

STUDENT RIGHTS:

A handbook to the Educational Rights of Students with Disabilities in Montana

DISABILITY RIGHTS MONTANA

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I. INTRODUCTION

Welcome to Disability Rights Montana’s (DRM) Special Education Handbook. We designed this handbook to help parents, advocates, and educators learn about the legal requirements and resources available for students with disabilities and to help ensure the rights of people with disabilities are protected to the maximum extent of the law. The handbook allows you to jump right into areas we think you may find important, and is written so that you do not need a legal background. However, if you want a “how to read the law” primer, please see the “conducting additional research” section. DRM also maintains a companion website to this Handbook, which contains additional resources and information. You can find our special education website through our main site at www.disabilityrightsmt.org.

In the following pages and on our website you will find information about DRM’s education workgroup, education law, resources for parents, students and educators, and sample forms to assist parents and advocates in protecting student’s rights. We have also included information about private educational evaluators and attorneys who handle special education matters in Montana for parents when DRM cannot take a case.

It is our hope that this handbook will be a valuable resource for those involved in helping every Montanan access education. We welcome feedback and comments for how we can improve this handbook and our website as well as information about resources and practitioners we should include. As always, if you have questions about information in this handbook, please feel free to [contact](#) DRM. We are often busy handling cases, but we will do our best to get back to you in a timely manner.

II. SPECIAL EDUCATION LAW OVERVIEW

a. SPECIAL EDUCATION ALPHABET SOUP

Special education, like many technical fields, is filled with acronyms, abbreviations and definitions. Throughout this discussion, we try to minimize the use of acronyms, define acronyms we do use, and provide definitions as much as possible. There are many other acronyms, abbreviations, and definitions used in special education. An excellent explanation of these acronyms, abbreviations, and definitions may be found at the Technical Assistance for Excellence in Special Education Center for Persons with Disabilities at Utah State University at http://www.taese.org/cms/images/utahstate_media/documents/resources/EducatorandParentPrimerAcronyms.pdf. The first acronym you need to know is IDEA, which stands for the Individuals with Disabilities Education Act, the primary federal law governing special education.

i. “School district” and state educational agencies

We have used the terms school or school district in this discussion because that is most often where IDEA is applied. However, IDEA applies in other contexts such as juvenile correctional facilities or state operated residential facilities. IDEA typically uses the term local educational

agency (LEA) to refer to a school district or its equivalent.² A state educational agency (SEA) is the state level agency with primary responsibility for supervising public elementary and secondary schools in the state.³ In Montana, the SEA is the Office of Public Instruction (OPI). It is important to note that the obligations under IDEA fall on the school district as a whole, not just the individual school, like a middle or elementary school.

b. LAWS THAT PROVIDE PROTECTION TO PERSONS WITH DISABILITIES IN PUBLIC K-12 EDUCATION

There are three key federal laws that provide specific protection and rights to students with disabilities in public K-12 education. They are (1) the **Individuals with Disabilities Education Act (IDEA)**; (2) **Section 504 of the Rehabilitation Act of 1973 (Section 504)**⁴; and (3) the **Americans with Disabilities Act (ADA)** (primarily Title II of the Act).⁵ Additionally, each of these laws are implemented in U.S. states and territories through local laws and regulations. You should always check your local laws and regulations because they may provide protections beyond the federal law.

Section 504 and Title II of the Americans with Disabilities Education Act (ADA), which both prohibit discrimination on the bases of disability. Section 504 applies to federally funded programs, including public schools. Title II of the ADA applies to any state or local government services, regardless of whether they receive federal funds, including public schools.

Additionally, two other federal laws often come into play in special education cases. They are the **McKinney-Vento Homeless Assistance Act (McKinney-Vento)**⁶ and the **Family Educational Rights and Privacy Act (FERPA)**⁷. McKinney-Vento provides certain protections to students that are homeless, and aims to ensure continuity of education even when a child moves from one school district to another. Information about McKinney-Vento may be found at the National Law Center on Homelessness and Poverty, Youth and Education Resources site at https://www.nlchp.org/youth_resources.

FERPA protects the confidentiality of educational records and a student's right to access those records in elementary, secondary, and higher education. The U.S. Department of Education's Family Policy Compliance Office enforces FERPA and the **Protection of Pupil Rights Amendment (PPRA)**,⁸ which restricts schools from asking students for information about certain protected areas such as political affiliations and religious practices. Information about FERPA and PPRA can be found at the Family Policy Compliance Office's website, <http://familypolicy.ed.gov/>.

² See 20 U.S.C. § 1401(19) (2016).

³ 20 U.S.C. § 1401(32).

⁴ 29 U.S.C. § 794.

⁵ 42 U.S.C. § 12101–213. Title II begins at 42 U.S.C. § 12131.

⁶ 42 U.S.C. § 11431–11435.

⁷ 20 U.S.C. § 1232g.

⁸ 20 U.S.C. § 1232h.

Other federal, state, and local laws or regulations provide protection to students based on other protected classes, such as race, color, religion, sex or national origin, may also apply. Those include the **Equal Educational Opportunities Act (EEOA)**,⁹ the **Civil Rights Act of 1964**¹⁰ (particularly Title VI), and **Title IX of the Educational Amendments Act of 1972**.¹¹

III. IDEA – OVERVIEW

IDEA is primarily a funding law, meaning that it provides a mechanism for the federal government to provide money to states to deliver special education services. In exchange for receiving this money, states agree to comply with all of the rules and regulations in IDEA, which are described in more detail later.

IDEA is divided into five parts:

Part A – General provisions

Part B – Special education for school aged children (3 to 21)

Part C – Early intervention for children under age 3

Part D – Systemic activities to improve education of children with disabilities

Part E – National Center for Education Research (Special Education Research Center)

This discussion is focused primarily on Part B, which is the most significant part for school-aged children and provides for the Individualized Education Program (IEP). IDEA Part B is described in great detail in the pages that follow.

IV. IDEA PART C – EARLY INTERVENTION FOR INFANTS AND TODDLERS

IDEA Part C provides for early intervention services for infants up to age three. Part C services are not obtained through the school system, they are administered by the Montana Department of Public Health and Human Services (DPHHS) and delivered through a Part C provider. You can find your local Part C provider in Montana at <http://dphhs.mt.gov/dsd/developmentaldisabilities/PartC-EarlyInt/aboutpartc>. You may also be able to get help from your county or tribal health department. A list of the county and tribal health departments in Montana may be found at <https://dphhs.mt.gov/publichealth/FCSS/countytribalhealthdepts>.

The purposes of Part C include: early identification of children with developmental disabilities to minimize the potential for delay, the need for special education, and enhancing family

⁹ 20 U.S.C. § 1701–58.

¹⁰ 42 U.S.C. §2000d–2000d-7.

¹¹ 20 U.S.C. §1681–88.

capacity to meet the needs of infants and toddlers with disabilities.¹² Part C focuses on services delivered in the child’s home and in community settings, rather than in schools, and emphasizes family involvement. Part C services could include occupational, speech, and physical therapy; parent training; social work; transportation; and many other services.

The child’s present levels of development, needs, and the services she will receive are all described in an Individual Family Service Plan (IFSP). The Part C provider and the parent form a team to develop an IFSP for a child eligible for services under Part C.¹³

If you are concerned that your child may not be developing typically, get help now. Do not delay. Call your pediatrician and your local Head Start office and discuss your concerns. The earlier your infant or toddler gets help, the better.

V. **IDEA PART B – SPECIAL EDUCATION AND RELATED SERVICES FOR SCHOOL AGED CHILDREN**

a. **SPECIAL EDUCATION AT ITS CORE**

IDEA Part B provides special education and related services to children in K-12 education, from age 3 through 21.¹⁴ IDEA’s key elements can be summarized as follows: every eligible child is entitled to a **free appropriate public education (FAPE)**, in the **least restrictive environment (LRE)**, provided according to an **Individualized Education Program (IEP)**, and subject to the parent’s and student’s rights to certain **procedural protections**.¹⁵

b. **ELIGIBILITY**

There are three main components to eligibility for services under IDEA. (i) the student must meet the age and residency requirements that all students need to meet to attend the public school; (ii) the student must not have already earned a regular high school diploma; (iii); and the student must meet the definition of a “child with a disability” under IDEA.

i. **The student must meet the age and residency requirements**

In order to enroll in public school in Montana, the student must generally be a **resident of the district** and meet the age requirement discussed below. However, **in order to be eligible for services under IDEA, the child does not have to actually be attending school**. IDEA requires school districts to serve children who reside in the district, **even if they are suspended, expelled, or not attending at all**.¹⁶ There are certain exceptions that allow a student to attend an out-of-district placement.

¹² 20 U.S.C. § 1431(a); *See also Early Intervention* (Part C of IDEA), <http://www.wrightslaw.com/info/ei.index.htm>.

¹³ 20 U.S.C. §§ 1435–36.

¹⁴ 20 U.S.C. § 1412(a)(1)(A).

¹⁵ *See* 20 U.S.C. § 1412.

¹⁶ 20 U.S.C. § 1412(a)(1)(A).

Montana currently operates under an exception that does not require school districts to educate youth through age 21. Each Montana school district may decide for itself if it will provide services beyond age 18 to all students with disabilities or under special circumstances.

In Montana, a youth can be enrolled for a particular school year if he is not yet 19 on or before September 10th of that school year. However, Montana law does allow a school district to adopt a policy allowing older youth to seek a special exception from the local school board permitting the youth to attend school beyond the age cut-off.¹⁷

If you think your child will need to attend school beyond age 18, you should request a special exception from your school board as early as possible, to give the school board adequate time to make a decision. If the school denies your request, ask in writing for a copy of all policies, documents, and other information they used to make their decision.

ii. **The student must not have earned a regular high school diploma**

Generally, children are not eligible for special education and related services once they have graduated from high school with a **regular high school diploma**.¹⁸ A regular high school diploma is one that is “fully aligned with the state’s academic standards.”¹⁹ A child who has not been awarded a **regular high school diploma** may still be eligible for services.²⁰ However, even when a student on an IEP graduates with a regular diploma, the school district must still provide the student with “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.”²¹

iii. **The student must meet the definition of a “child with a disability” under IDEA**

The term “child with a disability” is a “term of art” under IDEA. That means that the term has a specific meaning defined by law, which is different from the plain definition of the words in common usage. Under IDEA as implemented in Montana, **the term “child with a disability” has two components:** (1) the child’s disability is within at least one of the categories defined by law; and (2) the disability adversely affects the child’s educational performance such that she needs “special education” as that term is defined in IDEA (discussed below).²²

¹⁷ Mont. Code Ann. § 20-5-101; A.R.M. § 10.16.3122(3).

¹⁸ 34 C.F.R. § 300.102(a)(3)(i).

¹⁹ 34 C.F.R. § 300.102(a)(3)(iv).

²⁰ 34 C.F.R. § 300.102(a)(3)(ii).

²¹ 34 C.F.R. § 300.305(e)(3).

²² A.R.M. § 10.16.3007.

1. *The child's disability is within at least one of the categories defined by law*

The child's disability must fit into one of the categories defined under the IDEA and Montana regulations. The IDEA and Montana regulations define the categories slightly differently. **However, do not get caught up in the definitions. If you suspect your child has one of these disabilities, you should request an evaluation in writing. It is the school's responsibility to evaluate the child and to determine whether he meets any of the criteria for services under IDEA. Your child's pediatrician, psychologist, or other medical or mental health professional may be able to help you determine whether your child meets any of these criteria as well.**

The disability categories under IDEA are defined in [34 C.F.R. § 300.8\(c\)](#). Each one of the categories defined under IDEA has specific criteria which the student must meet in order to qualify under the particular category. The criteria are specified in state law or regulation.

If you are in Montana, you should follow the Montana definitions found at [A.R.M. §§ 10.16.3010 through 10.16.3022](#). The categories in Montana include **developmental delay** (age 3-5), **autism**, **cognitive delay**, **deaf-blindness**, **deafness**, **emotional disturbance**, **hearing impairment**, **orthopedic impairment**, **other health impairment**, **specific learning disability**, **speech-language impairment**, **traumatic brain injury**, or **visual impairment**. The checklists that OPI has developed for schools to use in determining eligibility under each category are available at: <http://opi.mt.gov/pdf/SpecED/Forms/CriteriaChcklst.pdf>.

Although these definitions are lengthy, we wanted to give you an opportunity to read the relevant criteria as they are written in the law. We have bolded certain phrases to assist with ease of reading. The acronyms for certain disabilities are not official, but are commonly used. The criteria for each of the Montana categories are as follows:²³

Developmental delay (age 3–5) (DD)

10.16.3010 CRITERIA FOR IDENTIFICATION OF A CHILD AGED THREE THROUGH FIVE HAVING A DEVELOPMENTAL DELAY

(1) A student may be identified as having a developmental delay if the student is:

- (a) three, four, or five years old; and
- (b) functions at a developmental level two or more standard deviations below the norm in any one area of development or 1.5 standard deviations below the norm in two or more of the following areas:
 - (i) cognitive development;

²³ A.R.M. § 10.16.3010–3022.

- (ii) physical development;
- (iii) communication development;
- (iv) social and emotional development; or
- (v) adaptive functioning skills.

Autism (AU)

10.16.3011 CRITERIA FOR IDENTIFICATION OF STUDENT AS HAVING AUTISM

(1) The student may be identified as having autism if documentation supports the existence of a developmental disability that was generally evident **before the student was three years of age** and if the **student has communication difficulties in verbal and nonverbal communication and social interaction.**

(2) Assessments shall document the presence of significant delays in verbal and nonverbal communication and social interaction.

(a) Significant delays in verbal communication are manifested by **at least one** of the following:

- (i) delay in, or total lack of, the development of spoken language (not accompanied by an attempt to compensate through alternative modes of communication such as gesture or mime);
- (ii) in students with adequate speech, marked impairment in the ability to initiate or sustain a conversation with others.

(b) Significant delays in nonverbal communication are manifested by a marked impairment in the use of multiple nonverbal behaviors such as eye to eye gaze, facial expression, body postures, or gestures to regulate social interaction.

(c) Significant delays in social interaction are manifested by **at least one** of the following:

- (i) failure to develop peer relationships appropriate to developmental levels;
- (ii) lack of spontaneous seeking to share enjoyment, interests, or achievements with other people (e.g., lack of showing, bringing or pointing out objects of interest);
- (iii) lack of social or emotional reciprocity;
- (iv) lack of varied, spontaneous, make-believe play or social imitative play appropriate to developmental level.

(3) Other characteristics often associated with autism may include restricted, repetitive and stereotyped patterns of behavior, interests and activities, as manifested by one or more of the following:

- (a) Encompassing preoccupation with one or more stereotyped and restricted patterns of interest that is abnormal either in intensity or focus;
 - (b) Apparently inflexible adherence to specific nonfunctional routines or rituals;
 - (c) Stereotyped and repetitive motor mannerisms (e.g., hand or finger flapping or twisting, or complex whole-body movements);
 - (d) Persistent preoccupation with parts of objects.
- (4) A student who manifests the characteristics of autism **after age three could** be identified as having autism if the criteria in (2) and (3) are met.
- (5) The student may not be identified as having autism if the student's educational performance is adversely affected primarily because the student has an emotional disturbance.

Cognitive Delay (CD)

10.16.3012 CRITERIA FOR IDENTIFICATION OF STUDENT AS HAVING COGNITIVE DELAY

- (1) The student may be identified as having cognitive delay if the student has a significantly subaverage general intellectual functioning and corresponding deficits in adaptive behavior and educational performance, especially in the area of application of basic academic skills in daily life activities.
- (2) "General intellectual functioning" means performance on a standardized intelligence test that measures general cognitive ability rather than one limited facet of ability.
- (a) "Significantly subaverage general intellectual functioning" is defined as two or more standard deviations below the population mean on a standardized intelligence test. Error in test measurement requires clinical judgment for students who score near two standard deviations below the mean.
 - (b) The presence of subaverage general intellectual functioning must occur during the developmental period defined as the period of time between conception and the 18th birthday.
- (3) Deficits in adaptive behavior is defined as significant limitations in the student's effectiveness in meeting the standards of personal independence, interpersonal communication, and social responsibility expected for the student's age/grade peers and cultural group as measured by standardized instruments or professionally recognized scales.

Deaf-Blindness

10.16.3013 CRITERIA FOR IDENTIFICATION OF STUDENT AS HAVING DEAF-BLINDNESS

- (1) The student may be identified as having deaf-blindness if documentation supports that the student:
- (a) meets the criteria in ARM 10.16.3022 for visual impairment;
 - (b) meets the criteria in ARM 10.16.3020 for speech-language impairment;
 - (c) meets the criteria in ARM 10.16.3016 for hearing impairment or in ARM 10.16.3014 for deafness; and
 - (d) is experiencing severe delays in communication and other developmental and educational skills such that services designed solely for students with deafness or for students with blindness would not meet the student's educational needs.

Deafness

10.16.3014 CRITERIA FOR IDENTIFICATION OF STUDENT AS HAVING DEAFNESS

- (1) The student may be identified as having deafness if an audiological report documents that hearing loss is so severe that the student is impaired in processing linguistic information, with or without amplification, to the extent that prevents the auditory channel from being the primary mode of learning speech and language.
- (2) The student's educational performance is adversely affected as documented by specific examples. The results and analysis of a current assessment of language development as measured by standardized tests or professionally recognized scales appropriate to age level and administered individually is required to show an impairment in processing linguistic information prior to identification.

Emotional Disturbance (ED)

10.16.3015 CRITERIA FOR IDENTIFICATION OF STUDENT AS HAVING EMOTIONAL DISTURBANCE²⁴

- (1) The student may be identified as having emotional disturbance if a condition which includes **one or more** of the following characteristics is present:
- (a) an inability to build or maintain satisfactory relationships with peers and teachers;
 - (b) inappropriate types of behavior or feelings under normal circumstances including behaviors which are psychotic or bizarre in nature or behaviors which are atypical and for which no observable reason exists;

²⁴ Please note: ADD/ADHD is classified in the Other Health Impairment category (OHI).

- (c) a general, pervasive mood of unhappiness or depression including major depression and dysthymia but excluding normal grief reactions;
- (d) a tendency to develop physical symptoms or fears associated with personal or school problems including separation anxiety, avoidant disorder and overanxious disorder;
- (e) schizophrenia.

(2) For each of the conditions in (1), the condition shall meet the criteria of having been present to a marked degree, over a long period of time and adversely affecting the student's educational performance.

- (3) The student may be identified as having emotional disturbance when:
- (a) the student has been observed in more than one setting within the educational environment; and
 - (b) the local educational agency has planned and implemented one or more positive behavioral interventions specific to the individual student. Interventions shall not unnecessarily delay appropriate identification when it can be shown through a student's social or developmental history, compiled directly from the student's parents or from records when the parents are not available, the existence of characteristics that clearly identify emotional disturbance.

(4) The student **may not** be identified as having emotional disturbance if delays in educational performance are primarily due to visual impairment, hearing impairment, orthopedic impairment, cognitive delay, health factors, or limited educational opportunity.

(5) Common disciplinary problems may exist in conjunction with emotional disturbance, but cannot be used as the sole criteria for determining the existence of an emotional disturbance.

(6) The term emotional disturbance does not apply to students who are socially maladjusted, unless it is determined that they meet the criteria herein for emotional disturbance.

Hearing Impairment

10.16.3016 CRITERIA FOR IDENTIFICATION OF STUDENT AS HAVING HEARING IMPAIRMENT

(1) The student may be identified as having a hearing impairment if an audiological report documents that the student has a permanent hearing loss in excess of 20 dB better ear average in the speech range (500, 1,000, 2,000 Hz), unaided, or has a history of fluctuating hearing loss which has interrupted the normal acquisition of speech and language and continues to adversely affect educational performance.

Orthopedic Impairment

10.16.3017 CRITERIA FOR IDENTIFICATION OF STUDENT AS HAVING ORTHOPEDIC IMPAIRMENT

- (1) The student may be identified as having orthopedic impairment if:
 - (a) the student is diagnosed by a qualified medical practitioner as having an orthopedic impairment;
 - (b) the impairment is severe; and
 - (c) the impairment adversely affects the student's educational performance.
- (2) The term orthopedic impairment includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g., poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

Other health Impairment (OHI)

Note that the **other health impairment category is a “catch all”** meaning that disabilities that may not fit directly into the other disability categories, may meet the definition of OHI and allow the child to be qualified for services.

10.16.3018 CRITERIA FOR IDENTIFICATION OF STUDENT AS HAVING OTHER HEALTH IMPAIRMENT

- (1) The student may be identified as having other health impairment if:
 - (a) the student has limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems such as **asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, or Tourette syndrome;** and
 - (b) the condition adversely affects the student's educational performance.
- (2) A medical diagnosis of a chronic or acute health problem is required.

Specific Learning Disability (LD)

Note that a student can meet criteria for LD in a number of ways. There are also specific documentation requirements for an LD determination under A.R.M. § 10.16.3019C. See the discussion on the Substantive Requirements for Evaluation, below, for more information.

10.16.3019 CRITERIA FOR IDENTIFICATION OF STUDENT AS HAVING SPECIFIC LEARNING DISABILITY

(1) The student may be identified as having a specific learning disability if, when provided learning experiences appropriate to the student's age or grade-level based on state approved K-12 content standards:

(a) The student does not make sufficient progress to meet age or grade level based on state approved K-12 content standards in one or more of the following areas: oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, mathematics problem solving.

(b) Consistent with district procedures, evaluation teams shall use either response to scientific, research based intervention under ARM 10.16.3019A or severe discrepancy under ARM 10.16.3019B when determining whether the student is not making sufficient progress toward age or grade level based on state approved K-12 content standards.

(c) The student may not be identified as having a specific learning disability if the student's significantly low rate of progress in meeting age or grade level based on state approved K-12 content standards is primarily the result of a visual, hearing, or motor impairment; cognitive delay; emotional disturbance; environmental or economic disadvantage; cultural factors; or a lack of appropriate instruction.

