

Chapter

Eleven

The Special Education Process: Due Process Rights

Informed parental consent is required before a school conducts an initial evaluation, before a school provides special education and related services for the first time, and before a school conducts a reevaluation of the child.

Written by

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The Supreme Court has placed at least as much emphasis on the importance of the school's compliance with procedural protections under the Individuals with Disabilities Education Act (IDEA) as on the substantive standard of appropriateness of a school's educational program. In fact the Court held that

When the elaborate and highly specific procedural safeguards embodied in Section 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis on compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process. . . as it did upon the measurement of the resulting Individual Educational Program (IEP) against a substantive standard.

Hendrick Hudson Sch. Dist. Bd. of Educ. v. Rowley, 458 U.S. 176, 205-206 (1982).

The critical procedural protections conferred by the IDEA are: (1) the opportunity to examine records and to obtain an independent educational evaluation of the child; (2) written prior notice whenever the school proposes to initiate or change (or refuses to initiate or change) the identification, evaluation, educational placement, or educational program of a child with a disability; (3) procedures to protect the rights of children whose parents are unknown or unavailable, or the child is a ward of the State, including the assignment of an individual to act as the child's surrogate parent for educational purposes; (4) an opportunity to present complaints to a due process hearing; (5) the availability of mediation to resolve disputes, where both parties agree to participate; and (6)

the maintenance of the child's current educational placement during the pendency of any proceedings involving a complaint regarding the child's education. 20 U.S.C. §§1415(b) - (j).¹ This chapter will address these basic due process rights, with the exception of due process hearings, which is the subject of a separate chapter.²

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¹As discussed in further detail below and in Chapter 10, IDEA's general maintenance of placement provision, 20 U.S.C. §1415(j), does not apply in the context of certain disciplinary actions. See 20 U.S.C. §1415(k)(7).

²In addition to the rights conferred by the IDEA, federal courts will enforce additional procedural rights granted by state law. *Smith v. Union School*, 15 F.3d 1519, 1524 (9th Cir. 1994), cert. denied, 115 S. Ct. 428 (1994); (additional state law protections for parents which are not inconsistent with IDEA are enforceable rights in federal court; state confers right to receive related services independent of special education); *Antowiak v. Amback*, 838 F.2d 635 (2nd Cir. 1988); (additional procedures that protect rights more stringently are enforceable, but those that merely require additional steps not required by IDEA are not enforceable.) See also *Town of Burlington v. Department of Education*, 736 F.2d 773, 789 (1st Cir. 1984), aff'd., 471 U.S. 359 (1985); *Johnson v. Independent School District*, 921 F.2d 1022, 1029 (10th Cir. 1990); *Thomas v. Cincinnati Bd. of Ed.*, 918 F.2d 618, 629 (6th Cir. 1990); *Geis v. Bd. of Ed. of Persippany-Troy Hills*, 774 F.2d 575,581 (3rd Cir. 1985).

I. Records

Parents have the right to inspect and review all education records with respect to the identification, evaluation, and educational placement of the child, as well as the provision of a free, appropriate public education (FAPE). 34 C.F.R. §300.502 (1997).³ States may also give the child access to educational records, depending on the student's age and the type or severity of the child's disability. 34 C.F.R. §300.574 (1997). Students age eighteen or older have an independent right under the Family Educational Rights and Privacy Act ("FERPA"), 20 U.S.C. § 1232 (g), to access their records. 34 C.F.R. §§ 99.5, 99.10. In addition, as an IDEA matter, states may opt to transfer all IDEA rights, including records access rights, from parents to students when students reach the age of majority under state law. 20 U.S.C. § 1415 (m).⁴ The school must respond to a parent's request for records "without unnecessary delay and before any meeting regarding an IEP or any hearing" but "in no case more than 45 days after the request has been made." 34 C.F.R. §300.562(a) (1997); 34 C.F.R. §99.10(a)-(b). The right to review records also includes the right to have the records interpreted for the parent as well. 34 C.F.R. §300.562(b)(1) (1997); 34 C.F.R. §99.10. The term "education records" is broadly defined to include records which are directly related to the student and are maintained by the educational agency. 34 C.F.R. §99.3. Some few exceptions exist for records which include teacher records maintained privately by the

³The §504 regulations also require that parents be given access to records. *See* 34 C.F.R. §104.36.

