, the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the No Child Left Behind Act of 2001 (NCLB), has required each State to apply the same challenging academic content and achievement standards to all schools and all children in the State, which includes children with disabilities. 20 U.S.C. §6311(b)(1)(B). The U.S. Department of Education (Department), in its regulations implementing Title I of the ESEA, has clarified that these standards are grade-level standards. 34 CFR §200.1(a)-(c). To assist children with disabilities in meeting these grade-level academic content standards, many States have adopted and implemented procedures for developing standards-based IEPs that include IEP goals that reflect the State's challenging academic content standards that apply to all children in the State.

**Interpretation of "General Education Curriculum"**

Under the IDEA, in order to make FAPE available to each eligible child with a disability, the child's IEP must be designed to enable the child to be involved in and make progress in the general education curriculum. 20 U.S.C. §1414(d)(1)(A). The term "general education curriculum" is not specifically defined in the IDEA. The Department's regulations implementing Part B of the IDEA, however, state that the general education curriculum is "the same curriculum as for nondisabled children." 34 CFR §300.320(a)(1)(i). In addition, the IDEA Part B regulations define the term "specially designed instruction," the critical element in the definition of "special education," as "adapting, as appropriate to the needs of an eligible child, the content, methodology, or delivery of instruction to address the unique needs of the child that result from the child's disability and to ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children." 34 CFR §300.39(b)(3) (emphasis added). Otherwise, the IDEA regulations do not specifically address the connection between the general education curriculum and a State's academic content standards.

<sup>3</sup> In accordance with 34 CFR §200.1(d), for children with the most significant cognitive disabilities who take an alternate assessment, a State may define alternate academic achievement standards provided those standards are aligned with the State's academic content standards; promote access to the general curriculum; and reflect professional judgment of the highest achievement standards possible. See also 34 CFR §300.160(c)(2)(i).

## Analysis

The Department interprets “the same curriculum as for nondisabled children” to be the curriculum that is based on a State’s academic content standards for the grade in which a child is enrolled. This interpretation, which we think is the most appropriate reading of the applicable regulatory language, will help to ensure that an IEP for a child with a disability, regardless of the nature or severity of the disability, is designed to give the child access to the general education curriculum based on a State’s academic content standards for the grade in which the child is enrolled, and includes instruction and supports that will prepare the child for success in college and careers. This interpretation also appropriately harmonizes the concept in the IDEA regulations of “general education curriculum (i.e., the same curriculum as for nondisabled children),” with the ESEA statutory and regulatory requirement that the same academic content standards must apply to all public schools and children in the State, which includes children with disabilities.

The IDEA statutory and regulatory provisions discussed above, the legislative history of the IDEA, and clarification the Department has provided on the alignment of the IEP with a State’s content standards in the Analysis of Comments and Changes to the 2006 IDEA Part B regulations also support this interpretation. When it last reauthorized the IDEA in 2004, Congress continued to emphasize, consistent with the provisions in the ESEA, the importance of “having high expectations for [children with disabilities] and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible.” 20 U.S.C. §1400(c)(5)(A). The Senate Report accompanying the 2004 reauthorization of the IDEA also explained that “[f]or most children with disabilities, many of their IEP goals would likely conform to State and district wide academic content standards and progress indicators consistent with standards based reform within education and the new requirements of NCLB.” S. Rep. No. 108-185, 105th Cong., 1st Sess. 29 (Nov. 3, 2003).

The Analysis of Comments and Changes accompanying the 2006 IDEA Part B regulations also included important discussion that further clarifies the alignment of an IEP with a State’s academic content standards under the ESEA, explaining: “section 300.320(a)(1)(i) clarifies that the general education curriculum means the same curriculum as all other children. Therefore, an IEP that focuses on ensuring that the child is involved in the general education curriculum will necessarily be aligned with the State’s content standards.”<sup>4</sup>

<sup>4</sup> See Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, Final Rule, 71 Fed. Reg. 46540, 46662 (Aug. 14, 2006); see also 71 Fed. Reg. 46579.

The Department's interpretation of the regulatory language "general education curriculum (i.e., the same curriculum as for nondisabled children)" to mean the curriculum that is based on the State's academic content standards for the grade in which a child is enrolled is reasonable. This interpretation is also necessary to enable IDEA and ESEA requirements to be read together so that children with disabilities receive high-quality instruction that will give them the opportunity to meet the State's challenging academic achievement standards and prepare them for college, careers and independence. Therefore, in order to make FAPE available to each eligible child with a disability, the special education and related services, supplementary aids and services, and other supports in the child's IEP must be designed to enable the child to advance appropriately toward attaining his or her annual IEP goals and to be involved in, and make progress in, the general education curriculum based on the State's academic content standards for the grade in which the child is enrolled.

### Implementation of the Interpretation

Based on the interpretation of "general education curriculum" set forth in this letter, we expect annual IEP goals to be aligned with State academic content standards for the grade in which a child is enrolled. This alignment, however, must guide but not replace the individualized decision-making required in the IEP process.<sup>5</sup> In fact, the IDEA's focus on the individual needs of each child with a disability is an essential consideration when IEP Teams are writing annual goals that are aligned with State academic content standards for the grade in which a child is enrolled so that the child can advance appropriately toward attaining those goals during the annual period covered by the IEP. In developing an IEP, the IEP Team must consider how a child's specific disability impacts his or her ability to advance appropriately toward attaining his or her annual goals that are aligned with applicable State content standards during the period covered by the IEP. For example, the child's IEP Team may consider the special education instruction that has been provided to the child, the child's previous rate of academic growth, and whether the child is on track to achieve grade-level proficiency within the year.

<sup>5</sup>The IEP must include, among other required content: (1) a statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum; (2) a statement of measurable annual goals, including academic and functional goals, designed to meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and (3) the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals, and to be involved in and make progress in the general education curriculum in accordance with the child's present levels of performance. 34 CFR §300.320(a).

The Department recognizes that there is a very small number of children with the most significant cognitive disabilities whose performance must be measured against alternate academic achievement standards, as permitted in 34 CFR §200.1(d) and §300.160(c). As explained in prior guidance,<sup>6</sup> alternate academic achievement standards must be aligned with the State's grade-level content standards. The standards must be clearly related to grade-level content, although they may be restricted in scope or complexity or take the form of introductory or pre-requisite skills. This letter is not intended to limit a State's ability to continue to measure the achievement of the small number of children with the most significant cognitive disabilities against alternate academic achievement standards, but rather to ensure that annual IEP goals for these children reflect high expectations and are based on the State's content standards for the grade in which a child is enrolled.

In a case where a child's present levels of academic performance are significantly below the grade in which the child is enrolled, in order to align the IEP with grade-level content standards, the IEP Team should estimate the growth toward the State academic content standards for the grade in which the child is enrolled that the child is expected to achieve in the year covered by the IEP. In a situation where a child is performing significantly below the level of the grade in which the child is enrolled, an IEP Team should determine annual goals that are ambitious but achievable. In other words, the annual goals need not necessarily result in the child's reaching grade-level within the year covered by the IEP, but the goals should be sufficiently ambitious to help close the gap. The IEP must also include the specialized instruction to address the unique needs of the child that result from the child's disability necessary to ensure access of the child to the general curriculum, so that the child can meet the State academic content standards that apply to all children in the State.

#### An Example of Implementation

We provide an example of how an IEP Team could apply the interpretation of "general education curriculum" set forth in this letter. For example, after reviewing recent evaluation data for a sixth grade child with a specific learning disability, the IEP Team determines that the child is reading four grade levels below his current grade; however, his listening comprehension is on grade level. The child's general education teacher and special education teacher also note that when materials are read aloud to the child he is able to understand grade-level content. Based on these present levels of performance and the child's individual strengths and weaknesses, the IEP

<sup>6</sup>See U.S. Department of Education Non-regulatory guidance: Alternate achievement standards for students with the most significant cognitive disabilities August 2005 available at: <https://www2.ed.gov/policy/elsec/guid/altguidance.pdf>

Team determines he should receive specialized instruction to improve his reading fluency. Based on the child's rate of growth during the previous school year, the IEP Team estimates that with appropriate specialized instruction the child could achieve an increase of at least 1.5 grade levels in reading fluency. To ensure the child can learn material based on sixth grade content standards (e.g., science and history content), the IEP Team determines the child should receive modifications for all grade-level reading assignments. His reading assignments would be based on sixth grade content but would be shortened to assist with reading fatigue resulting from his disability. In addition, he would be provided with audio text books and electronic versions of longer reading assignments that he can access through synthetic speech. With this specialized instruction and these support services, the IEP would be designed to enable the child to be involved and make progress in the general education curriculum based on the State's sixth grade content standards, while still addressing the child's needs based on the child's present levels of performance.<sup>7</sup> This example is provided to show one possible way that an IEP could be designed to enable a child with a disability who is performing significantly below grade level to receive the specialized instruction and support services the child needs to reach the content standards for the grade in which the child is enrolled during the period covered by the IEP.<sup>8</sup> We caution, though that, because the ways in which a child's disability affects his or her involvement and progress in the general education curriculum are highly individualized and fact-specific, the instruction and supports that might enable one child to achieve at grade-level may not necessarily be appropriate for another child with the same disability.

### Summary

In sum, consistent with the interpretation of "general education curriculum (i.e., the same curriculum as for nondisabled children)" based on the State's academic content standards for the

<sup>7</sup>For information on developing, reviewing, or revising the IEP for a child with limited English proficiency, see: *Questions and Answers Regarding Inclusion of English Learners with Disabilities in English Language Proficiency Assessments and Title III Annual Measurable Achievement Objectives*

<https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/q-and-a-on-elp-swd.pdf>.

<sup>8</sup>While the Department does not mandate or endorse specific products or services, we are aware that many States have issued guidance addressing standards-based IEPs. For example see Minnesota Department of Education, *Developing Standards-Based IEP Goals and Objectives A Discussion Guide* available at:

[https://education.state.mn.us/mdeprod/idcpilg?IdcService=GET\\_FILE&dDocName=050483&RevisionSelectionMethod=latestReleased&Rendition=primary](https://education.state.mn.us/mdeprod/idcpilg?IdcService=GET_FILE&dDocName=050483&RevisionSelectionMethod=latestReleased&Rendition=primary). States and LEAs also may consider reviewing the following examples from OSEP-funded projects regarding implementation of standards-based IEPs: *inForum: Standards-Based Individualized Education Program Examples* available at: [www.nasdse.org/portals/0/standards-basediepexamples.pdf](http://www.nasdse.org/portals/0/standards-basediepexamples.pdf). For an example of annual goals aligned with State academic content standards for a child taking the alternate assessment based on alternate academic achievement standards, see: an issue brief provided by the OSEP-funded National Center and State Collaborative (NCSC), *NCSC Brief 5: Standards-based Individualized Education Programs (IEPs) for Children Who Participate in AA-AAS* available at: <http://www.ncscpartners.org/Media/Default/PDFs/Resources/NCSCBrief5.pdf>.

grade in which a child is enrolled set forth in this letter, an IEP Team must ensure that annual IEP goals are aligned with the State academic content standards for the grade in which a child is enrolled. The IEP must also include the specially designed instruction necessary to address the unique needs of the child that result from the child's disability and ensure access of the child to the general education curriculum, so that the child can meet the State academic content standards that apply to all children, as well as the support services and the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals.

**Opportunities for Input**

We are interested in receiving comments on this document to inform implementation of this guidance. If you are interested in commenting on this document, please e-mail your comments to [iepgoals@ed.gov](mailto:iepgoals@ed.gov) or write to us at the following address: US Department of Education, 550 12th Street SW, PCP Room 5139, Washington, DC 20202-2600. Note that we are specifically interested in receiving input from the field on examples of models of alignment of IEP goals with State content standards that are working well at the State and local level, and how this guidance could be implemented for children with disabilities who are English learners and children with the most significant cognitive disabilities. We will share appropriate models with you in further communications as they become available. We would also be glad to help answer your questions and help with your technical assistance needs in this important area.

We ask you to share this information with your local school districts to help ensure all children with disabilities are held to high standards and high expectations. Thank you for your continued interest in improving results for children with disabilities.

Sincerely,

/s/  
Michael K. Yudin  
Assistant Secretary

/s/  
Melody Musgrove  
Director  
Office of Special Education Programs

# **Chapter 3**

## **REFERRAL AND ELIGIBILITY**

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### **What This Chapter Is About**

A parent or school can refer a student with a disability for special education services; in fact, schools have an affirmative obligation to find students with disabilities who may need help, including students who are homeless and those attending private or charter schools.

A student with a disability is eligible for special education services and supports if he or she fits into one of 13 categories of disability. Students who do not fit into one of the categories may still receive help under Section 504 of the Rehabilitation Act.

### **Advocacy Hints in Chapter 3**

- ◆ Make sure your local charter school fulfills its student find responsibility (Page 2).
- ◆ Request a due process hearing if your child attends private school and your public school district will not evaluate him or her for special education (Page 4).
- ◆ Once your child is eligible for special education, he or she may receive any of the full range of special education services available (Page 5).
- ◆ Eligibility for special education services is determined by the IEPT and not by labels the student carries from other service systems (Page 6).
- ◆ Use the “other health impairment” category to make your child with attention deficit disorder or other health conditions eligible for special education (Page 7).
- ◆ Children up through age 7 may be identified with early childhood developmental delay, but programs and services under that category may serve children only up through age 5 (Page 8).
- ◆ The new “response to intervention” approach to identifying students with specific learning disabilities may benefit students with other disabilities, but it is not required for those students prior to evaluation for eligibility and may not be used to delay a requested evaluation (Page 8).
- ◆ Use the definitions of “major life activities” in federal law to help your child be eligible for assistance under Section 504 (Page 12).
- ◆ Students with attention deficit disorder or other disabilities may be eligible for services under Section 504 (Page 13).

The process the school must use to determine which students are eligible for special education is set forth in the Michigan Administrative Rules for Special Education (MARSE). The MARSE describe each step of the procedure, identify the expertise of the evaluators, and explain the protections afforded. Clear time lines are provided so that the student does not have to wait indefinitely for help.

In most situations, the need for special education is clear and uncontested by either the school or the student's parent. For some students, however, additional evaluations, extraordinary expertise or the exercise of due process rights is necessary. Special education eligibility and the educational assistance and protections this offers the student are extremely important. It is important to know the process for determining eligibility and to know what to do if there are difficulties along the way.

## **Child Find**

IDEA instructs the state to engage in "Child Find" activities. This means that schools cannot just sit back and wait for parents, teachers, or other interested people to notify them about a student who may need special education services. They must have a method in place to search out and identify students who need services. The school must also find ways to determine which children are receiving special education and related services. **20 USC 1412(a)(3); 34 CFR 300.111.**

Child Find extends to nonpublic schools as well. **34 CFR 300.131.** Under the 2004 IDEA Amendments, schools must consult with private schools regarding child find and the needs of private school students with disabilities. Private schools may complain to the state and to OSEP if they feel the consultation process has not been followed or was not meaningful. **20 USC 1412(a)(10); 34 CFR 300.136.**

**►Advocacy Hint: Child Find in charter schools.** Because charter schools operate as a separate school district, using public money, they have the same responsibilities as any other district in Child Find matters. As may any other school district, a charter school may call upon their intermediate school district for assistance and expertise on special education issues.

## **Protections for Students Not Yet Identified**

Holding schools responsible for finding students in need of special education services protects students in several ways. It provides help for students whose parents may not know about available services; it identifies a source of information and assistance for the parents of an infant with disabilities, or at risk of developing them; it protects students who may not have a "parent" to address their rights; and it provides an experienced pool of teachers and administrators who may recognize disabilities before a parent may suspect their existence.

The responsibility for identification also protects students who have behavior difficulties which have led to suspension or expulsion. Repeated suspensions or expulsion may indicate that a student may have an undetected disability that may qualify them for special education or services under Section 504. If there is some reason to suspect that the student has a disability such as an emotional impairment or a learning disability but the student has not been evaluated, a special

education referral will stop the expulsion process and will return the student to school or an alternative educational placement until an evaluation and an individualized education program team (IEPT) can determine whether the student is eligible for services.

If the student is eligible for special education, the student returns to school with the protections and services of this law. If the student has already been expelled, the referral, evaluation and IEPT can still take place. The student's school district retains the responsibility for evaluating and holding an IEPT and for eligible students, providing services in the appropriate environment. Please see the "Suspension and Expulsion" chapter of this manual for a complete explanation of this process.

The protections of IDEA apply to each student for whom it can be determined that the school has some indication that special education services may be needed. IDEA lists three situations in which it is determined that the school knew that a student may have needed special education services:

1. The parent of the student has expressed concern in writing (unless the parent is illiterate or has a disability that prevents compliance with the requirements contained in this clause) to supervisory or administrative personnel of the appropriate educational agency, or the student's teacher, that the student is in need of special education and related services;
2. The parent of the student has requested an evaluation of the student; or,
3. The teacher of the student, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the student directly to the director of special education of such agency or to other supervisory personnel in the agency. **20 USC 1415(k)(5); 34 CFR 300.534.**

## **Referral**

Any parent or school representative can refer a student as possibly needing special education. *Within ten (10) school days after receipt of a written referral*, the school must notify the parent of the referral and request written consent to initially evaluate the student. This notice must include the parent's procedural safeguards, the reasons for and scope of the evaluation and a list of available special education services within the intermediate school district. **34 CFR 300.504; R 340.1721.**

A student is eligible for special education if he or she:

1. is not more than 25 years old as of September 1<sup>st</sup>;
2. has one or more of the disabilities listed in the federal or state rules;
3. needs special education or related services; and
4. has not graduated with a high school diploma.

A student who turns 26 after September 1<sup>st</sup> is eligible for special education services until the end of the next school year. **R 340.1702.**

## Referral in Private Schools

The school district's Child Find plan must include a provision for individual evaluation of students who may qualify for special education and are attending a private school located geographically within that school district. If a parent or teacher of a student enrolled in a private school or in a registered home school suspects that a student may have a disability requiring special education services, they may also contact the school district in which the student lives to request that the student be evaluated. The process and timelines for completing a private school referral are the same as for any other student in the district. **34 CFR 300.131.**

► **Advocacy Hint: Child Find and due process.** When parents voluntarily place children in nonpublic schools for reasons not related to special education services, they forfeit the right to request a due process hearing in most situations—except for a school district's failure to conduct Child Find, including individual evaluations. **34 CFR 300.140.**

## Referral in Charter Schools and Public School Academies

Because of the status of charter schools, also known as public school academies (PSAs) in Michigan, as separate school districts, the process for identifying students as possibly eligible for special education and evaluating them may be carried out entirely by the charter school. Charter schools who lack staff or expertise may request help from their ISD as may any other school district.

## Eligibility Under IDEA and State Law

Students with disabilities who may be eligible for special education services include those who:

- ◆ have a cognitive impairment, **R 340.1705;**
- ◆ have an emotional impairment, **R 340.1706;**
- ◆ are deaf or hard of hearing, **R 340.1707;**
- ◆ have a visual impairment, **R 340.1708;**
- ◆ have a physical impairment, **R 340.1709;**
- ◆ have an other health impairment, **R 340.1709a;**
- ◆ have a speech and language impairment, **R 340.1710;**
- ◆ have early childhood developmental delay, **R 340.1711;**

- ◆ have a specific learning disability, **R 340.1713**;
- ◆ have severe multiple impairment, **R 340.1714**;
- ◆ have autism spectrum disorder, **R 340.1715**;
- ◆ have a traumatic brain injury, **R 340.1716**; or,
- ◆ have a deaf-blindness determination, **R340.1717**.

► **Advocacy Hint: One category, all services.** Qualifying under a specific disability category is a “ticket” into the special education system. The category does not determine or limit placement or services. All special education services determined by the evaluation process to be necessary for the student to benefit from his or her education must be provided. **34 CFR 300.304(c)(6)**.

The criteria that establish eligibility for special education under each of the disability categories are summarized below. **Note:** The terms used in the federal special education regulations to describe impairment categories in which students qualify for special education services vary somewhat from those in the MARSE. Differences that may be important to individual students are noted. **34 CFR 300.8**.

The criteria for each disability category also include the necessary members of the multidisciplinary evaluation team for each category. The state rules specify which professional evaluators must be included on the team for each area of suspected disability. In addition to those professionals identified in the rules, multidisciplinary teams that perform initial evaluations should include qualified professionals that will evaluate the student in ***all areas of suspected disability***.

**Cognitive Impairment** — development at a rate approximately 2 or more standard deviations below the mean as determined through intellectual assessments, scores approximately within the lowest 6th percentile on a standardized test in reading and arithmetic, lack of cognitive development, impairment of adaptive behavior, and an adverse effect on the student’s educational performance. The multidisciplinary evaluation team must include a psychologist. **R 340.1705**.

**Emotional Impairment** — manifestation of behavior problems primarily in the affective (emotional) domain over an extended period of time that adversely affect the student’s education to the extent that the student cannot profit from learning experiences. The behavior includes one or more of the following characteristics:

- ◆ inability to build or maintain satisfactory interpersonal relationships in school;
- ◆ inappropriate types of behavior or feelings;
- ◆ general pervasive mood of unhappiness or depression; or

- ◆ tendency to develop physical symptoms or fears associated with personal or school problems.
- ◆ Students with emotional impairment also include those who exhibit behavior related to schizophrenia or similar disorders, but does not include students who are "socially maladjusted, unless it is determined that the persons have an emotional impairment." Therefore, if the student is determined to have an emotional impairment and found to be socially maladjusted, the student will still meet the eligibility criteria. The multidisciplinary evaluation team must include a school social worker and a psychologist or psychiatrist. The team must document behavior in all settings and the interventions used to address it. **R 340.1706.**

(Note: In the category "Emotional Disturbance," Federal rules add a fifth possible element — "an inability to learn that cannot be explained by intellectual, sensory, or health factors" — and require only that the behavior adversely affect educational performance, not an inability to benefit from education. **34 CFR 300.8(c)(4).**)

► **Advocacy Hint: Different systems, different labels.** In some cases, a student may be eligible for mental health services as a student with an emotional disturbance (defined by the U.S. Department of Health and Human Services), but not eligible for special education as a student who has an emotional disturbance or emotional impairment (defined in special education law). Eligibility for special education services under any special education category is determined by the IEP Team and not by labels the student carries from other service systems.

**Deaf or Hard of Hearing** — any type or degree of hearing loss that interferes with development or adversely affects educational performance in a regular classroom setting. The multidisciplinary evaluation team must include an audiologist and an otolaryngologist or otologist. **R 340.1707.**

**Visual Impairment** — an impairment that interferes with development or adversely affects educational performance plus one or more of the following characteristics:

- ◆ a central visual acuity for near or far point vision of 20/70 or less in the better eye after correction;
- ◆ a peripheral field of vision restricted to no greater than 20 degrees; or,
- ◆ a diagnosed progressively deteriorating eye condition.

The multidisciplinary evaluation team must include an optometrist or ophthalmologist. **R 340.1708.**

**Physical Impairment** — a severe orthopedic impairment that adversely affects educational performance. The multidisciplinary evaluation team must include a physician. **R 340.1709.**

**Other Health Impairment** — a chronic or acute health problem that limits a student's strength, vitality, or alertness, adversely affecting educational performance. Examples include asthma, ADD/ADHD, bipolar disorder, diabetes, epilepsy, fetal alcohol spectrum disorder, lead poisoning, Tourette syndrome, and others. The multidisciplinary team must include a physician. **R 340.1709a.**

► **Advocacy Hint: “Other health impairment” may include ADHD and other conditions.** Many students with attention deficit disorder receive special education under this category. In order to address the medical part of the evaluation, the student's pediatrician or primary care physician may provide the parent with a letter or some other documentation of the diagnosis. If this isn't possible, but the parent suspects this disability, the school can contract with a doctor to complete this evaluation or seek information from the family's doctor, provided the information is provided at no cost to the family.

The regulations implementing the 2004 IDEA Amendments added Tourette Syndrome explicitly and suggested by implication that conditions such as bipolar disorder and fetal alcohol spectrum disorder were neurological conditions that might fit under the definition of other health impairment. (See **71 Fed.Reg. 46550 (8/14/06)**).

**Speech and Language Impairment** — one or more of the following communication impairments that adversely affects educational performance:

1. articulation impairment, including omissions, substitutions or distortions of sound;
2. voice impairment, including inappropriate pitch, loudness, or voice quality;
3. fluency impairment, including abnormal rate of speaking, speech interruptions, and repetition of sounds, words, phrases, or sentences, that interferes with effective communication; or
4. one or more language impairments, i.e. phonological, morphological, syntactic, semantic, or pragmatic use of aural/oral language.

The multidisciplinary evaluation team must include a speech and language impairment teacher or speech and language pathologist. **R 340.1710.**

**Early Childhood Developmental Delay** — a student through 7 years of age whose primary delay cannot be differentiated through existing criteria and who manifests a delay in 1 or more areas of development equal to or greater than one-half of the expected development for chronological age as measured by more than one developmental scale. The rules do not specify which professionals must be on the multidisciplinary evaluation team. **R 340.1711.**

► **Advocacy Hint: Eligibility does not determine placement.** The corresponding program and services for children with early childhood developmental delay are only legally appropriate for children up through age 5. Children between 5 and 7 years old can be eligible for special education under this category, but should not receive services in early childhood settings. **R 340.1754, 1755.**

**Specific Learning Disability**—a "specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. The term includes such conditions as perceptual impairments, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

"Specific learning disability" does not include students who have learning problems that are primarily the result of visual, hearing, or motor disabilities, of a cognitive impairment, of an emotional impairment, of autism spectrum disorder, or of environmental, cultural, or economic disadvantage. **R 340.1713(1).**

The 2004 IDEA Amendments made fundamental changes in how learning disabilities are identified. Under IDEA 2004, schools can no longer require the use of a severe discrepancy between achievement and intellectual ability to be found eligible. The schools must permit the use of a process based on the child's response to scientific, research-based intervention and may permit the use of other alternative research-based procedures. **34 CFR 300.307(a).** State law does permit the use of alternative procedures, such as a "pattern of strengths and weakness" analysis, in determining specific learning disability. **34 CFR § 300.309; R 340.1713(2).**

The multidisciplinary team must include, at a minimum, a general education teacher and an evaluator such as a school psychologist, speech and language teacher, or teacher consultant. **34 CFR 300.308(c)(10); R 340.1713(3).**

► **Advocacy Hint: RTI is not required for everyone.** The new standard may also benefit students with other disabilities, and parts of IDEA 2004 encourage schools to engage in "preventive" interventions. Some schools may, however, erroneously interpret this language to mean that students who may have other disabilities must use response to intervention approaches before seeking eligibility for special education, thus delaying evaluations. **IDEA does not require use of the response to intervention approach when serving students who may have other disabilities and does not authorize school districts to delay evaluations.**

When determining whether or not a child has a specific learning disability, the following three criteria must be met:

- ◆ The child does not achieve adequately for his/her age or meet State approved grade-level standards in one or more of the following areas, when provided with appropriate learning experiences and instruction: oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, mathematics calculation, or mathematics problem solving;
- ◆ The child does not make sufficient progress to meet age or State-approved grade-level standards in the above-mentioned areas or demonstrates, through assessments, a relevant pattern of strengths and weaknesses; and,
- ◆ The group determines that the above-mentioned discrepancies are not the result of a visual, hearing or motor disability, cognitive disability, emotional disturbance, cultural factors, environmental or economic disadvantage, or limited English proficiency. **34 CFR 300.309.**

The school must also look at the child's history. Did the school provide appropriate instruction in a general education setting from qualified personnel? Were there formal assessments of the child's progress made available to the parent? Unfortunately, the IDEA regulations do not say how long such instruction should occur before a learning disability can be identified.

The school must ensure that a child is observed in his/her learning environment. **34 CFR 300.310.** The documentation of determination of eligibility must contain:

- ◆ whether the child has a specific learning disability;
- ◆ the basis for the determination;
- ◆ any relevant behavior (from observations);
- ◆ any educationally relevant medical findings;
- ◆ whether the child does not achieve adequately to meet age or State-approved grade-level standards; and 1) the child does not make sufficient progress to meet age or State-approved grade-level standards; or 2) the child exhibits a pattern of strengths and weaknesses;
- ◆ the determination of the group regarding the effects of visual, hearing or motor disability, mental retardation, emotional disturbance, cultural factors, environmental or economic disadvantage, or limited English proficiency on the child's achievement level; and
- ◆ the findings from any and all assessments related to research based intervention. **34 CFR 300.311.**

- ◆ **Severe Multiple Impairment** — a condition where a student is evaluated as having either of the following combinations of characteristics (either A or B).
  - A. Development at a rate of 2 to 3 standard deviations below the mean and **two** or more of the following conditions:
    - ◆ a hearing loss so severe that the auditory channel is not the primary means of developing speech and language skills;
    - ◆ a visual impairment so severe that the visual channel is not sufficient to guide independent mobility;
    - ◆ a physical impairment so severe that activities of daily living cannot be achieved without assistance; or,
    - ◆ a health impairment so severe that the student is medically at risk.
  - B. Development at a rate of 3 or more standard deviations below the mean or students for whom evaluation instruments do not provide a valid measure of cognitive ability and one or more of the following conditions:
    - ◆ a hearing loss so severe that the auditory channel is not the primary means of developing speech and language skills;
    - ◆ a visual impairment so severe that the visual channel is not sufficient to guide independent mobility;
    - ◆ a physical impairment so severe that activities of daily living cannot be achieved without assistance; or,
    - ◆ a health impairment so severe that the student is medically at risk.

The multidisciplinary evaluation team shall include a psychologist and other professionals depending upon the nature of the physical disability. **R 340.1714.**

**Autism Spectrum Disorder** — a lifelong developmental disability that adversely affects a student's educational performance in academics, behavior, or social interaction. Autism spectrum disorder is characterized by qualitative impairments in reciprocal social interactions, qualitative impairments in communication, and restricted range of interests/repetitive behavior. Determination of eligibility shall include all of the following:

- A. Qualitative impairments in reciprocal social interactions including a least two of the following:
  - ◆ Marked impairment in multiple nonverbal behaviors such as eye-to-eye gaze, facial expression, body postures, gestures to regulate social interaction;

- ◆ Failure to develop peer relationships appropriate to developmental level;
- ◆ Marked impairment in spontaneous seeking to share enjoyment, interests, or achievements with other people, for example, by a lack of showing, bringing, or pointing out objects of interest; or,
- ◆ Marked impairment in the areas of social or emotional reciprocity.

B. Qualitative impairments in communication including at least one of the following:

- ◆ Delay in, or total lack of, the development of spoken language not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime;
- ◆ Marked impairment in pragmatics or in the ability to initiate, sustain, or engage in reciprocal conversation with others;
- ◆ Stereotyped and repetitive use of language or idiosyncratic language; or,
- ◆ Lack of varied, spontaneous make-believe play or social imitative play appropriate to developmental level.

C. Restricted, repetitive, and stereotyped behaviors including at least one of the following:

- ◆ Encompassing preoccupation with 1 or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus;
- ◆ Apparently inflexible adherence to specific, nonfunctional routines or rituals;
- ◆ Stereotyped and repetitive motor mannerisms, such as hand or finger flapping or twisting or complex whole-body movements; or,
- ◆ Persistent preoccupation with parts of objects.

A determination may include unusual or inconsistent response to sensory stimuli, in combination with A, B, and C above. While autism spectrum disorder may exist concurrently with other diagnoses or areas of disability, to be eligible under this rule, there shall not be a primary diagnosis of schizophrenia or emotional impairment. The multidisciplinary team must include a psychologist or psychiatrist, an authorized provider of speech and language services, and a school social worker. **R 340.1715.**

**Traumatic Brain Injury** — an acquired injury to the brain caused by external physical force, resulting in total or partial functional disability or psychosocial impairment, or both, that adversely affects the student's educational performance. The term applies to open or closed head injuries resulting in impairments in one or more areas such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem solving; sensory, perceptual and motor abilities; psychosocial behavior; physical functions; information processing; and speech. The term does not

apply to brain injuries that are congenital or degenerative, or brain injuries induced by birth. The multidisciplinary evaluation team shall include a physician. **34 CFR 300.8(c)(12); R 340.1716.**

**Deaf-blindness** — concomitant hearing loss and visual impairment, the combination of which causes severe communication and other developmental and educational needs that cannot be accommodated in special education programs without additional supports to address the unique needs specific to deaf-blindness. Deaf-blindness also means both of the following:

- A. Documented hearing and visual losses that, if considered individually, may not meet the requirements for visual impairment or deaf or hard of hearing, but the combination of the losses affects educational performance; and,
- B. Functional hearing and visual loss, based upon responses to auditory and visual stimuli in the environment, or during vision and hearing evaluations.

The multidisciplinary evaluation team must include a medical specialist, a teacher of students who are deaf or hard of hearing, and a visual impairment teacher. **R 340.1717.**

## **Eligibility Under Section 504**

Students who fall under one or more of the 13 disabilities listed in the state and federal special education law are eligible for special education and related services. Students who do not meet the definitions for these 13 categories may still qualify for extra services and supports under Section 504 of the federal Rehabilitation Act of 1973 or the Americans with Disabilities Act. These laws protect “qualified individuals with disabilities.” Such an individual has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.

**►Advocacy Hint: Use function, not diagnosis.** The definition of “major life activities or functions” comes from the Developmental Disabilities Assistance and Bill of Rights Act of 2000. **42 USC 15001 et seq.** This Federal law establishes the definition of developmentally disabled which is a severe, chronic disability of an individual that – (A) is attributable to a mental or physical impairment or combination of mental or physical impairments; (B) is manifested before the individual attains age 22; (C) is likely to continue indefinitely; (D) results in substantial functional limitations in three or more of the following areas of major life activity—self-care; receptive and expressive language; learning; mobility; self-direction; capacity for independence; and economic self-sufficiency. (E) Reflects the individual’s need for a combination and sequence of special, interdisciplinary, or generic services, supports, or other assistance that is of a lifelong or extended duration and is individually planned and coordinated. When applied to infants and young students, the term developmental disability applies to individuals from birth through age 9 who have a “substantial developmental delay or specific congenital or acquired condition” with a high probability of resulting in developmental disabilities if services and supports are not provided. **42 USC 15002(8)(B).**

For education related protections, Section 504 also looks at the age of the individual with the disability and requires access to services and programs for non-disabled individuals of the same age.

**►Advocacy Hint: 504 is broader.** Students with disabilities such as ADHD who may not be eligible for services under special education law may be entitled to similar protections under the broader provisions of Section 504. The MET should not limit itself to the criteria of eligibility found in IDEA and the MARSE. Also, if an IEP Team determines that a student is not eligible under the IDEA and the MARSE, the school should have procedures in place to have a group of knowledgeable persons determine Section 504 eligibility.

## **Determining Eligibility**

The importance of evaluations in identifying disabilities, providing information for program planning, and determining eligibility for services is difficult to overestimate. No single evaluation or set of evaluations determines whether a student is eligible or not eligible for special education services. For each student who is referred to special education, there must be an initial IEP Team meeting. The determination of eligibility is made by the IEP Team, not by the multidisciplinary evaluation team. To determine eligibility, the IEP Team uses the evaluation results and any other appropriate evidence including parent and teacher observations and recommendations, statements by doctors and other qualified experts, and cultural background information.  
**R 340.1721a.**

Occasionally parents will have evaluation results from sources other than the school and may wish to use them in the eligibility process. Parents also have a right to an independent educational evaluation (IEE) at the school's expense if they disagree with a school district evaluation. The results of these kinds of evaluations must be considered by the school when eligibility is determined. See the chapter on "Evaluations" for more information on independent educational evaluations.

## **Appendix 3-1**

### **Letter Requesting Services**

**(Be sure to keep a copy for your notebook)**

(Date)

(Name of Principal)

(Name of School)

(Address of School)

Dear (Name of Principal):

I believe my child may be in need of Special Education Services. I am writing to request that a multidisciplinary team evaluate my child, (student's name), and an Individualized Educational Planning Team meet to consider providing special education programs and services. I believe my child has a disability and is eligible for special education because

*(Describe the evidence that supports giving special education to your child, such as your observations about learning problems, physician's reports, or observations made by teachers. List every area in which you suspect your child has a disability.)*

Please evaluate my child in all areas in which he/she may have a disability, including eligibility under Section 504 of the Rehabilitation Act.

Please advise me by (date) when the evaluation will take place, and who will be performing the evaluation so that I may give my consent. I plan to attend the IEP Team meeting. Please contact me to arrange a mutually convenient time and place.

Sincerely,

(Your Name)

(Your Address)

(Your Telephone Number)

## Appendix 3-2

### Checklist of Eligibility Categories

Students with disabilities who may be eligible for special education services include those who:

- ◆ have a cognitive impairment, **R 340.1705**;
- ◆ have an emotional impairment, **R 340.1706**;
- ◆ are deaf or hard of hearing, **R 340.1707**;
- ◆ have a visual impairment, **R 340.1708**;
- ◆ have a physical impairment, **R340.1709**;
- ◆ have an other health impairment, **R 340.1709a**;
- ◆ have a speech and language impairment, **R 340.1710**;
- ◆ have early childhood developmental delay, **R 340.1711**;
- ◆ have a specific learning disability, **R 340.1713**;
- ◆ have severe multiple impairment, **R 340.1714**;
- ◆ have autism spectrum disorder, **R 340.1715**;
- ◆ have a traumatic brain injury, **R 340.1716**; or,
- ◆ have deaf-blindness, **R 340.1717**.

The preceding federal definitions are also at **34 CFR 300.8(c)**.

- ◆ A student who has a physical or mental impairment which substantially limits one or more major life activities may qualify for services and supports under Section 504 of the federal Rehabilitation Act of 1973.

# **Chapter 4**

## **EVALUATIONS**

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### **What This Chapter Is About**

Many kinds of evaluations take place in school. Some evaluations, including the initial evaluations that help determine eligibility and subsequent similar reevaluations are carried out by a team. These evaluations are called Multidisciplinary Evaluation Team (MET) evaluations in Michigan.

While the law requires that MET evaluations occur periodically, it also requires that the school provide other, less extensive evaluations on an as-needed or requested basis. When the student's parents or teacher request evaluations, they must be provided. This kind of evaluation might be used to determine whether an additional service is needed or may help in designing individualized programs.

Students in special education must also have access to evaluations, such as the Michigan Education Assessment Program (MEAP), given to general education students, or an alternative. If the student has behavior difficulties, evaluations may be provided to determine how best to write a behavior intervention plan.

Evaluations are not just standard tests, or checklists. The Individualized Education Program Team (IEPT) can design a specific evaluation process to determine the need for any kind of special education service, including services like extended school year services, or an individual aide.

### **Advocacy Hints in Chapter 4**

- ◆ Make sure the person consenting to the evaluation is the parent (Page 3).
- ◆ Apply the state rule on when an evaluation must be completed (Page 3).
- ◆ Beware waiving your right to enforce the timelines (Page 3).
- ◆ Don't wait; ask for a reevaluation when your child's situation changes (Page 4).
- ◆ Look beyond the evaluation to include all facts (Page 4).
- ◆ Use the reevaluation process to evaluate necessary changes in your child's program (Page 4).
- ◆ Students with disabilities are part of the statewide standardized assessment process (Page 6).

- ◆ Understand the tests your child will be given, the results obtained, and how those results are reported (Page 6).
- ◆ When requesting an individual evaluation, be specific about the part of the school's evaluation you don't like (Page 7).

After the parents have signed consent to evaluate, the school district must conduct an evaluation and convene an IEP Team meeting in a timely manner. There are many different types of evaluations. Evaluations include intelligence tests and achievement tests, usually given by schools. They include tests done by physicians, such as hearing and sight tests. They also include tests on how the brain functions, asking questions like does this child have problems reading, remembering, controlling movement or emotions.

The importance of evaluations to the special education process cannot be overrated. This chapter will examine the legal requirements for conducting evaluations and provide information about specific tests often used by schools.

## **Legal Requirements for Special Education Evaluations**

The legal requirements for conducting evaluations are quite extensive, covering issues such as when evaluations must be conducted, what the scope of the evaluation must be, who must be on the evaluation team, and what specific matters the evaluation team must review. The school staff that actually does the evaluations must have the credentials or training necessary to administer the assessments.

An evaluation is probably the single most important step in determining an appropriate education. A student must be provided a "full and individual evaluation" by a multidisciplinary team before the student may be placed in a special education program. **34 CFR 300.301(a)**. When the IEPT determines that the student is eligible for special education, the evaluation becomes an important factor in the development of the student's individualized education program. **34 CFR 300.15**.

## **When Are Evaluations Required?**

As a starting point, it is helpful to distinguish between the initial evaluation of a student and subsequent reevaluations.

### **Initial Evaluations**

Initial evaluations determine whether or not a child is eligible for special education. The parents must give written consent for an initial evaluation. If the parent refuses to consent to an initial evaluation, the school may, but is not required to, request a due process hearing to order an evaluation. **20 USC 1414(a); 34 CFR 300.300**.

► **Advocacy Hint: Who is the parent?** A parent is a biological or adoptive parent, a foster parent, a guardian, a person acting as a parent (such as a caregiver relative), or a “surrogate parent” appointed by the school. **34 CFR 300.30**. In cases involving foster parents, the biological parent is presumed to be the parent with authority to consent to evaluations unless the court has assigned that authority to someone else. **R 340.1701b(d)**. Public agency case managers or service providers cannot serve as surrogate parents, but private agency providers can be appointed by courts as surrogate parents in some circumstances. **34 CFR 300.519**.

The Individuals with Disabilities Education Act (IDEA) requires that initial eligibility evaluations use more than one test, and that a team of evaluators perform the evaluations. In Michigan, the Multidisciplinary Evaluation Team (MET) performs the evaluations.

The Michigan rules allow the school 30 school days after they receive the parents' consent to complete the initial evaluation and hold an IEPT meeting. **R 340.1721b(1)**. Note that the timeline does not start to run upon *requesting* the evaluation, but upon *signing the consent* to the evaluation. If the District does not send you consent forms in a timely manner, or if you do not sign them in a timely manner, the District has whatever that time was *plus* 30 school days to complete the evaluation.

► **Advocacy Hint: Michigan, not Washington, time.** Under the 2004 IDEA Amendments, a school district has 60 calendar days or an alternate state deadline from the date the parent consents to the evaluation to complete the evaluation. Michigan has set its own timeline of 30 school days which, in this case, overrides the federal standard.

► **Advocacy Hint: Waivers at work.** Some schools ask parents to sign waivers of the time requirements, either before the evaluation or even after the evaluation is complete. These waivers are sometimes included in other documents. Be aware of your right not to waive the timelines if you feel the resulting delay will hurt your child.

The 2004 IDEA Amendments also require schools to coordinate assessments of children with disabilities who move from school district to another during the same academic year. The goal is to complete all evaluations promptly. **20 USC 1414(b)(3); 34 CFR 300.304(c)(5)**.

## Reevaluations

Students with disabilities shall be reevaluated if the school determines that eligibility or educational needs have changed or if the student's parents or teacher ask for a reevaluation. **20 USC 1414(a)(2); 34 CFR 300.303(a)**.

Reevaluations shall occur at least once every three years unless the parent and the school agree that a reevaluation is unnecessary. The 2004 IDEA Amendments limit reevaluations to once a year, unless the parent and the school agree to hold additional evaluations during the school year. **34 CFR 300.303(b).**

In Michigan, reevaluations are subject to the same timelines as initial evaluations – they must be completed within 30 school days from the receipt of consent, unless the parent waives the timeline. **R 340.1721b(1).**

**►Advocacy Hint: Changes may call for reevaluation.** When requesting a reevaluation, explain why you think it is necessary. A parental request, including reasons related to changes in a student's service needs, achievement, or performance, is powerful.

## **What Must Evaluations Cover?**

The initial IEPT meets to review the MET evaluations and other information to determine whether the student meets any of the eligibility criteria listed in the rules. The team will review and discuss the school's MET evaluations and any other information about the student which will help them decide whether the student is eligible for special education. They must review information provided by the parents and school staff, and must also review any evaluations the parents provide from outside sources.

The student must be assessed in every area related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor (physical) abilities. **34 CFR 300.304(c)(4).**

**►Advocacy Hint: Look at all facts.** While evaluations form the basis for services in special education, the IEPT can make decisions that vary from the evaluation recommendations if it is in the best interests of the student to do so. IEPT decisions about programs are based on the information that evaluations provide but are not bound by them.

Evaluations must address both the student's eligibility and the student's educational needs. **20 USC 1414(b); 34 CFR 300.301(c), 300.304(b).**

**►Advocacy Hint: More than eligibility.** Even if no additional data is needed to decide that the student is eligible, there may be a need for more evaluation data and recommendations on the details of the student's educational needs and services.

## How Are Evaluations Conducted?

An evaluation must include a variety of standardized tests, behavioral observations, and academic information from the parents, the IEPT, and other qualified specialists to assess all areas of a student's functioning – physical, social, emotional, intellectual, and educational. A comprehensive evaluation can provide a good picture of the student's abilities and needs.

The rules that implement IDEA define the standards that must be met in evaluating a student. **20 USC 1414(b)(3); 34 CFR 300.304**. State and local educational agencies must make certain that tests and other evaluation materials meet the following minimum standards:

- ◆ Assessment and evaluating materials selected shall not be racially or culturally discriminatory. Tests and other evaluation materials must be administered in the form most likely to give accurate information on what the child can do.
- ◆ Tests and other evaluation materials must be administered by trained and knowledgeable personnel who meet the qualifications described by the producer of the material.
- ◆ Tests and evaluation tools must be validated and reliable for the specific purpose for which they are used. For example, a test that was designed only to measure intelligence cannot be used to measure achievement.
- ◆ Tests must be selected and given so that when the tests are administered to a student with impaired sensory, manual, or speaking skills, the test results will accurately reflect the student's disability, unless those tests are specifically designed to determine the extent of an impairment.
- ◆ Tests and other evaluation materials must include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single measure of intelligence. The materials should provide relevant information that directly assists in determining the educational needs of the child. Under the 2004 IDEA Amendment, the school may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors when determining whether a child has a disability.
- ◆ No single measure or assessment test or tool is to be used as the sole criterion for determining an appropriate education program for a student.

## Standardized Tests and Assessments

Under IDEA, students with disabilities must participate in statewide assessments such as the Michigan Educational Assessment Program (MEAP) or Michigan Merit Examination (MME). **20 USC 1412(a)(16)**. Individualized Education Program's (IEPs) must now include a statement of any modifications a student needs to take the MEAP or other assessment; or, if the IEPT decides the student should not take the tests, the IEP must explain why not and describe the alternate assessment. **20 USC 1414(d); 34 CFR 300.320(a)(6)**.

The Michigan Department of Education (MDE) has prepared a guide to accommodations on statewide assessments. The guide lists a number of possible accommodations, including but not limited to flexible test scheduling, revised test format, flexible setting, revised test directions, use of aids and devices, audiocassette test editions, qualified signers, interpreters and readers, scribes and tape recorders, word processors, calculators, and other accommodations.

The guide may be found on the Michigan Department of Education website at:

[http://www.michigan.gov/documents/mde/Updated\\_Revised\\_Accommodation\\_Summary\\_Table\\_092909\\_294052\\_7.pdf](http://www.michigan.gov/documents/mde/Updated_Revised_Accommodation_Summary_Table_092909_294052_7.pdf)

There is also a process for reviewing and approving any accommodations that are not included on the standard list. MDE also has an alternate assessment for students whose IEPs indicate such assessments are appropriate. (*Note: The number of students who may take alternate assessments is limited by regulations implementing the federal Elementary and Secondary Education Act Amendments of 2001.*)

**► Advocacy Hint: Everyone takes a test.** Under both IDEA and the federal Every Student Succeeds Act (ESSA), all students must take either the standard assessment or an alternate assessment. School districts are found to be failing the “adequate yearly progress” standard under ESSA when they fail to test at least 95% of their students. IEP teams do not have the authority to exclude students with disabilities from statewide testing.

**► Advocacy Hint: Understand your test.** You should understand what test will be given, how it will be given, what it is supposed to show, why it is chosen for the student, and how the results will be reported. An intelligence test, for example, should never be used as the sole basis of placement in special education.

## **The Independent Educational Evaluation**

Parents who disagree with the school’s evaluation of the student have a right to obtain an independent educational evaluation (IEE). An IEE is “an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.” The right to an independent evaluation is a procedural safeguard. **34 CFR 300.502; R 340.1723c.**

Parents have a right to an IEE at public expense when they disagree with the evaluation performed by the school. The school must provide parents with information about independent evaluations at public expense. This information must include criteria regarding credentials for qualified examiners, suggested sources and locations, procedures for reimbursement, reasonably expected costs, and notice that the parents are not

restricted to choosing from sources suggested by the public agency.

The school district may set reasonable criteria on the cost of independent evaluations. Parents may demonstrate that unique circumstances justify an independent evaluation that does not fall within the district's criteria.

If parents want an independent evaluation, Michigan rules require that the request be written, signed, and dated. **R 340.1723c(2)**. See Appendix 4-2 for an example of a letter requesting an independent evaluation.

When parents request an independent evaluation, the school must respond in writing within seven calendar days. The school has only two choices – it may honor the request, or it may initiate a hearing to show that its evaluation is appropriate. At the hearing, the school must prove that its evaluation is appropriate for the student. If the hearing officer finds that the school's evaluation is appropriate, the parents may still obtain an independent evaluation, but the parents must pay for it.

If the parents choose to obtain an independent evaluation, that evaluation must be considered in decisions made regarding the student's education and may be introduced as evidence at any administrative hearing. If a disagreement goes to hearing, the hearing officer may also request an independent evaluation at the school's expense.

**►Advocacy Hint: What don't you like?** When requesting an independent evaluation, make sure you understand what part of the school's evaluation you disagree with. Do you disagree with the results of standardized assessments, interpretation of assessment results, or recommendations made?

When an independent evaluation is approved, the evaluator must be given access to the school in order to observe the student in the classroom or other educational setting. **34 CFR 300.502; 71 Fed.Reg. 46690 (8/14/06)**.

## **Parents' Role In The Evaluation**

The most vital role of parents in their child's evaluation is providing information and observations about the child's abilities and behavior in a variety of circumstances. NO ONE has more opportunity to observe the student than parents. It is important that parents' observations be stated honestly to assure that the student is assessed as accurately as possible. Parents should neither overestimate nor underestimate what the child can do.

Advocates should also be informed about the types of tests suggested for use and possible pitfalls in testing. The parents have a right to explanations regarding tests and results kept in the student's records and should not hesitate to question school personnel during the evaluation procedure.

## **Appendix 4-1**

### **Letter Requesting An Evaluation\***

(Be sure to keep a copy for your records)

(Date)

(Name of Principal)

(Name of School)

(Address of School)

Dear (Name of Principal):

We are the parents of (name of student). Because of difficulties related to school work, (give information about the difficulties your child is having, such as difficulty in understanding spoken directions, not reading at an expected level, having coordination problems), we suspect our child may have an unidentified disability. Please schedule evaluations to see if there is a disability and if special education and related services are necessary. Please tell us in writing who will be performing the evaluation so that we may give our consent.

Thank you for your help. We look forward to hearing from you soon.

Sincerely,

(Your name)

(Your address)

(Your telephone number)

\*All materials so designated in this section are taken from *Parent Manual—Education For Your Handicapped Child*, Advocacy Incorporated, Austin, Texas, 1979. Materials have been revised to conform with Michigan law.

## **Appendix 4-2**

### **Letter Requesting An Independent Evaluation\***

(Be sure to keep a copy for your records)

(Date)

(Name of Principal)

(Name of School)

(Address of School)

Dear (Name of Principal):

We are the parents of (name of student). We disagree with the results of the evaluation of (name of student) on (date) because (reason why you feel the tests were invalid, inadequate or not an accurate measure of your child's performance).

We would like an independent evaluation to gather the valid and reliable information we need to plan an appropriate educational program for our child. Please send us information on: (a) criteria for qualified examiners; (b) suggested sources and locations for examiners; (c) procedures for reimbursements; and (d) reasonable and expected costs.

We understand that the school must pay for the independent evaluation unless it can prove in a due process hearing that its assessment is appropriate. Please inform us in writing within seven days regarding your intention to honor our request or to request a hearing on the issue.

We will forward the results of the evaluation to you because, as we understand it, the results of an independent evaluation must be considered in any future decisions about our child's education.

Thank you. We look forward to hearing from you soon.

Sincerely,

(Your name)

(Your address)

(Your telephone number)

## **Appendix 4-3**

### **Letter Requesting An Independent Evaluation Exceeding The School's Recommendation Of "Reasonable Cost"\***

(Be sure to keep a copy for your records)

(Date)

(Name of Principal)

(Name of School)

(Address of School)

Dear (Name of Principal):

We are the parents of (student's name). On (date you requested the independent evaluation) we requested an independent evaluation because we disagreed with the school's evaluation of our child. We disagreed with the evaluation because (reason why you feel the tests were invalid, inadequate, or not an accurate measure of your child's performance). On (date you received independent evaluation information from the school), we received information from you on obtaining an independent evaluation. Contained in this information was an amount (amount), which is your proposed reasonable expected cost for the evaluation.

While we agree in principle with your desire to contain costs, there are unique circumstances which preclude an evaluation for the costs you mention. (Give your argument here for the tests you think are required, e.g., although in general there is agreement that our child has a learning disability, no tests to date have identified any specific disability or teaching strategies that will help; or, although we agree that our child has an emotional impairment, the program based on current evaluations has failed to meet his or her needs).

We have identified a qualified examiner who has had success in (the examiner's unique area of expertise). Costs for this evaluation are expected to be (cost). We understand that if you believe these fees are unreasonable you may either pay this cost or initiate a due process hearing to prove that the costs are unreasonable.

Sincerely,

(Your name)

(Your address)

(Your telephone number)

## **Appendix 4-4**

### **Letter Requesting Reevaluation\***

(Be sure to keep a copy for your records)

(Date)

(Name of Principal)

(Name of School)

(Address of School)

Dear (Name of Principal):

We are the parents of (name of student). We recently reviewed our child's evaluation and it is (out-of-date, incomplete, inappropriate due to growth and changes, time for a three-year evaluation). We request that our child be reevaluated. Please tell us in writing who will be doing the evaluation and when it will be scheduled.

Thank you for your help. We look forward to hearing from you soon.

Sincerely,

(Your name)

(Your address)

(Your telephone number)

## **Appendix 4-5**

### **Letter Requesting Additional Testing\***

(Be sure to keep a copy for your records)

(Date)

(Name of Principal)

(Name of School)

(Address of School)

Dear (Name of Principal):

We are the parents of (name of student). We have studied the reports of the school's evaluation of our child and feel that (student's name) was not evaluated in every area of suspected disability. We believe additional testing is needed in the area of (list areas needing further testing). Please tell us in writing who will be performing the additional testing.