Speech-Language Impairment

10.16.3020 CRITERIA FOR IDENTIFICATION OF STUDENT AS HAVING SPEECH-LANGUAGE IMPAIRMENT

(1) The student may be identified as having a speech-language impairment if the student has a significant deviation in speech such as fluency, articulation or voice, or in the ability to decode or encode oral language which involves phonology, morphology, semantics or pragmatics or a combination thereof.

(a) The student has a significant deviation in oral performance if the student's performance on standardized test is two standard deviations below the population mean, or between 1.5 and two standard deviations below the population mean, and there is documented evidence over a six month period prior to the current evaluation of no improvement in the speech-language performance of the student even with regular classroom interventions.

(b) For articulation, a significant deviation is consistent articulation errors persisting one year beyond the highest age when 90 percent of the students have acquired the sounds based upon specific developmental norms.

(c) If norm referenced procedures are not used, alternative assessment procedures shall substantiate a significant deviation from the norm.

(2) The student may be identified as having a speech-language impairment only when documentation of the student's interpersonal communication effectiveness in a variety of educational settings by the teacher, parent, speech-language pathologist, and others as appropriate supports the adverse educational effect of the speech-language impairment or oral communication in a classroom or school setting.

(3) The student may not be identified as having a speech-language impairment if the speech or language problems primarily result from environmental or cultural factors.

Traumatic Brain Injury (TBI)

10.16.3021 CRITERIA FOR IDENTIFICATION OF STUDENT AS HAVING TRAUMATIC BRAIN INJURY

(1) The student may be identified as having traumatic brain injury if the student has an acquired injury to the brain caused by external physical force which adversely affects the student's functional or psychosocial ability or both and the student's ability to learn or participate in the local educational agency's education program.

(2) The term traumatic brain injury applies to open or closed head injuries resulting in impairments in one or more areas such as cognition; language; memory; attention; reasoning; abstract thinking; judgment; problem-solving; sensory, perceptual, and motor abilities; psycho-social behavior; physical function; information processing; and speech.

(3) The student may not be identified as having a traumatic brain injury if the injury to the brain is congenital, degenerative, or caused by birth trauma.

Visual Impairment

10.16.3022 CRITERIA FOR IDENTIFICATION OF STUDENT AS HAVING VISUAL IMPAIRMENT

(1) The student may be identified as having a visual impairment if the student has:

- (a) a visual acuity of 20/70 or less in the better eye with correction or field of vision which at its widest diameter subtends an angle of no greater than 20 degrees in the better eye with correction; or
- (b) a medically indicated expectation of visual deterioration that would qualify the child as having a visual acuity as described in (1)(a).

2. *The child's disability must "adversely affect educational performance"*

A key difference between eligibility under Section 504 and IDEA, is the requirement under IDEA that the child's disability "adversely affect educational performance." If the child's disability does not "adversely affect educational performance" the child may be eligible for protections under Section 504, but not for special education and related services under IDEA.

Montana law defines the term "adversely affects educational performance" as follows:

"Adversely affect the student's educational performance" means that there is evidence that measures of student performance (e.g., achievement tests, grades, behavioral or developmental assessments, classroom based assessment, **observations**, progress monitoring, or criterion-referenced tests, etc.) **indicate a pattern of educational, developmental, or functional** attainment or achievement below the student's age or grade level based on state approved K-12 content standards that can wholly or in part be attributed to the disabling condition.²⁵

Under this definition **a child does not have to be failing in school to receive special education and related services.** Under IDEA, schools must make a free appropriate public education available to "any individual child with a disability who needs special education and related services, even if the child has not failed or been retained in a course or grade, and is advancing from grade to grade."²⁶ **Note also that Montana's definition allows the analysis to be based on informal observations, not just formal psychological, medical, or classroom testing.**

C. **WHO IS A "PARENT" UNDER IDEA?**

IDEA's requirements ensure that the child's educational rights and the parent's right to participate in decisions about their child's education are protected. So, who is a "parent" under IDEA?

IDEA defines the terms "parent" very broadly. Anyone within the definition of "parent" has the same rights under IDEA as the child's biological parent. Under IDEA, "parent" means:

- a natural, adoptive, or foster parent of a child
- a **guardian** (but not the State if the child is a ward of the State);

²⁵ A.R.M. § 10.16.3008 (emphasis added).

²⁶ 34 C.F.R. § 300.101(c).

- an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child’s welfare; or
- an individual assigned to be a surrogate parent.²⁷ A “surrogate parent” is an individual appointed (usually by a court) to protect the educational rights of a minor student, such as a child in foster care, who does not have any parents, who is a ward of the state, or whose parents cannot be found.²⁸

Some children in foster care do not need educational surrogates. Though the child may be in the legal custody of child and family services, the parents’ right to make educational decisions about the child may not be terminated.²⁹ If either of the child’s parents can be found and that parent’s parental rights have not been terminated, then an educational surrogate should not be used in most cases.

A surrogate parent is not appointed for an adult student. Other legal procedures must be used in the case of an adult student who lacks the ability to give informed consent to educational decisions.³⁰

d. PROCEDURAL AND SUBSTANTIVE REQUIREMENTS – INTRODUCTION

IDEA contains both “procedural” and “substantive” requirements. Procedural requirements ensure that the child’s educational rights and the parent’s right to participate in the development of their child’s IEP are protected through a fair process. In broad terms, procedural requirements protect the rights of a parent (and student) to: (1) participation in developing their child’s educational program; (2) notification before action is taken regarding the child and (3) an opportunity to be heard before an impartial tribunal (e.g. a judge) when disputes arise. The IDEA contains specific protections that bring these broad concepts to life.³¹

IDEA’s substantive requirements relate to the quality of the education the school is required to provide a child with a disability. This includes the right to a Free Appropriate Public Education (FAPE) and the right to be educated in the Least Restrictive Environment (LRE).³²

²⁷ For the process to assign a surrogate parent in Montana, see A.R.M. § 10.16.3504 and Mont. Code Ann. § 20-7-461 through 20-7-463.

²⁸ 20 U.S.C. § 1401(23).

²⁹ See A.R.M. § 10.16.3504(2).

³⁰ See *In the Matter of C.S.*, 2014 MT 74, 374 Mont. 289, 320 P.3d 981; 20 U.S.C. § 1415(m)(2); 34 C.F.R. § 300.520(b).

³¹ 20 U.S.C. § 1412.

³² 20 U.S.C. § 1412.

A violation of a procedural requirement (or a fair process) may be a denial of FAPE. Under IDEA, a procedural violation amounts to a substantive denial of FAPE where the violation:

- (I) impeded the child’s right to a free appropriate public education;
- (II) significantly impeded the parents’ opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents’ child; *or*
- (III) caused a deprivation of educational benefits.³³

i. **Substantive requirements – introduction**

IDEA contains several key substantive requirements designed to ensure that children with disabilities are identified, evaluated, and properly served with a FAPE. **The purposes of IDEA are set out at the beginning of the Act, and are important to keep in mind as part of understanding the “big picture” of what the law is trying to accomplish**, especially when IEP teams get bogged down in the details of IDEA’s complex rules. The express purposes of the IDEA include:

- (1) (A) to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; [and]
- (B) to ensure that the rights of children with disabilities and parents of such children are protected
- (3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services³⁴

The key substantive requirements of IDEA, are:³⁵

1. Providing all eligible children with a **FAPE**;
2. Identifying children with disabilities through the **Child Find** requirement;
3. Completing appropriate and comprehensive **evaluations**;
4. Delivering FAPE through an individualized education program (**IEP**);
5. Delivering services in the Least Restrictive Environment (**LRE**);
6. Delivering services through “appropriately and adequately trained” personnel;³⁶

³³ 20 U.S.C. § 1415(f)(3)(E)(ii) (emphasis added); *see also N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d 1202, 1208 (9th Cir. 2008).

³⁴ 20 U.S.C. § 1400.

³⁵ *See* 20 U.S.C. § 1412.

³⁶ 20 U.S.C. §1412(a)(14).

7. Compliance with IDEA’s **procedural safeguards**, including maintaining **confidentiality**.

There are many requirements in IDEA relating to funding, systemic data collection, administration, and other requirements that are beyond the scope of this discussion and are not areas in which parents and students are typically involved. They are summarized in 20 U.S.C. § 1412. The provisions regarding teacher qualifications are not discussed in detail here. The provisions regarding procedural safeguards and confidentiality are discussed in the sections on IDEAs procedural requirements that follow. The FAPE, Child Find, evaluation, IEP, and LRE requirements are discussed in detail below:

ii. **Substantive requirements – FAPE, the Rowley standard, Chevys, and Cadillacs**

The IDEA mandates that the state, through its Local Education Agencies (LEA) (i.e. school districts), provide all eligible children with a FAPE, “including children with disabilities who have been suspended or expelled from school.”³⁷ FAPE is the core requirement of IDEA. A district’s denial of FAPE entitles the student to a remedy (a solution) under IDEA.³⁸

1. *What is a FAPE?*

FAPE is a term of art under IDEA (meaning it has a specific legal meaning). Under IDEA, **FAPE means:**

- . . . special education and related services that—
- (A) have been **provided at public expense**, under public supervision and direction, and without charge;
- (B) meet the **standards** of the State educational agency;
- (C) include an **appropriate preschool, elementary school, or secondary school** education in the State involved; and
- (D) are provided in conformity with the [**properly developed IEP**]³⁹

In addition to traditional classroom instruction, FAPE is accomplished through a series of accommodations, “supplementary aids and services” and “related services,” both inside and outside the classroom, **designed to address the child’s unique social, emotional, behavioral, academic, and other needs resulting from the disability and to allow the child “to be involved in and make progress in the general education curriculum.”**⁴⁰

³⁷ 20 U.S.C. §1412(a)(1)(A).

³⁸ See e.g. 20 U.S.C. § 1415(f)(3)(E).

³⁹ 20 U.S.C. § 1401(9).

⁴⁰ 20 U.S.C. § 1414(d)(1)(A).

The word “appropriate” in the phrase “Free Appropriate Public Education” (FAPE) is very important and has been the subject of many lawsuits. In a case referred to as the *Rowley*⁴¹ decision, the U.S. Supreme Court set what many disability rights advocates see as a very low standard for special education. The Court determined that an “appropriate” education under IDEA must provide “a basic floor of opportunity” consisting of “access to specialized instruction and related services which are individually designed to provide *educational benefit* to the handicapped child.”⁴² The school is not required to provide services that will “maximize” the child’s potential.⁴³ Though the education provided under IDEA need not be the “absolute[] best or potential maximizing . . . Congress did not intend that a school system could discharge its duty under the [IDEA] by providing a program that produces some minimal academic advancement, no matter how trivial.”⁴⁴

2. *What are special education and related services?*

The definition of FAPE states that it requires special education and related services. But what are special education and related services?

Under IDEA “**special education**” means:

- . . . **specially designed instruction**, at no cost to parents, to **meet the unique needs** of a child with a disability, including—
- (A) instruction conducted in the classroom, in the home, in hospitals and institutions, **and in other settings**; and
 - (B) instruction in physical education.⁴⁵

The term “**specially designed instruction**” as used in the definition of special education means:

- adapting**, as appropriate to the needs of an eligible child under this part, **the content, methodology, or delivery of instruction--**
- (i) To **address the unique needs of the child** that result from the child's disability; and
 - (ii) To **ensure access of the child to the general curriculum**, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.⁴⁶

⁴¹ *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley*, 458 U.S. 176 (1982).

⁴² *Rowley*, 458 U.S. at 201.

⁴³ *Rowley*, 458 U.S. at 199.

⁴⁴ *Amanda J. ex rel. Annette J. v. Clark Cty. Sch. Dist.*, 267 F.3d 877, 890 (9th Cir. 2001) (internal quotations and citations omitted).

⁴⁵ 20 U.S.C. § 1401(29) (emphasis added).

⁴⁶ 34 C.F.R. § 300.39(b)(3) (emphasis added).

Further, the U.S. Dept. of Education has recently clarified that “**an [IEP] for an eligible child with a disability under the [IDEA] must be aligned with the State’s academic content standards** [applicable to all children] for the grade in which the child is enrolled.”⁴⁷

“**Related services**” are typically delivered outside the classroom and mean “. . . transportation, and such developmental, corrective, and other supportive services **as may be required to assist a child with a disability to benefit from special education . . .**” Related services can include speech-language pathology, occupational therapy, physical therapy, counseling, and many other services.⁴⁸

iii. **Substantive requirement – Child Find and “Zero Reject”**

It is not possible to deliver a FAPE if a school district does not know that children residing within the district are in need of special education and related services. The IDEA’s Child Find requirement is designed to ensure that these children are located, identified and evaluated for services.

Under IDEA, school districts are required to identify, locate, and evaluate for services students with disabilities from birth through age 21 living within the district’s boundaries.⁴⁹ The Child Find requirement applies to all children with disabilities residing in the district, including children who are in private schools, homeless, or in foster care (i.e. wards of the state). This responsibility applies to all children “regardless of the severity of their disabilities.” The requirement to serve even the children with the most severe disabilities is known as the “zero reject” policy, and means that a school district cannot turn a child away because of the severity or nature of his disability.⁵⁰

The Child Find requirement is triggered whenever a school district **has reason to suspect a student is a child with a disability in need of special education** and related services.⁵¹ The Child Find responsibility rests on the school, not the parents. Therefore it is not the parent’s responsibility to go to a school and demand services. It is the school’s responsibility to identify children with disabilities in need of special education and related services and evaluate those children to determine if they are eligible and what services are required to provide a FAPE.

⁴⁷ *Dear Colleague Letter 1* (OSERS Nov. 16, 2015) (emphasis added),

<http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf>

⁴⁸ 20 U.S.C. § 1401(26).

⁴⁹ 20 USC § 1412(a)(3).

⁵⁰ 20 USC § 1412(a)(3).

⁵¹ 20 U.S.C. §1414(b)(3)(B); 34 C.F.R. § 300.111(c); *Timothy O. v. Paso Robles Unified Sch. Dist.*, No. 14-55800, 822 F.3d 1105, 2016 WL 2957215, at *11 (9th Cir. May 23, 2016).

However, even though it is not the parent’s responsibility to bring the child to the school’s attention, a parent should still do this. **If you suspect your child might have a disability you should write a letter to the school principal or the district superintendent explaining your concerns, requesting an evaluation, and providing your consent for an evaluation.** A sample letter for requesting an evaluation is on our [forms](#) page.

iv. **Substantive requirement – Evaluations**

Now that we know a school district must locate, identify, and evaluate children suspected of having disabilities, the next question is how do we confirm whether the child has a qualifying disability and what services might be needed to address the disability so that the child can receive a FAPE? That is the purpose of the evaluation process. Evaluations must be completed before a student first begins receiving special education and related services (initial evaluation)⁵² and at least every three years thereafter (reevaluation).⁵³

1. Initial evaluation

Under IDEA, before a student may be provided with special education and related services, the school district “shall conduct a **full and individual initial evaluation**” according to the procedures specified in IDEA.⁵⁴ Here are some of the **key requirements** for initial evaluations:

- **Requesting an evaluation.** Either a parent, a state agency, or a school district can request an evaluation of a child.⁵⁵ This could include a child protective, public assistance, or other health and human service agency.
- **Purpose.** The purpose of an initial evaluation is both to determine whether the child is **eligible** under IDEA AND to determine the **child’s educational needs**.⁵⁶
- **Consent.** Parental consent **must** be given **before** the school will start the evaluation. It is critical that when parents make a request for evaluation they provide their consent at the same time. Without parental consent, the school can delay the evaluation. Consent for evaluation does not mean the parent is giving consent for the provision of special education and related services.⁵⁷
- **Consent for children who are wards of the state.** Consent is still required from the parent of a child who is a ward of the state unless that parent cannot be found after reasonable efforts by the school, the parent’s parental rights have been terminated, or educational decision making authority has been placed in another person by a court order.⁵⁸

⁵² 20 U.S.C. §1414(a)(1)(A) (emphasis added).

⁵³ 20 U.S.C. §1414(a)(2)(B)(ii).

⁵⁴ 20 U.S.C. §1414(a)(1)(A) (emphasis added).

⁵⁵ 20 U.S.C. §1414(a)(1)(B).

⁵⁶ 20 U.S.C. §1414(a)(1)(C)(i).

⁵⁷ 20 U.S.C. §1414(a)(1)(D)(i).

⁵⁸ 20 U.S.C. §1414(a)(1)(D)(iii).

- **Notice.** A school district is required to provide [prior written notice \(PWN\)](#) before conducting an evaluation.⁵⁹ In Montana, schools typically do this by providing an “**evaluation plan**” setting out the testing and evaluations the district proposes to conduct. The district will then ask the parent to consent to the evaluation plan. **However, you should provide consent to evaluations in your letter requesting evaluations; you should not have to wait for the school to produce an evaluation plan.**
- **Time.** Evaluation must be completed within 60 days of the date the parent gives consent to evaluate.⁶⁰ Again, it is critical that when parents make a request for evaluation they provide their consent at the same time. If the parent only makes a request but does not provide consent, the district can delay in preparing an evaluation plan.
- **There are no magic forms to request and evaluation.** A parent should just send the principal, superintendent, or special education director a **written letter** (preferably by certified mail, email, or fax with confirmation page) **requesting an evaluation, identifying all areas of suspected disability, and providing consent.**
- **Evaluations must assess all areas of suspected disability.** This means that **anything that may amount to a disability needs to be assessed.** For example, even though a child tests low on an IQ test, his hearing must still be checked if there is reason to suspect he may have a hearing impairment. Children with hearing impairments are often misdiagnosed as having cognitive delays. This also means that **if new areas of suspected disability come up after the initial evaluation, those new areas need to be assessed as well.**⁶¹
- **The evaluation must use data from various sources.** The district must “use a variety of assessment tools and strategies to gather **relevant functional, developmental and academic information**, including information provided by the parent”⁶² to determine whether the child is eligible and the content of the student’s IEP.
- **The evaluation must use technically sound assessment instruments.**⁶³ This means that the tests and assessment used in evaluating the child must be scientifically researched and validated to accurately and precisely test for the issue in question in children with the same characteristics as your child. For example, a teacher’s best guess as to a child’s intelligence is not a technically sound instrument. In order to accurately measure intelligence in a child, you need to properly administer a research based instrument like the Wechsler Intelligence Scale for Children® - Fourth Edition (WISC®-IV). Another example would be using a test that is not designed (normed) for use on a child with your child’s characteristics. For example the WISC®-IV is designed for use on children from

⁵⁹ 20 U.S.C. §§ 1415(b)(3); 1414(b)(1).

⁶⁰ 20 U.S.C. §1414(a)(1)(C)(i)(I).

⁶¹ 20 U.S.C. §1414(b)(3)(B).

⁶² 20 U.S.C. §1414(b)(2)(A).

⁶³ 20 U.S.C. §1414(b)(2)(C).

age 6 years, zero months until age 16 years, 11 months. It would be inappropriate to use the WISC®-IV to test a child outside that age range.

- **Evaluation team.** Eligibility is determined by members of the **evaluation team**, which **includes parents**, after assessments are completed and reviewed as a team.⁶⁴
- **Report.** A copy of the evaluation report, indicating the evaluation results, eligibility determination and the child's educational needs, must be given to the parents.⁶⁵

2. *Reevaluations*

Children must be reevaluated periodically. This is called a reevaluation.⁶⁶ Here are some of the key features of reevaluations:

- **Procedures.** **The procedures for evaluations are essentially the same for initial evaluations as noted above.** The district is still required to obtain consent,⁶⁷ use comprehensive, multi-faceted and technically sound evaluation tools, and assess all areas of suspected disability.
- **Purpose.** The purpose of a reevaluation is the same as the purpose for an initial evaluation. The reevaluation should help determine whether the child is still eligible under IDEA AND to determine the child's educational needs.⁶⁸ Sometimes districts claim that reevaluations are only for the purpose of determining continuing eligibility. This is not true. The reevaluation should be a comprehensive evaluation and should be used to determine the child's ongoing educational needs, which like most children, are likely to change over time.
- **Timing of reevaluations.** Reevaluations **must** occur at the following times:
 - if the district determines the child's **educational or related services needs**, including improved academic and functional performance, **warrant reevaluation;**
 - If the **parent or the teacher** requests a reevaluation;
 - **At least every three years** (unless the parent and the district agree a reevaluation is not necessary);
 - **Not more than once per year** (unless the parent and the district agree).⁶⁹

v. Substantive requirement – eligibility determination

Once a child is identified as having a suspected disability under Child Find and evaluated according to IDEA, the next question is whether the child is eligible for special education and

⁶⁴ 20 U.S.C. § 1414(b)(4)(A).

⁶⁵ 20 U.S.C. § 1414(b)(4)(B).

⁶⁶ 20 U.S.C. § 1414(a)(2).

⁶⁷ 20 U.S.C. § 1414(c)(3).

⁶⁸ 20 U.S.C. §§ 1414(a)(1)(C); 1414(a)(2)(A); 1414(b)(2)(A).

⁶⁹ 20 U.S.C. § 1414(a)(2).

related services under IDEA. The requirements for eligibility under IDEA are discussed in the section on [eligibility](#), above. This section is about the process of determining eligibility.

The **Evaluation Team**, composed of a “team of qualified professionals,” **including the parents**, meet together to review and to discuss the evaluation and determine eligibility, **including under which disability categories the child will be qualified for services**. The evaluation team also determines **the educational needs of the child and makes recommendations to the IEP team for areas the team should consider**.⁷⁰

Evaluation teams are called different things in different states, but they have the same purpose under the law. The members of the evaluation team and the IEP often overlap but are not necessarily the same. The evaluation team completes an **evaluation report** which must be shared with the parent.⁷¹

One issue addressed in IDEA is the “**over-identification**” of children for special education and related services. One way IDEA addresses this is to make sure that children are not identified for special education and related services solely because of a lack of instruction (teaching). Therefore, **lack of instruction in reading or math, or limited English proficiency is not a basis for qualifying a child under IDEA**.⁷² **Outside of this limitation, a child can be qualified for special education and related services if he meets the definition of “child with a disability” as discussed in the section on [eligibility](#), above.**

The evaluation team must make its decision using **data** from a variety of sources. This includes **reviewing existing data** from the following sources:

- Evaluations and information **provided by the parents** (e.g. private psychological or medical diagnoses obtained by the parents), including **parent observations**;
- **Current** classroom and state standardized **assessments** and classroom **observations**;
- **Observations** by teachers and related service professionals.⁷³

Based on this review, the evaluation team must determine whether it **needs additional information** to determine:

1. if the child is or (in a reevaluation) remains a “child with a disability” as defined in IDEA,
2. the child’s present levels of academic and functional performance (PLAAFP) (i.e. where the child is now);
3. whether the child needs special education and related services, and

⁷⁰ 20 U.S.C. § 1414(b)(4).

