Tri-State Regional Special Education Law Conference

Top Legal Issues in Providing Special Education

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I. Introduction

A. The Education for All Handicapped Childrens Act (Public Law 94-142) first established the legal entitlement to a Free Appropriate Public Education (FAPE) in 1975. The law has been reauthorized several times. The last reauthorization occurred in 2004--- the Individuals with Disabilities Education Improvement Act of 2004 (IDEA 2004) was signed into law on December 3, 2004. Other than the personnel requirements which went into effect when the bill was signed in December 2004, the new statutory provisions went into effect on July 1, 2005.

This outline summarizes the current major statutory and regulatory requirements. Even with the federal regulations promulgated, many questions of statutory interpretation remain. In addition, consideration needs to be given to any state laws or regulations which may exceed the IDEA 2004 requirements.

II. IDEA Purposes

A. To ensure that children with disabilities have a Free Appropriate Public Education (FAPE) available to meet their unique needs and prepare them for further education, employment, and independent living.

B. To ensure that the rights of children with disabilities and their parents are protected.

C. To assist states, localities, educational service agencies, and Federal agencies in providing for the education of all children with disabilities.

D. To assess and ensure the effectiveness of efforts to educate children with disabilities.

III. Identification and Evaluation

A. Child Find (IDEA Regulations, 34 CFR 300.111 and 131)

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Covers all children with disabilities, including students attending private schools placed by their parents.

The IDEA places the responsibility for child find activities on the Local Education Agency (LEA) where the private elementary or secondary school is located regardless of the residency status of the student even if the student is from out of state.

If the LEA where the private school is located is different than the LEA of residence parental consent must be obtained before personally identifiable information is released between officials in the LEA where the private school is located and officials in the LEA of the parent's residence (34 CFR 300.622 (a))

The IDEA clarifies that the child find requirements apply to highly mobile children (such as migrant children), homeless children, children who are wards of the state and children who may have a disability and be in need of special education even though they are advancing from grade to grade.

Note: The definition of a homeless child includes not only those children and youth who are living on the streets, cars, parks, etc., but also includes migratory children and children who are sharing housing of other persons due to loss of housing, economic hardship, or a similar reason (McKinney-Vento Homeless Assistance Act, 42 U.S.C. 11434a, Section 725).

B. Major Court/Administrative Cases

1. The Court determined that the district complied with the IDEA when it attempted pre-referral intervention before placing a student in special education. Furthermore, state policy expected that general education interventions would be considered before referring a student for a special education evaluation. Johnson v. Upland Unified School District, 36 IDELR 2, 29 Fed. Appx. 689 (United States Court of Appeals, 9th Circuit (2002)) Note: This is an unpublished decision

2. The Court affirmed the District Court's conclusion supporting the use of a general education intervention team as part of the regular pre-referral process before a student would be evaluated for special education services. The Court noted that the use of alternative programs is not inconsistent with the IDEA for it is sensible policy for a school to explore options in the regular education environment before designating a child as a special education student. The process did not act as a "roadblock" to prevent the parents from requesting an evaluation at any time. In this case, the parents had never submitted a request to have their child evaluated.

Lastly, the Court concluded that the IDEA's procedural safeguards do not apply to general education interventions and therefore the parents do not have a legal right to be part of such team. The mere discussion of a possible special education referral by the team does not become a special education referral triggering the IDEA's procedural protections. A.P. v. Woodstock Board of Education 370 F.Appx. 202, 55 IDELR 61 (United States Court of Appeals, 2nd Circuit (2010)). Note: This is an unpublished decision.

3. The United States Department of Education issued a clarification memo that it would be inconsistent with the IDEA's evaluation procedures for a school to reject a referral for a special education evaluation from a parent and delay the provision of an initial evaluation on the basis that the student has not participated in an RTI (Response to Intervention) strategy or framework. The IDEA allows a parent to request an initial special education evaluation at any time.
   In addition, although the IDEA does not prescribe a specific timeframe from referral for evaluation to requesting parental consent to evaluate, it is the Department's policy that the school must seek parental consent within "a reasonable period of time" after receiving a referral. If the school does not feel a special education is warranted and denies the parent's request, the school must provide written notice of refusal to evaluate the student which is subject to a due process hearing or an administrative complaint should the parent challenge the school's decision. Memorandum to State Directors of Special Education 56 IDELR 50 (United States Department of Education, Office of Special Education Programs (2011)).

IV. Evaluation Issues (34 CFR 300.301-305)

A. An initial evaluation shall be conducted, pursuant to a request by the parents or the public agency, before the initial provision of special education and related services to a child with a disability.
   In conducting the evaluation, the LEA must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information to determine whether the child is special education eligible and the content of the child's IEP.

   The evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the child's disability category. Also, if appropriate, members of the IEP Team and other qualified personnel review existing information to determine what additional data needs to be collected as part of the evaluation.

   The evaluation must be completed and the eligibility determination must be made within 60 days from the date of consent unless the State establishes a different timeframe. (Check your respective state regulations) Exceptions are permitted in

situations where the student moves to a new LEA prior to the eligibility determination (in which case the LEA and the parent must agree to a specific time when the evaluation will be completed) or if the parent fails to produce the student for the evaluation.

Screening by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation is not deemed an evaluation.

In addition, an evaluation involving two school districts in the same academic year shall be coordinated and expeditiously completed.

B. Evaluation Contents/Procedures (34 CFR 300.304 and 305)

1. Relevant functional and developmental information

2. Information from parents

3. Information related to enabling access in and progress in the general curriculum

4. Technically sound instruments that assess cognitive and behavioral factors in addition to physical and developmental factors

5. Review of existing data

6. Current classroom-based assessments and observations

7. Teacher and related service providers' observations

8. Evaluations are to be administered in a child's native language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally unless not feasible.

9. Assessments must be selected and administered so as not to be discriminatory on a racial or cultural basis.

10. Assessments must be administered by trained and knowledgeable personnel in accordance with any instructions provided by the producer of the assessments.

