Minnesota Special Education Law: Background and Step-By-Step

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OVERVIEW

INTRODUCTION

In 2004, there were just over 7 million students nationwide who were eligible for and receiving special education services.[1] In Minnesota, there were around 118,000 eligible students receiving services, representing about 12 -13% of the total student enrollment.[2]

These students are entitled to protections, procedures, and requirements found in a variety of federal and state laws. The primary federal law, originally passed in 1975, concerning the education of students with disabilities was recently reauthorized, or changed, in late 2004 and was renamed the Individuals with Disabilities Education Improvement Act (IDEIA or IDEA 2004). This law ensures that students with disabilities have access to a free appropriate education in public schools and mandates specific legal rights to guarantee and promote access as well as legal mechanisms for parents and others to enforce these rights. It will be referred to as **IDEIA** or **IDEA 2004** herein.

Two other federal laws, Section 504 of the Rehabilitation Act of 1973 and Americans with Disabilities Act also provide certain protections, but IDEIA is broader in scope and is primarily focused on the education of students with disabilities. Section 504 and the ADA are briefly summarized in Chapter 2.

While the federal IDEIA sets a minimum of standards, state laws can provide additional protections or procedures that go beyond the IDEIA minimum or where IDEIA is silent. For example, Minnesota law includes shorter timelines for evaluations than IDEIA[3] and requires specific actions if districts use conditional procedures[4] (restraints or time out rooms, for example) with students or if students are in care and treatment facilities.[5]

SCOPE OF COVERAGE

In Minnesota, children from ages 0-21 are entitled to the full range of services and protections under IDEIA and state law, if they meet for special education criteria.[6] Public school districts must provide these services.[7] These students have an individual right to a FAPE and all due process protections. The public school district in which the parent resides, or the public charter school that the child attends, is responsible for carrying out the protections and procedures under IDEIA and state law.

Students who are placed in private schools by their parents or guardians do not have any individual entitlement to IDEIA services or protections.[8] However, public schools still must work to locate and identify parentally-placed private school students to determine whether they may be eligible for services under IDEIA. If these students are eligible, public schools must also offer to provide special education services in the public schools and, if the students remain in private schools, must propose what, if any special education services are available to student at the private school.[9] By law, public schools must spend a portion of its federal IDEIA funds to provide special education services to

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parentally placed private school students.[10] This amount is quite small, and services are typically quite limited.

If a public school district places a student into a private school in order to provide special education services, the public school remains responsible to offer a free appropriate public education (FAPE) and to comply with IDEIA and state law.[11]

Categories

Since 1990, IDEIA covers 13 specific disability types including hearing impairments, mental retardation, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, developmental delay, and specific learning disorder. (Prior to 1990 changes, autism, traumatic brain injury and developmental delay were not included.) Children with other types of disabilities may be covered by Section 504 and ADA.

Minnesota law has specific criteria for how students can be eligible under each of these categories, and, in some cases, renames the categories.[12] For example, the federal disability categories of autism, serious emotional disturbance, and mental retardation are called, in Minnesota law, autism spectrum disorders, emotional or behavioral disorders, and developmental cognitive disability, respectively. Other states can have different names and criteria for the federal categories.

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[1] See https://www.ideadata.org/AnnualTables.asp
[2] http://education.state.mn.us/mde/static/001596.pdf
[3] Minn. R. 3525.2550 (30-school days); Public Law 108-446, 20 USC 1614, Sec. § 614 (a)(1)(C) (60 calendar days unless state law has a shorter timeframe)
[4] Minn. Stat. §121A.66-67; Minn. R. 3525.2900
[5] Minn. Stat. §125A.515; Minn. R. 3525.2325
[6] Minn. Stat. §125A.02; Minn. Stat. §125A.03
[7] Minn. Stat. §125A.08
[8] 34 CFR §300.454
[9] Minn. Stat. §125A.18, 34 CFR §300.341
[10] 34 CFR §300.453
[11] 34 CFR §300.401
[12] See Minn. R. 3525.1325-1350

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COMPARISON TO OTHER DISABILITY-RELATED FEDERAL LAWS

SECTION 504

IDEIA is distinct in purpose from another relevant federal law, Section 504 of the 1973 Rehabilitation Act (Section 504) that provide protections to students with disabilities. In broad terms, Section 504 prohibits disability-based discrimination against students and prospective and current employees.

Section 504 is different in scope, purpose, and funding. First, Section 504 has a broader scope. It covers students and school employees who have or are regarded as having a significant physical or mental impairment from discrimination based on the impairment. In other words, Section 504 prohibits schools from taking or allowing negative actions or conditions that result in a person covered by Section 504 not being able to access programs, services, opportunities, or facilities.

Section 504 is also broader with respect to the types of disabilities covered. While IDEIA only covers 13 disability categories, Section 504 covers all students who have a significant physical or mental impairment. There is no specific list of qualifying impairments. Rather, the school district determines if the severity of a student's or employee's impairment (whatever it might be) is significant enough to substantially limit daily life activities (such as walking, learning, talking, seeing, etc.). If the impairment is significant enough, the school district must take steps to ensure that person (student or employee) can access programs, services, opportunities, and facilities to the same extent as someone without the impairment.

For students, this means that Section 504 covers all students who are eligible under IDEIA and those students who are not IDEIA-eligible but have a significant physical or mental impairment, but are not eligible for special education services under IDEIA. Students who are eligible for Section 504 protections can have a Section 504 plan, which discusses what accommodations, modifications or services are necessary to ensure meaningful access to education for a protected student. As such, protections and services may look similar to protections and services under IDEIA, but they have a different legal source and purpose. While the services and protections may look the same, it should be noted that Section 504 has substantially fewer protections and regulations. Thus, it is broader in scope but less in depth.

Second, Section 504 is an anti-discrimination law, not education law. This means that Section 504 is similar to laws prohibiting unlawful decisions and practices based on age, race and gender. For example, Section 504 would prohibit a school district from not hiring a prospective employee solely because of an actual or suspected disability. In contrast, IDEIA only covers students and is more focused on the education *process* for students with disabilities.

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Third, although it is a federal law, the federal government does not provide federal funds to schools for implementing Section 504. In part, this is because Section 504 prohibits discrimination (which schools shouldn't do anyway) whereas IDEIA defines a specific set a procedures for educating students with disabilities.

AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (ADA) is a more general anti-discrimination law and prohibits disability-based discrimination in the private and public sectors in the areas of employment and accessibility. Private and public sectors that offer services to the public must comply with basic nondiscrimination requirements that prohibit exclusion, segregation, and unequal treatment.

These private and public sector organizations, including day care centers, also must comply with specific requirements related to architectural standards for new and altered buildings; reasonable modifications to policies, practices, and procedures; effective communication with people with hearing, vision, or speech disabilities; and other access requirements. Additionally, these organizations must remove barriers in existing buildings where it is practicable to or "reasonable" to do so without much difficulty or expense.

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History

The original IDEIA was first passed in 1975 and was called the Education for All Handicapped Children Act (EHA or EAHCA). It was also known as Public Law 91-142. Prior to 1975, there was no comprehensive federal law on the subject of educating students with disabilities but states had a patchwork of state laws.

Prior to compulsory education laws (beginning in the early 1900's), children who had disabilities almost never received any public education. Instead, they were typically kept at home, were hospitalized, or were placed in state-run institutions. For example, in Minnesota, schools for the deaf and blind first opened in 1863 and an experimental department for the "idiotic and feebleminded" opened in 1879. During this time, the field of medicine was rapidly evolving and there was great hope that disabilities could be "cured" and the institutions were often run by doctors and used experimental techniques. Children with disabilities now had a specific, albeit separate place, other than at home or in the hospital.

Following the enactment of compulsory education laws that mandated schooling for all children in the early 1900's, more and more children with disabilities became known to the communities and the institutions and hospitals simply did not have enough capacity. Some children were sent to hospitals and institutions in other states. The growing numbers of children with disabilities presented new demands on society and government, and as medicine failed to "cure" disability, the 1920's and 1930's was also a period of time of fear and mistrust of people with disabilities. There were growing concerns about how people with disabilities fit into society and the nation was swept with the eugenics movement. Many states, including Minnesota, enacted eugenics-based laws that permitted the sterilization of people with disabilities under some circumstances; a practice that was authorized by the US Supreme Court in 1927.[1]

This institutionalization largely continued through the 1940's when the growing numbers of children with disabilities and changing social perceptions and understandings resulted in the development of special education classes within the local school district. For example, when the nation was engulfed in World War II, people with disabilities were pressed into service and they often exceeded expectations with their contributions to the war effort. While a new view of people and children with disabilities, there was still separation. Public school offerings, although most often located within a traditional school, were typically entirely separated from classrooms of other student and these classes left much to be desired, as they were limited in scope and expectations.

Further, most states had laws that permitted the exclusion of students with disabilities and/or their arbitrary removal from the school for any reason. Additionally, many school buildings and opportunities were not accessible because of structural barriers, prevailing attitudes, and societal conventions. As a result students with disabilities were not able to access or take full advantage of education, co-curricular or extracurricular opportunities.

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The battle to obtain legal rights and protections for students with disabilities started to coalesce in the 1940's and 1950's with the formation of many local and national parent advocacy groups and a concentrated legal strategy at both that state and federal levels. Organizations such as the National Association for Retarded Children (now ARC/USA), the Council for Exceptional Children (CEC) and the United Cerebral Palsy Association, formed demanded changes to public education for students with disabilities at both the local and federal levels. These parent and disability advocacy groups become more powerful and strongly advocated lawmakers for changes. In Minnesota today, Arc remains as a consistent presence as an advocate for people with disabilities and PACER has emerged as a major player, advocate, and resource.

Advocacy groups also participated in legal strategies for creating positive changes by having a hand in the court cases that established the foundations for the original IDEIA. In the early 1970's, two main federal court decisions established the basis for the future federal law. First, a case from Pennsylvania, *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania*,[2] challenged a state policy that conditioned access to public schools on a child reaching a "mental" age of five. Following a settlement agreement, the PARC case established the right of all students with disabilities to access a public education in Pennsylvania.

Second, in a 1972 case, *Mills v. Board of Education of the District of Columbia*,[3] children with emotional and behavior disorders challenged the legality of a public school practices that denied initial enrollment and expulsion from school on the basis of disability. The public school noted that because of these decisions, resulting from inadequate resources, over 12,000 children were denied an education. The court determined that the disabled children had an equal right to education and if a school proposed to deny this right, the school would have to provide procedural safeguards before removing this right.

These two cases formed an important basis of the EAHCA. The U.S. Supreme Court, in the seminal case of *Board of Education v. Rowley*, recognized that

> *Mills* and *PARC* both held that handicapped children must be given access to an adequate, publicly supported education. … The fact that both *PARC* and *Mills* are discussed at length in the legislative reports suggest that the principles which they established are the principles which, to a significant extent, guided the drafters of the Act. Indeed, immediately after discussing these cases the Senate Report describes the 1974 statue as having "incorporated the major principles of the right to education cases." S. Rep. No 94-168, supra, at 8. Those principles in turn became the basis of the Act, which itself was designed to effectuate the purposes of the 1974 statue.[4]

These advocacy groups and growing numbers of court decisions prompted the original federal legislation in 1975. This legislation, the EHA or Public Law 91-142, recognized the nationwide exclusions, denials and problems faces by students with disabilities and their families. The law attempted to address those concerns by providing federal funds on condition of complying with the law's provisions. Importantly, states could choose whether to receive the federal funds and comply with EHA. All but one, New Mexico,

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did; New Mexico later changed course. The EHA included provisions on having a statewide plan for education students with disabilities and mandated fair testing and evaluation practices, an individualized education plan for each student, a free and public education that was "appropriate," and the right to be educated with non-disabled peers to the maximum extent possible. Even as an understatement, this was a significant change for schools, students and parents.

Main Cases following the Initial Legislation

Three other major cases went even further to protect student with disabilities from being removed or suspended from school and clarified the substance of what IDEIA means in practice.

First, in *Goss v. Lopez,* 419 U.S. 565 (1975), the Court held that because the state of Ohio gave its students the right to an education, it could not simply remove that right without sufficient procedures. The Court determined that students facing suspension of more than 10 school days should have notice of the suspension and a type of hearing to challenge it. At the time G*oss* was issued, the IDEIA contained no explicit provisions concerning the discipline of students with disabilities. As a result, *Goss* marked a turning point in how students with disabilities were disciplined.

Second, in 1982, the United States Supreme Court issued its first substantive decision concerning IDEIA's requirements in *Board of Education of the Hendrick Hudson School District v. Rowley*.[5] In *Rowley*, the court considered whether a deaf student needed a sign language interpreter in each of her classes to maximize her learning potential. The Court noted that while the IDEIA did not give much definition to what a "free appropriate public education" really meant, there was enough to support a conclusion that a district must ensure a minimum of "some educational benefit" that can be established by passing classes and advancing from grade to grade.

Third, in a 1988 case, *Honig v. Doe*,[6] a school challenged the "stay put" provision of EHA, which mandated that students who were challenging a proposed removal or suspension from school could remain in the current educational placement until the dispute was resolved. The school asserted that there should be a "dangerousness" exception to this provision – thus allowing the school to unilaterally remove a dangerous student from the current placement. The US Supreme Court rejected the school's position and held that if the Congress wanted such an exception, it would have included it. Since it did not, the student was entitled to remain in the current placement until the dispute ran its course. This case, in part, resulted in pressure for Congress to include specific discipline provisions in federal special education law; this did not occur until 1997.

Recent US Supreme Court Cases

Since *Honig*, there have been two other major US Supreme Court decisions involving special education. First, in 1999, the Court, in *Cedar Rapids (IA) Community School District vs. Garret F*.,[7] determined the school was required to provide nursing services,

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including catheterization and tracheotomy tube suctioning. Essentially, the Court held that IDEA created a bright line of what services a school must provide to ensure FAPE: if the service was a "medical service" that could only be provided by a doctor the school was not responsible. However, if the service was a "school health service" that could be provided by a school nurse, the school was responsible. The school district argued that the analysis should not be confined to this "bright line" and proposed that the scope, duration, and cost of services should be considered. The Court rejected the school district's argument and found for Garret F.

Next, on November 14, 2005, the US Supreme Court issued its decision in *Schaffer v. Weast*[8] and held, in a 6-2 ruling, that the party bringing the due process hearing request has the burden of proof. Justice O'Connor, writing for the majority, noted that Congress had addressed concerns over school district information advantages by including a variety of due process protections to ensure parental access to information. Additionally, the Court referred to a long line of Congressional attempts to limit administrative or litigation costs. This is interesting because a prior Court decision, *Garret F.*, rejected district arguments based on the cost of providing services. In dissent, Justice Ginsburg asserted that placing the burden on districts serves as an important check on the provision of adequate services especially when districts have limited resources and may decide or may be forced into a decision to reduce necessary services. In other words, Ginsburg argued that the burden of proof on districts would help to prevent making programming decisions on cost.

Minnesota state law already allocates the burden of proof on the school districts (in most instances) and the US Supreme Court decision did not appear to overturn Minnesota's state law or similar laws in eight other states. Conversely, 16 other states already allocated the burden of proof on the complaining party, so *Schaffer* clarifies which party has the burden in the remaining states.

Major Legislative Changes

Since 1975, the IDEIA has been significantly changed in 1990, 1997, and 2004. In 1990, the act's name was changed from Education for All Handicapped Children Act to Individuals with Disabilities Education Act (IDEA) to reflect the person-first orientation, the eligibility categories of autism and traumatic brain injury were added, and transition services (transition from the school environment to post-secondary education, life, or work) were required.

Also in 1990, Congress made a number of "findings" concerning a disabled student's access to education. These findings are included in the preamble to the legislation and form a legal basis for the legislation. Calling disability "a natural part of the human experience," Congress recognized that over 1 million students with disabilities were "excluded entirely from the public school," more than half of those that did have access "did not receive appropriate educational services" and could not have a positive experience "because their disabilities were undetected." Congress stated that children with disabilities had a right to a "free appropriate public education," that they were

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entitled to protection of this right, and that educators and parents have resources to assist children with disabilities.[9]

The next major change occurred in 1997. In response to growing concern over discipline of special education students and dangerous students, substantial changes were made, but not without much controversy. School board and administrator groups wanted more authority and flexibility to remove and punish students who violated school codes while parent and advocacy groups pointed to the abuse of existing flexibility to deny special education students the right to education, especially when their disabilities limited their ability to comply with school codes. Indeed, the 1997 changes had been delayed for quite sometime, and eventually advocates, administrator groups, and congressional staff worked behind the scenes to develop a compromise approach to discipline. Once this compromise was reached, Congress followed the recommendations by passing what came to be known as IDEA '97 and President Clinton signed the compromise into law. The reauthorization and subsequent departmental regulations promulgated in 1999 completed this major revision to discipline provisions.

Most recently, in late 2004, the IDEA was renamed the Individuals with Disabilities Education Improvement Act (IDEIA) and important changes were made. Some of these changes included revisions to how often and when reevaluations must occur, what must be included in IEPs, who must attend IEP meetings and alternative means of conducting them, and to discipline provisions. These changes are discussed more fully throughout.

However, despite these legal changes the main underlying principles have remained. The next chapter reviews IDEIA's five main principles.

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[1] Buck v. Bell, 274 US 200, 1927
[2] *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania* 334 F.Supp. 1257 (E.D. PA 1972)
[3] *Mills v. Board of Education of the District of Columbia*, 343 F. Supp. 866 (DC 1972),
[4] *Board of Education v. Rowley*, 458 US 176 (1982).
[5] *Board of Education v. Rowley*, 458 US 176 (1982).
[6] *Honig v. Doe,* 484 U.S. 305 (1988)
[7] *Cedar Rapids (IA) Community School District vs. Garret F.*, 526 U.S. 66 (1999)
[8] Decision available at: http://www.supremecourtus.gov/opinions/05pdf/04-698.pdf
[9] Preamble, See H. R. Rep. No. 94-332, p. 2 (1975); S. Rep. No. 94-168, p. 8 (1975)

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Main Principles

INTRODUCTION

The development of federal and state special education law can be understood as a societal response to the needs and interests of students with disabilities and of the public schools that serve them. Further, these laws can be understood from its bedrock principles. A review of five main principles in special education law is discussed below.[1]

FREE APPROPRIATE PUBLIC EDUCATION (FAPE)

The IDEIA guarantees the right to a free appropriate public education (FAPE). In short, FAPE requires that a student's IEP must be reasonably calculated to ensure a meaningful educational benefit. FAPE does not guarantee the maximum or best education, but only a minimum level. This minimum level, though, must allow the student to make reasonable progress in achievement. The right to FAPE ensures that students and parents are not charged for the often-costly specialized services and that they have access to an education in a public school that is appropriate for their needs. This means that the public school education is free and is unique to the student. The IDEIA guarantees the right to a free appropriate public education.[2] Stemming from the court actions in *PARC* and *Mills*, the right FAPE ensures that students and parents are not charged for the often-costly specialized services and that they have access to an education in a public school that is appropriate for their needs and based on their disabilities.