⁷¹ 20 U.S.C. § 1414(b)(4)(B).

⁷² 20 U.S.C. § 1414(b)(5).

⁷³ 20 U.S.C. § 1414(c)(1)(A).

4. whether “any additions or modification to the child’s special education and related services are needed to enable the child to meet the measurable annual goals set out in the [IEP] . . . and to participate in the general education curriculum.”⁷⁴

If the **evaluation team determines it does not need additional data** to determine the above issues, the district **must send the parents notice** specifying its determination and the reasons for the determination and the right of the parents to request an assessment to determine eligibility and the child’s needs even if the district doesn’t think one is necessary.⁷⁵ Once the district provides this notice, it does not need to conduct additional assessments **unless the parents request** them.⁷⁶

1. *Eligibility determinations for children with “specific learning disabilities,” “response to intervention,” and “severe discrepancy”*

A “specific learning disability” (LD) is a “disorder in one or more of the basic psychological processes involved in understanding or in using [spoken or written] language,” which might be demonstrated by difficulties in listening, thinking, reading, writing, spelling, or doing math calculations.⁷⁷ These disorders include dyslexia, perceptual disabilities, brain injury, minimal brain dysfunction, and developmental aphasia, but these are not the only disorders that may meet criteria for LD.⁷⁸ LD is a disorder specifically related to understanding or using language, that is not otherwise explainable because of: another disability, lack of instruction (i.e. teaching), or because of cultural, environmental, or economic factors.⁷⁹

In Montana, a child meets LD criteria if the child does not make “sufficient progress” academically to meet the state approved content standards in **any of the following areas**: “oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, mathematics problem solving.”⁸⁰ **In order to determine whether the child has made “sufficient progress” districts use either “response to intervention (RTI)” or the “severe discrepancy” test.**⁸¹ [A.R.M. § 10.16.3019C](#) contains specific documentation requirements for LD eligibility.

⁷⁴ 20 U.S.C. § 1414(c)(1)(B).

⁷⁵ 20 U.S.C. § 1414(c)(4)(A).

⁷⁶ 20 U.S.C. § 1414(c)(4)(B).

⁷⁷ 20 U.S.C. § 1401(30)(A).

⁷⁸ 20 U.S.C. § 1401(30)(B).

⁷⁹ 20 U.S.C. § 1401(30)(C); *see also* A.R.M. § 10.16.3019(1)(c).

⁸⁰ A.R.M. § 10.16.3019(1)(a).

⁸¹ A.R.M. § 10.16.3019(1)(b).

2. Response to Intervention (RTI)

RTI is designed to assist in early recognition of students facing learning difficulties. Under RTI, a student is provided with research-based instructional approaches of increasing intensity, beginning with a school-wide or classroom-wide approach (Tier I), continuing with a small group approach (Tier II), and finally escalating to an individual approach (Tier III). Data is collected to see if the student is making progress based on the intervention or if more intensive intervention is needed.⁸² **In Montana, if a child is making sufficient progress through RTI, but the “level of intervention necessary to sustain the response can only be provided through special education services,” then the student can be qualified for IDEA services under the LD category.**⁸³

It is very important to note that **school districts cannot use RTI to delay or to deny the evaluation process.**⁸⁴ Once a parent provides consent for evaluation, the school only has 60 days to complete the evaluation process and to determine eligibility. The school cannot say, “we will do an evaluation, if necessary, after we try RTI.”

3. Severe Discrepancy

The “severe discrepancy” test is more like the qualification criteria for other disability categories under IDEA in that it is based primarily on the students’ performance on testing completed during the evaluation process, not performance in the classroom. Under Montana’s regulations, a child can be identified as having LD based on the severe discrepancy test if there is a:

50 percent or higher probability of a two standard deviation discrepancy between general cognitive ability and achievement in one or more of the areas identified in ARM 10.16.3019 [(the learning deficiencies necessary for an LD qualification noted above)] when adjusted for regression to the population mean [unless this type of testing would be invalid, in which case alternative means can be used to determine “severe discrepancy”].⁸⁵

⁸² See A.R.M. § 10.16.3019A. Neither IDEA nor Montana regulations specifically define RTI. Extensive information about RTI can be found at The National Center for Learning Disabilities, RTI Action Network website at <http://www.rtinetwork.org/>. A similar tiered system of interventions for behavioral issues is Positive Behavioral Interventions and Supports (PBIS). More information about PBIS can be found at OSEP’s PBIS site: <http://www.pbis.org/>.

⁸³ A.R.M. § 10.16.3019A(2).

⁸⁴ See Melody Musgrove, *Memorandum to State Directors of Special Education 1* (OSEP Jan. 21, 2011), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf>.

⁸⁵ A.R.M. § 10.16.3019B(1)(a).

In less technical terms, a severe discrepancy exists if psychological testing shows a large difference between the child’s intellectual ability (i.e. intelligence) and his academic achievement (i.e. how well he has mastered specific subjects like reading comprehension or math calculations appropriate to his age and grade level).

vi. **Substantive requirements – evaluations before change in eligibility or graduation**

In general, a district must evaluate a child using the above noted protocols **before determining the child is no longer eligible for services under IDEA.**⁸⁶ However, a district is not required to evaluate the child if the reason the district is changing eligibility is because either (1) the child is graduating high school **with a regular diploma (i.e. having met the same diploma requirements as students without disabilities)** or because the child has **aged out** (i.e. is over the age at which he can attend school).⁸⁷ Even in these cases, the district must provide the student with a **“summary of performance” indicating his present levels of academic and functional performance, including recommendations on how to assist the child with his post-school goals.**

vii. **Substantive requirements – The IEP document**

1. Introduction

The child has been identified under Child Find. A comprehensive educational evaluation was completed and provided to the evaluation team. The evaluation team met, reviewed the available information, concluded the child is eligible, and determined the child’s educational needs. The evaluation team prepared an evaluation report summarizing its findings. Now what?

Developing an Individualized Education Program (IEP) for the student is the next step. The IEP is a tool for understanding the student’s present levels of academic achievement and functional performance (PLAAFP), setting annual goals, tracking progress, and determining services, supports, modifications, and accommodations the student will need to progress in his education.⁸⁸ **An IEP is a written document developed, reviewed, and revised by the IEP team in one or more IEP meetings.**⁸⁹ The key mechanism for carrying out FAPE is the IEP and FAPE cannot be provided without a compliant IEP.⁹⁰

⁸⁶ 20 U.S.C. § 1414(c)(5).

⁸⁷ 20 U.S.C. § 1414(c)(5)(B)(i).

⁸⁸ 20 U.S.C. § 1414(d).

⁸⁹ 20 U.S.C. § 1414(d)(1)(A)(i).

⁹⁰ 20 U.S.C. § 1401(9).

A “compliant IEP” is a phrase we use to refer to an IEP that contains all necessary **content** of an IEP (detailed below) and was created using the appropriate **process** (detailed below) for developing an IEP. An IEP that was not created through the appropriate process and does not contain all the needed elements is not technically an IEP, but schools or others may often refer to it as an IEP. Thus, we use “compliant IEP” to refer to an IEP that is compliant in both content and procedure.

In Montana, the school district is required to obtain parental consent to the initial IEP and to each annual IEP.⁹¹ Therefore, in many ways, the IEP is essentially a contract between the parents and the school for the student’s educational program.

2. The IEP Team

IEPs are developed by the IEP team. The IEP team includes:

- the parents,
- at least one regular education teacher of the child,
- at least one special education teacher of the child,
- a school administrator (decision maker for the school, often a special education director);
- someone to interpret evaluation results (usually a school psychologist);
- related service providers (such as a speech language pathologist or occupational therapist),
- transition service providers (when transition planning is occurring);
- Part C (early childhood intervention) providers (as appropriate); and
- **“at the discretion of the parent or the [LEA] other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate;”** and
- The student (where appropriate).⁹²

Note that IDEA allows the parent (or the district) to add other individuals to the IEP team who have special knowledge or expertise regarding the child. If a parent invites such a person to be a part of the IEP team, it is **the parent, not the district, who decides** whether this person has “special knowledge or special expertise regarding the child.”⁹³ Indeed, this person could be anyone that would benefit the parent, the student or other team members in developing the IEP. Thus, if a parent is nervous, and wants to bring along a friend for emotional support, the school should not prevent the participation of this person. This would also include a parent’s

⁹¹ A.R.M. § 10.16.3505.

⁹² 20 U.S.C. § 1414(d)(1)(B–D) (emphasis added).

⁹³ 34 C.F.R. § 300.321(c).

non-attorney advocate or attorney. Conversely, if the district invites the individual, the district makes the determination on whether that person has expertise on the child.

3. Contents of an IEP

An IEP must include a statement of the:

1. Child's **present levels** of academic achievement and functional performance (PLAAFP);
2. Child's measurable annual **goals**;
3. Methods for **assessing progress** towards the goals;
4. Description of the **special education and related services, supplementary aids and services, and program modifications or supports** for school personnel that will be provided for the child;
5. Extent to which the student **will not participate with nondisabled peers** in regular class and extracurricular activities;
6. **Accommodations** the child will receive on state or district standardized tests or statement of why the student cannot participate in these tests and what alternative test he will take;
7. **The date** services will start and the **location, duration, and frequency** of services;
8. **Transition** plan for the student (beginning at age 16 or earlier), including an **educational rights notice** (at least one year before the student turns 18).⁹⁴

4. Present levels of academic achievement and functional performance (PLAAFP)

PLAAFPs are a statement of where the child is at when the IEP is written. PLAAFPs include:

- "how the child's disability affects the child's involvement and progress in the general education curriculum;"
- "for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities;" and
- "for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;"⁹⁵

5. Annual Goals

An IEP must include a statement of "measurable annual goals, including academic and functional goals, designed to—

- "meet the child's needs . . . to enable the child to be involved in and make progress in the general education curriculum;" and

⁹⁴ 20 U.S.C. §1414(d)(1)(A)(i).

⁹⁵ 20 U.S.C. §1414(d)(1)(A)(i)(I).

- “meet each of the child’s other educational needs that result from the child’s disability.”⁹⁶

The fact that goals must be designed to “meet each of the child’s *other* educational needs” cannot be stressed enough. Many schools make two mistakes in this area:

- First they think that a student can only be identified in one disability category. This is not true. **A student can be identified in each disability category in which he meets criteria.**
- Second, some schools think they only need to provide services related to the disability area identified. Again, this is not true. In addition to providing goals that “meet the child’s needs . . . to enable the child to be **involved in and make progress in the general education curriculum**” the goals must also “meet each of the child’s **other** educational needs” **that result from the disability whether the services are needed for academic progress or not.** Therefore, an IEP must, for example, address social and emotional concerns, even if a child is identified under the “orthopedic impairment” category.

IEP goals must be **measurable**. We have to be able to determine in an objective way what we need to do to achieve the goal and whether the goal has been met or not. If a child has significant disabilities such that the team determines he must take **alternate assessments** (i.e. different tests than other children), the goals must include **short term benchmarks or objectives**⁹⁷ that are stepping stones to completion of the annual goals.

For an excellent discussion of how to craft IEP goals, see Chapter 11 in the book *From Emotions to Advocacy*.⁹⁸ Good IEP goals are SMART: specific, measurable, use action words, are realistic and time specific.⁹⁹

6. Progress reporting

The district must report on the child’s progress towards the annual goals.¹⁰⁰ The IEP must include a “description of how the child’s progress toward meeting the annual goals . . . will be measured and when [progress reports] . . . will be provided.”¹⁰¹

⁹⁶ 20 U.S.C. §1414(d)(1)(A)(i)(II) (emphasis added).

⁹⁷ 34 C.F.R. § 300.320(a)(2)(ii).

⁹⁸ Pam Wright & Pete Wright, *From Emotions to Advocacy* (2014).

⁹⁹ *From Emotions to Advocacy*, at 115.

¹⁰⁰ See 34 C.F.R. §§ 300.320(a)(1) and 300.320(a)(3).

¹⁰¹ 20 U.S.C. § 1414(d)(1)(A)(i)(III).

7. *Special education, supplementary aids and services and related services*

The IEP must contain the following:

- “a statement of the **special education and related services and supplementary aids and services**, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child,” and
- “a **statement of the program modifications or supports** for school personnel that will be provided for the child [to allow the child to:]”
 - “. . . **advance appropriately** toward attaining the annual goals;”
 - “**be involved in and make progress in the general education curriculum**[;]”
 - “. . . to participate in **extracurricular and other nonacademic activities**;”
 - and “to be educated and participate **with other children with disabilities and nondisabled children . . .**”¹⁰²

This subsection of IDEA contains a lot of information. Let’s unpack it piece by piece:

Special education. Remember, special education means:

. . . specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—
(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
(B) instruction in physical education.¹⁰³

The term “**specially designed instruction**” as used in the definition of special education means:

adapting, as appropriate to the needs of an eligible child under this part, **the content, methodology, or delivery of instruction**--
(i) To **address the unique needs of the child** that result from the child's disability; and
(ii) **To ensure access of the child to the general curriculum**, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.¹⁰⁴

“**Related services**” are typically delivered outside the classroom and mean “. . . transportation, and such developmental, corrective, and other supportive services as may be required to assist a child with a disability to benefit from special education” Related services can include:

¹⁰² 20 U.S.C. § 1414(d)(1)(A)(i)(IV) (emphasis added).

¹⁰³ 20 U.S.C. § 1401(29).

¹⁰⁴ 34 C.F.R. § 300.39(b)(3) (emphasis added).

speech-language pathology, occupational therapy, physical therapy, counseling, and many other categories. *Id.* at § 1401(26).

“Supplementary aids and services” means “aids, services, and other supports that are *provided in regular education classes or other education-related settings* to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate . . .”¹⁰⁵ This might include things like an aide for the child to help complete assignments, or an e-reader that speaks the text of assignments to the child.

“Based on peer-reviewed research to the extent practicable” Remember, to the “extent practicable,” special education interventions should be based on good science done by qualified researchers, not just anecdotal techniques someone thinks might work without any research to prove this. Further, the research backing for the intervention should not be just any old research, it should be “peer-reviewed,” meaning that it holds up to scrutiny and scientific standards when reviewed by other experts.

“Program modifications or supports for school personnel” The IDEA is not expecting teachers to operate miraculously. The IDEA specifically directs IEP teams to consider what program modifications or supports for school personnel might be needed to achieve the IEP goals. For example, a teacher may need specific training on how to implement an appropriate reading program for a student with dyslexia. Or a second teacher, with a specialty in teaching students with hearing impairments, may need to be brought into the general education classroom to assist.

“Advance appropriately toward attaining the annual goals” Remember the definition of FAPE under the [Rowley](#) standard, discussed above. We are looking for “appropriate” advancement towards the annual goals, not the best or maximum amount of advancement.

“Be involved in and make progress in the general education curriculum” Good IEP goals are tied to the content standards that all students at the child’s grade level are expected to learn.¹⁰⁶ OSEP’s *Dear Colleague Letter*¹⁰⁷ on tying IEP goals to content standards contains a good discussion on how to develop IEP goals that are aligned to content standards for students functioning below grade level in particular areas. For example, by modifying assignments to make them accessible to the particular student.

¹⁰⁵ 20 U.S.C. § 1401(33) (emphasis added).

¹⁰⁶ Office of Special Education Programs (OSEP), *Dear Colleague Letter 1* (OSEP Nov. 16, 2015), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf>.

¹⁰⁷ *Dear Colleague Letter 1* (OSEP Nov. 16, 2015), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/guidance-on-fape-11-17-2015.pdf>.

“To participate in extracurricular and other nonacademic activities” This tells us an IEP cannot just address academics. A child with a disability must be able to access extracurricular and other nonacademic activities with appropriate supports and services.

“To be educated and participate with other children with disabilities and nondisabled children” This phrase incorporates the Least Restrictive Environment (LRE) mandate into the IEP. The LRE mandate is described in greater detail below.

8. Inclusion

The next required part of the IEP is a statement about **inclusion**. The IEP must include an explanation of the extent to which the child will not participate in activities with other disabled and non-disabled children.¹⁰⁸ Remember, **inclusion is a strategy, not an outcome.**¹⁰⁹ **The outcome is “prepar[ing the student for] further education, employment, and independent living.”**¹¹⁰ It is not enough to say “We’ve included the student in the general education classroom, our work here is done.” The child’s participation in the general education classroom must be properly backed with services and supports so the child may make meaningful progress.

9. Assessments (testing)

The IEP must contain a description of accommodations needed for the child to participate in state or districtwide testing (usually standardized tests) or a justification for why the child will not participate in this testing and will have an “alternate assessment.”¹¹¹ If the IEP Team determines a child cannot participate in regular assessments, the IEP must indicate why the child cannot participate and why the specific alternate assessment selected is appropriate for the child.¹¹²

10. Timing

The IEP must include a statement of when it will begin and the frequency, location and duration of services.¹¹³ A current IEP **must be in place at the beginning of the school year** in which the child is enrolled.¹¹⁴ The IEP is an annual document. The goals should reflect what we hope the student will accomplish over the next 12 months. **The IEP must be reviewed at least annually.**

¹⁰⁸ 20 U.S.C. § 1414(d)(1)(A)(i)(V).

¹⁰⁹ Prof. Robert H. Horner, Alumni-Knight Endowed Professor, Special Education Director, Educational and Community Supports, University of Oregon.

¹¹⁰ 20 U.S.C. § 1400(d)(1)(A) (emphasis added).

¹¹¹ 20 U.S.C. §1414(d)(1)(A)(i)(VI).

¹¹² 20 U.S.C. §1414(d)(1)(A)(i)(VI)(bb).

¹¹³ 20 U.S.C. §1414(d)(1)(A)(i)(VII).

¹¹⁴ 20 U.S.C. §1414(d)(2)(A) (NOTE: there are additional rules for transfer students).

If more than 12 months go by without an IEP meeting, the school is probably out of compliance with IDEA. ¹¹⁵

11. Transition

Beginning not later than the IEP that will be in place when the child turns 16, the IEP must contain a transition plan setting out “**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 those goals.**”¹¹⁶ Parents should apply for services from the state vocational rehabilitation program (VR) early (well before the child turns 18) and ask that the VR counselor be added as a member of the IEP team and invited to all meetings regarding transition.¹¹⁷

12. Notice of transfer of rights

In Montana, when a child turns 18, he becomes an adult and the rights to make decisions about his education transfers from his parents to him. At least 1 year before the child turns 18, the IEP must contain a statement that the child has been notified of the transfer of his educational rights from his parents to him at age 18.¹¹⁸

An adult can be appointed for a student over age 18 who has not been determined incompetent by a court, but who does not have the ability to provide informed consent to educational services.¹¹⁹ In rare cases, it may be important to obtain a limited guardianship or power of attorney for educational decision making if the student does not have capacity to make informed decisions about his education. However, **this is a decision that should be made with great care and it would be wise to consult with an attorney regarding planning for a child who may require a guardianship as an adult.**

viii. Substantive requirements – Developing the IEP

Now that we know what’s in the IEP, the next question is how is the IEP developed? The IEP is developed by the IEP team in a series of meetings.

1. General factors to consider

In developing the IEP, the IEP team must consider:

¹¹⁵ 20 U.S.C. §1414(d)(4)(A)(i).

¹¹⁶ 20 U.S.C. §1414(d)(1)(A)(i)(VIII).

¹¹⁷ See 34 C.F.R. §§ 300.321(b)(3); 300.322(b)(2).

¹¹⁸ A.R.M. §10.16.3502; see also 34 C.F.R. §§ 300.520 and 300.320(c).

¹¹⁹ 34 C.F.R. § 300.520(b); see also *In the Matter of C.S.*, 2014 MT 74, ¶ 24, 374 Mont. 289, 320 P.3d 981.

- (i) The **strengths** of the child;
- (ii) The **concerns of the parents** for enhancing the education of their child;
- (iii) The **results** of the initial or most recent **evaluation** of the child; and
- (iv) The academic, developmental, and functional **needs of the child**.¹²⁰

2. Special factors to consider

In addition to the above factors, which must be considered in every IEP, the IDEA adds some factors that must be considered in special circumstances. Those include:

- **Behavior.** If the child’s behavior impedes learning, the team must “consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.”¹²¹
- **Limited English Proficiency.** If a child has limited English proficiency, the team must “consider the language needs of the child as those needs relate to the child's IEP.”¹²² Additionally, protections for all English language learners (ELL), regardless of disability, are also contained in the Equal Educational Opportunities Act (EEOA) and other laws. More information about the EEOA is available from the U.S. Department of Justice at <https://www.justice.gov/crt/types-educational-opportunities-discrimination>.¹²³
- **Visual impairments.** If a child is **blind or visually impaired**, the team must:
 - provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the child's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child.¹²⁴
- **Communication.** The team must consider the communication needs of the child. This does not only relate to children who are deaf or hard of hearing. Many other children, including many children experiencing autism spectrum disorders, have special communication needs. Regarding a child who is **deaf or hard of hearing**, the team must:
 - consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the

¹²⁰ 34 C.F.R. § 300.324 (emphasis added).

¹²¹ 34 C.F.R. § 300.324(a)(2)(i). Positive Behavioral Interventions and Supports (PBIS) is a tiered system of increasingly intensive interventions for behavioral issues. More information about PBIS can be found at OSEP’s PBIS site: <http://www.pbis.org/>.

¹²² 34 C.F.R. § 300.324(a)(2)(ii).

¹²³ See also U.S. Department of Education’s ELL site, <https://www2.ed.gov/about/offices/list/ocr/ell/index.html>; *Lau v. Nichols*, 414 U.S. 563 (1974) (requiring school districts to take affirmative steps to overcome educational barriers faced by non-English speakers).