⁴Under §1415(m), added to the law as part of the IDEA Amendments of 1997, states exercising this option must continue to provide all required IDEA notices to parents as well as student. *See* 20 U.S.C. §1415(m)(1)(A). States may, however, elect to terminate the notice of rights of students who have reached the age of majority and are incarcerated in an adult or juvenile correctional institution. 20 U.S.C. § 1415(m)(1)(D).

teacher, personnel matters, law enforcement matters, certain types of mental health information related to treatment of students aged eighteen or older, and information concerning a student after graduation. 34 C.F.R. §99.3.

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Attorneys should file a request for educational records as soon as possible after picking up the juvenile case, regardless of whether educational advocacy appears necessary.⁵ Federal law provides similar rights of access to both regular and special education records. 34 C.F.R. §300.562 (1997) and 34 C.F.R. Part 99. Attorneys should obtain a release from the parent and provide the release, along with a cover letter identifying consult their local school system to determine where to submit the request for records. Some schools maintain special education records separately from regular education records; other schools maintain separate records on the student

⁵Of course, in a matter involving a juvenile case, the attorney also has the option of issuing a subpoena for the records. One should avoid using a subpoena to obtain records, however, if the records subpoenaed are not relevant to the hearing. Moreover, counsel should not delay in obtaining educational records; waiting for a delinquency hearing may occasion unnecessary delay in obtaining records. In addition, the attorney may not want to alert the school to the existence of a juvenile matter through the use of a subpoena. A school official, even a custodian of documents, may be a witness who is hostile to the child's interests in a delinquency case; school officials, knowing of a child's delinquency involvement, may attempt to suspend or expel the child from school or otherwise act prejudicially to the child.

in each school attended by the student. Thus, several copies of essentially the same letter may be necessary to garner and compile all the student's records.

Generally, a request for records should include a request for any and all records maintained by the school concerning the student, including but not limited to: attendance records; progress reports; deficiency notices; truancy notices; notices of major or minor suspensions and expulsions; report cards; correspondence to and from parents; awards; commendations; standardized testing results; and class schedules. If the child is in special education, attorneys should also include a request for the following documents: referrals for evaluations; evaluations; notes from multidisciplinary team meetings; IEP's; notices of placement; and statements of rights which were provided to parents.

II. Independent evaluations

Once all the records have been obtained, the attorney should review them carefully. One is well-advised to construct a chart of a chronology, or both, to summarize the child's educational history. If the child is not already in special education, but has a history of poor performance in school, the parent may wish to refer the student to the local school for a special education assessment. See Chapter 7. The parent also always has the option of obtaining an independent evaluation of the student at private expense. A privately-obtained evaluation may be submitted to the school, and the school must consider the results of the evaluation. 34 C.F.R. §300.503(c)(1) (1997).⁶ If the child is tested by the school and is found ineligible, or has pre-

viously been found ineligible but the parent disagrees with the specific test results, then the parent has a right to seek an independent evaluation at public expense. 34 C.F.R. §300.503(b) (1997).

The results of the independent evaluation must be considered by the school in any decision regarding the provision of free, appropriate public education (FAPE) to the student and may be presented as evidence at a due process hearing. 34 C.F.R. §300.503(c) (1997). The independent evaluation, if done at public expense, must meet the same criteria which the school uses in its own evaluations. 34 C.F.R. §300.503(e) (1997). The parent is not obligated either to notify the school of specific areas of disagreement with the school's evaluation or to seek the school's permission prior to obtaining the independent evaluation at public expense. See *Inquiry of Fields*, EHLR 213:259 (1989). The school may seek a due process hearing to establish that its evaluation was appropriate, and, if the hearing officer decides in favor of the school, the school does not have to pay for the evaluation. 34 C.F.R. §300.503(b) (1997).

