

What, When, Why? – Legal Issues and Practical Tips on IDEA's Prior Written Notice Requirement

by

Jose L. Martín, Attorney at Law
RICHARDS LINDSAY & MARTÍN, L.L.P.
13091 Pond Springs Road, Suite 300
Austin, Texas 78729
jose@rlmedlaw.com

Copyright © 2016, 2017 RICHARDS LINDSAY & MARTÍN, L.L.P.

The Prior Written Notice Regulation

34 C.F.R. §300.503

Prior notice by the public agency; content of notice.

(a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency –

- (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or*
- (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.*

(b) Content of notice. The notice required under paragraph (a) of this section must include –

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

(c) Notice in understandable language. (1) The notice required under paragraph (a) of this section must be –

- (i) Written in language understandable to the general public; and
- (ii) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(2) If the native language or other mode of communication of the parent is not a written language, the public agency must take steps to ensure –

- (i) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;
- (ii) That the parent understands the content of the notice; and
- (iii) That there is written evidence that the requirements in paragraphs (c)(2)(i) and (ii) of this section have been met.

When PWN is required

Some examples of when an LEA must provide prior written notice are when it proposes or refuses to:

- Conduct an initial evaluation of the student;
- Change the student’s placement from a special education classroom to a general education classroom; or
- Change the types or amounts of related services the student receives.

Note—Keep in mind that “propose,” for purposes of PWN, means when the IEP Team decides to take an action, not merely when it is discussing an option that it ultimately decides not to adopt. Thus, PWN is not required when the IEP Team suggests an option, but opts to not go through with it. See, e.g., *Grant v. Independent Sch. Dist. No. 11, Anoka-Hennepin*, 43 IDELR 219 (D.Minn. 2005)(school had no PWN duty prior to reaching a final decision on the appropriateness of one-to-one reading instruction).

Must PWN be issued every time the IEP Team makes changes to an IEP?—Yes. Prior written notice is required whenever a student’s IEP is changed. If the proposed change materially affects the composition of the educational program, the notice requirement is triggered. *Weil v. Board of Elem. & Secondary Educ.*, 17 IDELR 902 (5th Cir. 1991), *cert. denied*, 112 LRP 26051 (1991); see also *Letter to Lieberman*, 52 IDELR 18 (OSEP 2008).

Placement Changes—Changes in placement always require PWN. In a Colorado case, not providing PWN of a placement change for a student with autism and other disabilities until a month after the placement became effective violated the PWN requirement. *Mesa County Valley Sch. Dist. 51*, 68 IDELR 84 (SEA CO 2016). In fact, the state complaint officer found that the procedural violation might have amounted to a denial of FAPE, although FAPE was denied on other grounds as well. A district is not required to effect a change in placement merely because a parent requests. But, if it declines the request, the district must provide prior notice of the decision. *See, e.g., Constellation Schs. Elyria Cmty.*, 116 LRP 11802 (SEA Ohio 2015)(charter school violated IDEA where there was no PWN informing the parent that it was declining a request to change the student's placement to a self-contained class).

Evaluation issues—Similarly, districts are not required to evaluate a student every time a parent requests an evaluation if there is no reason to conduct the evaluation. But, it must provide PWN of the refusal. *Columbus City Sch. Dist.*, 116 LRP 13808 (SEA Ohio 2016).

What if the school proposes a functional behavioral assessment (FBA)?—Since FBAs are considered evaluations under the IDEA, a proposal to conduct an FBA is an action involving evaluation, and thus, triggers the PWN requirement. *Letter to Anonymous*, 59 IDELR 14 (OSEP 2012).

Is PWN needed when parents agree to the IEP Team decisions or actions?—IEP teams must understand that the prior written notice requirement applies whether the parent has agreed to an action or not. *See Letter to Lieberman*, 52 IDELR 18 (OSEP 2008). The trigger for PWN is the taking of actions involving identification, evaluation, placement, or provision of a FAPE, or the refusal to take any such actions. An LEA must provide prior written notice regardless of whether the parent agrees or disagrees with the change.

Does it matter who initiates the IEP change or other action taken?—No. The school must provide prior written notice regardless of who initiated the change. Even if the parent requests the change in question, the PWN requirement applies. *Letter to Lieberman*, 52 IDELR 18 (OSEP 2008).