¹²⁴ 34 C.F.R. § 300.324(a)(2)(iii).

child's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child's language and communication mode.¹²⁵

- **Assistive Technology.** The team **must always consider** whether the child needs assistive technology and services.¹²⁶ Assistive technology device means:

any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is **used to increase, maintain, or improve the functional capabilities of a child with a disability.** The term does not include a medical device that is surgically implanted, or the replacement of such device.¹²⁷

3. Review and Amendment of an IEP

A parent or other member of the IEP Team can call an IEP meeting at any time. The Team does not need to wait until the next annual IEP meeting to address concerns.¹²⁸ **At least annually, and at other times as may be required, the team must review the IEP to determine whether the annual goals are being achieved and revise the IEP “as appropriate to address:”**

- Lack of expected progress toward the goals;
- The results of any new evaluation;
- New information provided about the child’s disability and needs;
- The child’s “anticipated needs;” or
- “other matters”¹²⁹

The IEP may be modified between annual meetings in a written amendment if the parents and the district agree to amend the IEP without a meeting.¹³⁰

4. Attendance at IEP meetings

In general all members of the IEP team are expected to be in attendance. A member of an IEP **whose area of the curriculum or related service is not being discussed at that meeting** may be excused if the district and the parent agree in writing that their attendance is not necessary because their area is not being modified or discussed at the meeting.¹³¹ A member of an IEP team **whose area of the curriculum or related service is being discussed at the meeting** can only be excused if (a) the parents and the district consent in writing; and (2) the team member

¹²⁵ 34 C.F.R. § 300.324(a)(2)(iv).

¹²⁶ 34 C.F.R. § 300.324(a)(2)(v).

¹²⁷ 34 C.F.R. § 300.5 (emphasis added).

¹²⁸ 20 U.S.C. § 1414(d)(4).

¹²⁹ 20 U.S.C. § 1414(d)(4)(A).

¹³⁰ 20 U.S.C. § 1414(d)(3)(D and F).

¹³¹ 20 U.S.C. § 1414(d)(1)(C)(i).

who will be absent submits a **written input** to the team and the parent into the development of the IEP **prior to the meeting**.¹³²

ix. **Substantive requirements – Least Restrictive Environment (LRE) and placement**

1. Least Restrictive Environment (LRE) generally

One of the key requirements of IDEA is that a FAPE must be provided in the Least Restrictive Environment. Specifically, the IDEA mandates that:

To the **maximum extent appropriate**, children with disabilities, *including children in public or private institutions or other care facilities*, are educated with children who are not disabled, and special classes, separate schooling, or **other removal of children with disabilities from the regular educational environment** occurs **only when** the nature or severity of the disability of a child is such that education in regular classes **with the use of supplementary aids and services cannot be achieved satisfactorily**.¹³³

The question of what is the LRE for a particular child is complicated and the subject of much litigation. However, **from the text of the IDEA itself we know a few important things**: first, **inclusion is the rule, not the exception**. LRE mandates that children with disabilities are educated with nondisabled children **“to the maximum extent appropriate.”** Second, when asking whether a child can make educational progress in the regular classroom with his non-disabled peers, the question is not whether the child could make progress without any support or services, but **what “supplementary aids and services” could be used to make the general education classroom accessible for the student**.

2. Not just academics

LRE **includes non-academic settings**, such as meals, recess, counseling, athletics, recreation, clubs, and many other categories.¹³⁴

3. Continuum of placements

A school district must have a “continuum of alternative placements” available to meet the needs of children with disabilities under IDEA.¹³⁵ These include “[i]nstruction conducted in the

¹³² 20 U.S.C. § 1414(d)(1)(C)(ii).

¹³³ 20 U.S.C. §1412(a)(5) (emphasis added); for a discussion of 9th Cir. LRE standard see *Sacramento City Unified Sch. Dist., Bd. of Education v. Rachel H.*, 14 F.3d 1398 (9th Cir. 1994).

¹³⁴ 34 C.F.R. §§ 300.107 and 300.117.

¹³⁵ 34 C.F.R. § 300.115.

classroom, in the home, in hospitals and institutions, and in other settings.”¹³⁶ The continuum must also “[m]ake provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.”¹³⁷

4. *Placement*

While the term “placement” is not specifically defined in IDEA, the Department of Education has provided some guidance on the meaning of “placement.” Placement “refers to the provision of special education and related services rather than a specific place, such as a specific classroom or specific school.”¹³⁸ In other words, “placement” is the set of services and supports the student will be provided to allow her to make progress toward the goals. **The placement decision, therefore, must come after the PLAAFPS and goals in an IEP are determined, not the other way around.**

The placement decision is “made by a **group of persons, including the parents**, and other persons **knowledgeable about the child**, the meaning of the **evaluation data**, and the **placement options**,” and in accordance with the LRE requirements.¹³⁹

The child’s placement **must be**:

- determined at least **annually**;
- based on the child's IEP;
- **as close as possible** to the child's home;
- in **the school the child would normally attend** if she did not experience a disability unless the child’s **IEP requires** some other arrangement;
- based on consideration of “any potential harmful effect on the child or on the quality of services that he or she needs”; and
- designed to ensure the child is not “not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.”¹⁴⁰

x. **Procedural requirements – the procedural safeguards notice**

Procedural safeguards would hardly be effective if nobody knew about them. That’s why IDEA requires school districts to provide parents with a “procedural safeguards notice.” **The procedural safeguards notice describes the procedural protections under IDEA**, most of which are summarized in this discussion. However, nothing in this discussion is an excuse for a school

¹³⁶ 34 C.F.R. §§ 300.39; 300.115.

¹³⁷ 34 C.F.R. § 300.115(b)(2).

¹³⁸ 71 Fed. Reg. 46540, 46687 (Aug. 14, 2006)

¹³⁹ 34 C.F.R. § 300.116(a).

¹⁴⁰ 34 C.F.R. § 300.116(a–e) (emphasis added).

district not providing a procedural safeguards notice. Further, just because a parent can access this discussion or other sources describing IDEA’s procedural safeguards, a parent is not waiving their right to procedural safeguards notice as provided in IDEA.

The IDEA requires districts to give the parents “a copy of the procedural safeguards available to the parents of a child with a disability . . . upon initial referral or parental request for evaluation”¹⁴¹ The notice must also be given annually and whenever a parent files a due process complaint.¹⁴² The procedural safeguards notice must be “. . . **written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner. . . .**”¹⁴³

xi. **Procedural requirements – Parents have a right to participate**

The first, and perhaps most important, procedural right of a parent has **is the right to participate.** ¹⁴⁴ A parent has a right to participate in **all meetings regarding the identification, evaluation, placement, and provision of FAPE to the child.**¹⁴⁵

A parents’ right to participate is protected in several ways, including:

- Most importantly, **a parent is a full member of an IEP team and has the same rights as any other team members** (including school officials) to speak in the IEP meeting, to raise concerns, to bring information to the IEP team, and to receive information available to the other team members.¹⁴⁶ **A parent must also be a member of any group that makes decisions about the educational placement of the child.**¹⁴⁷
- A parent must be given a copy of the child’s IEP at no cost to the parent.¹⁴⁸
- School districts are required to “take steps to ensure that one or both parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to attend. . . .”¹⁴⁹ If a parent cannot be personally present, the district must use other methods to ensure participation, such as via telephone call.¹⁵⁰
- School districts must schedule IEP Team meetings at a “mutually agreed upon time and place;”¹⁵¹

¹⁴¹ 20 U.S.C. § 1415(d)(1)(A)(i).

¹⁴² 20 U.S.C. § 1415(d)(1)(A).

¹⁴³ 20 U.S.C. § 1415(d)(2).

¹⁴⁴ See 20 U.S.C. §§ 1414(b)(1) and (d)(1)(B)(i); 34 C.F.R. § 300.322.

¹⁴⁵ 20 U.S.C. § 1415(b)(1).

¹⁴⁶ 20 U.S.C. § 1414(d)(1)(B)(i).

¹⁴⁷ 34 C.F.R. § 300.327.

¹⁴⁸ 34 C.F.R. § 300.322(f).

¹⁴⁹ 34 C.F.R. § 300.322(a).

¹⁵⁰ 34 C.F.R. § 300.322(c); see also 34 C.F.R. § 300.328.

¹⁵¹ 34 C.F.R. § 300.322(a)(2).

- School districts **must provide notice** to the parent of each IEP Team meeting, “**early enough** to ensure that [the parent] will have an opportunity to attend;”¹⁵²
- The IEP meeting notice must indicate the purpose, time, place of the meeting, and who will attend.¹⁵³
- If a school district intends to bring **an attorney** to an IEP meeting, the district must indicate that in the meeting notice. If the district does not give advance notice that its attorney will attend the meeting and the attorney shows up, the parent can ask the attorney to leave or reschedule the meeting so the parent has time to retain his own attorney.¹⁵⁴
- Unlike a school district, a parent is not required to give notice to the district that she intends to bring someone with her to the IEP meeting, including the parent’s attorney.
- The Department of Education (DOE) has made clear that, unless the parent agrees, a **school district cannot delay or refuse to hold an IEP meeting because a parent brings her attorney**.¹⁵⁵
- The IEP meeting notice must inform the parents **that the parents can bring anyone to the meeting** “who has special knowledge or expertise regarding the child” or about the services the child may access or need, and can also include the child’s Part C early intervention provide if the parent requests.¹⁵⁶ **This includes an educational advocate or an attorney.**
- School districts “**must take whatever action is necessary**” to ensure parents **understand** what is occurring during an IEP meeting, including providing an **interpreter** at the school’s expense. This could include accommodations for visual or hearing impaired parents.¹⁵⁷
- A school district can only hold an IEP meeting without a parent if the district is unable to convince the parent to attend. The district must keep a record of its attempts to arrange a mutually agreeable time and place, including records of phone calls, correspondence, and visits made to the parents.¹⁵⁸

xii. **Procedural requirements – right to refuse consent to evaluation, services, or an IEP**

1. *What is Consent?*

IDEA regulations specifically define the term “consent.” Under IDEA’s regulations, consent means that:

¹⁵² 34 C.F.R. § 300.322(a)(1).

¹⁵³ 34 C.F.R. § 300.322(b)(1)(i).

¹⁵⁴ 34 C.F.R. § 300.322(b)(1)(i)

¹⁵⁵ *Letter to Andel* (OSER Feb. 17, 2016), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/15-017791-il-andel-iepteam-acc.pdf>.

¹⁵⁶ 34 C.F.R. § 300.322(b)(1)(ii).

¹⁵⁷ 34 C.F.R. § 300.322(e).

¹⁵⁸ 34 C.F.R. § 300.322(d).

- (a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;
- (b) The parent **understands and agrees in writing** to the carrying out of the activity for which his or her consent is sought, and the **consent describes that activity and lists the records (if any) that will be released** and to whom; and
- (c)
 - (1) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.
 - (2) If a parent **revokes consent, that revocation is not retroactive** (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).
 - (3) If the parent revokes consent in writing for their child’s receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child’s education records to remove any references to the child’s receipt of special education and related services because of the revocation of consent.¹⁵⁹

2. Evaluations, re-evaluations, and special education services

Under IDEA, a school district must obtain informed consent for an initial evaluation and a separate informed consent is required for an eligible student to actually receive special education and related services.¹⁶⁰ Informed consent is also required for any re-evaluation after the initial evaluation.¹⁶¹

In other words, even if a parent consents to have her child evaluated for special education and related services, that does not mean that the parent consents to the school actually providing the child with services. Even if a parent does not want her child “in special education” she should have the child evaluated if the parent suspects the child may have a disability, such as where the child does not appear to be meeting developmental milestones or progressing in his class along his peers. It is better to know that a child experiences a disability and be able to make informed choices from there than not to know.

¹⁵⁹ 34 C.F.R. § 300.9 (emphasis added).

¹⁶⁰ 20 U.S.C. § 1414(a)(1)(D)(i).

¹⁶¹ 20 U.S.C. §1414(c)(3).

3. *Consent to the IEP, an important special rule in Montana*

IDEA does not require a parent to consent to each annual IEP. However, in Montana, there is a special rule that goes above and beyond the requirements of the IDEA. The requirements of this rule are **VERY IMPORTANT**, so **read the following carefully**:

- Montana regulations require that a school district must obtain written consent for the initial IEP and each annual IEP for a student.
- If the parents and the school cannot agree upon the entire IEP, the new IEP will be implemented in the areas of agreement and the last agreed upon IEP will be implemented in all other areas.
- If the school district cannot obtain parental consent to an IEP “within a reasonable time,” the school district must send the parent a letter indicating that the district will implement the IEP 15 days after the letter. **If the parent does not respond to this letter, the school district will implement the IEP it developed, whether the parent agrees or not**, subject to the parents’ right to a due process hearing (discussed elsewhere).¹⁶² However, if the parent responds to the notice, the school cannot implement the proposed IEP over the parent’s objection.

xiii. **Procedural requirements – Parents have a right to access education records**

1. *Right to inspect, to review, and explanation*

Both IDEA and the Family Educational Rights and Privacy Act (FERPA), **guarantee a parent the right to inspect and to review their child’s “educational records.”**¹⁶³ IDEA uses the same definition of “educational records” as FERPA.¹⁶⁴ Under FERPA, “educational records” are records directly related to the student that are “maintained by an educational agency or a party acting for the agency or institution.” Educational records generally do not include a person’s individual notes that are kept as a memory aid and not shared with or accessible to anyone else.¹⁶⁵

Under IDEA, the right to inspect records, includes:

- the right to a response from the school providing the parent with **reasonable explanations and interpretations of the records**;

¹⁶² A.R.M. § 10.16.3505.

¹⁶³ See 20 U.S.C. § 1415(b)(1) and 34 C.F.R. § 300.613 (IDEA); 34 C.F.R. § 99.10 (FERPA).

¹⁶⁴ 34 C.F.R. § 300.611(b).

¹⁶⁵ 34 C.F.R. § 99.3.

- the right to copies of the records if the agency’s failure to provide copies “would effectively prevent the parent from exercising their right to inspect and review the records;” and
- the right to have a parent’s representative, such as the parent’s **attorney or advocate inspect and review the records.**¹⁶⁶

2. Why should parents request their child’s educational records?

In special education, documentation is very important. It’s important to know what is in a child’s educational record for a number of reasons:

- Educational records help parents understand how the school views the child;
- Educational records give information about whether the school is complying with the law and may be used as evidence if legal action is taken against a school;
- School records are not always accurate and complete. Reviewing records allows parents to see if the information contained in their child’s education file is accurate and includes all necessary information. **Parents should always keep their own file of all educational records received from the school as they come in;**
- Copies of records are useful for parents to provide to any independent evaluators;
- If a child is moving to another school district, it’s important to make sure the next school has complete information about the child;
- If a child is transitioning from high school to college, it may be important for the college to know what educational barriers the child experiences and how they were previously accommodated.

3. How do you request your child’s educational records?

A form to request your child’s educational records is located on our [forms](#) page.

4. Fees

While IDEA allows the school to charge a fee for copies, the fee cannot “effectively prevent the parent from exercising their right to inspect and review [the] records” and the school cannot charge a fee for time spent searching for the records.¹⁶⁷

5. Timing

The following rules describe the time a school has to respond to a records request:

¹⁶⁶ 34 C.F.R. § 300.613(b).

¹⁶⁷ 34 C.F.R. § 300.617.

- Generally, a school must provide records in response to a request “without unnecessary delay.”
- The school must comply with the records request before any IEP meeting.
- In no case can the school wait more than 45 days to produce the records, even during the summer break.¹⁶⁸

6. Confidentiality

Education records, including special education records are confidential. Records containing personally identifiable information about the student cannot be released except with a signed, written consent or as otherwise provided by law.¹⁶⁹ There are detailed exceptions to FERPA’s confidentiality requirements, which are beyond the scope of this discussion. A question and answer discussion on confidentiality and the exceptions can be found in the [FERPA regulations](#).

One important aspect of confidentiality under both FERPA and IDEA is that the school is required to maintain a record of who requests, such as other school personnel, access to any educational records containing personally identifiable information about the student.¹⁷⁰ **In some cases, a parent may wish to request a copy of this access log.**

Although it is common to send an authorization for **release of information** when a parent requests educational records for their child, a release is not actually necessary for a parent requesting their own child’s special education records unless the school has been notified that the parent is prohibited from accessing the records pursuant to a particular state law (such as in a guardianship, separation, or divorce proceeding).¹⁷¹

xiv. **Procedural requirements – Parents have a right to an independent educational evaluation (IEE)**

Once the school has reason to suspect a child may have a disability and the parent provides consent to have the child evaluated, the school is required to evaluate the child to understand and determine whether the child is eligible for service under IDEA and, if so, determine the

¹⁶⁸ 34 C.F.R. § 613(a); 34 C.F.R. § 300.11 (indicating the word “day” means a calendar day, unless the regulations or law specifically says “business day” or “school day”).

¹⁶⁹ See 34 C.F.R. §§ 300.610 through 300.626; 34 C.F.R. §§ 99.30 through 99.31; A.R.M. § 10.16.3560.

¹⁷⁰ 34 C.F.R. § 300.614; 34 C.F.R. § 99.32; A.R.M. § 10.16.3560.

¹⁷¹ See 34 C.F.R. § 613(c) (an agency may presume that the parent has the authority to inspect and to review the records of his child unless the agency has been advised that the parent does not have this authority under applicable state law).

child's educational needs.¹⁷² What happens if a parent does not agree with the school's evaluation? Once the school performs its evaluation, the parent has a right to an IEE.¹⁷³

1. *What is an IEE?*

An IEE, is an evaluation “conducted by a **qualified examiner** who is **not employed by the [school district]**” and either paid for entirely by the school district or otherwise provided “**at no cost to the parent.**”¹⁷⁴ A parent has a right to an IEE at public expense “if the parent disagrees with an evaluation obtained by the [school district].”¹⁷⁵

2. *How can a school respond to an IEE request?*

If a parent requests an IEE, the school district only has two choices: either (1) provide the IEE without cost to the parent; or (2) file for an administrative due process hearing asking an administrative judge to determine that the evaluations the district completed were “appropriate” and therefore, there is no need for an IEE. Whatever option the district chooses, it must act “without unnecessary delay.”¹⁷⁶

Even if the school district files for a due process hearing and “wins” (i.e. the judge determines the school's evaluation was appropriate), the parent is still entitled to an IEE, but the school district does not pay for it.¹⁷⁷ **The IEP team must consider all qualifying evaluations brought to its attention, not just those completed or paid for by the school district.**¹⁷⁸

3. *IEE considerations and limitations*

Here are some **important considerations** and limitations regarding a parent's right to an IEE:

- A school district can set **limited criteria** for who will conduct the IEE, including the location of the evaluation and the qualifications of the examiner. However, the criteria “**must be the same as the criteria that the public agency uses when it initiates an evaluation**, to the extent those criteria are consistent with the parent's right to an independent educational evaluation...”¹⁷⁹ Other than establishing these criteria, the

¹⁷² See e.g. 20 USC § 1412(a)(3). The Child Find requirement is triggered whenever an LEA has reason to suspect a student is a child with a disability in need of special education and related services. 34 C.F.R. § 300.111(c)(1); *Timothy O. v. Paso Robles Unified Sch. Dist.*, No. 14-55800, 822 F.3d 1105, 2016 WL 2957215 (9th Cir. May 23, 2016).

¹⁷³ 20 U.S.C. 1415(b)(1) and (d)(2)(A); 34 C.F.R. § 300.502.

¹⁷⁴ 34 C.F.R. § 300.502(a)(3).

¹⁷⁵ 34 C.F.R. § 300.502(b)(1).

¹⁷⁶ 34 C.F.R. § 300.502(b)(2).

¹⁷⁷ 34 C.F.R. § 300.502(b)(3).

¹⁷⁸ 34 C.F.R. § 300.502(c)(1).

¹⁷⁹ 34 C.F.R. § 300.502(e)(1) (emphasis added).

school district cannot put timelines or conditions on the IEE.¹⁸⁰ **For a discussion of the validity of school district evaluator criteria, see *Letter to Petska*.**¹⁸¹

- Even if a district publishes a list of evaluators who might conduct an IEE, **a parent has the ultimate right to select an evaluator the parent chooses**, even if the evaluator is not on the list, provided the evaluator meets the district's IEE criteria.¹⁸²
- In some circumstances the only qualified evaluator may not meet the district's criteria. The district must give the parent an opportunity to demonstrate that unique circumstances require an evaluator who does not meet the district's criteria.¹⁸³
- When a parent requests an IEE, a school district must provide the parent with information about where an IEE can be obtained and any criteria the district has for obtaining an IEE.¹⁸⁴
- A parent is **only entitled to one IEE at public expense for each evaluation** the school district conducts with which the parent disagrees.¹⁸⁵
- If a parent requests an IEE, **the district may ask why she objects to the school's evaluation**. However, the school cannot "require the parent to provide an explanation and may not unreasonably delay either providing the [IEE] . . . or filing a due process complaint . . . to defend the public evaluation."¹⁸⁶
- A parent has a **right to request an IEE to address an area of concern that school's evaluation did not cover**.¹⁸⁷ For example, if a parent suspects a student may have an autism spectrum disorder, but the district's evaluation did not look at autism, the parent may request an IEE to address that issue.

4. *Why request an IEE?*

There are lots of reasons to request an IEE, some include:

- You believe the original evaluation was incomplete, incorrect, or additional testing should be done.
- The evaluations used were not designed to be used with your child (e.g. the child is too young to be tested with this instrument or the child is non-verbal and the test is designed for children who speak English as a first language). An excellent resource on

¹⁸⁰ 34 C.F.R. § 300.502(e)(2).

¹⁸¹ *Letter to Dr. Petska* (OSERS Sep. 10, 2001), <http://www2.ed.gov/policy/speced/guid/idea/letters/2001-3/petska091001iee.pdf>.

¹⁸² *Letter to Parker 1* (OSERS Feb. 20, 2004), <https://www2.ed.gov/policy/speced/guid/idea/letters/2004-1/parker022004iee1q2004.pdf>.

¹⁸³ *Letter to Parker* at 1–2.