LEAST RESTRICTIVE ENVIRONMENT (LRE)

To ensure students with disabilities are not uniformly segregated from their non-disabled peers, as they were prior to 1975, the IDEIA creates a presumption that students with disabilities will be educated with their non-disabled peers. Also commonly referred to "inclusion" or "mainstreaming," the LRE provision directs schools to first consider what services and supports are needed by a student with disabilities to function in the regular educational environment.[3] Placement in a setting with only other students with disabilities is limited to situations where student needs require this type of setting. [4] There can be a variety, or a continuum, of potential placements with different levels of inclusion. Public schools must consider this continuum with parents before making a final decision on placement.

Individualized Education Plan (IEP); Individualized Family Service Plan (IFSP); Interagency (IIIP)

The IDEIA recognizes that students with disabilities require a specific plan of services, commonly called an Individualized Education Plan, or IEP.[5] This plan is necessary to ensure student's *individual* needs are identified and addressed. A school may not simply provide any educational services or only educational services that other students receive. Instead, schools must develop a unique plan based on the student's individual needs that result from the student's specific disability and needs. This plan must be based on an appropriate evaluation, which determines the student's needs and eligibility for services, and shows how the student will be provided a FAPE. The Supreme Court's guidance in *Rowley* is vital here: a student's IEP must be reasonably calculated to ensure a meaningful educational benefit.[6] The laws guiding how IEPs must be premised on

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evaluations and what elements the IEPs must include is a framework for ensuring individuality in the plan and the meaningfulness of the plan.[7] The intended uniqueness of the IEP is to ensure students are not just provided with the standard curriculum if their needs dictate otherwise.

In Minnesota, there are three types of plans: an Individualized Education Plan (IEP) for children ages 5-21, an Individualized Family Services Plan (IFSP) for children ages 0-5, and an Individual Interagency Intervention Plan (IIIP) for children ages 0-21 who are being provided services by a school district and other organizations.

PARENTAL INVOLVEMENT

Recognizing the role of parents and the potential of their knowledge and experience with the student, the IDEIA mandates parents are involved in every step of the special education process, from the initial determination of eligibility and development of the IEP to the implementation of the IEP and termination of services. Parent consent is required before beginning an initial evaluation to determine eligibility and before the school may provide services.[8] Similarly, parents must be notified and provide consent to substantive changes in the IEP or the location of the services and must consent to the termination of special education services.[9] Parents are part of the student's "IEP team," which is the group that makes educational decisions for the student.

DUE PROCESS PROTECTIONS

Lastly, a host of other due process protections exists to ensure students with disabilities can enforce their legal rights. The IDEIA includes a wide array of additional basic protections from ensuring that parents are notified of their rights and the procedural safeguards to protect them,[10] to the parents' ability to resolve or contest school decisions in mediation sessions,[11] administrative complaints,[12] due process hearings,[13] and/or appellate court actions.[14]

These five main principles are central to the detailed process mandated by IDEIA. An overview of this process follows.

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[1] This section is based in part on and adapted from Arc's GetSet Parent Training Curriculum.
[2] 34 CFR § 300.13 and § 300.121
[3] 34 CFR §300.550; 34 CFR §300.551
[4] 34 CFR §300.552;
[5] 34 CFR §300.340; 34 CFR §300.346
[6] *Board of Education v. Rowley*, 458 US 176 (1982).
[7] 34 CFR §300.340-.350
[8] 34 CFR § 300.505
[9] 34 CFR § 300.503
[10] 34 CFR § 300.504
[11] 34 CFR § 300.506;
[12] 34 CFR § 300.660-.662
[13] 34 CFR § 300.507
[14]34 CFR § 300.512

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The Very Basics of the IDEIA Process

1. CHILD FIND – *IDENTIFY STUDENTS WITH DISABILITIES*
This is a school district's responsibility to make efforts to locate children who may need special education services. This responsibility covers all children from birth to age 21.

2. EVALUATION – *DETERMINE STUDENT'S DISABILITY AND NEEDS*
Evaluation is the formal process that school districts use to determine whether a child is eligible for special education services. This process typically involves testing, observations, parent input, and other forms of data collection. The evaluation is used to determine whether a student meets any special education eligibility criteria. Parents must consent to this formal evaluation before it begins.

3. IEP DEVELOPMENT – *FORMULATE PLAN FOR SERVICE DELIVERY*
The IEP is the documented plan of what educational services will be provided to the child. It must be based on the evaluation and must contain each of the student's documented needs. The IEP is generally a legally binding document that is jointly created, reviewed, and changed through the student's IEP team.

4. PLACEMENT – *DETERMINE WHERE STUDENT WILL RECEIVE SERVICES*
The educational setting where the student will receive services goes hand-in-hand with the development of an appropriate IEP. The setting can dictate what services are available and who can provide them. Placement decisions should reflect how and where best the IEP can be implemented.

5. IEP IMPLEMENTATION – *DELIVER SERVICES*
Once the IEP is developed, its terms must be carried out by the school district. Not everything about the student's education is included in the IEP, but the IEP establishes the framework and whatever specifics are necessary for the student to receive FAPE (a free appropriate public education).

6. IEP REVIEW – *REVIEW AND RE-EVALUATE NEEDS AND PLACEMENT*
During the course of a child's academic career, his or her needs may change. Accordingly, there must be an annual review of the student's IEP and a formal "re-evaluation" every three years, unless parents waive this requirement. In general, these provisions ensure the IEP and placement are appropriate for the student's needs.

7. EXITING SPECIAL EDUCATION SERVICES
Students who are eligible for special education services may stop receiving services for a number of reasons: parental decision, no longer meeting standards for receiving services, graduating, or aging out. Each avenue triggers different district responsibilities.

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Other Major Aspects of the Law

IDEIA and state laws also provide details on many other aspects of a district's responsibilities to educate a student with disabilities. The following chapter covers a number of the other major aspects, including discipline, extended school year and transition.

DISCIPLINE

Prior to 1997, federal special education law did not specifically deal with the discipline of students with disabilities. Growing discontent from school and parent groups resulted in pressure for specific provisions. Congress responded to this pressure in 1997, when the law was amended to include a number of discipline provisions including:

- the 10-day rule, permitting students to be removed for 10 days or less without any special type of procedures or protections, but triggering a variety of duties if students were removed for more than 10 consecutive days or more than 10 cumulative days if there was a pattern of removal;
- the 45-day rule, allowing schools to unilaterally (without parent input or consent) remove students for up to 45 days if there was a weapon and drug offense at school;
- permitting a school to petition a hearing officer to remove the student from the current setting if there is a substantial likelihood of serious injury;
- mandating parent notice for any 45-day removal or removals that exceeded 10 days.

For students who were removed for more than 10 consecutive days or for a pattern of more than 10 cumulative days, the 1997 required schools to take the following steps:

- Determine whether the behavior was a manifestation of the disability. A manifestation determination is a process to decide whether the student's conduct was related to the student's disability and if the student's IEP and educational placement were appropriate. If the conduct was not related and the IEP and placement were appropriate, the school could impose its regular discipline consequences.
- Conduct a functional behavioral assessment (FBA). An FBA is designed to identify the antecedent causes of the student's behavior and provide information about the most effective strategies to avoid the behavior
- Review and revise the existing behavioral strategies or create new ones based on the FBA and the student's needs. This is done to ensure the student's educational placement and plan is working for the student, given the student's needs.
- Provide the student with alternative educational services. This ensures the student is not being deprived of education and of making progress towards his or her goals while the meetings, FBA, and strategies are being developed.

In 2004, there was a push to dramatically change discipline provisions. The House proposal would have essentially permitted schools to unilaterally remove students with disabilities to a different placement for 45 days for *any* violation of a student conduct

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code. This change did not prevail, but another change did. Effective July 2005, schools may unilaterally remove a student with disabilities for 45-days if the student committed a serious bodily injury.

EXTENDED SCHOOL YEAR (ESY)

ESY is discussed in both federal and state law. Eligibility for ESY services is an IEP team determination and is based on whether the student needs ESY services to be provided with a free appropriate public education. ESY includes those special education and related services provided to students with disabilities in conformance with their IEPs *outside* of the regular school year. Importantly, ESY services cannot be limited to specific disability categories or to certain types, amounts or duration of services.

Federal law gives authority to states to develop specific ESY standards. Minnesota has developed ESY standards in the form of defining the conditions of ESY eligibility. ESY services are generally available during a break in instruction if those services are necessary to provide a free appropriate public education. It should be emphasized that ESY services are not the necessarily the same as summer school. ESY services can be provided over any break of instruction if necessary to provide FAPE and are individually tailored to student needs. Summer school is generally a uniform curriculum.

TRANSITION

The IDEIA also includes provisions concerning the transition of students from K-12 education. Transition services must appear in student IEPs when the student turns age 16 (age 14 in Minnesota) and must be based on an evaluation of the student's transition needs. The needs may include preparation for post-secondary education, employment, adult services, independent living or community life. If there are any interagency responsibilities or links, these too must be included in the IEP.

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IDEIA 2004 Changes

INTRODUCTION

After two years of negotiation and debate, the US Congress passed the reauthorization of IDEA. Along with a new name, IDEA becomes IDEIA, the Individuals with Disabilities Education Improvement Act, the reauthorization resolved several controversial issues including funding, discipline, and IEP content.

Both Houses passed the compromise developed by the joint House and Senate conference committee on November 17, 2004 and it became law on December 3, 2004 upon President Bush's signature. The effective date for the changes is May 31, 2005, and the United States Department of Education has one year from the date of enactment to issue its implementing regulations. The regulations provide further detail on exactly how the changes are interpreted and implemented. Pending the release of the regulations, the statutory law is effective.

The following is a brief summary of the major changes in IDEIA 2004.[1]

Evaluations

- A 60 calendar day timeline to complete initial evaluations unless a state has a lower time limit (note: Minnesota has a 30 school day time limit)
- Clarifies that where there is an absence of parent consent or failure of the parents to produce child for an initial evaluation, the district may use due process procedures to obtain the evaluation
- However, due process is not to be used for the initial provision of services; if parents do not give consent, the district will not be found in violation of not providing FAPE
- Clarifies process for obtaining consent for wards of state
- Includes provisions on ensuring homeless children are evaluated
- Specifies that screening children to develop curricular strategies is not an initial evaluation

Reevaluations

- Must be completed if a parent requests or if the student's educational or related services needs, including academic achievement and functional performance warrant reevaluation.
- Reevaluations can not be done more than once a year, unless parent and district agree otherwise

IEP Content

- Short term objectives and benchmarks removed
- Progress reporting requirements clarified to ensure district describes progress towards each goal and indicates how progress reports are completed

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- IEPs must include accommodations necessary to measure academic achievement and functional performance
- Clarifies transition services and planning begins at age 16, not 14 (Note: still age 14 in Minnesota)

IEP Meetings and IEP Development

- Allows parents and districts to agree to excuse certain members of the IEP team from attending under some circumstances and if parental agreement is in writing.
- Allows amendment to IEP without a full IEP team meeting if annual meeting already occurred and parent and district agree to this process
- Clarifies procedures and data transmission requirements for transfer students
- Requires review of academic, development and functional needs and consideration of positive behavioral supports
- Allows 15 states to participate in demonstration project for multi-year IEPs
- Allows alternative means to participate in IEP meetings

Procedural Safeguards

- Clarifies procedures for appointing surrogate parents for wards of the state and homeless children
- Establishes a 2-year statute of limitations on challenges
- Establishes notification procedures for filing due process hearing requests
- Expands mediation provisions to define confidentiality and written agreements.
- Creates a "resolution" meeting that must occur prior to the due process hearing and provides guidelines on written settlement documents
- Establishes a 90-day timeline to appeal hearing decisions
- Allows schools to recover attorney's fees from parents or parent attorneys if the legal action is frivolous, harassing or otherwise improper

Discipline

(Note: the discipline provisions were changed and reorganized in an effort to simplify the process, the changes and reorganizations are summarized below)

- Allows schools to determine discipline on a case-by-case basis in determining whether to order a change in placement
- Clarifies school administrator authority to order removal for not more than 10 days
- Clarifies that where a student's conduct is not a manifestation of the disability, the student may be disciplined as non-disabled students but must receive services in the same type of setting to enable progress toward IEP goals and must receive services and assessments to ensure the behavior does not recur
- Revises manifestation determination language to have IEP teams determine whether the disability directly caused or had a substantial relationship to the conduct and whether the district's failure to implement the failed directly caused the conduct.

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- States that if the conduct was a manifestation of the disability, the student must receive an FBA and have a BIP implemented or must revise the student's current BIP.
- Adds "serious bodily injury" to list of exceptions permitting a 45-day unilateral removal
- Requires the IEP team to determine the interim alternative educational placement
- Clarifies appeal procedures and requires hearing to be held within 20 days and decision within 10 days after hearing

[1] See Public Law 108-446, 20 USC 1400, et. seq., §601-682

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Minnesota Special Education Law Changes in 2005

Not to be outdone by the federal IDEIA reauthorization, Minnesota made a number of special education law changes in 2005. The following is a brief summary of the provisions:[1]

Time-Out Changes

- Changed and created new categories for "time out" procedures including "contingent observations" (a non regulated intervention within the same room); "exclusionary" (a non regulated intervention requiring the student to leave the room); and "locked" (a regulated involuntary intervention requiring removal of the student to a special room and where the student cannot leave)

- Establishes new guidelines for use of locked time out – the time out room must have a locking mechanism that disengages automatically when not continuously engaged by school personnel, and must be in full compliance with state and local fire and building codes, including state rules on time-out rooms. Additionally, locked time out can only be used if it is: (i) part of a comprehensive behavior intervention plan, which is included with or in the IEP, and the plan uses positive behavioral interventions and supports, and data support its continued use; or if it is (ii) used in an emergency for the duration of the emergency only.

- School districts and cooperatives must establish an oversight committee composed of at least one member with training in behavioral analysis and other appropriate education personnel to annually review aggregate data regarding the use of aversive and deprivation procedures.

- Requires school districts to register with the commissioner any room used for locked time-out, which the commissioner must monitor by making announced and unannounced on-site visits;

Positive Behavioral Interventions, Aversive and Deprivation Procedures, Emergency, Notification of Conditional Procedure Use, and IEP Meeting after Two Removals by Peace Officer within 30 Days

- Changes the statutory definition of an "emergency." Interventions, on an emergency basis, must only occur to protect individuals from injury or to prevent "serious" property damage. The prior stature did not specify the severity of property damage before interventions are permitted. In contrast, the current Minnesota rule requires potential of "severe" property damage.

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- Replaces the term “positive approaches” with “positive behavioral interventions and supports” and defines the term to mean “those strategies used to improve the school environment and teach pupils skills likely to increase pupil ability to exhibit appropriate behaviors.”

- Requires districts to hold IEP meetings to determine the adequacy of the IEP and need for additional evaluation if a peace (police) officer removes a student twice within 30 days

- Restates the rule provision requiring that planned (non-emergency) aversive and deprivation procedures to only be used after an FBA and included in a IEP

- Requires notification of emergency use on same day or in writing within two days if same day notification not possible.

New Aversive and Deprivation Rules

- The final bill changed many definitions relating to aversive and deprivation procedures and also required the Minnesota Department of Education (MDE) to, after consulting with stakeholders, develop new rules in correspondence with those changes. There is also a requirement for MDE to consolidate and clarify provisions related to behavior intervention plans.

Councils, Committees and Task Forces

- Requires district parent advisory councils to include non-public representative when a non-public school is located in the district;

- Requires the State interagency coordinating council to report at the same time the federal Part C annual report is due and changes the expiration date from 2005 to 2009

- Establishes committee for library of Blind and Physically Handicapped

- A task force appointed by the governor to address the delivery of special education services to non-public students and to report by January 15, 2006.

Finance

- In general, the final bill followed the provisions originated from the House with regard to a new special education levy revenue program and supplemental excess cost funding stream and changes the current excess cost, levy equalization, aid payment percentages, and growth factors.

State Aid for Hearing and Litigation Costs Repealed

- Repealed a $17,000 per year reimbursement fund for districts that were in hearings or in litigation

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Suspensions, Exclusion and Expulsions, Readmission Plans

- School boards must report student exclusions and expulsions through the education department's electronic reporting system and to include age, grade, gender, race and special education status of the student.

- Allows schools to impose "alternatives to pupil suspension. After following requirements in the Pupil Fair Dismissal Act, school may 1. strongly encourage the parent to attend school with the student, 2. assign the student to school on Saturday, or 3. petition the juvenile court that the student is in need of child protection services.

- Allows schools include a character education program in a readmission plan.

- Allows school officials to use readmission plans when suspending students. Requires plans for regular education student to include alternative education services where appropriate.

- Prohibits schools from obligating parents to consent to administering psychotropic drugs to their students as a condition of attending class or participating in school activities and prohibits schools from using a refusal to consent to administering these drugs as a basis for abuse, neglect or medical or educational neglect.

- School boards must have policy prohibiting intimidation and bullying.

- Dangerous weapons reporting need only be done once per year.

- Dismissal of one school day or less is not a suspension, except for students who are eligible for special education.

Other

- Changes to provisions on transporting students without disabilities to temporary placements outside of a district;

- School boards to adopt anti-bullying and intimidation policies.

- ESCE changes: focus on 3 and 4 year olds, assign student identification number at screening. New reimbursement rates: 3 = $50, 4= $40 and 5 = $30.