Is PWN required when an IEP is changed, without a meeting, on the basis of an IEP amendment?—Yes. If an LEA and a parent or an adult student agree to amend the student's IEP without convening an IEP team meeting, the LEA must provide the parent or adult student with prior written notice of the amendment, as it is nevertheless a change to the IEP.

Is PWN required prior to graduation?—Since graduation is a change in placement, and in accordance with a federal regulation on the issue, PWN is required prior to graduations. IDEA regulations at 34 CFR §300.102(a)(3)(iii) read in part, “graduation from high school with a regular high school diploma constitutes a change in placement, requiring written prior notice in accordance with §300.503.”

What about when the school will discontinue aide assistance?—Yes. The removal of one-to-one paraprofessional assistance to a child with Autism without prior written notice was held to be a violation of IDEA in *R.Y. v. New York City Dept. of Educ.*, 68 IDELR 230 (S.D.N.Y. 2016). Moreover, as discussed below, the procedural violation significantly impeded the parents’ right to meaningful participation, and thus constituted a denial of FAPE, and not merely a technical violation.

Must proposed changes in placement specify a particular school location?—Apparently, the courts are divided on this issue. The Fourth Circuit has held that failure to state the particular school location violates PWN and possibly FAPE. *A.K. v. Alexandria City Sch. Bd.*, 47 IDELR 245 (4th Cir. 2007)(proposal to place teen in an unspecified private day school did not permit parents to effectively evaluate whether the placement would meet his needs). But, the Second Circuit has held that a description of the educational program, even without a specific location, satisfies the PWN provision, as it indicated that the student would be served in a 6:1+1 class in a school for students with disabilities. *T.Y. v. New York City Dept. of Educ., Region 4*, 53 IDELR 69 (2nd Cir. 2009).

2006 Commentary—In its commentary to the 2006 regulations, the Department of Education stated that “While public agencies have an obligation under the Act to notify parents regarding placement decisions, there is nothing in the Act that requires a detailed explanation in children's IEPs of why their educational needs or educational placements cannot be met in the location the parents' request. We believe including such a provision would be overly burdensome for school administrators and diminish their flexibility to appropriately assign a child to a particular school or classroom, provided that the assignment is made consistent with the child's IEP and the decision of the group determining placement.” 41 Fed. Reg. 46,588 (August 14, 2006). The commentary acknowledges that at times “a public agency may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement.” *Id.* This position appears to support the courts that have held that the PWN need not

specify a particular location or school, but rather the nature and type of educational setting. But, there may be situations, such as in the *A.K.* case above, where a description of a “private day placement” is insufficient to understand the nature of the setting, particularly since it is not a common public school setting.

Do temporary changes in a student's program require PWN?—No. *Washoe County Sch. Dist.*, 55 IDELR 115 (SEA NV 2010)(no PWN necessary where student with autism was pulled four days from her music class while her violin was being repaired after she damaged it. OSERS has generally taken the position that changes in a student’s program of ten days or less do not amount to a change in placement. See, e.g., *Questions and Answers on Providing Services to Children with Disabilities During an H1N1 Outbreak*, 53 IDELR 269 at Question A-3 (OSERS 2009).

Is PWN required if the school changes its educational methodology?—Not generally. IDEA does not require that IEPs specify the educational methodology by which it is implemented. “There is nothing in the Act that requires an IEP to include specific instructional methodologies.” 71 Fed. Reg. 46,665 (August 14, 2006). Thus, a change in methodology does not require PWN unless it is specified in the IEP. If specified in the IEP, then a change in methods triggers PWN. *Alaska Gateway Sch. Dist.*, 116 LRP 15983 (SEA Alaska 2016).

Mention of methodology in PWN does not commit the school to implementing only that method—In the case of *O.M. v. Falmouth Sch. Dept.*, 69 IDELR 86 (1st Cir. 2017), the court held that the fact that a prior written notice document mentioned a particular reading program did not require the school to use that program for the student’s reading instruction. The Court noted that IDEA does not required IEPs to include instructional methodologies, and that the student’s IEP itself did not state the method that was listed on the prior written notice. In any even, schools may want to avoid stating any particular instructional methodology on prior written notices, unless the IEP team is committing to implementing a particular methodology (although not generally required by IDEA).