Thank you for your help. We look forward to hearing from you soon on this matter.

Sincerely,

(Your name)

(Your address)

(Your telephone number)

# **Chapter 5**

## **RECORDS**

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### **What This Chapter Is About**

Schools keep records on children in special education. Schools have to grant access to these records in a timely way. Parents may view records, may have a representative view them, and may copy them for a nominal fee.

Records are confidential, with some exceptions, and cannot be disclosed without written consent. Juvenile courts have access to school records without consent. Schools must implement safeguards to ensure that records remain confidential.

Parents may ask that incorrect records be changed and may request a hearing if the school refuses to correct them. At the very least, a parent may insert a statement disagreeing with records they think are wrong. Parents may also complain to the federal government if they believe schools are not handling records properly.

Individualized Education Program's (IEPs), evaluations, records of your activity on your child's behalf, letters, and reports are among the records you must keep in order to advocate effectively for your child.

### **Advocacy Hints in Chapter 5**

- ◆ Records include items in paper, electronic, and other formats (Page 2).
- ◆ "Records" do not include all documents about your child (Page 2).
- ◆ You may have access to your child's records unless you no longer have a legal right to participate in his or her educational program (Page 3).
- ◆ You must have custody of your child in order to require the school to create new records about him or her (Page 3).
- ◆ Keep a list of relevant records so you can track them down in the many places within the school district where they may be kept (Page 5).
- ◆ Review your child's records with an administrator so you can get an explanation of why each record is kept (Page 5).
- ◆ Use past IEPs and evaluations to build a case for better services (Page 7).
- ◆ Use IEPs to hold a school responsible for serving your child (Page 8).
- ◆ Keep a notebook with relevant laws, rules, and records (Page 8).

## School Records

Local school districts keep records on all students. Each of these records, known as the Cumulative Record File or "CA-60", contain information such as name, gender, date of birth, address, enrollment dates, exit dates, and types of specialized programs and services being rendered (such as special education, limited English proficiency, career and technical education, and others). Local districts report this information to the state through the Michigan Student Data System (MSDS). The MSDS has a unique identification code for each student in the state. For more information on the Michigan Student Data System, visit [http://www.michigan.gov/cepi/0,4546,7-113-986\\_50502---,00.html](http://www.michigan.gov/cepi/0,4546,7-113-986_50502---,00.html).

Local school districts also keep special education records. These records, often kept separately from general education records, may include assessment information, reports, and evaluations, reports from the Individualized Educational Planning Team (IEPT) meetings, Individualized Education Programs (IEP), and other information pertinent to the provision of special education services.

Intermediate school districts maintain "registry" records that relate to students with disabilities in local districts, including students placed in state and private facilities. **MCL 380.1711(1)(f); MARSE R 340.1861.**

► **Advocacy Hint: Records come in all forms...** Record means any information recorded in any way, including, but not limited to, handwriting, print, computer media, video or audio tape, film, microfilm, and microfiche. **34 CFR 99.3.**

Legal rights and obligations covering records are governed by a variety of laws. The most important are Individuals with Disabilities Act (IDEA), the Michigan Mandatory Special Education Act (MMSEA), and the Family Educational Rights and Privacy Act of 1974 (FERPA). **20 USC 1232g.**

► **Advocacy Hint: ... but not everything is a record.**

**According to FERPA, "educational records" do not include:**

- (1) Records that are kept in the sole possession of the maker, are used only as a personal memory aid, and are not accessible or revealed to any other person except a temporary substitute for the maker of the record.
- (2) Records of the law enforcement unit of a school, created for the purpose of law enforcement.
- (3) Records about school employees that are exclusively related to their role as an employee.
- (4) Certain medical or psychological records regarding adult or postsecondary students.
- (5) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student.
- (6) Grades on peer-graded papers before they are collected and recorded by a teacher. **34 CFR 99.3(b).**

In some cases, these items may be available through other laws such as the Freedom of Information Act (FOIA).

## Access By Parent

In general, the school must presume that the parent has authority to inspect and review records relating to the child unless the agency has been advised that the parent does not have that authority under the state laws governing such matters as guardianship, separation, and divorce. If this happens, the parent can provide information proving custody or guardianship. **34 CFR 300.613(c).**

► **Advocacy Hint: Right to records access...** The Family Education Rights and Privacy Act allows parents who do not have physical custody of their child, but have not had their parental rights limited or terminated, to have access to their child's school records. **34 CFR 99.4.**

Additionally, parents have specific access rights:

- ◆ The school must permit parents to inspect and review any education records relating to their children that are **collected, maintained, or used** by the school.
- ◆ The school must comply with any request by a parent to view records without unnecessary delay, immediately if requested for use at any Individualized Education Program Team (IEPT) meeting, hearing or appeal, and never more than 45 days after the request is made.
- ◆ The school must respond to reasonable requests by the parent for explanations and interpretations of the records.
- ◆ The parent has the right to have a representative of the parent inspect and review the records upon presentation of a signed release or permission statement.
- ◆ The parent has the right to obtain copies of the records, if not having copies would prevent the parent from inspecting and reviewing the records. Copying costs can be charged to the parent unless this would prevent the parent from reviewing the records. The school cannot charge a fee to search for or retrieve information. **34 CFR 300.613 and 300.617.**

► **Advocacy Hint: ... but not records creation.** A non-custodial parent cannot require the school to create a record they do not already have. For example, the custodial parent could request that the school provide weekly progress reports as part of a child's IEP. If the school agrees to do this and produces the reports, the non-custodial parent would have access to these reports. The non-custodial parent could not, however, request that the school provide him or her with weekly progress reports if they were not already in existence and were not required by the reporting requirements in the IEP.

## Confidentiality

School records must be confidential. This means that no one may show records or discuss information from the child's records with unauthorized people. This includes records maintained on a computer. Authorized access to a child's records can be gained in two ways: first, the parent may consent to access; second, some school personnel may have access authorized by law.

## Consent

Under federal law, the school MUST obtain the parents' written consent before disclosure of personally identifiable information to anyone other than school officials. The consent must specify the records to be disclosed, the purpose of the disclosure, and the person to whom the disclosure may be made. The school must provide the parent with copies of any records disclosed, if the parent requests them. **34 CFR 300.622(a); 34 CFR 99.30.**

In situations where a child may have committed a crime that is reported by the school, the school is required to provide a copy of the child's special education and disciplinary records to the court.

**34 CFR 300.535.** (Note that this section does not require schools to report crimes, nor does it excuse schools from the responsibility to refrain from criminalizing disability-related conduct.)

## Authorized Access

**Some people have access to records without consent. They include:**

- ◆ other school officials, including teachers within the educational institution or local education agency, who have been determined by such agency or institution to have legitimate educational interests;
- ◆ school officials of another school or ISD if the child transfers from one school to another, provided the parent receives notice of the transfer of records;
- ◆ federal and state educational authorities, if it is for auditing purposes required by law and personally identifying information is subsequently destroyed when no longer needed;
- ◆ in connection with a child's application for, or receipt of, financial aid;
- ◆ organizations or individuals conducting studies, if the studies will not permit personal identification of children;
- ◆ accrediting organizations;
- ◆ appropriate people in a health or safety emergency;
- ◆ to victims of violent or non-forcible sex offenses;
- ◆ appropriate parties in order to comply with a court order or subpoena;

- ◆ appropriate parties when the school is a party to litigation. **20 USC 1232g(b)(1); 34 CFR 99.31.**

**Remember, if none of these exceptions apply, the school cannot release or disclose any information maintained in a record until the parent (if the child is under 18 years of age), the child (if 18 years of age or older), or the guardian gives consent.**

## Safeguards

To protect confidentiality as information is collected, stored, disclosed, or destroyed, each school must appoint a person who is responsible for insuring confidentiality. Each school must also:

- ◆ keep a list of the names and positions of school employees who have access to records;
- ◆ keep a record of all people who have seen the records, noting their name, the date access was given, and the purpose for authorizing the use of the records;
- ◆ ensure that all persons who collect or use personally identifiable information or computer terminals or microcomputers receive training in procedures for safeguarding the confidentiality of records. **34 CFR 300.623; 20 USC 1232g.**

► **Advocacy Hint: So many files, so little time.** Documents from a child's records may be kept by teachers, evaluators, or administrators in different locations in local and intermediate school districts. Each district must keep a list of the types and locations of educational records (each of these lists must be given to the parent, upon request). **34 CFR 300.616.** It is very useful to have a list of all the records maintained by the school district. You will at least know the location of the records, and will have an easier time tracking them down. Once a school decides that information is no longer needed to provide educational services to a child, the school must notify the parent of this. At the request of the parent, the information must be destroyed. However, the school is required to maintain a permanent record including name, address, telephone number, grades, attendance records, classes attended, grade level and year of completion for each child that attends that school. **34 CFR 300.624.**

## How To Change Records

Records are one of the primary ways that teachers and other professionals learn about children. Sometimes information included in the records may be inaccurate, misleading, or may in other ways violate the student's privacy or other rights. If such misleading information remains in the file, it may have an effect on the student's present and future educational programs and placements.

► **Advocacy Hint: Ask for administrator's help.** The parent may request that a school administrator review their child's record with them. The administrator can review each document in the record to let the parent know why each of the documents is being held and the use the school will make of them.

If the parents believe that a student's records contain erroneous or misleading information, they may request that the school amend or delete the information. The school must decide whether or not to change the records within a reasonable time after receiving the request. If the school refuses to amend the records, it must inform the parents of the refusal and the right to a hearing. This hearing is different from a hearing on educational programming. **34 CFR 300.618.**

The purpose of a hearing is to decide whether information in a student's record is inaccurate or misleading, or in violation of the child's privacy or other rights. **34 CFR 300.619.** The hearing must be conducted according to FERPA rules. **34 CFR 300.621.** These rules require the following:

- ◆ The hearing must be held within a reasonable time after the parents have made a request. The school must notify the parents reasonably in advance about the hearing date, time, and place.
- ◆ A hearing officer must be appointed. The hearing officer may be any person, including a school official, who has no direct interest in the outcome of the hearing.
- ◆ The parent must be given the chance to present evidence, to call and cross-examine witnesses, and to be represented by an advocate or attorney.
- ◆ The hearing officer's decision must be made in writing, and be based solely on the evidence presented at the hearing. The decision must include a summary of evidence and the reasons for the decision. **34 CFR 99.22.**

If the hearing officer decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the student, the school must amend the information accordingly and inform the parent in writing. If the hearing officer decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the student, the school does not have to amend the information. Instead, the school must inform the parents of their right to place a statement in the records commenting on or giving reasons for disagreement with the information. This statement must be maintained by the school as part of the student's records as long as the record or contested portion is maintained by the agency. Further, if the record is disclosed by the school to any party, the parent's statement must be disclosed to the party as well. **34 CFR 99.21; 34 CFR 300.620.**

## **Complaints About Records**

IDEA complaints about records should be directed to the state (see "Problem Solving and Complaints" chapter). In addition, if FERPA rights are being violated, or there is widespread misuse of records, the parent may wish to also file a complaint with the U.S. Department of Education at the address below.

Family Policy Compliance Office  
U.S. Department of Education  
400 Maryland Ave., S.W.  
Washington, D.C. 20202-5920

A complaint should include the names of the student, the school and the district, a description of the violation, and your daytime telephone number. Complaints must be timely submitted,

not later than **180 days** from the date you learned of the circumstances of the alleged violation, and must contain specific allegations of fact giving reasonable cause to believe that a violation has occurred, including:

- ◆ Relevant dates, such as the date of a request or a disclosure and the date the parent learned of the alleged violation;
- ◆ Names and titles of those school officials and other third parties involved;
- ◆ A specific description of the education record around which the alleged violation occurred;
- ◆ A description of any contact with school officials regarding the matter, including dates and estimated times of telephone calls and/or copies of any correspondence exchanged between the parent and the school regarding the matter;
- ◆ The name and address of the school, school district, and superintendent;
- ◆ Any additional evidence that would be helpful in considering the complaint.

The complaint will be investigated and, if found valid, the school will be ordered to correct its practices and procedures.

For more information on FERPA from the Family Policy Compliance Office, go to  
<http://www.ed.gov/policy/gen/guid/fpcos/ferpa/parents.html>.

<http://www2.ed.gov/policy/gen/guid/fpcos/index.html>

## **Records To Keep**

The most important record for you to keep about your child's education is a copy of his or her current IEP or 504 Plan and his or her behavior support plan (if your child has one). These documents are the record of the plan you and the school agreed to for the student. They record the student's eligibility, program and services and accommodations. They list related services such as therapy, transportation and behavior plans, and tell you specifically what the school is doing to address needs related to your child's disability. Reviewing goals and services in past IEPs and 504 plans will give a long-term perspective on the student's educational progress.

It is also important to keep copies of multidisciplinary and other evaluations which list achievement levels and the evaluator's recommendations. With copies of IEPs, or 504 plans, and evaluations you have a good basis for reviewing the student's educational progress and continuing needs.

**► Advocacy Hint: Read your child's history.** Reviewing past IEPs and evaluations will provide you with useful information on which to base requests for significant changes in programs or services. It is difficult to argue that program changes are not necessary if the student has had the same goals for several years, or has not changed reading or other skill levels or if decreases in related services have occurred at the same time as stagnating skill levels.

► **Advocacy Hint: Get it in writing.** The IEP or 504 plan is the only record of the agreement between you and the school on your child's services. Your copy of this document will help you with formal or informal complaints when you believe the school has not followed the student's plan in providing listed related services such as behavior plans or transportation or other program elements.

There are two other types of records parents and advocates should keep. First, you may wish to keep a notebook or file where you can record telephone calls, conversations, and meetings you have regarding the student. For each conversation or meeting, write down the date and time, the people with whom you talked, and what was said during the conversation or meeting. It does not need to be a word-for-word record as long as you include important points.

Second, you may wish to keep copies of letters or other correspondence you write or receive regarding the student. This is especially important when the law requires you to make requests or respond to the school in writing or when verbal requests have not produced the anticipated result. This file should also include the IEP or 504 plan, evaluations, and other educational records such as:

- ◆ progress reports, grades, or report cards;
- ◆ discipline reports;
- ◆ parent contact notes, progress reports, and teacher reports;
- ◆ informal assessments (tests of motor skills, self-help skills, language development, social and emotional skills);
- ◆ reports from medical doctors and other outside agencies; and,
- ◆ notices, or invitations, of IEPT meetings.

► **Advocacy Hint: Don't lose this book!** It is a good idea to keep a notebook containing copies of important laws, rules and regulations. A suggested format for keeping records is at the end of this chapter.

## Appendix 5-1

### Parent's Notebook\*

Purpose: To keep an accurate record of meetings, phone conversations, and letters between you and school personnel and others about your child. The suggested format is:

DATE, TIME, KIND OF COMMUNICATION (telephone, letter, meeting)

WHO

WHAT WE TALKED ABOUT

IMPORTANT DOCUMENTS AND RECORDS

#### **Example:**

April 4, 1987, 3:00 p.m., IEPT Committee Meeting at Smithwick School.

**Who:** Mr. Dodd, Principal of Smithwick School; Mrs. Jones, Special Education Director of the Blank Intermediate School District; Mrs. O'Hara, Johnny's teacher at Smithwick School; Mrs. Beech, Physical Therapist; John Wainwright; Mr. and Mrs. Wainwright.

**What we talked about:** An IEP was developed for Johnny (see IEP in file). Johnny will continue in his current placement at the Smithwick School, but will no longer receive physical therapy. As parents, we disagreed and said we thought Johnny should continue to receive physical therapy. The IEPT-Committee refused to agree to physical therapy because they said they didn't have enough therapists and that Johnny had low priority for physical therapy.

#### **Important Documents:**

IEP (in file)

IEPT Meeting Report (in file)

Tape of IEPT Meeting (in tape box)

\* All materials so designated in this section are taken from *Parent Manual - Education For Your Handicapped Child*, Advocacy Incorporated, Austin, Texas, 1979. Materials have been revised to conform with Michigan law.

## Appendix 5-2

### Letter Requesting Review of Records\*

(Be sure to keep a copy for your records)

(Date)

(Name of Appropriate Person)

(Position)

(Name of School)

(Address of School)

Dear (Name):

I would like to review my child's, (name of student) complete records. I understand that these records must be made available to me no later than 45 days from your receipt of this letter. I will come to the school office to review these records during the morning of (date 45 days from time you expect the school to get this letter). I would like to review the records before this date. If this is possible please contact me and we can arrive at a mutually agreeable time for this to take place. I would appreciate your prompt response to my request. If I do not hear from you I will be in the office on (date) at (time) to review the records.

Sincerely,

(Your Name)

(Your Address)

(Your Telephone Number)

## Appendix 5-3

### **Letter Requesting Copy of Records\*** **(parent cannot go to school and review them)**

(Be sure to keep a copy for your records)

(Date)

(Name of Appropriate Person)

(Position)

(Name of School)

(Address of School)

Dear (Name):

I would like to review my child's, (name of student) complete records. I understand that these records must be made available to me no later than 45 days from your receipt of this letter. (For X reason, or due to X), I am unable to inspect and review these records in person. Therefore, pursuant to 34 C.F.R. § 300.613, I am requesting that you provide copies of the records to me at (Address). Failure to provide copies would effectively prevent me from exercising my right to inspect and review the records.

I would like to review the records before this date (date 45 days from time you expect the school to get this letter). I would appreciate your prompt response to my request.

Sincerely,

(Your Name)

(Your Address)

(Your Telephone Number)

## Appendix 5-4

### **Letter Requesting Records from School When a Meeting is Pending\***

(Be sure to keep a copy for your records)

(Date)

(Name of Principal)

(Name of School)

(Address of School)

Dear (Name of Principal):

I am the parent of (name of student), who is a (grade level or special education etc.) student. I am preparing for (student's name's) (type of meeting, for example: IEPT meeting, manifestation determination review, disciplinary hearing) on (date) and I need to review (his or her) records prior to that date. I have tentatively reserved time to review the file in the school office on (date) at (time). I understand that all (his or her) records may not be in the office file. Please let me know if it is possible to review all the documents in the file at the school office on (date) and if it is necessary to schedule another time to review the remainder of the file. I understand that I have the right to review my child's records prior to the meeting currently scheduled for (date). I can be reached at (day and evening telephone numbers).

I look forward to hearing from you soon.

Sincerely,

(Your Name)

(Your Address)

(Your Telephone Number)

## Appendix 5-5

### Letter Requesting A Change In Student's Records\*

(Be sure to keep a copy for your records)

(Date)

(Name of Principal)

(Name of School)

(Address of School)

Dear (Name of Principal):

I am the parent of (name of student), a student in your school. There is a statement in (name of student's) (give name of record. For example, "physical therapy evaluation, performed by Mrs. Wormwood on June 5, 1978") that I believe is ("misleading," "inaccurate," and/or "in violation of my child's rights") because (give your reasons).

I request that you change (name of student's) (name of record) records so they will no longer be ("misleading," "inaccurate, "and/or" in violation of my child's rights").

I look forward to hearing from you soon on this matter.

Sincerely,

(Your Name)

(Your Address)

(Your Telephone Number)

# **Chapter 6**

## **THE INDIVIDUALIZED EDUCATION PROGRAM**

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### **What This Chapter Is About**

The Individualized Education Program Team (IEPT) takes information from evaluations, assessments, and observations and (1) decides whether or not a student is eligible for special education, and (2) creates an individual plan for each student in special education.

IEPT members include school representatives and teachers. Parents are also team members and must be invited, with the meeting time arranged to meet their needs. The IEPT may also include other people, including evaluators, advocates, and the student.

IEPT meetings differ depending on the individual students, but most should follow a predictable pattern of introductions, discussion, and eligibility determination, then planning and completing the actual Individualized Education Program (IEP) document. The IEPT must take specific steps to allow parental participation in the IEP process.

IEPs are developed and implemented under specific timelines. Parents are entitled to notice during several steps of the process and must consent before some steps can be taken.

Each IEP has a set of core elements defined in the law and set forth in an IEP: functional performance; annual goals; a description of how the child's progress toward meeting the annual goals will be measured and when periodic reports on the progress will be provided; special education and related services; participation in extracurricular activities; what standardized tests will be administered as well as accommodations necessary for testing; beginning dates; specific frequency and duration of related services; specialized transportation; and what general education placements were considered. The IEP also has assurances, certified by the superintendent or designee, that the IEP process was followed and the IEP will be implemented.

The decisions that the IEP team makes about these core elements will be written into the IEP document. It is important to review the document after it has been completed to make sure that everything the team agreed upon is accurately reflected in the written document.

If, during the course of the year the IEP is in place, the IEPT determines that minor changes need to be made to the IEP, an amendment to the IEP may be written. This does not require a meeting of the entire IEP team.

This chapter includes pages of the model state IEP forms (updated in 2015) with commentary by MPAS.

## Advocacy Hints in Chapter 6

- ◆ Ask for more frequent staffing or IEPT meetings to monitor the progress of your child's program (Page 3).
- ◆ Be specific in approving time extensions – do not tolerate long, indeterminate delays (Page 4).
- ◆ Don't stay away from the meeting – it won't help you (Page 4).
- ◆ Before the IEPT meets, review your child's records, write out your most important questions, and find a friend to go with you (Page 5).
- ◆ Get and read evaluations in advance so you are prepared to discuss them (Page 5).
- ◆ Introduce yourself to the IEPT members; ask them to do the same (Page 5).
- ◆ If what you want will not fit within the IEP form boxes or lines, add information on another sheet of paper (Page 6).
- ◆ Get to know your school's IEP form so you know where to ask for services or supports your child needs (Page 6).
- ◆ Know what to do when the school brings a draft IEP to the meeting (Page 7).
- ◆ Invite the student, especially the older student (Page 11).
- ◆ Know who has to be at the meeting and who can be excused (Page 12).
- ◆ Know the difference between "consent" (written) and "agreement" (Page 12).
- ◆ Speak up and disagree if the team finds your child ineligible (Page 12).
- ◆ Ask questions about the FAPE factors (Page 17).
- ◆ When present levels of performance do not change from year to year, ask whether or not the services and supports provided are sufficient (Page 18).
- ◆ Relate services you request to a specific IEP goal; the goals and objectives drive and shape the school's duty to provide services (Page 23).
- ◆ Focus on what the student needs, not what the school offers (Page 26).
- ◆ Make sure services are written in the IEP; the school does not have to provide services based upon verbal statements at the meeting (Page 30).
- ◆ Discuss where educational services will be provided by first looking at general education settings with supports (Page 31).

## General Information About the IEP Process

The special education decision-making process centers on evaluation and professional consideration of the individual needs of specific students. In Michigan the “multi-disciplinary evaluation team” (MET), a team of professionals with different areas of expertise, conducts comprehensive evaluations of students. The educational data and recommendations developed by the MET are then brought to a meeting of the school and parents, which is now called an “individualized education program team” (IEPT) meeting. At the IEPT meeting, the IEPT considers this data, applies the expertise and knowledge of the team members, and makes decisions about the student’s eligibility and services. These decisions are then recorded in a document known as the “individualized education program” (IEP).

An IEP is required for every student eligible for special education. **20 USC 1412(a)(4); 34 CFR 300.112.** The IEP is the cornerstone of the Individuals with Disabilities Education Act (IDEA). It is a way to identify goals for the student and to identify the programs and services needed to achieve these goals.

An IEPT meeting is convened for each student at least once a year. An IEPT meeting is also held after the initial MET evaluation. Additionally, either the school or a parent can request that the IEPT convene to discuss changing the IEP at any time there is concern that the existing IEP is not appropriate. **34 CFR 300.324(b).** Minor changes can be made in an amendment to the IEP if the parent and school agree to it. **34 CFR 300.324(a)(iv),(6).**

**►Advocacy Hint: Monitor the program.** IEPT meetings can be held more than once a year, as there may be a need to review the adequacy of the student’s programs and services or to consider new information. Also, it is good practice to have the IEP require periodic staff meetings during the school year, including parental participation, to review the student’s progress and/or to brainstorm about the student’s needs. If one of these “staffings” results in an agreement that the student’s program or goals needs to be changed, the school and parents may agree to use an amendment to change the IEP without rewriting the entire IEP.

Timelines are written into the law to ensure that an IEP is developed for an eligible student in a timely fashion. The school has 10 school days after receiving a written request for an evaluation for a student with a suspected disability to notify the parent of the school’s intent to evaluate the student and to get the parent’s written consent for this evaluation. **R 340.1721.** After receiving the parent’s written consent to evaluate the student, the school then has 30 school days to complete the MET evaluation, convene the IEPT meeting, decide whether or not the child is eligible for special education services, and either offer services or provide notice that the child is not eligible. **R 340.1721b(1).**

This 30-day timeline can be extended if agreed to by the parent and school. The basic point under both state and federal law is that time is of the essence and long delays are intolerable.

► **Advocacy Hint: Avoid long delays.** Schools sometimes do not have the resources to assure timely evaluations and may therefore seek an extension from the parent, either before or after the delay occurs. Giving the school additional time may be reasonable, but the parent/advocate should make sure the extension is specific ("extended by 14 additional days") and does not threaten to waste precious education time (for example, a long delay in evaluating a preschooler can waste critical months for specialized instruction during a crucial developmental period of the child's life). Keep in mind, also, that "school days" do not include weekends, holidays, or school vacations.

## Invitation to Attend the IEPT Meeting

Parents must be invited to attend the IEPT meeting. The school must notify the parent early enough to assure the parent an opportunity to attend the meeting and must schedule the meeting "at a mutually agreed on time and place." **34 CFR 300.322(a).** The school may contact the parent in person, by phone, or with a written invitation. If it is not possible to attend the meeting at the time that has been suggested, it is important to contact the school immediately to schedule a different time.

When a parent does not attend an IEPT meeting, the school must carefully document efforts to arrange a mutually agreeable time and place for the meeting, including records of phone calls, letters, and visits to the parent's home or workplace. **34 CFR 300.322(d).** IDEA allows for alternative means of meeting participation for IEPT meetings and other meetings. Members can participate through a telephone conference call or video conferencing. **34 CFR 300.322(c).**

► **Advocacy Hint: Go to the meeting.** The school district has the responsibility to give parents the opportunity to attend IEPT meetings, but if a parent does not attend, the IEPT can complete an IEP without parent participation. Parents cannot "vote with their feet" and forestall changes in a program by refusing to attend. Make sure the meeting is at a mutually convenient day and time, then go to the meeting and speak up, especially if you have questions or do not agree with something the school proposes.

The school must also provide the parent with information about the IEPT meeting. Before the meeting, the school must contact the parent and explain the purpose of the IEPT meeting and the role of each person who will be participating in the IEPT. **34 CFR 300.322(b).**

At the meeting, the school must take whatever action is necessary to ensure that the parent understands the proceedings, including arranging for an interpreter for parents who are deaf or whose native language is other than English. **34 CFR 300.322(e).**

► **Advocacy Hint: Be prepared!** There are several things that a parent can do prior to the meeting in order to be prepared to participate fully in the IEPT meeting. First, obtain and review all recent evaluations and assessments. If test results are unclear or confusing, you may want to schedule a meeting with the person who conducted the assessments to discuss them. If the IEP is not the student's initial IEP, review the student's previous two or three IEPs. Pay special attention to the goals and objectives and whether they have been achieved, since that will help to make clear what programs and supports have proven effective in the past. Make a list of the things that you want to make sure the IEPT addresses. Then try to narrow that list to four or five most important points. It may be useful to write a note or to email that list of concerns to the school prior to meeting in order to make the meeting productive and efficient. Finally, it may be helpful to arrange for a friend or relative to come to the meeting with you. They can provide support to you in your advocacy efforts.

► **Advocacy Hint: Get evaluations in advance.** Because evaluations are so important, it is reasonable to request (in writing if possible) that copies of new evaluations be provided to the parent/advocate prior to the IEPT meeting to allow the parent/advocate time to adequately review the information. It is poor practice to provide such detailed and new information to the parent at the IEPT meeting, as this does not allow enough time for review. If the school does not provide the evaluations in advance, make sure to take enough time during the meeting to review and understand them.

## The IEPT Meeting

Because each student has individual needs, what happens during an IEPT meeting may vary widely from one student to another. The following is a description of how an IEPT meeting agenda might look.

- (1) All present should make introductions.

► **Advocacy Hint: Introduce yourself.** If persons are not introduced, you should request introductions so you will know each of the participants, their positions or relationships to the student, and their reasons for attending.

- (2) The chairperson should state the reasons for the meeting and the ground rules for conducting the meeting.

### If the IEPT is meeting to determine eligibility:

- (3) A summary should be given of the reasons for the initial referral of the student and of the kinds of assessments used to help determine eligibility.
- (4) The team should discuss all information pertinent to determining eligibility.

- (5) If there is disagreement among team members, more information can be obtained. The school district must provide any additional testing the IEPT recommends.
- (6) The team will determine eligibility.
- (7) If the IEPT finds the student eligible, the members must write an IEP or reconvene for that purpose.

**If the IEPT is meeting to write or revise an IEP:**

- (8) As information is shared, recommendations should be restated and agreements and disagreements discussed. Ask that the recommendations be read aloud so that you can agree or disagree with the wording.
- (9) After consensus is reached on recommendations, the program that the IEPT has agreed upon will be recorded on the IEP form.

**The IEP Form**

IDEA includes specific requirements for the content of the IEP document. **34 CFR 300.320.** The IEP form is an important tool for parents and advocates, as there is a place to address almost any issue of concern.

**► Advocacy Hint: Draw outside the lines.** If important information will not fit in lines or boxes provided on the form, it can be attached to the form with a note on the form stating that there is an attachment. This includes IEPs that are recorded on electronic programs. If there is no field or not enough characters available to record the necessary information, create attachments.

The Michigan Department of Education has developed a standard IEP form that is used by many (but not all) schools. While a school may use an IEP form that has a different order or format, the information that is required will be the same.

**► Advocacy Hint: Master your district's IEP form.** A parent or advocate who is preparing for an IEPT meeting should get a blank IEP form from the school and walk through it before the meeting to identify places where issues of concern can be addressed. It may be helpful to jot notes on the blank form as a reminder of what important matters you want the team to discuss.

► **Advocacy Hint: Dealing with a draft.** The school may come to the IEPT table with a “Draft IEP” prepared. This is not illegal, as long as it is truly used as a “draft,” with changes made to reflect the input and discussion of the team during the meeting. Obtaining a copy of the draft prior to the meeting can be a good way of preparing to participate in the meeting, since it allows parents and advocates an opportunity to think about the issues and concerns raised by the school in advance of the meeting. Parents and advocates can offer a similar opportunity to the school by sharing with the school the most important concerns they have about the student’s educational needs prior to the meeting.

## IEP Timelines

Michigan law sets the timelines for making decisions about special education services and then actually providing them. All of these timelines refer to “school days,” which do not include weekends, holidays, seasonal breaks, or summer. Under these timelines:

- ◆ The school has **10 school days** from receipt of a written request to conduct any special education evaluation to respond with a request for consent or a notice saying why they will not evaluate. **R 340.1721b(1)**.
- ◆ The school has **30 school days** from receipt of consent to conduct an evaluation, convene an IEPT meeting, decide on eligibility, and offer appropriate services. **R 340.1721b(1)**.
- ◆ The school has **7 school days** from the date of the IEPT meeting to notify the parent in writing that services will be offered, where they will be provided, and when they will begin. **R 340.1721b(3)**. Often this notice is provided directly to the parent at the end of the IEPT meeting.
- ◆ If the child is receiving special education services for the first time, the parent has **10 school days** from when they receive written notice to consent to services. **R 340.1721b(2)**.
- ◆ The school has **15 school days** after notice is issued (or, if the child is receiving services for the first time, after consent is received from the parent) to start providing services, unless the parent appeals. **R 340.1721b(4)**.

**While every IEP must contain the following sections, the format of your district's IEP may be different.**

<b>IEP DATES</b>			
<b>IEP Team Meeting</b>	<b>Initial IEP</b>	<b>Annual/Review IEP</b>	<b>Reevaluation IEP</b>
Offer of a FAPE: _____ Implementation: _____			

**Individualized Education Program (IEP)**

**Section 1  
Demographic Information**

<b>Student</b>	Last:	First:	M:	Birth Date:	Gender:	Grade:	UIC:
Address:				City:		State:	Zip:
Phone:							
Resident District:				Operating District:			
County:				Attending Building:			
<b>Parent</b>	Last:	First:	M:	Relationship to Student:			
Native Language or Other Communication Mode:							
Address (if different):				City:		State:	Zip:
Home Phone:			Work Phone:		Pager/Cell:		
Email:							
<b>Parent</b>	Last:	First:	M:	Relationship to Student:			
Native Language or Other Communication Mode:							
Address (if different):				City:		State:	Zip:
Home Phone:			Work Phone:		Pager/Cell:		
Email:							

**PURPOSE OF MEETING**

Check one of the following:	Check all others that apply:
<input type="checkbox"/> Initial IEP <input type="checkbox"/> Annual/Review IEP <input type="checkbox"/> Reevaluation IEP	<input type="checkbox"/> Change of Placement <input type="checkbox"/> Suspension/Expulsion <input type="checkbox"/> Secondary Transition <input type="checkbox"/> Change of Eligibility <input type="checkbox"/> Other: _____

**OFFICE USE**

<b>PARENT CONTACT</b>			
The parent/adult student was contacted to explain the purpose of the meeting and the roles and responsibilities of each participant via (check all that apply):			
<input type="checkbox"/> IEP Invitation	<input type="checkbox"/> Letter	<input type="checkbox"/> Phone	<input type="checkbox"/> Other: _____
Results: _____			

(This is a Michigan Department of Education, Office of Special Education form. This is not a product of MPAS)

## Michigan Protection & Advocacy Service, Inc.

### PARENTAL RIGHTS AND AGE OF MAJORITY

Check all that apply:

- The student will be age 17 during this IEP and the student was informed of parental rights that he or she will receive at age 18.
- The student has turned age 18 and the student and parent were informed of parental rights that were transferred to the student at age 18, including the right to invite a support person such as a parent, advocate, or friend.
- The student has turned age 18 and there is a guardian established by court order. The guardian is: \_\_\_\_\_.
- The student has turned age 18 and a legally designated representative has been appointed. The representative is:  
\_\_\_\_\_ as \_\_\_\_\_  
(e.g., power of attorney, trustee)

### IEP MEETING PARTICIPANTS IN ATTENDANCE

Check the box  indicating the IEP participant(s) who can explain the instructional implications of evaluation results.

Student (must invite at age 16 and older)	<input type="checkbox"/> District Representative/Designee
Parent	<input type="checkbox"/> General Education Teacher
Parent	<input type="checkbox"/> Special Education Teacher
<input type="checkbox"/> Agency Providing Secondary Transition Services (consent on file)	<input type="checkbox"/> Other
<input type="checkbox"/> Other	<input type="checkbox"/> Other

#### Parent and District Agreement on Attendance Not Necessary

These members are absent; their curricular area/related services are not being modified or discussed in the meeting: \_\_\_\_\_

#### Parent and District Agreement on Excusal Prior to Meeting

These members are absent and have submitted written input to the IEP team, including the parent, prior to the meeting: \_\_\_\_\_

### ELIGIBILITY FOR SPECIAL EDUCATION

- Eligible     Ineligible

Area of disability: \_\_\_\_\_

If the student is determined ineligible as a student with a specific learning disability (SLD), provide a statement of the basis for the determination of ineligibility:

\_\_\_\_\_

If the student is determined eligible as a student with an SLD, check all that apply:

- |   |  |  |  |
|---|--|--|--|
| <input type="checkbox"/> Oral expression        | <input type="checkbox"/> Listening comprehension | <input type="checkbox"/> Written expression      | <input type="checkbox"/> Basic reading skill         |
| <input type="checkbox"/> Reading fluency skills | <input type="checkbox"/> Reading comprehension   | <input type="checkbox"/> Mathematics calculation | <input type="checkbox"/> Mathematics problem solving |

Determination of eligibility was made in accordance with IDEA regulations at § 300.306(c)(1).

(This is a Michigan Department of Education, Office of Special Education form. This is not a product of MPAS)

## Section 1: Basic Background Information

**IEP Dates:** The first two pages of the sample IEP form contains some basic background information, beginning with dates. These dates help ensure that the IEP and re-evaluations take place in the proper time frames. (See page 7.) “Offer of a FAPE” simply means the date that the IEP was concluded and someone from the school signed it. That is the usual way the school provides notice of what supports and services are being offered. The implementation date will reflect the date that the supports and services actually begin. The school has to make sure that the IEP is updated at least annually; putting the dates at the beginning of the IEP form is one way to keep track of this.

**Demographic Information:** The next area captures some important information about the student and his or her family. There is a place for the student’s name and other personal information, including address and school. There is also a spot for recording the student’s parents’ names and contact information. If the “parent” is someone other than the student’s legal parent or guardian, the relationship to the student will be recorded, along with any special language needs of the student or parent.

**Purpose of Meeting:** This area includes information about the purpose of the IEPT meeting — to discuss initial eligibility, to review or revise an existing IEP, for re-evaluation, to determine whether there is an additional or different disability, or for some other reason.

**Parent Contact:** There is a place on the bottom of the first page where the school will make a note of the attempts that were made to make sure that the parents were informed about the meeting, its purpose, and who else would be attending. This part of the form provides information about how the school has attempted to allow parents to participate, and what resulted from those efforts.

**Parental Rights and Age of Majority:** The second page begins with an area that helps remind the IEP team that the student will have additional rights upon turning 18, unless a guardian has been appointed for the student. Certainly, not all students with an IEP will want or need a guardian, and there are many less restrictive possibilities. Beginning to consider some options at age 17 allows for plenty of time to plan.

**IEP Meeting Participants in Attendance:** The next box provides a place for the members of the IEP team to sign in to show their attendance at the meeting. In addition to the parents, the IEPT must include:

- ◆ a representative of the school who is qualified to provide or supervise special education programs and is knowledgeable about the general school curriculum and the availability of public resources;
- ◆ a general education teacher, if the student is or may be participating in regular education;
- ◆ a special education teacher or provider; and, an individual who can interpret the educational implications of evaluation results. **34 CFR 300.321(a)**.

The student may be invited to any IEPT meeting, no matter the student's age, if the student's attendance would be appropriate. **34 CFR 300.321(a)(7)**. If the IEP is to include transition services, the school **must** invite the student and (if appropriate and agreed to by the student) a representative of other agencies likely to be responsible for transition services (such as Michigan Rehabilitation Services). If the student or agency does not attend, the school must take other steps to get their input. **34 CFR 300.321(b)**.

**►Advocacy Hint: Whose life is it anyway?** It is good practice to include students in IEPT meetings, as they can relate their motivations, learning styles, etc. Even if a student's age or disability prevents him or her from attending the entire meeting, the student could attend part of the meeting to give input and receive information about programs. Older students must be invited, as their futures are being decided under the umbrella of transition services.

**Who may attend?** In addition to the mandatory participants, both the school and parents have discretion to invite other people with knowledge or expertise, including family members, friends, advocates, or related services providers. **34 CFR 300.321(a)(6)**. If the school program is provided in another district or ISD, and that district is conducting the IEPT meeting, the parent may request that a representative of the district of residence attend the meeting. **R 340.1721(e)(7)**.

The 2004 IDEA Amendments allow a member of the IEP team to be excused from attending an IEPT meeting, or to attend only part of the meeting, if both the school and the parent agree in writing that it is not necessary for that person to attend because the member's area of the curriculum or related services are not going to be discussed or modified at the meeting. If the person's area of responsibility **is** being discussed or changed, the parent must consent in writing and the person missing the meeting must submit information (regarding what is to be discussed) in writing before the meeting. **34 CFR 300.321(e)**.

► **Advocacy Hint: Too busy is no excuse!** This provision is intended to provide a reasonable means for excusing a member who is not critical to the decision-making process — not to allow teachers or other team members to bow out because of schedule conflicts. If a team member is needed to provide input or answer questions that the other team members raise, they should not be excused from the meeting. Generally, members of the IEPT are required to attend meetings because their input is necessary to plan an appropriate program. This position was underscored in a court decision: “The rationale for requiring the attendance of a regular education teacher is closely tied to Congress’s ‘least restrictive environment’ mandate. The input provided by a regular education teacher is vitally important in considering the extent to which a disabled student may be integrated into a regular education classroom and how the student’s individual needs might be met within that classroom.” **Deal v Hamilton County Board of Education, 392 F.3d 840 (6<sup>th</sup> Cir. 2004)**. Even when a student is placed in a special education classroom, a general education teacher will be able to provide the team with input necessary for inclusion with nondisabled peers, as well as access to the general curriculum and the determination of appropriate positive behavioral interventions and support.

► **Advocacy Hint: Consent? Agree?** IDEA defines “agree” and “consent” differently. “Consent” must be informed, voluntary, and written, while “agreement” can be written or verbal and need not be informed. **34 CFR 300.9; 71 Fed.Reg. 46551 (8/14/06)**.

**Eligibility for Special Education:** The IEPT will determine whether or not a student is eligible for special education. (Information regarding eligibility is covered more fully in Chapter 3.)

► **Advocacy Hint: Speak up.** Be certain to express your feelings if you disagree with the eligibility decision of the group. You may request a hearing on the issue of eligibility alone.

The team will also determine under which category of eligibility a student qualifies. (Information about categories of qualification is covered in detail in Chapter 3.) In addition to the primary qualifying disability, the team may identify a secondary disability. Remember that, regardless of these categories of qualification, any student who is identified as eligible for special education services is entitled to whatever services are necessary for the student to benefit from his or her education, not just those services related to the student’s category of eligibility.

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**Section 2-A**

**P resent Level of Academic Achievement and Functional Performance**

<b>FACTORS TO CONSIDER</b>
<p><b>General</b></p> <p>The IEP team must consider each of the following:</p> <p>The strengths of the student: _____ _____ _____</p> <p>The concerns of the parent for enhancing the education of the student: _____ _____ _____</p> <p>The results of the most recent evaluation(s) of the student: _____ _____ _____</p>
<p><b>Special Factors</b></p> <p>The IEP team must consider the following for the student (check boxes to indicate consideration):</p> <p><input type="checkbox"/> The communication needs of the student. <input type="checkbox"/> The need for assistive technology devices and services for the student.</p> <p>The IEP team must consider the following for the student, as appropriate (check all that apply):</p> <p><input type="checkbox"/> The use of positive behavioral interventions and supports, and other strategies, to address behavior because the student has behavior that impedes his or her learning or the learning of others. <input type="checkbox"/> The language needs of the student because the student has limited English proficiency. <input type="checkbox"/> Braille instruction because the student is blind or visually impaired. <input type="checkbox"/> The mode of language and communication because the student is deaf or hard of hearing.</p>

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### **Section 2-B: Option I** **Present Level of Academic Achievement and Functional Performance**

After reviewing the student's progress in the general education curriculum and any prior special education goals and objectives, describe how the student accesses or makes progress in the general education curriculum based on grade level content standards for the grade in which the student is enrolled or would be enrolled based on age.

	Report and describe baseline data such as curriculum-based assessments, student work, teacher observations, parent input, and other relevant data for each area of need.	Describe how the student's academic, developmental, and functional needs affect involvement and progress in the general education curriculum or participation in appropriate activities for preschool students.
<b>ACADEMIC/PRE-ACADEMIC ACHIEVEMENT</b> <i>Individual and/or district-wide assessments.</i>		
<b>GENERAL EDUCATION CURRICULUM</b> <i>Involvement and progress in the general education curriculum, or participation in age-appropriate activities for preschool students.</i>		
<b>SECONDARY TRANSITION ASSESSMENTS</b> <i>Age-appropriate assessment related to training, education, employment, and independent living skills.</i>		
<b>COMMUNICATION/ SPEECH &amp; LANGUAGE</b>		
<b>SOCIO-EMOTIONAL/ BEHAVIORAL</b>		
<b>PERCEPTION/MOTOR/ MOBILITY</b> <i>Gross and fine motor coordination, balance, and limb/body mobility.</i>		
<b>INDEPENDENT LIVING SKILLS</b> <i>Skills for academic success and independent living.</i>		
<b>MEDICAL</b> <i>Health, vision, hearing, or other physical/medical issues.</i>		

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### **Section 2-B: Option II**

#### **P resent Level of Academic Achievement and Functional Performance**

After reviewing the student's progress in the general education curriculum and any prior special education goals and objectives, describe the student's present level of academic achievement and functional performance.

Report and describe baseline data such as curriculum-based assessments, student work, teacher observations, parent input, and other relevant data for each area of need.

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Describe how the student's academic, developmental, and functional needs affect involvement and progress in the general education curriculum or participation in appropriate activities for preschool students.

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Describe how the student accesses or makes progress in the general education curriculum based on grade level content standards for the grade in which the student is enrolled or would be enrolled based on age.

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### ***Section 2-B: Option III***

After reviewing the student's progress in the general education curriculum and any prior special education goals and objectives, describe the student's present level of academic achievement and functional performance.

What is the identified area of need? <hr/> <hr/>	Report and describe baseline data such as curriculum-based assessments, student work, teacher observations, parent input, and other relevant data. <hr/> <hr/>
For an area of academic need, what are the district's prioritized content expectations for the student's grade level? <hr/> <hr/> <hr/>	
What predictive measure(s) does the district use to determine progress on these prioritized expectations? <hr/> <hr/> <hr/>	
What do we know about _____ graders' skills in _____? _____? _____ (grade level) (content area) <hr/> <hr/> <hr/>	
How does the student's academic, developmental, and functional needs affect involvement and progress in the general education curriculum, specific to _____, or participation in appropriate activities for preschool students? (content area) <hr/> <hr/> <hr/>	

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***Include a graph of individual student and peer group performance over time.***

## Section 2: Present Level of Academic Achievement and Functional Performance (PLAAFP)

**Factors to Consider:** The IEPT is guided in its preliminary discussion by a list of factors to consider in order to ensure the provision of a free appropriate public education (FAPE). The most important criterion in determining appropriateness is that the program must be individually designed to provide educational benefit. The list of factors will assist the team in determining the needs of an individual student. (FAPE is more completely addressed in Chapter 2.)

**►Advocacy Hint: Don't skip the preliminaries!** The key to a service being "appropriate" is that the education program must be designed to meet the unique needs of the student. The parents, teacher, and other professionals may differ in their ideas of what is appropriate; therefore, "appropriateness" of the education program must be decided on a case-by-case basis.

There may be a tendency to rush through discussion of the factors to consider in order to provide FAPE. But considering each factor carefully will ensure that the program that is developed is appropriate for the student. Don't allow the boxes to simply be checked without discussion, and make sure that pertinent comments are recorded on the IEP form. If you have prepared a written statement of your concerns, it can be noted here that they are included as an attachment.

**Options for Recording the PLAAFP:** The Department of Education's model IEP form now provides three different options for recording the student's present level of performance. Regardless of the format, the information in this section is critical to understanding the needs of the student, which drives the program planning. The PLAAFP pages also require the IEP team to think carefully about how the student's needs are related to the general education curriculum — the content that all students are expected to master. This focus on academic standards helps to bring the IDEA into alignment with other federal laws and ensures that students with disabilities are given appropriate access to the same challenging curriculum as are their peers.

The present level statement must provide information about the student's current performance in all areas of education that are affected by a student's disability. **34 CFR 300.320(a)(1)**. It should be stated in terms that clearly identify a measurable level of skill that has been achieved. Performance information may come from data collected from a variety of assessments, including standardized achievement tests, diagnostic tests, classroom performance, systematic observations, progress reports, state-wide or district-wide assessments, and parent reports. **Don't forget to add your own observations — write them out beforehand and attach them to the IEP.**

Present level statements are necessary for each area of deficit, so there may be multiple pages with present level statements for different areas of academic achievement and/or functional performance. Present level statements will relate to the goals that have been achieved in the previous year, and they will inform the selection of goals for the IEP that is being written. The present level statement will also impact the team's decision-making about supplementary aids, services and supports and state-and district-wide assessments. Present level statements should show an increase in skills from one IEP to the next.

► **Advocacy Hint: Educational benefit.** The issue of whether the services and supports in a student's program are adequate to confer educational benefit may be revealed in the progress — or the lack of progress — recorded in successive present level statements. See Chapter 2.

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### Section 3 Secondary Transition Considerations

Secondary transition services are required to be in effect when the student turns 16. IEP teams are recommended to consider secondary transition services at a younger age if appropriate. Secondary transition considerations must be updated annually thereafter.

<b>DATA</b>		
<b>Data Source(s) Used</b>	<b>Date Conducted</b>	<b>Name</b>
<input type="checkbox"/> Educational Development Plan (EDP)		
<input type="checkbox"/> Transition Assessment(s) (specify):		
<input type="checkbox"/> Student Interview (indicate the type of interview): <input type="checkbox"/> Written <input type="checkbox"/> Verbal		
<input type="checkbox"/> Other (specify):		

<b>STUDENT'S PREFERENCE AND INTEREST</b>	
<b>If the student did not attend the IEP team meeting, describe steps taken to ensure consideration of the student's preferences/interest:</b>	
<b>Adult Living</b> —As an adult, where do you want to live?	
<b>Career/Employment</b> —As an adult, what kind of work do you want to do?	
<b>Community Participation</b> —As an adult, what hobbies and activities do you want to do (e.g., arts, recreational activities, shopping, eating out, etc.)?	
<b>Postsecondary Education/Training</b> —After high school, what additional education and training do you want?	

<b>APPROPRIATE MEASUREABLE POST SECONDARY GOALS</b>	
<b>Training:</b>	
<b>Education:</b>	
<b>Employment:</b>	
<b>Independent Living (if appropriate):</b>	

<b>PLANNING/COMMUNITY SECONDARY TRANSITION SERVICES</b>		
<b>Needed Service Related to the Student's Strengths, Postsecondary Goals, and Present Level</b>		
Identify the service needed in at least one of the six areas below. Include the coordinated activity/activities for the service. Identify the responsible agency/other for each activity for the needed service.		
<b>IEP Team Must Consider</b>	<b>Instruction</b>	
	Service:	
	Activity:	
	Activity:	
	Activity:	
	<input type="checkbox"/> Considered, not needed (explain):	
Expected completion date:		
Responsible agency/other:		
Responsible agency/other:		
Responsible agency/other:		

	<b>Community Experiences</b>	Expected completion date:
	Service: Activity: Activity: Activity: <input type="checkbox"/> Considered, not needed (explain):	Responsible agency/other: Responsible agency/other: Responsible agency/other:
<b>IEP Team Must Consider</b>	<b>Development of Employment</b>	Expected completion date:
	Service: Activity: Activity: Activity: <input type="checkbox"/> Considered, not needed (explain):	Responsible agency/other: Responsible agency/other: Responsible agency/other:
<b>Consider When Appropriate</b>	<b>Other Post-School Adult Living Objectives</b>	Expected completion date:
	Service: Activity: Activity: Activity: <input type="checkbox"/> Considered, not needed (explain):	Responsible agency/other: Responsible agency/other: Responsible agency/other:
	<b>Acquisition of Daily Living Skills</b>	Expected completion date:
	Service: Activity: Activity: Activity: <input type="checkbox"/> Considered, not needed (explain):	Responsible agency/other: Responsible agency/other: Responsible agency/other:
	<b>Functional Vocational Evaluation</b>	Expected completion date:
	Service: Activity: Activity: Activity: <input type="checkbox"/> Considered, not needed (explain):	Responsible agency/other: Responsible agency/other: Responsible agency/other:

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### **Section 3: Secondary Transition Considerations**

This section provides the place to record the planning necessary to prepare a student for life after high school, or secondary transition. The team will consider both the **Student's Postsecondary Goals**, which are intended to capture the student's desires for adult living, and the **Planning/Community Secondary Transition Services** that will be needed to assist the student in meeting his or her goals. The team will also indicate how the course of study that has been indicated for the student aligns with the goals for adult living that the student has expressed. If the student anticipates a career that requires postsecondary education, for example, the course of study aligned with that plan would lead to a diploma. For more complete information related to planning for transition, please refer to Chapter 10.

## Michigan Protection & Advocacy Service, Inc.

### Section 4: Option I Goals and Objectives/ Benchmarks

<b>Instructional Area</b> —List the appropriate content area (e.g., strand/domain):		
<b>Michigan Content Expectations Upon Which Goal Will Be Based</b> —List the appropriate GLCE, EGLCE, HSCE, EHSCE, or Early Childhood Standards of Quality for Pre-kindergarten:		
<b>Baseline Data</b>  The student is currently _____ on the _____. (data) (assessment)		
<b>Annual Goal</b>  By _____, the student will _____ when/at _____ on _____. (date) (demonstrate skill) (conditions criteria) (assessment/evaluation)		
 <b>Short-Term Objective/Benchmark:</b> _____  <b>Performance Criteria:</b> _____  <b>Evaluation Procedure:</b> _____  <b>Evaluation Schedule:</b> _____		
Status Date: _____ Progress Toward Annual Goal: _____ Comments: _____	Status Date: _____ Progress Toward Annual Goal: _____ Comments: _____	
Status Date: _____ Progress Toward Annual Goal: _____ Comments: _____	Status Date: _____ Progress Toward Annual Goal: _____ Comments: _____	
 <b>Short-Term Objective/Benchmark:</b> _____  <b>Performance Criteria:</b> _____  <b>Evaluation Procedure:</b> _____  <b>Evaluation Schedule:</b> _____		
Status Date: _____ Progress Toward Annual Goal: _____ Comments: _____	Status Date: _____ Progress Toward Annual Goal: _____ Comments: _____	
Status Date: _____ Progress Toward Annual Goal: _____ Comments: _____	Status Date: _____ Progress Toward Annual Goal: _____ Comments: _____	
<b>SCHEDULE FOR REPORTING PROGRESS</b>		
When: _____		
Position(s) responsible for implementing goal activities (check all that apply):		
<input type="checkbox"/> Special Education Teacher	<input type="checkbox"/> Teacher Consultant	<input type="checkbox"/> Speech and Language Provider
<input type="checkbox"/> School Social Worker	<input type="checkbox"/> Occupational Therapist	<input type="checkbox"/> Physical Therapist
<input type="checkbox"/> Other: _____		
Position(s) responsible for reporting progress on goal: _____		

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## Section 4: Option II

### Goals and Objectives/ Benchmarks

**Instructional Area**—List the appropriate content area (e.g., strand/domain):

**Michigan Content Expectations Upon Which Goal Will Be Based**—List the appropriate GLCE, EGLCE, HSCE, EHSCE, or Early Childhood Standards of Quality for Pre-kindergarten:

#### Baseline Data

The student is currently \_\_\_\_\_ on the \_\_\_\_\_.  
(data) (assessment)

#### Annual Goal

By \_\_\_\_\_, the student will \_\_\_\_\_ when/at \_\_\_\_\_ on \_\_\_\_\_.  
(date) (demonstrate skill) (conditions criteria) (assessment/evaluation)

### SHORT-TERM OBJECTIVES/BENCHMARKS

By the end of the \_\_\_\_\_ marking period of \_\_\_\_\_, the student will \_\_\_\_\_ on \_\_\_\_\_.  
(#) (school year) (criteria) (assessment/evaluation)

By the end of the \_\_\_\_\_ marking period of \_\_\_\_\_, the student will \_\_\_\_\_ on \_\_\_\_\_.  
(#) (school year) (criteria) (assessment/evaluation)

By the end of the \_\_\_\_\_ marking period of \_\_\_\_\_, the student will \_\_\_\_\_ on \_\_\_\_\_.  
(#) (school year) (criteria) (assessment/evaluation)

By the end of the \_\_\_\_\_ marking period of \_\_\_\_\_, the student will \_\_\_\_\_ on \_\_\_\_\_.  
(#) (school year) (criteria) (assessment/evaluation)

### SCHEDULE FOR REPORTING PROGRESS

When: \_\_\_\_\_

#### Insert Progress Monitoring Data

#### Progress Reporting

**Report Date:** \_\_\_\_\_ **Progress:** \_\_\_\_\_ **Comments:** \_\_\_\_\_

Position(s) responsible for implementing goal activities (check all that apply):

- Special Education Teacher       Teacher Consultant       Speech and Language Provider  
 School Social Worker       Occupational Therapist       Physical Therapist  
 Other: \_\_\_\_\_

Position(s) responsible for reporting progress on goal: \_\_\_\_\_

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## Section 4: Goals and Objectives/Benchmarks

The MDE model IEP form includes two different options for recording goals and objectives, as well as reporting the progress a student is making in achieving them. In developing a goal, the IEPT will determine what the student is expected to achieve in the year ahead. **34 CFR 300.320(a)(2)**. The team will develop goals for the student in each area related to the student's disability that impacts the student's academic achievement and/or functional performance. The goals should address both the student's access to and progress in the general education curriculum and the student's other education and transition needs. The goals should logically be related to the present level of academic achievement and functional performance as a starting point. The goals should link to the supports and services written into the IEP by reflecting what support the student needs in order to achieve the goals in the year ahead.