Finding an independent expert to do the evaluation is something of an art form in itself. Local hospitals and universities are a good source for referrals. If the parent is interested in pursuing a private school placement, most private schools are aware of professionals in the community who do independent testing. The child may have a treating pediatrician or counselor who may have suggestions. Attorneys in the local jurisdiction who already practice in special education should be able to provide referrals to reputable professionals. Most jurisdictions also have a non-profit organization designated to act as a protection and advocacy (P&A) system for persons with disabilities.⁷ These organizations often work with

⁶Under the revised IDEA regulations proposed by the U.S. Department of Education in October, 1997, schools would not be required to consider privately-obtained independent evaluations unless it meets the same criteria that the school uses in its own evaluations. See 62 Fed. Reg. 55097 (October 22, 1997)(proposed 34 C.F.R. §300.502(c)(1).

⁷An advocate or parent who has difficulty locating the nearest P&A office can contact the National Association of Protection and Advocacy Systems (NAPAS). People in that office should be able to provide information about the location and

professionals who may also be available to individual attorneys. Some school systems maintain a list of private evaluators available to parents.

Before retaining any expert, the attorney must carefully review the expert's qualifications with the expert to ensure that the particular expert is appropriate for the task at hand. For example, if the child has been diagnosed as seriously emotionally disturbed based on the school's projective testing, the independent evaluator must have the necessary qualifications to perform projective testing; usually only a clinical psychologist is qualified to perform this kind of testing. Another important factor to consider in seeking expert assistance is whether the expert has any experience with children from the same racial and socio-economic background as the client. Finally, the attorney should determine whether the evaluator has ever testified before as an expert witness and whether the expert will be available to testify about the results, if necessary.

III. Notice

Written notice is required a reasonable time before a school either proposes to or refuses to initiate or change the identification, evaluation, or educational placement of a student with a disability, or the provision of a free appropriate public education to the child. 20 U.S.C. §1415 (b)(3),(c),(d).⁸ The required content of the notice depends upon the context in which it is being given. In all circumstances, the notice must include a description of the action proposed or

phone numbers of all state and local P&A offices.

⁸The regulations implementing §504 also require notice with respect to actions regarding the identification, evaluation or educational placement of students who need, or may need, special education or related services. However, they do not specify whether the notice must be written, and do not contain the explicit content requirements set out in IDEA. *See* 34 C.F.R. §104.36.

refused by the school, and the basis for the school's decision; a description of any other options that the school considered, and the reasons why those options were rejected; a description of each evaluation procedure, test, record or report the school used as a basis for the decision; and a description of any other factors relevant to the school's decision. 20 U.S.C. § 1415(c). If the notice is being provided in connection with an initial referral for evaluation or a reevaluation, it must be accompanied by what the statute calls a "procedural safeguards notice"; otherwise, the notice must inform parents that they have protection under the procedural safeguards of the Act, and notify them of how they may obtain a description of the safeguards. 20 U.S.C. §§ 1415(c)(6), 1415(d). The procedural safeguards notice must also be given to parents each time they are notified of an IEP meeting, and whenever a complaint is filed. 20 U.S.C. § 1415(d)(1). The procedural safeguards notice must be written in easily understandable language and include a full description of rights regarding independent evaluations, prior written notice, parental consent, access to records, complaints and due process hearings, maintenance of placement, placement in an interim alternative educational setting, placement by parents of children in private schools at public expense, civil actions and attorneys' fees. 20 U.S.C. § 1415(d)(2). Notices must be written in language understandable to the general public and must be provided in the parent's native language. 20 U.S.C. §§1415(b)(4), 1415(d)(2).⁹

⁹Notice requirements may prove a source of confusion for advocates and schools for the near future. While IDEA and its implementing regulations have long required prior written notice of school decisions, many of the detailed requirements discussed above were added to the statute as part of the IDEA Amendments of 1997, and took effect on June 4, 1997. Prior to that time, these issues were addressed in detail solely through regulation. The pre-existing regulation on this issue, 34 C.F.R. §300.505 (1997), however, is inconsistent with the new statute, and is no longer a good law. New regulations, proposed on October 22, 1997, are expected to be finalized in 1998.