¹⁸⁴ 34 C.F.R. § 300.502(a)(2).

¹⁸⁵ 34 C.F.R. § 300.502(b)(5).

¹⁸⁶ 34 C.F.R. § 300.502(b)(4).

¹⁸⁷ *Letter to Baus* (OSERS Feb. 23, 2015), <https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acc-14-012562r-baus-iee.pdf>.

tests and assessments is Melissa L. Farall, et al., *All About Tests and Assessments* (Harbor House Law Press 2014).¹⁸⁸

- The evaluation did not address all areas of suspected disability or need.
- The evaluation was not conducted with needed accommodations or was done in an environment that was distracting or challenging for the student.

5. How to request an IEE?

In order to request an IEE, you need to write a letter to the school district specifying areas you think should be assessed. A sample letter is included on our [forms](#) page.

xv. **Procedural requirements – Parents have a right to prior written notice before a school district takes action or refuses to take action**

1. What is PWN and when is it required?

PWN is a written statement indicating that a school district intends to make or to decline a change regarding a student covered under IDEA. A parent is entitled to **prior written notice (PWN) anytime a school district proposes or refuses to initiate a change to the student’s identification, evaluation, placement, or provision of FAPE.**¹⁸⁹

2. When does a “change in placement” occur?

A change in placement occurs any time the educational services decided on by the IEP team are changed. This would include the child’s removal from school or transfer to a partial day schedule, but would also include a change in services, such as removing a child’s one-to-one aide or occupational therapist. Changes in placement require PWN.

3. What information must PWN contain?

PWN must be given to the Parent in their **native language** “unless it clearly is not feasible to do so.”¹⁹⁰ **PWN must include:**

- (A) a description of the action proposed or refused by the agency;
- (B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- (C) a statement that the parents of a child with a disability have protection under the **procedural safeguards** of [IDEA] and, if this notice is

¹⁸⁸ Available for purchase at <http://www.harborhouselaw.com/>.

¹⁸⁹ 20 U.S.C. § 1415(b)(3).

¹⁹⁰ 20 U.S.C. § 1415(b)(4).

not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
(D) **sources for parents to contact** to obtain assistance in understanding the provisions of [IDEA];
(E) a description of **other options considered by the IEP Team** and the reason why those options were rejected; and
(F) a description of the factors that are relevant to the agency’s proposal or refusal.¹⁹¹

4. *What’s the purpose of PWN?*

The requirements of PWN help explain its purposes. If we look at the requirements, we see that PWN helps parents understand that a change is coming or a proposed change will be refused. It gives parents time to take action if they do not agree with the school’s proposal. It also helps the parents understand why the school is making the proposal, the data, the documents that support the proposal, and what options and factors impacted the decision. PWN should also make clear that parents have rights and resources available, if they disagree with the school’s decision.

xvi. **Procedural requirements – student discipline**

Students with disabilities incur school discipline at a much higher rate than students without disabilities. For example, students with disabilities are more than twice as likely to receive out of school suspension as students without disabilities.¹⁹² As the U.S. Supreme Court determined in the seminal case *Honig v. Doe*, the protections of the IDEA are designed to “strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school.”¹⁹³ Therefore, it is important for anyone working with students with disabilities to be aware of the discipline procedures under IDEA.

What happens when a student with an IEP violates the school’s student code of conduct (i.e. a school rule)? There are special rules under IDEA about suspending, expelling, or otherwise changing the educational placement of a student with an IEP because the student violated a student code of conduct. **When a school district proposes to “change the placement” of a child with an IEP because of the child’s alleged violation of a student code of conduct, the district must conduct a “manifestation determination” review (MDR) to determine whether the behavior that resulted in the violation of school rules related to the child’s disability.**¹⁹⁴

¹⁹¹ 20 U.S.C. § 1415(c) (emphasis added).

¹⁹² U.S. Department of Education Office for Civil Rights, *Civil Rights Data Collection: Data Snapshot (School Discipline)* (March 21, 2014), <http://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf>.

¹⁹³ 484 U.S. 305, 323 (1988)

¹⁹⁴ 20 U.S.C. § 1415(k)(1); 34 C.F.R. § 300.530(e)(1)

1. *When does a “change in placement” because of a disciplinary removal occur?*

A “change of placement” resulting from violation of a school code of conduct occurs when:

1. The child is removed from his current educational placement for more than 10 consecutive days because of a disciplinary infraction; **OR**
2. The child has been subjected to a series of disciplinary removals that constitute a pattern:
 - a) Because the removals total more than 10 school days in a school year;
 - b) Because the child's behavior is substantially similar to the child's behavior in previous incidents resulting in the prior removals; **and**
 - c) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.¹⁹⁵

The school district determines, on a case-by-case basis, whether a “change of placement” has occurred, but this decision is reviewable in due process and court.¹⁹⁶

2. *What is the “manifestation determination” review (MDR) process?*

Within 10 school days of any decision to “**change the placement**” (as defined above) of a student because of a violation of a student code of conduct, the school district must hold an MDR. In the MDR the district, the parent, and the relevant members of an IEP team (as determined by the parent and the district) must “review all relevant information in the student’s file, including the child’s IEP, any teacher observations, and any relevant information provided by the parents” in order to answer two questions:

1. Was the conduct in question caused by, or did the conduct have a direct and substantial relationship to, the child's disability?
2. Was the conduct in question a direct result of the district’s failure to implement the IEP?¹⁹⁷

If the answer is YES

If the answer to either of the above-noted questions is “yes,” the District must “return the child to the placement from which the child was removed” unless the parent and the District agree to the change in placement.¹⁹⁸ Further, if either of the MDR questions are answered with a yes,

¹⁹⁵ 34 CFR § 300.536(a).

¹⁹⁶ 34 CFR § 300.536(b).

¹⁹⁷ 34 C.F.R. § 300.530(e)(1).

¹⁹⁸ 34 C.F.R. § 300.530(f)(2).

the IDEA provides specific procedures the District must follow. First, if the child’s conduct “was the direct result of the [District’s] failure to implement the IEP,” the District “must take immediate steps to remedy those deficiencies.” Second, if the team determines the conduct was a manifestation of the child’s disability, the District must conduct a functional behavioral assessment (FBA) and implement a behavioral intervention plan (BIP) or, if a BIP already exists for the child, review the existing BIP and “modify it as necessary to address the behavior.”¹⁹⁹

If the answer is NO

If the answer to both of the above questions is no, the district may discipline the child in the same way they would discipline a child without a disability.²⁰⁰ However, even in this case, the district must conduct an FBA and BIP “to address the behavior violation so that it does not recur.”²⁰¹ Also, the district must still provide the child with a FAPE during any period of suspension (even one of less than 10 days), even if the child is out of school in an “interim alternative educational setting” (IAES).²⁰²

3. What are FBA and BIP?

A functional behavioral assessment (FBA) is a formal assessment of behavior that examines the antecedents (what came before the behavior and may have triggered the behavior), the behavior, and the consequences (what came after the behavior) to better understand the function or purpose for the behavior. Based on an FBA, a BIP is developed.

A behavioral intervention plan (BIP) is a formal plan for how school personnel and other people involved with the child react when the behavior comes up again in order to teach the child more appropriate replacement behaviors using positive interventions and supports.

For example, a student with dyscalculia (a neurological disorder making it difficult to complete math calculations) may throw a fit every time he is given a math assignment involving two digit multiplication. When he does this, he gets suspended. The FBA should identify that the antecedent is giving the child a two-digit multiplication problem; the behavior is throwing a fit; and the consequence is getting suspended.

A good behaviorist would recognize that throwing a fit is an avoidance behavior, which the student does because he does not want to (i.e. can’t) do the math problem. As a consequence, he gets suspended, which means he does not have to do the math problem. The student’s behavior is effective in obtaining his objective and the school’s reaction (the consequence) is

¹⁹⁹ 34 C.F.R. § at 300.530(e–f).

²⁰⁰ 20 U.S.C. § 1415(k)(1)(C).

²⁰¹ 20 U.S.C. §1415(k)(1)(D)(ii).

²⁰² 20 U.S.C. § 1415(k)(1)(D)(i).

counter-productive because it is only reinforcing the negative behavior (throwing a fit), since the student gets what he wants when he throws a fit. The BIP might work on training the student to ask for help in an appropriate fashion when he encounters a problem he does not know how to solve and the child's IEP might be modified to provide for additional supports and services related to math and addressing the child's dyscalculia.

4. What is an interim alternative educational setting (IAES)?

An interim alternative educational setting (IAES) is a temporary setting in which a child is educated during a period of discipline. An IAES may be an administrative building, home school, or another setting. A child with an IEP must still be provided a FAPE in an IAES.²⁰³ A student's IEP team determines the IAES.²⁰⁴

5. Are there special circumstances where a school can remove a child even if the behavior is a manifestation of his disability?

Yes, but the IDEA only contains **three** exceptions to the MDR requirements, where the child:

- (i) **carries or possesses a weapon** to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;
- (ii) knowingly possesses or uses **illegal drugs**, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or
- (iii) has **inflicted serious bodily injury** upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.²⁰⁵

Even in those cases, the child cannot be removed to alternative educational setting for more than 45 days.²⁰⁶

For these purposes, the term "**controlled substance**" means a federally controlled drug or substance under Schedule I–V of Section 202(c) of the Controlled Substances Act, including marijuana, heroin, "acid" (LSD), "ecstasy" (MDMA), cocaine, methamphetamine, Adderall, Ritalin, and many other "street drugs, prescription, and over the counter drugs."²⁰⁷ **IDEA does not prohibit possession of "controlled substances" unless they are possessed illegally.** IDEA call this illegal use of a controlled substance an "illegal drug," even though the drug itself may not be illegal. For example, a child who has a prescription for Ritalin to treat his ADHD and is

²⁰³ 20 U.S.C. § 1412(a)(1); 1415(k)(1)(C–D).

²⁰⁴ 34 C.F.R. § 300.531.

²⁰⁵ 34 C.F.R. § 300.530(g).

²⁰⁶ 20 U.S.C. § 1415(k)(1)(G).

²⁰⁷ See 20 U.S.C. § 1415(k)(7).

using the medication for his own use in school cannot be suspended for that reason.²⁰⁸ However, a child with a disability who illegally buys Ritalin from another student, may be suspended under this rule.

“**Dangerous weapon**” as used in IDEA means “a weapon, device, instrument, material, or substance, animate or inanimate, that is **used for, or is readily capable of, causing death or serious bodily injury**, except that such term does not include a pocket knife with a blade of less than 2½ inches in length.”²⁰⁹ “**Serious bodily injury**” means “bodily injury which involves— (A) a substantial risk of death; (B) extreme physical pain; (C) protracted and obvious disfigurement; or (D) protracted loss or impairment of the function of a bodily member, organ, or mental faculty.”²¹⁰

6. Is there a right of appeal from an MDR decision?

Yes. IDEA provides for an expedited due process hearing to a parent who disagrees with an MDR determination or the decision regarding placement. A district that “believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others” may appeal.²¹¹ The hearing must occur within 20 days of the filing of a complaint and a decision must be rendered within 10 days of the hearing.²¹² The child remains in the IAES while the hearing is pending, subject to the time limitations discussed above.²¹³

7. Are there protections for children with disabilities who are not yet eligible for special education and related services?

A child who has not been previously qualified for services under IDEA is still protected by the MDR requirements if the district “had knowledge” that the child was a “child with a disability before the behavior that precipitated the disciplinary action occurred.”²¹⁴ If the district does not have this knowledge, the student may be disciplined to the same extent as children without disabilities. A district is deemed to have knowledge of this fact if:

1. the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
2. the parent of the child has **requested an evaluation** of the child [under IDEA] . . . ; **or**

²⁰⁸ 20 U.S.C. § 1415(k)(7)(B).

²⁰⁹ 20 U.S.C. § 1415(k)(7)(C); 18 U.S.C. § 930(g)(2).

²¹⁰ 20 U.S.C. § 1415(k)(7)(D); 18 U.S.C. § 1365(h)(3).

²¹¹ 34 C.F.R. § 300.532.

²¹² 34 C.F.R. § 300.532(c)(2).

²¹³ 34 C.F.R. § 300.533.

²¹⁴ 20 U.S.C. § 1415(k)(5)(A).

3. the teacher of the child, or other **personnel of the [district] . . . , has expressed specific concerns about a pattern of behavior demonstrated by the child**, directly to the director of special education of such agency or to other supervisory personnel of the agency.²¹⁵

Further, 20 U.S.C. § 1415(k)(5)(D)(ii) provides:

If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under this subsection, *the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with [IDEA], except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.*²¹⁶

8. Reports to law enforcement

It is very important to note that nothing in IDEA protects a student from prosecution for a crime he allegedly committed, even if the student experiences a disability or the crime was allegedly committed on school property or during a school function. In other words, if a student with a disability assaults another student, steals something, or commits any other crime, he can still potentially be charged, prosecuted, and punished like any other person his age.²¹⁷ However, when a school district reports a crime it is required to “ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the [district] reports the crime.”²¹⁸

xvii. **Procedural requirements – parents’ rights when things go bad (i.e. dispute resolution)**

1. About dispute resolution and keeping the peace

Although IDEA envisions a collaborative process where parents and schools work together to provide an appropriate education to the student, things do not always work out that way. Sometimes parents and schools get into disputes they may not be able to resolve amongst themselves.

²¹⁵ 20 U.S.C. § 1415(k)(5)(B) (emphasis added).

²¹⁶ 20 U.S.C. § 1415(k)(5)(D)(ii) (emphasis added).

²¹⁷ 20 U.S.C. § 1415(k)(6)(A).

²¹⁸ 20 U.S.C. § 1415(k)(6)(B).

In any dispute, particularly one regarding a child, it is important to think about the continuing relationship between the parties to the dispute. In most cases, students will continue to attend school in the district where the dispute arose. The parents may continue to live in the district, have other children who attend district schools, and may also have other children who need special education services.

Because special education involves strong feelings and committed individuals on both the parents' and the school's parts, disputes can escalate quickly. **While escalating a dispute to a lawsuit is an option, it is not always the best option from either the school's or the parent's view. Both parents and schools have a responsibility to the students and the taxpayers to look for ways to resolve disputes without resorting to the high financial, emotional and time costs involved in litigation. This does not mean parents should compromise their child's rights when the issue in dispute will have a significant impact on the student. Likewise, schools should be wise with public funds. Many schools have spent more money litigating cases than they would have spent providing the services requested. Parents and schools should choose their battles wisely.**

For this reason, IDEA and Montana regulations provide several dispute resolution processes to help resolve disputes in both collaborative and, when needed, adversarial ways. Special education dispute resolution options available in Montana are described below, in general order from least to most adversarial:

2. OPI Early Assistance Program

The Montana Office of Public Instruction (OPI) is the State Educational Agency for Montana. You can ask OPI to provide you with dispute resolution services through the Early Assistance Program (EAP).²¹⁹ This program may allow OPI to negotiate with the school for a mutually agreeable conclusion for both the school and the parents. The EAP also helps arrange mediation and facilitated IEP meetings (described below). **The dispute resolution options offered by EAP may be used at any time, regarding any special education dispute, regardless of whether a formal complaint has been filed with OPI or not.** The EAP contact point is: Mandi Gibbs, Program Director; Early Assistance Program, Office of Public Instruction, Legal Division, P.O. Box 202501, Helena, MT 59620-2501; (406) 444-5664.

3. Facilitated IEP Meeting

EAP can arrange a facilitated IEP meeting, which can be a very helpful problem solving tool. OPI covers the cost of a facilitated IEP meeting. In a facilitated IEP meeting a neutral IEP facilitator comes in to the IEP meeting to help the team reach an agreed upon IEP. **The facilitator cannot make decisions or decide who is right or wrong, but can help:**

- set ground rules for the meeting;

²¹⁹ See A.R.M. § 10.16.3660.

- keep the meeting organized and on task;
- help focus the discussion;
- help make sure everyone at the meeting participates and have their voices heard;
- ensure all issues are covered;
- suggest options for resolution;
- help ensure that any decisions are properly incorporated into the IEP.

4. Mediation

A mediation is similar to a facilitated IEP meeting in that a neutral “mediator” helps the parties reach a resolution without making any decisions or determining who is right or wrong. However, in a mediation, the entire IEP team is not present and a mediation might cover issues beyond just the IEP. Mediation can be used anytime there is a dispute regarding special education or related services.²²⁰ Mediation might also occur after a complaint is filed to try and resolve the issues in the complaint.

Typically, a mediation might involve a school administrator (such as a principal), the special education director, the parents, and the mediator. The parties and the mediator might meet together or in separate rooms and will work to craft a solution to the problems that meets the child’s educational needs. Mediations are confidential and either party is free to leave at any time, if they feel the mediation is not productive. Neither the parties nor the mediator can discuss what occurred in the mediation outside the mediation, including in any later legal action. If an agreement is reached in mediation, the final, signed agreement is not confidential. OPI covers the cost of a special education mediation if it is arranged through EAP. **As with any legal document, it is wise to consult an attorney before signing any agreement reached in mediation. There is no requirement that an agreement must be signed at mediation and both a parent and a school district always have the option to consult with an attorney before signing any agreement reached in mediation.**

5. State Complaint

Anyone may file a complaint with the OPI alleging that a school is violating the IDEA as to a particular student or as a systemic issue involving more than one student.²²¹ In a state complaint, OPI assigns an investigator who looks at the records, conducts interviews, and collects other information to determine whether the school district violated IDEA or a state special education law or rule. A parent does not need to be represented by an attorney to file a state complaint, although a parent may wish to consult with one. The investigator issues formal findings and a decision. If a violation is found, the investigator also issues a corrective action plan.

²²⁰ See 34 C.F.R. § 300.506, A.R.M. §10.16.3506.

²²¹ 34 C.F.R. § 300.153(a); A.R.M. § 10.16.3662(1).

The OPI has established procedures for filing complaints alleging that a school has failed to follow state and/or federal law in providing a student with disabilities a free appropriate public education. When a formal complaint is filed with OPI, informal dispute resolution procedures (as discussed above) are initiated in an attempt to resolve the issues. If the dispute is not resolved within 15 days, the formal complaint process will continue.

To file a complaint, the complainant must send a written and signed statement to OPI that includes:

- The name of the child, the address of the child, and the name of the school the child is attending;
- An alleged violation that occurred **no more than one year** before the complaint;
- The nature of the problem and the facts on which the statement is based. Be sure to include all the facts regarding the allegations, including what was said or done, by whom, dates, witnesses, and contact information for the witnesses; and
- A proposed resolution to the problem, if the complainant has a proposal.²²²

The complaint must allege a violation that occurred not more than one year prior to the date the complaint is received. A final decision will be issued within 60 days of receipt of the complaint, unless an extension is agreed upon. The EAP has 15 days to assist the parties in reaching an agreed upon resolution. Otherwise, the OPI will commence its investigation.²²³

A complaint form is available from the OPI upon request by calling (406) 444-5664. The complaint must be filed with the OPI Dispute Resolution Office, Office of Public Instruction, P.O. Box 202501, Helena, MT 59620-2501. **A copy must be provided to the school district against which the complaint is filed. This should be directed to the building principal or the district superintendent (if there is one).**

6. Due Process Complaint

A due process hearing is much like a lawsuit, except that it happens in front of an appointed administrative law judge, not an elected Montana District Court Judge. **A due process hearing request must be filed within two years of the alleged violation of IDEA.**²²⁴ This process is complicated, expensive, and usually involves attorneys on both sides. Because of the complexity of a due process hearing, the details of the process are beyond the scope of this discussion.

²²² A.R.M. § 10.16.3662(2).

²²³ A.R.M. § 10.16.3662(5).

²²⁴ See 20 U.S.C. § 1415(f)(3)(C).

A due process complaint and subsequent hearing may be difficult to manage without an attorney. It is strongly recommended that parents obtain the assistance of an attorney, if they decide to proceed with due process. **Parents should not sign anything from the school district, including any proposed settlement, until they have an attorney review it.**

7. *What happens with the student while a dispute is pending (“stay put”)?*

During any administrative or judicial process regarding a due process complaint, **the child must remain in her current educational placement, unless:**

1. The school district and the parents agree to a different placement; or
2. A hearing officer or judge “agrees with the child’s parents that a change of placement is appropriate.”²²⁵

If the dispute is about admission, the child must be enrolled, pending the outcome of the proceeding.²²⁶ The rules for “stay put” are different for a child who is removed for an alleged violation of a student code of conduct. For a discussion of those issues, see the section on [Student Discipline](#).

VI. **SECTION 504, THE ADA, AND THE IDEA**

The provisions of Section 504 and ADA are complicated, detailed, and apply in many areas of public life, not just schools. This discussion is designed to give the reader a general overview of Section 504 and Title II of the ADA in the public K-12 school context. It is not designed to be an exhaustive discussion of Section 504, Title II of the ADA, or to address any areas outside of public K-12 schools, such as public accommodations or employment. If you have specific questions about Section 504 or the ADA, you should consult an attorney.

The IDEA is primarily a funding law, meaning that it provides funding to states to deliver special education and related services to elementary and secondary school children. Section 504 and the ADA are broad anti-discrimination laws. They do not provide funding to states.

Whereas IDEA is focused on the provision of specially designed instruction designed to meet the unique needs of a child with a disability, Section 504 and ADA are focused on providing people with disabilities equal opportunity and access to public services, programs, and activities, including public schools.²²⁷ In the public school context, this requires compliance with specific rules that are similar, but not the same as the requirements for special education under IDEA. In some situations, a violation of IDEA might also constitute a violation of Section 504 and/or ADA, but this may not always be true.

²²⁵ 34 C.F.R. § 300.518.

²²⁶ 34 C.F.R. § 300.518(b).

²²⁷ See e.g. 28 C.F.R. § 35.130(b).

Section 504 prohibits disability discrimination in programs receiving federal financial assistance. Because public schools receive federal funding through a variety of programs, including via IDEA for special education, public schools are covered under Section 504's antidiscrimination provisions.