- Requires MDE to update old special education terminology to reflect current terms.

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[1] 2005 Special Session, Chapter 5, Art. 3

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PART II

INTRODUCTION

Part II is a review of the special education process, which is divided into seven separate chapters:

1. Child find
2. Initial evaluations
3. LRE, Placement and Significant Changes
4. IEP Development
5. IEP Implementation and Review
6. Reevaluations and Other Non-Initial Evaluations, and
7. Termination of Services

Each chapter contains a systemic review of the legal parameters, highlights of new changes in state or federal law, and an identification of where trouble-spots have occurred in Minnesota as shown by Minnesota special education complaint and hearing decisions.

LEGAL SOURCES

Minnesota Complaints, Hearings, Policy Letters, and Court Decisions

The full text of complaint decisions, hearing decisions, and policy letters from the Minnesota Department of Education can be searched and retrieved at the Minnesota Department of Education's website at:
http://education.state.mn.us/html/compliancesearchdisplay.htm.

The full text of Minnesota State Court decisions can be searched and retrieved at http://www.lawlibrary.state.mn.us/archive/ and Federal Court, Minnesota Division decisions can be searched and retrieved at http://www.nysd.uscourts.gov/courtweb/PubMain.htm. Federal court appellate decisions in the Eighth Circuit, which includes Minnesota can be searched and retrieved at http://www.ca8.uscourts.gov/opns/opFrame.html.

MNSTACS also has indexed, reviewed and summarized complaint, hearing, and court decisions since July 2004. These publications are available through the MNSTACS website at www.mnstacs.com.

State and Federal Law

An index and complete text of Minnesota Special Education Rules are available at: http://www.revisor.leg.state.mn.us/arule/3525/

An index and complete text of Minnesota Special Education Statutes are available at: http://www.revisor.leg.state.mn.us/stats/125A/

The new IDEIA 2004 is available at: http://thomas.loc.gov/cgi-bin/query/z?c108:h.1350.enr and the proposed federal regulations are available at: http://a257.g.akamaitech.net/7/257/2422/01jan20051800/edocket.access.gpo.gov/2005/pdf/05-11804.pdf

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CHILD FIND IN MINNESOTA

INTRODUCTION

The term "child find" refers to a school district's responsibility to locate, identify, and propose an evaluation for children who may be eligible for special education services. This responsibility exists not only at the beginning of the school year but also whenever it appears that a child in the district might require special education services.

This chapter discusses 1. the legal requirements concerning when and how the child find responsibility is triggered, including new changes in IDEIA 2004; 2. responses to the child find responsibility; and 3. a review of child find legal decisions in Minnesota to show trends, patterns, common trouble-spots, and consequences for violations.

POLICIES AND PROCEDURES

Schools must be prepared to facilitate the determination of a child's special education eligibility.[1] Each Minnesota school district must have a Total Special Education System plan (TSES), and the TSES must include child find procedures including some type of communication with parents, physicians, private and public programs, and health and human services agencies in the district to fulfill this obligation.[2]

Child find responsibilities to identify private school students who attend a school in a different public school district may be tricky. If a student, who may be eligible for special education services, attends a non-public school within the boundaries of a public school district, but lives in another district, both public school districts have some responsibilities to identify and locate the student.[3] The district in which the student attends the non-public school has the child find responsibilities, but the district in which the student lives is responsible for excess program costs.[4]

Charter schools, which do not have "boundaries," are only responsible for monitoring students within the charter school.[5]

SCOPE OF CHILD FIND RESPONSIBILITY

The child find responsibility extends to all children, ages 0-21,who reside within the district, attend private schools within the district (regardless of their district of residence), or who are transient, homeless or migrants.[6] Child find is a continuing responsibility-that is, children who attend school within the district must be monitored throughout the school year to see if their academic performance, behavior, or needs suggest special education eligibility.[7] Because children may evidence the need for special education services at any point of their school career, the district must be ready to identify and address their needs.

PROVISIONS CONCERNING PRIVATE SCHOOLS

IDEIA 2004 expanded language with regard to how public school districts implement their child find duties for private school students. Districts must seek a written affirmation from a private school to document their "meaningful consultation" concerning the identification and provision of services to students in private schools. [8]

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Also, districts are required to maintain records on private school students and submit information on how many were evaluated and found eligible.[9] Districts must have a process for private schools to use where there are disagreements with public school service provision in private schools.[10]

In the event a district and private school disagree over the process for identification and/or provision of services to private school students, the district must provide a written explanation and obtain the "written affirmation" of "meaningful consultation."[11] Private schools can now file complaints with MDE concerning a district's child find efforts with the private schools.[12]

CHILD FIND DUTY TRIGGERS

There are three main ways that a school district's child find duties are triggered: school district suspicion (including referrals from other organizations), parent requests, and, more rarely, a child's placement in a care and treatment facility within the district.

School District Suspicion

First, school districts have an independent obligation to locate students who may be eligible for special education. While child find obligations are prominent at the beginning of the year when students enter the district, the child find obligation is an ongoing one in order to ensure that students who enter the district or who demonstrate academic and performance changes during the school year are located and evaluated.

Standard for Suspicion

Current federal and state laws do not specifically state when suspicion exists. However, state complaint and hearing decisions do show when districts have been found to violate their child find responsibilities.[13] Typically, Minnesota complaint decisions examine a student's progress reports, report cards, medical and health reports, behavior reports, evaluations from any source, district documents, and attendance.[14] Similarly, Minnesota hearing officers use a "notice" or "knowledge" standard.[15]

For example, a recent hearing decision stated that the "child-find duty 'is triggered when the [district] has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability.' Under these requirements, a child must be identified and evaluated 'within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability.'[16]

Complaint and hearing decisions have noted a number of times that faltering student grades alone do not compel the conclusion that a special education evaluation is warranted.[17] But, child find duties are triggered when there are sudden changes, as such the failure of pre-referral or Section 504 efforts; new or recently provided medical reports; a major behavioral incident; a student entering a new district; failing statewide tests (bringing graduation into question); a continual decline in behavior and academics; or other similar warning signs.[18] A student's actual or suspected chemical issue does not remove a district's child find obligation when other factors are present.[19]

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Importance of Record Keeping
It is also important to keep comprehensive records for students. Failing to keep or maintain records (such as grades, attendance history, report cards, etc.) can be evidence the district did not adequately monitor a student for potential special education service needs.[20]

Considerations for Students who are Being Disciplined
The suspicion standard is also very important when a student is disciplined, but not yet evaluated or eligible special education services. If a student faces discipline and the district either had or was deemed to have knowledge[21] of the student's potential need for special education services, the student is entitled to all protections (e.g. manifestation determinations, notice, limits on suspension and expulsion, etc.) that students with identified disabilities have.[22] In fact, a district's attempt at expulsion was overturned by MDE when MDE determined the district failed to identify the student as potentially needing special education services.[23]

<u>Parent and Public Agency Requests</u>
Parent Requests
Child find responsibilities are triggered by parent requests for special education evaluation. As there is no legally required form for parent requests, districts may be responsible for responding to either verbal or written requests. Districts must either agree to the request and start the evaluation process or provide written notice of refusal.[24] Where a district fails to provide notice of refusal, even if there is no violation of the underlying child find obligation, it has been found in violation.[25]

Neither federal nor state law state by when a district must respond to a parent's request for an evaluation. The Office of Special Education Programs has noted that the determination of what constitutes a reasonable amount of time for the District to respond may be made on a "case-by-case basis."[26] In Minnesota complaint decisions, delays of three months, with some compelling intervening circumstances, were determined to be reasonable.[27] This 3-month delay is likely an outside limit and is only excused for compelling reasons; a shorter timeframe for responding (closer to 2-4 weeks) will probably be determined "reasonable."[28]

If a district does not think a special education evaluation is warranted and wants to give pre-referral interventions a try first, this is fine, but the district still must provide notice of refusal to the parent's request for evaluation.[29] In other words, a parent's request for evaluation does not disappear if they agree to pre-referral interventions. The notice of refusal may include a statement about the provision of pre-referral interventions. The provision of formal notice of the district's refusal to conduct an evaluation allows the parents to be adequately informed of the district's decision and of their rights to challenge the refusal in a due process hearing.[30]

Outside Agency/Organization Referral or Notice
IDEIA 2004 expressly authorizes parents, districts or other state agencies to make referrals for initial educational evaluations.[31] A child's health care provider may also do

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this. If the district receives a notice or referral, the district's child find duties may be triggered. While the district has the authority to decide whether to begin the child find process, it should at least document the notice or referral, monitor the student, and be prepared to justify why it did not take action.

Care and Treatment Screening

The third and least common trigger to a district's child find obligation is if a regular education student is placed in a care and treatment facility (such as a hospital, treatment facility, etc) within the district. While a student does not automatically become eligible for special education because he or she attends a care and treatment facility,[32] the district in while the facility is located must begin providing regular education services immediately[33] and must determine whether the student is already eligible for special education services.[34] For students who have already been determined eligible for special education, the district must provide notice, hold an IEP team meeting, and determine how special education services will be provided.[35] For students who have not been determined eligible, the district must conduct a screening to determine the student's needs.[36]

BEGINNING THE PRE-REFERRAL OR INITIAL EVALUATION PROCESS

Once a district has identified a child as potentially needing special education services through its child find responsibilities, the district may proceed by either agreeing to conduct pre-referral interventions or by beginning the initial evaluation. If the district fails to take action, it risks a child find violation.

Pre-Referral Interventions

Pre-referral interventions are defined as regular education strategies, alternatives or interventions that are designed to assist the student in school before special education services are deemed necessary.[37] These pre-referral interventions might include Section 504 accommodation plans, tutoring, support services, Title I services, or a wide variety of extra regular education techniques to help the student succeed.

Relevant law requires a school district to conduct and document at least two pre-referral interventions before initiating a special education evaluation, unless the district's assessment team waives this requirement because of an "urgent" need for evaluation.[38] Importantly, where a parent requests an evaluation and agrees to pre-referral interventions prior to the evaluation, the district must still provide the parents a notice of refusal to evaluate.[39]

Also, pre-referral interventions can not be used to purposefully or practically deny or delay the parent's and student's rights to have a special education evaluation (or to receive notice of the district's refusal to evaluate). If a staff member conditions an evaluation on going through the pre-referral interventions or if multiple interventions are employed but none are successful, and where no evaluation occurs, a district is likely to be found in violation.[40] Further, where a child's needs are "urgent" and pre-referral interventions are not succeeding, but the district does not begin an evaluation, it is likely to be found in violation.[41]

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Evaluation
If an evaluation is warranted or a district agrees to a parent request for a special education evaluation, the district must provide notice to the parents of the evaluation, describe the evaluation in a plan presented to the parents, and obtain parental consent prior to starting the evaluation.[42] Evaluations may not be conditioned on a student taking medication.[43]

Once parent consent is received, Minnesota law requires the district to complete the evaluation within 30 school days[44] and to provide a copy of the final evaluation report to the parents within that same 30-day period.[45] If parents refuse to consent, districts may not seek a due process hearing to override a the refusal.[46] At the same time, IDEIA 2004 provides that if parents do not consent, they also will not be able to prevail on a claim that the district failed to provide FAPE.[47]

Note: IDEIA 2004 stipulates that initial evaluations must be done within 60 calendar days, unless there is a shorter state law timeframe. While the Minnesota timeframe seems shorter (30 school days), it could be longer if an initial evaluation is started at the end of a school year. In this case, the federal timeframe may very well apply.

The evaluation must follow all requirements concerning non-discrimination, comprehensiveness, adequacy, and proper procedures and personnel.[48] (See Initial Evaluation Chapter). If a district's evaluation is not comprehensive, it could be found in violation later on. For example, if the district does not conduct a comprehensive evaluation, its subsequent use of planned conditional procedures, which require an appropriate evaluation before use, may be in question.[49]

Once the evaluation is complete and the parents are provided a copy of the evaluation report, a meeting to develop an IEP after the determination of initial eligibility "must be conducted within 30-days."[50] Further, the Student's IEP must be implemented "as soon as possible" following this IEP meeting.[51]

Again, if districts decide not to conduct an evaluation after receiving a parental request, they must provide notice of refusal.[52] This is also true if the district conducts pre-referral interventions instead of conducting an evaluation after a request for evaluation.

REVIEW OF CHILD FIND COMPLAINTS
To determine where schools have encountered problems and successes in their child find duties, 24 special education complaints issued by the Minnesota Department of Education between July 2001 and July 2004 were reviewed. Sixteen of them resulted in violations.

In the 24 cases, two thirds concerned students in grades 6-12. This suggests that either these were new students to the districts or, for students who have been in the district for a while, the disability is newly developing or the disability went unrecognized. The rest of the 8 complaints involved students in grades PK-5.

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For the students involved in these 24 cases, 18 were eventually determined eligible for special education services. Thirteen of the 18 were determined eligible under emotional or behavioral disorders (EBD), four under Other Health Disabilities (OHD), and one under Autism Spectrum Disorders (ASD). Not surprisingly, for the EBD students, significant behavior was overlooked or not addressed, and for the OHD students, some type of medical or health issues was missed.

The remaining six of the 24 students were not found eligible. In four of these six cases, no violation was found, but in the remaining two, there were violations for failing to provide a notice of refusal to evaluate to the parents.

Overall, in the eight cases of 24 where no violation was found, the district responded appropriately to parent requests,[53] continuously monitored the students for special education needs,[54] met relevant timelines,[55] or the student's academics and other factors did not demonstrate the district should have suspected a need for special education services.[56] Note that the applicable standard is whether the district should have suspected a need for special education services. This is a lower standard then determining the student needed special education.

Violations and Corrective Action

MDE found 16 child find violations in the 24 cases, or 66%. MDE ordered corrective action in most of the cases where violations were found.[57] In the cases where corrective action was not ordered, the district already remedied the issue by providing services, evaluations, or developing a plan.[58] Where a district proposed or completed its own corrective action, MDE accepted the proposal, at least in part.[59]

The most common corrective action ordered by MDE included some type of compensatory education (e.g. make up services) and/or training (12 of 16 cases).[60] The compensatory education awards are designed to remedy the violation for the student, while training and other orders are generally designed to ensure the problem does not happen again. The compensatory education plans were sometimes substantial in length of time and amount of services depending on the severity of the student's disability and time passed between when the district was deemed to have knowledge of the disability and when the student was actually determined eligible.

Other corrective action orders included: opportunities for the student to make up missed or failed classes,[61] developing a plan for future services,[62] and preparing a memo for distribution to staff.[63] Still other corrective action orders included: reimbursement to parents for evaluation expenses,[64] correcting incorrect district staff manuals,[65] conducting an independent evaluation,[66] conducting an functional behavioral assessment (FBA),[67] incorporating training as part of the district's continuous improvement process[68] and informing MDE special education monitors of the violations for future monitoring.[69]

Given the increasing numbers of students requiring evaluation, staff and service cutbacks, and the difficulty associated with coordinating everyone and everything involved with evaluations, it is no surprise that districts are found in violation of missing the required

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timelines. The consequence, however, for missing timelines is significantly less in scope then missing the overall child find responsibility entirely (unless, of course, the district missed timelines for long periods of time, resulting in a denial of services and of FAPE).

Pitfalls and Consequences

Based on this review, a number of common problems are apparent in the following areas:

- Not having comprehensive procedures to catch students who demonstrate sudden or continual changes in a number of areas including academics, attendance, behavior, medical condition, and placements in correctional or care and treatment facilities.
- Failing to respond effectively to "triggering" conditions such as sudden changes at school in grades, behavior, and attendance; a new doctor's diagnosis; a major behavioral incident; a student entering a new district; and a student failing statewide tests, thus calling graduation into question.
- Missing evaluation and meeting timelines in the initial evaluation process. Delays of months in responding to evaluation requests or completing evaluations will likely be determined unreasonable.
- Not giving formal written notice of a refusal to evaluate to parents who have requested an evaluation.
- Failing to monitoring the success of pre-referral interventions and using them as a substitute for providing notice of refusal or for initiating a special education evaluation.
- Falling into these common pitfalls can land schools and students into some substantial and potentially costly consequences. In their corrective action orders, MDE is directed by law to remedy the violation and prevent it from occurring again.[70] MDE appears to be willing to review and accept school-initiated corrective action and efforts to meet the student's needs prior to the final issuance of the complaint decision.

SUMMARY

This chapter has reviewed the basic outline of the child find process. It has discussed the legal requirements concerning the preparation in policies and procedures needed, the scope of the duty, as well as the three main triggers of child find responsibilities: district suspicion, parent request, and care and treatment.

This chapter also included a review of recent child find complaints and hearings. Most child find cases involve secondary age students, and in most cases a student is eventually determined eligible, with EBD being the most common disability. Where a student is not eventually determined eligible, districts have been found in violation for not providing a notice to the parents indicating the district's refusal to evaluate.

A number of trouble-spots were identified, from districts not being prepared to missing timelines and failing to monitor students. Where violations are found, MDE is likely to order corrective action in the form of compensatory education and/or training as well as ordering the development of a plan for future services, allowing the student to make up missed or failed classes, or preparing a memorandum for distribution. MDE appears

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receptive to district efforts to offer its own corrective action or take steps to address student needs prior to the issuance of the complaint decision.