C. Notice/Consent for initial evaluation (34 CFR 300.300)

1. Written notice of initial evaluation

The notice must:

a. be in parent's native language, unless it is clearly not feasible to do so;
b. describe the action;
c. explain why the agency is proposing/refusing such action;
d. description of other options considered;
e. evaluations and other information used as a basis for the action;
f. other relevant factors;
g. how a copy of the procedural safeguards can be obtained; and
h. resources to assist parents

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

Consent means that the parents have been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication; the parent understands and agrees in writing to carry out the activity and that the granting of consent is voluntary and may be revoked at any time although the revocation is not retroactive.

Parental consent is not required before reviewing existing data as part of an evaluation or administering a test/evaluation administered to all children.

3. Refusal to consent to an evaluation.

The District may use mediation and due process hearing procedures to pursue the evaluation. The LEA does not violate its child find responsibilities if it declines to pursue the evaluation after making reasonable efforts to obtain parental consent.

If a parent of a student who is home schooled or parentally placed in a private school does not provide consent for the initial evaluation or reevaluation, the LEA may not use mediation or a due process hearing to override the parent's refusal. The LEA is not required to consider such child as eligible for services.

4. If the child is a ward of the state (which does not include a child who has a foster parent) and not residing with a parent, reasonable efforts shall be made to obtain parent consent. No parental consent is required if the parent cannot be found, parental rights have been terminated, or a judge has appointed an individual with educational authority.

D. Re-evaluations (34 CFR 300.303)

1. A re-evaluation is required to be conducted if conditions warrant, if the child's parent or teacher requests, but at least once every three years. The

three year re-evaluation may be waived by agreement of the LEA and the parents. In addition, a re-evaluation need not be conducted more than once per year unless the parents and the LEA both agree.

2. Consent required. (34 CFR 300.300) A District may conduct the re-evaluation without consent if it has taken reasonable measures to obtain consent and the parent has not responded. The IDEA requires that the agency have a record of its attempts in requesting consent for re-evaluation in meeting the reasonable measure requirement.

E. Scope of Re-evaluation (34 CFR 300.305)

1. If the IEP Team and "other qualified professionals" determine that no additional data is needed to confirm continued eligibility, the District shall:

   a. Provide notice to parents.

   b. Afford the right of parents to request additional assessments. The district is not required to conduct the assessment unless requested by the parents.

2. The IDEA permits the IEP Team and other qualified individuals to review the existing evaluation data to determine the scope of the evaluation without a Team meeting required.

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

1. An LEA shall reevaluate a child with a disability before determining that the child is no longer eligible for special education services.
A re-evaluation is not required due to a termination of eligibility resulting from graduation with a regular high school diploma or exceeding the State's age eligibility for FAPE. Note that graduation with a regular diploma constitutes a change of placement requiring prior written notice. In addition, the term regular high school diploma does not include an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or a general educational development credential (GED). (300.102 (a)(3)(iv))

2. The IDEA permits parents to withdraw consent for continued IEP services in their entirely for their child at any time. The revocation must be in writing and the school must respond by sending the parents written notice acknowledging the revocation and specifying the date on which IEP services will end. The parents' right to terminate their child's IEP services is not subject to challenge in a due process hearing. If a parent subsequently requests special education services, the school district has an

obligation to evaluate. If eligible, the school has an obligation to make a FAPE available to the child including the development and implementation of an IEP. (300.300(b)(4)) (Federal Register, Volume 73, No.231, December 1, 2008)

G. Independent Educational Evaluation (34 CFR 300.502)

1. Parents have the right to obtain an Independent Educational Evaluation (IEE). Upon requesting an IEE, the public agency shall provide to the parents information about where an IEE may be obtained and the agency criteria applicable for IEEs.

2. The IEE is at public expense if the parent disagrees with the district's evaluation unless the district initiates a due process hearing. A parent is entitled to only one independent educational evaluation at public expense each time the agency conducts an evaluation with which the parent disagrees.

   a. District has the right to initiate a hearing without unnecessary delay to show that its evaluation is appropriate.

3. The IDEA allows a public agency to ask for (but not require) an explanation by the parent why he/she objects to the agency's evaluation. Such request may not unreasonably delay payment or due process.

4. The IEE at public expense must meet the same criteria as the district uses for its evaluations.

5. The independent educational evaluation must be considered by the LEA in any decision made with respect to FAPE if the IEE meets the agency criteria.

H. Major Court Cases

1. The school, by referring a family to an evaluation center to determine whether the child with a disability was also autistic, violated its obligation under the IDEA to evaluate the student in all areas of suspected disability. The Court held that a school cannot abdicate its affirmative duties under the IDEA by simply referring the parents to an evaluation center since it would not ensure that the child is assessed. The Court concluded that such procedural deficiency denied the student a FAPE. N.B. v. Hellgate Elementary School District, 50 IDELR 241, 541 F.3d 1202 (United States Court of Appeals, 9th Circuit (2008)).

2. The parent of a student who was diagnosed as having an attachment disorder, oppositional defiant disorder, conduct disorder, and histrionic

personality, obtained an IEE which concluded that the student required a residential placement. The Court found that the school failed to consider the IEE as the IDEA requires since the team did not have a staff member who had knowledge in the suspected disability. Also, the team failed to reconcile the inconsistent opinions of the IEE's conclusion with the district's position. Seattle School District v. B.S., 24 IDELR 68, 82 F.3d 1493 (United States Court of Appeals, 9th Circuit (1996)).

V. Eligibility Issues

A. The term 'child with a disability' means a child (34 CFR 300.8)

1. with an intellectual disability (formerly termed mental retardation), hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as 'emotional disturbance'), an orthopedic impairment, autism,
traumatic brain injury, deaf-blindness, multiple disabilities, other health impairments (which now includes Tourette syndrome), or specific learning disabilities;

2. which adversely affects educational performance;

3. who, by reason thereof, needs special education and related services.

   Special education is defined as specially designed instruction (adapting, as appropriate, the content, methodology, or delivery of instruction) to address the unique needs of the child that results from the disability and to ensure access to the general curriculum. Special education includes travel training and related services (if state standards include related services as special education).