Title II of the ADA expands Section 504's protection to all state and local government programs, services, and activities, regardless of whether they receive federal funding or not. The anti-discrimination protections of ADA overlap Section 504 in public schools because those schools are both federally funded (and therefore covered under Section 504) and state or local government services (covered under Title II of the ADA). Title II of the ADA provides no less protection than Section 504 and the two Acts are generally analyzed together.²²⁸

While ADA is often thought of in terms of physical access to buildings, including requiring ramps, automatic doors, etc., ADA and 504 provide for much broader accommodations than just physical access. This could include things like policy changes, assistive technology, and many other accommodations. For some examples a searchable database of many workplace accommodations, listed by disability, can be found on the Job Accommodation Network (JAN) at <https://askjan.org/>.

a. NON-DISCRIMINATION UNDER SECTION 504 AND ADA

Section 504's antidiscrimination provision states:

No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, *be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .*²²⁹

Title II of the ADA is even broader and states:

no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.²³⁰

The ADA and Section 504 and their related regulations have many detailed provisions that implement these broad anti-discrimination mandates, prohibit differential treatment of

²²⁸ 28 C.F.R. § 35.103; *see e.g. Vinson v. Thomas*, 288 F.3d 1145, 1152 (9th Cir. 2002).

²²⁹ 29 U.S.C. § 794(a)(emphasis added).

²³⁰ 42 U.S.C. § 12132.

persons with disabilities, and work to ensure equal access to public services, programs and activities.

b. ELIGIBILITY UNDER SECTION 504 AND ADA

Section 504 and ADA phrase the eligibility standard slightly different, but the result is very similar. Under ADA, a person must be a “qualified individual with a disability” to receive protection. The term “qualified individual” means “an individual with a disability who, *with or without reasonable modifications . . . or the provision of auxiliary aids and services*, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.”²³¹

Section 504 uses the term “otherwise qualified” to refer to the same concept. This means that if a person with a disability meets the general requirements for the program applicable to people without a disability, the person with a disability cannot be discriminated against in that program.²³² For example, if a school district requires that a student must be between the age of 6 and 19 and reside within the district in order to be enrolled in school, a child with a disability who is 8 and resides in the district is a “qualified individual” (under ADA) or “otherwise qualified” (under Section 504) and protected from disability discrimination under those laws.

It is important to note that under ADA, a person is a “qualified individual” even if they need accommodations to meet the general program requirements. For example, let’s say a school district requires that in order to be enrolled in a public pre-school the child must be at least 3, a resident of the district and toilet trained. A child with cerebral palsy applies to the school. The child is 3-years-old and resides in the district. The child requires a personal aide to use the bathroom, but is able to communicate the need to go to the bathroom. This child meets the definition of a “qualified individual,” because, with accommodations (a personal aide), he meets all requirements for admission to the pre-school (is at least 3, resides in the district and is toilet trained).

Under both Title II of the ADA and Section 504, the definition of “disability” is the same²³³ and means “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment”²³⁴ An individual is “regarded as having . . . an impairment” if the person is discriminated against because of “an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity.”

²³¹ 42 U.S.C. § 12131.

²³² See e.g. *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 406 (1979) (person with disability must meet all program requirements to obtain protection).

²³³ See 29 U.S.C. § 794(a); 29 U.S.C. § 705(20); 42 U.S.C. § 12102.

²³⁴ 20 U.S.C. §12102(1).

In other words, if a program employee discriminates against a person because they believe he has a disability (even though that person does not actually have a qualifying disability) the person is still protected under both Section 504 and ADA.²³⁵

Finally, the term “major life activity” is defined as follows:

(2)Major life activities

(A)In general

. . . major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.

(B)Major bodily functions

. . . a major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.²³⁶

As you can see, the definition of “disability” under Section 504 and ADA is very broad and covers many people with a variety of disabilities, from minor to very severe. The key is that the disability must “substantially limit” a major life activity. For example, a person who uses reading glasses with a minor correction to help make reading easier (but can read without his classes), probably does not fit the definition. However, a person who is legally blind and cannot read at all without heavy prescription glasses probably does meet the definition.

Importantly, if a person meets the definition of an “individual with a disability” he is entitled to the protection of Section 504 and ADA. **There is no requirement that the disability impacts the person’s learning, or “adversely affects educational performance,”** as required by IDEA. **This is not a factor under ADA or Section 504. Therefore, a student might be eligible for Section 504 and ADA protection, but not eligible for special education under IDEA.** For example, a child who uses a wheelchair because of an amputation but has no social, emotional, or cognitive impairment and is performing well in school might not be eligible for special education under IDEA, but is eligible for protection under Section 504 and ADA. The school might need to build ramps, move classes to an accessible area of campus, or provide other reasonable accommodations in order to allow the student to access school.

C. COMPARING THE IMPACT OF SECTION 504 , ADA, AND IDEA IN EDUCATION

As we discussed, ADA, IDEA, and Section 504 all apply in public elementary and secondary education.²³⁷ But while ADA and Section 504 apply to any child with a qualifying disability, IDEA

²³⁵ 42 U.S.C. § 12102(3).

²³⁶ 42 U.S.C. § 12102(2).

²³⁷ See e.g. *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1097 (9th Cir. 2013).

only applies to those children whose disability falls within the specific disability categories defined in IDEA and because of that disability need special education (i.e. specialized instruction) and related services. For more information on this requirement, see the section on [eligibility under IDEA Part B](#).

The general antidiscrimination provisions of ADA Title II apply in public elementary and secondary schools, colleges and universities, vocational programs, and other public educational programs, services, and activities. Even though ADA Title II regulations do not set out specific requirements for public school education, recall that **a violation of Section 504 is also a violation of ADA Title II.**²³⁸

Section 504's regulations do set out specific requirements for implementing Section 504's general antidiscrimination provisions in public education. Like IDEA, Section 504 regulations provide both substantive and procedural protections to students with disabilities. However, it is important to note that while the requirements for educating children with disabilities under Section 504 and IDEA are similar, they are not identical.²³⁹ The substantive and procedural requirements of Section 504 are examined in more detail in the following sections.

d. SUBSTANTIVE REQUIREMENTS UNDER SECTION 504

Section 504 regulations set out several substantive requirements to ensure children with disabilities are not discriminated against in public education. Like IDEA, Section 504 has regulations relating to FAPE, Child Find, evaluations, and least restrictive environment.

i. Free Appropriate Public Education (FAPE) under Section 504

While both IDEA and Section 504 use the term “free appropriate public education” (FAPE), **the meaning of FAPE under IDEA and Section 504 are different.** FAPE under IDEA requires the delivery of special education (i.e. specialized instruction) and related services, in accordance with a properly developed IEP. FAPE under Section 504 requires education and services “designed to meet individual educational needs of handicapped persons *as adequately as the needs of nonhandicapped persons are met.*”²⁴⁰ FAPE also requires the district to comply with Section 504's procedural protections.²⁴¹ A district must also provide transportation to outside providers who will provide services necessary for FAPE.²⁴²

FAPE under Section 504 “require[s] a comparison between the manner in which the needs of disabled and non-disabled children are met, and focuses on the [‘]design[‘] of a child's

²³⁸ See e.g. Catherine E. Lhamon, Asst. Sec. of Civil Rights, *Dear Colleague Letter*, 3 (OCR Oct. 21, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/disabharassltr.html>.

²³⁹ See e.g. *Mark H. v. Lemahieu*, 513 F.3d 922, 933 (9th Cir. 2008).

²⁴⁰ 34 C.F.R. § 104.33(b)(1)(emphasis added).

²⁴¹ 34 C.F.R. § 104.33(b)(1).

²⁴² 34 C.F.R. § 104.33(b)(2).

educational program.”²⁴³ While Section 504 does not require an IEP, a properly developed IEP is one way for a school district to comply with Section 504’s FAPE requirement.²⁴⁴ However, even if a District provides a compliant IEP, and therefore satisfies Section 504’s FAPE requirement, it may still violate Section 504 in other ways.²⁴⁵

In order to comply with Section 504, a school district must provide “reasonable accommodation[s] that [the student] needs in order to enjoy meaningful access to the benefits of public services [e.g. a public education].”²⁴⁶ At a minimum “meaningful access” requires public schools to abide by Section 504’s implementing regulations, including the FAPE requirement, but may also require other accommodations.²⁴⁷

What accommodations may be “reasonable” to provide FAPE to a particular student requires a case-by-case analysis. Reasonableness “depends on the individual circumstances of each case, and requires a fact-specific, individualized analysis of the disabled individual’s circumstances and the accommodations that might allow him to enjoy meaningful access to the program.”²⁴⁸ While Section 504 does not require schools to “make fundamental or substantial alterations to its programs” in order to accommodate a person with a disability, “mere speculation that a suggested accommodation is not reasonable” is not enough to deny the requested accommodation.²⁴⁹

Therefore, Section 504 “create[s] a duty to gather sufficient information from the disabled individual and qualified experts as needed to determine what accommodations are necessary.”²⁵⁰ Schools, like other public entities, have “a mandatory obligation to engage in an informal interactive process to clarify what the individual needs and identify the appropriate accommodation.”²⁵¹ Unlike IDEA, Section 504 does not mandate the use of a particular document (such as an IEP) to describe what accommodations will be provided and how they will be implemented. However, schools typically undertake the “interactive process” of determining the student’s needs and identifying appropriate accommodations in a series of meetings resulting in a written document describing the accommodations. This document is sometimes called a “504 plan.”

²⁴³ *Mark H. v. Lemahieu*, 513 F.3d 922, 933 (9th Cir. 2008).

²⁴⁴ 34 C.F.R. § 104.33(b)(2).

²⁴⁵ *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1099 (9th Cir. 2013).

²⁴⁶ *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1204 (9th Cir. 2016) (emphasis added).

²⁴⁷ *A.G. v. Paradise Valley Unified Sch. Dist. No. 69*, 815 F.3d 1195, 1204 (9th Cir. 2016).

²⁴⁸ *Mark H. v. Hamamoto*, 620 F.3d 1090, 1098 (9th Cir. 2010).

²⁴⁹ *Mark H. v. Hamamoto*, 620 F.3d 1090, 1098 (9th Cir. 2010).

²⁵⁰ *Mark H. v. Hamamoto*, 620 F.3d 1090, 1098 (9th Cir. 2010).

²⁵¹ *Vinson v. Thomas*, 288 F.3d 1145, 1154 (9th Cir. 2002).

ii. **Child Find**

Under Section 504's Child Find requirement, a school district must annually "identify and locate every qualified handicapped person residing in the recipient's jurisdiction who is not receiving a public education."²⁵² Each year, the district must also take appropriate steps to notify parents of the schools' non-discrimination duty under Section 504.²⁵³

iii. **Evaluations and placement**

A school district must evaluate any child that "needs or is believed to need special education or related services" before placing the child in a regular or special education program or otherwise changing the child's educational placement.²⁵⁴

Evaluations must be conducted using valid testing instruments and administered by trained personnel according to the instructions provided by the producer of the testing instrument.²⁵⁵ Evaluations must use tests designed to assess specific areas of educational need, not just produce a general IQ score.²⁵⁶ When tests are administered to children "with impaired sensory, manual, or speaking skills," the test results must "accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure)."²⁵⁷

When a district interprets evaluation data and makes placement decisions, it must:

- Draw upon information from a variety of sources, including aptitude (intelligence) and achievement (academic) tests, teacher recommendations, physical condition of the student, social or cultural background, and adaptive behavior;
- Ensure information from all sources is documented and carefully considered,
- Ensure that the placement decision "is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options"; and
- Ensure that placement complies with the least restrictive environment requirement, discussed below.²⁵⁸

²⁵² 34 C.F.R. § 104.32(a).

²⁵³ 34 C.F.R. § 104.32(b).

²⁵⁴ 34 C.F.R. § 104.35(a).

²⁵⁵ 34 C.F.R. § 104.35(b)(1).

²⁵⁶ 34 C.F.R. § 104.35(b)(2).

²⁵⁷ 34 C.F.R. § 104.35(b)(3).

²⁵⁸ 34 C.F.R. § 104.35(c).

School districts must provide for periodic reevaluations. Compliance with IDEA’s reevaluation procedure is one method of complying with this requirement.²⁵⁹

iv. **Least Restrictive Environment**

Like IDEA, Section 504 also has a least restrictive environment requirement. Section 504 requires that children with disabilities are educated with children without disabilities “to the maximum extent appropriate to the needs of the [child with the disability].”²⁶⁰ Similar to the IDEA, Section 504 requires that children with disabilities are placed in the regular education environment “unless it is demonstrated by the [district] that the education of the person in the regular environment *with the use of supplementary aids and services* cannot be achieved satisfactorily.”²⁶¹ In other words, a school cannot simply place a child with a disability in a general education classroom and expect him to succeed. The school must provide supports in the classroom to enable the child to succeed before removing the child to a special education classroom or other program outside the general education classroom.

The least restrictive environment requirement applies to non-academic activities as well. Therefore, a school must ensure that a child with a disability participates in non-academic and extracurricular activities with children without disabilities to the “maximum extent appropriate to the needs of the child with the disability.”²⁶² This includes meals, recess, physical education, athletic teams, clubs, recreational activities, transportation, counseling, student employment, health services, and other services and programs offered to other students.²⁶³ Schools must provide students with disabilities equal opportunity to access these non-academic programs and services in a non-discriminatory fashion.²⁶⁴ Facilities operated specifically for persons with disabilities must be comparable to the other facilities, services, and activities offered by the school that are not specifically for persons with disabilities.²⁶⁵

e. **PROCEDURAL REQUIREMENTS UNDER SECTION 504**

The procedural requirements of Section 504 are less detailed than those in the IDEA. Section 504 requires that districts must have procedures in place to provide parents notice of proposed action or refusal to take certain action, an opportunity to examine relevant records, and an opportunity for a hearing and review of decisions made at any hearing. These rights relate to any issue regarding “identification, evaluation, or educational placement of persons who, because of [disability], need or are believed to need special instruction or related services.” A school may utilize the procedural safeguards under IDEA in order to comply with the Section

²⁵⁹ 34 C.F.R. § 104.35(d).

²⁶⁰ 34 C.F.R. § 104.34(a).

²⁶¹ 34 C.F.R. § 104.34(a) (emphasis added).

²⁶² 34 C.F.R. § 104.34(b).

²⁶³ 34 C.F.R. § 104.34(b); *see also* 34 C.F.R. § 104.37.

²⁶⁴ 34 C.F.R. § 104.37.

²⁶⁵ 34 C.F.R. § 104.34(c).

504 requirements, but this is not the only way to meet Section 504’s procedural requirements.²⁶⁶

f. **“EFFECTIVE COMMUNICATION” UNDER ADA**

The ADA requires that public entities “take appropriate steps to ensure that communications with applicants, participants, members of the public, and companions with disabilities are as effective as communications with others.”²⁶⁷ This includes the obligation to provide “appropriate auxiliary aids and services where necessary to afford qualified individuals with disabilities, including applicants, participants, companions, and members of the public, *an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity of a public entity.*”²⁶⁸ The ADA regulations define the term “auxiliary aids and services” broadly to include qualified interpreters, exchange of written notes, real time transcription, audio recordings, Braille materials, screen-readers, videophones, and many other high-tech, low-tech or no-tech methods.²⁶⁹

There is no one-size-fits all answer to what type of auxiliary aids and services might be necessary to accomplish effective communication. Instead, this depends on the person’s “method of communication . . . the nature, length, and complexity of the communication involved; and the context in which the communication is taking place.” Primary consideration must be given to the requests of the person with the disability.²⁷⁰ Like other accommodations under Title II of the ADA, accommodations requested to accomplish “effective communication” must be reasonable. Therefore, under the effective communication provision of Title II, the public entity is not required to “take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in undue financial and administrative burdens,” but must take any other action that “would not result in such an alteration or such burdens but would nevertheless ensure that, to the maximum extent possible, individuals with disabilities receive the benefits or services provided by the public entity.”²⁷¹

A public entity should not require an individual with a disability to bring his own interpreter.²⁷²
A public entity:

shall not rely on an adult accompanying an individual with a disability to interpret or facilitate communication except—(i) In an emergency involving an imminent threat to the safety or welfare of an individual or

²⁶⁶ 34 C.F.R. § 104.36.

²⁶⁷ 28 C.F.R. § 35.160(a)(1).

²⁶⁸ 28 C.F.R. § 35.160(b)(1) (emphasis added).

²⁶⁹ 28 C.F.R. § 35.104.

²⁷⁰ 28 C.F.R. § 35.160(b)(2).

²⁷¹ *K.M. ex rel. Bright v. Tustin Unified Sch. Dist.*, 725 F.3d 1088, 1096–97 (9th Cir. 2013) (quoting 28 C.F.R. § 35.164).

²⁷² 28 C.F.R. § 35.160(c)(1).

the public where there is no interpreter available; or (ii) Where the individual with a disability specifically requests that the accompanying adult interpret or facilitate communication, the accompanying adult agrees to provide such assistance, and reliance on that adult for such assistance is appropriate under the circumstances.²⁷³

A public entity shall not rely on a minor child to interpret or facilitate communication “except in an emergency involving an imminent threat to the safety or welfare of an individual or the public where there is no interpreter available.”²⁷⁴

g. DISPUTE RESOLUTION UNDER SECTION 504 AND ADA

In Montana, the Office of Public Instruction does not handle complaints regarding violations of Section 504 or the ADA, they only handle complaints regarding IDEA. Local school districts must have a complaint procedure, but procedures vary from district to district.²⁷⁵

In addition to filing a complaint with the local school district, complaints alleging a violation of Section 504 or the ADA relating to education may be filed with the Montana Human Rights Bureau (HRB) or with the U.S. Department of Education, Office of Civil Rights (OCR). The contact information is below:

Human Rights Bureau:

Human Rights Bureau
Montana Department of Labor and Industry
PO Box 1728
Helena MT, 59624-1728
Phone: 1 (800) 542-0807
Fax: (406) 443-3234

Office of Civil Rights:

Office for Civil Rights
U.S. Department of Education
915 Second Avenue, Room 3310
Seattle, WA 98174
Telephone: (206) 607-1600
Fax: (206) 607-1601

Montana’s HRB does not specifically enforce Section 504, although a violation of Section 504 is typically also a violation of the ADA, which the HRB does enforce. Additionally, HRB enforces the Montana Human Rights Act (HRA)²⁷⁶ and the Governmental Code of Fair Practices

²⁷³ 28 C.F.R. § 35.160(c)(2).

²⁷⁴ 28 C.F.R. § 35.160(c)(3).

²⁷⁵ 34 C.F.R. § 104.36.

²⁷⁶ Title 49, Mont. Code Ann.

(GCFP)²⁷⁷ which both prohibit discrimination on the basis of disability, specifically in education.²⁷⁸ Parents and students also have an individual right to sue a school district for violations of ADA and Section 504.

h. RETALIATION

Both Section 504 and ADA prohibit retaliation against a person seeking to enjoy or enforce their rights or assisting others in the enjoyment or enforcement of their rights under those laws.²⁷⁹ In Montana, the HRA and GCFP both prohibit retaliation as well.²⁸⁰ Specifically, ADA provides:

(a) No private or public entity shall discriminate against any individual because that individual has opposed any act or practice made unlawful by this part, or because that individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act or this part.

(b) No private or public entity shall coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by the Act or this part.²⁸¹

The anti-retaliation regulations incorporated into Section 504's regulations are similar to the ADA anti-retaliation regulations.²⁸²

VII. FORMS

Our website's [forms](#) page, contains various forms to assist in advocating for students with disabilities. Some of the forms are included in appendix at the back of this handbook, but more updated forms may be available on our [website](#). These forms are developed for your guidance and information only. **As with any legal form, you need to make modifications appropriate to your situation and review the completed form carefully to ensure it is accurate and complete.** Some of the forms included on our website are:

²⁷⁷ Title 49, Ch. 3, Mont. Code Ann.

²⁷⁸ Mont. Code Ann. §§ 49-2-307 and 49-3-203.

²⁷⁹ 28 C.F.R. § 35.134 (ADA); 34 C.F.R. § 104.61 (Section 504) (incorporating 34 C.F.R. § 100.7(e) by reference); see also *Dear Colleague Letter* (OCR Apr. 24, 2013) <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201304.html>.

²⁸⁰ Mont. Code Ann. §§ 49-2-301 (HRA); 49-3-209 (GCFP).

²⁸¹ 28 C.F.R. § 35.134.

²⁸² 34 C.F.R. § 104.61 (Section 504) (incorporating 34 C.F.R. § 100.7(e) by reference).

a. DRM UNIT EDUCATION INTAKE FORM.

This form should be completed by a person seeking assistance from DRM's education unit. You can fill this out in advance before calling or with the assistance of one of our intake specialists when you call.

b. REQUEST FOR PART C EARLY INTERVENTION EVALUATION

This form is used to request an evaluation of a child, age 0-3 for early intervention services. It is directed to the local Early Head Start program, not the local school district.

c. REQUEST FOR INITIAL EVALUATION

This form is used to request an initial evaluation for a child age 3 and up. It is directed to the local school district. It could also be used to request a re-evaluation if you modify the form to be clear that you are seeking a reevaluation and why.

d. REQUEST FOR REEVALUATION

This form is used to request a reevaluation of a child aged 3 and up from the school district.

e. RECORDS REQUEST

This form is used to request all of a child's educational records from a school district. The requester should give the school district a reasonable amount of time to comply with the request, generally at least a week or two, unless the records are needed sooner for an upcoming meeting regarding the student.

f. REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATION (IEE)

This form is used to request an IEE.

g. REQUEST FOR AN IEP TEAM MEETING

This form is used to request an IEP team meeting to address a concern after a child is already receiving special education services.

h. FOLLOW UP LETTER TO IEP MEETING

This is a general format letter to following up on any concerns an IEP team member may have after an IEP meeting. It is important to document any concerns promptly, completely, and in writing after an IEP meeting. For example, you might send this letter to indicate that items discussed at the IEP meeting were not included in the meeting notes and to ask that they be included in the meeting notes before the IEP is finalized. It's a good idea to send a similar letter outlining concerns that should be discussed before an IEP meeting, and proposing an agenda for the meeting.

i. REQUEST FOR REASONABLE ACCOMMODATION FOR OUT OF SCHOOL STUDENT

This form may be used to request a reasonable accommodation to a District's attendance policy. This often comes up when a student cannot attend because of his disability, but the District is reporting him as truant and the county attorney is threatening prosecution for truancy. This form could be modified to request other types of accommodations as well.

j. **REQUEST FOR GRADUATION REQUIREMENTS**

This form is used to request information about a District's graduation requirements.

k. **REQUEST FOR SCHOOL BOARD POLICIES**

This form is used to request information about a District's policies and procedures and may be limited to policies and procedures about a certain topic (e.g. student discipline).