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[1] *See* 34 C.F.R. § 300.125; 34 C.F.R. § 300.220; 34 C.F.R. § 300.320; Minn. R. 3525.0750.
[2] Minn. R. 3525.1100, Subpt. 2
[3] 34 CFR §300.451, Minn. R. 3525.1100, Subpt. 2A.
[4] Minnesota Department of Education Policy Letter, Students Enrolled in K-12 Nonpublic Schools Outside the Resident District, L225, November 7, 2001.
[5] See, e.g. Minnesota Department of Education Complaint Decision 1812
[6] Id.
[7] The child find requirement applies to "children who are suspected of being a child with a disability … in need of special education, even though they are advancing from grade to grade." 34 C.F.R. § 300.125.
[8] Public Law 108-446, 20 USC 1412, §612 (a)(10)(a)
[9] Id.
[10] Id.
[11] Id.
[12] Id.
[13] Minnesota Rule 3525.2750, subpt. 1(A), repealed in 2001, formerly required districts to conduct an evaluation "when a student's "academic, behavioral, emotional, social, physical, communication, or functional skill acquisition in the present educational placement warranted."
[14] See e.g. Minnesota Department of Education Complaint Decisions 1469, 1502, 1548, 1605, 1642, 1672, 1685, 1717,1837, 1897, 2028
[15] Minnesota Department of Education Hearing Decisions 577, 578, 584
[16] Minnesota Department of Education Hearing Decision 584; *Department of Education v. Cari Rae S.,* 158 F. Supp. 2d 1190, 35 IDELR 90 (D. Hawaii 2001), *quoting Corpus Christi Independent School District*, 31 IDELR 41, 158 (1999).
[17] Minnesota Department of Education Hearing Decisions 282, 552; *Independent Sch. Dist. No. 11*; *Rockwall Indep. Sch. Dist.,* 21 IDELR 403 (SEA TX 1994).
[18] Minnesota Department of Education Complaint Decisions 1469, 1502, 1548,1605, 1642, 1685, 1672, 1717, 1837, 1897, 2028,
[19] Minnesota Department of Education Hearing Decision 586
[20] Minnesota Department of Education Complaint Decision 1469
[21] Incidentally, it is this "deemed" knowledge standard that the complaint and hearing decisions use to determine child find violations regardless if the student is facing disciplinary consequences.
[22] 34 CFR§300.527
[23] Minnesota Department of Education Complaint Decision 2108
[24] If the District refuses to conduct an initial special education evaluation, the District must comply with the procedural and content requirements in 34 C.F.R. § 300.503
[25]Minnesota Department of Education Complaint Decision 1888
[26] *Letter to Saperstone*, 21 IDELR 1127, July 28, 1994.
[27] Minnesota Department of Education Complaint Decisions 1926 (3 month delay excused because of intervening circumstances including hospitalization of student), 2028 (3 month delay excused because of district attempts to schedule meetings and gain parent consent)
[28] See e.g. Minnesota Department of Education Complaint Decision 1663
[29] 34 C.F.R. § 300.503
[30] See 34 CFR § 300.507.
[31] Public Law 108-446, 20 USC 1414, §614 (a)(1)(b)
[32] Minn. Stat. §125A.515, subd. 3(c)
[33] Minn. Stat. §125.515, subd. 4; Minnesota Rule 3525.2325, subpt. 2 (B)
[34] Minn. Stat. §125.515, subd. 5
[35] Id.
[36] Minn. Stat. §125.515, subd. 5(c)
[37] Minn. Stat. §125A.56
[38] Id.
[39] 34 CFR §300.503

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[40] Minnesota Department of Education Complaint Decision 1642
[41] Minnesota Department of Education Complaint Decision 1831
[42] Minn. R. 3525.2710, 34 CFR §300.532
[43] Public Law 108-446, 20 USC 1412, §612(A)(25)
[44] Minn. R. 3525.2550
[45] Minn. R. 3525.2710, Subpart 6
[46] If districts decide not to conduct an evaluation after receiving a parental request, they must provide notice of refusal.[46] This is also true if the district conducts pre-referral interventions instead of conducting an evaluation after a request for evaluation.
[47] Public Law 108-446, 20 USC 1414, §614 (a)(1)(D)
[48] Minn. R. 3525.2710, 34 CFR §300.532
[49] Minnesota Department of Education Complaint Decision 1971
[50] 34 CFR §300.343 (b)(2).
[51] 34 CFR §300.342 (b)(1)(ii).
[52] Minnesota Department of Education Complaint Decision 1869
[53] Minnesota Department of Education Complaint Decision 1926.
[54] Minnesota Department of Education Complaint Decision 1837
[55] Minnesota Department of Education Complaint Decisions 1812, 1838, 1926
[56] Minnesota Department of Education Complaint Decisions 1477, 1837, 1945
[57] Minnesota Department of Education Complaint Decisions 1469, 1465, 1502, 1548, 1605, 1642, 1662, 1672, 1685, 1717, 1831, 1888, 1897, 2028
[58]Minnesota Department of Education Complaint Decision 1971
[59] Minnesota Department of Education Complaint Decisions 1605, 1685, 1971
[60] Training: Minnesota Department of Education Complaint Decisions 1888, 1605, 1662, 1672, 1717, 1831, 1897; Compensatory Education: Minnesota Department of Education Complaint Decisions 1465, 1469, 1502, 1548, 1605, 1642, 1662, 1672, 1831, 1897
[61] Minnesota Department of Education Complaint Decisions 1469, 1502, 1642
[62] Minnesota Department of Education Complaint Decisions 1469, 1642
[63] Minnesota Department of Education Complaint Decisions 1502, 2028
[64] Minnesota Department of Education Complaint Decision 1502
[65] Minnesota Department of Education Complaint Decision 1685
[66] Minnesota Department of Education Complaint Decision 1831
[67] Minnesota Department of Education Complaint Decision 1971
[68] Minnesota Department of Education Complaint Decision 1888
[69] Minnesota Department of Education Complaint Decision 1831
[70] 34 CFR §300.660

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INITIAL EVALUATIONS

INTRODUCTION

The initial evaluation is the necessary formal process to determine and document a child's eligibility for special education services and identify the child's needs arising from the disability. The initial evaluation is also the basis for developing the IEP.

This chapter reviews the initial evaluation process (including legal standards for notice, consent, content, timelines, and criteria), discusses the new changes in this areas created by IDEIA 2004, and highlights particular legal trouble-spots (including general problems and specific issues about obtaining medical diagnoses) in initial evaluations as shown by Minnesota special education complaints and hearings.

OVERVIEW OF PROCESS

Following the district's child find responsibilities to locate and identify children who may need special education, the initial evaluation actually determines eligibility. To initiate this evaluation, a number of steps are required.

Notice and Consent

First, the public school must provide *notice* to the parents of its proposal to evaluate the child for special education service eligibility.[1] This parental notice must describe the evaluation in sufficient detail so that parents may make an informed decision whether to proceed.[2]

Second, the district must obtain *parental consent* prior to starting the evaluation.[3] The notice and evaluation plan may be discussed at an "evaluation planning meeting." Parents may provide their written consent at this meeting or following the meeting. Consent is required prior to conducting an evaluation. If parents do not consent, districts cannot request a due process hearing to conduct the evaluation.[4] Importantly, a district cannot condition an initial evaluation or receipt of services on a child taking medication.[5]

Parental consent may be difficult to obtain for some students, especially those who are wards of the state. The new 2004 IDEIA requires districts to actively seek and obtain consent from parents of children who are wards of the state, unless parental rights have been terminated.[6]

Screening for Instructional Purposes Permitted

Districts are expressly permitted by IDIEA 2004 to conduct screening measures without parental consent as long as these measures are specifically for instructional or curricular purposes.[7]

Timeline

After consent is obtained, the entire evaluation must be completed within 30 school days. Technically, if an evaluation is begun with less than 30 days remaining in a school year,

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the district's timeline may extend into the new school year when "school days" are resumed. However, the new IDEIA requires evaluations to be conducted with 60 calendar days, if a state law does not contain a quicker timeline. For children ages 0-2, the timeline is 45 calendar days.[8] Within these timelines, to be complete, all parts of the evaluation plan must be conducted and it must contain an *evaluation report*.

Evaluation Report

The evaluation report (ER) is a critical document. It contains a summary of evaluation results, documentation of a child's disability, present levels of performance, education needs stemming from the disability, and a statement of whether the student needs special education services. The ER must be presented to the parents within the timelines noted above.

Evaluation Technical Requirements

There is a long list of federal and state requirements that the initial evaluation must fulfill.[9] Here is a summary:

- The evaluation must be non-discriminatory, technically sound, comprehensive, adequate, and conducted with the proper procedures and completed by people with appropriate training.
- The evaluation must include a variety of evaluation tools, obtain information from parents, use technically sound and valid instruments, be conducted in an appropriate environment, and must not use any one evaluation tool as a sole criterion for determining eligibility.
- The evaluation must recognize and account for the effect on test results of a student's sensory, manual, and speaking skills.
- The evaluation must be administered in the student's native language (unless clearly not feasible), be administered in such a way to not be discriminatory, protect against identification because of limited English proficiency, and review all areas of suspected disability.
- The evaluation process must be sufficient to address all of a student's individual needs whether or not commonly linked to the student's disability classification and must be done to identify and assess educational needs..
- IDEIA 2004 requires districts to review a child's performance on district and state tests as part of the evaluation as well as to focus on relevant functional, developmental, and academic information.[10]

Criteria

The initial evaluation must be designed to allow the district to determine whether the student's is eligible for special education under Minnesota's specific eligibility criteria. Federal law allows states to determine their own eligibility criteria. As such, a student

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who is eligible in one state may not be eligible in another state. Minnesota has different, but similar, criteria than other states.[11] These criteria are located in Minnesota rules and MDE has developed worksheets to assist in determining eligibility.[12]

Federal law can set minimum standards for eligibility and has recently enacted such a standard for the specific learning disorder (SLD) category. IDEIA 2004 states that a severe discrepancy between ability and achievement cannot be required. Prior to this change, many state criteria, including Minnesota, for SLD required such a discrepancy. Eliminating the requirement of having a severe discrepancy seeks to ensure that the provision of services to students with SLD *before* they demonstrate this discrepancy by poor performance. Schools *may* use tests that show discrepancies, but cannot require a severe discrepancy to identify a student as having a SLD.

Next Steps if a Child is Eligible

If a child is eligible for special education services, a meeting to develop an IEP must happen within 30-days of the eligibility determination.[13] Also, the resulting IEP must be implemented as soon as possible following this IEP meeting.[14] Parent consent for the initial evaluation is not the same as parent consent for the initial provision of services.[15] Separate parent consent must be obtained prior to the implementation of the IEP, even where eligibility and consent are anticipated.[16]

If parents do not agree with the eligibility determination, they can withhold consent for the initial provision of services. Districts may engage in dispute resolution options to address the disagreement. While Minnesota law prohibits a district from overriding a parent refusal for initial evaluation or a reevaluation, there is no such restriction on overriding parent refusal for initial provision of services.[17] The new IDEIA changes prohibit parents from succeeding on a claim that the district failed to provide special education services or FAPE if the parents refused consent for an initial evaluation.

Next Steps if a Child is Not Eligible

If a child is not eligible, but there are some evident needs, the district and parents may consider regular education support services and/or eligibility for Section 504 services.[18] The special education initial evaluation may be used to determine Section 504 eligibility or it can be determined through a separate evaluation.

If parents disagree with the special education eligibility determination, they may formally contest the district's eligibility decision in a number of processes. If so, the district would be required engage in dispute resolution processes to address the disagreement. [19] Parents may also file an administrative complaint with MDE[20] or request a due process decision.[21]

Parents May Revoke Consent

Parents can also revoke consent to evaluation procedures even after their initial consent to the evaluation.[22] Once the notice of revoked consent is obtained, the district must stop conducting the evaluation (or parts of it) according to the parent's desire. However, the

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district must engage due process procedures to address the disagreement leading to the revocation of consent.[23]

IMPORTANT CHANGES IN 2004

There are a number of changes in the new IDEIA in 2004 directly relate to Initial Evaluation:

- Districts cannot condition a special education evaluation on a student taking medication. [24] (This has generally been the law in Minnesota for a number of years, but Minnesota law[25] also requires the parent to consult with medical or educational professionals.)
- Barring parents who do not allow schools to conduct an initial evaluation from prevailing in a subsequent legal action claiming the district failed to offer or provide services;[26]
- Clarifying that parents, schools or other state agencies may request an initial evaluation;[27]
- Requiring schools to make reasonable efforts to find parents of children who are wards of the state;[28]
- Establishing that screening for curricular purposes is not an initial evaluation;[29] and
- Directing districts to review performance on local and state assessments and classroom based observations as a part of initial evaluations.[30]

COMPLAINT AND HEARING REVIEW OF TROUBLE SPOTS

There are two main types of trouble spots for districts in the initial evaluation area: general legal compliance and particular concerns around obtaining medical diagnoses. First, districts have run into trouble in not conducting a complete evaluation in terms of 1. not performing all required elements, [31] 2. not completing it within the 30 day timeline,[32] 3. not providing notice or the required explanation,[33] 4. not conducting an FBA when required, [34] 5. not performing the required evaluation prior to the use of non-emergency conditional procedures,[35] 6. not performing an assistive technology evaluation,[36] 7. not evaluating the student in all areas of suspected need,[37] and 8. not including parents in the group to determine the information needed in the initial evaluation.[38]

Second, districts cannot require parents to obtain their own medical diagnosis for special education eligibility.[39] However, districts are not obligated to obtain a medical diagnosis at public expense if a medical condition is not suspected. Conversely, of course, where a medical condition is suspected to negatively affect a student's performance, the district is obligated to obtain the medical diagnosis.[40] Further, under the Other Health Disorder (OHD) category, a district may not limit what is considered a qualifying medical condition. For example, districts cannot refuse to accept a medical diagnosis of fetal alcohol effects as evidence under the OHD criteria. Similarly, a medical diagnosis must be obtained to document eligibility under OHD.[41] As a side note, a medical diagnosis is not required, but can be used to determine, Section 504 eligibility.

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Relatedly, a district cannot justify not conducting an initial evaluation for an undue amount of time based on the student's limited English proficiency. Delaying the evaluation for up to three years to account for acquiring English was not a valid excuse.[42] In that case, MDE ordered the district to ensure its contracted alternative school did not wait more than 6 months before conducting a special education evaluation. Examples of where districts were found in compliance.[43]

SUMMARY

This chapter has reviewed the legal requirements for initial evaluations, the necessary formal process to determine and document a child's eligibility for special education services and to identify the child's needs arising from the disability. The review included the legal standards for notice, consent, content, timelines, and criteria and identified the new changes in this areas created by IDEIA 2004.

Further, this chapter highlighted particular legal trouble-spots in initial evaluations as shown by Minnesota special education complaints and hearings. Problems in this area included issues with completing a technically sound and complete evaluation within the required timelines and not involving parents in the eligibility decision. One other main concern related to districts requiring a medical diagnosis as a condition of eligibility determination.

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[1] Minn. R. 3525.2710, subpt. 3A
[2] See, e.g. 34 CFR §300.503
[3] 34 CFR §300.505
[4] Minn. Stat. §125A.091, subd. 5a
[5] Minn. Stat. §125A.091, subd. 5(b), Public Law 108-446, 20 USC 1412, §612 (A) (25).
[6] Public Law 108-446, 20 USC 1414, §614(a)(1)(D)(iii)
[7] Public Law 108-446, 20 USC 1414, §614 (a)(1)(E)
[8] 34 CFR §303.321
[9] 34 CFR §300.532, Minn. R. 3525.2710
[10] Public Law 108-446, 20 USC 1414, §614(b)(2)(a)
[11] Minnesota's criteria are found at: Minn. R. 3525.1325 (autism spectrum disorders); Minn. R. 3525.1327 (deaf blind); Minn. R. 3525.1329 (emotional or behavioral disorders); Minn. R. 3525.1331 (deaf and hard of hearing); Minn. R. 3525.1333; (developmental cognitive disability); Minn. R. 3525.1335 (other health disabilities); Minn. R. 3525.1337 (physically impaired); Minn. R. 3525.1339 (severely multiply impaired); Minn. R. 3525.1341 (specific learning disability); Minn. R. 3525.1343 (speech or language impairments); Minn. R. 3525.1345 (visually impaired); Minn. R. 3525.1348 (traumatic brain injury); Minn. R. 3525.1350 (early childhood special education)
[12] See www.education.state.mn.us/mde/Accountability_Programs/Compliance_and_Assistance/Special_Education_Monitoring/MNCIMP__TR/Criteria_Checklists/index.html
[13] 34 CFR 300.343(b)(2)
[14] 34 CFR 300.342(b)(1)(ii)
[15] 34 CFR 300.505
[16] Minnesota Department of Education Complaint Decisions 1846, 2027
[17] Minn. Stat. §125A.091, subd. 5

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[18] MDE has resources on Section 504 at:
http://education.state.mn.us/mde/Accountability_Programs/Compliance_and_Assistance/Section_504_of_the_Rehabilitation_Act/index.html
[19] Minn. R. 3525.3700-3750; 34 CFR §300.506
[20] 34 CFR §300.661-662
[21] Minn. Stat. §125.091, 34 CFR §300.507-511
[22] Minnesota Department of Education Complaint Decision 1562
[23] Minn. R. 3525.3700; Minnesota Department of Education Complaint Decision 1562
[24] Public Law 108-446, 20 USC 1412, §612(A)(25)
[25] Minn. Stat. §125A.091, subd. 5(b)
[26] Public Law 108-446, 20 USC 1414, §614(a)(1)(D)
[27] Public Law 108-446, 20 USC 1414, §614(a)(1)(B)
[28] Public Law 108-446, 20 USC 1414, §614(a)(1)(D)
[29] Public Law 108-446, 20 USC 1414, §614(a)(1)(E)
[30] Public Law 108-446, 20 USC 1414, §614(b)(2)(C)
[31] Minnesota Department of Education Complaint Decisions, 1326, 1508 (reevaluation), 2108, 2124, 2145
[32] Minnesota Department of Education Complaint Decisions 1615, 1897, 1997, 2034, 2145
[33] Minnesota Department of Education Complaint Decisions 1678, 1857, 1904
[34] Minnesota Department of Education Complaint Decisions 1971, 2124
[35] Minnesota Department of Education Complaint Decisions 1776, 1847
[36] Minnesota Department of Education Complaint Decision 1544
[37] Minnesota Department of Education Complaint Decisions 1826, 2131
[38] Minnesota Department of Education Complaint Decision 1826
[39] Minnesota Department of Education Complaint Decisions 2081, 2131
[40] Minnesota Department of Education Complaint Decision 1897
[41] Minnesota Department of Education Complaint Decision 1897; Minn. R. 3525.1335
[42] Minnesota Department of Education Complaint Decision 2132
[43] Minnesota Department of Education Complaint Decisions 1619, 1812, 2010, 2081, 2082

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PLACEMENT IN THE LEAST RESTRICTIVE ENVIRONMENT AND SIGNIFICANT CHANGES

INTRODUCTION

Once a student has been evaluated and determined eligible for special education services, important next steps include creating an Individualized Education Plan (IEP) and determining where the student will be placed to receive the services outlined in the IEP. These steps go hand in hand: it is difficult to determine what services the student will receive if the placement is not known and placing the student without having a full picture of the student's service needs will likely lead to programmatic problems.