B. Decisions made by a team of qualified individuals and the parent. (34 CFR 300.306)

C. Copy of eligibility determination and evaluation report provided to parent. (34 CFR 300.306)

D. A student is not eligible if the determinant factor is the lack of instruction in math or due to the limited English proficiency of the student. In addition, a student is not eligible for special education services if it is found that the determinant factor in learning problems is the lack of appropriate instruction in reading, including essential components of reading instruction as defined by the ESEA. The ESEA defines the essential components as: phonemic awareness, phonics, vocabulary development, reading fluency including oral reading skills, and reading comprehension strategies. (34 CFR 300.306)

E. The eligibility Team must draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations as well as information about a child's physical condition, social or cultural background and adaptive behavior. The IDEA prohibits the use of only a single measure or assessment as the sole criterion.

F. States have the discretion of using the "developmental delay" standard for determining eligibility for students ages three through nine. (34 CFR 300.8 (d))

G. States must establish policies and procedures designed to prevent inappropriate over-identification or disproportionate representation by race or ethnicity. (34 CFR 300.646)

H. Specific Learning Disabilities

1. LEA may opt out of using the severe discrepancy part of the specific learning disabilities definition (SLD) and replace it by using a response to scientific research based intervention (RTI) model of eligibility as part of the evaluation procedures. (34 CFR 300.307)

2. States must adopt criteria for determining SLD. A State must permit a process that determines if a child responds to scientific research-based interventions and may permit the use of other alternative research based procedures. (300.307 (a)).

United States Department of Education Guidance

- Although the U.S. Department of Education does not subscribe to a particular RTI model, they listed four characteristics that underpin all models: (1) students receive high quality research based instruction in their general education setting; (2) continuous monitoring of student performance; (3) all students are screened for academic and behavioral problems; and (4) multiple levels (tiers) of instruction that are progressively more intense, based on the student's response to instruction (Questions and Answers on Response to Intervention and Early Intervening Services, Question F-5 (OSERS (2007)).

- The definition of an SLD goes beyond a mere determination of whether the student is experiencing a "severe discrepancy" or is not successful under a RTI process model. As the comments to the IDEA regulations state, "the evaluation of a child suspected as having a disability, including an SLD, must include a variety of assessment tools and strategies and cannot rely on any single

procedure as the sole criterion for determining eligibility" (Federal Register, Page 46646). "An RTI process does not replace the need for a comprehensive evaluation. A public agency must use a variety of data gathering tools and strategies even if an RTI process is used. The results of an RTI process may be one component of the information reviewed as part of the evaluation procedures required…" (Federal Register, Page 46648).

I. Major Court Cases

1. The IDEA is intended to provide a public education for every child with a disability, unconditionally and without exception, regardless of the severity of the child's handicap. Timothy W. v. Rochester, New Hampshire School District, 441 IDELR393 (United States Court of Appeals, 1st Circuit (1989).

2. The Court held that a student diagnosed with ADHD, PTSD, RAD, and Intermittent Explosive Disorder was not eligible for special education services. . The Court concluded that the student was not emotionally disturbed since she was able to maintain satisfactory relationships and her inappropriate behavior was not to a marked degree over a long period of time. In addition, there was no adverse impact on her educational performance since her grades, tests and teachers' reports all indicated she was performing at average or above-average levels. R.B. v. Napa Valley Unified School District, 48 IDELR 60, 496 F.3d. 932 (United States Court of Appeals, 9th Circuit (2007)).

3. The Court held that a student with Asperger syndrome is eligible for special education services in spite of the fact that she was doing well academically. The "adverse affect" on her educational performance was the impact of her disability on her social skills and communication skills since the Court found nothing in the IDEA supports the conclusion that educational performance is limited to academic performance. In addition, the Court found the IDEA term "adverse affect" does not have a qualifier such as substantial or significant. Therefore, any adverse affect meets the standard.
Finally, the Court found that the student was in need of specialized instruction in social skills and therefore met the eligibility requirement of being in need of special education. Mr. and Mrs. I v. Maine School Administrative District 55, 47 IDELR 121, 480 F. 3d 1 (United States Court of Appeals, 1st Circuit (2007)).

4. A 9th grade student diagnosed as having a conduct disorder, bipolar disorder and ADHD was deemed eligible for IEP services under the emotionally disturbed and other health impaired categories. The Court rejected the school's argument that the student was socially maladjusted finding that the student had limited social skills, struggled to pass his

classes and failed his standardized tests. In addition, the Court found that his ADHD adversely affected his educational performance based on evidence that he had difficulty focusing during tutoring sessions. The school presented no evidence at the due process hearing relying only on the evidence presented by the parents. Hansen v. Republic R-III School District 632 F.3d 1024, 56 IDELR 2 (United States Court of Appeals, 8th Circuit (2011)).

VI. Free Appropriate Public Education (FAPE)

A. If eligible, the student is entitled to a FAPE. The term 'free appropriate public education' means special education and related services that –

1. have been provided at public expense, under public supervision and direction, and without charge;

2. meet the standards of the State educational agency;

3. include an appropriate preschool, elementary, or secondary school education in the State involved; and

4. are provided in conformity with the individualized education program.

B. The U.S. Supreme Court in Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley, et al. (102 S. Ct. 3034, IDELR 553:656 (1982)) held that an inquiry in determining whether a FAPE is provided is twofold:

1. Have the procedures set forth in the IDEA been adequately complied with?

2. Is the IEP reasonably calculated to enable the child to receive educational benefits?

C. A hearing officer can conclude that a FAPE was denied based on procedural violations only if the procedural violations resulted in a deprivation of educational benefit, significantly impeded the parents' opportunity to participate in the decision making process, or impeded the student's right to FAPE.

VII. Individual Education Programs (IEP)

A. IEP Team (34 CFR 300.321)

1. the parents;

2. not less than one regular education teacher of such child (if the child is, or may be, participating in regular education);

A regular education teacher must be part of an IEP Team when developing, reviewing, and revising the child's IEP to the extent appropriate. The regular education teacher should assist in the determination of appropriate positive behavioral interventions/strategies, supplementary aids and services, program modifications, and supports for school personnel.