VIII. EVALUATIONS

Below you will find information about private educational evaluators in Montana. More information may be available on our [website](#) or at <http://www.yellowpagesforkids.com/>. This is not a complete list of individuals who conduct educational evaluations in Montana. The individuals listed here are included as a courtesy, not a recommendation. DRM makes no recommendation or guarantee regarding the abilities of the individuals listed or their likelihood of success with your concerns.

a. **EDUCATIONAL EVALUATORS**

Private educational evaluators are typically psychologists or neuropsychologists who have specific training and experience conducting educational evaluations. You may wish to ask your pediatrician or other trusted healthcare provider for referrals in your area or for other professional who might evaluate your student's needs such as occupational therapists, physical therapists, speech pathologists, audiologists, or others. **If you are an educational evaluator and would like to be included in this list, please contact DRM at 406-449-2344.**

Some educational evaluators who practice in Montana are:

Dr. Jeffrey M. Cory, Ph.D.
Rocky Mountain Neuropsychology, PLLC
7 W Main Street, Suite 207-5, Bozeman, MT 59715
(406) 582-4466

Dr. Brenda Roche, Ph.D.
3021 Third Avenue North, Billings, MT 59101
The Center for Children and Families
(406) 294-5090

Dr. Robert Velin, Ph.D.
Community Physician Group - MT Neurobehavioral Specialists South
1622 South Avenue West, Missoula, MT 59801
(406) 543-9700

b. BOARD CERTIFIED BEHAVIOR ANALYSTS (BCBA)

BCBAs use principals of applied behavior analysis (ABA) to help understand socially significant behavior and develop plans to help change specific behaviors of concern. BCBAs are nationally certified through the Behavior Analyst Certification Board (BACB). A list of BCBAs that practice in Montana can be found on BACB's website at: <http://info.bacb.com/o.php?page=100155>. Not all BCBAs listed there are in private practice. **If you are a BCBA and would like to be included in our referral list, please contact DRM at 406-449-2344.**

IX. CONDUCTING ADDITIONAL RESEARCH

If you still have questions and want to conduct your own research, this section will give you some background about conducting legal research. It discusses where laws come from, how to find the law, how to read legal rules and regulations, and an overview of the court systems in the United States.

a. FINDING AND INTERPRETING THE LAW

Education law is complicated. The rules that govern come from a combination of federal and state law and regulations, court interpretations of law and regulation, and administrative agency guidance. You need to check current information from all of these sources to fully understand a legal issue.

i. Laws or statutes

Laws (also called statutes) are passed by legislatures and approved by the executive. In the federal system, Congress is the legislature and the President is the executive. In states, the state legislature makes the law, and the governor is the executive who approves the law. Laws are organized into codes so they can more easily be found. For example, federal laws are organized in the United States Code (U.S.C.), accessible at <http://uscode.house.gov/>.

A complete citation to the United States Code looks like this: 20 U.S.C. § 1415 (2015), where the first number is the title, the second number is the actual code section, and the number in parenthesis is the year the version of the statute you are referring to was published in the U.S. Code. The § symbol means section. The U.S. Code is organized the same way in print and online.

Montana laws are organized in the Montana Code Annotated (Mont. Code Ann.), available at http://leg.mt.gov/bills/mca_toc/. States often make laws implementing federal laws. For

example, the state laws implementing IDEA in Montana are located at Title 20, Chapter 7, Part 4 of the Montana Code Annotated.

A complete citation to the Montana Code looks like this: Mont. Code Ann. § 20-7-401 (2015), where the first number is the title, the second number is the chapter, the last number is the actual code section, and the number in parenthesis is the year the version of the statute you are referring was published in the Montana Code. The Montana Code is organized the same way in print and online.

ii. **Regulations or rules**

Executive or administrative agencies carry out the law and sometimes make administrative regulations (sometimes called rules) further explaining or adding detail to the law. For example, the United States Congress makes tax laws and the Internal Revenue Service (IRS), is the administrative agency that makes regulations explaining the law and enforces the tax law. The same is true in education. The Congress created education laws such as the Individuals with Disabilities Education Act (IDEA), which were approved by the President. The U.S. Department of Education (ED) then made regulations that help explain the IDEA. The ED also enforces the IDEA at the federal level.

Federal regulations are contained in the Code of Federal Regulations (C.F.R.) available at <http://www.ecfr.gov>. A complete citation to the CFR looks like this: 34 C.F.R. § 300.535 (2016). The number 34 is the title number, which corresponds to a physical book you can find in a library. The number 300.535 is the actual section number. The number in parenthesis is the year the regulation you are referring to was published, since regulations change but their section numbers may stay the same. So if you open Title 34 of the C.F.R. from 2016 and turn to section 300.535, you will find the rule we are talking about. Because different years may contain different content, it is important to always look at the most current regulations. The online version of the C.F.R. is organized the same way. Daily updates to federal regulations and other administrative actions are compiled in the Federal Register available at <https://www.federalregister.gov/>.

State agencies also make regulations. The Montana Office of Public Instruction (OPI) makes regulations related to education. OPI's website is <http://opi.mt.gov/>. Montana regulations are contained in the Administrative Rules of Montana (A.R.M.) available at <http://www.mtrules.org/>. Daily updates to Montana regulations and other administrative actions are compiled in the Montana Administrative Register also available at <http://www.mtrules.org/>.

Administrative agencies are required to give notice to allow for public comment for new regulations. If you are interested in receiving notices about administrative rule making you need to contact the agency that makes the rules you are interested in, such as the OPI.

iii. **Administrative guidance**

Sometimes, administrative agencies issue guidance further explaining their view of the law. Usually, this guidance is not binding, meaning no one is obligated to follow it. However, administrative guidance is often very helpful and persuasive because these documents are written in plain English and an administrative agency's interpretation of a law it enforces is usually entitled to considerable weight in court. The U.S. Department of Education's Office of Special Education and Rehabilitation Services (OSERS), Office of Special Education Programs (OSEP), and Office of Civil Rights (OCR) all issue guidance. These are often called "dear colleague letters" because they are broadly addressed to school administrators with the salutation "dear colleague."

OSEP and OSERS guidance can be found at:

<http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/index.html#memos>.

OCR guidance can be found at:

<http://www2.ed.gov/about/offices/list/ocr/publications.html#General-Pubs>.

iv. **Court interpretations and the court system**

While legislatures make the law and administrative agencies implement and enforce the law, courts interpret the law and regulations and, in some areas, have a shared role with administrative agencies in enforcing the law and regulations. For example, a key provision in the IDEA is the requirement that schools provide eligible children with "a free appropriate public education (FAPE)." But, how do we know when a FAPE has been provided? In a case called *Bd. of Ed. of the Hendrick Hudson Sch. Dist. v. Rowley*²⁸³, the U.S. Supreme Court defined what is required to provide a FAPE. Over time as more and more cases reach the courts the law is refined and, hopefully, judges, attorneys and the public develop a greater understanding of what is required to comply with the law.

In the United States, court systems are set up with at least two tiers—a trial court and an appellate or appeals court. Trial courts decide what the facts are based on the evidence presented and decide which side wins or loses after applying the law to the facts of the case. In some types of cases, such as criminal cases, a jury determines what the facts are and renders a verdict (decision) about whether the defendant is guilty of the crime charged. Likewise, in a civil

²⁸³ 458 U.S. 176 (1982).

case, the trial court decides whether the defendant is liable for plaintiff's injury. In other types of cases, the judge is both the finder of fact and the decider of the law.

If a party to lawsuit does not like the outcome, he can appeal the case to an appellate court. The appellate court reviews the records from the trial court, including a transcript of what was said in court and the evidence presented, and determines whether the trial judge made any mistake that substantially impacted the outcome of the case. Appeals courts issue written "opinions" (sometimes called decisions) which tell us how they decided the case. Opinions make up the "case law" on a particular issue. These opinions may then be cited as authority to lawyers, judges, and others to explain the law. For example, the text of the *Rowley* decision can be found at: <https://www.law.cornell.edu/supremecourt/text/458/176>.

In both the state and federal systems, parties have one appeal "of right." Meaning that the party does not have to ask permission from the appeals court to review the case. In court systems with more than one level of appeal, the second level of appeal requires permission from the court and the court is not obligated to hear the case.

For example, in the federal system, the trial court is called a federal district court. Next, you go to a circuit court of appeal. The U.S. federal courts are divided into 13 circuits. A map of the federal circuit courts of appeals is available at <http://www.uscourts.gov/file/document/us-federal-courts-circuit-map>. Montana is in the 9th Circuit Court of Appeals along with Arizona, California, Idaho, Nevada, Oregon, Washington, and others.

If you still don't like the result from the circuit court of appeal, you can ask the U.S. Supreme Court to review the case. This is called a "Petition for Writ of Certiorari," or in shorthand, a "petition for cert." The U.S. Supreme Court receives thousands of Petitions for Cert. each year and only grants a small number.

In Montana, there are only two tiers to our court system. There is no "intermediate court of appeal." Therefore, you have a right to appeal a case from a Montana trial court (called a district court) directly to the Montana Supreme Court.

A case in federal court in Montana starts in the Federal District Court for the District of Montana. Next, the case is appealed to the 9th Circuit Court of Appeals and then to the U.S. Supreme Court.

Law can be interpreted by both state court and federal courts. Usually state courts of appeals interpret state law and federal courts of appeal interpret federal law, but that is not always the case.

When an appeals court decides an issue, all the courts in that system that are lower than the appeals court are bound to follow that decision. Courts that are higher than that court, however, are not bound to follow that decision. The appeals court itself is also bound to follow its own prior decisions unless it overrules them in whole or in part. For example, if the 9th Circuit Court of Appeals decides an issue of federal law, all of the federal district courts in Arizona, California, Idaho, Montana, Nevada, Oregon, and Washington and the 9th Circuit Court of Appeals (in later cases) have to follow that ruling, but the U.S. Supreme Court does not. If the U.S. Supreme Court decides an issue of federal law, all of the federal courts in the entire U.S. have to follow that decision. Like other appeals courts in the U.S., the U.S. Supreme Court is also bound to follow its own prior decisions, unless it overrules them in whole or in part.

The same is true in the state system. If the Montana Supreme Court decides an issue, that becomes the law in Montana and all Montana courts have to follow that decision. But, the Montana Supreme Court has no control over federal courts and cannot tell them what to do.

v. **Supremacy**

Another important concept, particularly in special education law, is that federal law supersedes state law. Under the Supremacy Clause of Article VI of the U.S. Constitution, the federal law and interpretations of federal law by federal appeals courts are the supreme law of the land and are binding on both federal courts and agencies and state courts and agencies. For example, a state cannot legally pass a law banning freedom of speech. Freedom of speech is guaranteed by the First Amendment to the U.S. Constitution, and a state has no authority to provide fewer protections than the U.S. Constitution.

vi. **Sources of Law – in summation**

In summary, to determine what the law is on a particular issue, you might start with the statute, then look for any regulations implementing the statute, then look for state or federal case law interpreting the statute or regulation. You might also look at a law book (called a “treatise”) or scholarly article summarizing the law, which can often be the best way to get a quick and thorough understanding of the law in a particular area.

vii. **A note about reading statutes and regulations**

There are many “rules of construction” that tell us how to interpret a piece of law or regulation. A description of all the rules of construction is beyond the scope of this discussion. However, an in depth summary of these is available from Georgetown University Law Center.²⁸⁴ For our

²⁸⁴ Katharine Clark & Matthew Connolly, *A Guide to Reading, Interpreting and Applying Statutes* (The Writing Center at Georgetown University Law Center 2006), <https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf>.

purposes, there are some key words you should pay attention to when reading law. They are summarized in the chart below:

Word	Meaning
And	The word “and” in a list signifies that a list is “conjunctive.” That means that all elements of the list must be satisfied in order to comply with the rule. For example, if I say “in order to qualify for a car loan, you must have a job <u>and</u> a credit score above 700.” Then, in order to qualify for loan, you must have both of those things. If one element is missing, you do not qualify.
Or	The word “or” in a list signifies that a list is “disjunctive.” That means you can comply with the rule by satisfying any of the elements of the list. For example, if I say “in order to qualify for a car loan, you must have a job <u>or</u> a credit score above 700.” Then, in order to qualify for loan, you can have either of those things. If one element is missing, you can still qualify.
Must, shall, will	Words like “must,” “shall,” or “will” are mandatory language indicating that there is no option but to do the thing required. For example, if I say “every resident above the age of 18 <u>must</u> (shall, or will) file a tax return by April 15 of each calendar year,” then you do not have an option not to file a tax return.
May	The word “may” is permissive language indicating that the thing is not required, but something you could do. For example, if I say “every resident above the age of 18 <u>may</u> file a tax return by April 15 of each calendar year,” then you do not have to file a tax return, but you can, if you want to.
Unless, Except	These words indicate an exception to a rule. For example, if I say “in order to qualify for a car loan, an applicant must have a job, <u>unless</u> the applicant has a credit score above 700” or “in order to qualify for a car loan, an applicant must have a job, except those applicants with credit scores above 700,” then I will give a car loan to anyone who has a job <u>or</u> a credit score above 700. If you do not have a job and your credit score is only 650, you do not get the loan. If you have a job and your credit score is 500, you also get the loan.
If, then, before/after, provided that	These words indicate that one thing must happen for another thing to happen. This is called a “condition.” For example, let’s say I tell you that “if the temperature is above 70 degrees today, we can go to the beach.” Then the

	temperature must be above 70 in order for us to go to the beach. This same meaning can be phrased as “we can go to the beach, provided that the temperature today is above 70 degrees.”
Notwithstanding	The term “notwithstanding” indicates that some rule or part of a rule is an exception to another rule or part of a rule. For example, let’s say Rule 1 states “only those applicants with a job will qualify for a car loan” and Rule 2 states “notwithstanding Rule 1, any applicant with a credit score above 700 will qualify for a car loan.” If an applicant does not have a job, but still has a credit score above 700, the applicant will qualify for the car loan.

There are two other important ideas in reading statutes and regulations. The first is “**read the rule.**” This sounds simple, but it is surprising how many people (including lawyers) get in trouble because they did not read the rule. Whenever you have a question about the law, start by carefully reading the applicable rule or regulation.

The second, related idea, is known as the “**rule against surplusage.**” This is a complicated way of saying that when you read a statute or regulation, you have to read carefully and give each word meaning, avoiding any interpretation that would make words extra or meaningless.

When you read statutes and regulations you should **read with a pencil or highlighter**, looking carefully at each word for how it might impact the meaning. Circle words in the list above that might change the meaning as well as any cross references to other statutes or regulations. For example, if you see the phrase “the term educational records shall have the same meaning as the definition set forth in 34 C.F.R. § 99.3.” You should circle the reference to 34 C.F.R. § 99.3 so you know to go look up that definition.

X. DRM’S EDUCATION WORKGROUP

a. OVERVIEW OF THE PROGRAM

If you still have questions, please consider contacting DRM’s Education Workgroup, which is primarily focused on increasing opportunities for children with disabilities in K-12 schools and ensuring their access to a free appropriate public education (FAPE). On occasion, our work may extend to other education providers such as adult education, vocational programs, and universities. It is our mission to improve special education outcomes and educational equality through our advocacy and legal efforts.

DRM believes a student’s future depends on their educational experience. To this end, we advocate on behalf of your child to ensure educational programs are meeting their legal

obligations under federal and state laws, including the Individuals with Disabilities Education Act (IDEA); Section 504 of the Rehabilitation Act of 1973 (Section 504), Title II of the Americans with Disabilities Act (ADA), and Article X of the Montana Constitution.

b. HOW TO REQUEST ASSISTANCE

To qualify for DRM services, a student must experience a qualifying disability and meet DRM's Education Unit objectives and priorities, which change from year to year. The cases we accept are also impacted by our resources and staffing at the time our office is contacted.

To request assistance for your child, please contact Disability Rights Montana at (800) 245-4743 or fill out the service request form on our [website](#). Your call or email will be directed to our intake staff for an initial screening. Following the initial screening, intake staff will refer your information to the Special Education Unit at DRM. It is helpful if you fill out DRM's Education Intake Form, available on our [forms](#) page before calling, however if you need assistance filling out that form, one of our intake specialists would be happy to help.

If your case is accepted, you will receive a letter notifying you about the services DRM can provide or be asked to sign a retainer agreement regarding DRM's services. Services may include advocacy support for a specific issue, limited scope legal representation for a particular issue or task, or legal representation regarding a broader scope of work.

If your case is not accepted by the Education Unit, it may be because the case did not meet our case selection criteria or we did not have the resources available to provide assistance at that time. DRM will make every effort to provide appropriate referrals in these instances.

Please note it may take 7-10 days for Special Education Program staff to return your call due to our screening processes. We recommend you contact our office prior to the beginning of the school year or well in advance of any scheduled meetings.

c. DRM SPECIAL EDUCATION PRIORITIES

DRM establishes priorities for our programs following the guidance of our Board of Directors. Our program priorities are written yearly and based on identified needs. DRM makes every effort to ensure program priorities align with the education issues identified by our stakeholders, Board of Directors and the disability community. If you have any feedback for DRM about the broader special education issues we should address, please [email us](#).

XI. FINDING AN ATTORNEY

DRM's ability to provide legal representation is limited by our priorities, objectives, and resources available at any particular time. There are several private attorneys who practice special education law in Montana. These attorneys have requested to be included in this list. They are included as a courtesy, not a recommendation. DRM makes no recommendation or guarantee regarding the abilities of the attorneys listed or their likelihood of success with your concerns. **If you are an attorney with experience representing parents in special education matters and would like to be included in this list, or if you would like more information about representing parents in special education matters, please contact DRM at 406-449-2344.**

Lynda Butler
Attorney at Law
2360 River Road
Missoula, MT 59801
(406) 239-3732

Phil Hohenlohe
Hohenlohe and Jones, PLLP
316 Fuller Ave.
Helena, MT 59601
(406) 443-4601

Sarah Corbally
The Law Office of Sarah Corbally, PLLC
7 West 6th Avenue, Suite 4E
Helena, MT 59601
(406) 457-5475

Andrée Larose
Morrison, Sherwood, Wilson & Deola,
PLLP
401 North Last Chance Gulch
Helena, MT 59601
(406) 442-3261

You can also contact **the State Bar of Montana** for information on **low-cost legal services** and for **information about finding a lawyer**. The State Bar of Montana can be reached on the web at: <http://www.montanabar.org/> or by phone at (406) 442-7660.

XII. RESOURCES

There are many, many resources available to help people with disabilities, their families and educators navigate the special education system. Here are some books, websites, and organizations you should look at:

a. **BOOKS AND PUBLICATIONS:**

- Randy Chapman, *The Everyday Guide to Special Education Law* (Disability Law Colorado 3rd ed. 2015)
- Melissa L. Farall, et al., *All About Tests and Assessments* (Harbor House Law Press 2014)
- Primer on Special Education Acronyms, Abbreviations and Definitions, Technical Assistance for Excellence in Special Education (TAESE) Center for Persons with Disabilities at Utah State University *available at:*
http://www.taese.org/cms/images/_utahstate_media/documents/resources/EducatorandParentPrimerAcronyms.pdf
- Pam Wright & Pete Wright, *From Emotions to Advocacy* (Harbor House Law Press 2d ed., 2014). **This book is a must have for any parent or parent advocate.**
- Peter W.D. Wright & Pamela Darr Wright, *Special Education Law* (Harbor House Law Press 2d ed., 2014)

b. **ORGANIZATIONS AND WEBSITES**

i. **Montana or Rocky Mountain Region specific**

- Disability Rights Montana: Montana's designated P&A. www.disabilityrightsmt.org
- Montana Department of Public Health and Human Services Early Childhood Services Bureau: <http://dphhs.mt.gov/hcsd/ChildCare.aspx>
- Montana Office of Public Instruction (OPI): <http://opi.mt.gov/> and OPI's special education site: <http://opi.mt.gov/Programs/SpecialEd/Index.html>
- Parents Lets Unite for Kids, Montana's Parent training and information center: www.pluk.org
- Rocky Mountain ADA Center: <http://www.rockymountainada.org/>
- The Rural Institute on Inclusive Communities at the University of Montana: <http://www.ruralinstitute.umt.edu/>

ii. **Specific disabilities**

- American Speech-Language-Hearing Association (ASHA): <http://www.asha.org/>
- Autism Speaks: <https://www.autismspeaks.org/>
- The Epilepsy Foundation: <http://www.epilepsy.com/>
- Florida Center for Reading Research at Florida State University: <http://www.fcrr.org/>

- Food Allergy Research and Education (FARE): www.foodallergy.org
- International Dyslexia Association: <http://eida.org/>
- National Center for Learning Disabilities: <http://www.nclد.org/>
- The National Center for Learning Disabilities, RTI Action Network website at <http://www.rtinetwork.org/>
- Positive Behavioral Interventions and Supports (OSEP) website: <http://www.pbis.org/>

iii. **Education specific**

- Council for Exceptional Children (CEC): www.cec.sped.org
- Council of Parent Attorneys and Advocates, the leading organization for parent attorneys and advocates in the U.S.: <http://www.copaa.org/>
- National Association of Gifted Children: www.nagc.org
- National Center on Intensive Intervention (American Institutes for Research), presents tools and resources on educational interventions and progress monitoring: <http://www.intensiveintervention.org/>
- The National Center on Disability and Access to Education focuses on web-based accessible educational content: <http://ncdae.org/>
- The National Center on Dispute Resolution in Special Education (funded by OSEP): <http://www.directionservice.org/cadre/index.cfm>
- National Education Association (NEA): www.nea.org
- National Law Center on Homelessness and Poverty Youth and Education Resources site at https://www.nlchp.org/youth_resources.
- Parent training and information centers (PTIC) (www.parentcenterhub.org)
- U.S. Department of Education (ED). ED’s website at www.ed.gov is filled with all types of information about education. ED maintains a website dedicated to IDEA at <http://idea.ed.gov/>.
- ED’s Office of Special Education and Rehabilitative Services administers IDEA. Its website is: <http://www2.ed.gov/about/offices/list/osers/index.html?src=oc>
- OSEP and OSERS guidance can be found at: <http://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/index.html#memos>.
- ED Office of Civil Rights (OCR) guidance can be found at: <http://www2.ed.gov/about/offices/list/ocr/publications.html#General-Pubs>.
- Technical Assistance for Excellence in Special Education (TAESE) Center for Persons with Disabilities at Utah State University at <http://www.taese.org/>
- What Works Clearinghouse (ED) – compiles scientific research on effectiveness of educational interventions: <http://ies.ed.gov/ncee/wwc/aboutus.aspx>
- Wrightslaw provides extensive information about special education law and resources and publishes several excellent books on those topics: <http://www.wrightslaw.com/>
- Yellow Pages for Kids – compiles service providers and resources for children with disabilities in each state: <http://www.yellowpagesforkids.com/>

iv. Disability issues generally

- Bazelon Center for Mental Health Law: national policy and advocacy group. <http://www.bazelon.org/>
- Disability.Gov: comprehensive site linking to a huge variety of agencies and information about disability. <https://www.disability.gov/>
- Job Accommodation Network (JAN), provides comprehensive and searchable information on accommodation examples for a variety of disabilities. <https://askjan.org/>.
- National Disability Rights Network: National network of protection and advocacy organizations (P&As). www.ndrn.org
- U.S. Department of Justice, Civil Rights Division: <https://www.justice.gov/crt>

XIII. DISCLAIMERS

This handbook provides general information only and is not intended to provide an exhaustive manual to education law. Education law is complicated and comes from a combination of federal and state law and regulations, court interpretations of law and regulation, and administrative agency guidance. The law is complex and changes all the time, therefore there is no guarantee that information in this handbook is accurate, complete or applicable in your specific situation.