PWN not generally needed for changes to program details that are not listed on IEP—Thus, a change to transportation arrangements that are not included in the IEP, such as pick-up and drop-off details are not material to identification, evaluation, placement, or provision of FAPE, and thus do not require PWN. *Coeur D’Alene Sch. Dist. No. 271*, 113 LRP 40219 (SEA Idaho 2013). Here, the change involved picking up the student after other students were dropped off due to safety concerns. See also, *Owen J. Roberts*

Sch. Dist., 68 IDELR 86 (SEA PA 2016)(removal of a bus aide did not trigger PWN where such aide was not specified on the IEP; thus, there was no change to identification, evaluation, placement, or provision of FAPE).

In a situation of an initial identification proposal, must the PWN include the proposed disability category?—Yes. In the case of a proposal to identify a child as eligible under IDEA, it is expected that the PWN would include the proposed disability category, along with the proposal to initiate services. *Letter to Atkins-Lieberman*, 56 IDELR 141 (OSEP 2010). This is required in order to fully explain the action being proposed. “In order for the parent to make his or her decision, she or he must be clear on the action being proposed or refused.”

Is there a timeline for providing PWN?—States usually decide the timeline for providing the PWN, but it must be provided a “reasonable” time before the district implements the action or refusal. 34 C.F.R. §300.503(a). Thus, OSEP has stated that PWN must be given to parents a reasonable time before the agency implements that action, but after the agency’s decision on the proposal or refusal has been made.” *Letter to Helmuth*, 16 IDELR 550 (OSEP 1990). This is so parents have “a reasonable time to fully consider the change and respond to the action before it is implemented.” *Letter to Chandler*, 59 IDELR 110 (OSEP 2012).

Is a parental waiver of the PWN possible?—A waiver is possible, if the state allows. A parent or adult student may waive the notice requirement timeframe. LEAs can implement policies and procedures that address how a waiver of the notice requirement timeline should be documented.

Thus, in a state that imposes a 5-day PWN timeline, if a parent is notified at the conclusion of an IEP Team meeting that the IEP Team decisions and actions will not take place until 5 days after PWN is provided, the parent can choose to waive the PWN so that the actions will take place immediately. Districts that undertake this practice should create an appropriate form to document that the parents have been informed of the PWN requirement and timeline, but that they choose to waive such requirement and timeline so that the IEP Team actions can take place immediately.

Potential Impact of Lapses in PWN

Do PWN violations equate to a denial of FAPE?—Caselaw makes clear that some procedural violations, alone, can rise to the level of a denial of a FAPE. “The procedural mandates of the Act are so significant that, in some circumstances, failure to comply with the mandates ‘can itself constitute the

denial of a free appropriate education.” *J. R. v. Sylvan Union Sch. Dist.*, 49 IDELR 253 (E.D.Cal. 2008) citing *Blackman v. Dist. of Columbia*, 277 F. Supp. 2d 71, 79 (D.D.C. 2003).

This is true when the procedural violations result in a loss of educational opportunities for the student, or if they seriously infringe on the parents’ right to meaningfully participate in the IEP development process. See, for example, *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1484 (9th Cir. 1992)(“procedural inadequacies that result in the loss of an educational opportunity, or seriously infringe the parents’ opportunity to participate in the IEP formulation process, clearly result in the denial of a FAPE.”); *Doe v. Defendant I*, 898 F.2d 1186, 1191 (6th Cir. 1990)(“Adequate parental involvement and participation in formulating an IEP...[are of] primary concern in requiring that procedures be strictly followed.”); *Adam J. v. Keller ISD*, 328 F.3d 804, 812 (5th Cir. 2003); *Marcus I. v. Department of Education, State of Hawaii*, 63 IDELR 245 (9th Cir. 2014). For purposes of harm to the parent, the courts look to the whether the parent was denied meaningful input and participation as part of the process of developing the student’s educational program.

