

**Special Education:
Helping Children with Special Needs Exercise Their Right to a Free,
Appropriate Education
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Chuck Williams
Director
American Bar Association Division for Public Education
321 N. Clark Street
Chicago, IL 60654-7598
(312) 988-5728
WilliamC@staff.abanet.org

Chuck Williams is Associate Director of the American Bar Association Division for Public Education and editor of the journal ABA Preview of United States Supreme Court Cases. Mr. Williams has completed judicial clerkships with Judge James S. Getty of the Maryland Court of Special Appeals and Judge John L. Coffey of the 7th U.S. Circuit Court of Appeals. He is a graduate of the University of Maryland School of Law, where he served as Articles Editor for the Maryland Law Review.

Jay E. Grenig
Professor of Law
Marquette University Law School
Sensenbrenner Hall
1103 West Wisconsin Avenue
P.O. Box 1881
Milwaukee, WI 53201
(414) 288-5377
jgrenig@earthlink.net

Jay Grenig is a professor of law at Marquette University. He is the founder and former director of the Children with Special Health Needs Law Project at Marquette. He is the author of several books on special education and education law. The father of two sons with special needs, Prof. Grenig formerly served as legal advisor to a number of California school districts. He also was legal counsel to the California Association of School Psychologists and Psychometrists. He is a graduate of Hastings College of the Law, University of California.

Special Education: Helping Children With Special Needs Exercise Their Right To A Free, Appropriate Education

By Jay E. Grenig* and Charles F. Williams**

I. INTRODUCTION TO SPECIAL EDUCATION

“Special education” is specially designed instruction, at no cost to parents or guardians, meeting the unique needs of a child with a disability, including instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and instruction in physical education. Special education is an instructional technique, not a place. Once instruction for a child has been planned as required to address the child’s needs, it may be provided in a variety of settings including a regular education classroom. A local education agency cannot fulfill its obligation to provide special education by automatically placing a child with a particular disability in a particular classroom or program designated to serve that group.

II. STATUTES

A. FEDERAL LAWS

1. Individuals with Disabilities Education Act

Several federal laws provide protection for children with special needs. The Individuals with Disabilities Education Act¹ (IDEA), seeks to ensure that all disabled children have available to them a free appropriate public education (FAPE). The IDEA provides state and local education agencies with funds as well as imposes obligations; the IDEA also guarantees children with disabilities the right to a FAPE. A FAPE under the IDEA must include special education and related services tailored to meet the unique needs of a particular child, and must be reasonably calculated to enable the child to receive educational benefits. The IDEA is administered by the Office of Special Education and Rehabilitation Services, U.S. Department of Education, 400 Maryland Ave., S.W., Washington, DC 20202-3511.

* Professor of Law, Marquette University Law School. Author, *Children with Special Needs: Special Education*, in AMERICAN BAR ASSOCIATION COMPLETE PERSONAL LEGAL GUIDE; and CALIFORNIA CODE FORMS: EDUCATION CODE. Founder and former director, Children with Special Needs Law Project, Marquette University Law School.

** Associate Director, ABA Division for Public Education. Editor, *ABA Preview of United States Supreme Court Cases*.

¹ 20 U.S.C. §§ 1400-1482.

While the IDEA does not require public schools to maximize the potential of disabled children, public schools must provide such children with meaningful access to education. A FAPE under the IDEA must include special education and related services tailored to meet the unique needs of a particular child and must be reasonably calculated to enable the child to receive educational benefits.

The key element of the IDEA is development of an individualized education program (IEP) for each disabled child, including a comprehensive statement of the educational needs of the disabled child and the specially designed instruction and related services to be employed to meet those needs. In developing a child's individualized education program, a Committee on Special Education is required to consider four factors: (1) academic achievement and learning characteristics, (2) social development, (3) physical development, and (4) managerial or behavioral needs.

2. Rehabilitation Act

Section 504 of the Rehabilitation Act of 1973² prohibits discrimination on the basis of disability in a federally funded program or activity. Because virtually all public schools receive federal funds of some type, Section 504 is an additional tool for assuring that school-age children with disabilities receive a free appropriate public education. However, Section 504 is inapplicable when relief is available under the IDEA. The U.S. Department of Education's regulations implementing Section 504 in preschools, elementary schools, and secondary schools prohibit specified practices as discriminatory and require schools to take certain affirmative steps to ensure that children with disabilities receive an appropriate education.

Section 504 eligibility is not based on a categorical analysis of disabilities. Rather, Section 504 protections are available to children who can be regarded in a functional sense as "handicapped." Section 504 defines a person with a disability as one "with a physical or mental impairment that substantially limits one or more life activities" or one with a record of such an impairment or regarded as having such an impairment. Learning has been identified as a major life activity. Children with asthma, attention deficit disorder, and epilepsy are also included within the definition. Whenever a referral for special education assessment is made, the referral should also request that the child be assessed for eligibility for accommodations under Section 504. Section 504 is monitored by the U.S. Department of Education, Office of Civil Rights.

3. Americans with Disabilities Act

The Americans with Disabilities Act³ (ADA) was enacted in 1990 and prohibits discrimination against qualified disabled individuals by any public agency that receives federal funds. A public local education agency is such a public entity. A qualified individual with

² 29 U.S.C. §§ 701-794.

³ 42 U.S.C. §§ 12111-12117.

a disability is “an individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.” Where a claim under the ADA is redundant of a claim under the IDEA, the ADA claim is dismissed. The ADA is administered by the Equal Employment Opportunities Commission.

B. STATE LAWS

States have special education laws substantially mirroring the federal IDEA. States are not prohibited from setting higher quality and benefit standards than provided by federal law. It is necessary to follow the state procedures with respect to special education. State departments of public education or public instruction have helpful material to guide parents through the special education maze.

III. ELIGIBILITY FOR SPECIAL EDUCATION SERVICES

A. LEARNING PROBLEMS

The IDEA requires state and local implementation of plans to provide full educational opportunity to all children with disabilities aged birth through twenty-one. A child may have learning problems, but may not be eligible for special education services because the child does not fit into one of the special education eligibility categories or because the child’s learning problems are not severe enough to qualify the child for special education. However, such a child may be eligible for special services and program modifications under Section 504 of the Rehabilitation Act.

B. CHILDREN PROTECTED BY THE IDEA

Only children with disabilities as defined in the IDEA who, because of their disabilities, need special education are entitled to protection under the IDEA. Specific disabilities covered by the IDEA are the following conditions that result in a child’s entitlement to special education and related services:

- Mental Retardation
- Hearing Impairments (including deafness)
- Speech or Language Impairments
- Visual Impairments (including blindness)
- Serious Emotional Disturbance
- Orthopedic Impairments
- Autism
- Traumatic Brain Injury
- Other Health Impairments
- Specific Learning Disabilities

The term “children with specific learning disabilities” means those children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder manifests itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include:

- Perceptual disabilities
- Brain Injury
- Dyslexia
- Developmental aphasia

The term “children with specific learning disabilities” does not include children who have learning problems that are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

With respect to children ages three through five, at a state’s discretion, “children with disabilities” include children experiencing developmental delays as defined by the state in one or more of the following areas: physical development, cognitive development, communication development, social or emotional development or adaptive development and who, by reason of the developmental delays, need special education and related services.