3. not less than one special education teacher, or where appropriate, at least one special education provider of such child;

4. a representative of the LEA who –

   a. is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;

   b. is knowledgeable about the general curriculum; and

   c. is knowledgeable about the availability of resources of the LEA.

The LEA representative must have the authority to commit the LEA to implement the IEP resulting from the meeting. Also, the public agency may designate another member of the IEP Team to also serve as the agency representative if these criteria are met.

United States Department of Education Guidance

- The IEP Team meeting serves as a communication vehicle between parents and school personnel and enables them, as equal participants, to make joint informed decisions regarding the services that are necessary to meet the unique needs of the child. The IEP team should work towards a general agreement, but the public agency is ultimately responsible for ensuring the IEP includes the services that the child needs in order to receive a free appropriate public education (FAPE). It is not appropriate to make IEP decisions based on a majority "vote." If the team cannot reach agreement, the public agency must determine the appropriate services and provide the parents with prior written notice of the agency's determinations regarding the child's educational program and of the parents' right to seek resolution of any disagreements by initiating an impartial due process hearing or filing a State complaint. Letter to Richards 55 IDELR 107 (United States Department of Education, Office of Special Education Programs (2010)).

5. an individual who can interpret the instructional implications of evaluation results – who may be one of the above members;

6. at the discretion of the parent or the LEA, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and

   The party inviting these other individuals has the authority to determine whether they have knowledge or special expertise to participate.

7. whenever appropriate, the child with a disability.

   If transition is being discussed, the student shall be invited to participate at the IEP meeting. If the child does not attend, the school shall take other steps to ensure that the child's preferences and interests are considered.

United States Department of Education Guidance

- The Comments indicate that if the student is a minor, the parents (unless their rights have been limited or extinguished) have the authority to determine whether the student should attend the IEP Team meeting. (Page 46671)

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

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

9. If the public agency is considering a private school placement, it shall ensure that a representative of the private school attends the meeting or participates through other means.

10. If the child was previously served under Part C, the parent has the right to request that the Part C Coordinator or representative be invited to the initial IEP meeting.

11. An IEP Team member may be excused from attending the IEP Team meeting, in whole or in part, if the parents and LEA agree in writing because the area of the curriculum or related service is not being modified or discussed. The agreement must be in writing.

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

12. The IEP may be amended between the annual IEP meetings without the necessity of calling a new IEP meeting if agreed to by the parents and the LEA. The amendment or modification to the IEP shall be in writing. Upon request, the parents shall be provided a revised copy of the IEP with the amendments incorporated.

    If changes are made to the child's IEP as a result of an agreement with the parent outside the IEP Team meeting process, the child's IEP Team must be informed of those changes. (300. 324(a)(4)(ii))

B. Team Considerations (34 CFR 300.324)

1. strengths of the child
2. concerns of the parent
3. evaluation results
4. if behavior impedes learning of self or others, strategies, positive behavioral interventions and supports
5. language needs of a child with limited English proficiency
6. instruction in Braille for students who are blind or visually impaired unless the Team determines otherwise after an evaluation of the child's skills
7. communication needs of students and for students who are deaf or hard of hearing, the child's language and communications needs and the opportunities to directly communicate with peers and professional personnel
8. assistive Technology Device/Service needs
9. an agency is prohibited from requiring a child to obtain a prescription for a medication as a condition for attending school, getting an evaluation, or receiving services.

C. IEP Contents (34 CFR 300.320)

1. Present Level of Academic Achievement and Functional Performance

   a. Involvement and progress in the general curriculum.

   United States Department of Education Guidance

   - The Comments specify that every IEP is required to include a statement of the child's present level of academic achievement and functional performance. The Comments state that the Department cannot change the regulations to only require functional performance levels only if determined appropriate by the IEP Team. (Page 46662)

   - The Comments discuss that the term "functional" is generally understood to refer to skills or activities that are not considered academic and often used in the context of routine activities of everyday living. (Page 46661)

2. Goals/Objectives/Benchmarks

   a. Measurable annual goals including academic and functional goals

   b. An IEP must include short term objectives or benchmarks only for those students with disabilities who will be assessed using alternate achievement standards (students with significant cognitive disabilities). Some states have maintained this requirement for all students on IEPs.

3. Special Education and Related Services

   a. Anticipated frequency, location, and duration

   b. Projected date for the beginning of services

   c. The special education and related services in the IEP must be based on peer-reviewed research to the extent practicable.

4. Related Services (34 CFR 300.34)

   a. 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.
A related service does not include a medical device that is surgically implanted, the optimization of device functioning, maintenance of the device, or the replacement of that device. Services may include routine checking of an external component of a surgically implanted device.

b. The United States Supreme Court established a three-prong test for determining whether a particular service is considered a related service under the IDEA. To be entitled to a related service:

(1) A child must have a disability so as to require special education under the IDEA;

(2) The service must be necessary to aid a child with a disability to benefit from special education; and

(3) The service must be able to be performed by a non-physician.

Irving Independent School District v. Tatro, 104 S. Ct. 3371,555 IDELR 511 (1984).

5. Program Modifications

6. Support for school personnel to assist the student in meeting IEP goals, progress in the general curriculum, and to be educated with nondisabled children. Support could include special training for staff in meeting a unique and specific need of the child.

7. Explanation of the extent, if any, to which the child will not participate in class and extracurricular and non-academic activities with nondisabled children.

8. Supplementary Aids and Services

Supplementary Aids and Services is defined as aids, services, and other supports that are provided in regular education classes or other educationally related settings to enable students with disabilities to be educated with nondisabled students to the maximum extent appropriate.

9. Participation in District and State wide assessments

a. Accommodations/Alternate Assessments

b. Modified Academic Achievement Standards

10. Transition

a. Transition services (designed with a results oriented process focused on improving the academic functional achievement of the child) must be addressed in the IEP of the student no later than in the year in which they turn 16 years of age.

b. Appropriate measurable post-secondary goals based upon age appropriate transition assessments related to training, education, employment and where appropriate, independent living skills.

c. At least one year before reaching the age of majority, a statement of rights under State law.

d. Alternative strategies to meet transition objectives if other agencies fail to provide IEP services

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

11. A description of how progress toward the IEP goals will be measured and when periodic progress reports will be provided to the parent.