Short-term objectives, or benchmarks, help break down the goal into the intermediate steps needed to achieve the annual goal. Monitoring the student's progress on short-term objectives is a way to tell if the student is on track to achieve the annual goal. This is an important means of determining whether the supports and services written into the IEP are adequate, by alerting the team of the need to reconvene to add supports or services if necessary without waiting an entire year. Michigan law requires all IEP goals to include short-term objectives. R 340.1721e(1).

**►Advocacy Hint: Go for the goals and objectives.** The goals and objectives are often overlooked, yet they drive and shape the school's responsibility to provide services. Make sure any services you request are designed to meet a goal or objective. Goals and objectives must be measurable, and they should be written in a way that makes it clear to anyone – even a stranger – whether or not the goal has been reached. So the goal "Will improve reading skills" is not a well-written one, since a stranger would not be able to tell if the goal had been achieved. A goal of "Given first grade reading material, the student will read a passage orally at 50-80 words per minute with no more than five errors" can be measured by anyone.

The goal or objective should express in positive language something that the IEPT expects the student to do (as opposed to what the student cannot do). The IEPT should begin by considering what the student can do now (the statement of academic achievement and functional performance will give this information), then set the annual goal or objective based on what the student can be reasonably expected to achieve (with appropriate support) in a year. The goal or objective should also consider what nondisabled students of the same chronological age are expected to achieve, either through district standards or the state's grade-level content expectations (GLCEs). (For information on the state standards, see [www.michigan.gov/mde](http://www.michigan.gov/mde).) Writing clear, measurable goals will allow the IEPT to know if the program is working and will tell others what the school's expectations of the student are.

**Schedule for Reporting Progress:** The IEP team will also determine how to measure the student's progress toward his or her goals and objectives. The team will develop a way to track progress that includes a statement regarding the student's expected level of performance (what the student will be able to do, and under what circumstances), the procedure that will be used to evaluate the student's performance (how the school will test the student's performance), and how frequently the evaluation will be done. The IEP document will also identify who is responsible for working on the goal and who is responsible for reporting on the student's progress. This is an important mechanism that allows parents to celebrate progress as it occurs and to confer with school staff when progress is not occurring without waiting for a year to pass between annual IEP meetings.

The IDEA allows a parent and school to agree to meet without convening the entire IEP team if changes are needed after an annual IEPT meeting has been held. **34 CFR 300.324(a)(4), 300.324(a)(6).** The format for making these changes is the IEP Amendment. A sample Amendment Form is included at the end of this chapter.

While the law does not itself place any restrictions on the type of changes that may be made in an amendment (stating only that the school and parent must be in agreement), it is important that the changes relate to the existing IEP in a meaningful way. For example, if the student is not making the anticipated progress on goals, an amendment may be a logical way to increase the amount or frequency of the service designed to address the goal. Major changes, such as exiting from special education, changing placement, or changing eligibility, should be made with broad input from the entire IEP team, so an amendment would not be appropriate.

If a parent needs further information or believes that a discussion with the entire IEP team is necessary before agreeing to changes proposed by the school, the parent can refuse to agree to the amendment without a meeting of the entire IEP team. If an amendment is agreed upon, the school must ensure that the rest of the child's IEP team is informed about what changes were made. **34 CFR 300.324(a)(4)(ii).**

The amended IEP does not change the timeline for annual review; the next annual IEP meeting will need to be held within a year of the last meeting of the full IEP team. An IEP amendment – used judiciously – can be an efficient way of “tweaking” the student's educational program in a timely fashion.

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### Section 5 Supplementary Aids and Services

Supplementary aids and services are provided to enable the student:

- To advance appropriately toward attaining the annual goals.
- To be involved and progress in the general education curriculum and to participate in extra-curricular and other nonacademic activities.
- To be educated and participate in activities with other students with disabilities and nondisabled students.

Supplementary aids and services are needed at this time.		
<b>Ongoing Instruction and Assessment</b> Scheduling, Presentation, Response, etc.	<b>Time/Frequency/Condition</b>	<b>Location</b>
<b>Curriculum Supports and Adjustments</b> Directions, Grading, Handwriting, Assignments, Tests, Books, etc.	<b>Time/Frequency/Condition</b>	<b>Location</b>
<b>Supports and Modifications to the Environment</b> Classroom Environment, Health-Related Needs, Physical Needs, Assistive Technology, Behavioral, Training Needs, Social Interaction Supports for the Student, etc.	<b>Time/Frequency/Condition</b>	<b>Location</b>
<b>Other Supports, Accommodations, and Modifications</b>	<b>Time/Frequency/Condition</b>	<b>Location</b>

All aids and services identified will begin on the implementation date of the IEP and continue for the duration of the IEP.

Supplementary aids and services are not needed at this time.

Explain the extent, if any, to which the student will not participate with nondisabled students: \_\_\_\_\_.

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## Section 5: Supplementary Aids and Services

Supplementary aids and services referred to in this section mean the aids, services, program modifications, and/or supports for school personnel that are provided in the general education setting or other educational settings (including extracurricular and other nonacademic activities) so that the student can be educated with nondisabled peers to the maximum extent appropriate. The IEPT will consider and record what support the student needs, the amount of time that it will be needed, how often it will be provided, and where it will be provided. If the team identifies a need for positive behavior interventions, assistive technology devices and/or services, or any other special factors in Section 2 of the model form, the necessary supports can be listed here. Accommodations may also be listed here (or on an attached sheet, if they are lengthy). (More information about supplementary aids and services can be found in Chapter 2. Some of these devices and services may also be considered as special education or related services.)

Accommodations and supports should be written to meet the needs of the student in all environments. If a student needs accommodations on state assessments, for example, he or she will also need the same accommodations when taking regular classroom tests. In order for supports and accommodations to be provided consistently across all environments, it is essential that they be written with adequate specificity. Writing “as needed” is likely to result in implementation that is uneven, at best.

If the student does not need supplementary aids and services, the team will explain to what extent the student will be restricted from participating with general education students. This is a reminder of the expectation that students with IEPs are to be educated with their general education peers to the maximum extent appropriate; the team should consider the need for supplementary aids and services to support students in the general education setting. **34 CFR 300.114(a)(2)(ii).**

The consideration of a full range of possible supplementary aids and services is an important part of ensuring that the student is educated in the least restrictive environment. Discussion of the continuum of educational placements, which will be recorded under “Educational Environment” in Section 7 of the model IEP form, should begin here.

**►Advocacy Hint: Focus on the student, not the services.** The IEPT process is about student need and educational data, not about what services the school district has available for the student. In other words, the discussion should center on what the evaluations say about the student’s need for services, not on whether the student should attend available program A or available program B. Because of this, the details and specific recommendations of the experts and evaluators are of critical importance.

**Section 6**  
Assessment -Participation and Provision

GENERAL EDUCATION ASSESSMENTS		
<b>Content Areas</b> List the content area(s) in which the student will be administered the general education assessment.	<b>Accommodations</b> List the appropriate accommodation(s).	
ALTERNATE ASSESSMENTS		
<b>Content Area</b> List the content area in which the student will be administered an alternate assessment.		
<b>Need for Alternate Assessment</b> State why the student cannot participate in the general education assessment	<b>Assessment</b> State the alternate assessment that will be used and explain why it is appropriate.	<b>Accommodations</b> List the appropriate accommodation(s).
<b>Content Area</b> List the content area in which the student will be administered an alternate assessment.		
<b>Need for Alternate Assessment</b> State why the student cannot participate in the general education assessment	<b>Assessment</b> State the alternate assessment that will be used and explain why it is appropriate.	<b>Accommodations</b> List the appropriate accommodation(s).
<b>Content Area</b> List the content area in which the student will be administered an alternate assessment.		
<b>Need for Alternate Assessment</b> State why the student cannot participate in the general education assessment	<b>Assessment</b> State the alternate assessment that will be used and explain why it is appropriate.	<b>Accommodations</b> List the appropriate accommodation(s).
<b>Content Area</b> List the content area in which the student will be administered an alternate assessment.		
<b>Need for Alternate Assessment</b> State why the student cannot participate in the general education assessment	<b>Assessment</b> State the alternate assessment that will be used and explain why it is appropriate.	<b>Accommodations</b> List the appropriate accommodation(s).

(This is a Michigan Department of Education, Office of Special Education form. This is not a product of MPAS)

## Section 6: Assessment — Participation and Provisions

The Elementary and Secondary Education Act (ESEA) addresses the issue of how students with disabilities will be assessed. IDEA includes language that is intended to bring it into alignment with the ESEA on the issue of these assessments. IDEA requires that each state ensure that all students with disabilities are included in all general state and district-wide assessment programs with appropriate accommodations and alternative assessments, where necessary, as indicated in their IEPs. It also requires that the State develop guidelines for alternate assessments for children with disabilities who cannot participate in regular assessments, even with accommodations. Finally, the State must ensure that the alternate assessments are aligned with the State's challenging academic content standards and challenging student academic achievement standards. **34 CFR 300.320(a)(6)**.

The IEPT will discuss and document what state and district-wide assessments the student will take. The IEPT will also discuss whether there is a need for the student to take the English Language Proficiency Assessment (ELPA), given to students who speak English as a second language.

The team will then determine whether any of those assessments will be administered during the time period covered by the IEP. If the answer is yes, the team will go on to discuss and document which assessment is appropriate and why it is the appropriate choice. The team will also indicate what, if any, accommodations are needed. Offering assessments with standard accommodations does not change the validity of the test or prevent it from being used in district reporting. More information about standard and nonstandard accommodations can be found at the following web address:

[http://www.michigan.gov/documents/mde/M-STEP\\_Supports\\_and\\_Accomocations\\_Table\\_477120\\_7.pdf](http://www.michigan.gov/documents/mde/M-STEP_Supports_and_Accomocations_Table_477120_7.pdf)

(These accommodations can change rapidly. Updated versions can be found on the MDE website, [www.michigan.gov/mde](http://www.michigan.gov/mde), under the "Assessments and Accountability" tab on the menu bar.)

Federal guidelines cap the percentage of children in each state whose alternate assessment test scores will be counted, but decisions about both the tests and the accommodations are made by the IEPT. Assessments should be selected to align with the course of study pursued, the student's present level of performance, and the conditions under which the test is taken, among other factors. Decisions should not be based on the disability label of the student or on the possible impact of the student's participation on the school's overall performance.

**Michigan Protection & Advocacy Service, Inc.**

**Section 7  
Special Education Services and Programs**

Related Service	Rule Number	Specific Amount of Time and Frequency	Location	Duration*

Does the student have needs that require placement with a teacher with a particular endorsement?  Yes  No

Program	Rule Number	Departmentalized	Specific Amount of Time and Frequency	Location	Duration*
		<input type="checkbox"/> Yes <input type="checkbox"/> No			
		<input type="checkbox"/> Yes <input type="checkbox"/> No			
		<input type="checkbox"/> Yes <input type="checkbox"/> No			

\* All programs and services listed above will begin on the implementation date of the IEP and continue for the duration of the IEP, unless otherwise indicated above in the column "Duration."

**EXTENDED SCHOOL YEAR (ESY) SERVICES**

Extended School Year (ESY) services were considered.

It was determined that no ESY services are needed.

Current annual goals address one or more skills that require ESY services.

Service	Specific Amount of Time and Frequency	Location	Duration

**INSTRUCTIONAL TIME**

General Education Instruction (minutes/hours per week)	(+) Special Education Instruction (minutes/hours per week)	(=) Total (minutes/hours per week)
	+	=

**EDUCATIONAL ENVIRONMENT**

The district ensures that, to the maximum extent appropriate, the student will be educated with students who are nondisabled; and special classes, separate schools, or other removal of the student from the general education environment occurs only when the student's needs cannot be met satisfactorily in the general education setting with supplemental aids and services.

**Participation in a Regular Early Childhood Program** (students age 3-5)

- At least 10 hours per week and:
  - receives the majority of special education and related services IN a regular early childhood program.
  - receives the majority of special education and related services OUTSIDE of a regular early childhood program.
- Less than 10 hours per week and:
  - receives the majority of special education and related services IN a regular early childhood program.
  - receives the majority of special education and related services OUTSIDE of a regular early childhood program.

**Participation in General Education** (students age 6-26)

- 80% of the day or more    79% to 40% of the day    less than 40% of the day    separate facility

**SPECIAL TRANSPORTATION**

- Yes (specify): \_\_\_\_\_
- No

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## Section 7: Special Education Services and Programs

This section of the IEP is a record of what programs and services are going to be provided. The team will record what related services or special education programs will be provided, how often the student will receive the programs or services (frequency), how long each service will last (duration), and where they will be provided (in the classroom, pull-out, group, individual). If the IEPT has determined that the student requires a specially designed program for physical education, it will be included here. (Chapter 2 gives more detailed information about what kinds of programs and services are included in this section.) If the program or service will be provided for a different period of time than that covered by the IEP, that will be noted under "Duration."

Special education services must be based, to the extent practicable, on peer-reviewed research. **34 CFR 300.320(a)(4)**. This does not give parents the right to dictate the choice of school methodology, **71 Fed.Reg. 46664-5 (8/14/06)**, but one may ask if the services offered meet the standard in the law.

**►Advocacy Hint: Get all the services in writing.** Make sure every service your child needs is listed on the IEP. Remember to include services such as special transportation, physical education, speech or physical therapy, extended school year, or other services the student needs. The school does not have to provide services promised verbally unless they are noted in the IEP itself.

**Extended School Year:** The IEP team must consider whether the student needs extended time beyond the regular school year in order to receive FAPE. In making this decision, the IEP team will look at current IEP goals and consider: the nature and severity of the student's disability; whether the gains made by the student will be lost and not recoverable in a reasonable period of time without the extended school year; and whether the student is at a critical point in learning that would make the gap in instruction particularly damaging. Extended school year services should be considered at every IEPT meeting and must be evaluated in sufficient time to allow services to be implemented or, if necessary, appealed by the parent. **34 CFR 300.106; R340.1721e(2)**.

**Instructional Time:** This is where the IEP team will record the amount of time that the student is receiving general education instruction each week, along with the amount of time the student is receiving special education instruction each week. When added together, these two numbers should equal the total number of hours that students are in school each week.

**Educational Environment:** The information captured here is intended to clarify *where* instruction is taking place: general education or in a separate special education setting. The IEPT determines the educational placement of the student from a continuum of alternative placements. **34 CFR 300.115**.

► **Advocacy Hint: Moving down the continuum.** The law requires the IEPT to consider each step on the continuum of placements for the student — ranging from full-time placement in regular education to placement in a special school. The best practice and the one most consistent with the law is to begin at the most typical setting to determine if the student's goals can be met there.

For a student with cognitive impairment, for example, the IEPT should first consider whether the student's goals can be met in the general education class with supplementary aids and supports such as those considered in Section 5 of the model IEP form. Only after the IEPT concludes this is not appropriate (and documents the reasons why on the IEP form) should it look at the next step on the continuum — for example, part-time placement in regular education classes and part-time placement in a special education classroom.

This provision is a powerful tool for parents and advocates seeking a less restrictive setting for a student. **34 CFR 300.114(a)(2)(ii).** The “Notice” section on the last page of the IEP form requires documentation of the reason that an option was considered, but not selected. The reason should capture a rationale — something more than “is not appropriate.” Documentation should capture the facts that went into the determination — *why* the option is not appropriate.

The percentages for participation time in general education are related to targets for Least Restrictive Environment that have been set by the Office of Special Education Programs (OSEP). This is a way of tracking whether schools are complying with the least restrictive environment provisions of IDEA.

In checking the correct box to indicate “Participation in General Education,” finding the correct percentage will involve adding together the hours per week that the student is receiving special education services in a location other than general education. The resulting number will be subtracted from the total hours of instruction offered each week to calculate the time the student is in the general education setting. To get the percentage of the day in general education, divide the general education time by the total instructional time offered per week.

**Whatever the extent of time spent in general education, all students should have access to the general curriculum.** (Chapter 7 covers Least Restrictive Environment in greater detail.)

**Special Transportation:** If the IEP team determines that no special transportation is needed, the student will use the same transportation provided for all students. If, however, the student needs a specific accommodation or service (for example, regular bus with paraprofessional assistance, wheelchair lift bus, or reimbursed personal transportation), that must be recorded here.

# Michigan Protection & Advocacy Service, Inc.

## Notice for Initial Provision of Services and Programs

The *Individuals with Disabilities Education Act* (IDEA) mandates that the district provide written notice to the parent when the district proposes to initiate or change the educational placement of the student or the provision of a Free Appropriate Public Education (FAPE) to the student; or when they refuse to initiate or change the educational placement of the student or the provision of a FAPE to the student.

You are receiving this notice for: \_\_\_\_\_  
(student name)

- You are receiving this notice because we are proposing to implement your student's initial Individualized Education Program (IEP) with the IEP team meeting date of \_\_\_\_\_. **Parent consent is required for the initial provision of programs and services within 10 calendar days (see shaded box below to provide consent).** Pending receipt of parent consent, the programs and services will begin on \_\_\_\_\_ and will be located at \_\_\_\_\_.

Upon district signature (see bold box below), this notice and the student's IEP constitute the district's offer of a FAPE.

- You are receiving this notice because your student was found ineligible for special education programs and services at the Individualized Education Program (IEP) team meeting, dated \_\_\_\_\_.

The IEP describes each evaluation procedure, assessment, record, or report used in this offer of a FAPE. In the course of the development of the IEP, other options (e.g., programs and services, supplementary aids and services) considered but not selected were:

Option Considered but Not Selected	Reason Not Selected

No other options were considered.

- Other factors that are relevant to the district's proposal or refusal (describe): \_\_\_\_\_  
\_\_\_\_\_

- There are no other factors that are relevant to the district's proposal or refusal.

If the IEP team has determined that programs and services will be provided in a district other than the student's district of residence:

- The resident district authorizes the operating district \_\_\_\_\_ to conduct subsequent IEP team meetings.  
 The resident district will conduct subsequent IEP teammeetings.

The Procedural Safeguards Notice you received when the district requested your consent for the initial evaluation describes protections under the IDEA. The Procedural Safeguards Notice is also available at [www.michigan.gov/documents/mde/May09\\_ProceduralSafeguardsNotice\\_278611\\_7.pdf](http://www.michigan.gov/documents/mde/May09_ProceduralSafeguardsNotice_278611_7.pdf).

The following sources are available to assist you in understanding your rights:

\_\_\_\_\_

**X**  
Signature of Superintendent or Designee Date

### PARENT CONSENT

- I give consent for the initial provision of special education programs and services.  
 I refuse consent for the initial provision of special education programs and services.

**X**  
Signature of Parent Date

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# Michigan Protection & Advocacy Service, Inc.

## Notice for Provision of Services and Programs

The *Individuals with Disabilities Education Act* (IDEA) mandates that the district provide written notice to the parent when the district proposes to initiate or change the educational placement of the student or the provision of a Free Appropriate Public Education (FAPE) to the student; or when they refuse to initiate or change the educational placement of the student or the provision of a FAPE to the student.

You are receiving this notice for: \_\_\_\_\_  
(student name)

You are receiving this notice because we are offering the provision of a FAPE. The programs and services will begin on \_\_\_\_\_ and will be located at \_\_\_\_\_ . This proposal is the result of the Individualized Education Program (IEP) team meeting, dated \_\_\_\_\_ , that was convened for the purpose of:

Check one of the following:

- Annual/Review IEP
- Reevaluation IEP

Check all others that apply:

- Change of Placement
  - Suspension/Expulsion
  - Graduation
  - Other: \_\_\_\_\_
- Transition
- Change of Eligibility
- Other: \_\_\_\_\_

Upon district signature (see bold box below), this notice and the student's IEP constitute the district's offer of a FAPE.

You are receiving this notice because we are offering the provision of a FAPE. This proposal is the result of the Individualized Education Program (IEP) Addendum, dated \_\_\_\_\_ .

You are receiving this notice because your student was found ineligible for special education programs and services at the Individualized Education Program (IEP) team meeting, dated \_\_\_\_\_ , that was convened for the purpose of a reevaluation IEP.

The IEP describes each evaluation procedure, assessment, record, or report used in this offer of a FAPE. In the course of the development of the IEP, other options (e.g., programs and services, supplementary aids and services) considered but not selected were:

Option Considered but Not Selected	Reason Not Selected

No other options were considered.

Other factors that are relevant to the district's proposal or refusal (describe): \_\_\_\_\_

There are no other factors that are relevant to the district's proposal or refusal.

If the IEP team has determined that programs and services will be provided in a district other than the student's district of residence:

The resident district authorizes/authorized the operating district \_\_\_\_\_ to conduct subsequent IEP team meetings.

The resident district will conduct subsequent IEP team meetings.

The Procedural Safeguards Notice you received describes protections under the IDEA. The Procedural Safeguards Notice is also available at [www.michigan.gov/documents/mde/May09-ProceduralSafeguardsNotice\\_278611\\_7.pdf](http://www.michigan.gov/documents/mde/May09-ProceduralSafeguardsNotice_278611_7.pdf).

The following sources are available to assist you in understanding your rights:

X \_\_\_\_\_  
Signature of Superintendent or Designee Date

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## Notice for Provision of Services and Programs

IDEA requires prior written notice before a school changes or refuses to change all or part of a student's IEP or program. The notice must include:

- ◆ The action proposed or refused, and why;
- ◆ The facts relied upon by the team in making its decision;
- ◆ A statement that parents have procedural rights and how to get them;
- ◆ Sources of assistance for parents in understanding their rights; and,
- ◆ Other options considered and other factors influencing the team's decision. **34 CFR 300.503.**

The superintendent or designee must also ensure that the least restrictive environment rights of the student have been enforced. **34 CFR 300.116.**

The MDE model IEP form includes two different notice pages. If the IEP is an initial IEP (the first IEP written for the student), notice will be provided on the form titled, "Notice for Initial Provision of Services and Programs." For any other IEP, the form titled, "Notice for Provision of Services and Programs" will be used. The biggest difference between the two forms is in the signatures required.

The initial provision of services and programs cannot begin without the parent's consent. **34 CFR 300.300(b).** The school has no obligation to provide FAPE to a student with a disability if, even after the school has made reasonable efforts to obtain consent, the parent fails to respond or fails to provide consent. The only way that services for the student can begin is for the parent to sign the first IEP.

If the IEP is written to replace an existing IEP, a parent signature is not required. The only way for a parent to prevent the school from implementing an unacceptable plan is to file a due process hearing notice. (More information about due process hearings can be found in Chapter 8.)

A parent can revoke consent to special education services, but this may cause the student to lose the benefit of any services or supports offered in the IEP as well as the due process protections under IDEA and state law. **34 CFR 300.300(b)(4).** The school cannot use a parent's refusal to consent to one service or activity to deny all services, benefits, or activities, however. **34 CFR 300.300(d)(3).**

Any member of the IEPT who disagrees with all or part of the IEP may attach a report outlining the points of disagreement. **R 340.1721e(3).** There are procedural safeguards outlined in the law to protect the rights of parents of the student with a disability. Some of them, such as the complaint process and mediation, relate to parents' rights when there is a dispute related to the IEP. There is more information about this in Chapter 8.

# Michigan Protection & Advocacy Service, Inc.

## Individualized Education Program (IEP) Amendment

Student	Last:	First:	M:	Birth Date:	UIC:
Dates	IEP:	Amendment:			

### PURPOSE

The purpose of this IEP amendment is to add, remove, or modify content in (check all that apply):

- Section 1: Demographic Information.
- Section 2: Present Level of Academic Achievement and Functional Performance.
- Section 3: Secondary Transition Services.
- Section 4: Goals and Objectives/Benchmarks.
- Section 5: Supplementary Aids and Services.
- Section 6: Assessment.
- Section 7: Special Education Services and Programs.
- Other: \_\_\_\_\_

### PARTICIPANTS IN AGREEMENT

Parent: \_\_\_\_\_

District Representative: \_\_\_\_\_

#### ***Changes to Section 1: Demographic Information***

The following modifications are being made to Demographic Information: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

#### ***Changes to Section 2: Present Level of Academic Achievement and Functional Performance***

The following modifications are being made to Present Level of Academic Achievement and Functional Performance:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

#### ***Changes to Section 3: Secondary Transition Considerations***

The following modifications are being made to Secondary Transition Considerations:  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

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## ***Changes to Section 4: Goals and Objectives / Benchmarks***

ANNUAL GOALS			
The following goal is being: <input type="checkbox"/> modified <input type="checkbox"/> added <input type="checkbox"/> removed			
By _____, the student will _____ when/at _____ on _____. (date) (demonstrate skill) (conditions/criteria) (assessment/evaluation)			

For goals being modified or added, attach a completed goal page (Section 4 of the IEP).

## ***Changes to Section 5: Supplementary Aids and Services***

The following supplementary aid or service is being: <input type="checkbox"/> modified <input type="checkbox"/> added <input type="checkbox"/> removed		
Support/Accommodation/Modification	Time/Frequency/Condition	Location

## ***Changes to Section 6: Assessment***

The following modification is being made to participation in a state or district-wide assessment.

Assessment	Rationale	Accommodations
<input type="checkbox"/> State or District-wide Assessment _____	The state or district-wide assessment is not appropriate because: _____	
<input type="checkbox"/> Alternate Assessment _____	The alternate assessment is appropriate because: _____	

## ***Changes to Section 7: Special Education Services and Programs***

The following service is being: <input type="checkbox"/> modified <input type="checkbox"/> added <input type="checkbox"/> removed				
Related Service	Rule Number	Specific Amount of Time and Frequency	Location	Duration

The following program is being: <input type="checkbox"/> modified <input type="checkbox"/> added <input type="checkbox"/> removed					
Program	Rule Number	Departmentalized	Specific Amount of Time and Frequency	Location	Duration
		<input type="checkbox"/> Yes <input type="checkbox"/> No			

The following Extended School Year (ESY) service is being: <input type="checkbox"/> modified <input type="checkbox"/> added <input type="checkbox"/> removed				
ESY Service	Specific Amount of Time and Frequency		Location	Duration

## **SPECIAL TRANSPORTATION**

The following modifications are being made to Special Transportation: _____	
---	--

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## **Chapter 7**

# **LEAST RESTRICTIVE ENVIRONMENT (LRE)**

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### **What This Chapter Is About**

Once proper services are identified for a student with disabilities, the services must be provided in the least restrictive environment (LRE). Federal and State law require schools to serve students with disabilities in the general education setting to the maximum extent possible, even requiring schools to provide supplementary aids and services to help students benefit from those programs. Educational practices such as mainstreaming and inclusion have their legal roots in the LRE standard. In some limited situations, LRE can be read to require placement in the student's neighborhood school, with proper supports.

### **Advocacy Hints in Chapter 7**

- ◆ Consider student needs over cost and administrative convenience in determining the least restrictive environment (Page 2).
- ◆ Compare your child's setting to general education, not other special education programs, in deciding if it is LRE (Page 3).
- ◆ Be aware of the system pressure to place students with disabilities in less restrictive settings (Page 3).
- ◆ Ask for an assistive technology assessment to see how assistive technology can help your child move to a less restrictive environment (Page 4).
- ◆ Be careful when requesting paraprofessional assistance that the parapro doesn't become a surrogate teacher; in such situations, the school may find it easier to move your child to a separate classroom (Page 5).
- ◆ Look for unique features in your neighborhood school that make it, and only it, appropriate (Page 5).

### **Least Restrictive Environment (LRE)**

**Least Restrictive Environment** (LRE) is the legal term for the idea that students should be placed in the most normal and integrated settings possible. General concepts such as "mainstreaming," "inclusive education," and "universal education" are often addressed legally as LRE issues. Advances in understanding the nature of disabilities, in the expectation of full lives for people who have disabilities, and advances in teaching methods have also contributed to a changing view of best practices in education for students with disabilities, making the LRE requirement increasingly important in ensuring a quality education for these students.

► **Advocacy Hint: A student's needs come first.** Cost, administrative convenience, or the need to fill classes in established programs are not reasons for more restrictive placements. The Individualized Educational Program Team (IEPT) must justify placement based on the needs of the child.

## Least Restrictive Environment Under IDEA

Individuals with Disabilities Act (IDEA) requires that:

[T]o the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. **20 USC 1412(a)(5); 34 CFR 300.114(a)(2).**

Court decisions applying to Michigan also have shed some light on the duty of schools to educate students with disabilities in the least restrictive environment. In **Roncker v. Walter, 700 F2d 1058 (6th Cir. 1983), cert.den. 464 US 864, 104 S.Ct. 196, 78 LE2d 171 (1983)**, the court required a school to serve a child with a disability in a non-segregated setting when the necessary supports could be provided to make that setting appropriate. **700 F2d at 1063.**

Recent changes to the IDEA regulations make clear that students with disabilities cannot be removed from general education simply because they need modifications to the general curriculum. **34 CFR 300.116(e).**

In 2004, the Michigan State Board of Education adopted procedures for determining LRE. The procedures require that "options be available in general education programs within our general education facilities. Further, a process... must be followed by the Individualized Educational Program Team (IEPT) which includes an explanation of the extent to which the student will not participate with non-disabled students in the general education program, in extracurricular and other nonacademic activities. Education assignments are not to be based on the label describing the student's disability or the availability of programs." In addition, the Board adopted its Universal Education vision statement in October 2005. The Universal Education Vision Statement includes a principle that "honors the rights of students to learn together."

► **Advocacy Hint: Categorical special education classes are equally restrictive.**

In the eyes of the law, the LRE standard compares the program being considered to programs for non-disabled students. It does not use a standard which compares the program to programs for students with different disabilities. So while a child with eligibility under the cognitive impairment label may benefit from services in a resource classroom, this is not considered to be a less restrictive placement. Both CI and LD classrooms are considered to be equally restrictive when compared with general education. A court may, however, consider differences in the amount of time spent in general vs. special education settings. See **McLaughlin v. Holt Public Schools**, **320 F.3d 663 (6<sup>th</sup> Cir. 2003)**.

Two other provisions in IDEA – related to funding, highly qualified teachers, and access to the general curriculum – have a systemic impact on LRE. The first bars states from adopting funding mechanisms that result in placements that violate LRE. **20 USC 1412(a)(5); 34 CFR 300.114(b)**. If, for example, a state rule provided more money to schools for segregated programs, such a rule would violate IDEA and would be subject to challenge under the complaint process. (See Chapter 8.)

The second requires schools to offer all students access to the general curriculum according to standards set by the state. **34 CFR 300.39(b)(3)**. That means, in Michigan, that special education classes must offer students with disabilities access to curriculum that addresses the grade level content expectations (up to grade 8) and the high school graduation standards (grades 9-12). A parent whose student attends a program not meeting these standards may challenge that practice through either a hearing or complaint (see Chapter 8).

► **Advocacy Hint: What affects the system affects individuals.** The two provisions of IDEA discussed above make it harder for school districts to maintain segregated programs. The state cannot have a financial system that favors such programs, and programs must provide instruction linked to the general curriculum.

Placement should begin in general education. The law presumes that children can go to school with their non-disabled peers and that the school must give good reason for a more restrictive program. Here are the steps in analyzing LRE:

LRE CONTINUUM OF SERVICES	
First step:	Decide appropriate programs and services for an individual student.
Next step:	Decide placement beginning with general education. Placement must <b>not</b> be limited by program and services currently available.
If general education is not appropriate:	State reasons why options accepted or rejected. Explore use of supplemental aids and services in general education.
If general education with supplemental aids and services is not appropriate:	State reasons why options accepted or rejected. Explore placement in categorical special education classes.
If placement in categorical special education classes is not appropriate:	State reasons why options accepted or rejected. Explore placement in home or hospital/institutional instruction.

Many IEPs treat the requirement for considering general education first with cursory comments like “not appropriate at this time,” or “not enough support.” Parents and advocates should focus more effort on this discussion in the IEPT to clarify and note why it is not possible to provide “enough support” in a less restrictive setting. When discussing this issue, a parent might ask the following questions:

- ◆ Are there goals (such as socialization with non-disabled peers) which require the school to place my child in a less restrictive setting?
- ◆ Can the special education program meet my child’s academic goals? (This is especially important when a child is placed in a separate class due to behavior problems or physical disabilities.)
- ◆ What services are needed to help my child stay in a less restrictive classroom?
- ◆ What skills are necessary before my child will be able to leave a restrictive setting? Is he being taught these skills in the classroom curriculum or do his goals address these skills?

► **Advocacy Hint: Look at assistive technology.** IDEA requires that the student’s need for assistive technology (devices such as computers and wheelchairs), that help replace the body parts or functions affected by the disability, must be considered at each IEPT meeting. Assistive technology can often allow a student to be placed in a less restrictive environment by allowing the student to be more independent. It should be considered in any discussion of LRE.

A parent may ask the school to evaluate for additional services to improve the chances of moving to or keeping a less restrictive placement. Often, if a school does not cooperate in modifying the general education setting, an independent educational evaluation (IEE) might be necessary. (See Chapter 4)

► **Advocacy Hint: Avoid the “para trap.”** Paraprofessionals are often invaluable members of a student’s IEP team. Be careful, however, in specifying the required duties of a parapro who will provide support in general education. If a parapro is being asked to provide support to allow a child to benefit from the instruction in a general classroom, that is an appropriate role. In some cases, however, the parapro is expected to provide substitute programming or instruction, tasks he or she may not be qualified to do. By demonstrating the need for different or separate instruction, you may unwittingly be documenting the school’s case for moving the student to a separate program.

## **Least Restrictive Environment Under Section 504**

Section 504 also mandates education in the least restrictive environment and states that, if students are placed away from a regular school, the facilities, equipment, and programs available in that placement must be comparable to those available in the regular school. **34 CFR 104.34.**

## **LRE and the Neighborhood School**

Does LRE require schools to educate a student with a disability in his or her neighborhood school? The IDEA regulations state that a student’s placement should be “as close as possible to ... home” and that, unless the IEP requires otherwise, the student be allowed to attend the school that he or she would attend if not disabled. **34 CFR 300.116.** Despite this regulatory language, most courts have decided that LRE does not mean the neighborhood school. “[W]e do not interpret this section [34 C.F.R. § 300.116] as imposing upon a school board the obligation to place a child in his base school. Rather, this section requires only that a school board take into account, as one factor, the geographical proximity of the placement in making these decisions....” **Hudson v. Bloomfield Hills Public Schools, 910 F.Supp. 1291 (E.D.Mich. 1995).**

► **Advocacy Hint: Make your neighborhood school unique.** The school district may be required to serve your child in your neighborhood school if it has unique services or characteristics that are necessary to meet your child’s IEP goals. For example, if part of your child’s IEP requires interaction with siblings or neighborhood friends, the neighborhood school may be uniquely situated to meet that goal. Or if there are specific ancillary services such as therapy services, social work services or specialized transportation at your neighborhood school, it may be solely equipped to serve your child.

# **Chapter 8**

## **PROBLEM SOLVING AND COMPLAINTS**

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### **What This Chapter Is About**

Disputes over special education services may be resolved informally or formally.

When you disagree with your child's school district over eligibility, goals, services, or supports, the special education process offers several opportunities to informally resolve disputes. You should know your rights and responsibilities in these situations so that your voice is heard.

In some cases, you may have to resort to formal processes. These processes include complaints, due process hearings, and mediation.

When a school violates the law or fails to do something the law requires, you may file a complaint. Sometimes, you may be able to resolve the complaint informally; other times you may have to file a formal complaint.

A formal state complaint must be written, signed, and sent to the Michigan Department of Education (MDE) and your school district. You can file a complaint up to one year after the problem occurs. The complaint must contain information about the problem you are having and the laws you think have been broken. If the MDE finds your complaint is true, they will order the school to correct its actions.

You also may file a federal complaint under Section 504 of the Rehabilitation Act with the U.S. Department of Education Office for Civil Rights. This kind of complaint is useful when a school violates the law against a student who is not eligible for special education but nevertheless has a disability. You can file a complaint up to 180 days after the problem occurs.

Addresses and sample complaint letters are at the end of the chapter. The U.S. Department of Education has also prepared a guide to dispute resolution. See Appendix 8-5.

You may request a due process hearing by filing a due process hearing notice within two years of the date of the Individualized Education Program (IEP). Hearings are complex legal proceedings, and MPAS recommends that parents seek legal representation in due process hearings.

In a due process hearing, both parties may call and question witnesses, present documentary evidence, make arguments, receive a written decision, and engage in other actions related to legal proceedings. Parents have the right to decide whether to have the student present and whether to open the hearing to the public. During the hearing process, the student must remain in his or her present educational setting. The hearings must be conducted under strict timelines, with the option of postponement upon order of the hearing officer. The hearing officer must issue a written decision, which may be appealed to court within 90 days.

Mediation is available through public and private providers. Mediation allows the parties to settle disagreements without resorting to a formal hearing.

Knowing how to resolve disputes both formally and informally is the key to effective advocacy. This knowledge can help you improve your child's education and can build or maintain

cooperative relationships with school staff that make significant contributions to your child's educational success and well-being.

## **Advocacy Hints in Chapter 8**

- ◆ Use the evaluation process to gather information and identify new solutions (Page 3).
- ◆ Use the complaint process to address problems with both the content of your child's program and problems with the process or implementation of the program (Page 6).
- ◆ Use the complaint process to address systemic issues affecting lots of children instead of handling the problems one at a time (Page 6).
- ◆ Get a signed release of information from the student's parents if you want to receive information about the outcome of a complaint on a particular student (Page 7).
- ◆ Try to focus on a few important problems that have a real effect on your child's education, keeping in mind you do not have to know everything about the situation to ask the state to look into it (Page 7).
- ◆ If your child has been denied services and lost ground as a result, ask for remediation to make up for services not provided in the past (Page 8).
- ◆ You must file a due process hearing request within two years of when you learn or should know of the issue you are challenging (usually an Individualized Education Program Team (IEPT) meeting date) (Page 11).
- ◆ You must file a notice before the hearing process will start; it is not enough simply to disagree with an IEP and request a hearing (Page 12).
- ◆ Make sure to include all possible issues, as specifically as you can, in the due process notice (Page 13).
- ◆ The law is still evolving around what alternative ways are available to write and enforce agreements reached in resolution sessions and mediation (Page 14).
- ◆ Disclose your documents five days before a hearing, and check your child's file to make sure you have everything you need (Page 15).
- ◆ Think carefully before opening a hearing to the public (Page 15).
- ◆ Get a written decision and transcript to understand what happened (Page 15).
- ◆ You may have to use the complaint process, rather than requesting a hearing, to address process problems (Page 16).
- ◆ Parents may get attorneys' fees only if they win at hearing or court (Page 17).
- ◆ Schools may be able to get attorneys' fees from parents in rare situations available for many years in federal law (Page 17).
- ◆ Mediation is available any time (Page 18).
- ◆ Mediation agreements are contracts; they bind schools and parents (Page 18).

## Informal Problem Solving

In this section we will identify informal strategies and steps to use when you disagree with a school's decision.

**First, identify the problem.** Be specific. For example, a problem stated as "The principal doesn't like my child and keeps picking on him and sending him home," will have a solution that is dependent on factors that are, for the most part, out of the parent's hands, such as interactions that occur at school on any given day, how patient the principal is, or how non-confrontational the child is. Defined more narrowly, however, the problem might be stated as "My child has a difficult time in situations where he has to wait quietly. These situations often involve times when the principal is supervising, such as in the lunch room, lining up to come into the school, or in the halls. My child gets restless and starts teasing the other children by poking and pushing." With this definition of the problem, you have identified a time when the situation occurs, the important players, the action that takes place, and the situation that precedes the action. With this definition, a solution is much more likely.

Problems take many forms. It may be a *program* problem (for example, your child's IEP does not have the necessary level of service), a *process* problem (for example, the school did not tell you when your child failed to turn in her homework), a *human interaction* problem (for example, you feel intimidated by the assistant principal), or an *information* problem (for example, no one knows what level your child is reading at). The form of the problem is important in understanding how to solve it.

**Second, gather information about the issue.** This is the time to determine where you can get the information you need. If you believe that this is a special education problem, you may need to learn about your rights and the IEP process. You will also need impartial information, usually from a third-party evaluator, on your child's needs.

► **Advocacy Hint: Services are provided based on evaluations.** Services and supports are not provided at a parent's request, but are provided because there is evidence and experts who believe the student must have them to benefit from the education. The school district has the right — and the obligation in the law — to provide evaluations or to contract for them when requested by parents in most cases. If you disagree with the district's evaluation, you may ask for an independent educational evaluation. (See Chapter 4.)

**Third, identify possible solutions.** Along with identifying the problem, it is important to identify possible solutions. At least one solution may seem obvious. "My son never gets his homework done. He knows the work, and does pretty well on tests, but his grade is partly based on homework." Narrowly and clearly defined: "The school has provided a list of homework assignments. I am willing to work with him; the problem is he doesn't remember to bring home his books."

Try to think of several solutions to any given problem. The solution may not necessarily be expensive. Instead of a full-time aide to keep a student on task, could the classroom include quiet areas where the student can work?

How will you know the problem is resolved? The next step is to identify how you will know the problem is resolved. It may help to devise a measure for determining when the parent and the school will agree that the problem is actually resolved. When a parent says a child can't read, and the school claims the child can, that he reads on a third grade level, clarification may be necessary so that everyone is measuring the same thing in the same way. The school may be using a test to determine the child's reading level; the parent may be using a classroom situation in which he or she heard the child reading aloud very hesitantly. The way the parent measures "reading" can be part of the solution.

"Ms. Smith, how will you know when Johnnie can read?" "When he can read the newspaper out loud pretty fluently."

**Fourth, figure out who can solve your problem.** Problems differ in *who* has the power to solve them. If, for example, your child's program includes a notebook kept daily by the teacher, and this is not happening, you would want to talk with the teacher first. If you go to your school board to resolve an issue related to your child's IEP, you will not find a solution because the school board cannot order more services without deferring to the IEP process. On the other hand, if you want to work on issues related to getting rid of the modules where some classes are held and getting more classrooms, you may wish to go to the school board. Remember that there may be an overlap in responsibility.

If the person you are dealing with is not responding to your requests for resolution, s/he may lack the authority to solve the problem. In that case, don't be afraid to find the person who does have the power to act. Remember, though, that the person at the top does not always have all the information. Even though it may sound like a good idea to call the school superintendent, especially when you are angry, that person may not be the most knowledgeable about special education services — and certainly not about your child. Similarly, the special education director may not know all about your child's program if the school psychologist is usually the person who conducts the IEPT meetings. Be ready to explain your situation and provide support if the person lacks specific knowledge of your situation.

**Finally, follow up.** Keeping track of the implementation of a problem resolution is often harder than you would think. Occasionally there is a clear way to track follow-up, such as the legal timeline for special education evaluations or the measurement and reporting section of an IEP goal. In other cases, a teacher may suggest using a current classroom data gathering strategy to track implementation. If this is not the case, you should agree, with the person who will be implementing the solution, just how follow-up will be done. Set a quick meeting date to review progress.

Don't be afraid to use formal process if informal resolution does not work. Be careful, though, to use the right process. Some problem resolution methods, such as the complaint process, may be used by anyone, while others (such as due process hearings or independent evaluations) are specifically available to the parent in most cases.

## Effective Advocacy Techniques

Advocacy is the willingness of one person to assist and to follow through on securing or protecting the rights of another. Effective advocacy is not easy, but the advocate who knows the student, who has mastered the technical material, and who is willing to present the student's needs in a calm, rational manner can do much to obtain appropriate educational programs and services. Here are some basic guidelines for advocates (and school personnel) to follow to be as effective as possible.

- ◆ Identify differences of opinion; listen and ask questions until you understand the other point of view.
- ◆ Try not to get upset or use "authority" to resolve issues. Special education programs are based on expert opinion, not "Mom said" or "We don't do it like that in this district." Remember: You are not powerless.
- ◆ Come to meetings prepared to discuss problems and solutions. Hint: Remember that there can be many solutions to individual issues. When you are adamant that there is only one solution, you may eliminate solutions that might be even more effective.
- ◆ Be concise.
- ◆ Know what is on your child's IEP, and keep a copy handy for quick reference.
- ◆ Save copies of evaluations. Increases of services are easier to obtain if you have the school's own evaluations documenting that there is no progress.
- ◆ Take your time. Do not feel pressured to sign something immediately. Take a copy home and think about it.
- ◆ Keep track of releases of information that you sign (you may want to withdraw a release once the proposed information is received).
- ◆ Arrive promptly at meetings.
- ◆ Be as open as possible with information. But do not feel pressured to reveal family information that you do not wish the school to know.

The most important thing to do at a meeting with the school staff is to listen. The second most important thing is to ask questions until you are certain you understand.

## Common Informal Problems and Solutions

A list of common informal problems and solutions is included at the end of this chapter in Appendix 8-1.

## Formal Problem Solving

In this section we will identify appropriate formal action to take when you disagree with a school's decision or believe that a school has violated the law and when informal means of dispute resolution do not work. The two types of actions are **formal complaints** and **due process hearings**.

### Formal State Complaints

A complaint is a written and signed allegation by an individual or organization that there is a violation of any of the following:

- 1) federal and state laws and regulations;
- 2) provisions of an ISD special education plan;
- 3) provisions of MDE's application for federal funds (state plan); or,
- 4) provisions of an IEP, a hearing officer decision, or a court decision regarding special education programs or services. **R 340.1701a(c).**

A complaint must be made within **one year** of the school's legal violation. **34 CFR 300.153(c).**

► **Advocacy Hint: The complaint process reaches broadly.** In the comments to the 2006 IDEA regulations, the Office of Special Education Programs made clear that "the broad scope of the complaint process is critical to each state's exercise of its general supervision responsibilities... the state complaint procedures can be used to resolve any complaint ... including matters concerning the identification, evaluation, or educational placement of the child, or the provision of Free Appropriate Public Education (FAPE) to the child." **71 Fed.Reg. 46601 (8/14/06).**

► **Advocacy Hint: Complaints can be systemic.** A complaint need not relate to a specific child, but may relate to **patterns and practices** of violations that affect many students. For example, a person could file a complaint about a school's failure to make a related service available without having to refer to specific children who need that service. In resolving a complaint, MDE has a responsibility under its general supervisory authority to address "appropriate future provision of services for all children with disabilities." **34 CFR 300.151(b)(2); 71 Fed.Reg. 46601 (8/14/06).**

State law sets forth procedures for filing and investigating special education complaints. See **R 340.1851 through 1855.** MDE's complaint procedures are called "**Special Education Problem Solving Process**," and are available on the MDE Office of Special Education website at: [http://www.michigan.gov/documents/mde/SpecialEducationProblemSolvingProcess\\_550395\\_7.pdf](http://www.michigan.gov/documents/mde/SpecialEducationProblemSolvingProcess_550395_7.pdf). The complaint must include a statement that the school has violated the law, facts showing how the school violated the law, and the contact information for the person filing the complaint. If the complaint relates to a specific child, it must also include the child's name and address, name of the school the child is attending, contact information if the child is homeless, a description of the nature of the problem the child is having, and a proposed resolution if known. **34 CFR 300.153(b).**

► **Advocacy Hint: Get permission.** When filing a complaint about a specific child, make sure to include proof that you have authority to file the complaint on behalf of that child and may receive information about the investigation and the outcome. See **R 340.1851(4)**.

The complaint letter should be addressed and mailed to:

Michigan Department of Education  
Office of Special Education  
P.O. Box 30008  
Lansing, MI 48909  
(517) 373-8414 (fax) (separate number for Program Accountability)

MDE will not accept electronically-filed complaints. If your complaint is not complete when you file it, MDE will let you know and let you fix it. **MDE, Special Education Problem Solving Process, page 11** ([http://www.michigan.gov/mde/0,4615,7-140-6530\\_6598\\_7363--,00.html](http://www.michigan.gov/mde/0,4615,7-140-6530_6598_7363--,00.html)).

You must also send a copy to your local school district. **34 CFR 300.153(d)**. You should send the letter by fax or certified mail, return receipt requested. Keep a receipt with the date and confirmation of receipt.

► **Advocacy Hint: Not too hot, not too cold, but just right.** In a dispute between a parent and school district, it can be tempting to complain about every possible area of violation. It can also be tempting to not complain about something when you don't have all the information. Try to focus on a few important problems that have a real effect on your child's education, but remember that you do not have to know everything about the situation to ask the state to look into it.

## After a State Complaint is Filed

MDE has 60 calendar days to investigate a complaint and issue a written decision. **34 CFR 300.152(a); R 340.1853(5)**. The timeline starts when a complaint is filed — that is, when MDE and the school district have received a complaint with all of the basic information required by law. MDE may extend the 60-day timeline if:

- a) There is also a due process hearing request on the same issue for the same student;
- b) The parties have agreed to mediation; or,
- c) "Exceptional circumstances" (such as unexpected school closures, unusually complicated questions of law, large numbers of students affected, etc.) exist. **34 CFR 300.152(b), (c); R 340.1853(6)**.

During MDE's 60day complaint process:

- ◆ The MDE investigator interviews the person filing the complaint, talks with the person who filed the complaint, school officials and other relevant individuals, reviews records, and at the conclusion of the investigation, writes a Complaint Decision. When investigating a complaint challenging the appropriateness of a child's educational services or the denial of FAPE, MDE will look at both whether or not the school followed the proper procedures and whether or not the school reached an appropriate decision in light of the child's individual abilities and

needs. This may include looking at evaluation data, interviewing individuals, and making an independent determination as to whether or not the school is violating the law. **71 Fed.Reg. 46601 (8/14/06); Special Education Problem Solving Process, page 14** ([http://www.michigan.gov/mde/0,4615,7-140-6530\\_6598\\_7363--,00.html](http://www.michigan.gov/mde/0,4615,7-140-6530_6598_7363--,00.html)).

- ◆ The complainant and the school district may try and resolve all or part of the allegation through an informal meeting or mediation. If this results in a mediation agreement, it is up to the parties who sign the agreement — not MDE — to ensure that it is followed.
- ◆ The school district can admit noncompliance in writing to one or all of the allegations. MDE will then order corrective action and require proof of compliance.
- ◆ The complainant can withdraw the complaint at any time for any reason. A withdrawal allows the complainant to re-file the same allegation with the one year timeline.

## **When a State Complaint Allegation is Substantiated**

When any of the allegations made in a state complaint are substantiated the report will include corrective actions. **34 CFR 300.151(b)**.

MDE will direct the school district to take certain actions to correct the noncompliance, and will give the district due dates for completing those actions. **R 340.1854**. In resolving a complaint in which it has found a failure to provide appropriate services, MDE must address: (1) How to remedy the denial of those services, including as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the student; and, (2) appropriate future provision of services for all students with disabilities. **34 CFR 300.151(b)**.

If a school district refuses to comply, MDE may order the district to provide services, withdraw the district's authority to operate special education programs, withhold federal or state funds, withhold licenses or accreditation, or take court action. **R 340.1855**.

► **Advocacy Hint: Remediation required.** Federal and state rules explicitly recognize that compensatory education, sometimes referred to as “remediation,” is one of the remedies to be used when necessary in resolving complaints. Further, an order requiring a school to convene a new process to determine the extent of remediation does not comport with IDEA; MDE has the power and responsibility to order remediation directly when necessary to restore a child to where she or he would have been had the services specified in his or her IEP been received. **Fayette Co. BOE v. L.M., 478 F.3d 307 (6<sup>th</sup> Cir. 2007) cert den. 128 S. Ct. 693 (2007)**.

## **When a State Complaint Allegation is Not Substantiated**

If MDE does not substantiate the complaint, it must still send a written copy of its investigation report to all involved parties.

The process for challenging a state complaint finding is not clear. In some circumstances, one might have to request a due process hearing. In other circumstances, it may be possible to appeal the finding by filing state or federal court action.

## Tips on Filing an Effective State Complaint

When writing a complaint letter:

- ◆ lay out facts as concisely and as clearly as possible, focusing on events that happened within the last year (events older than that cannot be addressed through a complaint);
- ◆ cite violations of all the relevant statutes and regulations, plans, IEPs, hearing decisions, or court orders;
- ◆ tell how the violation occurred and what effect it had on the child or children involved;
- ◆ request that the complaint be investigated without delay and that you be informed of the resolution of the complaint;
- ◆ ask for compensatory education if a child or children have missed out on services or lost other educational benefits;
- ◆ ask for changes in policies and procedures if a violation affects many children;
- ◆ ALWAYS sign and date your complaint;
- ◆ ALWAYS make a copy of your complaint;
- ◆ include a release of information if the complaint relates to a specific child and you are not the parent;
- ◆ send copies to MDE and the local district; and,
- ◆ keep a copy of the investigation report and any actions the local district and ISD propose to take to rectify the situation.