IV. RIGHTS OF PARENTS

The rights of parents and children under the various special education laws can be summarized as follows:

- The right to a FAPE.
- The right to an education in the least restrictive environment.
- The right to prior written notice of the parent’s and the child’s educational rights.
- The right to notice before any action or refusal to act by the local education agency.
- The right to provide consent before the child’s initial evaluation and placement for special education.
- The right to withdraw permission for evaluation, the IEP or placement.
- The right to request an independent educational evaluation at local education agency expense and the right to obtain an outside evaluation at the parent’s own expense.
- The right to be included as equal partners with school personnel in developing the child’s IEP.
- The right of parents to see and to obtain copies of their child’s education records.
- The right to file a written complaint if the parent believes the local education agency has violated the rights of the parent or the child.
- The right to request a due process hearing to resolve disagreements with the school about the child’s needs as part of the school program.

- The right to prosecute IDEA claims on their own. See *Winkelman ex rel. Winkelman v. Parma City School District*, 550 U.S. 516 (2007).

V. FREE APPROPRIATE PUBLIC EDUCATION

A. INTRODUCTION

The IDEA requires each state to adopt and implement a policy insuring a FAPE for all children with disabilities within the state. Regulations under Section 504 also impose a similar requirement. A local education agency is not providing a free appropriate public education if it is not following a properly developed IEP.

B. DEFINITION

A free appropriate public education means “special education and related services,” and includes appropriate preschool, elementary, or secondary school education provided in conformity with the required individualized education program.

IMPORTANT: “Free” means free. All special education and related services must be provided at public expense, without cost to the child, parent or guardian. Parents cannot normally be required to use their child’s social security benefits or health insurance to pay for or defray the cost of special education and/or related services.

A package of special education and related services is “appropriate” if

- The individualized education program was developed in accordance with the statutory procedures.
- It is reasonably calculated to enable the child to receive educational benefits.
- The individualized educational program must be one under which educational progress is likely.

Educational agencies must take steps to provide nonacademic and extracurricular services and activities in such a manner as is necessary to afford children with disabilities an equal opportunity for participation. Such activities include athletics, recreational activities, special interest groups or clubs, and employment of children, including employment by the school and assistance in making outside employment available. In arranging for the provision of such services, lunch and recess, the local education agency must ensure that children with disabilities participate with non-disabled children to the maximum extent appropriate.

C. LEAST RESTRICTIVE ENVIRONMENT

1. Generally

The right to participate applies to the full range of academic program options, nonacademic services, extracurricular activities, and physical education.” However, it does not mean that all children must attend school at regular education campuses. Both IDEA and Section 504 guarantee children with disabilities the right to participate in regular classroom and extra-curricular activities with non-disabled children to the maximum extent appropriate in view of their individual needs, with the use of supplementary aids and services and/or modification of the regular education curriculum, if necessary. Depending on the child’s individual needs as documented by the IEP, the child may need to receive educational programming at a special school, non-public school, or residential facility.

2. Education in Regular Classroom

To the maximum extent appropriate, children with disabilities are educated with non-disabled children. In addition, special classes, separate schooling, or other removal of children with disabilities from the regular education environment should occur only 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.

Several factors can be utilized in determining whether a local education agency is complying with the least restrictive environment mandate:

- Educational benefits available to the child with a disability in a regular classroom, supplemented with appropriate aids and services, as compared with educational benefits of a special education classroom.
- Non-academic benefits of interaction with children who are not disabled.
- Effect on the teacher and the other children in the classroom of the presence of the child with disabilities.
- Cost of mainstreaming a child with disabilities in a regular education classroom as compared to the cost of a special education classroom.

Only when a child’s education cannot be achieved satisfactorily in the regular education classroom with one or more supplementary aids and services may the child be placed in another setting. Consideration of these issues must occur before and during the development of the IEP. If a local education agency proposes to remove a child from the mainstream, the local education agency bears the burden of proving that such an exclusion from the regular education setting (whether total or partial) is justifiable in view of these requirements.

A child with disabilities will have a stronger case for an integrated environment or full inclusion if the child’s IEP goals and objectives relate, at least in part, to the curriculum in use in the desired placement. Any modifications or services must be specifically written into the child’s IEP. Supplementary aids and services might include:

- Special seating arrangements
- Modification of tests to accommodate the child’s disability
- Curriculum modifications

- Instructional or health aides to accompany the child
- Adaptive equipment

Regular education staff have a duty to cooperate in providing a disabled child with integration, full inclusion, and mainstreaming opportunities. The local education agency is responsible for

- Giving a copy of the child's IEP to the child's regular education teachers or informing them of its contents.
- Ensuring that the special education teacher or other appropriate support person is available to consult with the regular education teacher.

D. RELATED SERVICES

1. Definition

“Related services” are any services that are necessary to assist a child to benefit from special education. “Related services” are defined as transportation and such development, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation and social work services, and medical and counseling services, including rehabilitation counseling, except that such medical services must be for diagnostic and evaluation purposes only) as may be required to assist a child with disabilities to benefit from special education, and includes the early identification and assessment of disabling conditions in children. The statutory list of related services is not exhaustive. If a child needs a particular service in order to benefit from special education and the service is a developmental, supportive or corrective one, it is also a “related” one and should be provided.

2. Eligibility

Once a child qualifies for special education services, the child is eligible for any related service required to meet the child's educational needs. A local education agency does not have to provide a service to a child with a disability just because the child will benefit from the service, or even if the child requires the service. The service is only related if it is necessary to help the child benefit from the educational instruction.

Any child who meets the eligibility requirements for special education is entitled to the related services, even if the child is placed full time in a regular classroom. Even children with disabilities who are not eligible for special education are entitled to receive supportive services necessary to enable them to benefit from their school program.

3. Frequency

The frequency of a related service and the amount of time in each session must be individually determined based on the child's needs at the IEP team meeting. Frequency and amount of time should be written into the IEP.

4. Examples

a. Transportation

Transportation is a related service when it is necessary in order for a child to attend a special education program due to the distance the child lives from school or the child's disability. Transportation is also available to and from related services that are not provided at the school site. So long as the IEP team determines the child needs transportation, the child is entitled to receive it, even if the child is mainstreamed in regular classes.

A local education agency may not provide transportation only to those children who live at least a specified minimum distance from their school site. The parents' ability to provide transportation does not relieve the local education agency of its responsibility.

Transportation options may include, but not be limited to, walking, riding the regular school bus, utilizing available public transportation (with reimbursement), riding a special bus from a pick-up point, and portal-to-portal transportation by school bus, taxi, reimbursed parent's driving with a parent's voluntary participation.

b. Physical Therapy and Occupational Therapy

Physical therapy and occupational therapy address a child's fine (for example, writing, drawing) and gross (for example, running, walking, throwing, jumping) motor functioning. In addition, a child's motor functioning may affect independent living skills.

c. Speech Therapy

Speech therapy addresses articulation difficulties. Language therapy addresses difficulties with memory, verbal expression, and listening problems. Any child eligible for special education may receive speech and language therapy if the child needs the service to benefit from special education. A child does not have to meet the special education eligibility criteria for speech or language disorders in order to receive speech and language therapy as a related service.

d. Mental Health Services

Psychological services include counseling and psychotherapy. Counseling generally focuses on school and school-related issues, such as behavior in school, grades, and curriculum. Psychotherapy generally focuses on a child's emotional status and feelings toward others. Psychotherapy is available when a child's emotional status has a negative effect on the child's educational performance.

