



Fagen Friedman & Fulfrost LLP

NEW IDEA 2004 SPECIAL EDUCATION REGULATIONS

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- I. **Background.** On August 14, 2006, the Secretary of the Office of Special Education and Rehabilitative Services (“OSERS”) of the U.S. Department of Education (“DOE”) issued the final Part B regulations for the IDEA 2004. These regulations became effective on October 13, 2006.
 - II. **What are Regulations?** The IDEA requires the DOE to develop Federal Regulations to provide administrative interpretation. OSERS is the federal agency within the DOE charged with monitoring and enforcing the IDEA. The Secretary provides guidance about the IDEA by issuing the Federal Regulations and the “Analysis of Comments and Changes” to the Federal Regulations. These are published in a document known as the “Federal Register.” The Federal Register is available at:
 - A. <http://www.ed.gov/news/fedregister>
 - B. <http://www.gpoaccess.gov/nara/index.html>
 - III. **Do the Regulations Change the Requirements of IDEA 2004?**
 - A. The IDEA is a federal statute, i.e. it is a federal law issued by the legislature, Congress. The Federal Regulations are not technically law. Rather, they are issued by a federal agency, OSERS, to clarify the law. Thus, the purpose of a Federal Regulation is to explain the existing requirements of the IDEA rather than to change or increase those mandates. It is not uncommon, however, for the Federal Regulations to be treated as law, particularly when the statute itself fails to define a term or address an issue.
 - B. The U.S. Supreme Court has held that where there is ambiguity in the statutory language, it may be proper to defer to the construction adopted by the agency charged with monitoring and enforcing the statute. (Honig v. Doe (1988) 484 U.S. 305, 326, fn. 8.)
 - IV. **How are the Regulations Organized?**
 - A. On June 21, 2005, OSEP published a notice of proposed rulemaking (“NPRM”) in the Federal Register to request comments from the public about the proposed regulations. (70 Fed. Reg. 35782 (2005).) The NPRM publication marks the start of the 75-day comment period.
 - B. More than 5,500 parties submitted comments on the proposed regulations, including parents, individuals with disabilities, teachers, related services providers, state and local officials, and members of Congress. (71 Fed. Reg. 46547.)
 - C. On August 14, 2006, OSERS issued the final Part B regulations for the IDEA 2004 in the Federal Register. (71 Fed. Reg. 46540.)



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- D. The first section of the Federal Register document is called the preamble.
1. **Major Changes in the Regulations.** The first part of the preamble summarizes the major substantive changes in the final regulations from the regulations proposed in the NPRM. This section is called the “Major Changes in the Regulations.” (71 Fed. Reg. 46541.)
 2. **Analysis of Comments and Changes.** The “Major Changes in the Regulations” is followed by the “Analysis of Comments and Changes” section. This portion explains the rationale for each of the changes. The format for this portion is:
 - (a) Comment.
 - (b) Discussion.
 - (c) Changes.
 3. For example, Federal Regulation section 300.30 defines the term “Parent.”
 - (a) **Comment:** Several commenters objected to the term “natural parent” in the definition of parent because “natural parent” presumes there are “unnatural parents.” The commenters recommended using “birth parent” or “biological parent” throughout the regulations.
 - (b) **Discussion:** We understand that many people find the term “natural parent” offensive. We will, therefore, use the term “biological parent” to refer to a non-adoptive parent.
 - (c) **Changes:** We have replaced the term “natural parent” with “biological parent” in the definition of parent and throughout these regulations. (71 Fed. Reg. 46565.)
 4. **The Code of the Federal Regulations.** The actual text of the regulations follows the “Analysis of Comments and Changes” section and begins on page 46755. (71 Fed. Reg. 46755.)
- V. **Do the Comments or Appendices Provide Legal Authority?** Like the regulations themselves, the comments and appendices are not technically law; however, the comments and appendices are issued by OSERS to help detail how the regulations and the IDEA should be applied.
- VI. **What Significant Areas of IDEA 2004 do the IDEA Regulations Clarify?**