12. Extended School Year (ESY)

Each public agency shall ensure that ESY services are available as necessary to provide FAPE

D. IEP Meeting Requirements/IEP Implementation (34 CFR 300.323)

1. An IEP must be made available "within a reasonable period of time" following receipt of parental consent for the initial evaluation. An IEP meeting must be held within 30 days of the eligibility determination.

2. The parents must receive notice of the purpose, time, location of the meeting, and who will be in attendance (including whether the student will be invited). In addition, they must be informed of their right to bring other individuals with knowledge or expertise
The IEP meeting may be held by using alternate means such as a video conference or conference call if the parents and LEA agree.
In the event that the parent does not attend, the agency must have a documented record of its attempts to arrange a mutually agreed on time and place for the meeting.

3. An IEP must be in effect before special education and related services are provided. The IEP should be implemented "as soon as possible" after the IEP meeting.

4. The IEP must be accessible to each service provider who is responsible for its implementation.

5. Each service provider must be informed of his/her specific responsibilities related to implementing a child's IEP.

6. The public agency shall give the parent a copy of the IEP at no cost.

7. A State may allow paraprofessionals who are appropriately trained and supervised under State standards to assist in the provision of special education and related services.

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

9. If a student on an IEP transfers from one LEA to another LEA in the same State within the same school year, the new LEA shall provide comparable services, in consultation with the parents, until the new LEA either adopts the previous IEP or develops a new IEP.
If a student on an IEP transfers from one LEA to another LEA in a different State within the same school year, the new LEA shall provide comparable services, in consultation with the parents, until the new LEA conducts a new evaluation, if necessary, and develops a new IEP.
The new LEA shall take steps to promptly obtain the educational records and the previous LEA shall promptly respond to such request.

E. IEP/FAPE Court Cases

1. The Court of Appeals upheld the lower court's decision, which concluded the school district program, offered a student with a hearing impairment a FAPE. Although the student's IEP contained some procedural

deficiencies, the deficiencies did not rise to the level of a denial of a FAPE, and the parents participated in all aspects of the IEP process. The deficiencies occurred with respect to the statement of present level of performance, short-term objectives, and annual goals. The related services section of the IEP failed to include a specific statement of the level of services to be provided, but this violation was deemed to be minor be the court, given the student's receipt of all requested related services. The IEP was calculated to provide the student with a FAPE, as it addressed the student's individual needs, and she made progress while attending district schools O'Toole by O'Toole v. Olathe Unified School District No. 233, 28 IDELR 177 (United States Court of Appeals, 10th Circuit (1998)).

2. The lack of a completed IEP did not substantively harm the student since the parents unilaterally terminated the IEP process due to their concerns about the school's proposal. The parents made this decision despite the fact that the IEP had not yet been finalized. Sytsema v. Academy School District No. 20 538 F.3d 1306, 50 IDELR 213 (United States Court of Appeals, 10th Circuit (2008)).

3. A student with autism, who exhibited severe behavioral problems at home and in the community, did not require a residential placement for educational purposes. The Court found that the student was making some progress on his IEP goals and his in school behavior was not as severe as in other settings. In such a case, the Court held that generalization of skills across settings is not required by the IDEA so long as the student is making educational progress at school. Thompson R2-J School District v. Luke P. 540 F.3d. 1143, 50 IDELR 212 (United States Court of Appeals, 10th Circuit (2008)) Review denied by the United States Supreme Court.

4. The Court found that an IEP provided FAPE for a child classified as having an "other health impairment" even though the school never specifically identified the student as also being autistic. The Court held that the evidence did not show that this purported error was harmful to the student since the IEP was individualized to meet the student's specific needs.
The Court, in its ruling, stated: " Given the IDEA's strong emphasis on identifying a disabled child's specific needs and addressing them, we believe that the particular disability diagnosis affixed to a child in an IEP will, in many cases, be substantively immaterial because the IEP will be tailored to the child's specific needs. Consequently, while the IDEA intends that IEPs contain accurate disability diagnoses, we will not automatically set aside an IEP for failing to include a specific disability diagnosis or containing an incorrect diagnosis. … Instead, as with any other purported procedural defect, the party challenging the IEP must show that the failure to include a proper disability diagnosis "compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation

process, or caused a deprivation of educational benefits." Fort Osage R-1 School District v. Sims 641 F.3d 996, 56 IDELR 282 (United States Court of Appeals, 8th Circuit (2011))

VIII. Placement Issues

A. Least Restrictive Environment (LRE) (34 CFR 300.114-120)

1. To the maximum extent appropriate, children with disabilities are educated with children who are not disabled. Each public agency shall ensure that a continuum of alternative placements is available.

2. Parents must be made members of placement teams.

3. State funding formulas based on the type of setting in which the child is served must be reviewed to ensure that it does not support the violation of LRE requirements. If so, the State must revise the funding mechanism as soon as feasible.

4. LRE also applies to non-academic and extracurricular services and activities such as recess, meals, athletics, counseling, groups and clubs.

5. The placement must be as close as possible to the child's home unless the IEP requires some other arrangement.

United States Department of Education Guidance

- The Comments clarify that placement decisions cannot be made solely on factors such as category of disability, severity of the disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience. (Page 46588)

- The Comments discuss the difference between placement and location. "Placement" refers to the points along the continuum of placement options and "location" is the physical surrounding such as the particular classroom. The school should have the flexibility to assign the child to a particular school or classroom provided that it is consistent with the placement determination. Schools are strongly encouraged to place the student in the school and classroom the child would attend if not disabled. (Page 46588)

- The Comments provide that while the school must notify

parents regarding placement decisions, there is nothing in the IDEA that requires a detailed explanation in the child's IEP of why their educational needs cannot be met in the location of the parent's request. (Page 46588)

B. Least Restrictive Environment Cases

1. The Court established the following standard in analyzing a LRE case. In a case where the segregated facility is considered superior, the court should determine whether the services which make that placement superior could be feasibly provided in a non-segregated setting. If they can, the placement in the segregated school would be inappropriate under the IDEA. Framing the issue in this manner accords the proper respect for the strong preference in favor of mainstreaming while still realizing the possibility that some children with disabilities simply must be educated in segregated facilities because any marginal benefits received from mainstreaming are far outweighed by the benefits gained from services which could not feasibly be provided in the non-segregated setting. A.W. v. Northwest R-1 School District 813 F.2d 158, 558 IDELR 294 (United States Court of Appeals, 8th Circuit (1987)).