Mental health services must be provided to any child who needs the service to help the child benefit from special education. It is not necessary that the child be classified as "seriously emotionally disturbed."

e. Communication Services and Equipment-Related Services

If a child is non-oral, the local education agency should contract with a non-oral communications specialist to do an assessment. Depending upon the results of the assessment, the IEP team may decide that the child would benefit from specialized services such as a computerized communications device and instructions in using the device.

f. Vision Therapy

If a child needs vision therapy in order to benefit from special education, the child is entitled to receive vision therapy as a related service. Vision therapy may include remedial or developmental instruction provided directly or in consultation with an optometrist, ophthalmologist, or by another qualified licensed physician or surgeon.

g. Medical Services

Except for medical services that are for “diagnostic or evaluation purposes,” education agencies are not responsible for providing medical services as related services. If a service can be performed by a school nurse or other qualified person and it is not one that must be provided by a licensed physician, then it is not a medical service. It is a related service if it is necessary to help a child with a disability benefit from special education. If a child needs health services to be able to attend school, then the child needs it to benefit from special education. *See Cedar Rapids Community School District v. Garret F. ex rel. Charlene F.*, 526 U.S. 66 (1999) (continuous nursing services required by quadriplegic student were “related services” that had to be provided by school district during school hours under IDEA, because such services were supportive services but did not constitute medical services).

h. Instructional Aides

A local education agency must provide an instructional aide if the child needs an aide in order for the child to benefit from his or her education, including situations where the child needs an aide to assist the child in a regular classroom. Any required qualifications should be written in the IEP, as well as the frequency, amount, and type of services the aide will provide.

i. Assistive Technology

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 children with disabilities. Assistive devices include evaluation of the needs of a child with a disability, purchasing, modifying or repairing of such devices, and the training necessary for the child and others to use it effectively. Federal law requires that education agencies ensure that assistive technology devices or services are available as part of the child’s:

- Special education
- Related Services
- Supplemental aids and services used to assist children in being placed in the least restrictive environment

Assistive devices that the U.S. Department of Education's Office of Special Education Programs has found to be related services include:

- Computers
- Auditory training equipment
- Computerized communication system
- Device for loading and unloading children from a bus
- Liberator communication device
- Computer assistance

Individual-prescribed devices (such as glasses and hearing aids) are generally considered personal items and education agencies do not have the responsibility to provide them.

In determining whether assistive technology is a related service, consideration is given to

- Importance of language to education, lack of alternative systems, and positive prognosis in ordering a local education agency to provide a communication device.
- Ability of lift to improve gross motor skills and safety, normalcy, and family acceptance of the device in deciding which means of removing a child from bus would be acceptable.
- Whether a child's IEP appropriately considers the child's potential.

A child probably can use an assistive device at home if the child needs the device to receive a free, appropriate public education, such as completing school homework or practicing functional skills in a non-school environment.

Education agencies cannot require parents to buy assistive devices. Parents can be required to use private insurance for assistive devices only in limited circumstances.

E. EXTENDED SCHOOL YEAR

The IDEA does not directly address providing special education and related services beyond the traditional school year. However, because special education programs must be designed to meet the unique needs of the individual child, if extended school year programming is required for a child with disabilities to receive an appropriate education, education agencies must provide special education and related services on an extended year basis.

The IEP team determines whether a child needs such a program and considers as factors:

- Degree of impairment

- Availability of other resources
- Amount of regression
- Rate of progress

If interruption of the child's educational programming may cause substantial regression and, coupled with limited recoupment capacity, render it impossible or unlikely that the child will attain the level of self-sufficiency and independence that would otherwise be expected in view of the child's disabling condition; an extended school year should be provided.

The special education and related services offered during the extended year must be comparable in standards, scope and quality to the program offered during the regular academic year. The extended school year services must be provided at no cost to the parents.

IMPORTANT: If the IEP team recommends extended year services, the recommendation should be written into the IEP.

F. TRANSITION SERVICES

"Transition services" are a coordinated set of activities for a child, designed within an outcome-oriented process, which promote 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. The coordinated set of activities must be based upon the individual child's needs, taking into account the child's preferences and interests. The activities also must include instruction, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

The IDEA requires that IEPs for children sixteen years of age and older contain a statement of needed transition services for the transition to post-school life.

G. RESIDENTIAL PLACEMENT

If placement in a public or private residential program is necessary to provide special education and related services to a disabled child, the program, including nonmedical care and room and board, must be at no cost to the parents of the child. Typically, residential placement is indicated when a child needs the structure, intensity and consistency of programming that a day program could not offer.

H. DISCIPLINE

If a child's disability impacts on the child's behavior, then the child's IEP should include special education and related services in the regular education environment that are needed to address the behavior. A child with disabilities cannot be suspended for more than ten days. If a pattern of short-term suspensions would result in a significant

change in placement and the behavior for which the child is being suspended is a manifestation of the child's disability or is due to an inappropriate IEP or placement, the child may not be suspended except in a genuine emergency, such as a threat to the health or safety of the child or others.

If a pattern of disciplinary suspension emerges, the local education agency should review the child's IEP and placement offer. The local education agency should take steps to assure the child's educational program addresses the child's unique needs, including educational interventions to address inappropriate behaviors arising from the child's disability.

A child with disabilities cannot be expelled from school for misconduct that is directly related to the child's disability or if the IEP team determines the child was not appropriately placed at the time of the misconduct. Because expulsion is a significant change in placement, before expelling a child with disabilities from school, the local education agency must follow specified procedures, including notice, assessment of the child and convening an IEP team meeting to determine if the misconduct is related to the child's disability.

Before expulsion proceedings can begin for any child enrolled in a special education program, the procedures prescribed by law must be followed. These procedures can be summarized as follows:

- Notifying parents in writing of the local education agency's intention to seek expulsion or suspension for more than ten days.
- Conducting an evaluation of the child's educational needs.
- Convening an IEP team meeting to determine if the misconduct is directly related to the child's disability or the result of an inappropriate placement.
- Informing the parents of their right to request both impartial administrative review of any IEP team decisions and judicial review of the final administrative determination.

At the meeting, the IEP team must attempt to reach agreement as to whether the misconduct was disability-related and whether the child was appropriately placed at the time of the misconduct. If the misconduct was related to the child's disability, or the child was inappropriately placed, the local education agency may not proceed with expulsion and the IEP team must consider additional services or other placement options rather than expulsion.

If the IEP team cannot reach agreement, then the local education agency must make these decisions and give the parent the right to appeal the local education agency's decision through a due process hearing. Any hearing and further judicial appeal of the hearing decision must be completed before the expulsion procedures begin. While the hearing or court proceedings are pending, the child must be returned to the child's last school placement unless the child's parents have agreed to a change in placement or the local education agency has obtained a court order permitting a change in placement.

If, after the conclusion of the IEP procedures, it is properly determined the child's misconduct was not disability-related and the child was in an appropriate placement at the time of the misconduct, the child is treated the same as non-disabled children with respect to expulsion. If a parent disagrees with the decisions about whether the behavior for which the child is being suspended is a manifestation of the child's disability or due to an inappropriate IEP or placement offer, the parent may request a due process hearing. The child's educational placement may not be changed before the conclusion of the hearing proceeding." However, the local education agency may seek a court order if a child's continuing in his or her current educational placement is substantially likely to result in injury to the child or others.

School officials who simply label children as "behavioral problems" instead of referring them for evaluations may be violating their affirmative obligations under federal and state disability laws to identify, locate and evaluate all children with disabilities residing within their jurisdictions and to provide those needing special education and related services with individualized evaluations of their needs.

The U.S. Department of Education has taken the position that a local education agency cannot terminate services for a special education child, even if the child was expelled for conduct not related to the child's disabilities.

VI. REFERRALS

A. BEGINNING THE REFERRAL PROCESS

The process of obtaining special education and related services for a child begins with the written request for a referral. Anyone, including a child's parents, may refer a child. If a local education agency receives a referral from a person other than the child's parents, the local education agency must send written notice of the referral to the child's parent.