This chapter is a guide of the legal steps and considerations in determining a student's placement in the Least Restrictive Environment (LRE). It includes a review of the necessary steps to complete the *initial placement* and important factors to consider in ensuring the appropriateness of *ongoing placements*, including *significant changes of placement.* Changes in placement resulting from *disciplinary actions* is also addressed.

The chapter also analyzes recent Minnesota complaint and hearing decisions, along with relevant state and federal laws, to show where legal violations have occurred and where they have been avoided. A description of the common consequences for violating the law and how problems may be avoided are also provided.

OVERVIEW

Minnesota's experience with LRE and placement considerations suggests the following main lessons:

★ LRE placement decisions generally involve five main considerations: notification, basing decisions on evaluations and IEPs, offering a continuum of services, ensuring a group decision, and consent and documentation.

★ Most often, problems with placement do not occur at the initial placement. Disputes are more likely to occur when changes in placement are proposed, made without notice and consent, or are necessary due to student issues.

★ LRE and placement complaints and hearings were spread across the age range of students but more frequently involved students with developmental cognitive disabilities, emotional or behavioral disorders and other health disabilities than students with other disability categories.

★ "Unilateral" decisions and changes by administrators and teachers to alter a student's schedule, withhold "mainstreaming" opportunities, or otherwise not

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including parents were frequent violations, especially where a student's time with non-disabled peers or amount of services is changed.

★ Imposing disciplinary consequences such as suspensions of more than 10 days (cumulatively or consecutively) and removals from scheduled "mainstreaming" opportunities can also result in a "change of placement" that requires notice and consent procedures.

★ Ensuring and documenting parental participation in meetings, placement decisions and considerations, and parental consent have avoided legal violations.

★ Violations have resulted in substantial and costly corrective action orders in the form of compensatory education for students, training of staff, additional meetings and planning, preparing memos to staff, and reimbursement of parental expenses, in addition to others.

PLACEMENT IN THE LRE

What is the LRE?
The LRE concept is basically the idea that students with disabilities are entitled to be educated with their non-disabled peers, unless a different educational placement is warranted and beneficial. This relatively simple concept has resulted in a multitude of legal requirements and complexities.

LRE Presumption
Minnesota and federal law creates a presumption that the LRE is in the regular education setting by requiring a different placement "only when the nature or severity of the disability is such that education in a regular educational program with the use of supplementary aids and services cannot be accomplished satisfactorily."[1] Furthermore, there must be an indication that the pupil will be better served outside of the regular program."[2] Consideration is also given to "any potential harmful effect on the child or on the quality of services" for the student.[3]

INITIAL PLACEMENT: FIVE MAIN CONSIDERATIONS

1. Notification:
The district must hold a meeting to develop an IEP and to determine placement "within 30-days" of the initial determination of eligibility.[4] The district informs the parent of this meeting and its intent to provide special education services with a formal notice to the parents. This notice, in addition to containing meeting details, must include information about the parent's rights and procedural safeguards.[5] Further, the Student's IEP must be implemented "as soon as possible" following this IEP meeting.[6]

Note that parent consent for the initial evaluation is not the same as parent consent for placement or initial provision of services. Separate parent written consent for placement and initial provision of services must be obtained prior to the district placing the student.[7]

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2. Base Placement on the Evaluation and IEP

Most importantly, the placement should be based on the student's unique needs as reflected in the evaluation and in the IEP. If the placement is not based on the IEP or on the current documented needs of the student as shown in the evaluation, a district may be found in violation.[8] Moreover, if IEP services and placement are based on a particular disability category or district policy, the IEP is not sufficiently individualized.[9] If the district is determined to have done an incomplete evaluation of the student's needs, it will have a difficult time establishing the appropriateness of placement.[10] "Any potential harmful effect" of the setting on the student and the quality of services are other required bases for the determination.[11]

In a policy letter dated November 23, 1994, the federal Office for Special Education Programs (OSEP) indicated that placement determinations cannot be based on the category or severity of the student's disability, the configuration of delivery system, the availability of services or space, or administrative convenience.[12]

3. A Continuum of Services, Starting with the Closest School

In considering the student's placement, the district must ensure that a continuum of options is discussed before arriving at a specific placement. A good starting point is to consider the school the student usually would attend and schools closest to the student. Requiring a medically frail student to be transported for 60-70 minutes to go less than 10 miles and having a commute of two hours per day (when a closer placement was possible) were both found to be violations.[13] Federal and state law require the placement to be as close as possible to the student's home, and is at the school the student would have been educated if the student was not disabled.[14]

Minnesota law specifies that the continuum must include "instruction in regular classes, special classes, special schools, home instruction, and instruction in schools and hospitals."[15] Consideration of the student's ability to access nonacademic and extracurricular offerings (including recess, meals, athletics, health services, counseling, and recreational activities) in the LRE must also occur.[16] If none of these instruction and activities options can provide FAPE to the student, a placement in a private or other public facility can be considered.[17] Presenting limited options to parents, or having little or no explanation of available options, will likely result in violations.[18]

Importantly, supplementary services and aids for a student to succeed in a regular education setting must be considered.[19] Indeed, a placement outside of the regular education setting cannot be made solely because of the lacked of needed modifications or personnel in that setting.[20]

4. Group Decision

Using the results and information included in the evaluation, a group of individuals, including the parents, makes the placement decision.[21] This group may be but is not necessarily the same people that are on the student's IEP team; the parents must be part of either group. Districts have been found in violation of this requirement by having a

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policy that sends all students with a disability to a particular school (regardless of individual needs)[22] or having a practice or policy that ties increased time with non-disabled peers on the student's behavior.[23]

An exception to the group requirement is if a county social service agency or a court places (or revokes placement of) a student, such as in residential facilities, for example. Where a county places a student, for example, in a district's residential program, and subsequently removes the student, the district has no obligation to inform the parents of the change or to follow due process procedures stemming from the change. The district, does, however, have to meet and discuss placement and service options for that student after the county removes the student.[24]

Once the group makes the placement decision and on the services needed by the student, an IEP is drafted and sent to the parents for their formal consent. The placement decision must be documented in the IEP must include an explanation of the extent to which the student is not participating with his or her non-disabled peers.[25] Failure to include this statement or failure to provide a reasonable explanation has lead to violations.[26]

5. Consent and Documentation

Documentation of parent involvement and consent to a placement in IEP meeting minutes and various types of due process forms will allow a district to escape findings of violations even if the parents claim that they signed even though they did not like it or felt they had no other options.[27]

The form of parental consent is important. Verbal consent is insufficient.[28] Similarly, "written" consent on an application from or other non-due process document will not establish a parent actually consented to a placement or a change through the IEP team process.[29] Documentation of written consent on IEP forms will insulate the district from findings of violations.[30]

ONGOING DETERMINATIONS AND SIGNIFICANT CHANGES

Ongoing Determinations

Following the initial determination, the student's placement must be revisited at least annually.[31] Failing to ensure the student's placement is appropriate on an annual basis will result in a violation.[32] While IEP team members might all agree informally or tacitly that the placement is appropriate, such an agreement must be documented on the IEP.

Placement determinations and legal requirements also apply to extended school year (ESY) services.[33]

Significant Changes

If the initial placement does not work out for the student, or if the student's needs change during the year, a change in placement may be required. What constitutes a "change is placement" is important because such a change requires notice to parents and parental consent prior to the change. Generally, minor modifications in a student's educational

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programming may be made without going through the IEP process or gaining the parents' consent. Similarly, if a student can receive the same services and has the same access to non-disabled peers in two different sites, there is no change in placement.

Importantly, the federal regulations seek to clarify that "specific day-to-day adjustments in instructional methods and approaches that are made by either a regular or special education teacher to assist a disabled child to achieve his or her annual goals would not normally require action by the child's IEP team," or included in Student's IEP.[34]

Minnesota law[35] and complaint decisions have defined what circumstances require IEP team action. These circumstances include: a modification that alters the provision or amount of services,[36] time with non-disabled peers,[37] the *type* of site or setting,[38] and where the student's IEP goals are completed or need to be changed.[39] A significant change in placement also occurs if the student's IEP team determines that a conditional procedure is needed for the student.[40] Again, a significant change in placement is important because it triggers notice and consent requirements *before* the change actually happens.[41]

The notice identifying the proposed change must include a copy of the IEP, must state that the district will not proceed with the change until written consent from the parents is received for initial placement and service provision or unless the parents provide written objection within 14 calendar days of the notice.[42] If districts are not aware of when a change in placement occurs, they risk making "unilateral" changes in placement, which are violations of law.[43]

Also, the withholding of a "mainstreaming" or regular education opportunity for disciplinary purposes by a teacher, principal or district staff can constitute a change in placement, if this action is not included in the IEP or recognized in a behavioral intervention plan as a planned, appropriate way of dealing with student behaviors.[44]

Note: The term "significant change in placement" is found in Minnesota, not federal, law and it seeks to provide guidance on when the notice and consent requirements are triggered.[45]

Changes in Placement: Discipline

Another type of change of placement can occur when a student is suspended/removed for 10 or more consecutive school days or when a student is suspended/removed for more than 10 cumulative days, where there is a "pattern" of removal.[46] A "pattern" exists depending on the length of each removal, the amount of time of removal, and the proximity between removals.[47] If there is this type of disciplinary change of placement, the district must conduct a functional behavioral assessment and implement a behavioral intervention plan. If an FBA and BIP already existed, the district must hold an IEP meeting to review the plan and revise it as needed to address the behavior.[48] An important question is what constitutes a removal. Under Minnesota law, a removal is any action by school staff member to prohibit a student from attending a class or activity period for up to five school days.[49] Attachment 1 to the federal regulations, which does is not codified

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or made a part of the federal IDEA regulations, but attempts to clarify IDEA's provisions, indicates that there would be a "removal" if the student is not "afforded the opportunity to continue to appropriately progress in the general curriculum, continue to receive the services specified on his or her IEP and continue to participate with nondisabled children to the extent they would have in their current placement."[50]

Moreover, the same Attachment #1 provides that "portions of a school day that a child had been suspended would be included in determining whether the child had been removed for more than 10 cumulative school days or subjected to a change of placement".[51]

While keeping a difficult special education student out of school following a suspension and providing him or her with services might seem like a good idea to minimize confrontation, prevent the recurrence of behavior, and to have an extended cooling off period, there can be numerous legal problems. Districts have been found in violation for not allowing the student to return to his previous placement from a homebound placement resulting from a disciplinary incident.[52] Homebound services are not likely to have any components for "mainstreaming" and thus violate the presumption of educating the student in the LRE. Often, the root of the issue stems from an incomplete IEP and an inappropriate placement. A meeting to review and revise the student's IEP, BIP, and/or placement is probably a good alternative to relying on the extended and continued provision of services through a homebound placement.[53]

One exception to the consent requirements is if a student has a weapon at school or at a school function or if the student "knowingly" has or uses illegal drugs or sells or solicits controlled substances at school or at a school function.[54] In this case, the district may unilaterally remove the student to an alternative interim educational setting (IAES) for up to 45 days.[55] The IDEIA changes in 2004 additionally allow such a removal where there is a "serious bodily injury."[56]

Another exception is if the district can prove to an independent hearing officer that 1. the student's current placement constitutes a substantial risk of injury to the student or to others; 2. the district made reasonable efforts to minimize the risk, and; 3. that the proposed alternative educational setting is appropriate.[57] If each of these elements are met, a hearing officer may remove the student. This exception is rarely used in Minnesota.

Summary of Changes in Placement

There are a number of situations that constitute a change in placement under state and federal law. Here is a list of them:

- ★ a modification that alters the provision or amount of services,
- ★ changes in time with non-disabled peers,
- ★ changes in the type of site or setting,
- ★ completed or out of date IEP goals,
- ★ IEP team determination that a conditional procedure is needed for the student

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- ★ graduation with a regular education diploma
- ★ suspension or removal of a student for more than 10 consecutive days
- ★ suspension or removal of a student for more than 10 cumulative days if there is a pattern

REVIEW OF LRE AND PLACEMENT COMPLAINTS

To determine where trouble-spots exist in Minnesota with LRE and placement situations, 25 special education complaints investigated by the Minnesota Department of Education (MDE) were reviewed between July 2001 and August 2004.

Students in these 25 complaints were fairly well distributed across the grade spectrum. Ten complaints involved students in grades PreK-5, six in grades 6-8, and nine in grades 9-12. This suggests that LRE and placement difficulties are prominent throughout a student's education.

For the students involved in these 25 complaints, the three most common disability categories were Developmental Cognitive Disorders, Emotional or Behavioral Disorder and Other Health Disabilities. Other common categories were Early Childhood Special Education and Autism Spectrum Disorders.

Overall, there were findings of violations in 19 of the 25 complaints, or 76%. In the six complaints were no violations were found because the districts properly documented parent consent,[58] parent participation,[59] or the placement decision in the IEP.[60]

Violations and Corrective Action

The most common violations concerned failing to provide required notice (8 complaints), unilateral changes by the district (7 complaints), significant change problems (4 complaints); and failing to include documentation of LRE in the IEP (3 complaints). Other violations included: failing to offer a continuum of placements, placing the student in the closest possible alternative resulting in lengthy bus rides, withholding mainstreaming opportunities, relying on improper forms of consent, and improperly continuing a homebound placement following a suspension. It should be noted that a violation of certain laws, for example, making a unilateral change in placement also form the basis for other violations, such as notice.

The most common corrective action ordered by the MDE included requiring the district to hold IEP meetings (6 of 19 complaints), training (6 of 19 complaints), and additional planning or review of programming (6 of 19 complaints). Compensatory education (e.g. make up services) was ordered in 5 complaints. The compensatory education awards are designed to remedy the violation for the student. The compensatory education plans were typically minimal and usually due to missed services caused by a change of placement.

Another frequently corrective action order included preparing a memo for distribution to staff (5 of 19 complaints). Other corrective action orders included: reimbursement to

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parents for transportation, conducting an evaluation, and informing other parents of problems that may have affected their children.

CONCLUSION

This chapter identified the five main LRE and placement legal considerations (notification, placement based on evaluation and IEP, continuum of services, group decision, and consent and documentation) and clarified that these considerations must be examined on an ongoing basis. Next, this chapter discussed what constitutes a significant change of placement in Minnesota, including changes of placement resulting from discipline. Finally, the chapter reviewed trends and patterns of legal problems occurring in Minnesota and noted the consequences of violations.

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[1] 34 CFR §300.550
[2] Minn. R. 3525.0400
[3] 34 CFR §300.552 (d)
[4] 34 CFR §300.343 (b)(2)
[5] 34 CFR §300.503, Minn. R. 3525.3600
[6] 34 CFR §300.342 (b)(1)(ii).
[7] Minn. R. 3525.2710, subpt. 1
[8] Minnesota Department of Education Complaint Decision 2012
[9] 34 CFR §300.340, Minn. R. 3525.2810, subpart 1(A); Minnesota Department of Education Complaint Decision 1760, 1973
[10] Minnesota Department of Education Complaint Decision 2013
[11] 34 CFR §300.552
[12] OSEP Memorandum 95-9, U.S. Department of Education, 21 IDELR 1152, November 23, 1994, available online, as of December 2005, at http://www.ibwebs.com/oseplre.htm
[13] Minnesota Department of Education Complaint Decisions 1745, 2005
[14] 34 CFR §300.552
[15] Minn. R. 3525.3010, subpt. 1
[16] Id.
[17] 34 CFR §300.349, 34 CFR §300.400-.403
[18] Minnesota Department of Education Complaint Decisions 1476, 1930, 2013
[19] Id.
[20] 34 CFR §300.552
[21] 34 CFR §300.552, Minn. R. 3525.3010
[22] Minnesota Department of Education Complaint Decision 1745
[23] Minnesota Department of Education Complaint Decision 1760
[24] Minnesota Department of Education Complaint Decision 1424
[25] 34 CFR §300.347
[26] Minnesota Department of Education Complaint Decision 1745, 1930, 2039
[27] Minnesota Department of Education Complaint Decisions 1402, 1662, 1816
[28] Minnesota Department of Education Complaint Decision 1536
[29] Minnesota Department of Education Complaint Decisions 1507, 1558, 1921
[30] Minnesota Department of Education Complaint Decisions 1526, 1466, 1816
[31] 34 CFR §300.552
[32] Minnesota Department of Education Complaint Decision 2039
[33] Minnesota Department of Education Complaint Decision 1930

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[34] *Federal Register,* Vol. 64, No. 48, at 12595 (March 12, 1999).
[35] Minn. R. 3525.0210, Subpt. 41
[36] Minn. R. 3525.0210, Subpt. 41, B and E; MDE Complaint Decision 1921, 2039
[37] Minn. R. 3525.0210, Subpt. 41, D; MDE Complaint Decision 1558, 1640, 2039
[38] Minn. R. 3525.0210, Subpt. 41, C; MDE Complaint Decision 1536
[39] Minn. R. 3525.0210, Subpt. 41, A
[40] Minn. R. 3525.0210, Subpt. 41, F
[41] Minn. R. 3525.3600, see also 34 CFR §300.503
[42] Id.
[43] Minnesota Department of Education Complaint Decisions 1640, 1921, 2012
[44] Minnesota Department of Education Complaint Decisions 1507, 1593
[45] Minn. R. 3525.0210, subpt. 41
[46] 34 CFR §300.519; Minnesota Department of Education Complaint Decision 1452
[47] Id.
[48] 34 CFR §300.520
[49] Minn. Stat. §121.60, subd. 1
[50] Attachment 1 to the IDEA regulations, page 12619
[51] Id.
[52] Minnesota Department of Education Complaint Decision 1513, 1567
[53] See Minnesota Department of Education Complaint Decision 1513, 1567
[54] 34 CFR §300.520
[55] Id.
[56] Public Law 108-446, 20 USC 1415, §615 (k)
[57] 34 CFR §300.521
[58] Minnesota Department of Education Complaint Decisions 1402, 1662, 1628
[59] Minnesota Department of Education Complaint Decision 1816
[60] Minnesota Department of Education Complaint Decisions 1526, 1466, 1816

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DEVELOPING IEPS IN MINNESOTA

INTRODUCTION[1]

An individual education plan (IEP) shows how a district plans to provide a free appropriate public education (FAPE) to a student.[2] The IEP must be reasonably calculated to provide the student with a meaningful education and must address the student's needs so that the student may benefit from the district's educational program.[3] An important FAPE concept is that the IEP must be sufficiently individualized to allow the particular student to progress – simply placing the student in a regular education environment without consideration or individual needs or supports is insufficient. Similarly, districts must consider adaptations and supports that would allow the student to be placed in a regular education environment before placing the student in a segregated class or setting.