The level of scrutiny given a notice varies among the courts. Some courts have held that any technical defect in the notice may be cured as long as the notice reasonably apprised the parents of the school's proposed action and the parents had the opportunity to actually investigate the proposed placement or program. *Smith v. Union School*, 15 F.3d 1519, 1525 (9th Cir. 1994), *cert. denied*, 115 S. Ct. 428 (1994). Other courts have held that the notice requirements must be scrupulously enforced in order to assist parents in making an informed decision and to create a clear written record of the school's program or proposed placement. *See Squillacote*, 800 F. Supp. 933 (D.D.C. 1992).

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In assessing the adequacy of the notice in an individual case, an attorney should find out from the parents what notice, if any, was actually received. Schools may fail to provide any notice or may attempt to provide notice by telephone contact only, a means which is insufficient as a matter of law. If written notice was provided, the attorney should review the notice and compare it with the statutory requirements. Does the notice advise the parent of the parent's rights, or, when the procedural safeguards notice is not required, of the fact that the parent does have rights, and may obtain a detailed explanation of them? Does the notice describe the agency's proposed action and all of the evaluations and any other factors used to justify the proposed action in sufficient detail that the parent can make an informed decision about the school's proposal? Or is the notice merely a "cursory and essentially

meaningless standardized description?" *Mckenzie v. Smith*, 771 F.2d 1527, 1532-1533 (D.C. Cir. 1985).

IV. Consent and surrogate parents

Informed parental consent is required before a school conducts an initial evaluation, before a school provides special education and related services for the first time, and before a school conducts a reevaluation of the child. 20 U.S.C. §§ 1414(a)(1)(C), 1414(c)(3); 34 C.F.R. § 300.504(b)(1).¹⁰ If the parent refuses to consent to the evaluation or reevaluation and the school wishes to proceed nonetheless, it may seek mediation or a due process hearing to resolve the dispute, unless state law provides otherwise. 20 U.S.C. §§ 1414(a)(1)(C)(ii), 1414(c)(3).¹¹ The consequences of a parent's refusal to consent to the initial provision of special education services are less clear. Regulations in existence prior to the IDEA Amendments of 1997 provide that under these circumstances, too, the school can resort to a due process hearing to override the parent's withhold of consent. *See* 34 C.F.R. §§ 300.504(b)(2), 300.504(3) (1997). Proposed regulations implementing the amended statute, however, delete this provision. *See* 62 Fed. Reg. 55098-55099 (October 22, 1998) (proposed new 34 C.F.R. § 300.505(b). A parent, within the meaning of the IDEA, means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent. 20 U.S.C. §1401(19); 34 C.F.R. § 300.12 (1997). A parent does not include the State if the child is a ward of the state. *Id.* A "person acting as a parent" includes persons such as grandparents or

¹⁰However, consent need not be obtained for a reevaluation if the school can demonstrate that it has taken reasonable measures to obtain consent and the parent has failed to respond. *See* 20 U.S.C. §1414(c)(3).

¹¹For example, state law might prohibit evaluation over parental objection, or provide for some other mechanism for overriding parental wishes. *See also, Holland v. D.C.*, 71 F.3d 417 (D.C. Cir. 1995)

a step-parent with whom the child lives, as well as persons who are legally responsible for a child's welfare, including potentially foster parents. See Note to 34 C.F.R. § 300.13 (1997).¹² See *Inquiry by Hargen*, 16 EHLR 738 (March 19, 1990); *Criswell v. Department of Educ.*, 1986-1987 EHLR 558; 156 (M.D. Tenn. 1986).