B. THE REFERRAL LETTER

The referral letter must include the following:

- The child's name, address, birth date, and other identifying information.
- A description of the child's disability and, if the child is enrolled in school, the problems the child is having in school.
- A request that the child be evaluated by an IEP Team.
- The letter should be dated in order to clarify when the 90-day period for the local education agency to act began.
- An address and daytime telephone number where the parent can be reached.

The letter should be addressed to the local education agency's Director of Special Education. The child's principal can usually provide the name and address of the person to be contacted. A copy of the letter should be retained. In addition, it may be helpful to send a

copy of the letter to the child's teacher, so that the teacher knows a request for referral has been made.

The request for a referral should request a referral under IDEA, Chapter 115, and Section 504 of the Rehabilitation Act of 1973. If the parent requests a Section 504 assessment and the local education agency agrees that there is reason to believe the child needs special education or related services, the local education agency must evaluate the child to see if the child qualifies for accommodations or services under Section 504. If the local education agency does not agree that the child may need special education and related services, the local education agency may refuse to evaluate the child under Section 504. The parent would then have to use the Section 504 fair hearing process to require the local education agency to evaluate the child for Section 504 eligibility.

C. RESPONDING TO THE REFERRAL REQUEST

A local education agency must accept and act on all referrals of children from birth to age 21, if a child has not graduated, who live in the local education agency. However, services do not have to be provided until the child turns three years old. Upon receiving a request to evaluate a child for the purpose of determining whether a child has a disability and qualifies for special education, the local education agency must evaluate the educational needs of any child, birth to 21 years of age (if the child has not graduated from school) who is suspected of having special education needs.

VII. EVALUATIONS

A. INTRODUCTION

1. When Evaluation Must Be Conducted

When a local education agency receives a referral, the local education agency has 90 calendar days within which to do the evaluations, and, if the child qualifies for special education, to write an IEP and offer placement. The 90-day period begins when a local education agency receives a letter of referral.

2. Evaluating Child Without Parental Permission

If it is the child's first referral, the local education agency cannot begin any evaluations until the local education agency has the parent's written consent to the evaluation. The consent must be voluntary and can be revoked in writing at any time. A child with exceptional educational needs must be reevaluated at least once every three years. The parents or the local education agency may request a reevaluation sooner if the circumstances warrant. If a parent refuses or revokes his or her consent for an IEP Team evaluation, a local education agency may initiate a hearing to determine whether the local education agency shall conduct an IEP Team evaluation of a child without the parent's written consent.

3. Notices

Whenever a local education agency proposes or refuses to initiate or change the evaluation process, it must send a written notice to the child's parent of its intent to propose or refuse. The notice must be sent within a reasonable period of time before the proposed action or before the refusal to take action.

B. THE EVALUATION

1. The IEP Team

The evaluation is performed by a multi-disciplinary team called the IEP Team. The IEP Team is a group of educators who, based on their evaluations, determine whether a child has a disability and needs special education and related services. The local education agency appoints members of the IEP Team based on information in the referral.

All members of the IEP Team must be employees of the local education agency and must prepare written reports of their evaluations. At least two members of the IEP Team must be persons who are skilled in assessing children and programming for children with handicapping conditions, at least one of whom is a teacher licensed to teach in the handicapping condition the child is suspected of having. Additional members may include:

- If a child is suspected of having a learning disability, the IEP Team must include the child's regular education teacher, if there is one.
- If a child is suspected of needing occupational therapy, the IEP Team must include an occupational therapist.
- If a child is suspected of needing physical therapy, the IEP Team must include a physical therapist.
- Other individuals as needed to evaluate and determine the needs of the child.

The IEP Team must examine all relevant available data concerning the child. If the child is suspected of being or is currently identified as being learning disabled, at least one member of the IEP Team, other than the child's regular teacher, must observe the child's performance in the regular classroom. The parents must be involved and consulted throughout the entire IEP Team process.

The IEP Team may consult with persons other than employees of the local education agency if it is needed to assess appropriately whether a child is a child with exceptional educational needs. Other people who can offer valuable information include:

- Parents or relatives of the child
- Foster parents
- Professionals who work with the child, such as therapists, physicians, social workers
- Friends

- Caregivers
- Advocate (attorney or support group advisor)

The IEP Team must use evaluation materials and procedures as needed to assess the child in all areas related to the suspected handicapping condition. The tests and other evaluation materials and procedures must meet the requirements of applicable statutes and rules.

Copies of individual evaluation reports must be provided if requested in writing within ten days of the local education agency's Notice of Evaluation. However, parents may request these reports in writing as soon as they are notified that an IEP Team has been appointed.

2. Conducting the Evaluation

The evaluation is conducted by the IEP Team, which must consider all areas related to the child's suspected disability, including where appropriate:

- Vision
- Hearing
- Motor abilities
- Academic abilities
- Self-help
- Mobility skills
- Career and vocational abilities and interest
- Social and emotional status

Tests must be validated for the specific purpose used and be given by trained personnel in conformance with the test producer's instructions. They must accurately measure a child's aptitude or achievement and assess specific areas of educational need rather than providing a single IQ or reflecting the child's impaired sensory, manual, or speaking skills. A psychological assessment must be conducted by a credentialed school psychologist trained and prepared to assess cultural and ethnic factors appropriate to the child being assessed.

The test must be given in the child's native language or other mode of communication. If this is not feasible, an interpreter must be used. The testing evaluation materials must be selected and administered so as not to be racially, culturally, or sexually discriminatory.

3. IEP Team Meeting

The local education agency sets a date for the IEP Team to meet and discuss the members' evaluations and findings. The local education agency notifies the parent of the IEP Team meeting within a reasonable amount of time prior to the meeting. If the meeting time and date are not convenient for the parent, the parent should immediately contact the local education agency to arrange a more convenient time. The notice must include the following information:

- Date, time, and location of the meeting
- A statement that the purpose of the meeting is to determine whether the child is a child with exceptional educational needs
- Names and titles of members of the IEP Team and any additional persons who may be attending
- A statement that the parent may attend the meeting and may bring an advocate
- If the child is a member of a minority, a statement that a member of that minority may attend the meeting and provide input into the IEP Team's decision-making process

The IEP Team members must have their individual reports available at the IEP Team meeting, if the parent requests this in writing within 10 days of the date the local education agency sent the notice of the IEP Team evaluation.

Before the team meeting, the parent and advocate, if any, should:

- Clarify what the child is being evaluated for.
- Determine who will be at the meeting.
- Review records and reports, especially the most recent IEP Team report and all individual reports, the current IEP and the previous IEP. Review any reports from private therapists or physicians.
- Determine what the child needs.
- If an advocate will be assisting the parent, discuss the role of the advocate and the parent.
- Determine what the issues are and research them.
- Plan a strategy.
- Have the parent notify the school that an advocate will be present to assist the parent.

Each member of the IEP Team is required to attend the meeting or to be represented by a person knowledgeable about the child and the absent member's evaluations and findings. More than half of the IEP Team members must be present at the meeting.

At the meeting, the IEP Team discusses and considers all the information received by it and discusses and compares the evaluations and findings of each of the members. Based upon its evaluations and findings and, using the statutory criteria, the IEP Team determines whether the child has a handicapping condition.

If the parents have an advocate at the meeting, the advocate should:

- Set a business-like tone.
- Arrive with the parent.
- Let the parent introduce the advocate.
- Sit with the parent.

- Give the parent time to react and speak.
- Take notes.

At the conclusion of the meeting, the participants should clarify what has been decided and who is to do what next. Any unanswered questions or concerns should be raised before the meeting is over. The name, title, and telephone number of the next contact person should be obtained.