Thus, some cases indicate that a failure to provide PWN within a reasonable time before the school implements a change involving identification, evaluation, placement, or provision of FAPE is a procedural violation of IDEA that may result in a denial of FAPE. See, e.g. *R.Y. v. New York City Dept. of Educ.*, 68 IDELR 230 (S.D.N.Y. 2016)(various procedural violations, most serious of which was failing to provide PWN before deciding not to offer a one-to-one paraprofessional, led to finding of denial of FAPE and reimbursement for private placement); *El Paso County Sch. Dist.*, 113 LRP 44602 (SEA CO 2013).

On the other hand, if there were extensive meetings with the parents, where there were ample opportunities for mutual discussion of proposals, IEP offers, and placements, a failure to provide a prior written notice might be excused. For example, in *S.H. v. Tustin Unified Sch. Dist.*, 69 IDELR 176 (9th Cir. 2017), the Court noted that although there was a failure to provide prior written notice of the IEP team’s placement offer, there had been six IEP team meetings over more than 18 hours in which the parents had been amply notified of the school’s placement offers and had opportunities to provide input. Thus, the failure to provide prior written notice did not deprive the parents of a meaningful opportunity to participate and was merely a technical procedural violation. Similarly, in *B.P. v. Regional Sch. Unit 75*, 65 IDELR 206 (D.Me. 2015), the team’s failure to provide the parents with prior written notice of its decision to separate the student from classmates during lunch outings was not a denial of FAPE, as the team had discussed their concerns over the nature of the outings and the parents had presented their input as well.

Content of PWN

The notice must contain the following elements:

1. Description of the action proposed or refused;
2. Explanation why the school proposed or refused the action;
3. Description of the evaluation procedure, assessment, record, or report used as a basis for the proposed or refused action;
4. Statement that parents have the protection of the IDEA procedural safeguards and how they can obtain a copy thereof;
5. Sources for parents to contact for help in understanding IDEA provisions;
6. Description of other options the IEP team considered and the reasons why those options were rejected;
7. Description of other factors relevant to the school's proposal or refusal. 34 C.F.R. §300.503(b).

How descriptive must the PWN be?—“The purpose of the placement notice is not to satisfy any state education authority personnel who might be keeping a close eye on the local educational authority. The purpose is to apprise the parents, in plain English, of what placement options were considered and why they were rejected.” *Fern Ridge Sch. Dist. 28J*, 16 IDELR 676 (SEA OR 1990). Here, the hearing officer found that the PWN did not specify any of the placement options considered or why they were rejected. “Parents should not be required to read between the lines.” This was particularly important in this case, as the parents did not participate in placement meetings at the time. Another case has stated that the PWN must provide detail sufficient to allow parents to meaningfully participate in the decision-making process in an informed way. *Smith v. Squillacote*, 19 IDELR 265 (D.D.C. 1992).

Native Language Issues—PWN must not only be provided in language understandable to the general public, but also in the parents' native language, unless it is clearly not feasible to so do. 34 C.F.R. §300.503(c); see also, *Adams County Sch. Dist.*, 55 IDELR 210 (SEA CO 2010). If the parents do not understand written language, the school must ensure the notice is translated orally or by other means to the parent in his or her native language or other mode of communication and that the parent understands the content of the notice. In those cases, the school should document evidence that these requirements were met. 34 C.F.R. §300.503(c)(2).

Is there an example of a poor PWN?—PWNs that use overly general or vague

language and are not specific to the circumstances are likely to be found to violate the PWN requirement. In *Cincinnati Public Schools*, 116 LRP 11536 (SEA Ohio 2016), the school's PWN was found to not meet the requirements of the regulations. Aside from not having a date, it contained the following:

- 1) a description of the action as "Annual IEP"
- 2) the explanation of the action as "The annual IEP review is required by law and will allow the team to review academic progress and implement new objectives"
- 3) other options considered as "No other options were considered, annual review required by law"
- 4) a description of each evaluation procedure, assessment, record, or report the district used as a basis for the action as "Progress Monitoring and academic assessments"
- 5) a description of other factors relevant to the district's proposal as "Input from the IEP team, including the parent/guardian and consideration of any outside evaluation."