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- A. IEP Amendment, Attendance and Excusal
 - B. Parental Consent
 - C. Placements
 - D. Related Services
 - E. Procedural Safeguards
 - F. Child Find
 - G. Resolution Meeting
 - H. Independent Educational Evaluation
 - I. Transition Agency Participation
- VII. **IEP Amendments, Attendance and Excusal.** IEP teams are now permitted to change a student's IEP without convening an IEP meeting or convening the IEP meeting without all of the required members if certain conditions are met.
- A. **Amending an IEP.**
 - 1. To change a student's IEP after the annual IEP team meeting, the parent and school district must: (1) agree to not convene the IEP meeting; and (2) develop a written document to amend or modify the student's current IEP. (34 C.F.R. § 300.324(a)(4).)
 - 2. The school district must ensure that the IEP team is informed of any amendments or modifications to a student's IEP.
 - 3. The school district, upon parent request, must provide the parent with a revised copy of the IEP with the amendments incorporated.
 - 4. Because the IEP team is required to review a student's IEP annually to determine whether the annual goals for the student are being achieved, annual IEP team meetings must still take place. Thus, changes to the IEP without an IEP team meeting can only be made between the annual IEP team meetings. (71 Fed. Reg. 46685.)
 - 5. There are no restrictions on the types of changes that may be made provided that the parents and school district agree upon the changes. (71 Fed. Reg. 46685.)
 - B. **Individuals Whose IEP Attendance is Required.** The following IEP team



members are required to attend an IEP meeting:

1. **Parent**: One or both parents, a representative selected by the parents, or both. (34 C.F.R. § 300.321(a)(1).)
2. **General Education Teacher**: Not less than one general education teacher if the student will or may be participating in the general education environment. (34 C.F.R. § 300.321(a)(2).)
3. **Special Education Teacher**: Not less than one special education teacher or, if appropriate, not less than one special education provider. A special education provider is a person who is, or will be, responsible for implementing the IEP, for example, speech pathologist or occupational therapist. (34 C.F.R. § 300.321(a)(3).)
4. **School District Representative**: A school district representative must be: (1) qualified to provide, or supervise the provision of specially designed instruction; (2) is knowledgeable about the general curriculum; and (3) is knowledgeable about the availability of resources. (34 C.F.R. § 300.321(a)(4).)
5. **Assessors**: A person who is qualified to conduct an evaluation does not necessarily have the skills or knowledge to assist the IEP team in determining the special education and related services that are necessary in order for the child to receive a free appropriate public education. Thus, it is not necessary to require that the IEP team also include a person who can conduct the evaluation. (34 C.F.R. § 300.321(a).)
6. **Other Individuals**: At the discretion of the parents or the school district, other individuals who have knowledge or special expertise regarding the pupil, including related services personnel, as appropriate. (34 C.F.R. § 300.321(a)(6).)
7. **Student**: Whenever appropriate, the student must attend. If the IEP team will discuss transition services, the school district must invite the student. If the student cannot attend, the school district must take steps to ensure that the student's preferences and interests are considered. (34 C.F.R. § 300.321.)
8. **Transition Service Representative**: If the IEP team will discuss transition services, the school district must invite a representative who is likely to be responsible for providing or paying for transition services. A parent can refuse to provide consent only for the school district to invite other agencies that are likely to be responsible for providing or paying for the transition



services.

9. **Part C Service Coordinator**: If a student was previously served under Part C, an invitation to the initial IEP team meeting must, at the request of the parent, be sent to this individual. (34 C.F.R. § 300.321(f).)

C. **Excusing an IEP Team Member**. The IDEA and Federal Regulations now permit the excusal of certain IEP team members from attending a meeting. (34 C.F.R. § 300.221(e)(1).)

1. IEP team members that may be excused are the following individuals:
 - (a) General education teacher;
 - (b) Special education teacher, or where appropriate, special education provider;
 - (c) School district representative; and
 - (d) A person who is qualified to interpret the instructional implications of an evaluation. (34 C.F.R. § 300.321(e)(1).)
2. It appears that the following IEP team members may not be excused:
 - (a) Student, when it is appropriate to invite him or her;
 - (b) Transition service representative; and
 - (c) Part C service coordinator, if invited by parent request.
3. Note, a meeting may be conducted without parents in attendance if the school district is unable to convince them that they should attend. In this case, the school district must keep a record of its attempts to arrange a mutually agreed upon time and place. (34 C.F.R. § 300.322(d).)
4. If the IEP team member's area of the curriculum or related services is not being modified or discussed, then the parent and school district representative must agree in writing that the attendance of this member is not necessary. (34 C.F.R. § 300.321(e)(1).)
5. If the IEP team member's area of the curriculum or related services is being modified or discussed, then the parent and school district representative must agree in writing to the excusal and the team member must submit, in writing, to the parent and IEP team, input into the development of the IEP prior to the meeting. (34 C.F.R. § 300.321(e)(2).) The comments to the



Federal Regulations state that “written informed consent” (as defined below) is required in this situation. (71 Fed. Reg. 46673.)