If the child is found to have a handicapping condition, the IEP Team determines whether as a result of the handicapping condition the child needs special education. If the IEP Team concludes that a child is a child with exceptional educational needs, the IEP Team must consider and make recommendations regarding what related services the child may need.

C. IEP TEAM REPORT

As a result of the IEP Team meeting, the IEP Team writes an IEP Team report, including at least the following:

- A list of the handicapping conditions found by the IEP Team
- The IEP Team's conclusion regarding whether the child needs special education because of a handicapping condition
- If the child's need for occupational or physical therapy was considered, the IEP Team's conclusions regarding such need
- A statement that documents the reasons for each of the IEP Team's findings and conclusions
- Recommendations regarding what related services the child may need

If the IEP Team finds that a child is not a child with exceptional educational needs, the IEP Team report must include the following:

- An identification of the child's non-exceptional educational needs
- A referral to any programs, other than special education programs, offered by the local education agency from which the child may benefit
- Information about any programs and services other than those offered by the local education agency of which the IEP Team is aware that may provide a benefit to the child

If the local education agency's Director of Special Education approves the IEP Team report, a copy of the report is sent to the local education agency board and to the child's parent together with all of the separately proposed IEP Team reports submitted. If the Director of Special Education approves an IEP Team report signed by a minority of the IEP Team members and the Director attended the IEP Team meeting resulting in the proposed IEP Team reports, the Director must send to the governing board and to the child's parent a copy of all of the separately proposed reports and indicate in writing which of the reports was selected and why.

If the Director of Special Education intends to approve as the IEP Team report a separately proposed IEP Team report signed by a minority of the IEP Team members and the Director did not attend the IEP Team meeting which resulted in the proposed reports, the Director must set a date to meet with the IEP Team and to discuss the proposed reports. The Director must notify the parent of the meeting within a reasonable amount of time.

IMPORTANT: If the child's parent was unable to attend the most recent IEP Team meeting, the Director must send with the approved IEP Team report and any separately proposed IEP Team reports, a notice informing the parent that the parent may request a conference with the Director to discuss any proposed IEP Team Report and the approved IEP Team Report and that an advocate may accompany the parent.

If the Director does not accept the IEP Team report or reports, the Director must send the report or reports back to the IEP Team with a list of questions that the Director wants the IEP Team to consider. The Director must set a date for the IEP Team to meet to discuss the Director's concerns and notify the parent of the meeting.

If a child is found not to qualify for special education, the parent may use the IEP Team report to create a more appropriate regular education program for the child. If the parents disagree with the results, they may request an independent evaluation.

D. RE-EVALUATION

If a child is receiving special education, an IEP Team re-evaluates the child at least once every three years. A re-evaluation can occur more frequently if either a parent or the local education agency feels it is necessary.

VII. INDEPENDENT EDUCATIONAL EVALUATION

A. RIGHT TO AN INDEPENDENT EDUCATIONAL EVALUATION

A parent of a child who has been evaluated may obtain an independent educational evaluation of the child if the parent disagrees with the local education agency's evaluation. The parent has the right to select the independent evaluator and to request in writing payment for the evaluation from the local education agency. Reasons for seeking an independent educational evaluation include the following:

- There is no one on the local education agency staff qualified to perform the evaluation.
- There is reason to believe the local education agency relied on insufficient testing when it made recommendations at the IEP meeting.
- The local education agency results are inconsistent with other testing done on the child, so clarification is needed.

B. REIMBURSEMENT

The local education agency is required to pay for the independent educational evaluation unless one of the following occurs:

- The parent refuses to give the local education agency a complete copy of the independent educational evaluation.
- It is found at a hearing that the local education agency's IEP Team evaluation is appropriate.
- The independent educational evaluation does not meet the statutory requirements.

Before obtaining an independent educational evaluation, a parent may ask the local education agency whether the local education agency believes the person selected to conduct the independent educational evaluation meets the statutory requirements. If the local education agency finds the person does not meet the requirements, the local education agency must inform the parent of the finding and must also inform the parent about whether the local education agency will request a hearing to challenge the payment of an independent educational evaluation conducted by that person.

C. WHO CAN ORDER AN INDEPENDENT EDUCATIONAL EVALUATION

A hearing officer or a reviewing officer may order an independent educational evaluation.

D. CONSIDERATION OF RESULTS OF INDEPENDENT EDUCATIONAL EVALUATION

If the parent obtains an independent educational evaluation, the results of the evaluation must be considered by the local education agency when making any decision regarding:

- The child's IEP Team evaluation
- The IEP
- Educational placement or the provision of a free appropriate education for the child

The independent educational evaluation may also be presented as evidence at a due process hearing.

VIII. NOTICE OF IDENTIFICATION

Whenever a local education agency proposes or refuses to initiate or change the identification of a child as a child with exceptional educational needs, it must send a written notice to the child's parent of its intent to so propose or refuse. A parent may initiate a due process hearing whenever a board proposes or refuses to initiate or change the IEP Team evaluation process or the identification of a child as a child with exceptional educational needs.

IX. INDIVIDUALIZED EDUCATION PROGRAM

A. INTRODUCTION

The individualized education program (IEP) is a document describing the specially designed instruction and related services for a child (1) who is three years of age or older, (2) who has not graduated from high school, (3) and who is determined by the M- Team to be have exceptional educational needs. A local education agency may not provide special education and related services to a child unless the child has a current IEP. The IEP should be developed in a collaborative manner with the parent and school professionals.

IMPORTANT: The IEP must be developed before a placement is chosen. A school system violates the IDEA if it writes an IEP to fit a placement it has already selected.

B. THE IEP MEETING

The local education agency sets a date for the meeting to discuss the special education program and related services needs of the child and to develop an IEP for the child. The time and location of the meeting are agreed upon by the local education agency and the child's parent. The local education agency must ensure that the required reports are completed in writing and made available to the parent prior to the IEP meeting.

IMPORTANT: The meeting must be held within 30 days after the IEP Team report is approved, indicating that the child is a child with exceptional educational needs.

C. PARTICIPANTS IN THE IEP MEETING

The local education agency ensures that the IEP meeting includes the following participants:

- A representative of the local education agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.
- One or both of the child's parents.
- The child if appropriate.
- If the IEP process was initiated because of an initial eligibility determination of a child, a member of the IEP Team that evaluated the child or a person who is knowledgeable about the child's evaluation and is familiar with the report.
- If a purpose of the IEP meeting is the consideration of transition services for a child, the local education agency must invite the child and a representative of any other agency that is likely to be responsible for providing or paying for transition services.
- If a child is enrolled in a private school and receives or is eligible to receive special education from the local education agency, a representative of the private school.

- If a local education agency is considering placing the child in a private school, a representative of the private school.
- Others may attend the meeting at the discretion of the parent or the board.

IMPORTANT: The local education agency representative must have the authority to commit the local education agency to provide whatever services are included in the IEP so that the IEP will not be vetoed by school administrators or other school officials.

The local education agency should not present a completed IEP for approval without a full discussion of the child's need for special education and the services offered. Local education agency personnel may suggest goals or meet with the parent before the IEP meeting if it does not prevent team members, including parents, from providing input and if it results in an IEP.

D. THE IEP MEETING

The IEP meeting should generally proceed as follows:

- Step 1: Discussion and description of child's current level of functioning, including academic and non-academic functioning.
- Step 2: Development of annual goals and short-term objectives derived from child's current functioning.
- Step 3: Discussion and description of special education and related services, including placement recommendation and significant details of placement (such as class size, integration and mainstreaming opportunities) that make up the child's appropriate educational program.