2. The Court of Appeals affirmed the lower court's decision that the least restrictive educational placement for a student who is classified as "moderately mentally retarded" is a regular classroom setting. The Court adopted a four factor balancing test considering:
   a. The educational benefits of placement full-time in a regular class;
   b. The non-academic benefits of such placement;
   c. The effect of the student on the teacher and children in the regular class; and
   d. The costs involved.

   Sacramento City Unified School District *v.* Holland, 20 IDELR 812 (U.S. Court of Appeals, 9th Circuit (January 24, 1994)). Review denied by the United States Supreme Court.

3. The parents of a kindergarten student, who has Downs Syndrome, challenged the IEP Team's decision to change his IEP trial placement (in effect for nine weeks) in a regular kindergarten class to a special education class. In concluding the LRE was the special education class, the Court rejected the parents' arguments that the regular class placement was "sabotaged" due to the school's failure to provide curricular adaptations, supplementary aids and services, training for staff, and properly communicate with the family T.W. v. Unified School District No. 259, Wichita, Kansas, 43 IDELR 187 (U.S. Court of Appeals, 10th Circuit (2005)). This is an unpublished decision.

4. In ordering reimbursement for the costs of a parents' placement for a pre-school student who is autistic, the Court held that the Least Restrictive Environment is a regular pre-school class at a private school rather than the District's pre-school program with mainly students with disabilities. The Court found that a regular class environment was needed in order for the student to benefit both academically and socially. L.B. v. Nebo School District, 379 F.3d 966, 41 IDELR 206 (United States Court of Appeals, 10th Circuit (2004)).

5. The LRE for a preschooler with a disability is in a public program serving only preschoolers with disabilities. The IDEA does not compel a state to establish new levels of public education to satisfy LRE requirements. The Court rejected the position that the LRE mandate is satisfied only if a child with a disability is educated in the same classroom with non-disabled children. Mark and Ruth A. *v.* Grantwood Area Education Agency, 1985-86 IDELR 557:412 (U.S. Court of Appeals, 8th Circuit (1986)).

IX. Behavior/ Disciplinary Issue Actions

A. Behavior Intervention Plans

If the IEP Team determines, based on the evaluation, that behavior impedes the learning of the student or others, the Team shall consider, if appropriate, strategies, positive behavioral interventions and supports to address that behavior.

B. Short Term Suspensions (34 CFR 300.530)

Short term suspensions, appropriate interim alternative settings, or other settings may be ordered for not more than 10 consecutive school days (to the extent such alternatives would be applied to children without disabilities) and for additional removals that do not constitute a change of placement.

A child with a disability can be removed from his/her current placement for up to 10 school days for any violation of school rules to the extent removal would be applied to a child without disabilities. In such a case, a public agency need not provide services for 10 school days or less if services are not provided to a child without disabilities who is similarly removed.

United States Department of Education Guidance

- The Comments clarify that the IDEA does not require that children with disabilities suspended or expelled for disciplinary reasons continue to be educated with children who are not disabled during the period of their removal. (Page 46586)

- The Comments clarify that the U.S. Department of Education's long standing policy regarding in school suspensions, portions of a day of suspension and bus suspensions, remain in effect.

- In school suspensions are not counted if: the child is afforded the opportunity to continue to appropriately progress in the general curriculum, continue to receive the IEP services and continue to participate with non-disabled children to the extent they would in their current placement. Portions of a day that a child is suspended may be considered as a removal in determining whether a pattern of removals exists. Bus suspensions also count if transportation is a part of the IEP and no alternative transportation is provided. (Page 46715)

  If the parent revokes consent for special education, the student is treated as a non-disabled student for disciplinary purposes under the IDEA. The parent is deemed to have refused services if they revoke consent for special education and therefore the public agency is not deemed to have knowledge that the student is a student with a disability. The student may be disciplined as a general education student. (Federal Register, Volume 73, No. 231, Page 73012)

C. Change of Placement For Disciplinary Reasons (34 CFR 300.536)

1. A change of placement occurs if –

   a. The removal is for more than 10 consecutive school days; or

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

United States Department of Education Guidance

- The Comments provide that the decision of whether a change of placement has occurred is made by school personnel. The IEP Team need not be involved although there is nothing to prohibit school personnel from involving the parents or IEP Team. (Page 46714)

- It is the longstanding position of the U.S. Department of Education that there is no need to make a change of placement removal under the disciplinary provisions if there is agreement between school personnel and the parents regarding a change in the educational placement when the child has violated the school's code of conduct. Questions and Answers on Discipline Procedures, Question A-1 (OSERS (2009))

c. The school may consider any unique circumstances on a case-by-case basis when determining whether to order a change of placement.

D. Services (34 CFR 300.530 (d))

1. In the case of a child with a disability who has been removed from his or her current placement for more than 10 school days in that school year, the public agency, for the remainder of the removals, must –

   Provide services to the extent necessary to enable the child to participate in the general curriculum, although in another setting and to progress toward meeting the goals set out in the child's IEP if the removal is under the school personnel's authority to remove for not more than 10 consecutive school days as long as that removal does not constitute a change of placement.

2. School personnel, in consultation with at least one of the child's teachers, determine the extent to which services are necessary to enable the child to continue to participate in the general education curriculum and to progress toward meeting the goals set out in the child's IEP if the child is removed for not more than 10 consecutive school days as long as that removal does not constitute a change of placement.

3. The child's IEP team determines the extent to which services are necessary to enable the child to continue to participate in the general curriculum and progress toward meeting the goals set out in the child's IEP if the child is removed because of behavior that has been determined not to be a manifestation of the child's disability, if the disciplinary action constitutes a change of placement.