## Federal Complaints

The United States Department of Education investigates complaints of noncompliance with Section 504 within educational programs. The U.S. Department of Education's Office of Civil Rights (OCR) is responsible for enforcing Section 504.

Section 504 prohibits discrimination based on disability in any program or activity that receives federal funds. Public education programs receive federal funds and must comply with the nondiscrimination provisions of Section 504. For instance, if a student in a wheelchair is denied access to art class because it is held in an inaccessible building, the school is in violation of Section 504 whether or not the student receives special education. Another example is the school's failure to justify the placement of a student in a separate school for students with disabilities. This is in violation of both Section 504 and IDEA unless it can be clearly shown that the placement is based on the student's unique needs.

Section 504 complaints are made in the same way as are state complaints but can be made only if the discrimination occurred within the past 180 days, unless there are special circumstances that would justify a waiver of that timeline. In order to file a complaint, write a complaint letter detailing all of the facts, all of the involved schools and persons, and all of the statutes and regulations you believe to have been violated. Attach medical documentation of the student's disability, along with any important reports, letters, or other written material. Make sure

to include your recommendation on what should be done to correct the violation. Letters of complaint should be sent to:

Office for Civil Rights, Cleveland Office  
U.S. Department of Education  
1350 Euclid Ave, Suite 325  
Cleveland, Ohio 44115-1812  
Telephone: (216) 522-4970 (Voice), (800) 877-8339 (TDD)

Unlike a state complaint, a federal complaint may be filed electronically. Go to :  
<http://www2.ed.gov/about/offices/list/ocr/complaintprocess.html>.

You may also wish to copy the Washington, DC, office:

U.S. Department of Education  
Office for Civil Rights  
400 Maryland Ave., S.W.  
Washington, DC 20202-1100

## **Due Process Hearings and Appeals**

A due process hearing may be requested over the issue of a student's identification, evaluation, eligibility, individualized education program or the proposed educational placement, or any matter relating to an appropriate education for the student. **34 CFR 300.507(a); R 340.1724f(5).** A due process hearing is the only way a parent may assert "stay put" rights, under which a student stays in the current placement pending the outcome of the hearing.

The due process hearing system is exceptionally difficult for parents to navigate without the assistance of legal counsel. It is a formal court proceeding that follow the rules and processes that attorneys must follow in court. Parents have to, from the outset, review their claims against the school district to ensure that the claims have a basis in law and have merit. Parties must file and respond to specific notices and motions. Experts will need to be retained in most cases to support the claims of the parent. The State Bar of Michigan Lawyer Referral and Information Service, (800) 968-0738, is a good resource for finding an attorney. Some counties also have local attorney referral services, and Legal Services organizations may maintain panels of private attorneys who take on selected cases. MPAS provides representation in selected cases that fit agency priorities.

## **When to Request a Hearing**

A due process hearing may be requested by the student's parents or legal guardian, the district of residence, the operating district or the Michigan Department of Education. (If the student is 18 years of age or older, the student or his/her attorney must request the hearing.) When any party requests a hearing, that party must notify the other parties of the intent to seek a hearing. **R 340.1724f(3).**

► **Advocacy Hint: Don't sit on your rights.** Federal law sets a time limit (two years) on how far back you can go in challenging IEPs. **34 CFR 300.507(a)(2)**. This time limit is most important in situations where a school district has not met a student's needs over a long period of time and, as a result, there is a need for compensatory education or remediation. In other cases, if there is a problem with an IEP, the simplest way to resolve it is to call a new IEPT meeting and, if you still disagree, challenge the finding from that meeting.

**Other Civil Rights Laws.** IDEA regulations say that asking for a hearing or review or bringing a lawsuit under special education law does NOT limit rights to seek action under the Constitution or other federal laws protecting the rights of students or youths with disabilities. There is one restriction. Before filing a lawsuit under other laws for a matter that is also covered by the special education law, a person must first go through the special education hearing process. This is called exhausting administrative remedies. **34 CFR 300.516(e)**.

**Complaints and Hearings Together.** Federal regulations do not allow the state to investigate a complaint and convene a hearing on the same issue. 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 part of the due process action must be resolved using the time limit and procedures. **34 CFR 300.152(c)**.

## How to Request a Hearing

**Step 1: Prepare and send a "due process complaint notice."** The parent, or the attorney representing the parent, must provide a "due process complaint notice" to the other party and forward a copy of the notice to the MDE.

The due process complaint notice is a very important first step since it sets the basis for attempting to resolve the issues be it through the resolution process, mediation, or the hearing process. Parents should seek assistance of counsel from the outset so that the issues outlined in the due process notice are thorough and comprehensive.

The notice must specify:

- ◆ Name of the child;
- ◆ Address where the child resides;
- ◆ Name of the school the child attends;
- ◆ A description of the nature of the problem relating to the initiation or change with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education, including the facts relating to such problem;

- ◆ A proposed resolution to the problem to the extent known and available to the party at the time; and,
- ◆ If the child is homeless, the notice must provide contact information for the child and the name of the school the child is currently attending. **34 CFR 300.508(b).**

**►Advocacy Hint: No notice, no hearing.** A party cannot have a due process hearing until the notice has been provided which meets the requirements discussed above. **34 CFR 300.508(c).** It is not enough to merely disagree and request a due process hearing.

Nor is it sufficient (or even possible in many cases) to request a hearing by signing an IEP in disagreement. The Michigan model IEP form does not include a signature page, reflecting the fact that no signature is required on an IEP — except for a signature providing consent for an initial IEP — in order to make it effective.

**Step 2: Receive a response.** The non-complaining party must respond to the due process complaint notice within *10 days* of receiving the notice, and specifically address the issues raised in the complaint.

What does this mean? Usually the parent is the person requesting the hearing. If the *parent* has requested a hearing, the school district has to respond to the due process notice, within 10 days, if they have not already sent to the parent a prior written notice regarding the subject matter contained in the parent's due process complaint notice. The district's response to the parent must include:

- ◆ An explanation of why the district proposed or refused to take the action at issue in the notice;
- ◆ A description of the options that the IEP team considered and the reasons why those options were rejected;
- ◆ A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; and,
- ◆ The description of the factors that are relevant to the district's proposal or refusal. **34 CFR 300.508(e).**

**Step 3: Address any objection to the notice.** The district's response also may include an objection that the parent's notice was insufficient. This objection must be filed within 15 days of receiving the hearing notice. **34 CFR 300.508(d)(1).**

► **Advocacy Hint: Be thorough up front.** It is imperative that the due process notice clearly describe all the issues you are attempting to resolve. You will not be allowed to raise issues that are not described in the notice. Although there are procedures for amending the notice, there is no guarantee that you will be allowed to do so.

For guidance on writing due process hearing notices, see Wrightslaw's "Letter to a Stranger" at: [http://www.wrightslaw.com/advoc/articles/Letter\\_to\\_Stranger.html](http://www.wrightslaw.com/advoc/articles/Letter_to_Stranger.html).

**Step 4: Arguing about/amending the notice.** If the non-complaining party objects that the due process complaint notice is not complete, the hearing officer has to, within 5 days of such notice, make a ruling regarding the adequacy of the due process complaint notice. **34 CFR 300.508(d)(2).**

If the hearing officer determines that the due process complaint notice is inadequate or the party seeking the hearing wants to amend the notice, there are procedures outlined for doing so. A complaint notice can only be amended if:

- ◆ the other party, in writing, consents to the amendment of the notice and is given the opportunity to resolve the dispute through the "resolution session" (discussed below); or,
- ◆ the hearing officer grants permission to amend the notice. The hearing officer may allow amendment right up to five days before the hearing. **34 CFR 300.508(d)(3).**

Once the notice is amended, the applicable timeline for the due process hearing recommences, including the timeline for the "resolution session."

**Step 5: Mandatory resolution session.** Prior to the opportunity to proceed with the due process hearing, the district must convene a meeting with the parents and the relevant member or members of the IEP team who have specific knowledge of the facts identified in the complaint. This meeting is known as a "resolution session". **34 CFR 300.510.**

The meeting has to be convened within 15 days of receiving the parent's due process hearing notice. The meeting must include a representative of the agency or district who has decision-making authority. The school district's attorney may not be present unless the parent brings an attorney. The purpose of the meeting is to have the parent(s) of the child discuss their complaint and the facts upon which it is based and allow the district the opportunity to resolve the complaint.

The meeting can be waived if both parties, in writing, agree to waive the resolution session meeting or use the mediation process.

If the parent(s) and district are able to resolve the problem at the resolution session, the parties must execute a legally binding settlement agreement. The agreement must be signed by the parent(s) and a representative of the agency or district who has the authority to bind the agency or district. This agreement is enforceable in court. A settlement agreement reached as a result of the resolution session can be voided by any party within three business days of the agreement's execution. **34 CFR 300.510(e).**

► **Advocacy Hint: How do I enforce an agreement?** MDE may, but has not yet, elected to make other forms of dispute resolution available to resolve conflicts over agreements reached in resolution sessions. **34 CFR 300.537.** Until MDE does so, the federal law appears to permit enforcement of resolution session agreements only by going to court.

If the district does not resolve the problem within 30 days of the receipt of the complaint, the due process hearing may occur. It is only then that the applicable timelines for the due process hearing commence. **34 CFR 300.510(b).**

## Due Process Hearing Rights

If neither mediation nor the resolution session resolves the issues raised in the due process complaint notice, then the parties can proceed to hearing.

**Subject matter of hearing.** The subject matter of hearing is restricted to the issues raised in the due process complaint notice. Only if the other party consents, can any additional issues be raised. **34 CFR 300.511(d).**

**The hearing officer.** Hearings are conducted by administrative law judges (ALJs) employed by the State Department of Licensing and Regulatory Affairs. The administrative law judge must possess:

- ◆ Knowledge of, and the ability to understand, the IDEA, its regulations, state regulations, and interpretation of IDEA rendered by state and federal courts;
- ◆ Knowledge and ability to conduct the hearing in accordance with appropriate, standard legal practice; and,
- ◆ Knowledge and ability to render and write decisions in accordance with appropriate legal practice. **34 CFR 300.511(c).**

Every due process hearing must be conducted according to rules, regulations, and procedures of both federal and state law.

- ◆ Any party has a right to be accompanied and represented by counsel, to present evidence, and to obtain a written or electronic copy of the decision and record. **34 CFR 300.512(a).**

- ◆ Any party has the right to prohibit the introduction of any evidence at the hearing that has not been disclosed AT LEAST FIVE DAYS before the hearing. **34 CFR 300.512(a)(3), (b).**

**►Advocacy Hint: Disclose evaluations and recommendations.** It is never a good idea to withhold evaluations/documents you want to use at the hearing from the five day exchange, since failure to disclose such evaluations could result in the ALJ barring the introduction of evaluations unless the other party consents. **34 CFR 300.512(b).** Also, remember that this rule does not require school districts to provide the entire file to the ALJ unless you request it. It's always a good idea to review your child's file before a hearing and make sure all important documents are included in the documents given to the ALJ.

- ◆ The student who is the subject of the hearing has the right to be present at the hearing and may open the hearing to the public. **34 CFR 300.512(c).**

**►Advocacy Hint: Private or public?** Because of a desire for privacy, the parent may wish to have a hearing closed to the public. The parent, however, should realize that this will restrict the number of people the parent may have present. In a closed hearing, only parents, the student, school officials, and advocates may be present. Others may attend only if both parties agree.

- ◆ The parent or parent representative has the right to obtain a copy of the record and decision at no charge. **34 CFR 300.512(c).**

**►Advocacy Hint: Get it in writing.** Obtaining a written hearing decision is crucial in order to understand the basis of the ALJ's decision and identify any possible issues for appeal to court.

## Placement During the Hearing Process

The school may not change the placement of a student during any administrative or judicial proceeding unless the parents and the school agree. **34 CFR 300.518(a).** If the hearing involves an application for initial admission to a public school and parental consent is obtained, the student must be placed into the public school until the completion of all administrative and judicial proceedings. **34 CFR 300.518(b).**

See the Chapter 11 on "Suspensions and Expulsion" for special rules governing alternative placements in specific disciplinary actions.

## Termination of the Hearing Process

Sometimes, through mediation or negotiation, an agreeable solution may be reached before the hearing process is exhausted. State regulations provide that the hearing or appeal procedure

may be suspended, delayed, or terminated at any point upon written stipulation (statement) by the parent and school, prior to the appointment of the ALJ. After appointment of the ALJ, the hearing may be terminated by stipulation between the district and the parent; however, delays, suspensions, or adjournments require ALJ approval.

## **The Hearing Decision**

The administrative law judge must render a decision not later than 45 days after the timeline for the resolution session ends. **34 CFR 300.515(a)**. The ALJ may grant specific time extensions at the request of either party. **34 CFR 300.515(c)**.

Discipline disputes are addressed through “expedited hearings.” An expedited hearing must be held within 20 school days of the date the hearing is requested and must result in a determination within 10 school days after the hearing. **34 CFR 300.532(c)**.

The ALJ’s decision must be made on *substantive grounds* on a determination of whether the child received a free appropriate public education. If procedural violations are alleged, the hearing officer may find that a child did not receive a free appropriate public education *only if* the procedural inadequacies:

- ◆ impeded the student’s right to a free appropriate public education;
  - ◆ significantly impeded the parent’s opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the student; or,
  - ◆ caused a deprivation of educational benefits. **34 CFR 300.513(a)**.
- ◆ ► **Advocacy Hint: But they broke the law!** Many parents’ complaints focus on a school’s compliance with procedural rules. IDEA outlines the right of parents to file a compliance complaint with MDE, or to ask a hearing officer to order compliance with procedural rules. It states clearly, however, that procedural violations by themselves do not automatically mean a school district is not providing a free appropriate public education. In general, it is always a good idea to ask, when you think a school district has violated an IDEA procedural rule, what impact the violation has on your child’s education.

## **Appealing the Administrative Law Judge's Decision**

If you disagree with an ALJ’s decision, you must appeal to court by filing a civil lawsuit. The suit may be filed in state or federal court. **34 CFR 300.516(a)**. The IDEA regulations include a statute of limitations for filing appeals to court. Appeal to a federal district court or a court of competent jurisdiction must be filed within **90 days** of the hearing officer’s decision. **34 CFR 300.516(b)**.

## Attorneys' Fees

Attorneys' fees and related costs may be awarded to students' attorneys in cases where students prevail in due process hearings or in court actions to enforce rights under IDEA. **34 CFR 300.517(a)**. There are a number of limitations on the collection of fees. For example, attorneys' fees may not be awarded if a student's attorney fails to respond promptly to a reasonable settlement offer and may not be awarded for representation in most IEPT meetings or mediation conferences. **34 CFR 300.517(c)(2)**. Attorneys' fees may be reduced if the student's attorney fails to give proper notice in the due process hearing request, if the attorney unreasonably delays resolving the conflict, or if the time spent or hourly rate billed are excessive. **34 CFR 300.517(c)(4)**. Despite these limitations, making attorneys' fees and costs available to students' attorneys may help encourage private attorneys to represent students with disabilities in due process hearings.

► **Advocacy Hint: Prevailing in court action or hearing only.** Parents are not entitled to receive attorneys' fees for reaching favorable settlements or agreements. Fees are only available in actions where there is a favorable finding by a court or hearing officer. **See T.D. v. LaGrange School District No. 102, 349 F.3d 469 (7th Cir. 2003); Buckhannon v. West Virginia DHHR, 121 S.Ct. 1835 (2001)**. This does not mean, of course, that attorneys' fees cannot be negotiated as part of a settlement agreement.

A court, at its discretion, may award attorneys' fees to a state or local educational agency against the *attorney of a parent* who files a complaint or subsequent cause of action which is (or becomes) frivolous, unreasonable or without foundation. A court, at its discretion, may award reasonable attorneys' fees to a State Education Agency (SEA) or Local Education Agency (LEA) against the *attorney of a parent, or against the parent*, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, or cause unnecessary delay, or to needlessly increase the cost of litigation. **34 CFR 300.517(a)**

► **Advocacy Hint: This is yesterday's news.** Under Rule 11 of the Federal Rules of Civil Procedure, anyone (including parents or school districts) can collect fees from a party when the party's claims are frivolous, unreasonable, without foundation, or presented for an improper purpose. **See Christianburg v. EEOC, 98 S.Ct. 694 (1978)**. Parents should evaluate their claims continuously to make sure that their claims are not frivolous, unreasonable, or without foundation. MPAS urges parents to review their retainer agreements carefully to see if the retainer agreement contains any fee shifting arrangement. Parents should also be wary of school districts who suggest that they have an automatic right to attorneys' fees as a way of dissuading parents from asserting their due process rights. Such threats would chill the right of parents to participate in educational decisions and might give rise to civil rights claims.

## Mediation

Mediation is different from hearings. In a hearing, the hearing officer makes a decision that is imposed on the two disputing parties. The role of the mediator is to facilitate the two parties in reaching their own decision.

Professional mediation of conflicts between parents and special educators can preclude the need for many special education due process hearings. Mediation is also more informal and easier than hearings.

Any party to a hearing may request mediation at any time. Participation in mediation is voluntary. The mediator must be acceptable to both the parent and the school. Mediation may not be used to delay a hearing, except by mutual agreement of the parties and approval of the hearing officer. Parties to mediation retain the right to take other action if mediation fails to achieve a settlement.

**► Advocacy Hint: Mediation is available any time.** Although mediation occurs most frequently in the midst of due process hearings, it is available at any time to address any dispute in the provision of special education services, including complaint issues. Remember, though, that either party may decline mediation.

Mediation is free of charge to parents. **34 CFR 300.506(b)(4).** Michigan has a series of Community Dispute Resolution Centers throughout the state with trained mediators to handle many kinds of disputes, including special education issues. A number of private mediators also accept assignments in such cases.

If the parent(s) and district are able to resolve the complaint as a result of mediation, the parties must execute a legally binding settlement agreement. The agreement must be signed by the parent(s) and a representative at the agency or district who has the authority to bind the agency or district. This agreement is enforceable in court. (See prior comments about resolution sessions.)

**► Advocacy Hint: It's a contract.** The agreement that is signed by the parties is, in essence, a contract. If either party fails to follow the terms of the agreement, the agreement can be enforced through legal action. This is a boon in getting the district to do its part, but it can also lead to trouble if the parent has responsibilities under the agreement and fails to follow the terms specified. It also can act to waive certain special education rights. Please review the agreement carefully and understand its implications before you sign the document. MPAS strongly advises parents to contact legal counsel prior to signing the agreement.

## Appendix 8-1

### Common Problems and Solutions

**“The school says my doctor’s letter is not enough.”** This problem surprises many professionals from other systems who make diagnoses and expect them to automatically result in special education eligibility. Most special education categories are defined legally, not clinically, and even disabilities that fit special education eligibility criteria must have a demonstrated impact on education.

To resolve this problem, ask the clinician or evaluator to explain if and how a child’s diagnosis fits into a special education classification when making any diagnosis or recommendation.

**“I don’t agree with what the school district’s evaluator said.”** It is important to identify the reason for disagreement. Standardized tests often may not be retaken immediately because of “practice effects” associated with some. In those cases, ask a clinician with comparable qualifications to review the testing.

More commonly, however, there may be disagreement with the interpretation of test results, observations, record review, or conclusions reached by evaluators. The easiest way to resolve this problem is to ask the evaluator to explain his or her findings. The IEP team must include a person who is knowledgeable about any evaluations conducted and can answer questions about them. If, after the explanation, there is still disagreement with the evaluation, a parent may request an independent evaluation.

**“The school said my child is not eligible.”** Sometimes a school district may only look at one or a few eligibility categories, such as specific learning disability. The district may do this because specific learning disability is the largest category of eligibility. In some isolated instances, a school district may even attempt to make an eligibility determination without an evaluation and discourage a parent from requesting an evaluation.

The law assures the right to seek an evaluation in all suspected areas of disability and does not allow school districts to prescreen applicants. To resolve this problem, ask the school district to evaluate for eligibility for all suspected areas of disability under IDEA, state law, and Section 504.

**“The school says I should not ask for special education eligibility because my child would have to go to a special education class or school.”** Some schools think that special education is a place and that eligibility for special education automatically requires moving a child into a special education program. Sometimes these assumptions are driven by how special education services are funded, a practice that violates IDEA. Other times, they are driven by misperceptions about the nature of special education services and supports.

To resolve this problem, ask for an evaluation, then advocate for individualized support. Consider beginning the discussion by assuming that the child will attend school in general education with supports, then move to more restrictive placements only if absolutely necessary.

**“The school never acted on my verbal evaluation request.”** In most cases, timelines don’t begin until the school receives a written request to do something. This creates particular

problems for children in foster care who move from one district to another, as any delay in acting upon an evaluation request may result in no services or supports being provided.

If communicating with the district in writing creates an overly formal relationship, one way to address this problem is to call the district, make the request, and then follow up with a letter or note.

**“The school won’t implement my child’s IEP when I move into a new district.”** When a child with an IEP moves into a new district, the new district must do one of two things: (1) implement the IEP as written with similar or comparable services; or, (2) convene a new IEP team meeting and write a new IEP. As a practical matter, transfers often slow down services because of delays in transmitting records.

To help resolve this problem, work with the parent to request an inspection of the child’s file and obtain a copy of the child’s current IEP and most recent evaluation report.

**“The school won’t give my child the services or supports she needs.”** One of the most commonly-overlooked problems with IEPs is the failure to include robust, up-to-date, and measurable goals. Services and supports must be designed to meet an IEP goal. IEP goals are in turn derived from the present level of academic achievement and functional performance (PLAAFP) and, to some extent, are tied to the general curriculum standards set by the state that apply to all students.

To address this problem, check the IEP goals to make sure they are current, robust, and measurable. Check the Michigan Department of Education’s grade level content expectations for various subjects and grade levels at [www.michigan.gov/mde](http://www.michigan.gov/mde) to see if a goal is strong enough. To be sure that a goal is measurable, apply the “stranger test,” i.e., whether a total stranger would be able to tell, based on performance, that the child is making progress. The goals and objectives should not be written using words like “improve” or “increase.”

**“I don’t agree with the way the school is teaching my child.”** This problem may show up because the school is not using a preferred teaching method, or because the child is not learning under the current method.

Methodology is the school’s choice, but it must be reasonably calculated to help a child learn based on his or her individual needs and must be, to the extent practicable, based on peer-reviewed research.

Progress should be more than minimal. To resolve this problem, schedule regular reviews to discuss progress, and insist on different methods if current ones don’t work.

**“The school will not write a service or accommodation into an IEP.”** When a service is included in an IEP, the parent has an enforceable claim to receive the service. A few school districts mistakenly believe that refusing to write a service into an IEP relieves them of responsibility for providing the service. Such a practice is contrary to federal law.

If persuasion doesn’t work, use the complaint process discussed in the following section to argue that the school is not following the IEP process.

**“The school is not providing a service in my child’s IEP.”** Usually this problem comes from a lack of staff or from not providing information to staff about the child’s service and program needs. Although these reasons may be honest explanations for the failure to provide IEP services, neither of them can excuse the school from providing the services.

To resolve this problem, try some informal methods of resolving the problem before filing a formal complaint. Start by talking to someone who has the authority to change the situation. Remember that while many people on the general education staff (such as school principals and counselors) deal with special education issues and students, they may not have the expertise or authority necessary to resolve complaint issues and occasionally do not recognize them.

Next, try to contact the school district's special education director, supervisor, or coordinator to discuss the problem. If the problem is not resolved, contact the person at the Intermediate School District (ISD) or the Michigan Department of Education (MDE) responsible for investigating complaints. This will likely be either the person in charge of compliance and monitoring or in some cases the ISD special education director.

If a formal complaint is necessary, send a copy to the local school district as well as to MDE. Occasionally, when a formal complaint is filed, the investigator will ask if they can try to resolve the complaint informally. This may be a good idea, but consider whether resolving the complaint informally will provide the same outcome for the student within the same timelines.

Complaints about problems with a Section 504 plan should be filed with the U.S. Office for Civil Rights. 504 complaints must be filed within 180 days of the event that you are complaining about. Unlike IDEA complaints, there are no formal timelines on investigation of such complaints.

**“My child is starting to have behavior problems and the school keeps suspending him.”**  
Behavior issues may not be reflected in the PLAAFP, or there may not be IEP goals for behavior, or there may not be an appropriate behavior assessment or plan. To resolve this problem, ask for an IEP meeting or for a functional assessment of behavior and behavior support plan before the problem gets worse. It's especially important to resolve behavior issues early, because the 2004 changes in the law make it much more difficult to challenge the adequacy of a program in a manifestation review.

**“The school will not write behavior goals unless the child is labeled as emotionally impaired.”** This myth is an extension of the mistaken belief that a school must only meet a child's needs that come from the category of eligibility under which the child falls. To resolve this problem, ask the IEP team to describe present levels of performance in all areas of disability and write goals that completely identify the child's needs.

## **Appendix 8-2**

### **Sample Complaint Letter**

Via fax and U.S. Mail: (517) 373-8414 and (000) 555-0000

October 17, 2017

Michigan Department of Education  
Office of Special Education  
608 West Allegan Street  
Lansing, Michigan 48909

Gene Simmons, Superintendent  
Hades School District  
123 Lucifer Street  
Hades, MI 48000

This is a formal complaint under 34 CFR 300.151-153 and R 340.1851-55. Please see the following pages showing how the school district did not follow the law and the facts showing how that happened.

#### **Complainant:**

Mark McWilliams  
Michigan Protection & Advocacy Service, Inc  
4095 Legacy Parkway, Suite 500  
Lansing, MI 48911  
(517) 487-1755, [mmcwilliams@mpas.org](mailto:mmcwilliams@mpas.org)

#### **Student Information:**

*Name:* Sherry Smith  
*Age:* 7 years  
*Date of birth:* 02/26/2003  
*Grade:* 1  
*School of attendance:* Gates Elementary School, 12 Lucifer St., Hades, MI 48000  
*Resident district/operating district:* Hades Public Schools  
*Parent name:* Jerry Smith  
*Address:* 781 Mephistophiles Road, Hades, MI 48000  
*Phone number:* (517) 555-4321

I have enclosed a Release of Information signed by the student's parent.

### **Complaint Allegations and Supporting Facts**

<b>Allegation</b>	<b>Supporting Facts</b>
1. The district has failed to identify, locate, and evaluate children with disabilities, in violation of 34 CFR 300.111.	See fact statements 3, 4, 5, and 6 below.
2. The district has failed to base decisions on data by not basing IEP goals on student needs, in violation of 34 CFR 300.320(a)(2).	See fact statement 7 below.
3. The district has failed to apply standards by not offering services and supports reasonably calculated to confer educational benefit, in violation of 34 CFR 300.101(a) and <i>Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley</i> , 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690.	See fact statement 8 below.
4. The district has failed to follow procedures by denying access to copies of records, in violation of 34 CFR 300.613.	See fact statement 9 below.

### **Supporting Facts**

1. Sherry Smith is a 7 year old girl with autism. She lives at home with her father, Jerry Smith. She loves to paint, and some of her paintings have been displayed at school.
2. Sherry was diagnosed with autism at the University of Michigan Clinic at age 4. Her diagnosis was confirmed by the Mayo Clinic at age 5.
3. Despite her artistic success, Sherry has struggled in school since she began kindergarten. From September 2009 to May 2011, Sherry received all “unsatisfactory” ratings from her teachers, who noted that she did not play well with other children and would not participate in group activities.
4. One teacher wrote on Sherry’s November 2010 progress report, “Your daughter needs medical help – please get it!”
5. From September 2009 to May 2011, the district received at least four letters from Sherry’s father asking for help. Each letter included copies of the University of Michigan and Mayo Clinic evaluations. Although none of the letters specifically asked for a special education evaluation, each letter put the district on notice that Sherry had a disability and needed help.
6. Despite having this information, the district did not initiate an evaluation until May 5, 2011, one day after receiving MPAS’ initial request for records.
7. Once the district finally initiated an evaluation, they convened an IEPT meeting within a week. In the IEP drafted by the district, there was a statement of present level of academic achievement and functional performance that concluded: “Sherry is developmentally delayed, but she is able to perform first grade work with appropriate supports and services.”

However, her goals were drawn from the district's day care center and included such goals as recognizing colors and shapes.

8. In the services section of Sherry's IEP, the district listed "the same services everyone gets, without exception." These services were not individually designed to help Sherry access the general curriculum or make progress toward her IEP goals.
9. MPAS submitted a detailed records request on May 1, 2011, attached. The district at first did not respond to the request for records. After a call to the district's counsel, the district responded by sending a single page – page 4 of Sherry's most recent IEP, describing "secondary transition services." All other documents were received from Sherry's father and CMH case manager.

### **Impact on the Student**

Sherry was denied special education services for at least a year. As a result, she is a year behind in school. Her loss comes at a key age and creates a disproportionately high risk of future educational struggles and delays.

### **Systemic Violations**

The school district violations shown in this complaint may include patterns and practices of violations that affect many students. In resolving a complaint, MDE has a responsibility to assure through its general supervisory authority to address 'appropriate future provision of services for all children with disabilities.' 34 CFR 300.151(b)(2); 71 Fed.Reg. 46601 (8/14/06).

A review of the district's State Performance Plan data from 2008-9 indicates that they have no special education students identified. Since the district's child find practices are at issue in this complaint, the absence of any students with disabilities suggests the district is not meeting its child find responsibilities.

### **Informal Resolution Attempts**

Sherry's father sent four letters and made 78 phone calls to the district asking for help. The district did not respond to any of these overtures.

### **Proposed Corrective Action**

1. Order a complete reevaluation and IEPT meeting to rewrite Sherry's IEP.
2. Order compensatory education based on an independent evaluation by an evaluator of the Smiths' choosing.
3. Order a revision of the district's child find policy.
4. Maintain oversight of the district to ensure compliance and improvement.

Please be advised that, although MPAS will allow the district to communicate directly with the parent regarding the issues in this complaint, as the complainant we reserve the right to accept or decline any proposed resolution the district might suggest.

Sincerely,

Mark McWilliams

## Appendix 8-3

### Section 504 Letter of Complaint

(Be sure to keep a copy for your records.)

(      Date      )

Office for Civil Rights, Cleveland Office  
U.S. Department of Education  
1350 Euclid Ave., Suite 325  
Cleveland, Ohio 44115-1812

RE: Edward Davis

Dear Sir or Madam:

The purpose of this letter is to make a formal complaint to you concerning the actions of the ( ) Intermediate School District and the education of my son, Edward Davis. The main facts of the complaint are as follows:

1. Edward is a 14-year-old boy with mild cognitive impairment who lives with me in the ( ) School District.
2. (\_\_\_\_\_) School District has excluded Edward from participation in his vocational education and physical education classes and failed to provide him with prescribed speech therapy.
3. On (date), the Individualized Education Program Team (IEPT) met to develop Edward's Individualized Education Program (IEP) for the coming school year when he would be entering Smith Junior High School. The IEPT agreed that Edward was ready to enter the vocational education program. The IEPT also agreed that he should continue to receive speech therapy three times a week for fifty minutes a session.
4. On (date), three weeks after school started, I learned that Edward had been dropped from his vocational education and physical education classes and that he would not be receiving any speech therapy this year. On (date), Ms. Edith Jones, Edward's counselor, called to tell me that Mr. Clark, the principal, and Mr. Smith, the teacher of the vocational program, had met the day before to discuss the problems Edward was having in classes. Ms. Jones told me that Edward had been teased and picked on by the other boys in his P.E. and shop classes. These problems were disrupting the classes.
5. The IEPT did not meet until (date). I said that Edward should be let back into the vocational education and physical education classes. I argued that he should not be punished for the behavior of the other students. Mr. Clark and Mr. Smith insisted that his presence was the source of the problem and they could not stop the other students' teasing. Mr. Clark also said he was sorry, but the school board had cut back on special education funding and there was no more money available to pay for speech therapy for students in the junior and senior high schools. Edward's IEP was changed to reflect the actions taken by the principal. I indicated my opposition to the school's actions on the

**Michigan Protection & Advocacy Service, Inc.**

IEP. I also insisted that the reasons given for the removal from the classes and denial of speech therapy be included in the IEP.

6. Since (date), Edward has not been going to his vocational education class. Instead, he has been placed in the study hall. He has not received any speech therapy since the school year began.
7. I believe that the school district's actions violate the Section 504 and IDEA regulations and my son's right to an appropriate education.
8. I request that you investigate the actions of (                ) School District and order the district to put Edward back into his vocational education and physical education classes and to give him the prescribed speech therapy. To assist you in your investigation, I will be happy to share with you all relevant documents from my file and put your investigators in touch with other persons who have pertinent information. The following individuals are responsible for the actions complained of:

Mr. Clark Principal; Ms. Edith Jones, Counselor; ISD, 123 Main Street, My City, Michigan (517) 444-3693

9. I expect that the Office for Civil Rights will keep me informed of any actions taken about this complaint, including providing copies of any written findings. I also expect that OCR will promptly acknowledge receipt of my letter and that it will immediately begin an investigation. I intend to keep the Washington Office for Civil Rights informed if there are delays in the investigation of this complaint.

Sincerely,

(Names of Parents)

(Address)

(Telephone Number)

cc: U.S. Department of Education  
Office for Civil Rights  
400 Maryland Ave., S.W.  
Washington, DC 20202-1100

## **Appendix 8-4**

### **Follow Up Letter To OCR**

(Be sure to keep a copy for your records.)

(  Date  )

Office for Civil Rights, Cleveland Office  
U.S. Department of Education  
1350 Euclid Ave, Suite 325  
Cleveland, Ohio 44115-1812

Dear Sir or Madam:

On (  Date  ), I filed a complaint with your office charging that (                ) School District had discriminated against my child on the basis of his disability in violation of Section 504 and IDEA. However, I have not received a letter acknowledging my complaint and saying when your office will begin an investigation of my complaint.

My child, (       ), is being denied urgently needed services. Please let me know by (  date  ) when your investigation will begin.

Sincerely,

(Your Name)  
(Your Address)  
(Your Telephone Number)

cc: U.S. Department of Education  
Office for Civil Rights  
400 Maryland Ave., S.W.  
Washington, DC 20202-1100

## **Appendix 8-5**

### **U.S. Department of Education Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education**

*The complete document can be found at*

<https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acccombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf>

UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

July 23, 2013

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OSEP MEMO 13-08

#### **MEMORANDUM**

TO: Chief State School Officers  
State Directors of Special Education

FROM: Melody Musgrove, Ed.D.  
Director  
Office of Special Education Programs

SUBJECT: Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education  
Act (Part B)

The purpose of this Memorandum is to introduce the updated and combined question and answer (Q&A) document on the dispute resolution procedures that are set out in the Part B regulations, published in the Federal Register on August 14, 2006, including mediation procedures (34 CFR §300.506), State complaint procedures (34 CFR §§300.151-300.153), and due process procedures (34 CFR §§300.507-300.516 and 300.532-300.533). The Office of Special Education Programs (OSEP) encourages parents and local educational agencies (LEAs) to work collaboratively, in the best interests of children, to resolve the disagreements that may occur when working to provide a positive educational experience for all children, including children with disabilities. To this end, the IDEA and its implementing regulations provide specific options for resolving disputes between parents and public agencies, which can be used in a manner consistent with our shared goals of improving results and achieving better outcomes for children with disabilities.

The attached Q&A document provides responses to frequently asked questions to facilitate and enhance States' implementation of the Part B dispute resolution procedures. The Q&A document incorporates prior clarification of the requirements of Part B of the IDEA and the Part B regulations that OSEP has provided on the dispute resolution procedures in policy memoranda, Q&A documents, letters responding to individual requests for policy clarification, and responses to public comments published in regulatory notices in the Federal Register. Three previous memoranda are being updated and reissued at this time as part of the Q&A document: OSEP Memorandum 94-16 issued on March 22, 1994; OSEP Memorandum 00-20 issued on July 17, 2000; and OSEP Memorandum 01-5 issued on November 30, 2000. Some of the questions and

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answers in the Q&A document were previously contained in *Questions and Answers on Procedural Safeguards and Due Process Procedures For Parents and Children with Disabilities*, January 2007, updated June 2009. These questions have been revised, amended, and updated, as appropriate.

The Q&A document consists of five sections: mediation; State complaint procedures; due process complaints and due process hearing procedures; resolution process; and expedited due process hearings.

As part of its general supervisory responsibility, a State educational agency (SEA) must ensure implementation of IDEA's dispute resolution procedures in a manner that meets the requirements of the IDEA. OSEP encourages States and their public agencies to work cooperatively with parents to attempt to address their differences through informal means whenever possible. However, when those informal means prove unsuccessful, States should recognize the benefits of encouraging their public agencies to voluntarily engage in mediation with parents, consistent with 34 CFR §300.506. Also, since the inception of the Part B program in 1977, State complaint procedures have provided a very effective and efficient means of resolving disputes between parents and public agencies, without the need to resort to more formal, adversarial, and costly due process proceedings.

Sections A and B of the Q&A document provide guidance on mediation and State complaint procedures, respectively. Section C of the Q&A document describes procedures for due process complaints as well as procedures for due process hearings when the dispute between the parents and the public agency cannot be resolved through informal means, through mediation, or through the resolution process. Even when resorting to IDEA's due process procedures becomes necessary, States and their public agencies should focus on ways to resolve the dispute with parents as early as possible at the local level. Therefore, appropriate use of the resolution procedures, described in Section D of the attached Q&A document, provides an effective and efficient way of resolving disputes at the local level when a parent files a due process complaint. Section E of the Q&A document addresses procedures for expedited due process hearings when a parent or a public agency files a due process complaint regarding a disciplinary matter.

This Memorandum and the attached questions and answers are available at <http://idea.ed.gov> and <http://www2.ed.gov/about/offices/list/osers/osep/policy.html>.

We hope that you find this information helpful. If you or members of your staff have questions, please contact Gregg Corr or your State Contact in OSEP's Monitoring and State Improvement Planning Division.

Thank you for your continued commitment to improving results for children and youth with disabilities and to ensuring that the rights of children and their parents are protected.

Attachment

**QUESTIONS AND ANSWERS ON IDEA PART B**  
**DISPUTE RESOLUTION PROCEDURES**

Revised July 2013

Regulations for Part B of the Individuals with Disabilities Education Act (IDEA) were published in the *Federal Register* on August 14, 2006, and became effective on October 13, 2006. Supplemental IDEA regulations were published on December 1, 2008, and became effective on December 31, 2008. Since publication of the regulations, the Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education (Department) has received requests for clarification of some of these regulations. This is one of a series of question and answer (Q&A) documents prepared by OSERS to address some of the most important issues raised by requests for clarification on a variety of high-interest topics. Each Q&A document will be updated to add new questions and answers as other important issues arise or to amend existing questions and answers as needed.

OSERS issues this Q&A document to provide parents, parent training and information centers, school personnel, State educational agencies (SEAs), local educational agencies (LEAs), advocacy organizations, and other interested parties with information to facilitate appropriate implementation of the IDEA dispute resolution procedures, including mediation, State complaint procedures, and due process complaint and due process hearing procedures. This Q&A document represents the Department's current thinking on these topics. It does not create or confer any rights for or on any person. This guidance does not impose any requirements beyond those required under applicable law and regulations. Further, this document pertains only to IDEA Part B and is not meant to interpret Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990.<sup>1</sup>

This Q&A document updates and revises, as appropriate, the Department's guidance, entitled *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities* issued in January 2007 and revised in June 2009. This Q&A document also updates and revises the information and questions and answers contained in the following Office of Special Education Programs (OSEP) Memoranda: 94-16, *Complaint Management Procedures Under Part B of the Individuals with Disabilities Education Act - Public Law 101-476 (Part B)*, issued March 22, 1994; 00-20, *Complaint Resolution Procedures under Part B of the Individuals with Disabilities Education Act (Part B)*, issued July 17, 2000; and 01-5, *Questions and Answers on Mediation*, issued November 30, 2000. This Q&A document replaces the previously issued OSEP Memoranda and Q&A document.

Generally, the questions and corresponding answers presented in this Q&A document required an interpretation of the IDEA and its implementing regulations and the answers are not simply a restatement of the statutory or regulatory requirements. The responses presented in this document generally are informal guidance representing the interpretation of the Department of the applicable statutory or regulatory requirements in the context of the specific facts presented and are not legally binding. However, where controlling case law on these issues exists in your jurisdiction, it generally would be legally binding. The Q&As in this document are not intended to be a replacement for careful study of the IDEA and its implementing regulations or of controlling case law. The IDEA, its implementing regulations, and other important documents related to the IDEA are found at <http://idea.ed.gov>.

If you are interested in commenting on this guidance, please email your comments to [OSERSguidancecomments@ed.gov](mailto:OSERSguidancecomments@ed.gov) and include Dispute Resolution Procedures in the subject of your email or write us at the following address: Gregg Corr, U.S. Department of Education, Potomac Center Plaza, 550 12th Street, S.W., Room 4108, Washington, D.C. 20202.

<sup>1</sup> For more information about these laws please contact the Office for Civil Rights Enforcement Office that serves your State. Contact information for these offices can be found at: <http://wdcrobcolp01.ed.gov/CFAPPS/OCR/contactus.cfm>.

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# **Chapter 9**

## **INFANT, TODDLER, AND PRESCHOOL PROGRAMS**

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### **What This Chapter Is About**

Under Michigan and federal law, children with disabilities birth through five years old are eligible for special education and support services. Children "at risk" of having a disability are also eligible for services. Children under age three may receive either special education services or "early intervention" services set forth in an Individualized Family Service Plan (IFSP). Children ages two years six months and older receive traditional special education services through the Individualized Education Program (IEP) or 504 plan.

Early intervention services differ slightly from special education services in that they include family support services and are preventive in nature. The Michigan Department of Education is the lead agency responsible for providing early intervention services. Such services are multidisciplinary, involving many agencies, and require case management.

Children receiving early intervention and preschool special education services have many of the same rights as older students in special education, including the right to special education, related services, due process protections, and the right to services in the least restrictive environment.

### **Advocacy Hints in Chapter 9**

- ◆ Students who do not qualify as "disabled" under the Individuals with Disabilities Education Act (IDEA) may still qualify for services and supports under Section 504 (Page 7).
- ◆ Use the "at risk" category to get services for your child without labeling him or her inappropriately (Page 7).
- ◆ When deciding where the least restrictive environment is for your child, look at where he or she is most comfortable and where a child without a disability would attend the same kind of program (Page 8).

Michigan is one of the five "birth-mandate" states that have provided special education services for eligible students from birth. Beginning in 1973, the Michigan Mandatory Special Education Act mandated services for young children through the same procedure used for school-age students, including "Child Find" activities, referrals, evaluation, Individualized Education Program Team (IEPTs), IEPs, and procedural safeguards. Special education services to young children include school district preschool programs, Early Childhood Special Education programs, services in private preschool programs, and referrals to agencies such as Head Start. **R 340.1754; R 340.1755.**

In addition, infants and young children from birth to age three also may receive "early intervention" services under Part C of IDEA and the Michigan "Early On" program. Early On services take a

multi-agency approach to services and include services for the family through the Individual Family Service Plan (IFSP). Early On services may include assistance in the family settings and may provide education for parents on infant stimulation and play, physical therapy, and other services related to and supporting cognitive, psychosocial, and physical development. **34 CFR 303.13.**

In 1986, Congress changed the way most states provide services for children less than five years old. This law mandated special education services and protections for three to five year olds and early intervention services for infants and toddlers, birth to age three. The new federal law also gave states the discretion to provide services for "at risk" infants and toddlers. Because Michigan already offered services to infants and toddlers with disabilities, more emphasis was placed on identifying and providing services for "at risk" children.

Children who may not be eligible for services because they do not meet the eligibility requirements for special education or Early On may qualify under the broader eligibility of Section 504. Chapter 12 of this manual includes a full discussion of eligibility for programs and services under Section 504's broader definition of "person with a disability."

## **Early Intervention or "Early On" Services**

"Infants and toddlers with disabilities" are individuals from birth to age three who need early intervention services because they:

- ◆ are experiencing developmental delays as measured by appropriate diagnostic instruments and procedures in one or more of the following areas: cognitive development, physical development, communication development, social or emotional development, or adaptive development, or
- ◆ have a diagnosed physical or mental condition which has a high probability of resulting in developmental delay. **34 CFR 303.21.**

"Infants and toddlers with disabilities" may also include, at the State's discretion:

- ◆ at-risk infants and toddlers
- ◆ children with disabilities who are eligible for pre-school services and previously received early intervention services until such children enter or are eligible to enter kindergarten or elementary school. **34 CFR 303.21.**

Federal requirements for early intervention services for infants and toddlers vary somewhat from those previously used in Michigan and from those for preschoolers and school-age students.

- ◆ Services address the long-term benefits of early identification and treatment.
- ◆ Services are multidisciplinary and require the participation of several agencies in addition

to the school, including public health and community mental health programs. In multidisciplinary activities, a lead agency must be designated; in Michigan, this is the Department of Education.

- ◆ Services have a family focus, assisting the family in areas that affect the child's education and development.
- ◆ Programs for infants and toddlers (when appropriate, preschool children) are developed in an Individualized Family Service Plan (IFSP) rather than the IEP used for preschool and school-age students.
- ◆ Transition from infant-toddler programs to preschool programs is coordinated and planned. Referrals from infant-toddler programs to preschool programs are to be made at least 90 days prior to the child's third birthday.

Services include a case manager to assist parents in coordinating services.

Early intervention services are:

- ◆ provided under public supervision;
- ◆ provided at no cost except where federal and state law provide for a system of payments by families, including a sliding fee scale; and,
- ◆ designed to meet the developmental needs of an infant or toddler with a disability in physical, cognitive, communication, social/emotional, or adaptive development. **34 CFR 303.13(a).**

Early intervention services must meet state standards and must include:

- ◆ family training, counseling, and home visits;
- ◆ special instruction;
- ◆ speech pathology and audiology, sign language and cued language services;
- ◆ occupational therapy;
- ◆ physical therapy;
- ◆ psychological services;
- ◆ service coordination services;
- ◆ medical services only for diagnostic or evaluation purposes;

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- ◆ early identification, screening, and assessment services;
- ◆ health services necessary to enable the infant or toddler to benefit from the other early intervention services;
- ◆ social work services;
- ◆ vision services;
- ◆ assistive technology devices and services; and,
- ◆ transportation and related costs that are necessary to enable an infant or toddler and their family to receive services. **34 CFR 303.13(b).**

Services must be provided by qualified personnel, including:

- ◆ special educators;
- ◆ speech and language pathologists;
- ◆ audiologists;
- ◆ occupational therapists;
- ◆ physical therapists;
- ◆ psychologists;
- ◆ social workers;
- ◆ nurses;
- ◆ registered dieticians;
- ◆ family therapists;
- ◆ vision specialists, including ophthalmologists and optometrists;
- ◆ orientation and mobility specialists; and,
- ◆ pediatricians and other physicians (for diagnostic and evaluation purposes). **34 CFR 303.13(c).**

Services must be provided, to the maximum extent appropriate, in natural environments including in the home and community settings in which children without disabilities participate.

## **Individualized Family Service Plan (IFSP)**

For school-age students and most three to five-year-olds, special education services are written in an IEP. Early intervention services for children from birth through age two are written in an individualized family service plan (IFSP). The IFSP is broader than the IEP, including education services but also a wide range of other services that may be provided by agencies other than the school. Families are involved with the school and other agencies in developing the plan. **34 CFR 303.20, 303.340.**

The IFSP must be written and developed by a multidisciplinary team including the parent or guardian, as required, and must be based on a multidisciplinary assessment of unique strengths and needs and the identification of services appropriate to meet such needs. **34 CFR 303.321(a)(1)(ii)(A).** The IFSP must contain:

- ◆ a statement of the infant's or toddler's present levels of development in physical, cognitive, communication, social or emotional, and adaptive development, based on objective criteria;
- ◆ a statement of the family's resources, priorities and concerns related to enhancing the infant or toddler's development with a disability;
- ◆ a statement of the measurable results or outcomes expected to be achieved for the infant or toddler and the family, including pre-literacy and language skills, as developmentally appropriate for the child and the criteria, procedures and timeliness used to determine the degree to which progress toward achieving the results or outcomes is being made, and whether modifications or revision of the results our outcome is necessary;
- ◆ a statement of specific early intervention services based on peer-evaluated research to the extent practicable necessary to meet the unique needs of the infant or toddler and the family, including the length, duration, frequency, intensity, and method of delivering services;
- ◆ a statement of natural environments in which early intervention services will appropriately be provided, including a justification of the extent, if any, to which services will not be provided in a natural environment;
- ◆ payment arrangements, if any;
- ◆ the projected dates for initiation of services;
- ◆ the name of the service coordinator from the profession most immediately relevant to the infant's or toddler's or family's needs who will be responsible for the implementation of the plan and coordination with other agencies and persons, including transition services; and,
- ◆ the steps to be taken supporting the transition of the toddler with a disability to preschool or other appropriate services to the extent such services are considered appropriate. **34 CFR 303.344.**

The service area's Early On coordinator, upon receipt of a parent's request for evaluation, must forward the request for an evaluation to the responsible district within seven days. **34 CFR 303.303**. Unless there are "exceptional circumstances" (parents not available or not providing consent), the initial IFSP meeting must be held within 45 calendar days of receipt of the referral by the lead agency or early intervention service provider. **34 CFR 303.310**.

With the parent's consent, early intervention services may commence prior to the completion of the assessment. **34 CFR 303.345**. The IFSP must be evaluated once a year and the family shall be provided a review of the plan at six-month intervals (or more often where appropriate based on infant or toddler and family needs). **34 CFR 303.342**.

## **Lead Agency**

IDEA requires that early intervention services be multidisciplinary, using expertise and staff as necessary from agencies other than the school as needed by individual children and their families. To coordinate and oversee these programs, each state is responsible for designating a lead agency. In Michigan, the lead agency is the Department of Education. This means that in local communities, the local school district or intermediate school district is responsible for identifying eligible children, for providing educational services, and for coordinating and overseeing other services in the child's IFSP. **34 CFR 303.12, 120**.

## **Transition to Special Education Services**

Early intervention requirements emphasize the need for careful planning to facilitate the transition from early intervention services to a free appropriate public education under the traditional special education services of IDEA. **34 CFR 303.209**. Eligibility for special education services is not automatic for all students who have received early intervention services. Some children will not meet the eligibility requirements because they do not need special education or related services to benefit from their education, or because they do not have a disability that meets the IDEA eligibility criteria (or Section 504 broader eligibility standard). For these students, services under special education law will end.

States are required to develop policies and procedures to facilitate this transition. No fewer than 90 days before the child's third birthday, planning must begin to insure that eligibility is determined and an IEP is developed and implemented by that date for eligible students. **34 CFR 303.209(b)(i)**. If the child is found eligible for Early On services fewer than 90 days but more than 45 days before the child's third birthday, the lead agency shall notify the state and the local district "as soon as possible" that a child who may be eligible for special education services under IDEA Part B will reach the age of three. **34 CFR 303.209(b)(ii)**. If a child is referred for initial eligibility under Early On fewer than 45 days before the third birthday and might be eligible under Part B, the lead agency must refer the child to the state and to the local district but is not responsible for conducting an initial evaluation, assessment, or IFSP meeting. **34 CFR 303.209(b)(iii)**.

► **Advocacy Hint: Remember Section 504.** Remember that some students who do not meet the eligibility requirements of special education law may meet the broader eligibility of Section 504 and may still have an entitlement to services.

## Preschool Services

Students age three to nine with "developmental delays" may be included in the definition of students with disabilities, at the state's discretion, "not to expand or diminish the population of students eligible under "Part B" but to ensure that all eligible preschoolers are served and that students are not inappropriately labeled." **House Report No. 102-198, 4 (1991).**

Students with developmental delays, as defined by the state and as measured by appropriate diagnostic instruments and procedures, need special education services in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development, or adaptive development. **34 CFR 300.8(b).** In Michigan, eligibility under Early Childhood Developmental Delay (ECDD) goes through age seven. **R 340.1711.** Preschool children may receive early childhood special education programs, **R 340.1754**, or early childhood special education services, **R 340.1755**, through age five. Michigan children may also receive special education services from birth.

► **Advocacy Hint: Don't forget "at risk".** It is often difficult to diagnose developmental disabilities in infants, toddlers, and very young students. It may also be difficult to determine the extent of limitations caused by disabilities. Early intervention services are provided under labels such as "at risk, or "developmental delay" so that young students will not be labeled inappropriately for the purpose of receiving services. Michigan has a list of established conditions, the diagnosis of which indicates automatic eligibility for Early On. Recent or chronic lead exposure is one of these conditions. A non-exhaustive list can be found at [http://eotta.ccresa.org/Files/PDF/Early On Established Conditions List 04-06-11.pdf](http://eotta.ccresa.org/Files/PDF/Early%20On%20Established%20Conditions%20List%2004-06-11.pdf).

In Michigan, Early On services are not available to children after their third birthday. Many toddlers, however, may continue to be eligible for special education services under Part B and state law. In addition, transition requirements under Part C provide that planning takes place not fewer than 90 days—and not more than nine months—before the toddler's third birthday. **34 CFR 303.209.**

## Least Restrictive Environment

For infants and toddlers receiving early intervention services, the law states that "to the maximum extent appropriate," infants and toddlers are to be provided services in "natural environments." **34 CFR 303.126.**

For preschool children age three years and above who receive special education services, the regulations provide that school districts that do not operate preschool programs for children without disabilities must still provide services in the most integrated setting consistent with the

child's unique needs. This can be done by using preschool programs operated by community agencies or by other state or federal agencies such as Head Start, private preschool programs, or other publicly funded preschool programs. **34 CFR 300.116**.

**►Advocacy Hint: LRE may also be where the student learns the most.** When you attempt to determine the Least Restrictive Environment (LRE) for a specific service, determine where the child is most likely to be comfortable and secure enough to benefit from the service. Also think about where that specific service would be provided for an infant, toddler, or preschool age child who does not have a disability.

## **Procedural Safeguards**

All children, infants, toddlers, preschool and school-age children, who are eligible for services under IDEA have the same due process rights. **34 CFR 303.400**. These rights include the following.