The local education agency must send a written notice to the parents within a reasonable amount of time before the IEP meeting. The notice must include the following:

- The date, time, and location of the meeting and a statement that the meeting must be scheduled at a time and place agreed upon by the board and the child's parents.
- The purpose of the meeting.
- A statement that the parent may bring other people to the meeting.
- If the purpose of the meeting is the consideration of transition services for a child, the notice must state this, include a statement that the local education agency will invite the child, and identify any other agency that will be invited to send a representative.
- Names of persons who will attend the IEP meeting.

At the IEP meeting, the parent and advocate, if any, should:

- Determine who will be at the meeting and their roles.

- Review the child's current and previous IEPs. Consider whether goals are being met and whether the child is making progress.
- Review the most recent IEP Team report and any other evaluations.
- Determine what is needed to provide the child with a free appropriate public education.

IMPORTANT: The parent is expected to be an equal participant, along with school personnel, in developing, reviewing, and revising the child's IEP.

If a parent does not understand initials or jargon used in the meeting, the parent should not be reluctant to ask for an explanation of the initials or jargon. Most people do not understand special education initials or jargon. By asking for explanations, a parent is not indicating that the parent is uninformed, but is indicating that the parent is concerned about developing the appropriate education program for the child.

A parent can contribute to the IEP meeting by bringing a written summary describing the child's needs as the parent sees them. These include:

- **Strengths.** For example, outgoing, open, optimistic, articulate, and imaginative.
- **Weaknesses or Problem Areas.** For example, poor self-concept, academic deficits, fighting, disorganization, takes longer than average to complete assignments, discouraged easily.
- **Functioning Levels.** For example, difficulty with reading, mathematics, or spelling, responds to individual attention, needs verbal reinforcement for presented material.
- **What the Child Needs to Learn.** For example, more positive self-concept, proficiency at grade level in academic areas, age-appropriate social skills, self-help skills, job training, needs to be better organized, work at a more rapid pace.

A parent may bring others to the meeting to assist the parent in asserting the parent's position. A parent can bring whomever the parent wants, including an advocate, friend, caseworker, or attorney.

Parents have a right to tape record IEP meetings. If the local education agency tapes the meeting, the tapes are protected by the Family Educational Rights and Privacy Act of 1974. In addition, a parent has the right:

- To inspect and review local education agency-made tape recordings.
- To request that the tape recordings be amended if the parent believes that they contain information that is inaccurate, misleading, or in violation of the rights of privacy or other rights of the individual with exceptional needs.
- To challenge in a hearing a tape recording the parent believes is inaccurate, misleading, or in violation of the individual's right of privacy or other rights.

The local education agency must take necessary steps to ensure that the parent understands what is said at the IEP. If the parent needs a language or sign interpreter to participate at the IEP meeting, the local education agency must provide one at no cost to the parent.

If a parent is not able to attend, the local education agency must ensure the parent's participation by some other means such as individual or conference telephone calls. If no parent can attend the meeting or participate by other means, the local education agency must maintain a record of its attempts to have the parent attend or participate in the meeting.

X. CONTENTS OF THE IEP

A. GENERALLY

The IEP for a child must include the following:

- A statement of the child's present levels of educational performance
- A statement of annual goals, including short-term instructional objectives.
- The extent to which the child will be able to participate in regular educational programs.
- A statement of the specific special education and related services, including assistive technology services or devices if appropriate, to be provided the child.
- The projected dates for initiation of services and the anticipated duration of services.
- Appropriate objective criteria and evaluation procedures and schedules for determining on at least an annual basis whether the short-term instructional objectives are being achieved.
- Beginning no later than age 16, an annual statement of the needed transition services.
- If a child does not need transition services, a statement to that effect and the basis upon which the determination was made.
- If a child has a visual handicap, a statement indicating whether the child needs to be taught Braille.

The IEP should also include a statement concerning least restrictive environment. The purpose of this statement is to justify the chosen educational environment for the child. The statement must address the nature and severity of the child's disability, the characteristics of the regular education environment that necessitates the removal of the child, and the potential harmful effects to the child, to others, and to the services provided.

IMPORTANT: The IEP must contain a statement of all services needed by the child, not just those available within the school system.

The present level of performance should be a clear, descriptive statement of how the child is performing in a specific area of need found by the IEP Team. It should include the child's strengths, interests, and weaknesses. The present levels of educational performance should reflect the child's unique needs in any area of education affected by the child's dis-

ability, including academic areas, non-academic areas, and perceptual functioning. The child's performance should be described in objective, measurable terms. The team may use test scores and other information from the child's assessments.

B. ANNUAL GOALS

Annual goals are those the child can accomplish in one year. They should be directly related to present level of functioning. The annual goal should specify:

- Area of need
- Direction of behavior
- Level of attainment.

Short-term objectives are the specific, sequential steps between the child's present level of functioning and the annual goal. They should include a description of the skill or behavior to be performed and the conditions under which the child will be expected to perform them. Conditions can be materials, instructions, time limits, prompts, or assistive technology.

Annual goals and short-term instructional objectives allow a parent to track the child's progress in school and help to determine if the child's educational program is appropriate. They are also important because they help form and guide the child's specific instructional plans. They also define what kind of special education and related services the local education agency must provide. The local education agency must provide the programs and services necessary to meet the goals and objectives in the child's IEP. If the child needs a particular kind of special education program or service, the local education agency is not required to provide it unless it is necessary to meet an IEP goal or objective.

C. EVALUATION PROCEDURES

Evaluation procedures are the specific procedures used by the teacher to determine whether the child has met his or her goals. Evaluation consists of three parts:

- Criteria—what level of performance is acceptable
- Procedures—how it will be determined if the goal has been met
- Schedule—when the teacher will evaluate each objective

D. AMOUNT OF SPECIAL EDUCATION AND RELATED SERVICES

The amount of special education and related services should list all the special education and related services the child should receive. It should include all modifications in the regular schedule. It can be listed as classes or actual time. For each related service, the IEP should tell the amount, frequency and duration. Subjects that may be included in this area include special transportation needs, adaptive physical education requirements, assistance or supervision during lunch hour or recess, appropriate disciplinary approaches, and extended school year requirements. The related services should be specified in detail, not

merely described in general terms. The amount of time in the regular education environment should be written as a list of classes, actual time, or as a percentage—but not as a range of services.

IMPORTANT: Changes in the amount of services listed in the IEP cannot be made without holding another IEP meeting. However, as long as there is no change in the overall amount, some adjustments in scheduling the services should be possible without holding another IEP, provided that child's parent is notified.

The IEP is not intended to be detailed enough to be used as an instructional plan. Through its goals and objectives, the IEP:

- Sets the general direction those who will implement the IEP should take.
- Serves as the basis for developing a detailed instructional plan for the child.

However, the IEP must include all of the specific special education and related services needed by the child.

It must set out the amount of services to be provided, so that the level of the local education agency's commitment of resources will be clear to parents and other IEP team members. The amount of time to be committed to each of the various services to be provided must be:

- Appropriate to that specific service
- Stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP.

Children who are able to participate in regular classes may require modifications, supplementary aids or services, within that regular class in order to learn. Such modifications may include the use of a tape recorder, oral testing, or special seating. The modifications must be written into the child's IEP.

Special education means specially designed instruction to meet the unique needs of a child with disabilities. One of those unique needs may be a limit on class size. While a local education agency may disagree on the need for a class size limit, a local education agency may not categorically refuse to add class size to an IEP as a matter of policy. Such a policy would prevent the IEP team from developing an IEP based on the unique needs of the child.