Is verbal notice sufficient, if it meets the content requirements of PWN?—No. Regardless of whether the verbal notice is substantively appropriate, verbal notice does not meet the PWN requirement. *Union Sch. Dist. v. Smith*, 20 IDELR 987 (9th Cir. 1994); *Pikes Peak Bd. of Coop. Educ. Servs.*, 9 ECLPR 15 (SEA CO 2011).

Could not the IEP Team report include the PWN content?—Potentially, yes. The record from the IEP Team meeting, which includes among other things the proposed IEP, might be used for the prior written notice as long as the documents the parent or adult student receives contain all of the content that must be included in a prior written notice. See, e.g., *El Paso County Sch. Dist.*, 113 LRP 44602 (SEA CO 2013); 71 Fed. Reg. 46,691 (August 2006 commentary to IDEA PWN regulation). But, in many cases a stand-alone PWN helps schools ensure compliance with the notice requirement.

Note—The reality is that relying on the IEP Team report to comply with all the PWN content requirements is fraught with peril and inconsistency. Each action or refusal requires compliance with the 7-part content requirement, which is difficult to accomplish "on the fly," while the IEP Team report is being developed at an IEP Team meeting. Thus, it is advisable for districts to draft and provide separate PWNs that flow from the IEP Team deliberations and decisions.

PWN in practice—Schools must, after understanding the requirements of PWN, establish some best practices for actually drafting the PWN document. The notice can be drafted during the IEP team meeting as

decisions are made, immediately after the IEP meeting, or soon thereafter, since it must be provided to parents a reasonable time before implementation of IEP team actions. (States may set forth precise timeframes). To this observer, the explanation of why the team has proposed or refused an action is the most substantively important component of the PWN, and the one that requires most close attention.

An example of a dicey PWN dispute—In *K.A. v. Fulton County Sch. Dist.*, 62 IDELR 161 (11th Cir. 2013), the school proposed amending the IEP of a 1st grade student with Down’s Syndrome to have her placed at another campus where there would be fewer opportunity for mainstreaming. The parents alleged that the school’s notice was insufficient. The court noted that the school provided the parents with copies of the meeting minutes, the old IEP, the amended IEP, and other educational records, although those records were provided piecemeal and after parents requested. Thus, the court held that notice may have been inadequate. But, the court also found that the parents were notified fully a month before the planned change in placement, participated fully in two IEP team meetings about the change, and even observed the proposed new school. Therefore, the court held that despite the weak notice, “the parents’ participation was full and effective,” and that there was no substantive violation of IDEA.

Yet another dicey PWN dispute—A district’s offer to provide EYS services to a child with autism was held to amount to prior written notice that it was refusing to fund a private summer camp placement. *A.B. v. San Francisco Unified Sch. Dist.*, 51 IDELR 158 (N.D.Cal. 2008). The court agreed with the hearing officer below that the language of the ESY offer put the parents on notice that the district had denied their request for private summer camp. Importantly, the court also agreed that the offer contained all required elements for PWN, albeit not in the normally used form.

PWN Forms

USDOE-suggested form can be found at the following web address:

<http://www.ed.gov/policy/speced/guid/idea/modelform-notice.doc>

Additional form items—If you use one of the suggested forms, you may want to add the date the PWN was drafted, the date it was provided to the parent, and the mode of delivery (in case a dispute later arises about the timeliness or receipt of the PWN)

SAMPLE PRIOR WRITTEN NOTICE FORM

Student: _____

Date of PWN draft: _____

Date provided to parent: _____

Method of delivery: Hand-delivered to home __
 Mailed regular mail _____
 Mailed certified mail _____
 E-mail: _____ Address: _____
 Fax: __ Number: _____
 Other (describe): _____

Description of action(s) proposed or refused:

Reasons why action(s) proposed or refused:

Options considered by IEP Team and reasons why rejected:

Relevant evaluation procedures, assessments, tests, records, reports, or other data used as the bases for the proposed action(s) or refusal(s) of action:

Other factors, if any, relevant to the action(s) proposed or refused:

Sources for parent to obtain assistance in understanding the information in this notice:

Procedural Safeguards Notice: Students eligible to receive special education services under the IDEA are entitled to procedural safeguards and rights explained in the IDEA rights booklet that was made available to you during the IEP Team meeting to which this notice refers. Additional copies of the rights booklet are also available by contacting the following: _____