- ◆ Timely resolution of administrative complaints and review in state or federal court, **34 CFR 303.430**;
- ◆ Confidentially maintained records and access to records related to the assessment, screening, eligibility determination, and the development and implementation of an IFSP, **34 CFR 303.401-417**;
- ◆ Protection of the rights of infants or toddlers who are wards of the state or whose parents are unknown or unavailable, by the appointment of surrogate parents or guardians, **34 CFR 303.422**;
- ◆ Prior written notice when the state agency or service provider proposes to initiate or change or refuses to initiate or change the identification, evaluation, placement, or the provision of appropriate early intervention services, **34 CFR 303.420-421**;
- ◆ Procedures designed to assure that the parent or guardian fully understands all procedural safeguards, including a description of mediation (**34 CFR 303.431**), how to file a state complaint (**34 CFR 303.432-434**) and how to request a due process hearing (**34 CFR 303.430, R 340.1724f**); and,
- ◆ That unless the school and the parent or guardian agree, during any proceeding involving a complaint, the child should continue to receive the appropriate early intervention services being provided or if applying for initial services shall receive the services not in dispute, **34 CFR 303.430**

# **Chapter 10**

## **TRANSITION**

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### **What This Chapter Is About**

Almost all students in special education are entitled to prevocational, vocational and transition planning and services. Starting at age 16, the school should offer assessment and services to help your child prepare for life after school, including work and other community activities. The school must include transition goals and services in a student's Individualized Education Program (IEP). At age 17, the school must notify the student of his or her right to make educational decisions upon reaching 18.

### **Advocacy Hints in Chapter 10**

- ◆ Ask your school to assess your child's prevocational and vocational interests and needs no later than age 16, and sooner if possible (Page 2).
- ◆ Push for individualized services for students with learning disabilities or emotional impairments (Page 4).
- ◆ Write an accommodation plan for your child, or better yet, involve your child in writing it (Page 6).
- ◆ Hold other agencies, such as community mental health and vocational rehabilitation, responsible for working together to meet your child's needs and for resolving disputes quickly (Page 7).

What will your son or daughter do when he or she graduates or is no longer eligible for special education services? Transition goals are results-oriented, "focused on improving the academic and functional achievement of a child with a disability to facilitate" movement from school to post-school life. **34 CFR 300.43.** It's important to begin thinking about the future now.

Many people with disabilities work in regular competitive employment. They do not need assistance in preparing for and finding the job of their choice.

Some individuals with disabilities need accommodations in order to work. These accommodations are usually provided by the employer, sometimes with the help of vocational rehabilitation agencies. For example, a reasonable accommodation may involve a barrier-free environment for a person who uses a wheelchair or it may involve inexpensive and simple adaptations like a magnifying device for a person with low vision.

The more severely disabled a student is, the more assistance they may need in planning to learn the skills they will need when they leave school. It is important to begin planning early – before 16, if the Individualized Education Program Team (IEPT) agrees, or in no case later than age 16. In

many cases, the student's job and independent living needs are not addressed until the student is no longer eligible for special education. This severely limits the possibilities for the student's learning, and may leave the student sitting at home waiting for his or her name to come up on the waiting list for services.

**►Advocacy Hint: Start early.** Teams do not always look at transition needs closely, sometimes concluding that the student doesn't require any prevocational or vocational programs or services at the time. Remember that, for a few students who are at high risk of dropping out of school, vocational planning which may be all that motivates a particular student to remain in school cannot begin too soon.

In the last several years there has been an increase in options for employment and community living. This change is driven by several factors including a focus in the Individuals with Disabilities Education Act (IDEA) on early and extensive services meant to increase employability skills and make connections for the special education student with community agencies that will help with post school services. Supported employment, increased community living options, continued training in daily living skills, and employment accommodations under the Americans with Disabilities Act are all factors that have added possibilities to post school options.

IDEA presents new possibilities for cooperative planning between community mental health agencies, vocational agencies and the school that can make the student's years of special education eligibility more productive, and make the student job ready by graduation or age 26. For students who do not have disabilities, school is considered preparation for a job or a career and for living independently in a community. The same is true for students with disabilities. School programs prepare students for independence, community life, and for a job.

Among other services, special education students have the opportunity to develop pre-employment skills, explore vocational options, engage in on the job training, and as an additional help, make important connections with agencies that will continue to assist the student, in many cases, long after school eligibility is over.

This chapter looks at the Individualized Education Program Team (IEPT) responsibilities in employment related training and in the process of moving the student out of school and into the community.

## **Transition Services for Students with Disabilities**

Services for students with disabilities include vocational education, rehabilitation counseling, vocational evaluations, and transition services. **34 CFR 300.34, 300.39, 300.43.** It is important to understand each of these terms.

## **Special Education and Vocational Education**

Special education includes vocational education. *Vocational education* includes "organized educational programs that are directly related to the preparation of individuals for paid or unpaid

employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree." **34 CFR 300.39(b)(5)**. In Michigan, all teachers who are certified to teach in special education programs must have an understanding of "preparing students with disabilities for transitions consisting of preschool to elementary through post-secondary environments and employment." **R 340.1781(a)(viii)**.

## **Rehabilitation Counseling Services**

*Rehabilitation counseling services* are related services. They are "services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of the student with a disability. The term also includes vocational rehabilitation services provided to students with disabilities by vocational rehabilitation programs funded under the Rehabilitation Act of 1973, as amended." **34 CFR 300.34(c)(12)**.

Vocational rehabilitation services provide vocational evaluation, counseling, training, placement, and other services to persons who have disabilities. There are no age criteria for eligibility under vocational rehabilitation, although people are often discouraged from applying until they are old enough to work. A Michigan Rehabilitation Services (MRS) counselor can attend IEPT meetings as a consultant before the student officially applies for services from MRS. MRS has primary responsibility for supported employment programs in Michigan.

## **Vocational Evaluations**

If a vocational evaluation has not been done for a student 16 years old or older, the parent should request one. A vocational evaluation provides information needed for vocational planning and such an evaluation is required before vocational education may be provided.

These evaluations can vary quite a bit in quality and comprehensiveness, depending on the expertise and focus of the evaluator. The most useful evaluations include job tryouts or observations of the student in situations that simulate a variety of real jobs. If the vocational evaluation performed by the school does not provide enough information to proceed with vocational planning, the parent should consider requesting an independent evaluation. (See Chapter 4 on "Evaluations" for more information).

Once a thorough vocational evaluation has been completed, the information should be used to set prevocational and vocational objectives. Not all prevocational training must precede vocational training; much prevocational education can occur at the same time that vocational education is taking place.

Schools should provide similar vocational experiences for students in both general and special education. Participation in programs that identify job alternatives such as job fairs, work-study opportunities, and apprenticeships may help to identify the job that a student would like to do and the job that most suits the student.

The emphasis in vocational planning is individual. A student is not limited to choosing a workshop or vocational education program. Success occurs when evaluations and planning help the student

identify the job he or she is most comfortable doing and assist the student to obtain and perform the job successfully.

## **Transition Services**

The term “transition services” means a coordinated set of activities that:

- ◆ Is designed within a results-oriented process, that is focused on improving the academic and functional achievement of a child with a disability to facilitate the child’s movement from school to post-school activities, including postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;
- ◆ Is based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests, including instruction, related services, community experiences, development of employment and other post-school adult living objectives, and, if appropriate, acquisition of daily living skills and provision of a functional vocational evaluation; and,
- ◆ “May be special education or related services.” **34 CFR 300.43.**

“Transition services” are meant to provide the necessary linkages between school services and post-school services. This includes linkages with other community or state agencies that may have a responsibility to provide services for students. Transition services are also meant to provide the necessary educational experiences so that students with disabilities do not drop out of school prior to completing a program that will help prepare students to work and live in the community.

The IEP for each student, beginning no later than age 16 (the IEPT can determine that transition services are needed at a younger age), should include appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills, and a statement of the transition service needs of the student, updated annually, when recording the student’s course of study. **34 CFR 300.320(b).**

**►Advocacy Hint: Be creative for students who fall through the gaps between programs.**

There are a number of students who may have LD or EI labels who have difficulty meeting the general education requirements for entering vocational programs, even with accommodations, and who may prefer not to participate in vocational programs with more severely impaired students. Some of these students have significant problems in school, and can not or will not remain in an academic program on a full time basis. They will drop out before they are eligible for the programs that would motivate them to complete high school. It is a mistake to believe that there are no vocational services or services that are related to employment for these students prior to eligibility through meeting general education requirements. The student’s IEPT can work creatively to combine a part time academic program with volunteer, government adolescent work programs, and other community experiences in supervised settings to allow students to earn credits and even sometimes a small motivational wage.

## **Transition and General Education**

### Educational Development Plans

The Michigan Merit Curriculum (Public Act 141 of 2007) requires local schools to provide an opportunity for each student to develop an educational development plan (EDP) during the 7th grade. The EDP must be reviewed and updated in the 8th grade before the student begins high school, and then on an annual basis, or sooner as the student adjusts career goals. Parents and guardians should have the opportunity to review and understand their child's EDP and the assessments contained within.

The Educational Development Plan lays the groundwork for the student's future career pathways, allowing him to develop long range career goals and a plan of action to achieve them. The EDP is developed by the student, in cooperation with a school counselor or other designee, utilizing career interest surveys and exploration programs, high school readiness and aptitude testing, and student hobbies and interests, etc. Schools often use web based programs, such as My Dream Explorer or Career Cruising, to help students write out their career goals and determine the level of educational preparation needed to achieve those goals. This preparation includes identifying high school courses the student will need to achieve his or her goals, as well as the high school credits that may be fulfilled through career and technical education. The preparation also identifies on-the-job training, military service, two year or four year degree programs, apprenticeship and trade programs, technical education, etc., necessary for the student to meet his or her career goals.

When transition services in an IEP are developed, information related to the required education, training, employment, and when appropriate, independent living skills, may be drawn from the EDP, helping to create alignment between general and special education. The EDP fulfills many of the secondary transition requirements before transition services take effect at age 16. The EDP may also identify special resources and supports needed for the student's success that may later be provided through a personal curriculum. The EDP can provide support and documentation for a personal curriculum modification, allowing not otherwise allowable modifications, if the modification is consistent with both the student's EDP and the student's IEP.

The Michigan Department of Education has developed a handout, "EDP Fundamentals: Guidelines for the Use of Educational Development Plans," including a model EDP, that can be accessed at [https://www.michigan.gov/documents/mde/MDE\\_EDP\\_10-2-09\\_296459\\_7.pdf](https://www.michigan.gov/documents/mde/MDE_EDP_10-2-09_296459_7.pdf).

### The Michigan Merit Curriculum

The Michigan Merit Curriculum (MMC) was signed into law in 2006 and set forth the Michigan High School Graduation Requirements that apply to all students in public schools. The MMC sets the number of credits in each subject and in many cases, determines the specific course content to be included in English, math, science, social studies, health/physical education, the arts, world language other than English, and online learning. Local school districts may add to the requirements but may not reduce them. For further information, refer to the MI Department of Education handout on Graduation Requirements that can be found at:

<http://www.michigan.gov/documents/mde/FAQ - Entire Document 12.07 217841 7.pdf>.

Special education students must meet these same graduation requirements to receive a high school diploma. They do so with the use of an IEP, which documents the special education services necessary to access and achieve in the MMC. A Personal Curriculum (PC) may also be implemented for a student with an IEP; in this case, to modify an area of the MMC. The personal curriculum must include as much of the MMC as possible.

A school district must offer the personal curriculum option and respond to requests for personal curricula. School districts are not required, however, to approve all requests for personal curricula. The district should have a procedure identified for considering personal curriculum requests. Upon receiving a parent or student request, a personal curriculum team will review the student's information to determine if the student's disability is the reason he or she is unable to access or demonstrate achievement in the area of content. If approved, the personal curriculum team develops measurable performance goals for the modified content and methods to evaluate the achievement of those goals, linking with the measurable goals and supports of the IEP, all designed to enable a student with a disability to be successful in the educational and career pathways they have identified. Upon completing the Michigan Merit Curriculum, as modified by the personal curriculum, the student receives their high school diploma.

A parent of a student with an IEP may request a personal curriculum as early as 7th or 8th grade, when the EDP is developed. If approved, the personal curriculum will go into effect when the student enters high school.

For further information, refer to the MI Department of Education handout "A Parent's Guide to Personal Curriculum Focus on Students with an IEP" found at:

<http://www.michigan.gov/documents/mde/Focus of Students with an IEP 482098 7.pdf>.

**►Advocacy Hint: Accommodate.** The accommodation plan is a prime source of important transition related education for students and is often neglected. Learning about documenting the need for accommodations, determining which accommodations will be most effective and actually writing the plan provides practical experience that the student will use in future education and employment. Additionally, the student can learn through every day experience in actually requesting accommodations from teachers and later employers, how best to do this. So, education on the provisions of the ADA and how to access them can be an important addition to transition plans.

Students must be invited and encouraged to attend IEPT meetings to discuss transition services; representatives of agencies that are likely to be involved in providing or paying for transition services should also attend.

► **Advocacy Hint: Coordinate.** Transition requires that responsible agencies work together to provide appropriate services for students that are eligible for their services. This is not, however, always a smooth process. The school and other agencies such as community mental health or the vocational rehabilitation agency may each have a very different focus. There may also be some long standing misunderstandings about when and in what manner services will be provided for individual students. There can also be misunderstandings about the philosophies under which specific agencies operate and about their statutory mandates. If disagreements about responsibility for payment or provision of services arise, there must be an independent dispute resolution process. It is also important for each agency to understand the dispute resolution process in other agencies - for the school to understand the CMH Office of Recipient Rights, for the CMH staff to understand the complaint process, and for both to understand the Client Assistance Program in the Rehabilitation Act. Eligibility criteria for the Rehabilitation Act services and for Community Mental Health services are included at the end of this chapter.

Related to the student's need for vocational and community living skills is the need for recreation and leisure time education. "Recreation," listed as a related service, includes: "Assessment of leisure function; therapeutic recreation; recreation programs in schools and community agencies; leisure education." **34 CFR 300.34(c)(11).**

## The Workforce Innovation and Opportunity Act

The Workforce Innovation and Opportunity Act (WIOA), was signed into law on July 22, 2014.

The new law prohibits individuals with disabilities age 24 and younger from working in jobs paying less than the federal minimum wage of \$7.25 per hour unless they are first provided certain vocational rehabilitation services, among other requirements. There are exceptions, however, for those already working for what's known as subminimum wage and in cases where individuals are deemed ineligible for vocational rehabilitation.

Beyond limiting who can work for less than minimum wage, the law also mandates that state vocational rehabilitation agencies work with schools to provide "pre-employment transition services" to all students with disabilities. What's more, the agencies must dedicate at least 15 percent of their federal funding to help those with disabilities transition from school to meaningful work.

The WIOA reauthorization will improve upon the original Act's purpose in the following key ways:

- ◆ To maximize opportunities for individuals with disabilities, including individuals with significant disabilities, for competitive integrated employment;
- ◆ To increase employment opportunities and employment outcomes for individuals with disabilities, including through encouraging meaningful input by employers and vocational rehabilitation service providers on successful and prospective employment and placement strategies; and

- ◆ To ensure, to the greatest extent possible, that youth with disabilities and students with disabilities who are transitioning from receipt of special education services under the Individuals with Disabilities Education Act (20 U.S.C. 1400 et. seq.) and receipt of services under section 504 of this Act are either continuing their education or employed in competitive integrated employment independently.

## **Transfer of Rights**

Part of a student's transition services occur after the age of majority. This will mean that the student's parents may attend the IEPT at the student's request but that all the rights that were previously exercised by the student's "parent" are now exercised by the student. This includes the right to request evaluations, independent educational evaluations and due process.

In a state that transfers rights at the age of majority, (this occurs at age 18 in Michigan), beginning at least one year before a student reaches the age of majority under state law, the student's IEP must include a statement that the student has been informed of his or her rights under Part B of the Act, if any, that will transfer to the student on reaching the age of majority. **34 CFR 300.320(c).**

## Appendix 10-1

### Community Mental Health Services

The following information is from the Michigan Mental Health Code.

**MCL 330.1100d(2) “Serious emotional disturbance”** — means a diagnosable mental, behavioral, or emotional disorder affecting a minor that exists or has existed during the past year for a period of time sufficient to meet diagnostic criteria specified in the most recent diagnostic and statistical manual of mental disorders published by the American Psychiatric Association and approved by the department and that has resulted in functional impairment that substantially interferes with or limits the minor’s role or functioning in the family, school, or community activities.

**MCL 330.1100d(20) “Wraparound services”** — means an individually designed set of services provided to minors with serious emotional disturbance or serious mental illness and their families that includes treatment services and personal support services or any other supports necessary to maintain the student in the family home. Wraparound services are to be developed through an interagency collaborative approach and a minor’s parent or guardian and a minor 14 or older are to participate in planning the services.

**MCL 330.1227** — Each community mental health services program shall participate in the development of school-to-community transition services for individuals with serious mental illness, serious emotional disturbance, or developmental disability. This planning and development shall be done in conjunction with the individual’s local school district or intermediate school district as appropriate and shall begin not later than the school year in which the individual student reaches 16 years of age. These services shall be individualized. This section is not intended to increase or decrease the fiscal responsibility of school districts, community mental health services programs, or any other agency or organization with respect to individuals described in this section.

**MCL 330.1755 (1)** — Each Community Mental Health services program shall establish an **office of recipient rights.....**(5)(a) Provide or coordinate the protection of recipient rights for all directly operated or contracted services. (b) ensure that recipient, parents of minors, and guardians and other legal representatives have access to summaries of rights guaranteed by this chapter.

## **Appendix 10-2**

### **Vocational Rehabilitation Services**

Michigan Rehabilitation Services (MRS) is a state and federally funded program that helps eligible people prepare for, find, and keep jobs that match their interests and abilities. MRS has regional offices throughout Michigan.

A person with a disability is eligible for MRS services if the disability causes substantial problems in getting or keeping a job. The person must need vocational rehabilitation services in order to work.

Each MRS client is teamed with a rehabilitation counselor who helps the client develop an individualized plan, similar to an IEP, including vocational goals and objectives, and support services necessary to meet them. MRS provides support services such as skills training, placement assistance, accommodations and assistive technology, job coaching, tools, equipment, licenses, job training, medical services and support services such as interpreters, readers and transportation. Clients have the right to appeal MRS decisions they don't agree with through an administrative appeals process.

For information on vocational rehabilitation services and supported employment available through Michigan Rehabilitation Services, visit the MRS website at [http://www.michigan.gov/lara/0,4601,7-154-61256\\_25392---,00.html](http://www.michigan.gov/lara/0,4601,7-154-61256_25392---,00.html) or visit a regional MRS office. For assistance in applying for MRS services or appealing a denial of services, call or write the Client Assistance Program at MPAS.

## Appendix 10-3

### The Workforce Innovation and Opportunity Act - July 22, 2014

**The Workforce Innovation and Opportunity Act (WIOA)** will help job seekers and workers access employment, education, training, and support services to succeed in the labor market and match employers with skilled workers they need to compete in the global economy. Congress passed WIOA, the first legislative reform of the public workforce system in more than 15 years, by a wide bipartisan majority. In doing so, Congress reaffirmed the role of the American Job Center (AJC) system, a cornerstone of the public workforce investment system, and brought together and enhanced several key employment, education, and training programs. In recent years over 20 million people annually turn to these programs to obtain good jobs and a pathway to the middle class. WIOA continues to advance services to these job seekers and employers.

#### Highlights Of WIOA Reforms To The Public Workforce System

**Aligns Federal Investments to Support Job Seekers and Employers:** At the State level, WIOA establishes unified strategic planning across “core” programs, which include Title I Adult, Dislocated Worker and Youth programs; Adult Education and Literacy programs; the Wagner-Peyser Employment Service; and Title I of the Rehabilitation Act programs.

**Strengthens the Governing Bodies that Establish State, Regional and Local Workforce Investment Priorities:** WIOA streamlines membership of business-led, state and local workforce development boards. The Act emphasizes the role of boards in coordinating and aligning workforce programs and adds functions to develop strategies to meet worker and employer needs.

**Helps Employers Find Workers with the Necessary Skills:** WIOA emphasizes engaging employers across the workforce system to align training with needed skills and match employers with qualified workers. The Act adds flexibility at the local level to provide incumbent worker training and transitional jobs as allowable activities and promotes work-based training, for example by increasing on-the-job training reimbursement rates to 75 percent. The law also emphasizes training that leads to industry-recognized post-secondary credentials.

**Aligns Goals and Increases Accountability and Information for Job Seekers and the Public:** WIOA aligns the performance indicators for core programs, and adds new ones related to services to employers and postsecondary credential attainment. Performance goals must reflect economic conditions and participant characteristics. It makes available data on training providers’ performance outcomes and requires third party evaluations of programs.

#### **WIOA PROGRAMS**

WIOA supersedes the Workforce Investment Act of 1998 and amends the Adult Education and Family Literacy Act, the Wagner-Peyser Act, and the Rehabilitation Act of 1973.

WIOA authorizes the Job Corps, YouthBuild, Indian and Native Americans, and Migrant and Seasonal Farmworker programs, in addition to the core programs.

#### **EFFECTIVE DATES FOR IMPLEMENTATION**

President Barack Obama signed WIOA into law on July 22, 2014.

In general, the Act takes effect on July 1, 2015, the first full program year after enactment, unless otherwise noted. The State Unified Plans and Common Performance Accountability provisions take effect July 1, 2016. The U.S. Department of Labor (DOL) will issue further guidance on the timeframes for implementation of these changes.

DOL will issue proposed regulations reflecting the changes in WIOA soon after enactment.

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United States  
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**Fosters Regional Collaboration to Meet the Needs of Regional Economies:** WIOA requires states to identify economic regions within their state, and local areas are to coordinate planning and service delivery on a regional basis.

**Targets Workforce Services to Better Serve Job Seekers:** WIOA promotes the use of career pathways and sector partnerships to increase employment in in-demand industries and occupations. To help local economies target the needs of job seekers, WIOA allows 100 percent funds transfer between the Adult and Dislocated Worker programs. WIOA adds basic skills deficient as a priority category for Adult services. WIOA also focuses Youth program services to out-of-school youth. The Act strengthens services for unemployment insurance claimants. It also merges WIA core and intensive services into a new category of career services, clarifying there is no required sequence of services. The Act allows Governors to reserve up to 15 percent of formula funds for activities such as innovative programs.

**Improves Services to Individuals with Disabilities:** WIOA increases individuals with disabilities' access to high-quality workforce services to prepare them for competitive integrated employment. It requires better employer engagement and promotes physical and programmatic accessibility to employment and training services for individuals with disabilities. Youth with disabilities receive extensive pre-employment transition services to obtain and retain competitive integrated employment. It creates an Advisory Committee on strategies to increase competitive integrated employment for individuals with disabilities.

**Supports Access to Services:** To make services easier to access, the WIOA requires co-location of the Wagner-Peyser Employment Service in AJCs and adds the Temporary Assistance for Needy Families program as a mandatory partner. WIOA establishes dedicated funding from AJC partner programs to support the costs of infrastructure and other shared costs that support access to services. It asks the Secretary of Labor to establish a common identifier for the workforce system to help workers and employers find available services. In addition, WIOA allows local areas to award pay for performance contracts so providers of services get paid for results. It also allows direct contracts to higher education institutions to provide training.

### **STAKEHOLDER ENGAGEMENT AND TECHNICAL ASSISTANCE**

DOL, in coordination with the U.S. Departments of Education (ED) and Health and Human Services (HHS), is working diligently to ensure that states and local areas, other grantees, and stakeholders are prepared for implementation of WIOA. DOL will provide technical assistance, tools, and resources to States and local areas through the WIOA Resource Page ([www.doleata.gov/WIOA](http://www.doleata.gov/WIOA)), Webinars, and virtual and in-person discussions.

DOL will actively engage stakeholders in the implementation of WIOA. Opportunities to provide input will be communicated through the WIOA Resource Page.

### **WIOA RESOURCE PAGE**

Visit [www.doleata.gov/WIOA](http://www.doleata.gov/WIOA) to learn more and access relevant guidance and technical assistance tools and resources developed by the Employment and Training Administration (ETA). All relevant guidance will also be posted on the ETA Advisory Website (<http://wdr.doleata.gov/directives/>) Please email questions to DOL.WIOA@dol.gov or contact your ETA regional Office.

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# **Chapter 11**

## **SUSPENSION AND EXPULSION**

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### **What This Chapter Is About**

Schools have authority and discretion to suspend or expel students. The consequences differ if the act falls under the state “zero tolerance” law. All students have basic due process rights to notice and an opportunity to be heard when accused of misbehavior.

Students with disabilities have additional rights. A student with disabilities cannot be expelled or suspended for more than 10 days without a “manifestation determination review” (MDR) to see if the conduct was caused by the child’s disability or the school’s failure to implement the Individualized Educational Program (IEP). The burden of proof in this process rests with the parent.

Parents may challenge the MDR’s findings through a hearing. Schools may place students in alternative settings during an appeal, or in situations involving weapons, drugs, or serious physical assault. Students in special education are entitled to receive services still even if they are expelled.

Although schools may report crimes, they cannot shift their responsibility to provide services to students to family court unless they have exhausted all other possibilities.

### **Advocacy Hints in Chapter 11**

- ◆ Pay attention to what part of the law the school is using as a basis for discipline - it can affect your child’s rights in the future (Page 4).
- ◆ If your child is charged with bringing a weapon to school, make sure the “weapon” fits within the legal definition - many don’t (Page 5).
- ◆ Demand formal procedures if your child is placed on “indefinite suspension” (Page 5).
- ◆ Get the school’s Code of Conduct and Board Policies to make sure they are following their own rules in deciding on and handing out punishment (Page 6).
- ◆ Review your child’s IEPs and evaluations, and hold the school responsible for addressing problems left unsolved in these documents before agreeing to disciplinary action (Page 7).
- ◆ Ask to meet before 10 days have expired in any suspension or expulsion; even short suspensions may signal bigger problems ahead (Page 8).
- ◆ Don’t rely on what the school calls a removal (Page 9).

- ◆ Look to why your child is being suspended rather than limiting the number of days the school can suspend (Page 9).
- ◆ If your child is suspended from the bus, ask for a related services assessment or alternative transportation (Page 9).
- ◆ You must connect your child's disability to the specific behavior that is the subject of the disciplinary action so you can see if it is being addressed properly by the school (Page 10).
- ◆ If your child is facing discipline, there may be other special education programs or related services which can augment the IEP and stop the offending behavior (Page 10).
- ◆ Use the complaint process if the school is not implementing your child's IEP and causing behavior problems and potential discipline (Page 10).
- ◆ Make sure the manifestation review team is using up-to-date information about your child, and request new evaluations if necessary (Page 10).
- ◆ If you disagree with the school's functional behavioral assessment, use the independent educational evaluation (IEE) process to get a second opinion (Page 11).
- ◆ Section 504 also offers some protections in disciplinary removal (Page 11).
- ◆ Know the difference between weapons under state and federal law, and how each law provides for special treatment of students who use weapons (Page 11).
- ◆ Sign in disagreement to the manifestation review IEP if you don't agree; if you leave it unsigned, you are not protecting your rights (Page 12).
- ◆ Use the stay-put provision to negotiate a more appropriate place for your child (Page 14).
- ◆ Always consider developing a behavior plan to prevent behavior issues (Page 14).
- ◆ IDEA protects students who should be in special education (Page 15).
- ◆ Post-expulsion services must be appropriate to the student's needs (Page 15).
- ◆ Use post-expulsion services to negotiate an appropriate alternative setting (Page 15).
- ◆ If your child is referred to the criminal justice system by the school, send a letter to the court stating this is a school matter that should be handled by the school (Page 16).

Discipline of students with disabilities is very complicated. Although there are many forms of “discipline,” this chapter will focus on suspension and expulsion – in particular, on the legal requirements when a student with a disability is suspended from school for more than 10 days or expelled. This chapter will talk about:

- ◆ the school’s power to suspend or expel students from school;
- ◆ the rights of all students to notice of suspension or expulsion and a right to be heard; and,
- ◆ the specific rights of students with disabilities to stay in school when their conduct is related to their disability and to receive appropriate services in all situations.

## **School’s Power to Suspend or Expel Students**

The Michigan Revised School Code defines “suspension” as exclusion from school for disciplinary reasons for fewer than 60 school days. “Expulsion” is exclusion from school for disciplinary reasons for 60 or more school days. **MCL 380.1310d(5)**.

A school board, superintendent, principal or other designated school official may suspend or expel any student from school for “gross misdemeanor or persistent disobedience.” The school **has broad discretion** to suspend or expel students when, in its own judgment, “the interest of the school is served” by such an action. **MCL 380.1311(1)**.

Schools also have discretion regarding a student who possesses a dangerous weapon (except firearms), commits arson, or commits criminal sexual conduct in a school building or on school grounds. State law gives schools discretion to expel such students permanently after considering a number of factors (see below). The student can petition for reinstatement after 180 school days (150 days for elementary school students). Such an expulsion extends beyond the student’s district to include all schools in the state except alternative schools or strict discipline academies. The student can escape expulsion for possessing a weapon if the student proves that (a) the “weapon” was not intended for use as a weapon, (b) the student did not know he or she had a weapon, (c) the student did not know the weapon was dangerous, or (d) school personnel or the police encouraged or allowed him or her to keep the weapon. **MCL 380.1311(2)**.

Further, state law gives schools the option to permanently expel any student enrolled in grade 6 or above who commits a physical assault *against a school employee or volunteer*, after considering a number of factors (see below). **MCL 380.1311a(1)**. The law defines “physical assault” as “intentionally causing or attempting to cause physical harm to another through force or violence.” **MCL 380.1311a(12)(b)**. As with the weapons law, the student may petition for reinstatement after 180 school days. Such an expulsion extends beyond the student’s district to include all schools in the state except alternative schools or strict discipline academies.

Another section allows expulsion for physical assaults *against other students*, after considering a number of factors (see below). If a student in grade 6 or above commits a physical assault against another student, the school board “shall expel the pupil from the school district for *up to 180 days*.” **MCL 380.1310(1)**. Unlike the State expulsion laws on weapons and assaults on staff, an expulsion for an assault against another student does not expel the student from all school districts in the State.

Finally, state law authorizes expulsion for up to 180 school days if a student in grade 6 or above commits a “verbal assault, as defined by school board policy” against an employee or volunteer of the school or if the student “makes a bomb threat or similar threat directed at a school building, other school property, or a school-related event.” **MCL 380.1311a(2)**. This provision, like the assault-against-student law discussed above, gives the local school discretion as to the length of the expulsion, and requires consideration of the same factors (below), prior to taking any action. A Federal court decision found this provision to be an unconstitutional violation of the First Amendment’s freedom of speech. **Smith v. Mt. Pleasant Public Schools**, 285 F.Supp.2d 987 (E.D.Mich. 2003).

**2016 Changes to Mandatory Expulsion Law:** The Michigan Legislature made significant changes to the mandatory expulsion law in 2016. These changes are in effect beginning with the 2017-18 school year.

- ◆ Mandatory expulsion is no longer mandatory. Schools now have discretion to suspend or expel students even for violations of the mandatory expulsion sections of the Revised School Code. **MCL 380.1310d(1)**, except when firearms are involved.
- ◆ Under new **Section 380.1310d**, a school must consider a student’s age, history, disability, seriousness of violation, threat to safety, use of restorative practices, and use of less drastic interventions before suspending or expelling a student. Under the same section, the school faces a rebuttable presumption in favor of keeping a child in school if the school wants to suspend or expel the student for more than 10 days.
- ◆ Under **Section 380.1310c** of the Revised School Code, a school must consider the possible use of balanced and restorative justice (BARJ) before suspending or expelling a student. According to the Michigan Department of Education website, “restorative justice ... assumes that misconduct and conflict injure those directly involved (victims and offenders) as well as the broader community to which they belong. Rather than relying on punishment, restorative justice expects those who cause injuries to make things right with those they have harmed and with their community.”

[http://www.michigan.gov/mde/0,4615,7-140-74638\\_72831\\_72833-361320--.00.html#one](http://www.michigan.gov/mde/0,4615,7-140-74638_72831_72833-361320--.00.html#one)

► **Advocacy Hint: The numbers matter.** Pay attention to what part of the law the school is using as a basic for discipline – it can affect your child’s rights in the future. Even though the mandatory elements of expulsion have been relaxed, a student fares much better under a voluntary expulsion than under a mandatory expulsion because the scope of the expulsion order is narrower under a voluntary expulsion.

**Note:** The federal Gun-Free Schools Act, **20 USC 7961**, still requires schools to expel for at least 180 school days students who bring firearms to school.

► **Advocacy Hint: Is it a weapon?** A “dangerous weapon” is defined specifically in **MCL 380.1313**. A student should not be expelled automatically for using something that is not a weapon under that law. For example, most small pocket knives with blades shorter than three inches are not “weapons” under the law, so the school is not required to expel someone for having such a knife. Remember, though, that the school has the *discretion* to expel a child in such cases if it serves the interest of the school.

The Individuals with Disabilities Education Act (IDEA) also has special provision for weapons offenses (see below), and the federal definition of “weapon” is broader than Michigan’s. For example, a student who uses any dangerous instrument – not just knives or guns – can be placed in a 45-day alternative setting at the school’s discretion.

### **Due Process for All Students**

In no case can the school suspend or expel a student without due process. Due process is defined in the Federal and State Constitutions to require adequate **notice** of the charges pending against a student, and an **opportunity to be heard** and to refute the charges.

The school must give a student who has been suspended ten days or less oral, or written notice of the charges and, if the student denies the charges, a chance to explain his or her side of the story. This informal “notice and opportunity to be heard” can be granted within minutes of alleged misconduct by the person making the suspension and can consist of an “informal give and take” between the student and the school official. For example:

Principal Smith accuses John of disobeying Teacher Jones and asks, “Did you do it?” John says no. Principal Smith says, “I don’t believe you. You’re suspended for three days.” This conversation satisfies the minimal due process for short-term suspension.

In most cases, informal due process should be provided before the suspension takes effect, but if a student poses a continuing danger or threat of disruption, it can be granted after the student is suspended. **Goss v. Lopez**, 419 US 565, 95 SCt 729 (1975).

The Supreme Court in **Goss v. Lopez** suggested that “more formal procedures” would be required for suspensions longer than 10 days. Other courts have found that such “formal procedures” may include a written notice specifying the charges against the student and an opportunity to contest these charges before an impartial decision-maker, such as the school board. **Darby v. Schoo**, 544 F. Supp. 428 (W.D.Mi. 1982); **Birdsey v. Grand Blanc Community Schools**, 130 Mich. App. 718, 344 N.W.2d 342 (1983).

► **Advocacy Hint: Indefinite suspensions can cross the line.** The 10-day rule is important to keep in mind. Beware of indefinite suspensions as they may result in suspensions beyond 10 days without formal protections. If the student is kept out of school for more than 10 days, this is the trigger for protections, regardless of what the school calls the action. For example, a few school districts make suspensions longer by requiring students to make an appointment to see the district administrative staff or get a clearance from a doctor or therapist before returning to school. This practice often stretches a two-day suspension into a week or more. This becomes illegal if it results in a suspension for more than 10 school days without formal procedures.

**Using the Student Code of Conduct.** Almost all school districts have developed a Student Code of Conduct based on board policies, which will generally describe the offenses which can lead to suspension or expulsion and sets up notice and hearing requirements. Many Codes of Conduct also attempt to set up special procedures to assure that the statutory rights of students with disabilities are also protected. The Code of Conduct should be consistent with school policies, which are often available for review on the district's website. Board policies should also be in agreement with the law.

**►Advocacy Hint: Get the Code of Conduct booklet and review board policies.** Anyone dealing with a school suspension or expulsion case MUST get a copy of the school district's Code of Conduct, which is a public record available to anyone under the Freedom of Information Act or informally from the school office or on the district's website. It is important to study this Code to see if the offense the student is charged with is subject to long-term suspension or expulsion, as well as to find information about the student's right to a formal hearing. The policies and procedures adopted by the board will provide additional information that can help ensure the student has access to all rights related to due process in removal.

**What to expect at a school board hearing.** At a school board hearing, the student has the right to present his or her side of the story and to call and cross-examine witnesses. The student must also be permitted the assistance of a lawyer in major disciplinary hearings. **Carey v. Maine School Administrative District No. 17, 754 F. Supp.906 (D. Me. 1990).**

After hearing the evidence, the board will decide whether the offense has been proved and, if it has, what the punishment should be. Often, the specific punishment for such an offense may be listed in the Code of Conduct, and the board may be limited to such a punishment.

Decisions by the school board can be appealed to court, but courts have traditionally given schools much discretion in such matters and may be required to uphold the school's findings if supported by substantial evidence. **Birdsey v. Grand Blanc Community Schools, 130 Mich.App. 718, 344 N.W.2d 342 (1983).**

**Petition for reinstatement.** If a student is expelled under the mandatory provisions of the School Code, the student may seek reinstatement by filing a petition. **MCL 380.1311(5).** A student who was in or below fifth grade when expelled must wait 60 school days before filing a petition; a student who was above fifth grade when expelled must wait 150 school days before filing one. **MCL 380.1311(5)(a).**

The school must provide a form for filing a petition but need not offer any other assistance. **MCL 380.1311(5)(c).** Within 10 school days after the petition is filed, the school board must convene a committee made up of school board members, a teacher, an administrator, and a parent of another student in the district to review the petition. **MCL 380.1311(5)(d).**

The committee reviews the petition and makes a recommendation, taking into account:

- ◆ the risk of harm to other students if reinstatement occurs;
- ◆ the risk of individual or school district liability;
- ◆ the age and maturity of the student;

- ◆ the student's school record before he or she was expelled;
- ◆ the student's attitude toward the incident that caused the expulsion;
- ◆ the student's behavior since the expulsion; and,
- ◆ the degree of cooperation by the student's parents. **MCL 380.1311(5)(e).**

The school board must review the committee's recommendation no later than the next regularly scheduled board meeting and either grant or deny the petition. **MCL 380.1311(5)(f).** If a student is reinstated, the school may require the student and parents to agree in writing to specific conditions for returning, such as a behavior contract, anger management, or counseling. **MCL 380.1311(5)(g).**

### **Due Process Protections for Students with Disabilities**

A school may suspend or expel any student, and in some limited cases must do so. All students are entitled to due process, which includes notice and an opportunity to contest the charges, in different measures depending on the length of the suspension or expulsion.

Students with disabilities have additional due process protections. Why? Prior to 1975, when IDEA was first enacted into law, over a million students with disabilities were excluded from school under the school's discretionary authority to suspend or expel students when the school's best interest was served. The mass exclusion of such students is in direct conflict with IDEA, which mandates that students with disabilities be allowed to attend school. The additional protections for students with disabilities exist to ensure that IDEA is implemented properly and so students are not excluded because of their disability status.

Before examining the due process protections for students in special education, two points of further introduction may be helpful.

First and foremost, ***schools have a duty to prevent problems which may lead to suspension or expulsion of students in special education.*** The 1997 and 2004 amendments to IDEA repeatedly speak to the need for behavioral support plans (BSPs) to prevent misbehavior which can result in discipline. Any time that a student with a disability is proposed to be expelled or subjected to a long-term suspension from school, ask whether the school district has complied with IDEA and taken adequate steps to prevent the misbehavior from occurring.

**►Advocacy Hint: Hindsight is 20/20.** If a student is facing expulsion, the parent/advocate should examine the student's recent evaluations and IEPs and, if necessary, make the school go back and address the problems it identified (or should have identified) but left alone before using discipline. Was the student demonstrating behavioral problems? If so, were there behavioral goals and objectives in his or her IEP? Were there services such as social work, counseling, and/or a behavior intervention plan provided for to address these goals? Did the behavior intervention plan focus on positive behavior supports, as preferred by the IDEA? Was the behavior intervention plan and/or IEP implemented consistently? Did the team reconvene to address a lack of behavioral progress? It may be clear, in retrospect, that more should have been done. This may serve as a basis of discussion-- both for IEP planning, and in terms of the considerations that are now required.

► **Advocacy Hint: Meet sooner rather than later.** Even though the legal protections are not triggered until the student is out of school for 10 days, a short-term suspension may signal the need to adjust the student's program. A parent can request an IEPT meeting or a Functional Behavior Assessment to address the issues even if there is no legal requirement to convene a manifestation determination review.

Second, ***short-term suspensions do not trigger special education protections.*** The student's special education rights are not triggered unless the suspension becomes a "change in placement," which the IDEA and courts have defined as a 10-day exclusion from school. Remember, though, that all students have some basic due process rights – informal notice and an opportunity to be heard – even if they are suspended for fewer than 10 days.

How are the 10 days counted? What if a student is subjected to series of 3 or 5 day suspensions ("serial suspensions")? What if the student is not formally expelled but is sent home frequently or placed in in-school suspension? The answers to such questions are not always clear, but the law does provide some answers.

***Serial Suspensions.*** With respect to serial suspensions, IDEA procedural protections apply if:

- ◆ The removal is for more than 10 consecutive school days; or,
- ◆ The student is subjected to a series of removals that constitute a pattern because they add up to more than 10 school days in a school year, because the student's behavior is substantially similar during each incident resulting in removal, and because of factors such as the length of each removal, the total time the student is removed, and the proximity of the removals. **34 CFR 300.536.**

For example, a student who is suspended for 5 days in September, 7 days in October, and 5 days in November, is probably entitled to a manifestation review, whereas a student who is suspended for 5 days in November, then 7 days in May is probably not. Another approach is to count the total number of school days which the student has been out of school. If, for example, the student has been out for 42 days, it would be hard to argue that this is not a long-term suspension.

**Note:** Some educators interpret the law as allowing for an additional 10 days of suspension if a new Individualized Education Program Team (IEPT) is called. The belief is that the school can suspend freely for up to 10 days during the time a specific IEP is in effect, which may be for less than one school year. Of course, this position is susceptible to abuse, as it would circumvent the law for a school to call repeatedly for new IEPs in order to allow additional days of suspension.

► **Advocacy Hint: A suspension by any other name is still a suspension.**

If the decision to remove the child has been made by the school, it doesn't matter what the school calls it, it counts as a suspension. So, for example, if a parent is called to pick the child up and take him or her home for the remainder of the day, that is not an absence, it is a suspension. Even informal and improperly documented removals must be included in determining when a series of removals becomes a change of placement.

► **Advocacy Hint: Get to the root of the problem.** When parents ask how many days their children may be suspended, they often do so as a way of stopping any future suspensions. Issues often arise when the school must hold an IEPT meeting rather than addressing how to stop the suspensions from occurring. It may work better to ask *why* the student is being suspended, get appropriate evaluations, and develop a good behavior plan. The structure of schools is such that suspension is the only "punishment" available, and schools will resist efforts to limit their ability to impose it.

**Constructive Expulsion.** When a student has not been formally suspended or expelled but has still been kept out of school for more than 10 days (including the sum total of in-school suspensions, days the student is sent home or parents are called to pick the student up, and other practices where the student, for one reason or another, is not allowed to attend school), it is helpful to think of such actions as "constructive expulsions." This means that the student has not been properly expelled but is still not allowed to attend school. See **Darby v Schoo, 544 F. Supp. 428 (W.D.Mich. 1982)**. The comments to the IDEA regulations state that a student is excluded from school whenever s/he is denied FAPE, whether or not s/he is in the school building or out. An in-school suspension, then, counts as a suspension if the student does not receive Free Appropriate Public Education (FAPE) while in school (for example, if the student is confined to a time-out room with an aide). **71 Fed.Reg. 46715 (8/13/06)**.

► **Advocacy Hint: Suspended from the bus, not from school.** A

suspension from the bus for more than 10 days can also be a constructive expulsion if there is no other way for the student to get to school. Suspension from general transportation (such as the school bus with other students without disabilities) may be a sign that the student needs specialized transportation as a related service. Suspension from specialized transportation (provided as a "related service" through a student's IEP) triggers the school's duty to find another way to get the student to school. See **71 Fed. Reg. 46715 (8/13/06)**. For more about transportation, see Chapter 2, "Special Education Services and Supports."

## The Manifestation Review

In addition to due process rights afforded all students, students with disabilities are also protected by strong procedural requirements developed under the IDEA and Section 504. The heart of this process is the **manifestation determination review** (often abbreviated as "MDR").

The manifestation review is a process in which an IEP team decides whether or not the behavior that is the subject of discipline is related to the student's disability and whether or not the school did what was written in the IEP to keep the behavior from happening. Specifically, the team decides:

- ◆ Whether or not the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or,
- ◆ Whether or not the conduct in question was the direct result of the school's failure to implement the IEP. **34 CFR 300.530(e).**

► **Advocacy Hint: Be specific.** You must connect your child's disability to the specific behavior that is the subject of the disciplinary action so you can see if it is being addressed properly by the school. Make sure the behavior leading to disciplinary action is clearly described, rather than simply noting what part of the Code of Conduct has been violated.

► **Advocacy Hint: Look at different services.** Remember, a student in special education is entitled to the full range of services, not just those in his or her disability classification. You also can request related services.

► **Advocacy Hint: Use the complaint process.** Don't forget that if the school is not implementing your child's IEP, you can file a complaint. See Chapter 8, "Problem Solving and Complaints." Behavior plans in particular can be complicated, calling for a variety of responses to a variety of behavioral problems. This can be even more difficult when the Behavior Support Plan (BSP) must be implemented in several classrooms and other settings, as in a departmentalized middle or high school, and are often changing. As a result, there may be instances where a particular staff person fails to implement the specified response to a behavior. Such problems in consistent implementation of the BSP may not only give rise to a complaint, but also may support a finding that the misconduct was a manifestation of the student's disability.

**Information to consider.** The IEPT must consider "all relevant information" related to the behavior that is the subject of discipline. That information includes evaluation and diagnostic results, information supplied by the parents, observations, and the current IEP and placement. The manifestation review cannot limit its consideration to only the student's category of eligibility.

► **Advocacy Hint: Update the IEP.** If your child has not been evaluated recently, ask for updated evaluations before the IEPT conducts the manifestation review. IDEA allows for reevaluation more frequently than every three years if conditions warrant a reevaluation or a parent or teacher requests such. **34 CFR 300.303.** IDEA requires agreement between parent and school to conduct evaluations more than once a year.

► **Advocacy Hint: Challenge the assessment.** Remember, if you do not agree with the functional behavior assessment, you can request an independent educational evaluation (IEE) at public expense. See Chapter 4, “Evaluations,” for more information.

► **Advocacy Hint: Section 504 Rights.** While a student with a Section 504 Plan does not have the same clearly delineated procedures for a manifestation review, he or she is entitled to an evaluation, prior to any significant change in placement. The school district may meet that requirement through holding a manifestation determination review meeting, and should provide parents with a copy of the procedural safeguards under Section 504 at that time, as well.

***Alternative placement during the manifestation review.*** During the manifestation review, a student may be placed in an interim alternative educational setting in any one of the following five situations:

- ◆ The school and parents may agree on an alternative placement through the IEP process.
- ◆ School officials may move a student to an appropriate alternative educational setting for up to 45 school days if the student brings a weapon to school, uses, sells or possesses illegal drugs at school, or inflicts serious bodily injury upon another person at school. **34 CFR 300.530(g).** A parent can appeal this placement (see “Challenging Manifestation Reviews” below).
- ◆ During an appeal of a finding that a student’s behavior is not a manifestation of his or her disability, the student may be moved to an interim alternative educational setting. **34 CFR 300.533.**
- ◆ A hearing officer may order that a student be moved to an alternative educational setting for up to 45 school days if the hearing officer finds that keeping the student in the present placement “is substantially likely to result in injury to the child or others.” **34 CFR 300.532(b).**
- ◆ A court may order removal of a student from school if the student poses an imminent danger to self or others.

► **Advocacy Hint: Federal weapons and state weapons are different.** This is one of two school rules related to weapons. Remember, state law urges school districts to expel students (whether in general or special education) in many circumstances when they bring weapons, commit arson, or commit criminal sexual conduct at school. This law is subject to due process protections for all students and additional protections for special education students. State law defines “weapon” to include a firearm, dagger, dirk, stiletto, switchblade, iron bar, brass knuckles, or a pocketknife with a blade 3 inches or longer. **MCL 380.1313.**

Federal law allows school districts to place students in special education into an alternative setting for up to 45 days if they bring a weapon to school, possess, uses or sells drugs at school, or inflicts serious bodily injury on a person at school. Federal law defines “weapon” to include a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, but not including a pocket knife with a blade of less than 2 ½ inches in length. **18 USC 930(g)(2)**.

Interim alternative educational settings must continue to provide services and supports to enable students with disabilities to participate in the general education curriculum and to progress toward meeting IEP goals. **34 CFR 300.530(d)**.

**Relationship to prior manifestation reviews.** What happens if a manifestation review is the latest in a series of meetings which have failed to address conduct that is the subject of discipline? For example, a student is suspended for 10 days for talking back to a teacher. The IEPT meets at the end of 10 days and discusses some approaches to solving the problem but makes few changes in the student’s program. Shortly thereafter, the student is suspended again, the team meets again and does the same thing, and on and on.

To address this problem, look to the IEP goals, behavior plan, and services and supports offered to make sure they are appropriate, challenging them when necessary. When addressing behavioral needs, it is important to ensure that a student’s IEP describes the student’s needs, and the services and supports to meet them, as completely and accurately as possible. This review should, if possible, happen early and often, before a discipline problem rises to the level where a manifestation review is necessary.

Assuming that a student’s IEP is complete and accurate, IDEA does not allow schools to expel students with disabilities when the conduct in question is caused by failure to implement the IEP.

In the situation where a student is subjected to constant reviews with little progress, look at IEP implementation as an issue to use in preventing discipline problems from becoming more serious, and as a basis to improve the student’s program if there is behavior which leads to discipline.

## **Challenging the Manifestation Review**

One way to challenge the manifestation review finding indirectly is to request independent educational evaluations (IEEs). You can ask for an IEE if you do not agree with the functional behavioral assessment, or if you request updated evaluations and do not agree with them.

A parent may disagree with any finding made by the school or IEPT during the manifestation review process by signing in disagreement with the manifestation review and requesting a due process hearing. **20 USC 1415(k)(3); 34 CFR 300.532(a)**. IDEA now requires a person requesting a hearing to file a due process hearing notice in order to start the hearing process.

**►Advocacy Hint: Sign here in disagreement.** Just like with an IEP, refusing to sign a manifestation review has no legal effect; the school can implement the program despite your silence. In order to assert your right to challenge the team’s finding, you have to sign in *disagreement* AND request a hearing by filing a due process hearing notice.

**The importance of “stay put.”** See Chapter 8, “Problem Solving and Complaints,” for more explanation of the “stay-put” concept, which requires that a student stay in his or her present placement pending the outcome of an appeal. “Stay put” gets complicated when a student is subject to suspension or expulsion.

Generally, a student will remain in the placement last agreed upon by the parents and the school. If the school tries to expel a student and the parent files a hearing request, the student would stay in school pending the outcome of the hearing. During the hearing, the school may move the student to an interim alternative educational setting.

The following scenarios may prove helpful in understanding the importance of stay-put. John, a student in special education, commits misconduct, and the school administration recommends that he be expelled.

- ◆ John can be suspended for up to 10 days, during which time the school must send a due process notice and set up a school board hearing if John denies the misconduct.
- ◆ In the meantime, because of John’s special education status, the school must also set up a manifestation review to determine if John’s misconduct was a manifestation of his disability.

<b>What if...</b>	<b>Then...</b>
The manifestation review team finds that John’s misconduct was a manifestation of his disability.	The school board may not expel John; he must be placed in an appropriate program.
The manifestation review team finds that John’s misconduct was <i>not</i> a manifestation of his disability. John’s parents fail to request a due process hearing.	The stay put provision is not triggered because there is no appeal. The school board may meet and expel John from school.
The manifestation review team decides that John’s misconduct was <i>not</i> a manifestation of his disability, but John’s parents file a due process hearing notice to challenge the decision before the school board meets.	This triggers stay put and the school board cannot expel John. Instead, John must return to school, the school may move John to an interim setting, or the school must take further legal action to keep John out of school.

The timing of events can be crucial. In order to remain in school under the stay-put provision, there must be an appeal of the manifestation review team’s decision that the misconduct is not a manifestation of disability *before* the school board acts to finalize the expulsion. If, for example, John’s parents wait until March 10, after John was already expelled on March 9, the school may argue that John’s “current placement” for purposes of stay put is expulsion! (**Note:** Even if the parent fails to appeal the manifestation IEP until *after* the expulsion order is issued by the school board, there are sound arguments that stay-put should not consist of the status of the expulsion. The parent may not have had adequate notice about the various proceedings, or the 10 days may have elapsed way before the school board expelled the student. In any event, the student is entitled to receive post-expulsion services which are

sufficient to provide a free appropriate public education. See "Right to Post-Expulsion Services," below.

**► Advocacy Hint: Negotiate.** The stay-put provision gives parents and advocates for students some leverage in negotiating an alternative placement or program for a student who is subject to discipline for behavior in an existing program. An alternative placement may be preferable in such situations because (1) if the student is having behavior problems, the current placement probably is not working, and (2) finding a mutually agreeable alternative improves the chances that school staff will cooperate with the program.

**MDRs and Behavior Support Plans (BSPs):** IDEA recognizes the need for a behavior support plan (sometimes known as a behavior intervention plan or BIP) in its provisions governing suspension and expulsion. For example, when the IEPT considers whether a student's misconduct was a manifestation of his or her disability, it must determine whether the conduct was the direct result of the school's failure to implement the IEP. **34 CFR 300.530(e).** If it is determined that the behavioral strategies were *not* provided consistent with the student's IEP, then the behavior must be considered to be a manifestation of the student's disability, and the student cannot be expelled. In addition, if the behavior is a manifestation of the student's disability, a functional behavior assessment and BSP must be created or modified to address the behavior in question. **34 CFR 300.530(f).**

**► Advocacy Hint: Connect a behavior plan to the IEP.** Whenever behavior interferes with learning, the IEPT must consider positive behavior supports. The possibility of discipline including removal to an alternative setting makes it extremely important that a comprehensive BSP be developed and included as part of any student's IEP. Then if the school fails to adhere to that BSP and the student engages in behavior because of that failure, the parent/advocate can argue that the behavior was a manifestation of the student's disability and discipline should not be imposed under the school' general discipline policy.