Additionally, the duty to offer FAPE does not mean the district must provide the highest or maximum level of services. Instead, FAPE is a minimum standard and only directs the district to offer an appropriate education. Appropriateness is not specifically defined by federal or state law. Courts and administrative agencies determine whether a district has provided FAPE on a case-by-case basis and will look to many factors including whether the student is getting passing grades, advancing from grade to grade, and making progress on the IEP goals to determine FAPE.

This chapter includes: 1. four primary considerations for developing IEPs; 2. required IEP content areas; 3. consent and accessibility requirements, and; 4. a review of Minnesota complaint decisions to show where problems have existed with developing appropriate IEPs.

Note For Parentally Placed Private or Home Schooled Students:
IEPs also must be proposed to home-schooled and private school students with disabilities who reside in the district.[4] Parents are not required to accept the district's offer of IEP services.

PRIMARY CONSIDERATIONS

Prior to actually filling in the IEP, there are a number of important factors and requirements to meet: basing the IEP on the evaluation; keeping progress in mind; using draft IEPs, team requirements and membership; new changes in IDEIA 2004 on excusing members; and parent participation and notice.

Evaluation

The IEP must be premised on student needs, which are identified by and documented in evaluations, and should take into account the student's needs, strengths and present levels of performance.[5] Districts typically use standardized forms in creating IEPs.

Progress

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The IEP is a plan of services concerning the student's social, academic, functional, and behavioral needs and how the district proposes to assist the student to advance in or maintain these areas. Accordingly, it is important to think about how the evaluation and IEP can be used to:
1. identify a baseline of the student's status;
2. demonstrate how much and whether the student is progressing or maintaining skills;
3. have clear standards for determining how progress will be measured, reported on, discussed, and explained; and
4. document service delivery.

Draft IEPs

Draft IEPs are permitted if they are simply drafts for discussion and they should be labeled as such. A draft cannot represent the district's only or last offer. Parents must give written consent before the initial IEP is agreed upon and implemented.[6]

Team Requirements and Membership and Changes in 2004

The development of the IEP is an IEP team responsibility and it includes notice to the parents and having all required members at a meeting.[7] Failure to do so will result in a violation.[8]

The IEP team must include:
- Parents (or surrogate parents)
- at least one regular education teacher (if the student is or may be in the regular education environment),
- at least one special education teacher (or, where appropriate, one special education provider of the student),
- an administrative representative/designee (who is qualified to provide or supervise instruction for the student, is knowledgeable of the general curriculum, is knowledgeable about the resource availability of the district, and in Minnesota, the district representative must also have the ability to commit resources on behalf of the district),
- an individual who can interpret the evaluation,
- other individuals, at the discretion of the district or parent who have knowledge or expertise regarding the child, and
- when appropriate, the student. [9]

District staff may serve multiple roles on the IEP team.[10] This means that one district staff person can be, for example, a regular education teacher, an administrative representative, and an individual who can interpret evaluation results. It is important, however, to make sure someone is identified to fulfill each and every role at the IEP meeting. Failure to have the district representative at the meeting may invalidate the IEP.[11]

There may also be representatives from different agencies at an IEP meeting. For example, if a child is between the ages of 0-3 and is receiving some services from a non-school district organization, a representative from that organization could be present to

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coordinate the provision of services.[12] Also, if a child is 14 or older, a representative from a community organization might be at the meeting to coordinate transition services.[13]

Note on Early Childhood/IFSP Team Members
The membership for an IFSP team (for young children eligible for early childhood special education) is somewhat different than those on an IEP team. An IFSP team includes:[14]

- a parent or parents of the child;
- other family members, as requested by the parent, if feasible to do so;
- an advocate or person outside of the family, if the parent requests that the person participate;
- the service coordinator who has been working with the family since the initial referral, or who has been designated by the school to be responsible for implementation of the IFSP;
- a person or persons involved in conducting evaluations and assessments; and
- as appropriate, persons who will be providing services to the child or family.

The 2004 changes have new procedures for IEP teams. IEP team members may be excused if the parents and school agree and the member's relevant content area is not being changed.[15] If the content area is being changed, the member may be excused if that member sends a written report to the parent in advance and the parents agrees in writing.[16] IEP team meetings can occur by conference calls or videoconferences.[17]

Parent Participation and Notice
State and federal law recognize the importance parents play in the lives and education of their children. Accordingly, there are specific legal provisions requiring parental notice, consent, and participation. *Parental notice* is the responsibility of school districts to ensure parents are aware of educational and service decisions.[18] *Written parental consent* is required in many, but not all instances.[19] Notice and consent requirements, as well as provisions to ensure parents are informed of their rights and responsibilities and of their ability to participate in the special education process are all legal guarantees concerning how, when and where parents can be involved and informed.[20]

Once a child is determined eligible for special education services, the district must hold a meeting to develop an IEP and to determine placement "within 30-days."[21] The District must give the parent of this meeting and its intent to provide special education services. This notice, in addition to containing meeting details, must also include information about the parent's rights and procedural safeguards. [22] The notice must be provided to non-custodial parents as well.[23] The meeting to develop the IEP often happens right after a meeting to determine the student's eligibility for services.

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CREATING THE IEP

State and federal law mandate that IEPs have specific content.[24] These are listed and summarized next.

Present Levels of Performance (PLEP)

A PLEP is a summary of a child's strengths and needs derived from the Evaluation Summary Report and subsequent progress reports. PLEPs should identify specific student strengths and needs in academics, communication, functional skills, health and physical status, motor abilities, sensory status, social and emotional areas, behavior and transition (for students 14 and up in Minnesota). IDEIA 2004 emphasizes that PLEPs must include information on current academic achievement and functional performance.

Measurable Goals

IEP goals show what the student will be working on and working towards. These goals must be measurable to that progress may be determined and understood. Goals should be based on PLEPs, be the roadmap for providing FAPE and should contain information on: 1. Skills or behavior that need to change; 2. The direction of change (from present level to goal level); and 3. Evaluation criteria and procedures.

The new changes to the law in IDEIA 2004 remove short term objectives and benchmarks, which were typically used to show what steps students would be taking towards accomplishing the goals. These are no longer required elements, but they may voluntarily be included. *Importantly, as of January 2006, short-term objectives/benchmarks are still required under Minnesota law.*[25]

Least Restrictive Environment (LRE) Statement

The LRE is a presumption that children will be educated in their regular education classroom unless their needs require a different setting. The LRE *statement* on the IEP is to ensure that the IEP team properly considered why the student was placed in the chosen educational setting. Chapter 3 provides more information on LRE and placement.

Progress Reporting

To be able to measure progress towards a student's IEP goals and towards obtaining FAPE, it is vital for the IEP to specify how a student's progress will be measured and how and when progress will be reported to parents. Progress must be reported at least as often as it is for the child's non-disabled peers,[26] usually at common reporting periods. Progress refers specifically to progress made on the individual goals and objectives listed in the IEP. Meaningful progress reporting depends on solid and measurable goals as well as consistent and clear data collection and reporting.

Special Education and Related Services, supplementary aids and services, and program modifications or supports to allow the student to be involved and progress in the general curriculum

Special Education Services: These are services designed to address the unique needs resulting from the child's disability as documented in the IEP and ensure access to the

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general education curriculum. They include the necessary instructional adaptations to content, methodology or delivery of instruction. And, starting with the 2004 changes, the instruction must be based on peer-reviewed research to the extent possible.[27]

Related services: These consist of any specially designed service that enables a student to access and benefit from special education services. Related services can include, but are not limited to: transportation, counseling, psychological services, social work services, physical therapy, occupational therapy, recreational activities, and school health services (but not doctor provided medical services).

Typically, the amount and type of special education and related services those necessary to meet student needs so that the student can access FAPE. The determination of the type and amount of services are usually based on what other similar students have received in the past, but, of course, the exact amount and type of services must be tailored to the individual needs of the student. The determination of amount and type must be subject to progress reporting and review and revision to ensure their continuing appropriateness.

Direct and Indirect Services: In general, direct services are provided by a licensed teacher or related services provider to the student in the course of instruction. Indirect services, in contrast, are services that happen behind the scenes but are necessary for the student. For example, indirect services may include work by a range of district and non-district staff on progress reviews, planning, consultation, changes to the environment and/or materials, or monitoring.

Adaptations: The *adaptation* section of the IEP spells out the necessary *supplemental aids, services and supports* to enable children with disabilities to be educated with non-disabled children. State or federal law does not limit what adaptations can be provided. They should be developed and included on IEPs on an individual basis and can, for example consist of: seating arrangements, curriculum adaptations, modified homework, testing arrangements, large print books, modifying policies, one-to-one aides (paraprofessionals or educational assistants), etc. If paraprofessionals are needed, their specific duties must be included in the IEP.

Testing: Accommodations and Modifications to District and Statewide Assessments

Accommodations typically alter the conditions of a test or instruction, but do not change the substance of the test or instruction. Accommodations are more about access. Modifications typically change the substance of the test or instruction. A modification can change the level of required performance or the information tested.

States have a legal responsibility to test all children and report results. IEP teams determine if the student will take a standardized test and, if so, whether any accommodations or modifications are necessary. If the team determines that accommodations are necessary for the child to participate they must be designated and written in the IEP. If the team determines that a student cannot take the test, the determination must be noted and explained in the IEP, and an alternate assessment must be chosen and used. The appropriateness of the selected alternate assessment must also

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be documented in the IEP. More information about alternate assessments are available from the MDE.[28]

Importantly, IDEIA 2004 requires IEPs to include accommodations necessary to measure academic achievement and functional performance on district-wide and state-wide tests. The idea is to ensure that students with disabilities are provided with the supports necessary for them to participate in these tests.

Examples of district-wide tests include standard achievement tests, such as the Iowa Basic Skills Test and the Stanford Achievement Tests. They are designed to show student achievement and assess effectiveness of curriculum relative to national norms.

State-wide assessments and tests are school accountability tests, including the Minnesota Comprehensive Assessments (MCA) and the Minnesota Graduation Basic Standards Test (BST). The BSTs are intended to demonstrate basic skills expected of all high school graduates, unless the IEP (or Section 504) exempts students from these tests. Alternate assessments are required for exempted students.

Extended School Year (ESY)

ESY services are special education and related services that are provided to an eligible student during school breaks. ESY services differ from a student's IEP in that they are designed to help a student maintain skills over a specified period of time. ESY services are not designed to help a student make progress. The specific ESY services to be provided for each goal area are determined by the IEP team and must provided at no cost to parents. Transportation must be provided by the school if it is necessary to provide FAPE.

There must be an annual determination of ESY by the IEP team.[29] If the student is eligible for ESY, the student's IEP must include a statement concerning how the needs will be addressed during ESY programming.[30] To make the determination, the IEP team reviews data collected by the school over the year and decides if a student will be eligible for ESY services.

Data should also be collected over extended breaks such as winter and spring breaks or previous summers to determine what happens to the student's skill level before and after the break.

The student qualifies for ESY if the IEP team determines that:
1. The student will demonstrate "significant **regression**" during school breaks and the time for the student to regain lost skills ("**recoupment**") would be excessive once the school break is over; OR
2. The student would not reach their expected level of **self-sufficiency** as a result of the break in services; OR
3. ESY services are necessary to provide FAPE given the student's **unique needs**.[31]

Projected start date, anticipated frequency, location and duration of services

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This section of the IEP includes a list of specific services, when they will start, who will provide them, where they will be provided and in what amount. The services must be aligned with the IEP to ensure achievement of its goals. Appropriate services may include related services that do not have a specific academic focus.

Note about Methodologies and Service Providers
Methodologies are the techniques that the district uses to provide educational services. Some methodologies have specific names (like the Orton-Gillingham reading method) while others are combinations of different methods and do not have a specific name. Parents may want to request a specific methodology they are familiar with or with which the student has experienced success.

By law, however, districts generally may choose the service methodology and personnel to deliver and provide the services and thus do not need to include these specific choices on the IEP. The district may include these choices, but will be bound to them. So, while parents may request certain methodologies or personnel, the district is not obligated to meet these specific requests.

Transition
Transition services are designed to assist students to make a successful transition from the K-12 environment to post-secondary employment, education and living. IDEIA 2004 requires the transition section to include:

> "appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills … and the transition services (including courses of study) needed to assist the child in reaching these goals."[32]

In Minnesota, state law requires transition planning to begin at age 14 or when the student enters ninth grade,[33] not age 16 as stated by IDEIA 2004.[34] Minnesota may change this law to reflect the federal age for beginning transition, but until that happens, transition planning in Minnesota must be begin earlier.

Transfer of parental rights to the student when the student turns 18, unless a guardian or conservator has been appointed;
Students who turn 18 automatically are treated as "parents" and have decision making capacity under state law.[35] The IEP includes a statement indicating this. Rights will transfer unless the parent is appointed the student's legal guardian.

Documentation necessary to support use of conditional procedures
Some children have behavioral needs that require more significant planning and procedural protections. The interventions used to respond to these behavioral needs are called "conditional procedures," and they may include, for example: use of locked time out rooms, manual restraints (physical holds by one or more staff), mechanical restraints, and other aversive and deprivation procedures.[36] Minnesota law requires a number of steps prior to the use of conditional procedures to ensure they do not harm the student and are appropriate to their overall needs.

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To use these procedures, there must be an emergency situation (where people or property are threatened)[37] or there must be evaluation, preparation, and documentation prior to a "planned" use.[38] For the planned use there must be a functional behavioral assessment (FBA) and a determination that the IEP team has ruled out any other treatable cause for the behavior.[39] Further, there must be an identification of the frequency and severity of behavior and two positive interventions (and there effectiveness).[40] The conditional procedures must be documented in the IEP and based on PLEPs, needs, and goals and objectives.[41] Also, all school staff who may be called upon to use the conditional procedures must have access to the plan.[42]

Other conditions apply for use of conditional procedures in emergency situations, including requirements that: the conditional procedure must be the least intrusive one possible,[43] an IEP team meeting must be held if a conditional procedure is used twice in a month or more,[44]and same day notification if possible (or in writing within two days) of use of a conditional procedure.[45]

"Special Factors" and Individuality

The IEP team must also consider several "special" factors, including: the strengths of the student, concerns of parents, results of evaluations, and, student performance on statewide or districtwide assessments.[46] If a student is blind or visually impaired, the IEP must provide for instruction in Braille, unless it is inappropriate.[47] Failure to do so will result in a violation and corrective action.[48] Additionally, the team must consider:

- strategies (including positive behavioral interventions) to address the student's behavior if it impedes the student's learning or that of other students;
- the language needs of LEP/ELL students;
- the communication needs, especially for students who are deaf or hard of hearing; and;
- whether the student requires any assistive technology (AT).[49]

The changes in 2004 clarify that the IEP team must conduct a review of the student's academic, developmental, and functional needs and must consider any necessary positive behavioral supports.

LAST STEPS: CONSENT AND ACCESSIBILITY

Once the IEP team agrees on the IEP contents and there is agreement about where the student will be placed for services, all that remains is consent. Initial special education services cannot begin with this consent. A form is almost always used to request written parent consent. It should be noted that while typically the IEP team determines both IEP content and placement, federal and state laws allow the placement decision to be made separately by a group of individuals, including the parents.

Finally, the agreed-upon IEP must be "accessible to each regular education teacher, special education teacher, related service provider, and other service provider who is responsible for its implementation."[50]

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REVIEW OF IEP DEVELOPMENT COMPLAINTS

The review of IEP complaints consists of two parts. First, 32 complaints with "content" statement violations were reviewed to determine which content violations were most likely to occur. Second, a full review of 43 complaints with allegations concerning development and review of IEPs was performed.

Districts have been found in violation for a failure to incorporate evaluation information,[51] consider communication needs,[52] address behavioral concerns,[53] and assess student needs or lack of expected progress.[54] For example, a violation was found where the student repeated did not avail himself of IEP services; the district was required to at least hold a meeting to determine why this occurred and whether changes to the IEP should be made.[55] Also, if goals and objectives remain an IEP remains unchanged over years, violations will be found.[56] Moreover, if IEP services and placement are based on a particular disability category or district policy, the MDE will determine the IEP is not sufficiently individualized and find a violation.[57]

Content Violations

By far, the most common statement violation was the failure to include an adequate statement on progress reporting. There were 21 violations of this legal provision. These violations included failure to include all parts of requirements (e.g. the IEP stated when, but not how, progress reports would occur or did not say how parents would be informed). Seven violations concerned a failure to include necessary related services, modifications or accommodations, or paraprofessional duties. Other violations included: failure to include measurable goal, a transition plan, an "LRE statement" and a failure to address all the student's needs.

The second most common violation concerned a failure to include necessary related services, modifications or accommodations, or paraprofessional duties. Combined, there were 7 violations of these provisions. There were four instances each of a failure to include measurable goals or a transition plan. For example, goals and accommodations that are vague and do not oblige the district to implement them have been found in violation.[58] Additional violations occurred for a failure to include an "LRE statement" and to address all the student's needs.

Full Review

To determine where schools have encountered problems and successes in their IEP development duties, 43 special education complaints investigated by the Minnesota Department of Education were reviewed between August 2002 and October 2004. Complaints tended to occur at transition times in the student's education. For example, 12 complaints involved students in grades 6-7 and seven complaints involved students in 12th grade or above. The three most common disability categories were Emotional Behavioral Disorder, Specific Learning Disorder, and Developmental Cognitive Disorders.