6. Consent or written agreement between the school district and parent is not required to excuse individuals who are invited to attend the meetings at the discretion of the school district or parent because they are not required to attend. (71 Fed. Reg. 46674.)
7. The school district, not the parent, determines the specific personnel who are to attend as the required IEP team members for the school district. (71 Fed. Reg. 46674.)
8. The school district must also ensure that the student’s IEP is accessible to each general education teacher, special education teacher, related services provider and other service provider who is responsible for its implementation, regardless of whether the IEP team member was present or excused from an IEP team meeting. (34 C.F.R. § 300.323(d).)
9. Because parent agreement or consent is required each time an IEP team member is excused, a school district may not routinely or unilaterally excuse IEP team members from attending IEP team meetings. Otherwise, the school district that routinely excuses IEP team members from attending IEP meetings would not be in compliance with the IDEA, and therefore, would be subject to the State’s monitoring and enforcement provisions. (71 Fed. Reg. 46674.)
10. The school district should provide a parent with as much notice as possible to request that an IEP team member be excused from attending an IEP team meeting, have agreements or consents signed and have the excused member provide written input to the parent and other team members, at a reasonable time prior to the IEP team meeting. (71 Fed. Reg. 46676.)
11. Due to emergencies and unavoidable scheduling conflicts, it may not always be possible to obtain agreement, consent or distribute the written input prior to the IEP team meeting. If the school district requests an excusal at the last minute or a parent needs additional time or information to consider the request or written input, then the parent always has the right not to agree to or consent to the excusal of the IEP team member or request that the IEP team be rescheduled or reconvened if additional time is needed to consider the written information. (71 Fed. Reg. 46676.)
12. A parent cannot unilaterally exclude any of the required IEP team members. Also, a parent does not have the legal right to require other members of the IEP team to attend the meeting. Therefore, if a parent invites other school



district personnel who are not designated by the school district to be on the IEP team, they are not required to attend. (71 Fed. Reg. 46674.)

VIII. **Parental Consent.**

A. **Consent in General.**

1. “Consent” means that the parent has been fully informed in his or her native language, or other mode of communication, and understands that the granting of consent is voluntary and may be revoked at any time. (34 C.F.R. § 300.9.)
2. Whenever the term “consent” is used in the regulations, it means that the consent is both “informed” and “written.” (71 Fed. Reg. 46629.) Similarly, when the terms “consent,” “informed consent,” “parental consent,” and “written informed consent,” as used in the Federal Regulations, are all intended to have the same meaning. (71 Fed. Reg. 46629.)
3. School districts must make “reasonable efforts” to obtain informed consent.
 - (a) “Reasonable efforts” is defined as:
 - (i) Detailed records of telephone calls made or attempted and the results of those calls;
 - (ii) Copies of correspondence sent to the parents and any responses received; and
 - (iii) Detailed records of visits made to the parent’s home or place of employment and the results of those visits. (34 C.F.R. § 300.322(d).)
 - (b) “Reasonable efforts” must be documented and made.
4. A school district is obligated to use reasonable efforts when it is attempting to obtain informed consent in order to:
 - (a) Conduct an initial assessment (34 C.F.R. § 300.300(a)(1)(iii));
 - (b) Conduct a reassessment (34 C.F.R. § 300.300(c)(2)(i)); and
 - (c) Initially provide special education and related services (34 C.F.R. §



300.300(b)(2));

5. The school district must also use reasonable efforts when it is trying to:
 - (a) Locate the whereabouts of the parents of the student (34 C.F.R. § 300.300(a)(2)(i));
 - (b) To appoint a surrogate parent (34 C.F.R. § 300.519(a)(2)); and
 - (c) Dismiss a parent's due process hearing complaint because it has been unable to obtain participation of the parent in a resolution meeting by the end of the 30-day period. (34 C.F.R. § 300.510(b)(4)).
6. Parental consent is required for disclosures of personally identifiable information to parties, unless the interested parties are officials of participating agencies, collecting or using the information under this part, or the information contained in education records and the disclosure is allowed without parental consent under FERPA. (34 C.F.R. § 300.622(b)(1).)
7. Parental consent is required for the disclosure of information to participating agencies that likely may provide or pay for transition services. (34 C.F.R. § 300.622(b)(2).)

B. **Initial Evaluation.** If a parent refuses to consent to an initial evaluation and the school district does not attempt to override the parent's lack of consent initiating a due process hearing, the school district has not violated its obligation to provide FAPE. (34 C.F.R. § 300.300(a)(3).)