The IEP cannot require particular teachers, classrooms or placements. However, the local education agency must provide services in settings and with people meeting the child's IEP goals and objectives. If the local education agency's proposed classroom or teacher cannot meet the child's IEP goals, the parent should ask the local education agency to change the classroom or teacher.

The starting date and ending date of the IEP is typically for one school year. If a child requires services longer than a typical school year, then the child may need a separate IEP for the extended school year.

E. APPROVING THE IEP

A parent may consent to those portions of the IEP that the parent agrees with so that services can begin. The parent can disagree with other parts of the IEP. The parts not agreed to cannot be implemented and may be issues at a due process hearing. A parent may consent to the IEP as written, yet disagree with the actual placement site or classroom.

Some educational agencies will ask the parents to sign the IEP. However, it is not necessary for the parents to sign. Signing the IEP indicates the parents were present at the IEP meeting, but it normally does not mean the parent agrees with the IEP. If a parent does not agree with the IEP, the parent should indicate on the IEP form that the parent disagrees with the IEP.

A parent may withdraw consent to any or all portions of the IEP anytime after consultation with a member of the IEP Team. The withdrawal of consent must be in writing.

F. REVIEW OF IEP

At least once a year, the local education agency must review the IEP of each child with exceptional educational needs. A parent may request a review of the parent's child's IEP. Education agencies should grant any reasonable request for an IEP meeting.

G. UNILATERALLY CHANGE OF IEP

Once an IEP has been developed and agreed upon, school personnel may not unilaterally change it. In order to revise an IEP or change a placement, a local education agency must follow the meeting and team process. The local education agency must give parents prior written notice of any proposed change in identification, evaluation, educational placement of a child, or provision of a free appropriate public education. A parent may initiate a hearing whenever a local education agency proposes to initiate or change or refuses to initiate or change a placement.

H. CHALLENGING THE IEP

If a parent disagrees with the IEP, the parent should first attempt to resolve the disagreement informally with the local education agency. A parent may request a due process hearing, if the parent is unable to resolve the disagreement informally.

XI. PLACEMENT OFFER

A. DEVELOPING THE PLACEMENT OFFER

When an IEP has been completed the local education agency must develop a placement offer for the child based upon and carrying out the child's IEP. The placement offer consists of two parts:

- Specification of the delivery model to be used and the level at which each of the services will be provided to implement the child's IEP.
- Specification of the location at which services will be provided to implement the child's IEP in conformance with the first part of the placement offer.

IMPORTANT: A local education agency must provide educational services based on the educational needs of the child. Educational agencies cannot use economic issues to deny a child the services the child needs.

B. PARENT'S CONSENT

If this is the first placement of the child, the parent must give written consent. Once consent is given to placement in special education, the consent stays in effect for all future placements. However, the consent can be revoked at any time and the local education agency may not thereafter continue a child's placement offer. However, if the local education agency believes the child is best served in special education, the local education agency can request a due process hearing.

C. BASIS OF PLACEMENT

The program placement must be determined based on the child's unique needs as described in the child's IEP, rather than the programs available in the local education agency. The child must be provided with those services stated in the IEP.

In making the placement offer, the local education agency must take into consideration and document the following as well as any potential harmful effect on the child or on the quality of services the child needs:

- To the maximum extent appropriate, the child must be educated with children who are not children with exceptional educational needs.
- Special classes that would remove a child with exceptional educational needs from the regular educational environment may only be included when the nature or severity of a child's handicapping condition is such that education in regular classes with the use of supplementary aids and services, including assistive technology services or devices, cannot be achieved satisfactorily.
- Alternative programs that are needed to implement the child's IEP must be available.

- Appropriate nonacademic and extracurricular services and activities must be provided.
- Unless the IEP requires a different arrangement, the child shall be educated in the school the child would attend if the child were not a child with exceptional educational needs.
- Special education and related services shall be provided as close as possible to the child's home.
- A child may be placed in a special education program at the child's home or at a hospital, only if there is a physician's written statement that the child is unable to attend school.

D. GROUPING CHILDREN WITH DIFFERENT DISABILITIES

Children with different disabilities may be grouped together for instruction in the same classroom. However, the placement must meet the child's IEP goals and objectives. If it does not, it is not appropriate.

E. LOCATION OF PLACEMENT

If the local education agency operates or can immediately establish an appropriate special education placement as specified in the IEP and in the first part of the placement offer, the local education agency must put the child in the placement. If an appropriate special education placement is not available, the local education agency must determine whether an appropriate special education placement is available that is offered by a different local education agency or agency in the state. Under some circumstances, a child may be placed in a program offered by a public agency in another state or in a private school.

F. IMPLEMENTING PLACEMENT OFFER

The local education agency must send a copy of a child's placement offer to the child's parent each time the offer is developed or changed, before implementing the placement offer. Unless a time extension has been agreed to, the placement offer must be sent to the parent within 90 days of the date the board received the referral or initiated a reevaluation of the child.

The placement offer must be implemented as soon as possible after the IEP meeting. There can be no undue delay in providing special education and related services. However, the placement offer may not be implemented until a reasonable amount of time has elapsed since the local education agency provided the parent with a copy of the placement offer.

G. REFUSAL TO INITIATE OR CHANGE PLACEMENT

Whenever a local education agency refuses to initiate or change a placement offer it must send a written notice to the child's parent of its intent to refuse. A parent may initiate a hearing whenever a local education agency proposes to initiate or change or refuses to initiate or change the child's placement offer.

H. DISAGREEMENT WITH PLACEMENT OFFER

If a parent does not agree with the placement offer, the child's parent should first write the local education agency, explaining why the parent feels the placement is inappropriate. If the local education agency does not reconsider its placement offer, a parent may initiate a due process hearing.

XII. COMPLIANCE COMPLAINTS AND DUE PROCESS HEARINGS

A. NOTICE AND PARTICIPATION

Parents must be notified within a reasonable time before a local education agency proposes to initiate or change, or refuses to change, the identification, evaluation, or placement of a child with disabilities or the provision of a free appropriate education to the child. The notice must contain:

- A full explanation of all procedural rights available to parents.
- A description of the proposed or refused action, including an explanation for the school's decision.
- A description of other options considered, along with an explanation of why these options were rejected.
- A description of each evaluation procedure, test, report, or other factor relied on in making the decision in question.
- If the local education agency is initiating the hearing, it must inform the parent of any free or low-cost legal and other relevant services available.

IMPORTANT: The notice must be written in understandable language, and in the parent's native language unless clearly not feasible.

B. ACCESS TO EDUCATION RECORDS

During the evaluation and placement process, parental rights of access to all education records are protected. The parent is specifically entitled to a copy of the IEP. Parents are entitled to access to all education records in preparing for and during the hearing and appeals process.

C. PLACEMENT DURING ADMINISTRATIVE AND JUDICIAL PROCEEDINGS

Once a parent initiates a complaint, the child's placement status is protected during any hearing and appeals or judicial proceedings: the child remains in the child's present placement unless the parents and the state or local education agency agree otherwise. If the complaint involves initial admission to school, the child, with parental consent, must be placed in the public school program until all administrative and judicial proceedings are completed.

If a parent prevails at the hearing or impartial review level, the favorable placement decision should be considered to be an agreement between the parents and the state within the meaning of 20 U.S.C. § 1415(e)(3). The placement should be implemented at public expense, even if the school system seeks judicial review of the decision.