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Violations and Corrective Action
There were findings of violations in 35 of the 43 complaints. The most common violations concerned failing to review and revise IEPs when student negative behavior increased, the student failed to make expected progress or when the student's anticipated needs were not addressed.[59] The second most common violation was the failure to conduct annual IEP reviews.[60]

The third most common violation was the failure of the IEP to contain "special factors" such as assistive technology needs,[61] Braille services,[62] supplementary aids and services,[63] positive behavior interventions,[64] needs reflected by the evaluation,[65] and where there was not enough specificity in certain statements.[66]

A problem commonly associated with having an inappropriate IEP is a due process violation of suspension and removal provisions[67] or use of non-planned and non-emergency conditional procedures.[68] A student appears more likely to misbehave or violate school policy if the IEP services, provision of services, and/or placement is not working out. This makes sense, if a student's special education needs are not being met, the student may act out because of lack of necessary supports, frustration, or because of new needs.

The most common corrective action ordered by the MDE included requiring the district conduct training (20), compensatory education (16), conducting an IEE, evaluation or FBA (11), hold IEP meetings (7), review district policies (6), review files (5), and various other actions, including notifying parents of problems and rights (5), increasing student monitoring (3), proposing an IEP (3). Additionally, the MDE re-captured funds in one complaint.[69]

The rate of compensatory education orders is noteworthy. In over half of the complaints where violations were found, compensatory education was awarded. This suggests the failures to review and revise IEPs resulted in a denial of FAPE that needed to be remedied by compensatory education. Adding to the overall seriousness of violations, training was even more often ordered.

Strategies to Avoid Problems: Lessons from "No Violation Cases"
The main strategy revealed by the "no violations" cases is thorough monitoring of student needs throughout the course of the year.[70] In the eight complaints were no violations were found, the district properly documented IEP meetings, evidence of monitoring student progress, diligent record keeping, and comprehensive and complete IEPs. Had the district appropriately monitored student progress, needs and behavior, it is likely those districts would avoided over 18 complaints and costly corrective action. A secondary strategy is to ensure complete documentation in IEPs. Having clear documentation would have prevented most of the "statement" and "content" violations.

SUMMARY
The creation of appropriate IEPs is a crucial step in the special education process. The IEP should be based on the evaluation and should serve as the means to provide FAPE. It

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should also serve as a way to develop a baseline of the student's progress and track the progress over the year with measure-able data and indicators.

IEP development can be divided into four steps: ensuring parental notice and IEP team membership; including required content statements; including special factors; and obtaining parent consent and providing access to the IEP. While IEPs must be developed to offer FAPE, there is also a duty to review and revise the IEP when and if the student's needs change during the school year.

A review of the relevant laws, complaint decisions and hearing decisions reveals the following main lessons:

- ★ There are four main steps involved in developing an IEP: having a full IEP team; including the necessary "statements" of IEP content; considering special factors (such as behavioral concerns) and student's uniqueness; and ensuring accessibility of IEP to service providers.
- ★ After the IEP is developed, districts must take necessary steps to review and revise the IEP at least annually and must continuously monitor student progress and behavior to review and revise the IEP as warranted.
- ★ The IEP content standard that most often violated is progress reporting. Failures to include necessary accommodations/modifications, measurable goals, and transition were also common violations. Content standard violations were often the "tip of the iceberg" of more substantial and serious violations.
- ★ In complaints were no violations were found, the district properly documented IEP meetings, evidence of monitoring student progress, diligent record keeping, and comprehensive and complete IEPs.
- ★ Complaints tended to occur at transition times in the student's education; and the three most common disability categories were EBD, SLD, and DCD.
- ★ The most common violations concerned failing to review and revise IEPs when student negative behavior increased, the student failed to make expected progress or when the student's anticipated needs were not concerned.
- ★ Other common violations included the failure to conduct annual IEP reviews and the failure of the IEP to contain "special factors" such as assistive technology needs and positive behavior interventions.
- ★ Violations of removal and conditional procedures standards were commonly associated with having an inappropriately developed or reviewed IEP.
- ★ Training, compensatory education and ordering an evaluation were the most commonly awarded corrective action orders.

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[1] This section is based in part on and adapted from Arc's GetSet Parent Training Curriculum.
[2] *See Board of Education v. Rowley,* 458 U.S. 176 (1982)
[3] Id.
[4] Minnesota Department of Education Complaint 1965
[5] 34 CFR §300.346; Minn. R. 3525.2810
[6] 34 CFR §300.505
[7] 34 CFR §300.503, 34 CFR §300.343, 34 CFR §300.344
[8] Minnesota Department of Education Complaint Decisions 1849, 1931
[9] Minn. R. 3525.2810, subpart 1B.

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[10] See Appendix A to the Federal Regulations, Response to Question 22, p. 12447
[11] Minnesota Department of Education Complaint Decision 1741
[12] 34 CFR §303.343
[13] 34 CFR §300.344 (c)
[14] 34 CFR §303.343
[15] 614(d)(1)(C)(i)
[16] 614(d)(1)(C)(ii)
[17] 614(f)
[18] 34 CFR §300.503, 34 CFR §300.504; Minn. R. 3525.3600
[19] 34 CFR §300.505
[20] 34 CFR §300.345, 34 CFR §300.501, 34 CFR §300.503, 34 CFR §300.504
[21] 34 CFR §300.343
[22] 34 CFR §300.503, 34 CFR §300.504
[23] Minnesota Department of Education Complaint Decision 2076
[24] Minn. R. 3525.2810, 34 CFR §300.346, 34 CFR §300.347
[25] Minn. R. 3525.2810
[26] 34 CFR §300.347(a)(7)
[27] Public Law 108-446, 20 USC 1414, §614(d)(1)(A)(i)
[28] See the MDE website at: education.state.mn.us/mde/Learning_Support/Special_Education/Evaluation_Program_Planning_Supports/Statewide_Assessment_for_Students_Disabilities/index.html
[29] Minn. R. 3525.0755, subpart 3
[30] 34 CFR 300.346 (c);Minn. R. 3525.2810, subpart 2C.
[31] Minn. R. 3525.0755
[32] Public Law 108-446, 20 USC 1414, §614(d)(1)(A)(i)(VIII)
[33] Minn. R. 3525.2900
[34] Public Law 108-446, 20 USC 1414, §614(d)(1)(A)(i)(VIII)
[35] 34 CFR §300.517
[36] Minn. R. 3525.2900
[37] Minn. R. 3525.0210, subpt. 17
[38] Id.
[39] Minn. R. 3525.2710, subd. 4
[40] Minn. R. 3525.2900
[41] Id.
[42] 34 CFR §300.342(b)
[43] Minn. R. 3525.0210, subpt. 17
[44] Minn. R. 3525.2900
[45] 2005 Special Session, Chapter 5, Art. 3
[46] 34 CFR 300.346 (a);Minn. R. 3525.2810, subpart 2A
[47] 34 CFR 300.346 (a); Minn. R. 3525.2810, subpart 2A.
[48] Minnesota Department of Education Complaint Decision 1998
[49] 34 CFR 300.346 (a); Minn. R. 3525.2810, subpart 2B.
[50] 34 CFR §300.342 (b)(2).
[51] Minnesota Department of Education Complaint Decisions 1640, 1727, 1973, 2004, 2012, 2040
[52] Minnesota Department of Education Complaint Decision 1727
[53] Minnesota Department of Education Complaint Decisions 1711, 1770, 1776, 1860, 1876, 1885, 1909, 1931, 1977, 2024, 2040
[54] Minnesota Department of Education Complaint Decisions 1745, 1786, 1823, 1845, 1937
[55] Minnesota Department of Education Complaint Decision 1885
[56] Minnesota Department of Education Complaint Decision 1998
[57] 34 CFR §300.340, Minn. R. 3525.2810, subpart 1(A); Minnesota Department of Education Complaint Decision 1745, 1760, 1973
[58] Minnesota Department of Education Complaint Decision 1727
[59] Minnesota Department of Education Complaint Decisions 1711, 1727, 1745, 1770, 1776, 1786, 1823, 1845, 1860, 1878, 1885, 1886, 1909, 1937, 1973, 1977, 2040,

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[60] Minnesota Department of Education Complaint Decisions 1874, 1876, 1886, 1951, 1965, 1988, 2004, 2008, 2024
[61] Minnesota Department of Education Complaint Decision 2007
[62] Minnesota Department of Education Complaint Decision 1998
[63] Minnesota Department of Education Complaint Decision 1741
[64] Minnesota Department of Education Complaint Decisions 1741, 1931
[65] Minnesota Department of Education Complaint Decisions 2012, 2029
[66] Minnesota Department of Education Complaint Decisions 1727, 1909
[67] Minnesota Department of Education Complaint Decisions 1507, 1711, 1760, 1878, 1909, 2024
[68] Minnesota Department of Education Complaint Decisions 1760, 1770, 1776, 1860, 1876
[69] Minnesota Department of Education Complaint Decision 2008
[70] Minnesota Department of Education Complaint Decisions 1805, 1816, 1929, 1958

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IEP Implementation and Review

INTRODUCTION

The federal legal provision on the implementation of IEPs issue is straightforward; it provides that the district must "provide special education and related services to a child with a disability in accordance with the child's IEP."[1] The district must also make a "good faith effort" to help the child achieve his or her IEP goals.[2] Basically, if a service, adaptation, or responsibility appears on the IEP, the district must implement it as written. Of course, it is important and necessary to base the IEP on a comprehensive evaluation and an appropriately developed IEP as well as to review and revise the IEP when necessary.

This chapter reviews this basic responsibility to implement IEPs, the ongoing duty to review and revise the IEP, and trouble-spots revealed by Minnesota Department of Education special education complaint decisions.

IEP IMPLEMENTATION

While basic, the responsibility to implement an IEP as written is broad and covers just about everything on the IEP from providing transportation and related services to progress reporting and adaptations or modifications for the student. If an IEP team chooses to list services provided by other agencies, for example, county provided day treatment services, the IEP must clearly state the county is responsible for implementing those services. If the IEP does not specify which entity is supposed to provide the services, it is assumed the district is responsible and will be held in violation if the services are not provided.[3]

Similarly, districts are typically free to choose which educational strategy or methodology to use. If, however, the district includes these particulars in the IEP, it must follow them or later seek parental consent to use different approaches.[4] There may be situations where it is wise or necessary to include a particular approach, but including these specifics should be only written into the IEP with a clear rationale and an understanding that parental approval is needed to change the IEP. For example, an IEP that states that modifications or adaptations will be implemented "when necessary" or "where appropriate" was found to be in violation for not providing sufficient specificity to parents, staff, or the student; such language provides no guidelines or background of why it is included, for what specific reasons, or for when exactly it is to be used.

MDE has provided additional guidance on the implementation of IEP in complaint decisions and when the district is not strictly bound to the terms of the IEP. For example, MDE stated:

> The amount of weekly service documented on a student's IEP represents an average to be provided over the term of the IEP. The actual amount of service may vary due to student absences, school schedule changes, school holidays, or provider absences.

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> An IEP is not a contract that guarantees the provision of services with the exact number of minutes indicated. Minutes of service are normally treated as estimates over the term of the IEP. There are many reasons why the exact number of minutes are not provided: field trips, student absence, teacher absence, emergency school cancellations, etc. School districts typically are not required to make-up for services that are not provided for such reasons.[5]

Similarly, the district is excused from implementing the IEP

> In the event that school is not in session as a result of a holiday or emergency, the District is not responsible to provide make-up services for any special education and related services the Student may have missed on that day.
>
> In addition, if the Student is absent or participates in an extracurricular activity during the time school is in session, the District is not responsible to provide make-up services for any special education related services the Student may have missed on that day.[6]

Additionally, the IEP must be specific enough to give parents and staff sufficient understanding of when and how IEP provisions are to be implemented and how they will enable the student to advance toward IEP goals, be involved in the regular education curriculum and be educated with non-disabled peers.[7]

IEP IMPLEMENTATION: REVIEW AND REVISION

The District must review and revise, as appropriate, the IEP "not less than annually." [8] Failure to conduct the annual review will result in violations.[9] There is also a responsibility to review and revise the IEP if there is a lack of expected progress, new evaluation or other information about the student, a change in the student's anticipated needs, or "other matters."[10] Most commonly, districts have been found in violation where a student's behavior changes during the year and no IEP meeting was held to address the appropriateness of the IEP.

Reviewing and revising IEPs is particularly important to ensure the educational program is consistent with the student's needs. The failure to have an appropriate and up-to-date may be traced to further, more substantial problems such as disciplinary incidents, decline in attendance, lower student motivation, and, importantly, decreased academic performance in class, IEP goals, and standardized tests.[11]

ANALYSIS OF COMPLAINTS

So in what specific areas (e.g. service minutes, adaptations, related services) have there been problems with regard to IEP implementation? How has compliance been demonstrated? And, what can prevent allegations? The next section examines these questions by reviewing 50 complaint decisions with implementation failure issues. These decisions should constitute a fairly representative sample of the types of allegations in this area and demonstrate various trends and patterns.

Overall, the MDE found violations in 27 of the 50 decisions or 54%. The violations ranged in type and severity. For example, there were 13 instances where the MDE determined the district or charter school did not provide the required number of service minutes specified in the IEP.[12] This suggests problems with having the required staff

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members to provide the services, scheduling issues, lack of clarity in the IEP or misunderstanding between districts and parents, or a student's program slipping through the cracks.

There were 12 times where the MDE found the district or charter school did not provide adaptations listed in the IEP.[13] Several of the violations related to the weekly provision of a notebook, progress report or checklist to parents. The source of these problems may be in districts agreeing to provisions (such as weekly reporting) that are time consuming, administratively difficult, and/or not necessary for the student.

The third main type of violation was a failure to provide the required progress reports.[14] While the IEP may have contained the required elements of progress reporting (how progress will be measured toward each goal, how the parents will be informed of progress, and the extent to which the student is likely to achieve the goals at the end of the year[15]), the district must also actually provide the full progress reports. Failure to do so constitutes a failure to implement the IEP.

Overall, whether implementation violations resulted from simple poor implementation, a lack of service providers, or for some other reason is hard to determine from the complaint decisions. However, some violations seemed to stem from problems in transportation,[16] unilateral changes without parental involvement,[17] inconsistent provision of adaptations,[18] poor follow through by the case manager or teacher,[19] losing the student in the system,[20] and not having enough or the right staff.[21]

Demonstrating Compliance

Districts and charter schools were able to demonstrate compliance in three main ways. First, most often, schools produced documentation or evidence of compliance with phone and personal logs, service provider records, IEP meeting documentation, written progress reports, student schedules, staff records of providing adaptations, and having complete due process files for the complaint investigator.[22]

Second, schools also showed legal compliance by having IEP meetings to address problems and taking steps to stop them from recurring and by constantly monitoring the student and making efforts to address problems.[23] Third, districts were able to show that they continued to offer services or "stood ready" to provide FAPE even though the parent or student did not avail themselves of services.[24] However, it should be noted that if a student is not attending classes or accessing services, the district must at least inquire why and take steps to get the student to class and services. In other words, it is not enough to only offer services, the district must also determine strategies to enable the student to access services.

MDE also determined that the district was in compliance when the alleged violations did not have a basis in the IEP[25] or when another service provider was responsible to deliver services.[26]

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CONCLUSION

Districts mainly had difficulties in providing the required number of service minutes or providing adaptations listed on the IEP. These problems may be avoided by monitoring service and adaptation provision and holding IEP meetings to review and revise IEP contents when needed. It is likely that if parents are aware of problems and the district is actively working on them, parents may not resort to filling a complaint or a request for a due process hearing.

Another common violation was the failure to provide progress reports. Progress reports can be crucial in determination and communicating how well the student is doing in school and whether there are any noteworthy problems or changes. Proper progress reporting serves to inform the parents but also can serve to provide schools with the information they need to make necessary revisions and changes in accordance with the student's evolving needs.

Districts have demonstrated compliance with clearly drafted IEPs, "standing ready" to provide services where students and parents fail to avail themselves of the services, and with creating and maintaining documentation of its efforts to provide services, monitor student progress, contact parents, and hold meetings to address problems.

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[1] 34 CFR §300.350 (a)(1)
[2] 34 CFR §300.350 (a)(2)
[3] Minnesota Department of Education Complaint Decision 1517
[4] Minnesota Department of Education Complaint Decision 2021
[5]Minnesota Department of Education Decisions 1307, 1374, 1466
[6] Id.
[7] 34 CFR §300.347 (a)(3)
[8] 34 CFR 300.343 (c); Minn. R. 3525.2810, subpart 3.
[9] Minnesota Department of Education Complaint Decisions 1874, 1886, 1929, 1965,1988, 2008
[10]34 CFR 300.343 (c); Minn. R. 3525.2810, subpart 3.
[11] See, e.g. Minnesota Department of Education Complaint Decisions 1014, 1019, 1856, 1919, 2101, 2169, Hearings 189, 282, 418
[12] Minnesota Department of Education Complaint Decisions 1905, 1912, 1936, 1977, 1960, 1996, 2006, 2019, 2031, 2036, 2040, 2046, 2078
[13] Minnesota Department of Education Complaint Decisions 1906, 1909, 1912, 1922, 1931, 1979, 1990, 1996, 2017, 2007, 2027, 2030
[14] Minnesota Department of Education Complaint Decisions 1921, 1923, 1990, 2008
[15] 34 CFR §300.347 (a)(7)
[16] Minnesota Department of Education Complaint Decisions 2036, 2046
[17] Minnesota Department of Education Complaint Decisions 1905, 2031
[18] Minnesota Department of Education Complaint Decisions 1906, 1909, 1922
[19] Minnesota Department of Education Complaint Decisions 1923, 1990
[20] Minnesota Department of Education Complaint Decisions 1912, 1977
[21] Minnesota Department of Education Complaint Decisions 1999, 1960, 2040, 2078
[22]Minnesota Department of Education Complaint Decisions 1911, 1934, 1935, 1942, 1947, 1950, 1954, 1972, 1981, 1983, 1991, 2003, 2010, 2011, 2014, 2021, 2033, 2039, 2045
[23] Minnesota Department of Education Complaint Decisions 1927, 1934
[24] Minnesota Department of Education Complaint Decisions 2011, 2038
[25] Minnesota Department of Education Complaint Decision 1947
[26] Minnesota Department of Education Complaint Decision 1978

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Reevaluations and Non-Initial Evaluations

INTRODUCTION

This chapter provides an overview of reevaluations and other non-initial evaluations in Minnesota. Reevaluations are covered first, with a review of new standards created by IDEIA 2004 and of when they must be conducted, the process with which they must comply and when they must be considered by IEP teams. Next, other types of non-initial evaluations in Minnesota are described and discussed. Problem areas revealed by Minnesota legal decisions are discussed.