C. **Reevaluation.** If a parent fails to consent to a reevaluation, the school district may pursue a reevaluation by initiating a due process hearing to override the parent's refusal. (34 C.F.R. § 300.300(c)(1).)

D. **District's Obligation to File Complaint to Ensure FAPE.**

1. The Federal Regulations require that states adopt and implement procedures to "ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE." Thus, California must balance a parent's right to consent with the school district's duty to provide FAPE.
2. Where a parent has refused to consent to the school district's IEP offer of services, California law requires the school district "to take affirmative steps to ensure that Student receives a FAPE" and shall initiate due process hearing procedures to override the parent's refusal to consent. While the due process hearing request is pending, the school district may participate



in mediation or a parent conference to attempt informal resolution of the disagreement; however, if the matter goes to hearing, the parties are bound by the resulting decision. (Los Angeles Unified School District (OAH 2006) Case No. N2005110583, N2006030758, 106 LRP 31122, 45 IDELR 264, citing Cal. Ed. Code § 56346(c).)

E. **Home-Schooled Students, Parentally-Placed Private School Students and Transition Students.**

1. If a parent of a student who is home-schooled or placed in a private school by the parent at their own expense does not provide consent for the initial evaluation or reevaluation, or the parent fails to respond to a request to provide consent, the school district may not request a due process hearing. However, the school district must meet the reasonable efforts requirement and document its attempts to obtain parental consent. (34 C.F.R. § 300.300(d)(4).)
2. If a student is enrolled, or is going to enroll in a private school located in the school district's boundaries of the parent's residence, parental consent must be obtained before any personally identifiable information about the student is released between officials in the school district where the private school is located and the officials in the school district of the parent's residence. (34 C.F.R. § 300.622(3).)
3. Parental consent, or the consent of an eligible student who has reached the age of majority under state law, must be obtained before personally identifiable information is released to officials of participating agencies providing or paying for transition services. (34 C.F.R. § 300.622(2).)

IX. **Placements.** While a school district has an obligation under the IDEA to notify a parent regarding placement decisions, a school district is not required to give a detailed explanation in the IEP of why the student's educational needs or educational placement cannot be met in the location the parents request. (34 C.F.R. §§ 300.116; 300.503.)

X. **Related Services.**

- A. Related services do not include a medical device that is surgically implanted (e.g. cochlear implant), the optimization of that device's functioning (e.g. mapping), maintenance of that device, or the replacement of that device. (34 C.F.R. § 300.34(b)(1).)
- B. The right of a student with a surgically implanted device, such as a cochlear implant, is not limited from receiving related services that are determined by the



IEP team to be necessary for the student to receive FAPE. (34 C.F.R. § 300.34(b)(2).)

- C. A school district is not relieved of its responsibility to appropriately monitor and maintain medical devices that are needed to maintain the student's health and safety while the student is being transported to or from school or is at school. (34 C.F.R. § 300.34(b)(2).) Routine checking of an external component of a surgically-implanted device to ensure it is functioning properly is required. (34 C.F.R. § 300.113(b).)

XI. **Procedural Safeguards.**

- A. A copy of the procedural safeguards must be given to the parents only one time a school year, except that a copy also must be given to the parents:
 - 1. Upon the initial referral or parent request for evaluation;
 - 2. Upon receipt of the first state complaint in a school year;
 - 3. Upon receipt of the first due process hearing complaint in a school year;
 - 4. On the date on which the decision is made to make a removal that constitutes a change of placement because the student violated a code of student conduct (along with notification to the parent of the school district's decision); and
 - 5. Upon request by a parent. (34 C.F.R. § 300.504(a).)
- B. The school district may place a current copy of the procedural safeguards notice on its Web site. (34 C.F.R. § 300.504(b).)
- C. A parent may elect (verbally or in writing) to receive an electronic copy of the procedural safeguards notice (as well as prior written notice and due process complaint notices). (34 C.F.R. § 300.505.)

XII. **Child Find.**

- A. **District's Responsibility to Conduct Initial Evaluation and Reevaluation.** The school district where the private school is located is responsible for completing both the "child find" process and the initial evaluation. This means that the school district where the private school is located may not seek reimbursement from the school district of residence. Reevaluation is also part of the school district's "child find" responsibility for parentally-placed private school students. (34 C.F.R. § 300.622(b)(3).)