## **Students Not Yet Identified as Students with Disabilities**

Students who have not yet been found eligible for special education are nevertheless protected by the IDEA (including manifestation review, stay-put, etc.) in three distinct circumstances. Specifically, a school shall be deemed to have knowledge that a student is a student with a disability if, before the behavior occurs:

- ◆ the parent of the student has expressed concern in writing (unless the parent is illiterate or has a disability that prevents compliance with the requirements contained in this clause) to supervisory or administrative personnel of the appropriate educational agency, or the student's teacher, that the student is in need of special education and related services;
- ◆ the parent of the student has requested an evaluation of the student; or
- ◆ the teacher of the student, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the student

directly to the director of special education of such agency or to other supervisory personnel in the agency. **34 CFR 300.534(b).**

**►Advocacy Hint: No sweeping problem students under the rug.** This provision is critical to students whose parents or advocates have sought special education services over time without success. Schools can no longer ignore requests for special education services from “troublesome” students.

There are two important exceptions to this. First, schools are not deemed to have knowledge that a student has a disability if parents refuse to consent to evaluations. Second, schools are not deemed to have knowledge that a student has a disability if the school has evaluated the student for services and found him or her ineligible. **34 CFR 300.534(c).**

## Right to Post-Expulsion Services

If a student in special education is expelled, the school must still serve him or her. Under IDEA, schools must provide:

A free appropriate public education ... to all students with disabilities ..., *including students with disabilities who have been suspended or expelled from school.* **20 USC 1412(a)(1)(A).**

Post-expulsion services, like any other program of free appropriate public education, must:

- ◆ Meet the standards of the state educational agency, including the standard for minimum hours and school days. **MCL 380.1284; MCL 388.1606(4)(u).**
- ◆ Include an appropriate school education (not just limited to the hours spent in special education, but including general curriculum instruction); and,
- ◆ Be provided in conformity with the IEP (meaning the IEPT, not school administration, determines the alternative placement, and parents or students can appeal adverse decisions). **20 USC 1401(9).**

**►Advocacy Hint: Appropriate in all instances.** Although the school may choose the setting in which to educate an expelled special education student, the setting must meet the standards of the state and provide appropriate services in conformance with the IEP.

**►Advocacy Hint: Negotiate again.** Like stay-put, the post-expulsion education provision gives parents and advocates some leverage in negotiating an alternative placement or program for a student who is subject to discipline for behavior in an existing program. An alternative placement may be preferable in such situations because (1) if the student is having behavior problems, the current placement probably is not working, and (2) finding a mutually agreeable alternative improves the chances that school staff will cooperate with the program.

## The Role of Family Court

IDEA does not prevent schools from reporting crimes: An agency reporting a crime committed by a student with a disability shall ensure that copies of the special education and disciplinary records of the student are transmitted for consideration by the appropriate authorities to whom it reports the crime. **34 CFR 300.535.**

The school must still comply with confidentiality requirements set forth in the Family Educational Rights and Privacy Act (FERPA) and implementing regulations. **34 CFR 300.535(b)(2).** Furthermore, the authorities to whom the records are disclosed shall certify in writing that the information will not be disclosed to any other party, except as provided under State law, without the prior written consent of the parent of the student. **34 CFR 99.38.**

Although the school may report crimes to family court, the school still has a responsibility to provide special education and related services to the student. The school also may not make a referral to juvenile court under the “truancy” provision of state law until it has found that there are no alternative educational programs for the student. **Morgan v. Chris L., 927 F.Supp. 267 (E.D.Tenn. 1994).** A delinquency petition must be preceded by a meeting to reach educational solutions to problem behavior. **MCL 712A.2(a)(4); Flint Board of Education v. Williams, 88 Mich.App. 8, 276 N.W.2d 499 (Mich.App. 1979).**

► **Advocacy Hint: Send a letter to the court.** If your child is referred to the criminal justice system by his or her school, you can send a letter to the judge, prosecuting attorney, and/or court referee assigned to the case to let them know that your child has a disability and that this is a school matter that should be handled by the school, instead of being heard by the court. See Appendix 13-1 for an example.

## Preventing Behavior Problems Before They Occur

The prevention theme is imbedded in every area of special education law, including the evaluation and IEPT process, the preference for placement in general education, the training of personnel, and the role of other agencies with behavioral expertise or resources. For example, IDEA requires that the IEPT consider “appropriate strategies, including positive behavioral supports, strategies, and supports,” whenever a student’s behavior “impedes his or her learning or that of others.” **34 CFR 300.324(a)(2)(i).** Further, IDEA continues to recognize that behavior support planning is a related service, through school social work and school psychologist services, among others. **34 CFR 300.34(c)(10), (c)(14).** Finally, since 1997, IDEA has interwoven the focus on positive behavioral supports with an increased emphasis on a student’s ability to participate in the general curriculum. Accordingly, any IEP should act to prevent problems before they arise, using positive behavior support and other tools.

A BSP is only as good as the data that supports it. Whenever a student’s behavior has become an issue, data should be collected by school staff through a functional behavior assessment (FBA). A comprehensive FBA by a skilled evaluator identifies the consequences to maintaining behaviors and the contexts in which those behaviors reflect antecedents and

setting events. An FBA should be revised as needed. Data that show the effect of a selected support determine the need to revise the BSP.

There are many positive outcomes that can result from IEP teams effectively conducting functional behavior assessments under the appropriate circumstances. These include enabling the student to derive meaningful benefit from the IEP through skill development and reduction in problem behavior, providing staff with positive approaches to short and long term support with the student across circumstances and settings, and more effectively integrating relevant information about the student and contributing factors with problem behavior from a variety of sources.

See **Appendix 11-3** for resources on positive behavior support.

## Appendix 11-1

### Letter to Court Requesting Dismissal of Criminal Case Against Student

(Be sure to keep a copy for your records)

(Date)

Honorable (Judge's Name)  
(Address of court)

**RE: (Student's Name) - (Case No.); (Petition No.)**

Dear Judge (Judge's Name),

I am the parent of (student's name), who has been charged with (list charges against student) as a result of a behavior incident occurring at (name of school) on (date of incident). I am writing to respectfully explain why the matter before you should be considered a school discipline issue that should be addressed by the school district rather than the juvenile court.

(Student's name) is an (age)-year-old a student with disabilities. (He/She) has been diagnosed with (list student's diagnosed disabilities). (Name of school district) has found (student's name) eligible for special education. As a result of this finding, the school district has specific legal requirements to do further planning to provide support and services for (student's name's) behavior.

(Student's name) is a student who wants to do well in school, but whose behaviors, combined with the school district's lack of appropriate interventions, have held (him/her) back from succeeding. (Explain how school district is failing to support the student, for example: The school district's behavior plan is lacking in effective strategies to reduce or eliminate problem behaviors that are caused by (student's name)'s disability, as evidenced by the incident that led to this proceeding.) This is not a case where the student cannot learn how to behave appropriately, but one where the school district does not know how to teach (him/her).

This is a special education issue that should be addressed by the school district and not placed as a burden upon the court to develop a program of services for (student's name). Pursuant to the Individuals with Disabilities Education Act (IDEA) and the Michigan Administrative Rules for Special Education (MARSE), the school district must adopt its own plan that properly addresses disability-related behavior issues and develops strategies to prevent such behavior from occurring or escalating to the point where the police become involved. The provision of appropriate services through the school system is the most sensible approach for everyone involved and a fairer result than involving (student's name) in the juvenile justice system and the school-to-prison pipeline.

For these reasons, I respectfully request that you dismiss this delinquency proceeding, and thereby shift the obligation back to the school district to fulfill its responsibilities under federal

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and state law. Alternatively, I ask that you order a continuance in this matter while we attempt to resolve the special education issues described above.

Thank you for your consideration of this important issue.

Sincerely,

(Your Name)  
(Your Address)  
(Your Telephone Number)

Cc: Prosecutor  
Court Referee

## **Appendix 11-2**

UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

August 1, 2016

Dear Colleague:

The U.S. Department of Education (Department) is committed to ensuring that all children with disabilities have meaningful access to a State's challenging academic content standards that prepare them for college and careers. Consistent with these goals, the Individuals with Disabilities Education Act (IDEA) entitles each eligible child with a disability to a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet the child's unique needs.<sup>1</sup> 20 U.S.C. §§1412(a)(1) and 1400(d)(1)(A). Under the IDEA, the primary vehicle for providing FAPE is through an appropriately developed individualized education program (IEP) that is based on the individual needs of the child. 34 CFR §§300.17 and 300.320-300.324. In the case of a child whose behavior impedes the child's learning or that of others, the IEP Team must consider –and, when necessary to provide FAPE, include in the IEP –the use of positive behavioral interventions and supports, and other strategies, to address that behavior. 34 CFR §§300.324(a)(2)(i) and (b)(2); and 300.320(a)(4).

The Department has determined that this letter is significant guidance under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007). See [www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf](http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2007/m07-07.pdf). Significant guidance is non-binding and does not create or impose new legal requirements. The Department is issuing this letter to provide LEAs and other responsible public agencies with information to assist them in meeting their obligations under the IDEA and its implementing regulations.

If you are interested in commenting on this letter, please email us your comment at [iepgoals@ed.gov](mailto:iepgoals@ed.gov) or contact Lisa Pagano at 202-245-7413 or [Lisa.Pagano@ed.gov](mailto:Lisa.Pagano@ed.gov). For further information about the Department's guidance processes, please visit [www2.ed.gov/policy/gen/guid/significant-guidance.html](http://www2.ed.gov/policy/gen/guid/significant-guidance.html).

Recent data on short-term disciplinary removals from the current placement strongly suggest that many children with disabilities may not be receiving appropriate behavioral interventions and

<sup>1</sup>While this letter focuses on requirements under the IDEA relating to FAPE in the least restrictive environment, students with disabilities also have rights under two civil rights laws that prohibit discrimination on the basis of disability—Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act (Title II). The Office for Civil Rights (OCR) in the U.S. Department of Education enforces Section 504 in public elementary and secondary schools. Also, in this context, OCR shares in the enforcement of Title II with the U.S. Department of Justice. More information about these laws is available at: [www.ed.gov/ocr](http://www.ed.gov/ocr) and [www.ada.gov](http://www.ada.gov).

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supports, and other strategies, in their IEPs.<sup>2</sup> During the 2013-2014 school year, 10 percent of all children with disabilities, ages 3 through 21, were subject to a disciplinary removal of 10 school days or less, with children of color with disabilities facing higher rates of removal.<sup>3</sup> For instance, nineteen percent of black children with disabilities, ages 3 through 21, were subject to a removal of 10 school days or less within a single school year.<sup>4</sup> In light of research about the detrimental impacts of disciplinary removals,<sup>5</sup> including short-term disciplinary removals, the Department is issuing this guidance to clarify that schools, charter schools, and educational programs in juvenile correctional facilities must provide appropriate behavioral supports to children with disabilities who require such supports in order to receive FAPE and placement in the least restrictive environment (LRE). As a practical matter, providing appropriate behavioral supports helps to ensure that children with disabilities are best able to access and benefit from instruction.

The IDEA authorizes school personnel to implement a short-term disciplinary removal from the current placement, such as an out-of-school suspension, for a child with a disability who violates a code of student conduct. 34 CFR §300.530(b)(1). The Department strongly supports child and school safety, and this letter is not intended to limit the appropriate use of disciplinary removals that are necessary to protect children. Rather, the letter is a part of the Department's broader work to encourage school environments that are safe, supportive, and conducive to teaching and learning, where educators actively prevent the need for short-term disciplinary removals by effectively supporting and responding to behavior.<sup>6,7</sup> In keeping with this goal, this letter serves to remind school personnel that the authority to implement disciplinary removals does not negate their obligation to consider the implications of the child's behavioral needs, and the effects of the use of suspensions (and other short-term removals) when ensuring the provision of FAPE.<sup>8</sup>

Additionally, this letter provides alternatives to disciplinary removal which schools can apply instead of exclusionary disciplinary measures. We are issuing this guidance to clarify that the failure to consider and provide for needed behavioral supports through the IEP process is likely to result in a child not receiving a meaningful educational benefit or FAPE. In addition, a failure to make behavioral supports available throughout a continuum of placements, including in a regular education setting, could result in an inappropriately restrictive placement and constitute a denial of placement

<sup>2</sup> For purposes of this letter, we use "behavioral supports" to generally refer to behavioral interventions and supports, and other strategies to address behavior.

<sup>3</sup> U.S. Department of Education, EDFacts Data Warehouse (EDW), OMB #1875-0240: "IDEA Part B Discipline Collection," 2014.

<sup>4</sup> Id.

<sup>5</sup> Council of State Governments Justice Center and the Public Policy Research Institute. (2011). Breaking schools' rules: a statewide study of how school discipline relates to students' success and juvenile justice involvement. Available at [https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking\\_Schools\\_Rules\\_Report\\_Final.pdf](https://csgjusticecenter.org/wp-content/uploads/2012/08/Breaking_Schools_Rules_Report_Final.pdf)

<sup>6</sup> "The Act and the regulations recognize that school officials need some reasonable degree of flexibility when disciplining children with disabilities who violate a code of student conduct. Interrupting a child's participation in education for up to 10 school days over the course of a school year, when necessary and appropriate to the circumstances, does not impose an unreasonable limitation on a child with a disability's right to FAPE." 71 Fed. Reg. 46717 (Aug. 14, 2006).

<sup>7</sup> More about the Department's work is available at [www.ed.gov/rethinkdiscipline](http://www.ed.gov/rethinkdiscipline)

<sup>8</sup> This letter does not address the obligations of school personnel following a disciplinary change in placement, including obligations to provide behavioral supports. This letter is intended to supplement the June 2009 Questions and Answers on Discipline Procedures (as revised) from OSERS, which provided guidance on discipline policies for school-age children to personnel in State educational agencies (SEAs) and local educational agencies (LEAs), and parents. Further, as the obligations of school personnel covered in this letter also apply to school personnel serving children with disabilities in juvenile correctional facilities, this letter is also intended to supplement the December 5, 2014 OSERS Dear Colleague Letter on the Individuals with Disabilities Education Act requirements that apply to the education of students with disabilities in correctional facilities. The June 2009 guidance can be found at [http://idea.ed.gov/object/fileDownload/model/QaCorner/field/PdfFile/primary\\_key/7](http://idea.ed.gov/object/fileDownload/model/QaCorner/field/PdfFile/primary_key/7) and the December 5, 2014 letter can be found at <http://www2.ed.gov/policy/gen/guid/correctional-education/index.html>

in the LRE. While such determinations are necessarily individualized, this guidance is intended to focus attention on the need to consider and include evidence-based behavioral supports in IEPs that, when done with fidelity, often serve as effective alternatives to unnecessary disciplinary removals, increase participation in instruction, and may prevent the need for more restrictive placements.

This letter is organized into five areas:

- IDEA's procedural requirements regarding evaluations, eligibility determinations, IEPs, and behavioral supports;
- IDEA's IEP content requirements related to behavioral supports;
- Circumstances that may indicate potential denials of FAPE or of placement in the LRE;
- Implications for short-term disciplinary removals and other exclusionary disciplinary measures;<sup>9</sup>
- Conclusion, including additional information for parents and stakeholders.

## **I. IDEA Procedural Requirements Regarding Evaluations, Eligibility, IEPs, and Behavioral Supports**

The IDEA and its implementing regulations require IEP Teams to follow certain procedures to ensure that IEPs meet the needs, including the behavioral needs, of children with disabilities. See 20 U.S.C. §1414(d) and 34 CFR §§300.320-300.324. Those needs are generally identified during the initial evaluation or reevaluation, which must, among other matters, use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child, and assess the child in all areas related to the suspected disability, including, if appropriate, social and emotional status. 34 CFR §§300.304(b) and 300.304(c)(4); see also 34 CFR §§300.304-300.311. Further, the evaluation must use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical and developmental factors. 34 CFR §300.304(b)(3). Parents, classroom teachers, and other service providers will also have formal and informal information about an eligible child's current functional (e.g., behavioral) performance for the IEP Team's consideration. 34 CFR §§300.321 and 300.324. Once the IEP is developed, IEP Teams must: (1) review the child's IEP periodically, but not less than annually, to determine whether the child's annual goals are being achieved (34 CFR §300.324(b)(1)(i)), and (2) revise the IEP, as appropriate, to address any lack of expected progress towards the annual goals in the child's IEP and in the general education curriculum, the child's anticipated needs, or other matters. 34 CFR §300.324(b)(1)(ii).

There are a number of special factors that IEP Teams must consider in developing, reviewing, or revising a child's IEP. The IDEA specifically requires IEP Teams to consider the use of positive behavioral interventions and supports, and other strategies, to address behavior for any child with a disability whose behavior impedes his or her learning or that of others. 20 U.S.C. §1414(d)(3)(B)(i). This requirement applies to all IEP Teams, regardless of the child's specific disability, and to the

<sup>9</sup> For purposes of this document, we use "exclusionary disciplinary measures" as a descriptive term to discuss the range of actions that school personnel implement –in response to a child's misbehavior or violation of a code of student conduct –where the child is removed and excluded from their classroom, from school grounds, or school activities either formally (e.g., suspension) or informally (e.g., asking the parent to keep the student at home for a day or more). Additional information regarding exclusionary disciplinary measures may be found in Section IV of this document. development, review, and revision of IEPs (34 CFR §300.324(a)(2) and (b)(2)).

Incidents of child misbehavior and classroom disruptions, as well as violations of a code of student conduct, may indicate that the child's IEP needs to include appropriate behavioral supports. This is especially true when a pattern of misbehavior is apparent or can be reasonably anticipated based on the child's present levels of performance and needs. To the extent a child's behavior including its impact and consequences (e.g., violations of a code of student conduct, classroom disruptions, disciplinary removals, and other exclusionary disciplinary measures) impede the child's learning or that of others, the IEP Team must consider when, whether, and what aspects of the child's IEP related to behavior need to be addressed or revised to ensure FAPE. If the child already has behavioral supports, upon repeated incidents of child misbehavior or classroom disruption, the IEP team should meet to consider whether the child's behavioral supports should be changed.

In general, IEP Team meetings provide parents (who are required members of the team) critical opportunities to participate in the decision-making process, raise questions and concerns regarding their child's behavior, and provide input on the types of behavioral supports their children may need to facilitate their child's involvement and progress in the general education curriculum. 34 CFR §§300.320(a), 300.321(a)(1), and 300.324(a)(1)(ii). Parents have the right to request an IEP Team meeting at any time, and public agencies generally must grant a reasonable request from a parent for an IEP Team meeting.<sup>10</sup> See 20 U.S.C. §1414(d)(4)(A)(i)(III) and 34 CFR §300.324(b)(1)(ii)(C). We believe it would be appropriate for a parent to request an IEP Team meeting following disciplinary removals or changes in the child's behavior that impede the child's learning or that of others, as these likely indicate that the IEP, as written or implemented, may not be properly addressing the child's behavioral needs.<sup>11</sup> Whenever appropriate, the child with a disability should also be present during IEP Team meetings. 34 CFR §300.321(a)(7).

#### *When an IEP Has Already Been Developed for a School Year*

In instances where a child with a disability is subject to a disciplinary removal after the IEP for that school year has been developed and the parents and the relevant school officials agree that the IEP needs to be revised to address the behavior, but circumstances prevent the IEP Team from convening prior to the child's return to school, the IDEA regulations permit the parent and public agency to agree not to convene an IEP Team meeting and instead to develop a written document to amend or modify the current IEP. 34 CFR §300.324(a)(4)(i). This option could be used to provide the child with the necessary behavioral supports upon the child's return to school. However, if changes are made to the child's IEP in this manner, the agency must ensure that the IEP Team is informed of those changes. 34 CFR §300.324(a)(4)(ii).

<sup>10</sup> Assistance to States for the Education of Children with Disabilities and Early Intervention Programs for Infants and Toddlers with Disabilities, Final Rule, 64 Fed. Reg. 12406, 12581 (Mar. 12, 1999) explains, in response to public comment, that "A[regulatory] provision is not necessary to clarify that public agencies will honor 'reasonable' requests by parents for a meeting to review their child's IEP. Public agencies are required under the statute and these final regulations to be responsive to parental requests for such reviews."

<sup>11</sup> T.K., S.K., individually and on behalf of L.K. v. New York City Department of Education, Brief of the United States as Amicus Curiae Supporting Appellees (2015). Available at <https://www.justice.gov/sites/default/files/crt/legacy/2015/03/16/tknycdoebrief.pdf>

## **II. IDEA's IEP Content Requirements Related to Behavioral Supports**

Research shows that school-wide, small group, and individual behavioral supports that use proactive and preventative approaches, address the underlying cause of behavior, and reinforce positive behaviors are associated with increases in academic engagement, academic achievement, and fewer suspensions and dropouts.<sup>12</sup> In short, children are more likely to achieve when they are directly taught predictable and contextually relevant school and classroom routines and expectations, acknowledged clearly and consistently for displaying positive academic and social behavior, consistently prompted and corrected when behavior does not meet expectations, and treated by others with respect.<sup>13</sup>

However, when a child with a disability experiences behavioral challenges, including those that result in suspensions or other exclusionary disciplinary measures, appropriate behavioral supports may be necessary to ensure that the child receives FAPE. In the same way that an IEP Team would consider a child's language and communication needs, and include appropriate assistive technology devices or services in the child's IEP (34 CFR §300.324(a)(2)(iv) and (v)) to ensure that the child receives a meaningful educational benefit, so too must the IEP Team consider and, when determined necessary for ensuring FAPE, include or revise behavioral supports in the IEP of a child with a disability exhibiting behavior that impedes his or her learning or that of others. 34 CFR §§300.320(a)(4) and 300.324(a)(2)(i).

Therefore, as part of the development, review and, as appropriate, revision of the IEP, IEP Teams should determine whether behavioral supports should be provided in any of three areas: (1) special education and related services, (2) supplementary aids and services, and (3) program modifications or supports for school personnel. 34 CFR §300.320(a)(4).

IEPs should contain behavioral supports supported by evidence—IDEA specifically requires that both special education and related services and supplementary aids and services be based on peer-reviewed research to the extent practicable. 34 CFR §300.320(a)(4). As a matter of best practice, we strongly encourage schools to consider how the implementation of behavioral supports within the IEP could be facilitated through a school-wide, multi-tiered behavioral framework, described at greater length below.

<sup>12</sup> Christle, C. A., Jolivette, K., & Nelson, C. M. (2005). Breaking the school to prison pipeline: identifying school risk and protective factors for youth delinquency. *Exceptionality*, 13(2), 69-88. See also Crone, D. A., & Hawken, L. S. (2010). Responding to problem behavior in schools: the behavior education program. Guilford Press. See also Liaupsin, C. J., Umbreit, J., Ferro, J. B., Urso, A., & Upreti, G. (2006). Improving academic engagement through systematic, function-based intervention. *Education and Treatment of Children*, 29, 573-591. See also Luiselli, J. K., Putnam, R. F., Handler, M. W., & Feinberg, A. B. (2005). Whole-school positive behaviour support: effects on child discipline problems and academic performance. *Educational Psychology*, 25(2-3), 183-198. See also Putnam, R., Horner, R. H., & Algozzine, R. (2006). Academic achievement and the implementation of school-wide behavior support. *Positive Behavioral Interventions and Supports Newsletter*, 3(1), 1-6.

<sup>13</sup> Algozzine, B., Wang, C., & Violette, A. S. (2011). Reexamining the relationship between academic achievement and social behavior. *Journal of Positive Behavioral Interventions*, 13, 3-16. See also McIntosh, K., Chard, D. J., Boland, J. B., & Horner, R. H. (2006). Demonstration of combined efforts in school-wide academic and behavioral systems and incidence of reading and behavior challenges in early elementary grades. *Journal of Positive Behavioral Interventions*, 8, 146-154.

*Special Education and Related Services*

Behavioral supports provided as part of a child's special education and related services may be necessary to ensure that the child's IEP is designed to enable the child to advance appropriately toward attaining the annual goals specified in the IEP, to be involved in and make progress in the general education curriculum, and to participate in extracurricular and other nonacademic activities. 34 CFR §§300.320(a)(4)(i) and (ii). Interventions and supports that could assist a child with a disability to benefit from special education may include instruction and reinforcement of school expectations, violence prevention programs, anger management groups, counseling for mental health issues, life skills training, or social skills instruction. Please see the end of this section for additional tools and resources to assist with the implementation of behavioral supports.

*Supplementary Aids and Services*

Public agencies must comply with the requirement to make available a continuum of alternative placements as required under 34 CFR §§300.114-300.116, which includes the provision of supplementary aids and services (e.g. behavioral supports) throughout the continuum. Under 34 CFR §300.42, supplementary aids and services are defined to include aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with 34 CFR §§300.114-300.116.

Appropriate supplementary aids and services could include those behavioral supports necessary to enable a child with a disability to be educated in regular classes or the setting determined to be the child's appropriate placement in the LRE. Such behavioral supports might include meetings with a behavioral coach, social skills instruction, counselor, or other approaches. In general, placement teams may not place a child with a disability in special classes, separate schooling, or other restrictive settings outside of the regular educational environment solely due to the child's behavior when behavioral supports through the provision of supplementary aids and services could be provided for that child that would be effective in addressing his or her behavior in the regular education setting.<sup>14</sup> 34 CFR §§300.114-300.116. Children with disabilities may only be removed from the regular educational environment when 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. 34 CFR §300.114(a)(2)(ii).

*Program Modifications or Supports for School Personnel*

In addition to the behavioral supports that may be provided directly to children with disabilities, program modifications or supports for school personnel, provided on behalf of the child, may also be necessary to support the child's involvement and progress in the general education curriculum, advancement towards attaining the annual goals specified in the IEP, and participation in extracurricular and other nonacademic activities. 34 CFR §§300.320(a)(4)(i) and (ii). School personnel may need training, coaching, and tools to appropriately address the behavioral needs of a particular child. Supports for school personnel may be designed, as appropriate, to better implement effective instructional and behavior management strategies and specific behavioral interventions that are included in the child's IEP.

<sup>14</sup> We refer to the "placement team," rather than the IEP Team, as IDEA's implementing regulations specify that placement decisions must be made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options. 34 CFR §300.116(a)(1).

*Implementation of a Multi-Tiered Behavioral Framework*

Research shows that implementing evidence-based, multi-tiered behavioral frameworks can help improve overall school climate, school safety, and academic achievement for all children, including children with disabilities.<sup>15</sup> In general, behavioral supports are most effectively organized within a multi-tiered behavioral framework that provides instruction and clear behavioral expectations for all children, targeted intervention for small groups not experiencing success, and individualized supports and services for those needing the most intensive support. In recent years, the Department has disseminated a number of tools and resources to assist schools in the creation of safe and supportive school climates conducive to learning, including the implementation of effective alternatives to disciplinary removal. These resources include:

- *Supporting and Responding to Behavior: Evidence-based Classroom Strategies for Teachers*, a document summarizing evidence-based, proactive, and responsive classroom behavior support and intervention strategies for teachers.<sup>16</sup>
- *Positive Behavioral Intervention and Supports: Implementation Blueprint and Self-Assessment*, a guide to develop local capacity for sustainable, culturally and contextually relevant, and high-fidelity implementation of multi-tiered practices and systems of support.<sup>17</sup>
- *2014 School Discipline Guidance Package*, including guidance on how public elementary and secondary schools can meet their legal obligations to administer discipline without discriminating on the basis of race, color or national origin and a set of guiding principles to assist communities in improving school climate and school discipline.<sup>18</sup>

These and other resources can be found at [www.ed.gov/rethinkdiscipline](http://www.ed.gov/rethinkdiscipline) and <http://ccrs.osepideasthatwork.org>.

**III. Circumstances that May Indicate Potential Denials of FAPE or of Placement in the LRE**

It is incumbent upon IEP Teams to implement IDEA's procedural and substantive requirements to ensure that children with disabilities receive the behavioral supports they need to enable them to advance appropriately toward attaining the annual goals specified in their IEPs and to be involved in and make progress in the general education curriculum. 20 U.S.C. §§1414(d)(1)(A)(i)(IV); 1414(d)(3)(B)(i) and 1414(d)(3)(C). A failure to implement these procedural requirements or provide needed behavioral supports to a child with a disability could result in the child not receiving a meaningful educational benefit, and therefore constitute a denial of FAPE and/or a denial of placement in the LRE (i.e., an unduly restrictive placement).

<sup>15</sup> Bradshaw, C., Koth, C.W., Thornton, L.A., & Leaf, P.J., (2009). Altering school climate through school-wide positive behavioral interventions and supports: findings from a group-randomized effectiveness trial. *Prevention Science* 10(2), 100-115.

<sup>16</sup> Available at <https://www.osepideasthatwork.org/evidencebasedclassroomstrategies/>

<sup>17</sup> Available at <http://www.pbis.org/blueprint/implementation-blueprint>

<sup>18</sup> Available at <http://www2.ed.gov/policy/gen/guid/school-discipline/fedefforts.html#guidance>

A determination of whether there is a denial of FAPE is a fact-based determination, to be made on a case-by-case basis. Factors to consider include: whether the public agency has failed to follow the procedures IDEA requires when developing, reviewing, or revising the child's IEP, or has failed to consider and/or provide a child with a disability with necessary behavioral supports when the child's behavior impedes his or her learning or that of others; or whether the child's IEP is reasonably calculated to provide a meaningful educational benefit in the absence of behavioral supports.

Circumstances that may indicate either a procedural or substantive failure in the development, review, or revision of the IEP include, but are not limited to, the following<sup>19</sup>:

- The IEP Team did not consider the inclusion of positive behavioral interventions and supports in response to behavior that impeded the child's learning or that of others;
- School officials failed to schedule an IEP Team meeting to review the IEP to address behavioral concerns after a reasonable parental request;
- The IEP Team failed to discuss the parent's concerns about the child's behavior, and its effects on the child's learning, during an IEP Team meeting;
- There are no behavioral supports in the child's IEP, even when the IEP Team determines they are necessary for the child;
- The behavioral supports in the IEP are inappropriate for the child (e.g., the frequency, scope or duration of the behavioral supports is insufficient to prevent behaviors that impede the learning of the child or others; or consistent application of the child's behavioral supports has not accomplished positive changes in behavior, but instead has resulted in behavior that continues to impede, or further impedes, learning for the child or others);
- The behavioral supports in the child's IEP are appropriate, but are not being implemented or not being properly implemented (e.g., teachers are not trained in classroom management responses or de-escalation techniques or those techniques are not being consistently implemented); or
- School personnel have implemented behavioral supports not included in the IEP that are not appropriate for the child

<sup>19</sup> Under 34 CFR §300.513(a), a hearing officer's determination of whether a child received FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies: (1) impeded the child's right to FAPE; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the parent's child; or (3) caused a deprivation of educational benefit. 34 CFR §300.513(a)(2)(i)–(iii). Although best viewed as a procedural requirement, a failure to follow 34 CFR §§300.324(a)(2)(i) could result in a substantive denial of FAPE if any of the circumstances in 34 CFR §§300.513(a)(2)(i)–(iii) are present. As this is a fact-based determination, Section III provides examples of facts and circumstances that may indicate that a procedural failure has resulted in a denial of FAPE.

Circumstances that may indicate that the child's IEP is not reasonably calculated to provide a meaningful educational benefit include, but are not limited to, the following:

- The child is displaying a pattern of behaviors that impede his or her learning or that of others and is not receiving any behavioral supports;
- The child experiences a series of disciplinary removals from the current placement of 10 days or fewer (which do not constitute a disciplinary change in placement) for separate incidents of misconduct that impede the child's learning or that of others, and the need for behavioral supports is not considered or addressed by the IEP Team;<sup>20</sup> or
- The child experiences a lack of expected progress toward the annual goals that is related to his or her disciplinary removals or the lack of behavioral supports, and the child's IEP is neither reviewed nor revised.

A determination of whether there is a denial of placement in the LRE is also a fact-based determination. Factors to consider include whether the child's IEP is designed to enable the child to be educated and participate with nondisabled children in extracurricular and other nonacademic activities in the absence of behavioral supports. Circumstances that may indicate that the child's placement in the LRE may not be appropriate include, but are not limited to, a scenario in which a continuum of placements that provides behavioral supports is not made available (e.g., behavioral supports not provided in the regular educational setting), and, as a result, the IEP inappropriately calls for the child to be placed in special classes, separate schooling, or another restrictive placement outside the regular educational environment (e.g., home instruction, home tutoring program, or online learning program).

#### **IV. Implications for Short-Term Disciplinary Removals and Other Exclusionary Disciplinary Measures**

Schools should note that recent research demonstrates that disciplinary measures such as short-term removals from the current placement (e.g., suspension), or other exclusionary disciplinary measures that significantly impede the implementation of the IEP, generally do not help to reduce or eliminate reoccurrence of the misbehavior. In fact, there is a growing awareness that school suspensions produce unintended and undesirable results. Longitudinal studies, for example, have found that suspension from school does not deter misbehavior. These studies found a high rate of repeat offending in out-of-school suspension, ranging from 35% to 42%.<sup>21</sup> Research also shows that suspension from school is associated with significant adverse consequences for the children

<sup>20</sup> Under 34 CFR §300.536 a series of disciplinary removals that constitute a pattern is a change in placement. A pattern of removals is a series of removals that total more than 10 school days within a school year, for behavior that is substantially similar to the child's behavior in previous incidents that led to removals, with consideration for additional factors such as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

<sup>21</sup> Skiba, R.J., Shure, L.A., Middelberg, L.V., & Baker, T.L. (2012). Reforming school discipline and reducing disproportionality in suspension and expulsion. In Jimerson, S.R., Nickerson, A.B., Mayer, M.J., & Furlong, M.J. (Eds.) Handbook of School Violence and School Safety, 2nd Ed. New York: Routledge.

suspended.<sup>22</sup> Suspensions from school are consistently associated with lower academic performance.<sup>23</sup> As a suspended child's education is interrupted, he or she is more likely to fall behind, to become disengaged from school, and to drop out.<sup>24</sup>

Removals from the current placement generally do not address the needs of a child with a disability for positive behavioral interventions and supports. Accordingly, we remind States, LEAs, and IEP Teams that while 34 CFR §300.530 explicitly permits school personnel to implement short-term disciplinary removals from the current placement, such removals may indicate a need to review and revise the child's IEP to address his or her behavioral needs. In addition, exclusionary disciplinary measures that do not constitute a removal from the current placement may also indicate the need to review and revise the child's IEP.

*Authority of School Personnel under 34 CFR §300.530*

Under IDEA and its implementing regulations, school personnel have the authority to 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 up to 10 consecutive school days in a school year, to the extent those alternatives are applied to children without disabilities, and for additional removals of up to 10 school days in the same school year for separate incidents of misconduct, provided that the additional removals do not constitute a change of placement. 34 CFR §§300.530(b) and 300.536.<sup>25</sup>

While the IDEA and its implementing regulations recognize that school officials need some reasonable degree of flexibility when disciplining children with disabilities who violate a code of student conduct and that school safety is paramount, the Department cautions that the use of short-term disciplinary removals from the current placement may indicate that a child's IEP, or the implementation of the IEP, does not appropriately address his or her behavioral needs. This, in turn, may result in the child not receiving a meaningful educational benefit, which could constitute a denial of FAPE. As noted above, these determinations are highly factual, and would be made on a case-by-case basis. We are concerned, however, that some SEAs and LEAs may have erroneously interpreted the IDEA to provide school personnel with the broad authority to implement short-term removals without restriction and without regard to whether the child's IEP is properly addressing his or her behavioral needs. It has come to the Department's attention that there are a number of legal memos and technical assistance documents which have erroneously characterized the 10-day period as "free days."<sup>26</sup>

<sup>22</sup> Lee, T., Cornell, D., Gregory, A., & Xitao, F. (2011). High suspension schools and dropout rates for black and white students. *Education & Treatment Of Children*, 34(2), 167-192. See also Brooks, K., Schiraldi, V., & Zeidenberg, J. (2000). School house hype: two years later. Washington, DC: Justice Policy Institute / Covington, KY: Children's Law Center. See also Civil Rights Project. (2000). Opportunities suspended: the devastating consequences of zero tolerance and school discipline policies. Cambridge, MA.

<sup>23</sup> Id.

<sup>24</sup> Id.

<sup>25</sup> Disciplinary removals of more than 10 consecutive school days or a series of removals that cumulate to more than 10 school days in a school year that constitute a pattern are considered a change in placement. 34 CFR §300.536.

<sup>26</sup> National Council on Disability. (2015). Breaking the school-to-prison pipeline for students with disabilities. Available at [https://www.ncd.gov/sites/default/files/Documents/NCD\\_School-to-PrisonReport\\_508-PDF.pdf](https://www.ncd.gov/sites/default/files/Documents/NCD_School-to-PrisonReport_508-PDF.pdf). This report highlights an excerpt from a legal pamphlet designed for school districts: "Schools have free use of up to 10 school days of short-term removals per school year without IDEA implications. The days can be used in any combination, quickly or slowly, although caution would warrant using the 10 'free' days judiciously over the school year, and avoiding multiple suspension days if at all possible."

This characterization may discourage school personnel from considering whether behavioral supports are needed to address or improve patterns of behavior that impede learning before, during, or after short-term disciplinary removals are implemented. The Department reminds SEAs and LEAs that, under IDEA, IEP Teams have an obligation to develop appropriate IEPs based on the individual needs of each child. Teachers must also be fully informed about their specific responsibilities related to implementation of the child's IEP, including the specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP. 34 CFR §300.323(d).

Further, IDEA requires States and LEAs to ensure that all personnel necessary to carry out the purposes of Part B of IDEA are appropriately and adequately prepared and trained. 34 CFR §§300.156 and 300.207. This responsibility would include appropriately training teachers and other school personnel to provide required behavioral supports to children with disabilities. Therefore, a failure to provide appropriate behavioral supports (because they are not offered or because teachers and other staff are not adequately trained to implement such supports) that results in the child not receiving a meaningful educational benefit may constitute a denial of FAPE.

#### *Use of Exclusionary Disciplinary Measures*

Schools should take care when implementing exclusionary disciplinary measures that significantly interfere with a child's instruction and participation in other school activities. In some schools, staff are properly trained to implement and document measures such as the use of study carrels, time outs, and restrictions in privileges, in a manner consistent with a child's right to FAPE.<sup>27</sup> However, in other schools, staff may not be properly trained in the appropriate use of these measures; consequently, their improper use of these measures could rise to the level of a disciplinary removal. These exclusionary disciplinary measures also could include:

- A pattern of office referrals, extended time excluded from instruction (e.g., time out), or extended restrictions in privileges;
- Repeatedly sending children out of school on "administrative leave" or a "day off" or other method of sending the child home from school;
- Repeatedly sending children out of school with a condition for return, such as a risk assessment or psychological evaluation; or
- Regularly requiring children to leave the school early and miss instructional time (e.g., via shortened school days).<sup>28</sup>

<sup>27</sup> The Department has previously stated that the use of measures such as study carrels, time outs, or other restrictions in privileges is permissible so long as such measures are not inconsistent with a student's IEP (OSEP Memorandum to Chief State School Officers, Questions and Answers on Disciplining Students with Disabilities, April 1995).

<sup>28</sup> We have deliberately omitted from this list of examples any reference to referrals to law enforcement authorities due to our recommendation to schools, described in the Department's *Guiding Principles: A Resource Guide for Improving School Climate and Discipline*, that school resource officers not be involved in routine disciplinary matters. The Guiding Principles can be found at [www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf](http://www2.ed.gov/policy/gen/guid/school-discipline/guiding-principles.pdf)

In general, the Department does not consider the use of exclusionary disciplinary measures to be disciplinary removals from the current placement for purposes of 34 CFR §300.530, so long as children with disabilities are afforded the opportunity to continue to be involved in and make progress in the general education curriculum, receive the instruction and services specified on their IEPs, and participate with nondisabled children to the extent they would have in their current placement.<sup>29</sup> It is likely that the exclusionary disciplinary measures listed above, if implemented repeatedly, would constitute a disciplinary removal from the current placement. For example, when school personnel regularly require a child with a disability to leave school early and miss instructional time due to their behavior, it is likely that the child's opportunity to be involved in and make progress in the general education curriculum has been significantly impeded; in such circumstances, sending the child home early would constitute a disciplinary removal from the current placement. To the extent that schools implement exclusionary disciplinary measures in a manner tantamount to a suspension – or other removal from the removals,<sup>30</sup> and act within the authority of school personnel provided under 34 CFR §300.530.

Further, as we noted earlier, the use of exclusionary disciplinary measures may indicate that a child's IEP, or the implementation of the IEP, does not appropriately address his or her behavioral needs. To ensure that each child receives a meaningful educational benefit, IEP Teams must consider the need for positive behavioral interventions and supports for children with disabilities whose behavior impedes their learning or that of others, and, when determined necessary to ensure FAPE, include or revise needed behavioral supports in the child's IEP. Such behavioral supports also may include supports for school personnel, so that teaching staff are trained in best uses of such behavioral supports.

<sup>29</sup> The Department would apply the same analysis to the use of exclusionary discipline measures that apply to in-school suspensions, for purposes of 34 CFR §300.530. In the Preamble to the August 14, 2006 final Part B regulations, the Department explained: "It has been the Department's long term policy that an in-school suspension would not be considered a part of the days of suspension addressed in 34 CFR §300.530 as long as the child is afforded the opportunity to continue to appropriately participate in the general curriculum, continue to receive the services specified on the child's IEP, and continue to participate with nondisabled children to the extent they would have in their current placement. This continues to be our policy." The explanation concludes by indicating that whether an in-school suspension would constitute a day of suspension would depend on the unique facts and circumstances of each case. 71 Fed. Reg. 46715 (Aug. 14, 2006).

<sup>30</sup> IDEA mandates that States provide data each year to the Secretary of Education and the public on the use of long-term suspensions and expulsions (20 U.S.C. §1418(a)(1)(A)(v)(III)) and on the incidence and duration of disciplinary actions, including suspensions of one day or more, by race, ethnicity, limited English proficiency status, gender, and disability category (20 U.S.C. §1418(a)(1)(D)). Further, States are required to collect and examine data to determine whether significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State with respect to the incidence, duration, and type of disciplinary actions, including suspension and expulsions (34 CFR §300.646(d)(1)(C)), and whether significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities among LEAs in the State or compared to the rates for nondisabled children within LEAs (34 CFR §300.170).

## **V. Conclusion**

Children with disabilities are at a greater risk of disciplinary removals that significantly interrupt their learning, often unnecessarily. These risks are increased for children of color with disabilities. In many cases, we have reason to believe these removals are due to minor instances of misbehavior that are unrelated to issues of child or school safety, and can and should be addressed through supports and guidance.<sup>31</sup>

When behavioral supports are not provided and, as a result, a child with a disability is repeatedly removed from his or her current placement through suspensions for behavior that impedes his or her learning or that of others, a number of options are available to assist parents in challenging the appropriateness of their child's IEP. First, as noted earlier, parents have the right to request an IEP Team meeting at any time, and public agencies generally must grant a reasonable parental request for an IEP Team meeting. Parents may be particularly interested in making such a request following changes in the child's behavior that result in disciplinary removals. Further, parents, individuals, and organizations may also pursue child-specific or systemic remedies through the State complaint procedures outlined below.

When conditions persist and a denial of FAPE is suspected, a parent or a public agency may file a due process complaint to request a due process hearing on any matter relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to the child. 34 CFR §300.507(a). If the dispute cannot be resolved through the resolution process, the parent or public agency must have an opportunity for an impartial due process hearing. 34 CFR §§300.511(a), 300.512, 300.513 and 300.515.

A second important method for resolving disputes available under IDEA is the mediation process described in 34 CFR §300.506. The mediation process, which must be voluntary, offers a less formal opportunity for parents and public agencies to resolve disputes about any matter, including disciplinary removals, under 34 CFR part 300, including matters arising prior to the filing of a due process complaint. 34 CFR §300.506(a).

Lastly, States are also required to establish and implement their own State complaint procedures, separate from their due process procedures, for resolving any complaint that meets the requirements of 34 CFR §300.153. 34 CFR §300.151(a)(1). Any organization or individual, including one from another State, may file a signed written State complaint alleging that a public agency has violated a requirement of either Part B of the Act or the Part B regulations.

Additional information regarding dispute resolution is available at:

- Questions and Answers on IDEA Part B Dispute Resolution Procedures, revised July 2013 (OSEP Memo 13-08) ([http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acccombinedosersdisputeresolutionqa\\_finalmemo-7-23-13.pdf](http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acccombinedosersdisputeresolutionqa_finalmemo-7-23-13.pdf)); and

<sup>31</sup> Skiba, R. J., Chung, C. G., Trachok, M., Baker, T., Sheya, A., Hughes, R. L. (2014). Parsing disciplinary disproportionality: Contributions of infraction, student, and school characteristics to out-of-school suspension and expulsion. *American Educational Research Journal*, 51, 640-670.

**Michigan Protection & Advocacy Service, Inc.**

- Dear Colleague Letter on a public agency's Use of Due Process Procedures After a Parent Has Filed a State Complaint, April 2015  
(<https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/dcl04152015disputeresolution2q2015.pdf>)

The Office of Special Education and Rehabilitative Services (OSERS) is committed to ensuring that children with disabilities have access to learning environments that are safe, supportive, and conducive to learning. In such learning environments, educators have the skills and tools to prevent disciplinary incidents before they happen, use effective behavioral supports, teach behavioral expectations, and implement other behavioral management strategies. In many schools, effective behavioral supports have been implemented within a multi-tiered behavioral framework to organize school efforts to support children with disabilities and their peers. In this way, schools facilitate the provision of FAPE by providing children with disabilities with the behavioral supports they need to prevent, or bring an end to, disciplinary approaches that may unduly interfere with instruction and the implementation of IEPs. Further, this focus on prevention helps to ensure that educators receive the training, coaching, and other supports they need to help children with disabilities, and their peers, to focus on learning and succeed in school.

To better develop and implement appropriate IEPs for children whose behavior impedes the child's learning or that of others, and to ensure that behavioral supports are available throughout the continuum of placements, including in the regular education setting, OSERS has enclosed with this letter two technical assistance documents that we first released in November 2015 as part of the 40th Anniversary of IDEA:

1) Supporting and Responding to Behavior: Evidence-Based Classroom Strategies for Teachers:  
<https://www.osepideasthatwork.org/evidencebasedclassroomstrategies>

2) Positive Behavioral Interventions and Supports: Implementation Blueprint and Self-Assessment:  
<http://www.pbis.org/blueprint/implementation-blueprint>

These two documents provide additional information on evidenced-based classroom strategies to support and respond to behavior and on organizing practices in an integrated manner in a multi-tiered system of support.

If you have any questions or comments, please contact the Office of Special Education Programs Education Program Specialist, Lisa Pagano at 202-245-7413 or [Lisa.Pagano@ed.gov](mailto:Lisa.Pagano@ed.gov).

Thank you for your support and your continued interest in improving education access and opportunity for children with disabilities.

Sincerely,

/s/

Sue Swenson  
Acting Assistant Secretary  
Special Education and Rehabilitative Services  
Programs

/s/

Ruth E. Ryder  
Acting Director  
Office of Special Education

## Appendix 11-3

### Resources on Positive Behavioral Interventions and Supports

- Supporting and Responding to Behavior: Evidence-Based Classroom Strategies for Teachers, <https://www.osepideasthatwork.org/evidencebasedclassroomstrategies>
- Positive Behavioral Interventions and Supports: Implementation Blueprint and Self-Assessment, <http://www.pbis.org/blueprint/implementation-blueprint>
- Michigan Department of Education, Positive Behavior Intervention and Supports, [http://www.michigan.gov/mde/0,4615,7-140-74638\\_72831\\_72833-361319--,00.html](http://www.michigan.gov/mde/0,4615,7-140-74638_72831_72833-361319--,00.html)
- Michigan Integrated Behavior and Learning Support Initiative, <https://miblsi.org>
- AASA/Children's Defense Fund, Positive Behavioral Interventions and Supports: An Introduction, <http://www.childrensdefense.org/library/data/positive-behavioral-supports-1.pdf>

# **Chapter 12**

## **SECTION 504**

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### **What This Chapter Is About**

Services, supports, and accommodations are also available to students under Section 504 of the Rehabilitation Act. There are specific steps involved in obtaining services under Section 504. First, identify the school's 504 coordinator and turn in a written request for evaluations. A team will be convened to determine if the student qualifies as a student with a disability under Section 504, and, if so, a Section 504 Plan may be written. The 504 Plan must include accommodations, including special education and related services, if necessary, to meet the individual needs of the student. Services and supports must be provided in the least restrictive environment. Section 504 also provides the student with some due process protections in discipline. Each school must set up a process for addressing disputes, including a mechanism for a parent to have access to an impartial hearing. Parents can also address Section 504 violations directly with the United States Department of Education, Office for Civil Rights, rather than the district's internal dispute resolution process.

Section 504 can be helpful in serving students who do not qualify for special education, and can also be used to provide supports and accommodations while students are being evaluated for special education. Section 504 also provides protections that may be used to enhance the rights of students who do qualify for special education.

### **Advocacy Hints in Chapter 12**

- ◆ Look beyond special education programs to see if your school district receives federal funds, giving it responsibility under Section 504 (Page 2).
- ◆ Look to both Section 504 and special education if your child is having problems (Page 3).
- ◆ Since special education students are also covered under Section 504, they receive extra protections (such as requiring an evaluation before a change in placement) (Page 3).
- ◆ Use Section 504 to cover students who need only a plan of individualized supports and accommodations to fully access all school programs and activities (Page 4).
- ◆ Use the special education eligibility evaluation process, including the REED, to also evaluate for eligibility under Section 504 (Page 5).
- ◆ Include Section 504 accommodations in your child's IEP (Page 6).
- ◆ Put your child's 504 Plan in writing to avoid later disagreements (Page 7).
- ◆ Use Section 504 dispute resolution to address issues that cannot be addressed under the IDEA (Page 8).

## Section 504

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination against people with disabilities in any program that receives federal financial assistance. Section 504 states:

No otherwise qualified individual with a disability in the United States...shall, solely by reason of his disability, be excluded from participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance... **29 USC 794.**

► **Advocacy Hint: Any federal program will do.** The issue of federal financial assistance means participation in any federally sponsored program. This includes such things as federal food and nutrition programs (school lunch program), financial aid to students, and the use of federal grants for building or training, in addition to federal funding for special education.

The Rehabilitation Act requires any agency that receives federal money to provide an opportunity for people with disabilities to participate and benefit from the programs they offer. Agencies like schools that receive federal money must provide reasonable accommodations and other services for students with disabilities, as defined by the Rehabilitation Act, so that those students can participate in, and benefit from general education and extracurricular programs and services. Students with disabilities should also have the opportunity to participate with non-disabled students (to the maximum extent appropriate for the student with disabilities) in nonacademic settings, such as recess and lunch.

## Eligibility under Section 504

The definition of a person with a disability is broader under Section 504 than under The Individuals with Disabilities Act (IDEA). IDEA applies only to students with specified impairments who require special programs and services to benefit from education. **34 CFR 300.8.** Section 504 provides a general definition of a person with a disability as any person who:

- a) has a physical or mental impairment that substantially limits one or more major life activity;
- b) has a record of such an impairment; or
- c) is regarded as having such an impairment. **34 CFR 104.3(j).**

A person can have a disability and be entitled to the civil rights protections of Section 504 without being eligible for special education. Some conditions that have been found to be protected under Section 504, even if a child does not need special education include AIDS, ADHD, diabetes, dyslexia, mental illness, allergies (such as nut allergies) and seizure disorders. (In some cases, of course, those conditions may also meet IDEA criteria. For example, a student with ADHD might be characterized as "Other Health Impaired" and thus eligible for special education.) Also, "an impairment that is episodic or in remission is a disability if it would substantially limit a major life

activity when active." **42 USC 12102(4)(D)**. This may be particularly helpful in addressing some mental health disorders which produce symptoms that vary in severity over time.

Section 504 requires the school to conduct an evaluation, prior to taking any action that is related to the placement of the student --or a change of the student's placement-- in regular or special education. The evaluation requirements under Section 504 are far less specific than those used to qualify a child under IDEA, allowing school districts to establish their own standards and procedures for evaluation. The law does provide some guidance about evaluation procedures, however. Districts must ensure that the tests are valid and administered correctly. They may not rely on a single general intelligence test, and must ensure that the tests are designed to accurately measure whatever information the test is intended to capture. In both evaluating the student and making decisions about placement, the district is required to use information from a variety of sources, and make sure that the evaluation procedures include a process for documenting and carefully considering the information. Finally, the determinations made under Section 504 must be made by a group of people who know the child.

► **Advocacy Hint: Consider both special education and Section 504.** A parent whose child is experiencing significant problems in school may submit a written request that the district evaluate the child both under the IDEA and Section 504. Students who do not qualify for special education, but do need services, supports, and/or accommodations to address their disability-related needs, may find a Section 504 Plan provides adequate support. By considering both Section 504 and the IDEA from the outset, the student may benefit from the introduction of supports under a Section 504 Plan while further evaluations to determine eligibility under IDEA are conducted.

Some students are eligible as a student with a disability under the Rehabilitation Act definitions, but do not qualify for special education under the standards of IDEA and the Michigan Special Education Rules. Like the IDEA, Section 504 requires the school to provide a Free and Appropriate Public Education, which may include both regular or special education services, and related aids and services for these students, in addition to students that qualify for special education.

► **Advocacy Hint: All IDEA children are 504 children too.** Virtually all students who qualify for special education will also meet the definition of "disabled" in the Rehabilitation Act. The interplay between these two Acts provides significant protections for students, and some thought should be given to the similarities and the differences between the two acts, especially when eligibility under both acts provides extra protection. For example, while IDEA does not require an evaluation before a significant change in placement, Section 504 does. Because a special education student is almost certainly eligible under both Acts, this means that the student must be evaluated before a significant change in placement—even though IDEA does not require this. The parent will likely need to bring this up, however, since the staff charged with oversight of the IDEA may not be familiar with the rights conferred under Section 504.

► **Advocacy Hint: 504 may be just right.** There are several reasons why a student with a disability might not qualify for special education. Because special education eligibility is tied to specific categories which describe how a student may qualify, the standard for eligibility differs from that of Section 504. Section 504 is different from IDEA, but it is neither better nor worse than IDEA. If a student does not require anything more than the supports and accommodations that a Section 504 plan can provide, there is no reason to insist that the student must have an Individualized Education Program (IEP). For example, a student with diabetes may only need a Section 504 plan to ensure that blood sugars are well controlled, in order to have equal access to all school programs and activities, including physical education and field trips. If the Section 504 Plan is sufficient to meet those needs, Section 504 may be the most appropriate avenue of support.

The determination regarding whether a person has a disability varies, depending on what federal and/or state law applies to the specific set of circumstances. So, for example, different definitions of "disability" are used for Social Security determinations than are used for Special Education eligibility; similarly, eligibility under Section 504 differs from that under the IDEA. For more information about eligibility, see Chapter 3, "Referral and Eligibility."