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In the event a child is living with someone other than a parent (a grandparent or other extended relative, for example), the attorney should determine whether that person has legal custody of the child. In delinquency matters, this determination may include locating an order releasing the child to the person with whom the child is living. If the person does not have legal custody, the attorney should inquire whether the child's parent has given the person written authority to act on the parent's behalf for educational or other purposes. If there is no written authority, the attorney should explore whether the person has been accepted as the child's guardian by the school and other authorities in the past.

¹²The revised IDEA regulations proposed by the U.S. Department of Education in October 1997 would permit state law to treat foster parents as "parents" for IDEA purposes if the natural parents' authority to make educational decisions for the child has been terminated, and the foster parent (1) has an "ongoing, long-term parental relationship" with the child, (2) is willing to participate in educational decision-making, and (3) has no conflict of interest. See 62 Fed. Reg. 55071 (October 22, 1997) (proposed new 34 C.F.R. §300.19.)

In the event that the identity or the whereabouts of the parent are unknown, or if the child is a ward of the state, the school system must appoint a surrogate parent to protect the rights of the child in all matters relating to the identification, evaluation, and educational placement of the student. 20 U.S.C. § 1415(b)(1)(2); 34 C.F.R. § 500.514 (1997).¹³ The surrogate parent has the right to receive notice and the right to consent, or refuse consent, to the evaluation and placement of the child. The surrogate parent can not be an employee of a public agency responsible for the care or education of the child. 20 U.S.C. §1415 (b)(2); 34 C.F.R. §300.514(b) (1997). The surrogate parent must not have any interests which conflict with the interests of the child and must have the knowledge and skills necessary to ensure adequate representation of the child. 34 C.F.R. §300.514(c)(1997).

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Although federal law explicitly requires that states have a surrogate parent program, not every jurisdiction actually has surrogate parents available. Moreover, despite the law's clear prohibition, social workers employed by the agency with custody in some instances (e.g., in formulating IEPs) in some jurisdictions participate in lieu of the parents. In the event that a child has no available parent and educational advocacy would be helpful, the attorney may wish to file a due process hearing request on the child's behalf to force the school to appoint a surrogate, preferably someone the lawyer has

¹³If a surrogate is to be appointed because a child is considered to be a ward of the state, and the parent's right to make education decisions has not otherwise been terminated under state law, the parent may be appointed to serve as the surrogate.

selected who meets the general criteria for surrogate parents. In addition, the failure to provide surrogate parents for committed children has been the subject of class action relief in some jurisdictions. *See e.g., Ramon H. v. Illinois State Dept. Of Educ.*, 19 IDELR 12 (N.D. Ill. 1992) In situations where the child is committed to the state and is placed in a distant residential facility, the attorney may wish to locate a surrogate parent for the child in the jurisdiction in which the residential facility is located. The surrogate parent can serve as an important source of information about the child, independent of the information the facility provides.

V. The “Stay Put” provision

In the event that the parent disputes the school’s proposed placement or program, the child “shall remain in the then current educational placement of such child,” unless the State or local educational agency and the parents otherwise agree. 20 U.S.C. §1415(j); 34 C.F.R. §300.513 (1997). This provision protects the child from interruptions in his or her education while parents pursue their due process rights. *Joshua B. v. New Trier Township*, 770 F.Supp. 431 (N.D. Ill. 1991). The “stay put” rule applies through the due process hearing stage and any judicial appeals.¹⁴ Thus, the provision has been aptly characterized as an “automatic injunction” to prevent a change in placement over a parent’s objection. *Honig v. Doe*, 484 U.S. 305, 326 (1988) (quoting *Doe v. Maher*, 793 F.2d 1470 (9th Cir. 1986)).

Advocates must address two essential questions when invoking the “stay put” provision. First,

what is the child’s “current educational placement?” Second, what constitutes a change in placement sufficient to trigger the “stay put” provision? For most purposes, the child’s “current educational placement” will simply be the last uncontested school the child attended or the last school placement ordered by a hearing officer. *Zvi D. v. Ambach*, 694 F.2d 904 (2nd Cir. 1982). Somewhat more complex issues are presented where the placement is arguably not a school setting. *In M.R. v. Milwaukee Public Sch.*, 495 F. Supp. 864 (E.D. Wis. 1980), the school argued that day treatment centers for students with mental retardation were not “educational placements” because the students were placed and funded at these facilities by the local Department of Human Services, rather than the school system. The Court disagreed, holding that the treatment centers were educational placements within the meaning of the “stay put” provision because the state educational agency is responsible for all educational placements of students with disabilities, regardless of which agency delivers the services. *Accord McClain v. Smith*, 793 F.Supp. 756 (E.D. Tenn. 1989).