REEVALUATIONS

New Standards for Reevaluations

Until recently, federal and state standards for conducting reevaluations of students with disabilities were relatively barebones: a reevaluation must be completed at least every three years, if a teacher or parent requests, or if conditions warrant. The recent 2004 amendments to the IDEA provide more specificity to these standards in three aspects.

First, reevaluations are not to occur more than once a year, unless the parent and the district agree. Second, the three-year requirement may be waived upon agreement of the parent and the districts. And, third, a reevaluation must be completed if the district determines the educational or related service needs, including improved academic achievement and functional performance of the child, warrant reevaluation. These new provisions took effect in July 2005; and federal regulations, which are currently being developed, may further specify these requirements.

When Reevaluations Must Occur

There are three basic situations when a reevaluation must be conducted: a reevaluation must be completed at least every three years, if a teacher or parent requests, or if conditions warrant.

Every Three Years

Prior to the 2004 changes, there was a clear obligation for districts to complete reevaluations every three years. In complaint decisions, the MDE held districts to this standard and found violations if the timeline is missed by a month[1] or more,[2] but where the reevaluation was only late by 16 days, no violation was found.[3] Similarly, where the reevaluation is not conducted within 30 days of receiving parental consent, a violation will be found.[4]

Districts may wish to develop a parent consent/agreement form for IEP teams to use to document a waiver of the 3-year standard under the 2004 amendments.

Parent or Teacher Request

A district may have to conduct a reevaluation before three years if a teacher or parent requests. There are no specific standards regulating how much time the district has to respond to a parent request. In absence of a specific standard, the MDE uses a

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reasonableness standard to determine compliance.[5] MDE has determined that delays of one month or two months may be justified where the district is actively making efforts to request.[6] Longer delays have been acceptable.[7] However, even a one-month delay may not be justified if it appears the district would not have acted unless it was given information from outside the district.[8] Delays of four or more months have not been justified.[9]

Upon parent request to conduct a reevaluation, the district may accept the request and conduct the reevaluation or may refuse the request, inform the parent in writing why the request was refused and engage in dispute resolution options to address the issue.[10] If the district accepts the requests, it must propose a reevaluation plan and obtain parental consent. Following consent, it must complete the reevaluation within 30 days.[11] An IEP team can also mutually agree to a reevaluation.[12]

Warranting Conditions
Prior to the 2004 changes, a reevaluation must be conducted before the three year period expires if conditions warrant. MDE complaint decisions show that conditions warrant a reevaluation if there is a substantial, unexplained or continual negative change in a student's academic or behavior, or if there is a new medical diagnosis or event.

The 2004 changes (requiring a reevaluation if the district determines that "educational or related service needs, including improved academic achievement and functional performance of the child warrant reevaluation) provide a bit more specificity in what constitutes warranting conditions and appear to be consistent with MDE's interpretations under the old federal law.

REEVALUATION PROCESS

Reevaluations must be conducted under the same standards as initial evaluations. In summary:

> The district must provide notice to the parents of the reevaluation and describe the reevaluation in a plan presented to the parents.[13] Parent consent must be obtained prior to starting the reevaluation, unless the district can demonstrate it has taken reasonable measures to obtain consent and the parent has failed to respond.[14] Once parent consent is received or the district demonstrated reasonable measures, the district must complete the reevaluation within 30 school days and must provide a copy of the final evaluation report to the parents within that same 30 day period.[15] The reevaluation must follow all requirements concerning non-discrimination, comprehensiveness, adequacy, and proper procedures and personnel.[16]

When Reevaluations Must Be Considered

There are a number of situations in which reevaluations must be considered or must be completed. Most commonly, any reevaluations must be considered when the IEP team is periodically reviewing and revising an IEP.[17] The reevaluation can provide additional

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information in developing appropriate IEP goals, teaching strategies or behavioral approaches.

Reevaluations also come into play with regard to transition. By age 16, the reevaluation must include transition needs to postsecondary education and training, employment, and community living.[18] This transition evaluation must also conform to the basic evaluation standards noted above.

Finally, if a student appears to be no longer eligible for special education services and the district, parent, or IEP team seeks a formal exit from special education services, a reevaluation must be conducted to document eligibility for special education.[19]

OTHER NON-INITIAL EVALUATIONS

Minnesota law requires specialized evaluations to occur in a number of other circumstances. For example, the need for "additional evaluation" must be considered after the second use of an emergency intervention in a month[20] and there must be "an evaluation to determine whether seclusion is contraindicated for psychological or physical health reasons" if the district proposes to use time out rooms.[21] Additionally, prior to the use of planned conditional procedures, the IEP team must identify the frequency and severity of behavior, two positive interventions, and design and implement interventions based on the IEP.[22]

Additionally, under federal law, functional behavioral assessments must also be conducted and considered when a student is removed for more than 10 days.[23]

SUMMARY

This chapter has (1) reviewed the recent 2004 changes to reevaluation standards; (2) described when reevaluations must occur; (3) provided an overview of the reevaluation process; (4) examined when reevaluations must be considered; (5) identified when other non-initial evaluations must be considered or completed; and (6) noted throughout where districts have run into trouble with reevaluations.

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[1] Minnesota Department of Education Complaint Decisions 1165, 2056
[2] Minnesota Department of Education Complaint Decisions 1790, 1878
[3] Minnesota Department of Education Complaint Decision 1924
[4] Id.
[5] Minnesota Department of Education Complaint Decisions 1468, 1486, 1663, 1667, 1812, 1685, 1974
[6] Minnesota Department of Education Complaint Decisions 1468 (two months with planning and meeting and incorporating parent requests), 1486 (one month where efforts to find evaluator took place), 1685 (less than one month), 1812 (less than one month), 1974 (2 months with many student absences)
[7] Minnesota Department of Education Complaint Decisions 1926 (3 months with hospitalization and other evaluations)
[8] Minnesota Department of Education Complaint Decision 1685 (where district action depended on outside providers (if no response, district may not have acted)
[9] Minnesota Department of Education Complaint Decisions 1424 (3 months), 1594 (six months), 1620 (4 months), 1663 (one to two months where incorrect phone number), 1667(ten months)

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[10] 34 CFR §300.505
[11] Minn. R. 3525.2550
[12] Minnesota Department of Education Complaint Decision 1640
[13] Minn. R. 3525.2710
[14] Minn. R. 3525.2710, subpt. 4
[15] Minn. R. 3525.2550; Minn. R. 3525.2710, subpt. 6.
[16] Minn. R. 3525.2710
[17] 34 CFR § 300.343
[18] Minn. R. 3525.2900, subpt. 4
[19] Minn. R.34 CFR § 300.534
[20] Minn. R.3525.2900, subpt. 5C
[21] Minn. R.3525.2900, subpt. 5D
[22] Minn. R.3525.2900, subpt. 5A
[23] 34 CFR § 300.520

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Termination and Reinstatement of Services

INTRODUCTION

This chapter first addresses the debate in Minnesota over competing standards of termination and then discusses the four main legal avenues to terminate special education services to students with disabilities.

Each of these avenues triggers different legal responsibilities for districts and this chapter report reviews these responsibilities and identifies where problems have occurred in Minnesota. Reinstatement of terminated services is also discussed.

STANDARD FOR TERMINATION

There is some debate in Minnesota about the standard for termination of services. First, a recent due process hearing decision, which was appealed to and affirmed by a Minnesota Court of Appeals "unpublished" or non-precedential decision, indicate that the student must meet continuously meet eligibility criteria to access services.[1] Second, however, in contrast, a letter from the Minnesota Department of Education indicates that during a reevaluation

> the team must determine if the child continues to be a child with a disability and continues to need special education. That is the standard. It is not necessary for the child to meet initial eligibility criteria in order to continue to receive services. This standard assures that children with disabilities will not be excluded from necessary special education and related services as a result of progress that stems from the provision of those services." [2]

In support of its position this letter refers to 34 CFR §300.533, which requires an IEP team to identify data needed to determine "**whether the child continues to have such a disability**" and **whether the child continues to need special education and related services."**[3] This regulation, however, only discusses evaluation and reevaluation *requirements*, not the *standard* for concluding whether a student is still eligible for services. It is unclear how a student can be eligible for services without being a child with a disability under state eligibility criteria. MDE has long followed its interpretation in complaint decisions.[4] For example, in one complaint decision, the MDE indicated the district was responsible for reinstating a student who had been terminated from services but had academic needs, even over the district's objection that the student no longer met eligibility criteria.[5]

Because the Minnesota Court of Appeals decision, which affirmed the hearing decision, is "unpublished," it does not have the weight of precedent, meaning that it only applies to the individual case it resolved. Accordingly, MDE may possibly continue to require only "continuing need." As of December 2005 when this publication went to press, MDE has not publicly indicated which standard it is applying in its complaint decision.

TERMINATION OF SERVICES

There are four main ways that a special education student can stop receiving special education services:

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1. a parent can deny or withdraw consent for services or may remove the student from the district;
2. an IEP team can determine the student is no longer eligible for services;
3. the student graduates with a regular education diploma or a special education diploma; and
4. the student may "age out" of service eligibility.

Parent Refusal

One way a student may stop receiving services (or not get them in the first place) is for the parent to deny consent to services or withdraw consent for services. This can typically occur at the initial evaluation or initial provision of services. Parents may decide to withhold consent.[6] Similarly, after the student has been receiving services, the parent may entirely withdraw consent to provide services. In response the district may engage in dispute resolution options, including mediation or conciliation.[7] If these efforts fail, the district may **not** seek an order from a due process hearing officer to overrule the parent's denial of consent.[8]

Additionally, parents may remove students from a district and place them in a non-public school or chose to home school them. Parents may also place students in another school district or a charter school in an effort to avoid special education services. In each situation, the public school districts where the student resides still must engage in child find efforts to determine if the students potentially need special education services.[9]

IEP Team Agreement

A second way for the student to stop receiving services is for the student's IEP team to conclude the student no longer needs or is no longer eligible for services.[10] This only applies if the student has not graduated with a special education diploma or if the student has not "aged out."[11] Federal law spells out the process. First, a reevaluation must be conducted to determine whether the student "is no longer a child with a disability."[12] Next, because the United States Office for Civil Rights has indicated that the termination of a child's special education services constitutes a change of placement, the district must provide written notice to the parent, hold an IEP meeting, and before exiting the student ensure that the IEP team decided to terminate services.[13] If a student no longer meets or does not meet eligibility criteria, the student may still be eligible for services under Section 504[14] and nothing prevents a district from providing academic or other support services to students if they have needs.

If there is a dispute over continued eligibility at the IEP team level or if the parents disagree with the reevaluation or change of placement, the district may request a hearing to end special education services. For example, a recent hearing decision shows a district's successful attempt to terminate services through a due process hearing.[15] If the district follows the correct procedures and includes the parent in each step, it will escape violations.[16] Failure to do so will result in a violation and possibly compensatory education.[17] Also, termination of services must be premised on the student's needs, not where the parent and student wish to attend school in the district.[18]

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In sum, for services to be terminated by an IEP team, the district must: 1. conduct a reevaluation;[19] 2. the reevaluation must show the student is no longer a student with a disability based on eligibility criteria;[20] 3. the parents must be notified in writing that the district seeks to change the student's placement by terminating services;[21] 4. the district must hold an IEP team meeting to discuss the change in placement,[22] and; 5. the IEP team must agree to the termination of services.[23] If the team does not agree, the district must pursue conciliation, mediation, or seek a due process hearing to terminate services.[24]

Graduation

There are two alternatives of graduation options, with a regular education diploma or with a "special education" diploma.

First, if special education students meet state and district graduation requirements, they are entitled to a regular education diploma.[25] Once they meet these requirements, they are no longer eligible for special education services.[26] If a student is expected to receive a regular education diploma and graduate, this graduation is a change of placement and requires notice to parents.[27] Additionally, an IEP team meeting must be held and the team must agree to the change in placement.[28] The new IDEA 2004 clarifies that an evaluation is not required when a student graduates with a regular education diploma, but the district must provide "a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals." [29]

It should also be noted that some students will turn 18 around the time they and their peers may graduate. This is important since parental rights transfer to the student at age 18, unless a guardian has been appointed.[30] If the student obtains parental rights, the district must provide all notices to the student and seek consent from the student.[31]

If a district simply issues a regular education diploma without following the procedures, it may be liable for compensatory education. The parents may contest the legality and appropriateness of the issuance of the diploma and force the district to provide compensatory education[32] or be responsible for a post-graduation remedy.[33]

In a 2004 due process hearing, a hearing officer reviewed an allegation that the district did not evaluate the student for special education services but instead tried to serve the student with Section 504 services and through the student's attendance in an alternative program.[34] The hearing took place shortly before the student's class graduation, and finding in favor of the student, the hearing officer ordered the student's IEP team to "consider how the student may participate" in the graduation ceremony, such as by receiving a blank piece of paper while walking with his peers in the ceremony.[35] The district refused to do so, arguing the order allowed the team to not allow the student to participate. The district also disputed MDE's attempt to enforce the hearing officer's decision. Finally, the parents filed a lawsuit in federal court and succeeded[36]; the student eventually participated in the ceremony.

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Special education students can also graduate with a special education diploma. The terms "special education diploma" or "IEP diploma" do not appear in federal or state law. If the IEP team determines the regular education diploma route is not appropriate, the IEP team can agree to the student graduating upon meeting IEP goals.[37] Once the student achieves this, the student is entitled to receive the identical type of diploma that other students do.[38]

Aging Out

A fourth way for a student to no longer receive services is "aging out" or exceeding the age limitation in state and federal law. Federal law allows states to set the upper age limit for special education students to receive services.[39] Minnesota has chosen to permit students to potentially receive services "from birth until July 1 after the child with a disability becomes 21 years old."[40] Students may not receive services up to this limit if any of the three options discussed above apply. The new IDEA 2004 clarifies that an evaluation is not required when a student ages out, but the district must provide "a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals."[41]

REINSTATEMENT OF SERVICES

Current Minnesota law[42] allows districts, under certain circumstances, to reinstate special education services to students within one year of the termination of servcies.[43] A student's IEP team would presumably make this decision. If there is an evaluation less than 3 years old, the district is not required to conduct a new evaluation or document and implement two pre-referral interventions before reinstating services.[44]

Declining academic performance following termination of services is one reason to reinstate services.[45] A district will also stay in compliance even if subsequent to a termination of services, the student shows a decline in academics but the parent refuses reinstatement, provided that the district takes steps to offer services or supports.[46]

SUMMARY

This chapter has covered the last step in the special education process. It has reviewed the debate in Minnesota over the standard for terminating services (continued need or meeting eligibility criteria) and discussed the four main avenues services may be terminated (parent refusal, IEP team determination, graduation, and aging out.) Each of the avenues trigger different legal requirements. Additionally, this chapter reviewed the process for reinstating services and Minnesota legal decisions regarding the termination of services.

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[1] Minnesota Department of Education Hearing Decision #582, Minnesota Court of Appeals, A04-1615, *In the Matter of Chisago Lakes School District, Independent School District No. 2144, and J.D.*, 5/24/05.
[2] Minnesota Department of Education Letter, Dated September 21, 2004.
http://education.state.mn.us/content/085479.pdf
[3] Id.
[4] Minnesota Department of Education Complaint Decisions 1052, 1352
[5] Minnesota Department of Education Complaint Decision 1352

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[6] 34 CFR §300.505 requires a district to obtain consent prior to conducting the initial evaluation or a reevaluation and prior to the initial provision of services.
[7] 34 CFR §300.505 (b)
[8] Minn. Stat. §125A.091, subd. 5a
[9] 34 CFR §300.125
[10] Minnesota Department of Education Complaint Decision 1098
[11] 34 CFR §300.534
[12] 34 CFR §300.534 (c)(1)
[13] OSEP letter to Hagen-Gilden, 24 IDELR 294.
[14] Section 504 is a federal anti-discrimination law that requires districts to ensure students with physical or mental impairments that substantially limit a student's major life activity (such as learning, walking, seeing, etc.) have equal access to the district's offerings. Section 504 may require the district to provide supports and services that may look similar to special education.
[15] Minnesota Department of Education Hearing Decision 582
[16] Minnesota Department of Education Complaint Decision 1098, 1924
[17] Minnesota Department of Education Complaint Decision 1052, 1089, 1352
[18] Minnesota Department of Education Complaint Decision 1458
[19] 34 CFR §300.534
[20] 34 CFR §300.534, Minnesota Department of Education Hearing Decision 582
[21] OSEP letter to Hagen-Gilden, 24 IDELR 294; 34 CFR §300.503
[22] Id.
[23] Id.
[24] 34 CFR §300.505
[25] 34 CFR §300.122 (a)(3)(i); Minn. Stat. §120B.02; Minn. R. 3501.0010, et.seq.
[26] Id.
[27] 34 CFR §300.122 (a)(3)(iii); 34 CFR §300.503
[28] OSEP letter to Hagen-Gilden, 24 IDELR 294; 34 CFR §300.503
[29] Public Law 108-446, 20 USC 1414, §614 (c)(5)(b)
[30] 34 CFR §300.517
[31] 34 CFR §300.517, Minnesota Department of Education Complaint Decision 2040
[32] Minnesota Department of Education Complaint Decision 2040
[33] Minnesota Department of Education Complaint Decision 1874; Hearing Decision 337
[34] Minnesota Department of Education Hearing Decision 577
[35] Id.
[36] Olson v. Robbinsdale, Civil Case No. 04-2707
[37] Minn. Stat. §125A.04
[38] Id.
[39] 34 CFR §300.122
[40] Minnesota Statute §125A.03 (b); see also MDE Letter to Krumm, dated April 27, 2001
[41] Public Law 108-446, 20 USC 1414, §614 (c)(5)(b)
[42] Previously, Minn. R .3525.1356 specified the circumstances when termination would occur. Minn. R. 3525.1356 was repealed in 2000
[43] Minn. R. 3525.3100
[44] Id.
[45] Minnesota Department of Education Complaint Decision 1352
[46] Minnesota Department of Education Complaint Decision 1098

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