## **How to Apply for and Get Section 504 Services**

Federal law requires that the school take appropriate measures to identify and locate every qualified person who has a disability and is not receiving an appropriate public education. **34 CFR 104.32(a); 34 CFR 300.111.**

### **1. If possible, identify the Section 504 Coordinator.**

The first step in the process of determining whether a student qualifies for 504 is to find the person on the school staff who is responsible for the 504 process. This person is responsible for assuring that the district complies with Section 504, and must provide a grievance procedure for parents and students. In general, school staff may be less familiar with Section 504 processes and personnel than they are with the special education process. In some school districts there will be a 504 coordinator at the district level. Some districts have building staff assigned to act as 504 Coordinators. Occasionally the 504 coordinator will also be the special education director. Call your local school district's administrative offices to locate this person and to request a copy of your school district's 504 policy, which may also be available on the school's website. If you are unable to identify the Section 504 Coordinator, notify the building administrator and superintendent (in writing) of your difficulties, and ask them about how to proceed.

### **2. Request Necessary Evaluations.**

Federal law requires that evaluation and placement procedures be adopted to insure that appropriate identification and placement are made. **34 CFR 104.35(b); 34 CFR 300.301-300.306.**

The school must develop some process to determine whether the student is a person with a disability under the Rehabilitation Act. This can be the same evaluation used in the special

education process or may follow some other process which meets the requirements for evaluation outlined in Section 504. **34 CFR 104.35**.

► **Advocacy Hint: Use the IDEA evaluation process for 504 information.** The evaluation process used to determine eligibility for special education can be part of a determination of eligibility under Section 504. A written request for evaluations under both special education and Section 504 will prompt a review of existing evaluation data, often called a REED. The data already in the student's record (including the information brought in by the parent) may provide enough information to determine eligibility under Section 504, as well as to identify some basic support needs. Then the additional information that is gathered through special education evaluations can provide further information about the need for special education and/or additional Section 504 accommodations, supports and services.

Periodic evaluations and meetings to update and adjust the student's plan are required. **34 CFR 104.35(d)**. Evaluation prior to a significant change in placement is also required by Section 504. **34 CFR 104.35(a)**.

### **3. Convene the 504 Team Meeting.**

The 504 Coordinator is responsible for setting up a meeting with a group of people who are knowledgeable about the student to determine the student's eligibility and develop the student's Section 504 plan, if one is needed. A student may be eligible as a person with a disability under Section 504, because he or she has a physical impairment that substantially limits one or more major life activities, but not need any supports, services or accommodations in order to have equal access to school. In that case, the group may determine that no plan is needed.

While IDEA ensures that parents are an integral part of every phase of the special education process, 504 does not require the attendance of the student's parent at the meeting. Good professional practice would, however, require the school to include the parent and the student as appropriate. Parents must, in any case, be notified of the process and have the right to a hearing if they disagree with the school on any issue related to eligibility or the plan.

### **4. Write the 504 Plan.**

Once eligibility has been determined, the school (with the parent) will look specifically at the kind of difficulty the student is having in school and at the best way to provide effective services, supports and accommodations. A Section 504 Plan must be individualized and must meet the student's needs as adequately as the needs of nondisabled peers are met. **34 CFR 104.33(b)**. Once the plan is written it must be followed by all the student's teachers and other school staff.

The plan must include regular and special education and related aids and services to ensure that a free appropriate public education is available to all students with disabilities regardless of the nature or severity of the disability. **34 CFR 104.33(a) and (c)**.

Because all public (and many private) schools in Michigan receive federal money, they must comply with Section 504. Subpart D of the Section 504 regulations (**34 CFR 104.31-104.39.**) gives the requirements for preschool, elementary, and secondary education.

► **Advocacy Hint: Include accommodations in the IEP.** In the process of complying with IDEA schools also comply with Section 504. The IEP team can include a list of appropriate accommodations in the student's IEP. This is usually included in the Supplementary Aids and Services section of the form, but can be recorded anywhere on the form.

## **Problem-Solving**

**Complaints:** The school district must have a procedure for investigating complaints. Complaints may be useful to address issues such as the school's failure to follow the plan, or the school's failure to provide the student with equal access to specific program or services. Parents and students are not limited to using the school's internal complaint process. The U.S. Department of Education, Office for Civil Rights (USDOE-OCR) is responsible for enforcing rights under the Rehabilitation Act. A complaint can be made to USDOE-OCR at any time by mail, fax machine, email or online. It is not necessary to have completed the school's internal complaint process before contacting USDOE-OCR. It is important to avoid delay in contacting USDOE-OCR, because they will only investigate problems which occurred within 180 days prior to filing the complaint. More information about the USDOE- OCR complaint process is available by going to <http://www.ed.gov/about/offices/list/ocr/complaintintro.html>. An online form that may be used in filing a complaint with USDOE- OCR is available at <http://www.ed.gov/about/offices/list/ocr/complaintintro.html>. A written complaint pertaining to a Michigan school which is submitted via mail should be sent to: USDOE-OCR, 1350 Euclid Ave., Suite 325, Cleveland, OH 44115.

**Hearings:** School districts must provide an impartial hearing process for disputes related to the identification, evaluation, and placement of a student. The school district is responsible for the selection of a hearing officer. In similar processes, ensuring impartiality has meant the person in charge of the process is not employed by or under contract with the district in any capacity.

**Procedural Safeguards:** Federal law requires that the school district must have procedural safeguards in place when there is a dispute between parents and the school. Those safeguards include the parent's right to notice, an opportunity to examine relevant records, the right to be represented by an attorney, and a review procedure. The law also allows parents and guardians an opportunity to influence and contest decisions regarding evaluation and placement by taking the dispute to federal court. **34 CFR 104.36.**

► **Advocacy Hint: Get a written 504 plan.** Occasionally a school district will claim to be providing accommodation for a student with disabilities, and may in fact be doing so, without going through a determination of eligibility and the development of a plan. While there is nothing in Section 504 that requires written notice, and this informal approach sometimes works well, there are several disadvantages to such an approach:

- ◆ It is difficult to ensure that all school staff understand and consistently implement a plan, if it is not written.
- ◆ Parents and the student may not have any effective way of communicating information about the specific accommodations that the student needs to staff who will work with the child in the future.
- ◆ Without a determination that the student is a disabled person — and, is therefore entitled to protections and accommodations under the Rehabilitation Act — the student maybe denied due process protections.
- ◆ If the school inconsistently provides the accommodations, or refuses to provide specific accommodations or services, there is no right to a hearing or to file complaints unless the student has been formally identified as qualified under Section 504 and the plan is in writing.

## Similarities to IDEA

There are several similarities between Section 504 and IDEA. Both laws require:

- ◆ that students with disabilities be educated with students who do not have disabilities to the maximum extent appropriate to the needs of students who have disabilities, **34 CFR 104.34(a); 34 CFR 300.114;**
- ◆ that the school provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford students with disabilities an equal opportunity for participation in those services and activities. These services may include counseling, athletics, transportation, health services, recreational activities, special interest groups or clubs, referrals to agencies that provide assistance, employment of students by the school and assistance in making outside employment available, **34 CFR 104.37(a)(1),(2); 34 CFR 300.117.**
- ◆ that the school provide supplementary aids and services necessary to enable a student to participate in and benefit from regular education, **34 CFR 104.34(a); 34 CFR 300.42.**

## Differences between Section 504 and IDEA

Section 504 provides some rights not specifically given in IDEA. For example, program accessibility, discrimination, and retaliation are not specifically addressed by IDEA, but can be addressed under Section 504.

**Section 504 requires that programs that receive federal money must be readily accessible to people — including parents — with disabilities.** One part of program accessibility requires public buildings to be barrier free. Section 504 gives specific time lines for conversion of buildings to barrier-free status and includes specific standards for building accommodations. (The Americans with Disabilities Act (ADA) may establish parallel requirements for all public and nonsectarian private schools.)

**Section 504 prohibits discrimination based on disability.** Schools are required to provide students with disabilities opportunities to participate in and benefit from programs that are equal to those afforded students who do not have disabilities. This broad language may go beyond the "appropriate" standard of the IDEA. **34 CFR 104.4.**

**Section 504 also prohibits retaliation.** For example, if a person has engaged in a protected activity, such as filing a complaint against the school, and the school then takes actions intended to intimidate, threaten, coerce, or otherwise retaliate against the parent because of the complaint, Section 504 provides an avenue to address that illegal action. **34 CFR 104.61.** The Office for Civil Rights issued a "Dear Colleague" letter (April 24, 2013) affirming the rights of individuals to be free from the fear of retaliation, stating, "Discriminatory practices are often only raised and remedied when students, parents, teachers, coaches, and others can report such practices to school administrators without the fear of retaliation. Individuals should be commended when they raise concerns about compliance with the Federal civil rights laws, not punished for doing so." The letter goes on to address steps USDOE-OCR may take, if they find retaliation has occurred. Those steps include both remediating the injury to the individual who was the subject of retaliation, and ensuring that retaliatory actions do not occur in the future.

► **Advocacy Hint:** Use the protections available under Section 504 to address discrimination or retaliation when it involves students with disabilities. The United States Department of Education, Office for Civil Rights is responsible for enforcing these rights, whether the student with a disability is eligible under Section 504 or the IDEA.

**Section 504 does not provide for a school-funded independent educational evaluation (IEE).**

**Section 504 does not explicitly provide for stay put when a hearing request is filed,** although the Office for Civil Rights has issued guidance suggesting that there is an implied right to stay put: "To say that a school district can go ahead and implement a change of placement, even though the parent has a right to challenge the change, seems to undermine the rights given by due process. Thus, OCR believes that a fair due process system would encompass the school district waiting for the results of the process before making the change." (Letter to Zirkel, May 15, 1995.)

**Section 504 does not include a right to post-expulsion FAPE during long term disciplinary removal.**

## Appendix 12-1

### **Section 504 Regulations Related to Education for Children with Disabilities**

#### **Subpart D -- Preschool, Elementary, and Secondary Education**

##### **104.31 Application of this subpart.**

Subpart D applies to preschool, elementary, secondary, and adult education programs or activities that receive Federal financial assistance and to recipients that operate, or that receive Federal financial assistance for the operation of, such programs or activities.

##### **104.32 Location and notification.**

A recipient that operates a public elementary or secondary education program or activity shall annually:

- A. Undertake to identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education; and
- B. Take appropriate steps to notify handicapped persons and their parents or guardians of the recipient's duty under this subpart.

##### **104.33 Free appropriate public education.**

A. *General* A recipient that operates a public elementary or secondary education program or activity shall provide a free appropriate public education to each qualified handicapped person who is in the recipient's jurisdiction, regardless of the nature or severity of the person's handicap.

B. *Appropriate education*

- 1) For the purpose of this subpart, the provision of an appropriate education is the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements of 104.34, 104.35, and 104.36.
- 2) Implementation of an Individualized Education Program developed in accordance with the Education of the Handicapped Act is one means of meeting the standard established in paragraph (b)(1)(i) of this section.
- 3) A recipient may place a handicapped person or refer such a person for aid, benefits, or services other than those that it operates or provides as its means of carrying out the requirements of this subpart. If so, the recipient remains responsible for ensuring that the requirements of this subpart are met with respect to any handicapped person so placed or referred.

C. *Free education*

- 1) *General* For the purpose of this section, the provision of a free education is the provision of educational and related services without cost to the handicapped person or to his or her parents or guardian, except for those fees that are imposed on non-handicapped persons or their parents or guardian. It may consist either of the provision of free services or, if a recipient places a handicapped person or refers such person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, of payment for the costs of the aid, benefits, or services. Funds available from any public or private agency may be used to meet the requirements of this subpart. Nothing in this section shall be construed to relieve an insurer or similar third party from an otherwise valid obligation to provide or pay for services provided to a handicapped person.
- 2) *Transportation* If a recipient places a handicapped person or refers such person for aid, benefits, or services not operated or provided by the recipient as its means of carrying out the requirements of this subpart, the recipient shall ensure that adequate transportation to and from the aid, benefits, or services is provided at no greater cost than would be incurred by the person or his or her parents or guardian if the person were placed in the aid, benefits, or services operated by the recipient.
- 3) *Residential placement* If a public or private residential placement is necessary to provide a free appropriate public education to a handicapped person because of his or her handicap, the placement, including non-medical care and room and board, shall be provided at no cost to the person or his or her parents or guardian.
- 4) *Placement of handicapped persons by parents* If a recipient has made available, in conformance with the requirements of this section and 104.34, a free appropriate public education to a handicapped person and the person's parents or guardian choose to place the person in a private school, the recipient is not required to pay for the person's education in the private school. Disagreements between a parent or guardian and a recipient regarding whether the recipient has made a free appropriate public education available or otherwise regarding the question of financial responsibility are subject to the due process procedures of 104.36.

D. *Compliance* A recipient may not exclude any qualified handicapped person from a public elementary or secondary education after the effective date of this part. A recipient that is not, on the effective date of this regulation, in full compliance with the other requirements of the preceding paragraphs of this section shall meet such requirements at the earliest practicable time and in no event later than September 1, 1978.

**104.34 Educational setting.**

- A. *Academic setting* A recipient to which this subpart applies shall educate, or shall provide for the education of, each qualified handicapped person in its jurisdiction with persons who are not handicapped to the maximum extent appropriate to the needs of the handicapped person. A recipient shall place a handicapped person in the regular educational environment operated by the recipient unless it is demonstrated by the recipient that the

education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily. Whenever a recipient places a person in a setting other than the regular educational environment pursuant to this paragraph, it shall take into account the proximity of the alternate setting to the person's home.

- B. *Nonacademic settings* In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in 104.37(a)(2), a recipient shall ensure that handicapped persons participate with non-handicapped persons in such activities and services to the maximum extent appropriate to the needs of the handicapped person in question.
- C. *Comparable facilities* If a recipient, in compliance with paragraph (A) of this section, operates a facility that is identifiable as being for handicapped persons, the recipient shall ensure that the facility and the services and activities provided therein are comparable to the other facilities, services, and activities of the recipient.

**104.35 Evaluation and placement.**

- A. *Pre-placement evaluation* A recipient that operates a public elementary or secondary education program or activity shall conduct an evaluation in accordance with the requirements of paragraph (B) of this section of any person who, because of handicap, needs or is believed to need special education or related services before taking any action with respect to the initial placement of the person in regular or special education and any subsequent significant change in placement.
- B. *Evaluation procedures* A recipient to which this subpart applies shall establish standards and procedures for the evaluation and placement of persons who, because of handicap, need or are believed to need special education or related services which ensure that:
  - 1) Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;
  - 2) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and
  - 3) Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure).

C. *Placement procedures* In interpreting evaluation data and in making placement decisions, a recipient shall:

- 1) draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior,
- 2) establish procedures to ensure that information obtained from all such sources is documented and carefully considered,
- 3) ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options, and
- 4) ensure that the placement decision is made in conformity with 104.34.

D. *Reevaluation* A recipient to which this section applies shall establish procedures, in accordance with paragraph (B) of this section, for periodic reevaluation of students who have been provided special education and related services. A reevaluation procedure consistent with the Education for the Handicapped Act is one means of meeting this requirement.

#### **104.36 Procedural safeguards.**

A recipient that operates a public elementary or secondary education program or activity shall establish and implement, with respect to actions regarding the identification, evaluation, or educational placement of persons who, because of handicap, need or are believed to need special instruction or related services, a system of procedural safeguards that includes notice, an opportunity for the parents or guardian of the person to examine relevant records, an impartial hearing with opportunity for participation by the person's parents or guardian and representation by counsel, and a review procedure. Compliance with the procedural safeguards of section 615 of the Education of the Handicapped Act is one means of meeting this requirement.

#### **104.37 Nonacademic services.**

##### **A. General**

- 1) A recipient to which this subpart applies shall provide non-academic and extracurricular services and activities in such manner as is necessary to afford handicapped students an equal opportunity for participation in such services and activities.
- 2) Nonacademic and extracurricular services and activities may include counseling services, physical recreational athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the recipients, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the recipient and assistance in making available outside employment.

B. *Counseling services* A recipient to which this subpart applies that provides personal, academic or vocational counseling, guidance, or placement services to its students shall

provide these services without discrimination on the basis of handicap. The recipient shall ensure that qualified handicapped students are not counseled toward more restrictive career objectives than are non-handicapped students with similar interests and abilities.

**C. Physical education and athletics**

- 1) In providing physical education courses and athletics and similar aid, benefits, or services to any of its students, a recipient to which this subpart applies may not discriminate on the basis of handicap. A recipient that offers physical education courses or that operates or sponsors interscholastic, club, or intramural athletics shall provide to qualified handicapped students an equal opportunity for participation.
- 2) A recipient may offer to handicapped students physical education and athletic activities that are separate or different from those offered to non-handicapped students only if separation or differentiation is consistent with the requirements of 104.34 and only if no qualified handicapped student is denied the opportunity to compete for teams or to participate in courses that are not separate or different.

**104.38 Preschool and adult education.**

A recipient to which this subpart applies that provides preschool education or day care or adult education may not, on the basis of handicap, exclude qualified handicapped persons and shall take into account the needs of such persons in determining the aid, benefits, or services to be provided.

**104.39 Private education.**

- A. A recipient that provides private elementary or secondary education may not, on the basis of handicap, exclude a qualified handicapped person if the person can, with minor adjustments, be provided an appropriate education, as defined in 104.33(b)(1), within that recipients program or activity.
- B. A recipient to which this section applies may not charge more for the provision of an appropriate education to handicapped persons than to non-handicapped persons except to the extent that any additional charge is justified by a substantial increase in cost to the recipient.
- C. A recipient to which this section applies that provides special education shall do so in accordance with the provisions of 104.35 and 104.36. Each recipient to which this section applies is subject to the provisions of 104.34, 104.37, and 104.38.

## Appendix 12-2

### Frequently Asked Questions about Section 504 and Education

(Reprinted from <http://www.ed.gov/about/offices/list/ocr/qa-disability.html>, U.S. Department of Education, Office for Civil Rights, last visited 8/7/12.)

#### **How do Section 504 and Title II differ?**

The main difference between the two laws is that one applies to the recipients of grants from the federal government (Section 504) and the other applies only to public entities (Title II). A school or college may be both a recipient of Federal funds from the US Department of Education and also a public entity. In such cases, the institution is covered by both laws.

#### **Are all school districts, colleges, and universities covered by these laws?**

Virtually all public school districts are covered by Section 504 because they receive some federal financial assistance. Public colleges and universities generally receive federal financial assistance, and most private colleges and universities receive such assistance. There are some private colleges that do not receive any federal assistance, and Section 504 does not apply to them. Title II applies only to public institutions.

#### **Are all programs in a school or college covered if it receives federal financial assistance?**

Generally, all programs in a school or college are covered if the school or college receives federal financial assistance or is a public entity.

#### **Do these laws cover just students?**

No. The laws protect all participants in the program from discrimination, including parents, students, and employees.

#### **Do these laws cover just education programs?**

No. They cover all programs of a school or college, including academics, extracurricular, and athletics. Also, the laws apply to the activities of a school or college that occur off campus.

#### **Do all buildings have to be made physically accessible?**

No, not necessarily. While buildings constructed after the Section 504 regulation was issued (that is, those built since 1977) must be fully accessible, older buildings do not have to be made fully accessible. For older buildings, the law requires that the program or activity be made accessible. A common way this is done is to relocate the program to another building that is accessible.

#### **What types of adjustments are required for students with disabilities in colleges and universities?**

Colleges and universities are required to provide students with appropriate academic adjustments and auxiliary aids and services that are necessary to afford an individual with a disability an equal opportunity to participate in the school's program. Examples of auxiliary aids that may be required are taped texts, note-takers, interpreters, readers, and specialized computer equipment.

Colleges and universities are not required to supply students with attendants, individually prescribed devices such as hearing aids and wheelchairs, readers for personal use or study, or other devices or services of a personal nature.

**What types of services are required for students with disabilities in elementary and secondary schools?**

School districts are required to provide a free appropriate education to students with disabilities based on their individualized educational needs. The services may include special education and related aids and services such as physical therapy, as well as modifications to the regular education program including adjustments in test taking procedures and adjustments to rules regarding absences when a student's absences are due to a disability.

**Does OCR enforce laws that prohibit harassment of students or others because of a disability?**

Yes. Both Section 504 and Title II of the Americans with Disabilities Act make it unlawful to harass people in covered entities because of their disabilities. OCR and the Office of Special Education and Rehabilitation Services have jointly issued guidance to school districts regarding harassment based on disability.

# **Chapter 13**

## **PROTECTION AGAINST DISABILITY-BASED HARASSMENT, SECLUSION, AND RESTRAINT**

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### **What this Chapter is About**

This chapter explains the rights of students with disabilities facing harassment because of their disabilities by peers or staff in school. It outlines the steps to take to address the problem and what to do if the school district fails to act.

### **Advocacy Hints for Chapter 13**

- ◆ Keep written records about any incidents, including date, time, and any other students or staff involved (Page 4).
- ◆ Send your letters to all of the people in charge -- the school principal, the Special Education Director, the Superintendent of Schools and the Director of the Intermediate School District (Page 4).
- ◆ If nothing is done or the steps taken are inadequate, draft a second letter outlining the need for immediate action and the school's failure to act and suggest that other legal strategies will be pursued if action is not taken immediately to end the harassment (Page 5).
- ◆ File an administrative complaint with the United States Department of Education Office for Civil Rights (OCR) under Section 504 of the Rehabilitation Act or with the Michigan Department of Education (Page 5).
- ◆ Use the Michigan Department of Education Policy on Bullying and your school's code of conduct to set a high standard of conduct for schools (Page 5).

### **Who is Responsible?**

Schools have to respond when a person is harassed because of race, gender, disability, or other discriminatory reasons. Schools can be sued, can be forced to act and can also be liable for damages if, after finding out that a person is being harassed, they do nothing. Parents, guardians, or students may also file administrative complaints under Federal laws. The harassment must be severe and pervasive, or must create a hostile environment, and it must hurt, limit or deny the student's ability to learn or benefit from school.

### **How Do I File a Complaint?**

To raise a harassment claim, a parent, guardian or student must tell a person with authority to address the problem about the situation in writing. The written notice must also provide a time frame for solving the problem. The written letter would serve as notice of the existence of a problem and the need for immediate action by school staff. If the district then fails to take sufficient steps to fix the problem, then the parent, guardian and/or student should follow up with another letter to officials in charge outlining their failure to act. These letters document a school's "deliberate indifference" to a harassment situation.

## What are the State of Michigan Policies?

Michigan has a policy on bullying that schools are encouraged to follow. In addition, many schools have their own codes of conduct prohibiting bullying. A parent, guardian, or student may also ask schools to follow these policies to help keep students with disabilities safe.

Michigan also has state laws restricting the use of seclusion and restraint to emergency situations posing an imminent danger of harm to self or others. The new laws ban certain types of seclusion and restraint and also bans the use of aversive interventions against students. Schools must notify parents, train staff, and report use.

## What the Law Says About Harassment

Title II of the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act (see Chapter 16) prohibit harassment based on disability. Similarly, Title VI of the 1964 Civil Rights Act and Title IX of the 1972 Education Amendments bar discrimination on the basis of race or gender in federally-funded programs. The principles guiding sexual and race harassment cases shed light on what steps must be taken to remedy harassment on the basis of disability (either by another student or a school official) and what legal strategies or action can be taken when the school district fails to address the violations.

Section 504 states that "no person in the United States shall, on the basis of disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance". Section 504 prohibits harassment that constitutes discrimination in any program or activity solely on the basis of disability if the school receives federal financial assistance.

## Anti-Discrimination Statutes

When does harassment of a student with a disability rise to the level of discrimination? The United States Supreme Court has found that Title IX prohibits both student on student and teacher on student harassment in public school districts. In **Davis v. Monroe County Board of Education, 526 U.S. 629 (1999)**, the mother of a fifth grade student alleged that the school board and school officials were deliberately indifferent to the sexual harassment her daughter was subjected to by a fifth grade classmate. The student and the mother complained to teachers and the principal about the sexual harassment occurring by the fellow student on school grounds. The Court concluded that a school district can be held liable for a private action for damages when the school district, after having received actual notice of the harassment, is deliberately indifferent to the harassment that is so severe, pervasive and objectively offensive that it can be said to deny the victims of the harassment "access to the educational opportunities or benefits provided by the school."

Similarly, in **Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998)**, the Court concluded that a school district could be held liable for a private suit for money damages when the school district has actual notice of a teacher's sexual harassment and the district's response to the discrimination amounted to deliberate indifference. The Court stated that the actual notice has to be provided to an official with authority to take corrective action to end the discrimination.

These cases have been applied to situations of harassment of a student with a disability by either another student or a teacher. **See, e.g., M.P. v. Indep. School District No. 1, 326 F.3d 975 (8<sup>th</sup> Cir. 2003); K.M. v. Hyde Park Central School Dist., 381 F. Supp. 2d 343 (S.D.N.Y. 2005); Biggs v. Board of Education, 229 F.Supp.2d 437 (D.Md. 2002).**

In Michigan, the federal courts have said that to prove discrimination based on harassment, the student must show the following:

1. the student was subjected to significant or serious harassment by a school employee or another student;
2. the school board had notice of the harassment, which can be by constructive notice (through its staff);
3. the school was deliberately indifferent to the harassment and therefore gave tacit approval to the harassment; and,
4. the indifference of the school board was the cause of the discrimination against the student with a disability.

**William ex rel. Hart v. Paint Valley Local School Dist., 400 F.3d 360, 369 (6<sup>th</sup> Cir. 2005).**

Deliberate indifference can be shown if the school's response was clearly unreasonable in light of the circumstances. For example, if the school takes some remedial action such as counseling a staff member, and that action is inadequate and ineffective in stopping the harassment, the school must use different methods to eliminate the harassment. **Vance v. Spencer Co. Public School Dist., 231 F.3d 253, 260-61 (6<sup>th</sup> Cir. 2000).** In contrast, a school district may not be deliberately indifferent if it investigates any incidents reported to its staff, provides increased supervision, and provides counseling to students on how to behave. **Soper v. Hoben, 195 F.3d 845, 855 (6<sup>th</sup> Cir. 1999).**

Parents may be able to take advantage of the federal prohibitions against harassment as well. The Supreme Court decided in Jackson v. Birmingham Bd. of Educ., that a coach was protected against retaliation after he complained of sex discrimination against students. **125 S.Ct. 1497 (2005)**. The court determined that Title IX prohibits retaliation for making such a complaint, even if the complainant is not the victim of the discrimination. Thus, parents who face retaliation because they complained about harassment of their child may also be protected under Title II of the ADA and Section 504.

## **Harassment and the 2004 IDEA Amendments**

In addition to protections under the ADA and Section 504, a student may be able to address harassment under Individuals with Disabilities Act (IDEA). Harassment may rise to the level of denying the student a free and appropriate public education (FAPE) that provides educational benefit to the student. Following the reasoning in Davis, indifference of staff to severe harassment could prevent the student from deriving benefit from the services he or she is being offered by the district. **See M.L. v. Federal Way School Dist., 394 F.3d 634, 650-51 (9<sup>th</sup> Cir. 2005).** (See Chapter 2 for a full description of FAPE.) To show a denial of FAPE, the student must establish that the harassment affected his or her ability to learn. If the harassment did not prevent a student from getting educational benefit, he or she has no claim under IDEA. **See, e.g., In re: Student with a Disability, 44 IDELR 86 (SEA WA 2005).** The student may also need to give the school an opportunity to prevent the harassment from continuing. Id. This is a factual question that will need to be proven by the student based on the actual effect of the harassment on him or her.

## How do I Address Disability-Based Harassment?

Schools are responsible only for stopping harassment that is “severe, pervasive, and persistent.” In addition, parents, guardians, or students with disabilities must give actual notice to someone with authority to stop the harassment.

**Advocacy Hint: You need records.** Keep written records about any incidents, including date, time, and any other students or staff involved. This information may be critical when you write your letters to the school.

**Severe, Pervasive, and Persistent:** Harassment depends on many factors, such as the ages of the harasser and victim, the number of people involved, the conduct of the harasser(s), how often harassment occurs and for how long, and where it occurs. Damages are not available for simple acts of teasing and name calling among students even when these comments might target differences in gender, race, or disability. The behavior has to be severe, pervasive, and objectively offensive.

**Actual Notice:** To make a harassment claim, actual notice must be given to someone with authority to take corrective action. It is not enough to say the school district should have known or that some employee in the building knew what was occurring. The notice of harassment must be provided to a school official with the authority to address it and to institute corrective measures on the school district’s behalf. We strongly encourage you to provide written notice to those officials.

**Advocacy Hint: Send your letters to ALL of the people in charge.** MPAS strongly urges parents and students to provide written notice to the school principal, the Special Education Director, the Superintendent of Schools and the Director of the Intermediate School District.

### Suggested content of first letter:

- ◆ Name of student and school.
- ◆ Description of the incident(s), including:
  - Where it took place.
  - Who was involved.
  - When it happened.
  - How long it has been going on.
- ◆ Request that action be taken by a specific date.

**School's Response to Notice:** Harassment can rise to the level of a complaint or lawsuit when the school district is deliberately indifferent to the harassment after having received actual notice. Deliberate indifference can be shown by 1) the school district officially deciding not to correct the problem or 2) only taking corrective measures that are ineffective and failing to take other effective measures to stop the harassment. The school district's ability to remedy a violation requires the harassment to occur in an arena where it has substantial control over the harasser, that is, on school grounds and during school hours.

**Advocacy Hint: Follow up.** If nothing is done or the steps taken are inadequate, draft a second letter outlining the school's failure to act and suggest that legal action will follow if something is not done immediately to end the harassment. This second letter not only gives the school additional notice to solve the problem, but also documents its failure to do so if that is the case.

## Policies on Bullying

On July 25, 2000, the U.S. Department of Civil Rights (OCR) and Office of Special Education and Rehabilitative Services (OSERS) issued a letter on disability harassment in schools. Applying Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act (ADA), the letter stated that harassing conduct engaged in by school staff or peers could amount to violation of rights when the harassing conduct is sufficiently severe, persistent, or pervasive enough to create a hostile environment thereby affecting the student's ability to participate in or benefit from educational programs or activities. The letter also warned that harassment on the basis of a student's disability could amount to a violation of IDEA if it decreases the student's ability to benefit from the educational program, resulting in the denial of FAPE. OCR and OSERS have since updated their letters. The OCR letter, dated 2014, builds on the OSERS guidance letter from 2013. It explains that bullying of students with a disability on any basis can similarly result in a denial of FAPE under Section 504. See appendix 13-1,13-2,13-3 for a copy of the OCR/OSERS letters.

**Advocacy Hint: Let OCR or the state investigate.** You can file an administrative complaint with the United States Department of Education Office of Civil Rights (OCR) under Section 504 of the Rehabilitation Act and the ADA to allege deliberate indifference to the harassment. You can also file a complaint with the Michigan Department of Education if you feel that the harassment is denying the student a free and appropriate public education under IDEA. (See Chapter 8.)

The Michigan State Board of Education has instituted a policy on bullying. Find it at:

[http://www.michigan.gov/documents/mde/SBE\\_Model\\_AntiBullying\\_Policy\\_Revised\\_9.8\\_172355\\_7.pdf](http://www.michigan.gov/documents/mde/SBE_Model_AntiBullying_Policy_Revised_9.8_172355_7.pdf).

Many schools have anti-harassment policies or anti-bullying policies in their codes of conduct. You should ask for these materials when considering any harassment claim, as the school's failure to follow its own policies may bolster such a claim.

► **Advocacy Hint: Set a high standard.** Use the Michigan Department of Education Policy on Bullying to set a high standard of conduct for schools. The school's own policy may also require the school to do more than it is doing.

## Seclusion, Restraint, and Aversive Interventions

In 2016, the Michigan Legislature adopted new laws aimed at reducing and eliminating the use of seclusion, restraint, and aversive interventions in schools. **MCL 380.1307-1307h**. The Michigan State Board of Education updated its policy in March 2017 to conform to the new law. [http://www.michigan.gov/documents/mde/PolicyForSeclusion-Restraint\\_564940\\_7.pdf](http://www.michigan.gov/documents/mde/PolicyForSeclusion-Restraint_564940_7.pdf).

In September 2017, the Michigan Department of Education (MDE) issued a set of frequently asked questions and answers to provide guidance to districts and parents on the new law. [http://www.michigan.gov/documents/mde/EmergencySeclusionRestraintFAQ\\_599229\\_7.pdf](http://www.michigan.gov/documents/mde/EmergencySeclusionRestraintFAQ_599229_7.pdf). Local districts must have policies that apply to all students and incorporate the elements in the law beginning in the 2017-18 school year. **MCL 380.1307a**.

Here are some of the highlights of the new state law:

- ◆ The law limits the use of physical restraint and seclusion to narrowly-defined emergency circumstances when there is an imminent danger of physical harm to self or others requiring an immediate, time-limited intervention. **MCL 380.1307c**. All other forms of seclusion or physical restraint are not allowed. Some brief actions (breaking up a fight, stopping an impulsive act, taking away a weapon, participating in a sporting event, preventing an immediate physical assault, etc.) are not within the definition of restraint and therefore not restricted, to the extent that they are an immediate response to an instantaneous circumstance.
- ◆ Use of emergency physical restraint or emergency seclusion is time-limited. Emergency seclusion should not be used any longer than necessary, to the point that the emergency situation is ended. Emergency seclusion should be used no longer than 15 minutes for an elementary school pupil or 20 minutes for a middle school or high school pupil. Emergency physical restraint should be used no longer than 10 minutes for any pupil. Use of either beyond the timelines requires additional staff support and documentation justifying the extended time. **MCL 380.1307c**.
- ◆ School staff must call key identified personnel for help immediately when an emergency situation presents itself. **MCL 380.1307c**.
- ◆ Emergency seclusion and emergency physical restraint may not be used in place of appropriate less restrictive interventions. **MCL 380.1307c**. Emergency seclusion or emergency physical restraint may not be used as a planned response for the convenience of school personnel, as discipline or punishment, or as a substitute for an appropriate educational program. **MCL 380.1307e**.
- ◆ Emergency seclusion and emergency physical restraint shall be performed in a manner that, based on research and evidence, is safe, appropriate, and proportionate to and sensitive to the pupil's severity of behavior, chronological and developmental age, physical size, gender, physical condition, medical condition, psychiatric condition, and personal history, including any history of physical or sexual abuse or other trauma. **MCL 380.1307c**.
- ◆ Use of restraint or seclusion must not interfere with the student's ability to communicate in his or her primary mode of communication. **MCL 380.1307c**.

- ◆ Several specific practices are outlawed, including corporal punishment, deprivation of basic needs, child abuse, intentional application of any noxious substance or stimulus that results in physical pain or extreme discomfort, chemical restraint, any restraint that negatively impacts breathing, and prone restraint. **MCL 380.1307b.**
- ◆ Mechanical restraint is also prohibited. Mechanical restraint does not include administration of prescribed medication, use of prescribed adaptive or protective devices, or use of safety equipment when used as intended for the general student population. **MCL 380.1307h.**
- ◆ Recurring use of emergency seclusion or emergency physical restraint should prompt debriefing, behavior support planning and emergency intervention/safety planning. **MCL 380.1307e.**
- ◆ School staff must continually observe and document observations during any use of restraint or seclusion. **MCL 380.1307c.** Any use of restraint or seclusion must be reported to parents and recorded through data collection to the school and state. **MCL 380.1307d, 1307f.**
- ◆ Schools must train staff on general awareness and key identified personnel in several areas related to reducing and preventing the use of restraint and seclusion. **MCL 380.1307g.**

The Michigan law, policy, and guidance is supplemented by two federal resource documents on the use of seclusion and restraint against students with disabilities:

- U.S. Department of Education, Office for Civil Rights (OCR) Dear Colleague letter, <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf>.
- U.S. Department of Education, Office for Special Education Policy (OSEP) resource document, <https://www2.ed.gov/policy/seclusion/restraints-and-seclusion-resources.pdf>.

## **Appendix 13-1**

### **Joint OCR/OSERS Letter**

**UNITED STATES DEPARTMENT OF EDUCATION  
WASHINGTON, D.C. 20202**

July 25, 2000

Dear Colleague:

On behalf of the Office for Civil Rights (OCR) and the Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education, we are writing to you about a vital issue that affects students in school – harassment based on disability. Our purpose in writing is to develop greater awareness of this issue, to remind interested persons of the legal and educational responsibilities that institutions have to prevent and appropriately respond to disability harassment, and to suggest measures that school officials should take to address this very serious problem. This letter is not an exhaustive legal analysis. Rather, it is intended to provide a useful overview of the existing legal and educational principles related to this important issue.

#### **Why Disability Harassment Is Such an Important Issue**

Through a variety of sources, both OCR and OSERS have become aware of concerns about disability harassment in elementary and secondary schools and colleges and universities. In a series of conference calls with OSERS staff, for example, parents, disabled persons, and advocates for students with disabilities raised disability harassment as an issue that was very important to them. OCR's complaint workload has reflected a steady pace of allegations regarding this issue, while the number of court cases involving allegations of disability harassment has risen. OCR and OSERS recently conducted a joint focus group where we heard about the often devastating effects on students of disability harassment that ranged from abusive jokes, crude name-calling, threats, and bullying, to sexual and physical assault by teachers and other students.

We take these concerns very seriously. Disability harassment can have a profound impact on students, raise safety concerns, and erode efforts to ensure that students with disabilities have equal access to the myriad benefits that an education offers. Indeed, harassment can seriously interfere with the ability of students with disabilities to receive the education critical to their advancement. We are committed to doing all that we can to help prevent and respond to disability harassment and lessen the harm of any harassing conduct that has occurred. We seek your support in a joint effort to address this critical issue and to promote such efforts among educators who deal with students daily.

#### **What Laws Apply to Disability Harassment**

Schools, colleges, universities, and other educational institutions have a responsibility to ensure equal educational opportunities for all students, including students with disabilities. This responsibility is based on Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II), which are enforced by OCR. Section 504 covers all schools, school districts, and colleges and universities receiving federal funds.<sup>1</sup> Title II

<sup>1</sup> Section 504 provides: "No otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." 29 U.S.C. § 794(a). See 34 CFR Part 104 (Section 504 implementing regulations).

## **Michigan Protection & Advocacy Service, Inc.**

covers all state and local entities, including school districts and public institutions of higher education, whether or not they receive federal funds.<sup>2</sup> Disability harassment is a form of discrimination prohibited by Section 504 and Title II.<sup>3</sup> Both Section 504 and Title II provide parents and students with grievance procedures and due process remedies at the local level. Individuals and organizations also may file complaints with OCR.

States and school districts also have a responsibility under Section 504, Title II, and the Individuals with Disabilities Education Act (IDEA),<sup>4</sup> which is enforced by OSERS, to ensure that a free appropriate public education (FAPE) is made available to eligible students with disabilities. Disability harassment may result in a denial of FAPE under these statutes. Parents may initiate administrative due process procedures under IDEA, Section 504, or Title II to address a denial of FAPE, including a denial that results from disability harassment. Individuals and organizations also may file complaints with OCR, alleging a denial of FAPE that results from disability harassment. In addition, an individual or organization may file a complaint alleging a violation of IDEA under separate procedures with the state educational agency.<sup>5</sup> State compliance with IDEA, including compliance with FAPE requirements, is monitored by OSERS' Office of Special Education Programs (OSEP).

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<sup>2</sup> Title II provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.” 42 U.S.C. § 12132. See 28 CFR Part 35 (Title II implementing regulations).

<sup>3</sup> The Department of Education’s Office for Civil Rights (OCR) has issued policy guidance on discriminatory harassment based on race (see 59 Fed. Reg. 11448 (Mar. 10, 1994),) and sex (see 62 Fed Reg. 12034 (Mar. 13, 1997), ). These policies make clear that school personnel who understand their legal obligations to address harassment are in the best position to recognize and prevent harassment, and to lessen the harm to students if, despite their best efforts, harassment occurs. In addition, OCR recently collaborated with the National Association of Attorneys General (NAAG) to produce a guide to raise awareness of, and provide examples of effective practices for dealing with, hate crimes and harassment in schools, including harassment based on disability. See “Protecting Students from Harassment and Hate Crime, A Guide for Schools,” U.S. Department of Education, Office for Civil Rights, and the National Association of Attorneys General (Jan. 1999) (OCR/NAAG Harassment Guide), Appendix A: Sample School Policies. The OCR/NAAG Harassment Guide may be accessed on the internet at [www.ed.gov/offices/OCR/archives/Harassment/](http://www.ed.gov/offices/OCR/archives/Harassment/). These documents are a good resource for understanding the general principle of discriminatory harassment. The policy guidance on sexual harassment will be clarified to explain how OCR’s longstanding regulatory requirements continue to apply in this area in light of recent Supreme Court decisions addressing the sexual harassment of students.

<sup>4</sup> 20 U.S.C. §1400 et seq.

<sup>5</sup> 34 C.F.R. § 300.660 et seq.

Harassing conduct also may violate state and local civil rights, child abuse, and criminal laws. Some of these laws may impose obligations on educational institutions to contact or coordinate with state or local agencies or police with respect to disability harassment in some cases; failure to follow appropriate procedures under these laws could result in action against an educational institution. Many states and educational institutions also have addressed disability harassment in their general anti-harassment policies.<sup>6</sup>

**Disability Harassment May Deny a Student an Equal Opportunity to Education under Section 504 or Title II**

Disability harassment under Section 504 and Title II is intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services, or opportunities in the institution's program. Harassing conduct may take many forms, including verbal acts and name-calling, as well as nonverbal behavior, such as graphic and written statements, or conduct that is physically threatening, harmful, or humiliating.

When harassing conduct is sufficiently severe, persistent, or pervasive that it creates a hostile environment, it can violate a student's rights under the Section 504 and Title II regulations. A hostile environment may exist even if there are no tangible effects on the student where the harassment is serious enough to adversely affect the student's ability to participate in or benefit from the educational program. Examples of harassment that could create a hostile environment follow.

- Several students continually remark out loud to other students during class that a student with dyslexia is "retarded" or "deaf and dumb" and does not belong in the class; as a result, the harassed student has difficulty doing work in class and her grades decline.
- A student repeatedly places classroom furniture or other objects in the path of classmates who use wheelchairs, impeding the classmates' ability to enter the classroom.
- A teacher subjects a student to inappropriate physical restraint because of conduct related to his disability, with the result that the student tries to avoid school through increased absences.<sup>7</sup>
- A school administrator repeatedly denies a student with a disability access to lunch, field trips, assemblies, and extracurricular activities as punishment for taking time off from school for required services related to the student's disability.

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<sup>6</sup> For more information regarding the requirements of state and local laws, consult the OCR/NAAG Harassment Guide, cited in footnote 3 above.

<sup>7</sup> Appropriate classroom discipline is permissible, generally, if it is of a type that is applied to all students or is consistent with the Individuals with Disabilities Education Act (IDEA) and Section 504, including the student's Individualized Education Program or Section 504 plan.

- A professor repeatedly belittles and criticizes a student with a disability for using accommodations in class, with the result that the student is so discouraged that she has great difficulty performing in class and learning.
- Students continually taunt or belittle a student with mental retardation by mocking and intimidating him so he does not participate in class.

When disability harassment limits or denies a student's ability to participate in or benefit from an educational institution's programs or activities, the institution must respond effectively. Where the institution learns that disability harassment may have occurred, the institution must investigate the incident(s) promptly and respond appropriately.

**Disability Harassment Also May Deny a Free Appropriate Public Education**

Disability harassment that adversely affects an elementary or secondary student's education may also be a denial of FAPE under the IDEA, as well as Section 504 and Title II. The IDEA was enacted to ensure that recipients of IDEA funds make available to students with disabilities the appropriate special education and related services that enable them to access and benefit from public education. The specific services to be provided a student with a disability are set forth in the student's individualized education program (IEP), which is developed by a team that includes the student's parents, teachers and, where appropriate, the student. Harassment of a student based on disability may decrease the student's ability to benefit from his or her education and amount to a denial of FAPE.

**How to Prevent and Respond to Disability Harassment**

Schools, school districts, colleges, and universities have a legal responsibility to prevent and respond to disability harassment. As a fundamental step, educational institutions must develop and disseminate an official policy statement prohibiting discrimination based on disability and must establish grievance procedures that can be used to address disability harassment.<sup>8</sup> A clear policy serves a preventive purpose by notifying students and staff that disability harassment is unacceptable, violates federal law, and will result in disciplinary action. The responsibility to respond to disability harassment, when it does occur, includes taking prompt and effective action to end the harassment and prevent it from recurring and, where appropriate, remedying the effects on the student who was harassed.

The following measures are ways to both prevent and eliminate harassment:

- Creating a campus environment that is aware of disability concerns and sensitive to disability harassment; weaving these issues into the curriculum or programs outside the classroom.
- Encouraging parents, students, employees, and community members to discuss disability harassment and to report it when they become aware of it.
- Widely publicizing anti-harassment statements and procedures for handling discrimination complaints, because this information makes students and employees aware of what constitutes harassment, that such conduct is prohibited, that the institution will not tolerate such behavior, and that effective action, including disciplinary action, where appropriate, will be taken.

<sup>8</sup> Section 504 (at 34 CFR § 104.7) and Title II (at 28 CFR § 35.107(a)) require that institutions have published internal policies and grievance procedures to address issues of discrimination on the basis of disability, which includes disability harassment. While there

## **Michigan Protection & Advocacy Service, Inc.**

need not be separate grievance procedures designed specifically for disability harassment, the grievance procedures that are available must be effective in resolving problems of this nature.

- Providing appropriate, up-to-date, and timely training for staff and students to recognize and handle potential harassment.
- Counseling both person(s) who have been harmed by harassment and person(s) who have been responsible for the harassment of others.
- Implementing monitoring programs to follow up on resolved issues of disability harassment.
- Regularly assessing and, as appropriate, modifying existing disability harassment policies and procedures for addressing the issue, to ensure effectiveness.

### **Technical Assistance Is Available**

U.S. Secretary of Education Richard Riley has emphasized the importance of ensuring that schools are safe and free of harassment. Students can not learn in an atmosphere of fear, intimidation, or ridicule. For students with disabilities, harassment can inflict severe harm. Teachers and administrators must take emphatic action to ensure that these students are able to learn in an atmosphere free from harassment.

Disability harassment is preventable and can not be tolerated. Schools, colleges, and universities should address the issue of disability harassment not just when but before incidents occur. As noted above, awareness can be an important element in preventing harassment in the first place.

The Department of Education is committed to working with schools, parents, disability advocacy organizations, and other interested parties to ensure that no student is ever subjected to such conduct, and that where such conduct occurs, prompt and effective action is taken. For more information, you may contact OCR or OSEP through 1-800-USA-LEARN or 1-800-437-0833 for TTY services. You also may directly contact one of the OCR enforcement offices listed on the enclosure or OSEP, by calling (202) 205-5507 or (202) 205-5465 for TTY services.

Thank you for your attention to this serious matter.

Norma V. Cantu,  
Assistant Secretary for  
Civil Rights

Judith E. Heumann,  
Assistant Secretary  
Office of Special Education  
and Rehabilitative Services



## **Appendix 13-2**

UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES  
AUG 202013

Dear Colleague:

The U.S. Department of Education's Office of Special Education and Rehabilitative Services (OSERS) is committed to working with States to ensure that school districts provide all children with positive, safe, and nurturing school environments in which they can learn, develop, and participate. OSERS is issuing this letter to provide an overview of a school district's responsibilities under the Individuals with Disabilities Education Act (IDEA) to address bullying of students with disabilities.<sup>1</sup>

As discussed in this letter, and consistent with prior Dear Colleague Letters the Department has published, bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a denial of a free appropriate public education (FAPE) under the IDEA that must be remedied.<sup>2</sup> However, even when situations do not rise to a level that constitutes a denial of FAPE, bullying can undermine a student's ability to achieve his or her full academic potential. Attached to this letter are specific strategies that school districts and schools<sup>3</sup> can implement to effectively prevent and respond to bullying, and resources for obtaining additional information.

Bullying of any student by another student, for any reason, cannot be tolerated in our schools.<sup>4</sup> Bullying is no longer dismissed as an ordinary part of growing up, and every effort should be made to structure environments and provide supports to students and staff so that bullying does not occur. Teachers and adults should respond quickly and consistently to bullying behavior and

<sup>1</sup> This Letter is intended to supplement the July 25, 2000, joint Dear Colleague Letter from OSERS and the Department's Office for Civil Rights (OCR), which addressed disability harassment under Section 504 of the Rehabilitation Act of 1973 (Section 504), Title II of the Americans with Disabilities Act of 1990 (Title II of the ADA), and the IDEA (available at: <http://www.ed.gov/ocr/docs/disabharassltr.html>).

<sup>2</sup> Some bullying of students with disabilities may also constitute discriminatory harassment and trigger additional responsibilities under the civil rights laws that OCR enforces, including Section 504, Title II of the ADA, Title VI of the Civil Rights Act of 1964, and Title IX of the Education Amendments of 1972. See OCR's October 26, 2010, Dear Colleague Letter on Harassment and Bullying (available at: <http://www.ed.gov/ocr/letters/colleague-2010IOIO.html>).

<sup>3</sup> In the context of this letter "school" includes public preschools; elementary, middle, and high schools; and public agencies, including the State Educational Agency (SEA), Educational Service Agencies (ESA), Local Educational Agencies (LEA), nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities. See 34 C.F.R. §300.33.

<sup>4</sup> Although the focus of this letter is peer-to-peer bullying, it is important to acknowledge that it is also intolerable for teachers and school staff to be party to school bullying and disability harassment (*i.e.*, being active participants in bullying), or observers to school bullying without taking action to address the behavior. While teacher-student disability harassment also may constitute a denial of FAPE, those issues are beyond the scope of this letter. We recommend that States and school districts consult with legal counsel regarding their responsibilities and duties in cases of bullying that involve school personnel, including taking the matter seriously, and promptly addressing any problematic behaviors.

send a message that bullying is not acceptable. Intervening immediately to stop bullying on the spot can help ensure a safer school environment.

Bullying is characterized by aggression used within a relationship where the aggressor(s) has more real or perceived power than the target, and the aggression is repeated, or has the potential to be repeated, over time. Bullying can involve overt physical behavior or verbal, emotional, or social behaviors (e.g., excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors. Cyberbullying, or bullying through electronic technology (e.g., cell phones, computers, online/social media), can include offensive text messages or e-mails, rumors or embarrassing photos posted on social networking sites, or fake online profiles.

Addressing and reporting bullying is critical. Students who are targets of bullying behavior are more likely to experience lower academic achievement and aspirations, higher truancy rates, feelings of alienation from school, poor relationships with peers, loneliness, or depression.<sup>5</sup>

Bystanders, or those who only see or hear about bullying, also may be negatively affected as bullying tends to have harmful effects on overall school climate. Bullying can foster fear and disrespect and negatively affect the school experience, norms, and relationships of all students, families, and school personnel.<sup>6</sup> The consequences may result in students changing their patterns of school participation or schools eliminating school activities (e.g., dances, sporting events) where bullying has occurred. Teachers, school personnel, parents, and students should report bullying when they become aware of it.

Students with disabilities are disproportionately affected by bullying.<sup>7</sup> For example, students with learning disabilities, attention deficit or hyperactivity disorder, and autism are more likely to be bullied than their peers.<sup>8</sup> Any number of factors -- physical characteristics, processing and social skills, or intolerant environments -- may increase the risk that students with disabilities will be bullied. Due to the characteristics of their disabilities, students with intellectual, communication, processing, or emotional disabilities may not understand the extent to which

bullying behaviors are harmful, or may be unable to make the situation known to an adult who can help. In circumstances involving a student who has not previously been identified as a child with a disability under the IDEA, bullying may also trigger a school's child find obligations under the IDEA. 34 C.F.R. §§300.111, 300.201.

Whether or not the bullying is related to the student's disability, any bullying of a student with a disability that results in the student not receiving meaningful educational benefit constitutes a

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<sup>5</sup> Gini G., & Pozzoli T.(2009). Association between bullying and psychosomatic problems: A meta-analysis. *Pediatrics*, 123(3):1059-1065.

<sup>6</sup> O'Brennan, L. M., Bradshaw, C. P., & Sawyer, A. L. (2009). Examining developmental differences in the social-emotional problems among frequent bullies, victim, and bully/victims. *Psychology in the Schools*, 46(2), 100-115.

<sup>7</sup> Swearer, S. M., Wang, C., Maag, J. M., Siebecker, A., & Frerichs, L. J. (2012). Understanding the bullying dynamic among students in special and general education. *Journal of School Psychology*, 50, 503-520.

<sup>8</sup> Twyman, K. A., Saylor, C. F., Saia, D., Macias, M. M., Taylor, L. A., & Spratt, E.(2010). Bullying and ostracism experiences in children with special health care needs. *Journal of Developmental Behavioral Pediatrics*, 31 , 1-8.

denial of FAPE under the IDEA that must be remedied.<sup>9</sup> States and school districts have a responsibility under the IDEA, 20 U.S.C. § 1400, *et seq.*, to ensure that FAPE in the least restrictive environment (LRE) is made available to eligible students with disabilities. In order for a student to receive FAPE, the student's individualized education program (IEP) must be reasonably calculated to provide meaningful educational benefit.<sup>10</sup>

Schools have an obligation to ensure that a student with a disability who is the target of bullying behavior continues to receive FAPE in accordance with his or her IEP. The school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP Team must then determine to what extent additional or different special education or related services are needed to address the student's individual needs; and revise the IEP accordingly. Additionally, parents have the right to request an IEP Team meeting at any time, and public agencies generally must grant a parental request for an IEP Team meeting where a student's needs may have changed as a result of bullying. The IDEA placement team (usually the same as the IEP Team) should exercise caution when considering a change in the placement or the location of services provided to the student with a disability who was the target of the bullying behavior and should keep the student in the original placement unless the student can no longer receive FAPE in the current LRE placement. While it may be appropriate to consider whether to change the placement of the child who was the target of the bullying behavior, placement teams should be aware that certain changes to the education program of a student with a disability (*e.g.*, placement in a more restrictive "protected" setting to avoid bullying behavior) may constitute a denial of the IDEA's requirement that the school provide FAPE in the LRE. Moreover, schools may not attempt to resolve the bullying situation by unilaterally changing the frequency, duration, intensity, placement, or location of the student's special education and related services. These decisions must be made by the IEP Team and consistent with the IDEA provisions that address parental participation.