E. Interim Alternative Educational Setting (IAES) (up to 45 school days) (34 CFR 300.530 (g))

1. Basis for placing a student in an IAES:

a. Carries/possesses a dangerous weapon in school or at school functions

The term "dangerous weapon" means 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, except that such term does not include a pocket knife with a blade of less than 2½ inches in length.

b. Knowingly possesses or uses illegal drugs

c. Sale or solicitation of a controlled substance

d. Infliction of serious bodily injury to another person at school, on school premises or at a school function. Serious bodily injury requires a showing of substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of function of a bodily member, organ or mental faculty.

2. IAES placement/service determination by the IEP Team

F. Safety/Dangerousness (34 CFR 300.532)

1. A school district may seek a hearing officer order placing a student in an IAES for up to 45 school days if:

a. it is determined that maintaining the current placement for the student is substantially likely to result in injury to the student or to others.

This matter would be addressed in an expedited hearing. Should the standard be met, a hearing officer would need to determine the IAES proposed by the school after consultation with the child's special education teacher.

The regulations allow an LEA to seek a Hearing Officer's order again, after the expiration of the 45 school days, if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or others. (300.532 (b)(3))

G. Behavior Assessments/Behavior Intervention Plans (34 CFR 300.530)

1. After taking disciplinary action involving a change of placement that is determined to be a manifestation of the student's disability, placement in an IAES or a removal for more than 10 consecutive school days that is

deemed not to be manifestation, the IEP Team must, as appropriate, provide the child a functional behavioral assessment (FBA) and develop/review a behavior intervention plan.

United States Department of Education Guidance

- The Comments clarify that what constitutes a FBA is best left to the LEA, the parents, and relevant members of the IEP Team who are responsible for determining manifestation. (Page 46721)

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

1. Required if the school is considering removing the child with a disability from their educational placement for more than 10 school days in a given school year when it is deemed a change in placement or placing the student in an Interim Alternative Educational Setting.

   Note: If the student is placed in an IAES for weapons, drugs, or serious bodily injury, the student may remain in the IAES, as determined by the IEP Team, regardless of whether the violation was a manifestation of the student's disability. Questions and Answers on Discipline Procedures, Question F-4 (United States Department of Education, Office of Special Education and Rehabilitative Services (2009))

2. Procedures

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

   b. Determination made by the parent and relevant IEP Team members (as determined by the parents and LEA)

   c. Determination made immediately, if possible, but no later than 10 school days after the date on which the decision to change the placement is made.

3. Considerations

   a. all relevant information in the student's file

   b. relevant information supplied by the parents

   c. teacher observations of the student

d. IEP and placement

4. Manifestation Standard

a. Whether the behavior was caused by, or had a direct and substantial relationship to the disability, or was the direct result of the failure to implement the IEP.

I. Manifestation (34 CFR 300.530 (f))

1. If there is a manifestation, a functional behavioral assessment will be conducted and a behavior intervention plan will be implemented or revised, as appropriate. The student will return to the last placement unless the parents and the LEA otherwise agree as part of the behavior intervention plan.

J. No Manifestation (34 CFR 300.530 (c))

1. Regular Disciplinary Hearing

a. Special education and Disciplinary records sent to disciplinary hearing authority

2. Continue to provide a free appropriate public education

K. Expedited Due Process Hearings (34 CFR 300.532)

1. Parent may challenge manifestation determination or any decision regarding placement with a right to have an expedited due process hearing. The expedited hearing shall occur within 20 school days of the request and shall result in a determination within 10 school days after the hearing.

2. In the event an expedited hearing is requested, a resolution meeting must occur within seven days of the hearing request with a 15 day period of resolution unless the parties have mutually waived the resolution process.

3. States may establish different state imposed procedural rules for expedited Hearings except for the "five day rule" for exchanging evidence to be submitted at the hearing.

4. "Stay Put" is the IAES pending the hearing officer's decision or the expiration of disciplinary removal, whichever occurs first, unless otherwise agreed upon.

5. "Stay Put" Exception for dangerousness

a. Expedited hearing applying dangerousness standard.

L. Students Not Yet Eligible (34 CFR 300.534)

1. May assert IDEA protections if it is shown school district had knowledge that the child had a disability before the behavior incident.

2. The district shall be deemed to have such knowledge if:

a. parent has expressed concern in writing to school personnel that the child is in need of special education;

b. parent has requested an evaluation; or

c. the teacher or other school personnel expressed specific concern about a pattern of behavior of the child to the special education director or to other supervisory school personnel.

If the LEA does not "have knowledge" that a child is a child with a disability prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as are applied to children without disabilities who engage in comparable behaviors.

If a parent requests an evaluation of a regular education child who is suspended or expelled, the evaluation must be expedited. Pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

Such placement can include suspension or expulsion without educational services.

M. Referral to Law Enforcement/Judicial Authorities (34 CFR 300.535)

1. IDEA does not limit a district from reporting a crime to appropriate agencies.

2. Transfer of special education and disciplinary records.

The IDEA allows the transmission of the records only to the extent permitted by the Family Educational Rights and Privacy Act. Absent parent consent, FERPA allows disclosure if pursuant to a subpoena or court order, in connection with an emergency, or pursuant to a State statute concerning the juvenile justice system.

N. Discipline Records (34 CFR 300.229)

1. A State may require that LEAs include and transmit information regarding current or previous disciplinary actions to be included in the education records of a student with a disability to the same extent as students who are not disabled.

2. Content of the record includes a description of:

   a. behavior requiring disciplinary action
   b. disciplinary action taken
   c. other relevant information regarding the safety of the child or others

3. Transmission of records includes:

   a. statement of current and past disciplinary action, and
   b. IEP

X. Procedural Safeguards

A. State/Local procedures must be established (34 CFR 300.500)

B. Parent Participation (34 CFR 300.501 and 300.30)

1. The IDEA requires that parents be given an opportunity to participate in meetings with respect to the identification, evaluation, educational placement and provision of a free appropriate public education.

   A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision if those issues are not addressed in the child's IEP. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

2. Parent means a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent), a guardian (but not the State if the child is a ward of the State) or an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare or a surrogate parent.