D. DIFFERENCE BETWEEN A COMPLIANCE COMPLAINT AND A DUE PROCESS HEARING?

A due process hearing involves a disagreement over what a child's program should include, while a compliance complaint involves a failure by the local education agency to follow the rules or to do what has already been agreed to in writing in the IEP. When there is a disagreement about what should go into a child's IEP or where to implement the IEP, then a due process hearing is appropriate. When the local education agency has not followed special education laws or procedures or has not implemented what is already specifically written into a child's IEP, then a compliance complaint is appropriate.

E. INFORMAL REMEDIES

Special education is enhanced by cooperative relationships between parents and school officials. Before resorting to formal means of dispute resolution (compliance complaints or due process hearing), informal means of resolving problems should be explored.

- Parents should talk with the person with whom there is a dispute in order to try to resolve it. If this is not successful, the matter should be processed up the chain of command (for example from principal to Director of Special Education).
- Parents should identify key issues.
- Parents should seek a solution to the problem, giving consideration to reasonable compromises in the child's best interest.

F. COMPLIANCE COMPLAINTS

When the local education agency appears to have violated special education laws or procedures, a parent, individual, public agency or organization can file a complaint with the appropriate state agency. An investigator investigates the allegations and makes a written determination of whether the state local education agency was "out of compliance" with law or with the child's IEP. If the agency was out of compliance, it may be ordered back into compliance. The complaint must be in writing and signed by the complaining party. The state agency must investigate the complaint and issue a decision within sixty days.

Under the IDEA, a parent may complain "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 to such child." The Section 504 regulations also provide for parent complaints.

G. OTHER AVENUES OF COMPLAINT

Parents and others who believe IDEA or Section 504 rights have been violated may complain to the regional office of the Office of Civil Rights of the U.S. Department of Education.

H. DUE PROCESS HEARINGS

1. Request

A parent or local education agency may request a due process hearing after an IEP meeting if the parent and local education agency disagree on the child's eligibility, placement, program needs or related services. Section 504 also requires a hearing system. The hearing request is made in writing and sent to the local education agency governing board. The request for a hearing should identify the particular dispute as well as the general "failure to provide a free, appropriate public education."

A hearing must be held within forty-five days after the local education agency either sent the letter initiating the hearing or received a request for a hearing. However, the hearing officer may grant a time extension at the request of either party.

2. Hearing Officer

The hearing must be conducted by an impartial hearing officer who is not an employee or board member of the local education agency, and who does not have any conflicts of interest. The hearing officer may order that an independent educational evaluation of a child be conducted.

The hearing officer is selected by the local education agency with the written consent of the parent. If the parent does not respond within seven days of a local education agency's written notification of a proposed hearing officer, the proposed hearing officer is considered acceptable.

IMPORTANT: The objection to the hearing officer should be confirmed in writing.

If the parties are unable to agree on a hearing officer, the local education agency will ask the state education agency to provide a list of three hearing officers. The parents and the local education agency each strike one name and the remaining name is the hearing officer.

3. Preparation

In preparing for the hearing, a parent should:

- Analyze the issues and determine what evidence will be needed.
- Assemble documents, including correspondence with local education agency, school records, and independent evaluations.

- Consider who the witnesses will be. Contact them to determine if they will be available to testify.
- Analyze the local education agency's position.
- Define the issues.
- Stipulate to facts, if possible.
- Explore settlement. Use the hearing officer to mediate if you think it will be beneficial.

4. Attendance

At the hearing, each party has the right to

- Be accompanied and advised by counsel and by individuals with special knowledge or training.
- Present evidence and confront, cross-examine, and compel the attendance of witnesses.
- Prohibit the introduction of any evidence not disclosed at least five days before the hearing.
- Receive a free copy from the other party of each document offered into evidence by that party.
- Have access to any reports, records or clinical evaluations on which a decision was based or which could have a bearing on the correctness of the decision.
- Obtain a verbatim record of the hearing.
- Present an independent educational evaluation.
- Obtain written findings and decisions.

IMPORTANT: Parents have the right to have the child present and to make the hearing public. If the hearing is closed, members of the public cannot attend.

5. Location

The hearing must be conducted at a time and place reasonably convenient to the parents and child.

6. Conduct

The hearing normally begins with opening statements by each party describing what each intends to prove. Each side calls witnesses to testify from personal knowledge about the relevant facts. Expert witnesses may testify as to their opinions. Documents must be relevant to the issues. Each party may cross-examine the other's witnesses. The hearing concludes with the parties' closing arguments and post-hearing briefs.

7. Decision

A copy of the final decision must be mailed to the parties within forty-five days after receipt of a request for a hearing unless a specific time extension is granted.

8. Appeal and Impartial Review

The hearing officer's decision is final and binding unless appealed to the state superintendent of public instruction. Either party may appeal in writing within forty-five days of the decision. The state superintendent appoints an impartial independent reviewing officer to hear the appeal. In conducting an impartial review, the independent reviewing officer must:

- Examine the entire hearing record.
- Insure compliance with due process.
- Conduct a hearing in accordance with federal law, if additional evidence is necessary.
- Provide opportunity for oral or written argument.
- Make an independent decision, with written findings provided the parties.

The parties to the appeal have a right to submit to the reviewing officer a brief in support of their case. The review must be conducted at a time and place reasonably convenient to the parent and child. Copies of the final decision must be mailed to the parties within thirty days of receipt of the request for review, unless the reviewing officer grants an extension. The decision is final unless timely appealed to court.

9. Judicial Review

A party aggrieved by a hearing decision at the state level or aggrieved by an impartial review decision may bring a civil action in any state court of competent jurisdiction or in a federal court. In an appeal under the IDEA, the court reviews the evidence, giving due weight to administrative findings.

XIII. REMEDIES

The IDEA permits courts to order such relief as is "appropriate" in special education cases. Section 504 entitles children who successfully pursue their rights under that section to a variety of remedies as relief for having suffered discrimination. Due process hearing officers and courts can order a school system to take a number of actions in order to correct violations of IDEA and Section 504, including:

- Modify an IEP.
- Implement an existing IEP the local education agency has failed to carry out.
- Provide a particular placement.
- Provide a particular related service.
- Reimburse parents for expenses for independent assessments, witness fees, and private school tuition.

- Damages may also be available in IDEA or Section 504 cases.

Each public agency is required to inform parents that in any action or proceeding under Section 1415 of the IDEA, courts may award parents reasonable attorney fees under the circumstances described in Section 1415(e)(4) of the Act. Parents who prevail in IDEA disputes may recover reasonable attorney fees and costs, subject to certain conditions. Attorney fees are also available for parents who prevail in administrative due process hearings. Fees are recoverable for work done in settling IDEA disputes prior to a due process hearing. Parties who prevail in court on Section 504 claims may also be awarded attorney fees. *But see Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006) (non-attorney expert fees for services rendered to prevailing parties in IDEA action are not “costs” recoverable under IDEA’s fee-shifting provision).

Compensatory education and reimbursement for special education and related services paid for by parents are available under proper circumstances. The courts have recognized that without compensatory education, children whose parents lack the resources to place them in private programs and seek reimbursement have no way to vindicate their IDEA rights.

Appropriate relief under IDEA can include an order requiring a local education agency to reimburse parents for the cost of obtaining an appropriate education when the local education agency has failed to provide a free appropriate public education meeting IDEA standards. Education agencies should ordinarily be ordered to reimburse parents for such costs unless “equitable considerations” would make such an order unfair under the circumstances of the case. The Supreme Court heard oral argument on April 28, 2009, in *Forest Grove School District v. T.A.*, a case involving the issue of reimbursement for private school tuition.

A parent need not precisely replicate the placement a local education agency should have provided; parents may receive reimbursement for the costs incurred in providing special education or related services so long as these educational services meet the standard of “appropriateness” established by IDEA.