If the student who engaged in the bullying behavior is a student with a disability, the IEP Team should review the student's IEP to determine if additional supports and services are needed to address the inappropriate behavior. In addition, the IEP Team and other school personnel should consider examining the environment in which the bullying occurred to determine if changes to the environment are warranted.

As discussed above, any bullying of a student with a disability that results in the student not receiving meaningful educational benefit from the special education and related services provided by the school is a denial of FAPE. A student must feel safe in school in order to fulfill his or her full academic potential. We encourage States and school districts to alert Boards of Education, school administrators, teachers, and staff that bullying can result in a denial of FAPE

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<sup>9</sup> OCR also has authority to investigate complaints alleging denial of FAPE under Section 504 and Title II. See the July 25, 2000, joint Dear Colleague Letter on Disability Harassment; (available at:

<http://www.ed.gov/ocr/docs/disabharassltr.html>; and OCR's October 26, 2010, Dear Colleague Letter on Harassment and Bullying (available at: <http://www.ed.gov/ocr/letters/colleaguc-2010l01O.html>).

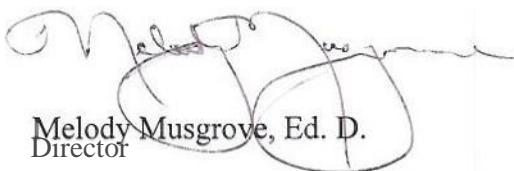
<sup>10</sup> See *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982).

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for students with disabilities. We also encourage States and school districts to reevaluate their policies and practices addressing problematic behaviors, including bullying, in light of the information provided in this letter, as well as in OSERS' July 25, 2000, joint Dear Colleague Letter and OCR's October 26, 2010, Dear Colleague Letter. The enclosure to this letter, "Effective Evidence-based Practices for Preventing and Addressing Bullying," includes practices for use as part of any bullying prevention and intervention program to help ensure that school and classroom settings are positive, safe, and nurturing environments for all children and adults.

We look forward to continuing to work with you to ensure that students with disabilities have access to high-quality services in positive, safe, and respectful school environments.

Sincerely,



Melody Musgrove, Ed. D.  
Director

Office of Special Education Programs

s

Michael K. Yulin  
Acting Assistant Secretary

Enclosure: Effective Evidence-based Practices for  
Preventing and Addressing Bullying



## **Appendix 13-3**

UNITED STATES DEPARTMENT OF EDUCATION  
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY  
October 21, 2014

Dear Colleague:

While there is broad consensus that bullying is wrong and cannot be tolerated in our schools, the sad reality is that bullying persists in our schools today, and especially so for students with disabilities.<sup>1</sup> In recent years, the Office for Civil Rights (OCR) in the U.S. Department of Education (Department) has received an ever-increasing number of complaints concerning the bullying of students with disabilities and the effects of that bullying on their education, including on the special education and related services to which they are entitled. This troubling trend highlights the importance of OCR's continuing efforts to protect the rights of students with disabilities through the vigorous enforcement of Section 504 of the Rehabilitation Act of 1973 (Section 504) and Title II of the Americans with Disabilities Act of 1990 (Title II). It also underscores the need for schools to fully understand their legal obligations to address and prevent disability discrimination in our schools.

Today's guidance follows a long history of guidance issued by the Department in this critical area of disability discrimination. In 2000, OCR and the Office of Special Education and Rehabilitative Services (OSERS) issued joint guidance informing schools that disability-based harassment may deny a student equal educational opportunities under Section 504 and Title II.<sup>2</sup> The 2000 guidance also noted the responsibilities of schools under Section 504 and the Individuals with Disabilities Education Act (IDEA) to ensure that students receive a free appropriate public education (FAPE),

<sup>1</sup> These students are bullied or harassed more than their nondisabled peers. See Office of Special Education and Rehabilitative Services (OSERS) 2013 Dear Colleague Letter on Bullying of Students with Disabilities, <http://www.ed.gov/policy/speced/guid/idea/memosdcltrs/bullyingdcl-8-20-13.doc>, at page 2 ("Students with disabilities are disproportionately affected by bullying."). That letter explains that, "[b]ullying can involve overt physical behavior or verbal, emotional, or social behaviors (e.g., excluding someone from social activities, making threats, withdrawing attention, destroying someone's reputation) and can range from blatant aggression to far more subtle and covert behaviors. Cyberbullying, or bullying through electronic technology (e.g., cell phones, computers, online/social media), can include offensive text messages or e-mails, rumors or embarrassing photos posted on social networking sites, or fake online profiles." *Id.* Throughout this guidance, the terms "bullying" and "harassment" are used interchangeably to refer to these types of conduct. See Office for Civil Rights (OCR) 2010 Dear Colleague Letter on Harassment and Bullying, <http://www.ed.gov/ocr/letters/colleague-201010.pdf>, at page 3 ("The label used to describe an incident (e.g., bullying, hazing,

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teasing) does not determine how a school is obligated to respond. Rather, the nature of the conduct itself must be assessed for civil rights implications.”).

<sup>2</sup> OCR-OSERS 2000 Dear Colleague Letter: Prohibited Disability Harassment, <http://www.ed.gov/ocr/docs/disabharassltr.html>.

and alerted schools that harassment of a student based on disability may adversely impact the school’s provision of FAPE to the student.<sup>3</sup> In 2010, OCR issued a Dear Colleague Letter on Harassment and Bullying that provided further guidance concerning when a school’s inappropriate response to bullying or harassment of a student based on disability constitutes a disability-based harassment violation under Section 504 and Title II.<sup>4</sup> In 2013, OSERS issued a Dear Colleague Letter on Bullying of Students with Disabilities that, in turn, provided additional guidance to schools that the bullying of a student with a disability on *any* basis can result in a denial of FAPE under IDEA that must be remedied.<sup>5</sup>

Building on OSERS’s 2013 guidance, today’s guidance explains that the bullying of a student with a disability on *any* basis can similarly result in a denial of FAPE under Section 504 that must be remedied; it also reiterates schools’ obligations to address conduct that may constitute a disability-based harassment violation and explains that a school must also remedy the denial of FAPE resulting from disability-based harassment. Following an overview of the federal protections for students with disabilities in schools, the guidance elaborates on the elements of a disability-based harassment violation and a FAPE violation, discusses how OCR generally analyzes complaints involving bullying of students with disabilities on each of these bases, and then concludes with a series of hypothetical examples that illustrate varying circumstances when conduct may constitute both a disability-based harassment violation and FAPE violation, a FAPE violation, or neither. Although by no means exhaustive, in the context of this discussion, the guidance also offers some insight into what OCR might require of a school to remedy instances of bullying upon a finding of disability discrimination. OCR urges schools to consider these hypothetical resolution agreement provisions in proactively working to ensure a safe school environment, free from discrimination, for all students.<sup>6</sup>

### **I. Overview of Federal Protections for Students with Disabilities in Schools**

OCR enforces Section 504 and Title II, both of which prohibit disability discrimination. Section 504 prohibits disability discrimination by recipients of Federal financial assistance.<sup>7</sup> OCR enforces Section 504 against entities that receive Federal financial assistance from the Department, including all public schools and school districts as well as all public charter schools and magnet schools. Under Section 504, recipients that operate a public elementary or secondary education program must

<sup>3</sup> The terms “school” and “school district” are used interchangeably in this letter and refer to public elementary and secondary schools that receive financial assistance from the Department.

<sup>4</sup> OCR 2010 Dear Colleague Letter on Harassment and Bullying, <http://www.ed.gov/ocr/letters/colleague-201010.pdf>.

<sup>5</sup> OSERS 2013 Dear Colleague Letter on Bullying of Students with Disabilities,  
<http://www.ed.gov/policy/speced/guid/idea/memoscltrs/bullyingdcl-8-20-13.doc>.

<sup>6</sup> This guidance addresses only student-on-student bullying and harassment. Under Section 504 and Title II, students with disabilities are also protected from bullying by teachers, other school employees, and third parties. Such bullying can trigger a school’s obligation to address disability-based harassment, remedy a denial of FAPE, or both. See 34 C.F.R. §§ 104.4, 104.33; 28 C.F.R. pt. 35. OCR

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recommends that States and school districts consult with legal counsel regarding their responsibilities and duties in cases of bullying that involve school personnel.

<sup>7</sup> 29 U.S.C. § 794; 34 C.F.R. pt. 104.

provide students with disabilities equal educational opportunities. Among other things, this means they must ensure that students with disabilities receive FAPE, defined as the provision of regular or special education and related aids and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that satisfy certain requirements concerning educational setting, evaluation, placement, and procedural safeguards.<sup>8</sup> Schools also have an obligation under Section 504 to evaluate students who need or are believed to need special education or related services. Further, schools have an obligation to ensure that Section 504 FAPE services are provided in an educational setting with persons who do not have disabilities to the maximum extent appropriate to the needs of the student with a disability.<sup>9</sup> Schools often document these services in written plans, sometimes referred to as Section 504 plans, or, if the child is receiving IDEA FAPE services, through the required individualized education program (IEP).<sup>10</sup>

Title II prohibits disability discrimination by public entities, including all public schools and school districts, as well as all public charter schools and magnet schools, regardless of whether they receive Federal financial assistance.<sup>11</sup> OCR, along with the U.S. Department of Justice (DOJ), enforces Title II in public elementary and secondary schools. Title II is generally construed to provide no less protection than Section 504. Therefore, violations of Section 504, including the failure to provide needed regular or special education and related aids and services to students with disabilities, also constitute violations of Title II.<sup>12</sup>

IDEA is another key Federal law addressing the needs of students with disabilities. OSERS, not OCR or DOJ, administers IDEA.<sup>13</sup> OCR, however, enforces the Section 504 and Title II rights of IDEA-eligible students.<sup>14</sup> Under Part B of IDEA, the Department provides Federal funds to State educational agencies and through them to local educational agencies (school districts), to assist

<sup>8</sup> For Section 504 and Title II, the term “disability” means a physical or mental impairment that substantially limits one or more major life activities of an individual; a record of such an impairment; or being regarded as having such an impairment. 29 U.S.C. § 705(9)(B), (20)(B); 42 U.S.C. § 12102. The Americans with Disabilities Act Amendments Act (Amendments Act), Pub. Law No. 110-325, amended the disability definition for Section 504 and Title II. Most notably, the Amendments Act required that “disability” under these statutes be interpreted broadly. More information about the Amendments Act is available from OCR’s website at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201109.html> and <http://www.ed.gov/ocr/docs/dcl-504faq-201109.html>.

<sup>9</sup> In this letter, the term “Section 504 FAPE services” is used to refer to the regular or special education and related aids and services provided to students with disabilities as specified in 34 C.F.R. § 104.33(b). The term “IDEA FAPE services” is used in this letter to refer to the special education and related services provided to students with disabilities that meet the requirements of 34 C.F.R. pt. 300, as specified in 34 C.F.R. §§ 300.17 (FAPE), 300.39 (special education), and 300.34 (related services).

<sup>10</sup> Students with disabilities who are IDEA-eligible also have rights under Section 504 and Title II. The Department’s Section 504 regulations provide that implementation of an IEP developed in accordance with IDEA is one means of providing Section 504 FAPE services. 34 C.F.R. § 104.33(b)(2).

<sup>11</sup> 42 U.S.C. §§ 12131-12134; 28 C.F.R. pt. 35.

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<sup>12</sup> 42 U.S.C. § 12201(a). To the extent that Title II provides greater protection than Section 504, covered entities must comply with Title II's requirements.

<sup>13</sup> For more information about OSERS, please visit <http://www.ed.gov/osers>.

<sup>14</sup> This letter only addresses Federal law; other State or local laws and policies may apply.

school districts in providing FAPE to eligible children with disabilities through the provision of special education and related services.<sup>15</sup> School districts must ensure that IDEA FAPE services in the least restrictive environment are made available to all eligible children with disabilities through a properly developed IEP that provides a meaningful educational benefit to the student. In addition, school districts must locate, identify, and evaluate children suspected of having disabilities who may need special education and related services.

## **II. Schools' Obligations to Address Disability-Based Harassment**

Bullying of a student on the basis of his or her disability may result in a disability-based harassment violation under Section 504 and Title II.<sup>16</sup> As explained in OCR's 2010 Dear Colleague Letter on Harassment and Bullying, when a school knows or should know of bullying conduct based on a student's disability, it must take immediate and appropriate action to investigate or otherwise determine what occurred.<sup>17</sup> If a school's investigation reveals that bullying based on disability created a hostile environment—i.e., the conduct was sufficiently serious to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school—the school must take prompt and effective steps reasonably calculated to end the bullying, eliminate the hostile environment, prevent it from recurring, and, as appropriate, remedy its effects. Therefore, OCR would find a disability-based harassment violation under Section 504 and Title II when: (1) a student is bullied based on a disability; (2) the bullying is sufficiently serious to create a hostile environment; (3) school officials know or should know about the bullying; and (4) the school does not respond appropriately.<sup>18</sup>

As explained in Section III, below, for the student with a disability who is receiving IDEA FAPE services or Section 504 FAPE services, a school's investigation should include determining whether

<sup>15</sup> 20 U.S.C. §§ 1400-1419; 34 C.F.R. pt. 300. IDEA establishes 13 disability categories: autism, deaf-blindness, deafness, emotional disturbance, hearing impairment, intellectual disability, multiple disabilities, orthopedic impairment, other health impairment, specific learning disability, speech or language impairment, traumatic brain injury, and visual impairment. 34 C.F.R. § 300.8(c).

<sup>16</sup> These legal protections extend to all students with disabilities, including students who are regarded as having a disability or who have a record of a disability and students with disabilities who are not receiving services under Section 504 or IDEA. In addition to being protected from harassment on the basis of disability, students with disabilities, like all students, are entitled to protection from harassment on the basis of race, color, national origin, sex (including sexual violence), and age under the Federal civil rights laws that OCR enforces. For more information about other types of discriminatory harassment, see OCR's 2010 Dear Colleague Letter referenced in note 4.

<sup>17</sup> Schools know or should know about disability-based harassment when, for example, a teacher or other responsible employee of the school witnesses the conduct. For more information about how to determine when knowledge of such conduct will be imputed to schools, refer to the OCR 2001 Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, <http://www.ed.gov/ocr/docs/shguide.pdf> at page 13; and OCR 2010 Dear Colleague Letter on Harassment and Bullying, at page 3 and note 11.

<sup>18</sup> This is the standard for administrative enforcement of Section 504 and in court cases where plaintiffs are seeking injunctive relief. It is different from the standard in private lawsuits for money damages, which, many courts have held, requires proof of a school's actual knowledge and deliberate indifference. *See Long v. Murray Cnty. Sch. Dist.*, 522 Fed. Appx. 576, 577 & n. 1 (11th Cir. 2013) (applying the test enunciated in *Davis v. Monroe Cnty. Bd. of Ed.*, 526 U.S. 629, 643 (1999)).

that student's receipt of appropriate services may have been affected by the bullying.<sup>19</sup> If the school's investigation reveals that the bullying created a hostile environment and there is reason to believe that the student's IDEA FAPE services or Section 504 FAPE services may have been affected by the bullying, the school has an obligation to remedy those effects on the student's receipt of FAPE.<sup>20</sup> Even if the school finds that the bullying did not create a hostile environment, the school would still have an obligation to address any FAPE-related concerns, if, for example, the school's initial investigation revealed that the bullying may have had some impact on the student's receipt of FAPE services.

### **III. Bullying and the Denial of a Free Appropriate Public Education**

The bullying on *any* basis of a student with a disability who is receiving IDEA FAPE services or Section 504 FAPE services can result in the denial of FAPE that must be remedied under Section 504. The OSERS 2013 Dear Colleague Letter clarified that, under IDEA, as part of a school's appropriate response to bullying on any basis, the school should convene the IEP team<sup>21</sup> to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide a meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP team must determine the extent to which additional or different IDEA FAPE services are needed to address the student's individualized needs and then revise the IEP accordingly. Any decisions made by the IEP team must be consistent with the IDEA provisions addressing parental participation and should keep the student with a disability in the original placement or setting (e.g., the same school and classroom) unless the student can no longer receive FAPE in that placement or setting. Under IDEA, schools have an ongoing obligation to ensure that a student with a disability who is the target of bullying continues to receive FAPE in accordance with his or her IEP—an obligation that exists whether the student is being bullied based on his or her disability or is being bullied based on other reasons.

Similarly, under Section 504, schools have an ongoing obligation to ensure that a qualified student with a disability who receives IDEA FAPE services or Section 504 FAPE services and who is the target of bullying continues to receive FAPE—an obligation that exists regardless of why the student

<sup>19</sup> As stated in OCR 2010 Dear Colleague Letter on Harassment and Bullying at page 2, "The specific steps in a school's investigation will vary depending upon the nature of the allegations, the source of the complaint, the age of the student or students involved, the size and administrative structure of the school, and other factors." When a student with a disability who receives Section 504 FAPE services is being bullied, an appropriate "other factor" is whether that student's receipt of services has been affected by the bullying.

<sup>20</sup> When a student with a disability has engaged in misconduct that is caused by his or her disability, the student's own misconduct would not relieve the school of its legal obligation to determine whether that student's civil rights were violated by the bullying conduct of the other student. For example, if a student, for reasons related to his disability, hits another student and other students then call him "crazy" on a daily basis, the school should, of course, address the conduct of the student with a disability. Nonetheless, the school must also consider whether the student with a disability is being bullied on the basis of disability under Section 504 and Title II.

<sup>21</sup> The IEP team is the group of persons specified in IDEA that determines the appropriate IDEA FAPE services for an IDEA-eligible student. 34 C.F.R. § 300.321(a).

is being bullied.<sup>22</sup> Accordingly, under Section 504, as part of a school's appropriate response to bullying on *any* basis, the school should convene the IEP team or the Section 504 team<sup>23</sup> to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the student is no longer receiving FAPE. The effects of bullying could include, for example, adverse changes in the student's academic performance or behavior. If the school suspects the student's needs have changed, the IEP team or the Section 504 team must determine the extent to which additional or different services are needed,<sup>24</sup> ensure that any needed changes are made promptly, and safeguard against putting the onus on the student with the disability to avoid or handle the bullying.<sup>25</sup> In addition, when considering a change of placement, schools must continue to ensure that Section 504 FAPE services are provided in an educational setting with persons who do not have disabilities to the maximum extent appropriate to the needs of the student with a disability.

Although there are no hard and fast rules regarding how much of a change in academic performance or behavior is necessary to trigger the school's obligation to convene the IEP team or Section 504 team, a sudden decline in grades, the onset of emotional outbursts, an increase in the frequency or intensity of behavioral interruptions, or a rise in missed classes or sessions of Section 504 services would generally be sufficient.<sup>26</sup> By contrast, one low grade for an otherwise straight-A student who shows no other changes in academic progress or behavior will generally not, standing alone, trigger the school's obligation to determine whether the student's needs are still being met. Nonetheless, in addition to addressing the bullying under the school's anti-bullying policies, schools should promptly convene the IEP team or Section 504 team to determine whether FAPE is being provided

<sup>22</sup> At the elementary and secondary educational level, a “qualified student with a disability” is a student with a disability who is: of an age at which students without disabilities are provided elementary and secondary educational services; of an age at which it is mandatory under State law to provide elementary and secondary educational services to students with disabilities; or a student to whom a State is required to provide FAPE under IDEA. 34 C.F.R. § 104.3(l). In addition to the provision of regular or special education and related aids and services pursuant to 34 C.F.R. § 104.33, FAPE protections extend to educational setting, evaluation and placement, and procedural safeguards. 34 C.F.R. §§ 104.34-.36.

<sup>23</sup> The Section 504 team is the group of knowledgeable persons that determines the appropriate Section 504 FAPE services for a qualified student with a disability under Section 504.

<sup>24</sup> A reevaluation would not be needed unless there is a reason to believe the student's underlying disability or disabilities have changed or the student has an additional disability.

<sup>25</sup> OCR would expect that schools address bullying behavior to ensure that the burden does not fall on the student with a disability. Along these lines, and consistent with the OSERS 2013 Dear Colleague Letter, schools should exercise caution when considering a change in placement, or the location of services (including classroom) provided to the student with a disability who is the target of bullying and should keep the student in the original placement unless the student can no longer receive Section 504 FAPE in that placement. OCR also urges schools to allow for parental participation when considering any change in placement or location of services (including classroom). See 34 C.F.R. pt. 104, app. A (discussion of Subpart D).

<sup>26</sup> In light of schools' ongoing obligation to ensure that students with disabilities are receiving FAPE, adverse changes in the academic performance or behavior of a student receiving FAPE services could trigger the school's obligation to convene the IEP team or Section 504 team regardless of the school's knowledge of the bullying conduct. See, e.g., Section V, Hypothetical Example B, below. As a best practice, schools should train all staff to report bullying to an administrator or school official who can promptly convene a meeting of

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knowledgeable people (e.g., the student's Section 504 team or IEP team) to ensure that the student is receiving FAPE and, as necessary, address whether the student's FAPE needs have changed.

to a student with a disability who has been bullied and who is experiencing any adverse changes in academic performance or behavior.

When bullying results in a disability-based harassment violation, it will not always result in a denial of FAPE. Although all students with disabilities are protected from disability-based harassment, the requirement to provide FAPE applies only to those students with disabilities who need or may need FAPE services because of their disability.<sup>27</sup> This means that if a student is the target of bullying resulting in a disability-based harassment violation, but that student is not eligible to receive IDEA or Section 504 FAPE services, there could be no FAPE violation.

When a student who receives IDEA FAPE services or Section 504 FAPE services has experienced bullying resulting in a disability-based harassment violation, however, there is a strong likelihood that the student was denied FAPE. This is because when bullying is sufficiently serious to create a hostile environment and the school fails to respond appropriately, there is a strong likelihood both that the effects of the bullying included an impact on the student's receipt of FAPE and that the school's failure to remedy the effects of the bullying included its failure to address these FAPE-related concerns.

Ultimately, unless it is clear from the school's investigation into the bullying conduct that there was no effect on the student with a disability's receipt of FAPE, the school should, as a best practice, promptly convene the IEP team or the Section 504 team to determine whether, and to what extent: (1) the student's educational needs have changed; (2) the bullying impacted the student's receipt of IDEA FAPE services or Section 504 FAPE services; and (3) additional or different services, if any, are needed, and to ensure any needed changes are made promptly. By doing so, the school will be in the best position to ensure the student's ongoing receipt of FAPE.

### **IV. How OCR Analyzes Complaints Involving Bullying of Students with Disabilities**

When OCR evaluates complaints involving bullying and students with disabilities, OCR may open an investigation to determine whether there has been a disability-based harassment violation, a FAPE violation, both, or neither, depending on the facts and circumstances of a given complaint.

<sup>27</sup> The FAPE requirement to evaluate applies to all students who are known or believed to need special education or related services, regardless of the nature or severity of the disability. 34 C.F.R. §§ 104.33, -.35. For a student who is suspected of having a disability but who is not yet receiving IDEA or Section 504 services, OCR may consider whether the school met its obligation to evaluate the student. 34

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C.F.R. § 104.35. For example, if a student suspected of having a disability was missing school to avoid bullying, OCR may consider whether the student's evaluation was unduly delayed (e.g., if the school knew or should have known of the bullying and failed to act) in determining whether there was a denial of FAPE under the circumstances.

**When investigating disability-based harassment, OCR considers several factors, including, but not limited to:**

- Was a student with a disability bullied by one or more students based on the student's disability?
- Was the bullying conduct sufficiently serious to create a hostile environment?
- Did the school know or should it have known of the conduct?
- Did the school fail to take prompt and effective steps reasonably calculated to end the conduct, eliminate the hostile environment, prevent it from recurring, and, as appropriate, remedy its effects?

*If the answer to each of these questions is "yes," then OCR would find a disability-based harassment violation under Section 504 and, if the student was receiving IDEA FAPE or Section 504 FAPE services, OCR would have a basis for investigating whether there was also a denial of FAPE under Section 504.*

*Even if the answers to one or more of these questions is "no," for a student who was receiving IDEA FAPE or Section 504 FAPE services, OCR may still consider whether the bullying resulted in a denial of FAPE under Section 504 that must be remedied.*

**When investigating whether a student receiving IDEA FAPE or Section 504 FAPE services who was bullied was denied FAPE under Section 504, OCR considers several factors, including, but not limited to:**

- Did the school know or should it have known that the effects of the bullying may have affected the student's receipt of IDEA FAPE services or Section 504 FAPE services? For example, did the school know or should it have known about adverse changes in the student's academic performance or behavior indicating that the student may not be receiving FAPE?

*If the answer is "no," there would be no FAPE violation.<sup>28</sup> If the answer is "yes," OCR would then consider:*

- Did the school meet its ongoing obligation to ensure FAPE by promptly determining whether the student's educational needs were still being met, and if not, making changes, as necessary, to his or her IEP or Section 504 plan?

*If the answer is "no," and the student was not receiving FAPE, OCR would find that the school violated its obligation to provide FAPE.*

<sup>28</sup> Where a student is suspected of having a disability but is not yet receiving IDEA FAPE services or Section 504 FAPE services, OCR

could consider whether the student's evaluation was unduly delayed in determining whether there was a denial of FAPE under the circumstances. *See* fn. 27, above.

## **V. Hypothetical Examples**

The following hypothetical examples illustrate how OCR would analyze a complaint involving allegations of the bullying of a student with a disability who only receives Section 504 FAPE services.

### **A. Disability-Based Harassment Violation and FAPE Violation**

At the start of the school year, a ten-year-old student with Attention Deficit Hyperactivity Disorder (ADHD) and a speech disability is fully participating in the classroom, interacting with his peers at lunch and recess, and regularly attending speech therapy twice a week. In addition to providing for speech services, the student's Section 504 plan also provides for behavior supports that call for all his teachers and other trained staff to supervise him during transition times, provide constructive feedback, and help him use preventative strategies to anticipate and address problems with peers.

Because of the student's disabilities, he makes impulsive remarks, speaks in a high-pitched voice, and has difficulty reading social cues. Three months into the school year, students in his P.E. class begin to repeatedly taunt him by speaking in an exaggerated, high-pitched tone, calling him names such as "weirdo" and "gay," and setting him up for social embarrassment by directing him to ask other students inappropriate personal questions. The P.E. teacher witnesses the taunting, but neither reports the conduct to the appropriate school official, nor applies the student's behavior supports specified in his 504 plan. Instead, she pulls the student aside and tells him that he needs to start focusing less on what kids have to say and more on getting his head in the game. As the taunting intensifies, the student begins to withdraw from interacting with other kids in P.E. and avoids other students at lunch and recess. As the student continues to withdraw over the course of a few weeks, he misses multiple sessions of speech therapy, but the speech therapist does not report his absences to the Section 504 team or another appropriate school official.

In this example, OCR would find a disability-based harassment violation. The student's peers were making fun of him because of behaviors related to his disability. For OCR's enforcement purposes, the taunting the student experienced, including other students impersonating him and calling him "weirdo" and "gay," was therefore based on his disability.<sup>29</sup> The school knew about the bullying because the P.E. teacher witnessed the conduct.<sup>30</sup> Yet upon witnessing the taunting, the P.E. teacher not only failed to provide the student behavior supports as required in the student's 504 plan, but also failed to report the conduct to an appropriate school official. Had she taken this step, the school could have conducted an investigation and found that the conduct created a hostile environment because it interfered with the student's ability to benefit from the speech therapy services that he

<sup>29</sup> OCR would have also investigated whether a school's inappropriate response to the use of the word "gay" in this context constituted a gender-based harassment violation under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688; 34 C.F.R. pt. 106, which prohibits discrimination on the basis of sex. For a discussion of gender-based harassment, see OCR 2010 Dear Colleague Letter on Harassment and Bullying, at pages 7-8.

<sup>30</sup> The P.E. teacher in this example is a responsible employee. See fn. 17, above.

should have been receiving and negatively affected his ability to participate fully in P.E., lunch, and recess. The school's failure to appropriately respond to the bullying violated Section 504.

OCR would also find FAPE violations under Section 504. First, when the P.E. teacher failed to implement the behavior supports in the student's Section 504 plan, the school denied the student FAPE under Section 504. In addition, and independent of the failure to provide behavior supports, because the bullying impacted the student's receipt of Section 504 FAPE, the school should have addressed the student's changed needs; by failing to do so, the student was denied Section 504 FAPE. The school should have known about the missed Section 504 services and related changes in behavior. The P.E. teacher knew about the bullying but did nothing to report the student's behavioral changes (e.g., the student's increasing efforts to isolate himself from other students) to the Section 504 team members or other appropriate school official. Similarly, the speech therapist knew that the student was missing speech therapy but did not report this to the 504 team or to an appropriate school official. By failing to address the adverse effects of the bullying on FAPE, the school did not make necessary changes to ensure the student was provided FAPE under Section 504. If, upon concluding its investigation, OCR and the district were to enter into a resolution agreement, OCR could require, for example, that the district (1) ensure that FAPE is provided to the student by convening the Section 504 team to determine if the student needs different or additional services (including compensatory services) and, if so, providing them; (2) offer counseling to the student to remedy the harm that the school allowed to persist; (3) monitor whether bullying persists for the student and take corrective action to ensure the bullying ceases; (4) develop and implement a school-wide bullying prevention strategy based on positive behavior supports; (5) devise a voluntary school climate survey for students and parents to assess the presence and effect of bullying based on disability and to respond to issues that arise in the survey; (6) revise the district's anti-bullying policies to develop staff protocols in order to improve the district's response to bullying; (7) train staff and parent volunteers, such as those who monitor lunch and recess or chaperone field trips, on the district's anti-bullying policies, including how to recognize and report instances of bullying on any basis; and (8) provide continuing education to students on the district's anti-bullying policies, including where to get help if a student either witnesses or experiences bullying conduct of any kind.

## **B. FAPE Violation, No Disability-Based Harassment Violation**

A thirteen-year-old student with depression and Post-Traumatic Stress Disorder (PTSD) who receives counseling as part of her Section 504 services is often mocked by her peers for being poor and living in a homeless shelter. Having maintained an A average for the first half of the academic year, she is now getting Bs and Cs, neglecting to turn in her assignments, and regularly missing counseling sessions. When asked by her counselor why she is no longer attending scheduled sessions, she says that she feels that nothing is helping and that no one cares about her. The student tells the counselor that she no longer wants to attend counseling services and misses her next two scheduled sessions. The counselor informs the principal that the student has missed several counseling sessions and that the student feels the sessions are not helping. Around the same time, the student's teachers inform the principal that she has begun to struggle academically. The

principal asks the teachers and counselor to keep her apprised if the student's academic performance worsens, but does not schedule a Section 504 meeting.

In this example, whether or not the school knew or should have known about the bullying, OCR would not find a disability-based harassment violation under Section 504 because the bullying incidents were based on the student's socio-economic status, not her disability.

Independent of the basis for the bullying and regardless of whether school officials knew or should have known about the bullying, the school district still had an ongoing obligation under Section 504 to ensure that this student with a disability was receiving an education appropriate to her needs. Here, the student's sudden decline in grades, coupled with changes in her behavior (missing counseling sessions), should have indicated to the school that her needs were not being met. In this example, OCR would find that these adverse changes were sufficient to put the school on notice of its obligation to promptly convene the Section 504 team to determine the extent of the FAPE-related problems and to make any necessary changes to her services, or, if necessary, reevaluate her, in order to ensure that she continues to receive FAPE. By failing to do more than keep track of the student's academic performance, the school failed to meet this obligation, which violated Section 504.<sup>31</sup>

### **C. No Disability-Based Harassment Violation, No FAPE Violation**

A seven-year-old student with a food allergy to peanuts has a Section 504 plan that provides for meal accommodations, the administration of epinephrine if the student is exposed to peanuts, access to a peanut-free table in the cafeteria, and the prohibition of peanut products in the student's classroom. In advance of the upcoming Halloween party, the teacher reminds the class that candy with peanuts is prohibited in the classroom at all times, including Halloween. That afternoon, while on the bus, a classmate grabs the student's water bottle out of the student's backpack, drinks from it, and says, "I had a peanut butter sandwich for lunch today, and I just finished it." The following day, while having lunch at the peanut-free table in the lunchroom with some friends, a classmate who had been sitting at another table sneaks up behind her and waves an open candy bar with peanuts in front of her face, yelling, "Time to eat peanuts!" Though the candy bar does not touch her, a few other classmates nearby begin chanting, "Time to eat peanuts," and the student leaves the lunchroom crying. When the student goes back to her classroom and tells her teacher what happened at lunch and on the bus, the teacher asks her whether she came into contact with the candy bar and what happened to the water bottle. The student confirms that the candy bar did not touch her and that she never got the water bottle back from the classmate who took it, but says that she is scared to go back into the lunchroom and to ride the bus. The teacher promptly informs the principal of the incidents, and the peers who taunted the student on the bus and in the lunchroom are removed from the lunchroom, interviewed by the assistant principal, and required to meet with the counselor during

<sup>31</sup> If OCR and the district were to enter into a resolution agreement in this case, such an agreement could include, for example, any of the provisions specified in Hypothetical Example A, above.

recess to discuss the seriousness of their conduct. That same week, the school holds a Section 504 meeting to address whether any changes were needed to the student's services in light of the bullying. The principal also meets with the school counselor, and they decide that a segment on the bullying of students with disabilities,

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including students with food allergies, would be added to the counselor's presentation to students on the school's anti-bullying policy scheduled in the next two weeks. Furthermore, in light of the young age of the students, the counselor offers to incorporate a puppet show into the segment to help illustrate principles that might otherwise be too abstract for such a young audience. In the weeks that follow, the student shows no adverse changes in academic performance or behavior, and when asked by her teacher and the school counselor about how she is doing, she indicates that the bullying has stopped.

In this example, based on the school's appropriate response to the incidents of bullying, OCR would not find a disability-based harassment violation under Section 504. The bullying of the student on account of her food allergy to peanuts was based on the student's disability. Moreover, the physically threatening and humiliating conduct directed at her was sufficiently serious to create a hostile environment by limiting her ability to participate in and benefit from the school's education program when she was near the classmates who bullied her in the lunchroom and on the bus. School personnel, however, did not tolerate the conduct and acted quickly to investigate the incidents, address the behavior of the classmates involved in the conduct, ensure that there were no residual effects on the student, and coordinate to promote greater awareness among students about the school's anti-bullying policy. By taking prompt and reasonable steps to address the hostile environment, eliminate its effects, and prevent it from recurring, the school met its obligations under Section 504.

OCR also would not find a FAPE violation under Section 504 on these facts. Once the school became aware that the student feared attending lunch and riding the bus as a result of the bullying she was experiencing, the school was on notice that the effects of the bullying may have affected her receipt of FAPE. This was sufficient to trigger the school's additional obligation to determine whether, and to what extent, the bullying affected the student's access to FAPE and take any actions, including addressing the bullying and providing new or different services, required to ensure the student continued receiving FAPE. By promptly holding a Section 504 meeting to assess whether the school should consider any changes to the student's services in light of the bullying, the school met its independent legal obligation to provide FAPE under Section 504.

## **VI. Conclusion**

OCR is committed to working with schools, students, families, community and advocacy organizations, and others to ensure that schools understand and meet their legal obligations under Section 504 and Title II to appropriately address disability-based harassment and to ensure that students with disabilities who are bullied continue to receive FAPE.

OCR also encourages States and school districts to reevaluate their policies and practices in light of this letter, as well as OCR's and OSERS's prior guidance. If you would like to request technical assistance or file a complaint alleging discrimination, please contact the OCR enforcement office that serves your area. Contact information is posted on OCR's website at: <http://www.ed.gov/ocr/complaintintro.html> or please contact OCR's customer service team at 1-800-421-3481 (TDD 1-800-877-8339).

I look forward to continuing our work together to address and reduce incidents of bullying in our schools so that no student is limited in his or her ability to participate in and benefit from all that our educational programs have to offer.

Sincerely,  
/s/  
Catherine E. Lhamon  
Assistant Secretary for Civil Rights

## **Appendix 13-4**

### **Michigan Model Anti-Bullying Policy**

#### **MICHIGAN STATE BOARD OF EDUCATION**

The (fill in district name) board of education recognizes that a school that is physically and emotionally safe and secure for all students promotes good citizenship, increases student attendance and engagement, and supports academic achievement. To protect the rights of all students and groups for a safe and secure learning environment, the board of education prohibits acts of bullying, harassment, and other forms of aggression and violence. Bullying or harassment, like other forms of aggressive and violent behaviors, interferes with both a school's ability to educate its students and a student's ability to learn. All administrators, faculty, staff, parents, volunteers, and students are expected to refuse to tolerate bullying and harassment and to demonstrate behavior that is respectful and civil. It is especially important for adults to model these behaviors (even when disciplining) in order to provide positive examples for student behavior.

"Bullying" or "harassment" is any gesture or written, verbal, graphic, or physical act (including electronically transmitted acts – i.e., cyberbullying, through the use of internet, cell phone, personal digital assistant (pda), computer, or wireless handheld device, currently in use or later developed and used by students) that is reasonably perceived as being dehumanizing, intimidating, hostile, humiliating, threatening, or otherwise likely to evoke fear of physical harm or emotional distress and may be motivated either by bias or prejudice based upon any actual or perceived characteristic, such as race, color, religion, ancestry, national origin, gender, sexual orientation, gender identity or expression; or a mental, physical, or sensory disability or impairment; or by any other distinguishing characteristic, or is based upon association with another person who has or is perceived to have any distinguishing characteristic. Bullying and harassment also include forms of retaliation against individuals who report or cooperate in an investigation under this policy. Such behaviors are considered to be bullying or harassment whether they take place on or off school property, at any school-sponsored function, or in a school vehicle or at any time or place where a child's imminent safety or over-all well being may be at issue.

"Bullying" is conduct that meets all of the following criteria:

- is reasonably perceived as being dehumanizing, intimidating, hostile, humiliating, threatening, or otherwise likely to evoke fear of physical harm or emotional distress;
- is directed at one or more pupils;
- is conveyed through physical, verbal, technological or emotional means;
- substantially interferes with educational opportunities, benefits, or programs of one or more pupils;
- adversely affects the ability of a pupil to participate in or benefit from the school district's or public school's educational programs or activities by placing the pupil in reasonable fear of physical harm or by causing emotional distress; and,
- is based on a pupil's actual or perceived distinguishing characteristic (see above), or is based on an association with another person who has or is perceived to have any of these characteristics.

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“Harassment” is conduct that meets all of the following criteria:

- is reasonably perceived as being dehumanizing, intimidating, hostile, humiliating, threatening, or otherwise likely to evoke fear of physical harm or emotional distress;
- is directed at one or more pupils;
- is conveyed through physical, verbal, technological or emotional means;
- substantially interferes with educational opportunities, benefits, or programs of one or more pupils;
- adversely affects the ability of a pupil to participate in or benefit from the school district’s or public school’s educational programs or activities because the conduct, as reasonably perceived by the pupil, is so severe, pervasive, and objectively offensive as to have this effect; and,
- is based on a pupil’s actual or perceived distinguishing characteristic (see above), or is based on an association with another person who has or is perceived to have any of these characteristics.

The scope of this policy includes the prohibition of every form of bullying, harassment, and cyberbullying/harassment, whether in the classroom, on school premises, immediately adjacent to school premises, when a student is traveling to or from school (portal to portal), or at a school-sponsored event, whether or not held on school premises. Bullying or harassment, including cyberbullying/ harassment, that is not initiated at a location defined above is covered by this policy if the incident results in a potentially material or substantial disruption of the school learning environment for one or more students and/or the orderly day-to-day operations of any school or school program.

The (fill in district name) board of education expects students to conduct themselves in a manner in keeping with their levels of development, maturity, and demonstrated capabilities with a proper regard for the rights and welfare of other students, school staff, volunteers, and contractors.

The (fill in district name) board of education believes that a comprehensive health education curriculum, within a coordinated school health framework, helps students attain knowledge and skills vital to school success, a productive workforce and good citizenship. Critical skills include anticipating consequences of choices, making informed decisions, communicating effectively, resolving conflicts, and developing cultural competency.

The (fill in district name) board of education recognizes that in order to have the maximum impact, it is critical to provide a minimum of annual training for school employees and volunteers who have significant contact with pupils on school policies and procedures regarding bullying and harassment. Training will provide school employees with a clear understanding of their roles and responsibilities and the necessary skills to fulfill them.

The (fill in district name) board of education believes that standards for student behavior must be set through interaction among the students, parents and guardians, staff, and community members of the school district, producing an atmosphere that encourages students to grow in self-discipline and their ability to respect the rights of others. The development of this atmosphere requires respect for self and others, as well as for district and community property on the part of students, staff, parents, and community members.

The (fill in district name) board of education believes that the best discipline for aggressive behavior is designed to (1) support students in taking responsibility for their actions, (2) develop empathy, and (3) teach alternative ways to achieve the goals and solve problems that motivated the aggressive behavior. Staff members who interact with students shall apply best practices designed to *prevent* discipline problems and encourage students’ abilities to develop self-discipline and make better choices in the future.

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Since bystander support of bullying and harassment can encourage these behaviors, the district prohibits both active and passive support for acts of harassment or bullying. The staff should encourage students *not* to be part of the problem; *not* to pass on the rumor or derogatory message; to walk away from these acts when they see them; to constructively attempt to stop them; to report them to the designated authority; and to reach out in friendship to the target. Periodic classroom meetings should be conducted to teach bystanders how and when to respond to bullying and harassment incidents. Informal classroom discussions and activities designed to provide awareness and increase student connectedness promote a positive shift in peer norms that will support empowered bystanders. When bystanders do report or cooperate in an investigation, they must be protected from retaliation with the same type of procedures used to respond to bullying and harassment.

The (fill in district name) board of education requires its school administrators to develop and implement procedures that ensure *both* the appropriate consequences *and* remedial responses to a student or staff member who commits one or more acts of bullying and harassment. The following factors, at a minimum, shall be given full consideration by school administrators in the development of the procedures for determining appropriate consequences and remedial measures for each act of harassment or bullying.

### *Factors for Determining Consequences*

- Age, development, and maturity levels of the parties involved
- Degree of harm (physical and/or emotional distress)
- Surrounding circumstances
- Nature and severity of the behavior(s)
- Incidences of past or continuing pattern(s) of behavior
- Relationship between the parties involved
- Context in which the alleged incident(s) occurred

*Note:* In order to ensure students' perception of fair and impartial treatment, a student's academic or athletic status is *not* a legitimate factor for determining consequences. Consequences must be perceived as fair and impartial.

### *Factors for Determining Remedial Measures*

#### *Personal*

- Life skill competencies
- Experiential deficiencies
- Social relationships
- Strengths
- Talents
- Traits
- Interests
- Hobbies
- Extra-curricular activities
- Classroom participation
- Academic performance

#### *Environmental*

- School culture
- School climate and lack of connectedness
- Student-staff relationships and staff behavior toward the student
- Level of consistency in staff responses to bullying or harassing behaviors
- Level of consistency in application or severity of consequences given to students
- Staff-staff relationships witnessed by students
- General staff management of classrooms and other educational environments

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- Staff ability to prevent and de-escalate difficult or inflammatory situations
- Social-emotional and behavioral supports
- Social relationships
- Community activities
- Neighborhood culture
- Family situation
- Range and number of opportunities for student engagement, involvement, and recognition for achievement (beyond academics and athletics)

Consequences and appropriate remedial actions for a student or staff member who engages in one or more acts of bullying or harassment may range from positive behavioral interventions up to and including suspension or expulsion, in the case of a student, or suspension or termination in the case of an employee, as set forth in the board of education's approved code of student conduct or employee handbook. School employees will also be held accountable for bullying or harassing behavior directed toward school employees, volunteers, parents, or students.

Consequences for a student who commits an act of bullying and harassment shall vary in method and severity according to the nature of the behavior, the developmental age of the student, and the student's history of problem behaviors and performance, and must be consistent with the board of education's approved code of student conduct. Remedial measures shall be designed to: *correct the problem behavior; prevent another occurrence* of the behavior; and *protect the victim* of the act. Effective discipline should employ a school-wide approach to adopt a rubric of bullying offenses and the associated consequences. The consequences and remedial measures may include, but are not limited to, the examples listed below:

### *Examples of Consequences*

- Admonishment
- Participation in a guided reflection process designed to teach alternative behavior
- Temporary removal from the classroom
- Loss of privileges
- Classroom or administrative detention
- Referral to disciplinarian
- In-school suspension during the school week or the weekend, for students
- Out-of-school suspension
- Legal action
- Expulsion or termination

### *Examples of Remedial Measures*

#### *Strategies for Individual Behavioral Change:*

- Framing the aggressive behavior as a failed attempt to solve a real problem or reach a goal. The adult assists the misbehaving student to find a better way to solve the problem or meet the goal.
- Restitution and restoration
- Transformative conferencing/restorative justice practices
- Supervised peer support group
- Corrective instruction or other relevant learning or service experience
- Supportive discipline to increase accountability for the bullying offense
- Supportive interventions, including participation of an Intervention and Referral Services team, peer mediation, etc.
- Behavioral assessment or evaluation, including, but not limited to, a referral to a Child Study Team, as appropriate
- Behavioral management plan, with benchmarks that are closely monitored
- Involvement of school disciplinarian

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- Student counseling
- Parent conferences
- Student treatment
- Student therapy

### *Strategies for Environmental Change (Classroom, School Building, or School District):*

- Activities or strategies designed to help the student who engaged in bullying or harassment reflect on the offending behavior, maintaining an emotionally-neutral and strength-based approach
- School and community surveys or other strategies for determining the conditions contributing to harassment, intimidation, or bullying
- Change process to improve school culture
- School climate improvement/improvement in conditions for learning and instructional pedagogy (incorporation of brain-compatible strategies)
- Adoption of research-based, systemic bullying prevention programs
- Modifications of schedules
- Adjustments in hallway traffic
- Modifications in student routes or patterns traveling to and from school
- Increased supervision and targeted use of monitors (e.g., hallway, cafeteria, bus)
- General professional development programs for certificated and non-certificated staff
- Professional development plans for staff in key disciplinary roles
- Disciplinary action for school staff who contributed to the problem
- Parent conferences
- Referral to family counseling
- Increased involvement of parent-teacher organizations
- Increased involvement of community-based organizations
- Increased opportunities for parent input and engagement in school initiatives and activities
- Development of a general bullying/harassment response plan
- Peer support groups
- Increase communication with and involvement of law enforcement (e.g., school resource officer, juvenile officer)
- Engage in community awareness events and planning sessions

The (fill in district name) board of education requires the principal and/or the principal's designee at each school to be responsible for receiving complaints alleging violations of this policy. All school employees are required to report alleged violations of this policy to the principal or the principal's designee. All other members of the school community, including students, parents, volunteers, and visitors, are encouraged to report any act that may be a violation of this policy. Reports may be made anonymously, but formal disciplinary action *may not* be based solely on the basis of an anonymous report.

The (fill in district name) board of education requires the principal and/or the principal's designee to be responsible for determining whether an alleged act constitutes a violation of this policy. In so doing, the principal and/or the principal's designee shall conduct a prompt, thorough, and complete investigation of each alleged incident. The investigation is to be completed within three school days after a report or complaint is made. The parents of the students involved shall receive written notice from the school on the outcome of the investigation (in compliance with current privacy laws and regulations). All reports on instances of bullying and/or harassment must be recorded by the school for annual data review.

The (fill in district name) board of education prohibits reprisal or retaliation against any person who reports an act of bullying or harassment or cooperates in an investigation. The consequences and appropriate remedial action for a person who engages in reprisal or retaliation shall be determined by the administrator after consideration of the nature, severity, and circumstances of the act.

**Michigan Protection & Advocacy Service, Inc.**

The (fill in district name) board of education prohibits any person from falsely accusing another as a means of bullying or harassment. The consequences and appropriate remedial action for a *person* found to have falsely accused another as a means of bullying or harassment may range from positive behavioral interventions up to and including suspension or expulsion. Consequences and appropriate remedial action for a *school employee* found to have falsely accused another as a means of bullying or harassment shall be in accordance with district policies, procedures, and agreements.

The (fill in district name) board of education requires school officials to annually disseminate the policy to all school staff, students, and parents, along with a statement explaining that it applies to all applicable acts of harassment and bullying that occur on school property, at school-sponsored functions, or on a school bus. The chief school administrator shall develop an annual process for discussing the school district policy on harassment and bullying with students and staff.

The school district shall incorporate information regarding the policy against harassment or bullying into each school employee training program and handbook.

Updated and Approved November 9, 2010

## **Glossary of Abbreviations and Terms**

<b>ADA</b>	Americans with Disabilities Act, federal law which bars discrimination based on disability
<b>ADD</b>	Attention Deficit Disorder, a disability which may qualify a student for special education services
<b>ADHD</b>	Attention Deficit Hyperactive Disorder, disability which may affect educational performance, may qualify a student for special education services
<b>AI or ASD</b>	Autism Impairment or Autism Spectrum Disorder, disability which may affect educational performance, may qualify a student for special education services
<b>ALJ</b>	Administrative Law Judge
<b>AT</b>	Assistive Technology, devices or supports to help a student with a disability learn more effectively
<b>BIP</b>	Behavior Intervention Plan, plan to address inappropriate behavior
<b>BSP</b>	Behavior Support Plan, plan to prevent inappropriate behavior by addressing its underlying causes and replacing them with appropriate behaviors
<b>CFR</b>	Code of Federal Regulations, rules that explain and implement Federal statutes and have the force of law
<b>CI</b>	Cognitive Impairment, disability which may affect educational performance, may qualify a student for special education service

<b>CMH</b>	Community Mental Health, public agency which provides mental health services to eligible children and adults in Michigan
<b>DB</b>	Deaf-Blind, a disability which may qualify a student for special education services
<b>DHS</b>	Department of Human Services, state agency which provides social services, child protective services and health care services
<b>DOE</b>	U.S. Department of Education, state agency responsible for implementing Federal and state special education laws
<b>ECDD</b>	Early Childhood Developmental Delay, a disability which may qualify a young child for special education
<b>EI</b>	Emotional Impairment, a disability which may affect educational performance, may qualify a student for special education services
<b>ESEA</b>	Elementary and Secondary Education Act, formerly known as "No Child Left Behind"
<b>ESY</b>	Extended School Year, educational program that extends beyond the regular school year (such as summer school)
<b>FAPE</b>	Free Appropriate Public Education, the standard for special education services set by Federal law which all schools must meet
<b>FBA</b>	Functional Behavior Assessment
<b>FERPA</b>	Family Education Rights and Privacy Act, Federal law governing access to school records and privacy protections

<b>HH</b>	Homebound and Hospitalized, educational services to students who cannot attend school because of health limitations
<b>HI</b>	Hearing Impairment, disability which may affect educational performance, may qualify a student for special education services
<b>IDEA</b>	Individuals with Disabilities Education Act, Federal law which requires states to provide special education and related services to students with specified disabilities
<b>IEE</b>	Independent Educational Evaluation, evaluation by an expert chosen by a student or parent, sometimes paid for by a school district
<b>IEP</b>	Individualized Education Program, written plan which sets forth a student's present level of performance, goals and objectives, and services and timelines to meet the goals and objectives
<b>IEPT</b>	Individualized Education Program Team, a team including parents, teachers, administrators and service providers which writes and implements the Individualized Education Program
<b>IFSP</b>	Individualized Family Service Plan, written plan which sets forth a young child's present level of performance, goals and objectives, and services (including family support services) and timelines to meet the goals and objectives
<b>ISD</b>	Intermediate School District, regional body which provides support and oversight to school districts and investigates compliance complaints

<b>LD</b>	Learning Disability, disability which may qualify a student for special education services
<b>LEA</b>	Local Education Agency
<b>LRE</b>	Least Restrictive Environment, concept requiring schools to educate students with disabilities in the same setting with other students when possible
<b>MARSE</b>	Michigan Administrative Rules for Special Education
<b>MiCI</b>	Mild Cognitive Impairment, a disability which may qualify a student for special education services
<b>MoCI</b>	Moderate Cognitive Impairment, a disability which may qualify a student for special education services
<b>MCL</b>	Michigan Compiled Laws, state statutes
<b>MDOE or MDE</b>	Michigan Department of Education, state agency responsible for implementing Federal and state special education laws
<b>MEAP</b>	Michigan Educational Assessment Program, statewide educational achievement test offered to all students
<b>MET</b>	Multidisciplinary Evaluation Team, team including parents and experts that writes an assessment plan and conducts assessments
<b>MME</b>	Michigan Merit Exam
<b>MMSEA</b>	Michigan Mandatory Special Education Act, state law which requires school districts to serve students with disabilities

<b>MPAS</b>	Michigan Protection & Advocacy Service, Inc, private nonprofit corporation mandated by federal and state law to provide information and advocacy to people with disabilities
<b>MPDCRA</b>	Michigan Persons with Disabilities Civil Rights Act
<b>MRS</b>	Michigan Rehabilitation Services, state agency which provides vocational rehabilitation services, including transition services, to people with disabilities
<b>ESEA</b>	Elementary and Secondary Education Act
<b>OHI</b>	Other Health Impairment, a disability which may qualify a student for special education services
<b>OCR</b>	Office for Civil Rights, federal agency that enforces Section 504
<b>OSEP</b>	Office of Special Education Programs, federal agency that oversees IDEA
<b>OSERS</b>	Office of Special Education and Rehabilitation Services, federal agency that oversees special education and vocational rehabilitation services
<b>PA</b>	Public Act, new state law as passed by the Legislature
<b>PL</b>	Public Law, new federal law as passed by Congress
<b>PLAAFP</b>	Present Level of Academic Achievement and Functional Performance
<b>PAC</b>	Parent Advisory Committee, district-wide advisory committee made up of parents who give input to school districts on special education

<b>PBS</b>	Positive Behavior Supports, a behaviorally based approach that works to address challenging behaviors by using an ongoing assessment and intervention process to develop supportive environments for student learning
<b>PI</b>	Physical Impairment, disability which may affect educational performance, may qualify a student for special education services
<b>RTI</b>	Response to Intervention
<b>SEA</b>	State Education Agency, Michigan Department of Education
<b>SLI</b>	Speech and Language Impairment, disability which may affect educational performance, may qualify a student for special education services
<b>SCI</b>	Severe Cognitive Impairment, disability which may affect educational performance, may qualify a student for special education services
<b>SXI</b>	Severe Multiple Impairments, combinations of disability which may affect educational performance, may qualify a student for special education services
<b>TBI</b>	Traumatic Brain Injury, disability which may affect educational performance, may qualify a student for special education services
<b>Title II</b>	Title II of the Americans with Disabilities Act
<b>USC</b>	United States Code, federal statutes
<b>VI</b>	Visual Impairment, disability which may affect educational performance, may qualify a student for special education services
<b>504</b>	Section 504 of the Rehabilitation Act