With regard to private school placements by parents, if a hearing officer concludes that the parent’s placement is appropriate and the school’s program is inappropriate, the school must pay for the private placement through the appeals process. *Clovis v. California Office of Admin. Hearings*, 903 F.2d 635 (9th Cir. 1990)(school district responsible for cost of private hospitalization as directed by Hearing Officer and District Court although Circuit Court ultimately concluded that the hospital was not the child’s educational placement). Of course, a parent can not simply place a child in a private school and then insist on public funding, absent a hearing officer’s determination that the school should be liable, and absent the school’s agreement. *Joshua v. New Trier Township*, 770 F.Supp. 431 (N.D. Ill. 1991). In some jurisdictions, even a temporary private placement may be considered the child’s “current educational placement” where the school failed to propose a public placement in a timely manner as required

¹⁴The D.C. Circuit Court of Appeals has held that “stay-put” applies only through the district court level. *See Andersen v. District of Columbia*, 877 F.2d 1019 (D.C. Cir. 1989). The Sixth Circuit recently held the same, without analysis, in an officially unreported per curiam opinion. *See Kari H. v. Franklin Special School District*, 26 IDELR 569 (6th Cir. 1997).

by law. *Board of Ed. of City of N.Y. v. Ambach*, 612 F.Supp. 203 (E.D.N.Y. 1985).

Regardless of whether private or public placement is at issue, the stay-put provision entitles parents who prevail at the due process hearing level to have the favorable placement decision implement-ed even if the school system appeals. The favorable decision is considered an agreement between parents and the “State or local educa-tional agency” within the meaning of the stay-put provision, entitling the parents to immediate implementation. *See School Committee of Twon of Burlington v. Dept. of Educ.*, 471 U.S. 359, 105 S. Ct. 1996, 2003-03 (1985); *Clovis, supra*, 903 F.2d at 641.¹⁵

In determining what constitutes a change in placement, advocates should be cautioned that not every change in an educational placement triggers the “stay put” provision. *Concerned Parents v. New York City Bd. of Educ.*, 629 F.2d 751 (2nd Cir. 1980)(transfer of special education classes at one school to substantially similar classes at other schools in same district did not trigger “stay put” rule). Rather, only those changes that effect a fundamental change in the student’s basic educational program allow invocation of the “stay put” provision. *Id.*; *see also Lunceford v. District of Columbia*, 745 F.2d 1577, 1582 (D.C. Cir. 1984)(“stay put” is triggered by a “fundamental change in, or elimination of a basic element of the educational program . . .”) In this regard, advocates should not that the termination of all educational services by graduation is generally considered to be a change of placement which triggers “stay put.” *See Mrs. C. v. Wheaton*, 916 F.2d 69 (2nd Cir. 1990). Advocates should also note that if remaining in the current placement would harm the child and the parent can meet the traditional criteria for injunctive relief, the parent may

obtain an order changing the child’s placement despite the stay-put provision. *Cf. Komminos v. Upper Saddle River Board of Education*, 13 F.3d 775 (3rd Cir. 1994).

Perhaps the most significant aspect of the “stay put” rule for advocates representing children involved in the delinquency system is its operation in the context of student discipline. For a full discussion of this issue, including the implications of the IDEA Amendments of 1997, *see* Chapter. 4.

¹⁵*See also Grace B. v. Lexington School Committee*, 762 F.Supp. 416 (D.Mass. 1991); *Blazejewski v. Board of Education of Allegheny Central School District*, 560 F.Supp. 701 (W.D.N.Y. 1983).