   The biological or adoptive parent shall be presumed to be the parent when more than one party qualifies under the IDEA definition of parent unless the natural/adoptive parent does not have the legal authority to make

educational decisions or there is a judicial decree or order specifying a person to act as the parent for educational decisions. (300.30(b))

Note: The IDEA also allows a State to transfer parental rights to a student who reaches the age of majority unless a Court has determined the adult student be incompetent under state law.

C. Written Notice (34 CFR 300.503)

1. Parents must receive prior written notice whenever the agency proposes to change or refuses to change:

   a. identification
   b. evaluation
   c. educational placement; or
   d. provision of a free appropriate public education

2. The notice must:

   a. be in parent's native language, unless it is clearly not feasible to do so
   b. describe the action
   c. explain why the agency is proposing/refusing such action
   d. description of other options considered
   e. evaluations and other information used as a basis for the action
   f. other relevant factors
   g. how a copy of the procedural safeguards can be obtained
   h. resources to assist parents

   Note that notice is also required for IEP meetings.

   Parents may elect to receive notices by e-mail if the agency makes this option available.

D. Consent (34 CFR 300.9 and 300.300)

1. Consent means that the parents have been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication; the parent understands and agrees in writing to carry out the activity and that the granting of consent is voluntary and may be revoked at any time although the revocation is not retroactive.

2. Consent is required in order to conduct an initial evaluation or a re-evaluation consisting of more than a review of existing information.

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

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

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

4. Parents have the right to revoke consent for continued IEP services for their child at any time. The revocation must be in writing and the school district must respond by providing parents with written notice acknowledging the revocation of services and specifying when all special education and related services will be terminated. The parents' right to terminate their child's IEP services is not subject to challenge in a due process hearing.
   If a parent subsequently requests special education services, the school district has an obligation to evaluate. If eligible, the school has an obligation to make a FAPE available to the child including the development and implementation of an IEP. (300.300(b)(4)) (Federal Register, Volume 73, No.231, December 1, 2008)

5. Consent is required each time the LEA will be asking the parents to use their private or public insurance or other benefits to cover the costs of the special education or related services. The parents must be notified that refusal to allow access to their insurance does not relieve the agency of its responsibility to ensure that all required services are provided at no cost to the parents.

E. Notice of Procedural Safeguards (34 CFR 300.504)

Shall be provided at a minimum:

1. Initial referral for evaluation

2. Once per year

3. Parental request for an additional copy

4. Filing a due process hearing complaint or administrative complaint

5. When the school is seeking a disciplinary change of placement.

F. Content of Procedural Safeguards must include a full explanation of: (34 CFR 300.504)

1. independent educational evaluation
2. prior written notice
3. parental consent and revocation of consent
4. access to educational records
5. opportunity to present complaints to initiate due process
6. "Stay Put" – placement during pendency of due process
7. procedures for placement in an interim alternative educational setting
8. requirements for unilateral placements by parents seeking public payment
9. mediation
10. due process hearings - including disclosure of evaluation results
11. state level appeals (if applicable)
12. civil actions
13. attorneys' fees
14. state administrative complaint procedures
15. statute of limitations period to file complaints
16. resolution meetings
17. time period for filing an appeal with the Court

The Regulations add the requirement that the safeguards address the differences between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures.

G. Mediation (34 CFR 300.506)

1. States must offer mediation options to parents and LEAs even if a due process hearing has not been requested.

2. Voluntary

3. Not used to delay/deny rights

4. Conducted by a qualified and impartial mediator

   a. trained in effective mediation techniques

   b. knowledgeable in special education law

   c. list maintained by State

   d. The SEA may select mediators on a random or rotational basis or some other impartial basis. A mediator could be an employee of a LEA not involved in educating the student

5. State shall cover cost of mediation

6. Written Mediation Agreement - A mediation agreement is a. legally binding agreement enforceable in State or Federal Court. The agreement will provide that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence during subsequent legal proceedings.

H. Due Process Hearings (34 CFR 300.507-515)

1. Due Process Hearing Complaints

   a. The parent or public agency may initiate a hearing on issues relating to identification, evaluation, educational placement or the provisions of FAPE. A due process hearing must be initiated within two years of the moving party either knowing of or should have known of the disputed decision, unless the state establishes an explicit state time limit. Exceptions are if the parent had not been informed or misinformed by the LEA.

I. State Administrative Complaints (34 CFR 300.151-153)

1. An organization or individual may file a signed written complaint alleging Part B violations.

   The complaint must allege a violation not more than one year ago.

2. The State shall investigate, issue a report within 60 days and or corrective action, if warranted.

   The State may order monetary reimbursement, compensatory education or other appropriate action to correct the non-compliance.

3. The public agency must be given an opportunity to respond to the complaint and to submit a proposal to resolve the complaint.

4. With the agreement of the parties, an opportunity to engage in mediation or other alternative means of dispute resolution must be afforded.

5. Clarifies that the enforcement of due process hearing decision against a public agency must be handled through the complaint process. (300.152 (c)(3))

6. Maintains the one year statute of limitation period but removes the three year period if compensatory services are being requested.

J. Confidentiality (34 CFR 300.611-627)

1. The State shall take steps to ensure the protection of any personally identifiable data, information and records collected by the SEA and LEAs.

2. The parents have the same rights as parents of nondisabled students under the Family Educational Rights and Privacy Act (FERPA) to access and to challenge alleged inaccurate or misleading information in their child's education records with the following additions:

   a. Timelines for inspections—Right to inspect and review their child's education records without unnecessary delay, before an IEP meeting, resolution meeting or a due process hearing but in no case later than 45 days.

   b. Consent—The parent must give written consent before their child's education records are shared between the LEA where a parentally private school is located and the LEA of the parents' residence.

   c. Destruction of Records—The agency must inform the parents when personally identifiable information maintained under the IDEA is no longer needed to provide educational services to the student. The information must be destroyed at the request of the parent. However, a permanent record of the student's name, address, phone number, grades, attendance records, classes

attended, grade level completed and year completed may be maintained.

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