- B. **District's Obligation to Both Public and Private School Students.** School districts have an obligation to conduct "child find" activities for both publicly-placed and parentally-placed private school students. The school district may not wait until after the "child find" is completed for public school students. (34 C.F.R. § 300.131(c).)
- C. **Equitable Services.** The school district where the private schools are located is responsible for the equitable services provided to a parentally-placed private school student. (34 C.F.R. § 300.131.)

XIII. **Resolution Meeting.**

- A. A resolution meeting is an informal, intermediate step under the IDEA that takes place before the formal due process hearing. The purpose of a resolution meeting is to help parents and school districts resolve their dispute before engaging in a drawn out and contentious due process hearing. The parents, relevant members of the IEP team, and a representative from the school district, must attend the resolution meeting.
 - 1. The Federal Regulations state that parents and the school district must agree on who will attend the resolution meeting. (34 C.F.R. § 300.510(a)(1).)
- B. The school district's representative may only attend the resolution meeting if the parents have an attorney present.
- C. The resolution meeting must be scheduled within 15 days of the receipt of a parent's request for a due process hearing. If the parties cannot resolve the dispute at the resolution meeting or if the dispute is not resolved within 30 days of the receipt of the complaint, the due process hearing timeline commences.
- D. The resolution meeting should not be postponed when the school district believes that a parent's due process complaint is insufficient. Although the same 15-day period applies to filing a sufficiency claim and resolution meeting, the sufficiency claim should be raised as early as possible, so that the resolution period will provide a meaningful opportunity for the parties to resolve the dispute. (34 C.F.R. § 300.510(a).)
- E. The resolution meeting may be waived if both parties agree to do so in writing. Furthermore, the resolution meeting may be waived if mediation is utilized.
- F. Discussions taking place at a resolution meeting are not confidential under the IDEA unless the parties agree otherwise in writing.



XIV. **Independent Educational Evaluations.**

- A. **IEE Defined.** An Independent Educational Evaluation (“IEE”) is an assessment conducted by a qualified examiner that is not employed by the public agency responsible for educating the student at issue. (34 C.F.R. § 300.502 (a)(3)(i).) Parents may either request that the school district pay for or reimburse them for an IEE for their child.
- B. **Only One IEE at Public Expense per Evaluation.** The regulations clarify that a parent is entitled to only one IEE public expense each time the school district conducts or obtains an evaluation or reevaluation with which the parent disagrees. (34 C.F.R. § 300.502(b)(5).)
1. For example, if the school district conducted an occupational therapy assessment which the parent disagreed with, a parent may be entitled to obtain reimbursement for one occupational therapy IEE. However, the parent would not be entitled to a speech and language IEE if the school district did not conduct this type of assessment.
 2. Parents are not entitled to be reimbursed for an IEE if it was obtained prior to or during the time the school district was conducting its own assessment of the student. (71 Fed. Reg. 46689.)
- C. **Privately-Placed Students.** If a parent of a privately-placed student disagrees with an evaluation obtained by the school district where the private school is located, the parent may request an IEE at public expense with that school district as opposed to the school district of residence. (71 Fed. Reg. 46597.)
- D. **Response to Intervention.** If a parent disagrees with the results of a completed evaluation that includes a review of the results of a student’s RTI process, he/she has a right to an IEE at public expense. However, the parent does not have the right to obtain an IEE at public expense before the school district completes its evaluation simply because the parent disagrees with the school district’s decision to use data from a student’s RTI as part of the evaluation process. (71 Fed. Reg. 46689.)
- E. **IEE Costs.** School districts may establish “reasonable cost containment criteria” applicable to evaluations used by both the school district and parents. While it is the Department of Education’s position that school districts should not be required to pay the cost of “unreasonably expensive IEEs,” a school district must give a parent an opportunity to demonstrate that “unique circumstances” justify selection of an evaluation whose fees are outside the school district’s cost containment criteria. (71 Fed. Reg. 46690.)



XV. **Transition Agency Participation.**

- A. Under former 34 C.F.R. § 300.344(b)(3)(ii), school districts were obligated to obtain participation of the transition planning service representative when he/she does not accept a school district's invitation to attend an IEP meeting. The Department of Education did not include this provision in the new regulations because they understood that school districts do not have the authority to compel other agencies to participate in the planning of transition services. (71 Fed. Reg. 46672.)
1. However, school districts should continue to take steps to obtain the participation of other agencies in the planning of transition services even though school districts will no longer have a legal obligation to ensure the participation of those agencies.
 2. If a transition agency fails to provide the transition services described in the student's IEP, the school district still has an obligation under the IDEA "to reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in that program." (20 U.S.C. § 1414(d)(5).)



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