The facts of each case are unique and how the law applies in any situation depends on the particular facts of the case. For legal advice about specific facts you should consult with an attorney licensed to practice law in your area.

Nothing in this handbook should be relied on as legal advice, as a substitute for consultation with an attorney or the exercise of sound, independent judgment by the user. If you have any questions about anything in this handbook, you should consult an attorney. Use of the handbook does not create or imply an attorney-client relationship or consent to provide any legal or advocacy services by Disability Rights Montana.

Disability Rights Montana shall have neither liability nor responsibility to any person or entity regarding any loss or damage caused or alleged to be caused, directly or indirectly, by the information contained in this handbook. If you do not wish to be bound by the disclaimer, please do not use this handbook.

XIV. APPENDIX

The appendix contains the forms discussed throughout this handbook. Please review these forms carefully and make necessary changes. These forms are designed to be customized. **Do NOT send as they currently appear.** We suggest sending forms via certified mail with return receipt requested. By requesting the receipt, you will be able to track that the recipient received the letter, and you should keep the receipt with other important papers you have on your student. Some forms includes a “cc” at the end. We suggest you mail a carbon copy of the letter to these individuals, but you do not need to send them with a return receipt requested – regular mail should be fine.

a. **DRM UNIT EDUCATION INTAKE FORM.**

This form should be completed by a person seeking assistance from DRM's education unit. You can fill this out in advance before calling or with the assistance of one of our intake specialists when you call.

EDUCATION UNIT SUPPLEMENTAL INTAKE FORM

(to be used in conjunction with general intake form)

Caller: _____	Date: _____			
Intake By: _____				
Part 1: BACKGROUND INFORMATION ABOUT THE <u>STUDENT</u>				
1. Student's Legal Name: _____	2. Preferred Name: _____			
3. Age: _____	4. Date of Birth: _____			
5. Sex: _____	6. Gender Identity: _____			
7. Race: _____	8. Tribal affiliation: _____			
9. Does the student self-identify as lesbian, gay, bisexual, transgender, queer or intersexed (LGBTQI)? _____				
10. Are you the student's parent or legal guardian? parent: <input type="checkbox"/> Legal guardian: <input type="checkbox"/> <input type="checkbox"/> Neither (please explain below): _____				
11. Is there anyone else who is the child's parent or legal guardian or who has parental or visitation rights to the child (if yes, please provide their information below)? Yes: <input type="checkbox"/> No: <input type="checkbox"/>				
12. Other parent/guardian/custodian:				
_____ (name)	_____ (age) _____ (date of birth)			
_____ (address)	_____ (city) _____ (state) _____ (zip)			
_____ (email)	_____ (work phone) _____ (cell phone)			
Employer: _____	Job title: _____			
Relationship to student: _____				
➤ Can we contact this person regarding the student? Yes: <input type="checkbox"/> No: <input type="checkbox"/>				
13. Where/with whom does the student live?				
14. Please list the names and ages of the student's siblings and with whom the sibling lives:				
Name	DOB	Age	Sex	Residence
15. Is the student the subject of any power of attorney, guardianship, parenting plan, treatment plan or other legal instrument impacting custody or decision making regarding the student (if yes, please provide a copy of all relevant orders/documents)? Yes: <input type="checkbox"/> No: <input type="checkbox"/>				
16. Has the child ever been the subject of a child protective services (CPS) investigation? Yes: <input type="checkbox"/> No: <input type="checkbox"/>				
17. Besides you, who else provides daily care for the student at home?				

18. What type of medical insurance, if any, does the student have? _____

19. Does the student receive any vocational rehabilitation services? _____

20. If so, who are the vocational rehabilitation service providers? _____

21. Please describe any vocational rehabilitation services the student receives:

Part 2: THE STUDENT'S SCHOOLING AND DISABILITIES

22. Current School: _____ 23. Grade: _____
 _____ 24. Principal: _____
 (address) _____
 _____ (phone)
 (city) (state) (zip) _____
 _____ (email)
 (phone) (fax) _____

25. Has the school's attorney contacted you? Yes: No: Name: _____

26. How long has the student attended this school? _____

27. How would you describe your relationship with this school? _____

28. How would you describe the student's relationship with this school? _____

29. Does the student receive any special education services? Yes: No:

30. Please describe any special education services the student currently receives: _____

31. Please list all school personnel or outside providers currently providing services to the student and their roles:

Name	Role (e.g. psychologist)	Agency (e.g. school)	Phone	Email

--	--	--	--	--

32. Please list all of the student's disabilities/diagnoses, who provided the diagnoses, and when the diagnoses was first made:

Diagnosis/Disability	Provider	Date

33. Please list all of the evaluations conducted on the student, who provided the evaluation, and the date:

Evaluation	Comments	Provider	Date
Psychological/cognitive:			
Occupational therapy:			
Physical therapy:			
Speech-language therapy:			
Social/emotional evaluations:			
Other (please specify):			

34. Please list all medications the student takes, the purpose, and the prescribing provider:

Medicine	Purpose	Provider

35. Has the student been identified as eligible for a Section 504 Plan? Yes: No:

36. Describe any Sect 504 services or accommodations the student receives: _____

37. If yes, what is the date of the student's last 504 Plan? _____

38. Has the student been identified as eligible for an IEP? Yes: No:

39. If yes, what is the date of the student's last IEP? _____

40. Did a parent or guardian sign the last IEP? Yes: No:

41. Does the student have any behavior problems? Yes: No:

42. If yes, please describe the behaviors and the school's response:

Part 3: PREVIOUS LEGAL ACTION

43. Have you ever been represented by or consulted with an attorney regarding a special education matter? Yes: No:

44. Have you ever filed an IDEA "state complaint" or Section 504 complaint against a school? Yes: No:

45. Have you ever been to a mediation or due process hearing in a special education/Section 504 matter? Yes: No:

46. Have you ever filed a complaint with the U.S. Dept. of Education, Office of Civil Rights? Yes: No:

47. If you answered yes to any of the questions in this section, please explain and provide contact information for any attorney that assisted you: _____

48. Can we speak with your prior attorney about the prior matter? Yes: No:

Part 4: CURRENT ISSUES AND CONCERNS

49. Please describe the current issues/concerns you have regarding the student: _____

50. Is the child currently being kept out of school? Yes: No: ➤If so, why and for how long? _____

51. Are there any immediate safety issues? Yes: No: ➤If so, please explain: _____

52. Do you have any deadlines coming up (e.g. IEP meetings, court dates, responses, etc.) Yes: No:

53. What are your goals for the student? _____

54. What goals, if any, has the student expressed? _____

Part 5: DOCUMENTS TO PROVIDE US

Please provide us copies of the following (as requested):

Document	Requested	Received
➤ Student’s most current IEP/504 Plans (or proposed IEP/504 Plan) with any minutes and summaries	<input type="checkbox"/>	<input type="checkbox"/>
➤ Student’s last two years of annual and interim IEPs/504 Plans with any minutes and summaries	<input type="checkbox"/>	<input type="checkbox"/>
➤ Any relevant correspondence between you and the school	<input type="checkbox"/>	<input type="checkbox"/>
➤ All evaluations performed on the student (speech, OT, PT, psychological, etc.)	<input type="checkbox"/>	<input type="checkbox"/>
➤ All Functional Behavioral Assessments (FBA) performed on the student	<input type="checkbox"/>	<input type="checkbox"/>
➤ All Behavior Intervention Plans (BIP) prepared for the student	<input type="checkbox"/>	<input type="checkbox"/>
➤ Any other documents you think are relevant to the issue	<input type="checkbox"/>	<input type="checkbox"/>
➤ Any documents providing educational decision making authority (e.g. parenting plan)	<input type="checkbox"/>	<input type="checkbox"/>
➤ Other:	<input type="checkbox"/>	<input type="checkbox"/>
➤ Signed releases of information	<input type="checkbox"/>	<input type="checkbox"/>
➤ Signed retainer agreement	<input type="checkbox"/>	<input type="checkbox"/>

Note: until and unless you and DRM both sign a written retainer agreement DRM is not the attorney for you or the student and no attorney-client relationship exists. No oral communications or other written communications should be interpreted to create an attorney-client relationship, except a written retainer agreement signed by you (or the student as appropriate) and a DRM attorney.

b. REQUEST FOR PART C EARLY INTERVENTION EVALUATION

This form is used to request an evaluation of a child, age 0-3 for early intervention services. It is directed to the local Early Head Start program, not the local school district.

[Patty Parent]
[500 Main St.]
[Any Town, MT] [59000]
Phone: [406-555-5555]

[DATE]

[Name of Early Head Start Director]
[School Address]
[City, State Zip Code]

VIA CERTIFIED MAIL (No. _____)

Re: Evaluation Request for [insert child's name], DOB: [insert date of birth]

Dear [Mr./Ms.] [Early Head Start Director],

I am writing as the educational rights holder for [insert child's name] ("Child") to request a comprehensive, multidisciplinary and multidimensional evaluation and assessment to determine whether the child is eligible for services under Part C of the Individuals with Disabilities Education Act (IDEA) and pursuant to A.R.M. § 37.34.4119.

The child is showing delays in the following areas: (*cognitive, communication, self-help, fine motor, gross motor, social-emotional*). Examples of these delays include: (*give as many examples as possible, for example you can list milestones that the child is not meeting*).

If the Child is determined eligible for Part C services, I am requesting that an Individual Family Services Plan be developed for the Child and the Child's family in accordance with A.R.M. §§ 37.34.4117–4119.

I hereby give my consent to all testing and evaluation of the Child needed to assess all areas of suspected disability, including but not limited to those identified above. Please provide a proposed evaluation plan to me immediately. Your assistance with this request is appreciated. If you have any questions, please contact me at [phone number and/or email]. Thank you in advance for your anticipated cooperation in this matter.

Sincerely,

[insert your name]

[insert your name]

c: [insert name of district special education director – send copy of this letter to this person]

C. REQUEST FOR INITIAL EVALUATION

This form is used to request an initial evaluation for a child age 3 and up. It is directed to the local school district. It could also be used to request a re-evaluation if you modify the form to be clear that you are seeking a reevaluation and why.

[Patty Parent]
[500 Main St.]
[Any Town, MT] [59000]
Phone: [406-555-5555]

August 31, 2016

[Name of Principal]
[School Address]
[City, State Zip Code]

VIA CERTIFIED MAIL/RETURN RECEIPT REQUESTED

Re: Evaluation Request for [insert child's name], DOB: [insert date of birth]

Dear [Mr./Ms.] [Name of Principal],

I am writing as the parent of [insert child's name] ("Student") to request a comprehensive psycho-educational evaluation for the above named child. The child is in the ___ grade and lives within the boundaries of the _____ school district. I suspect that the student may have a disability in the areas listed below which adversely affects the student's educational performance to the degree that the student needs special education and related services:

1. [list all of child's suspected disabilities, needs, educational deficits]
2. [academic needs]
3. [behavior needs]

I hereby give my consent to all testing of Student needed to assess all areas of suspected disability, including but not limited to those identified above. Please provide a proposed evaluation plan to me immediately. Your assistance with this request is appreciated. If you have any questions, please contact me at [phone number and/or email]. Thank you in advance for your anticipated cooperation in this matter.

Sincerely,

[insert your name]

cc: [insert name of district special education director – send copy of this letter to this person]

cc: [insert name of Superintendent – send copy of this letter to this person]

d. REQUEST FOR REEVALUATION

This form is used to request a reevaluation of a child aged 3 and up from the school district.

[Patty Parent]
[500 Main St.]
[Any Town, MT] [59000]
Phone: [406-555-5555]

[DATE]

[Name of Principal]
[School Address]
[City, State Zip Code]

VIA CERTIFIED MAIL (No. _____)

Re: Evaluation Request for [insert child's name], DOB: [insert date of birth]

Dear [Mr./Ms.] [Name of Principal],

I am writing as the educational rights holder for [insert child's name] ("Student") to request a comprehensive psycho-educational evaluation for the above named child. The child is in the ____ grade and lives within the boundaries of the _____ school district. I suspect that the student may have a disability in the areas listed below which adversely affects the student's educational performance to the degree that the student needs special education and related services:

1. [list all of child's suspected disabilities, needs, educational deficits]
2. [academic needs]
3. [behavior needs]

Following an initial evaluation, the Individuals with Disabilities Education Act requires reevaluations at least every three years, when a parent or the child's teacher requests one, or if the school district determines the child's educational or related services needs, including improved academic and functional performance, warrant reevaluation.

I hereby give my consent to all testing of Student needed to assess all areas of suspected disability, including but not limited to those identified above. Please provide a proposed evaluation plan to me immediately. Your assistance with this request is appreciated. If you have any questions, please contact me at [phone number and/or email]. Thank you in advance for your anticipated cooperation in this matter.

Sincerely,

[insert your name]

c: [insert name of district special education director – send copy of this letter to this person]

e. RECORDS REQUEST

This form is used to request all of a child's educational records from a school district. The requester should give the school district a reasonable amount of time to comply with the request, generally at least a week or two, unless the records are needed sooner for an upcoming meeting regarding the student.

[Patty Parent]
[500 Main St.]
[Any Town, MT] [59000]
Phone: [406-555-5555]

[DATE]

[Name of Principal]
[School Address]
[City, State Zip Code]

VIA CERTIFIED MAIL (No. _____)

Re: Records Request for [insert child's name], DOB: [insert date of birth]

Dear [Mr./Ms.] [Name of Principal],

I am writing as the educational rights holder for [insert child's name] ("Student") to request that you provide me with all educational records for Student from all locations, including but not limited to:

1. All evaluations for special and regular education (e.g. psychological, educational, speech, OT, PT, etc.);
2. All testing protocols;
3. All Special Education records (including all Individualized Education Programs);
4. All health records;
5. All cumulative records;
6. All permanent records;
7. All disciplinary records (including any manifestation determinations);
8. All standardized testing scores and reports;
9. All report cards;
10. All attendance and enrollment records;
11. All formal and informal correspondence (e.g., inter-office notes, memos, letters, emails, teacher-to-teacher notes, etc.);
12. A list of the types and locations of all educational records, collected, maintained or used by your agency; and
13. All access logs for Student's records.

[****if required] Enclosed is a signed *Authorization for Release of Protected Health Information* and a general *Release of Information* signed by [name], for [name of student]. [note that under 34

C.F.R. § 613(c) , an agency may presume that the parent has the authority to inspect and review the records of his child unless the agency has been advised that the parent does not have this authority under applicable state law (such as in a guardianship, separation or divorce proceeding)].

I respectfully request that the records be mailed so they are received by me by the close of business on [INSERT DATE] in accordance with the requirements of Federal and State law. If this request will be delayed or denied, please notify me of the reasons for the delay or denial.

Your assistance with this request is appreciated. If you have any questions or comments, please contact me at [phone number].

Sincerely,

[name]

f. REQUEST FOR INDEPENDENT EDUCATIONAL EVALUATION (IEE)

This form is used to request an IEE.

Patty Parent]
[500 Main St.]
[Any Town, MT] [59000]
Phone: [406-555-5555]

[DATE]

[Name of Principal]
[School Address]
[City, State Zip Code]

VIA CERTIFIED MAIL (No. _____)

Re: Independent Educational Evaluation for [insert child's name], DOB: [insert date of birth]

Dear [Mr./Ms.] [Name of Principal],

I am writing as the educational rights holder for [insert child's name] ("Student") who attends the [insert grade] grade at your school and is currently eligible for special education. I am writing to formally request an Independent Educational Evaluation (IEE) of Student at public expense under the provisions of the Individuals with Disabilities Education Act (IDEA). I am requesting an IEE because I disagree with the District's evaluations of Student.

I am specifically requesting an independent education evaluation completed by a private evaluator in the following areas and to address the following concerns:

[list assessment areas and concerns].

If the District has adopted written criteria for conducting IEEs, please provide them to me within the next ten business days. If I hear from you, I will follow any allowable criteria regarding the qualifications of the independent evaluator. If I do not hear from you, I will assume you have not adopted any district criteria and will then set up the appointments and arrange to have the school district billed. You can reach me at: (phone number) and/or (email). Thank you in advance for your anticipated cooperation in this matter.

Sincerely,

[insert your name]

c: [insert name of district special education director – send copy of this letter to this person]

g. REQUEST FOR AN IEP TEAM MEETING

This form is used to request an IEP team meeting to address a concern after a child is already receiving special education services.

[Patty Parent]
[500 Main St.]
[Any Town, MT] [59000]
Phone: [406-555-5555]

[DATE]

[Name of Principal]
[School Address]
[City, State Zip Code]

VIA CERTIFIED MAIL (No. _____)

Re: IEP Team meeting for [insert child's name], DOB: [insert date of birth]

Dear [Mr./Ms.] [Name of Principal],

I am writing as the educational rights holder for [insert child's name] ("Student") who attends the [insert grade] grade at your school and is currently eligible for special education. I am writing to formally request an IEP team meeting for the purpose of [insert reasons why you want an IEP team meeting at this time].

Accordingly, please send me written notice of a proposed date for the IEP meeting that is within thirty days of the date of this letter. If you have any further questions regarding this correspondence, do not hesitate to contact me. You can reach me at: (phone number) and/or (email). Thank you in advance for your anticipated cooperation in this matter.

Sincerely,

[insert your name]

c: [insert name of district special education director – send copy of this letter to this person]

h. FOLLOW UP LETTER TO IEP MEETING

This is a general format letter to following up on any concerns an IEP team member may have after an IEP meeting. It is important to document any concerns promptly, completely, and in writing after an IEP meeting. For example, you might send this letter to indicate that items discussed at the IEP meeting were not included in the meeting notes and to ask that they be included in the meeting noted before the IEP is finalized. It's a good idea to send a similar letter outlining concerns that should be discussed before an IEP meeting, and proposing an agenda for the meeting.

[Patty Parent]
[500 Main St.]
[Any Town, MT] [59000]
Phone: [406-555-5555]

[DATE]

[Name of Principal]
[School Address]
[City, State Zip Code]

VIA CERTIFIED MAIL (No. _____)

Re: IEP meeting for [insert child's name], DOB: [insert date of birth]

Dear [Mr./Ms.] [Name of Principal],

Thank you for the opportunity to meet with [insert child's name] on [insert date of IEP meeting]. Based on that meeting, [I have the following concerns – list them out] [and/or– I need the following information – list it out]. I would appreciate a written response to this letter by [insert date]. You can reach me at: [insert phone number] and/or [insert email]. Thank you for your prompt attention to this matter.

Sincerely,

[insert your name]

c: [insert name of district special education director – send copy of this letter to this person]

i. REQUEST FOR REASONABLE ACCOMMODATION FOR OUT OF SCHOOL STUDENT

This form may be used to request a reasonable accommodation to a District's attendance policy. This often comes up when a student cannot attend because of his disability, but the District is reporting him as truant and the county attorney is threatening prosecution for truancy. There is one form for a student on an IEP and another form for a student on a 504 plan. This form could be modified to request other types of accommodations as well.

[*Patty Parent]
[500 Main St.]
[Any Town, MT] [59000]
Phone: [406-555-5555]

August 31, 2016

[*Name of Principal]
[School Address]
[City, State Zip Code]

VIA CERTIFIED MAIL/RETURN RECEIPT REQUESTED

Re: Attendance Accommodation Request for [insert child's name], DOB: [insert date of birth]

Dear [Mr./Ms.] [Name of Principal],

I am writing as the parent of [*insert child's name] to inform you that I do not feel safe bringing [*insert child's name] to school at this time, given the absence of appropriate services to support [*his/her] disabilities. I am keeping [*insert child's name] home from school until we can resolve an IEP/accommodation which provides appropriate supports and services to allow [*insert child's name] to make meaningful progress in a safe school environment. To be clear, I want [*insert child's name] returned to school as quickly as possible and in no way am I withdrawing [*him/her] from school or consenting to [*his/her] disenrollment.

In the meantime, I need three things from you. First, I need to know how the District proposes to provide continuing educational services, such as homebound services, to [*insert child's name] until [*he/she] can safely return to school. Second, I am formally requesting that the District grant [*insert child's name] a reasonable accommodation exception to the District's attendance policy until we can figure out a safe way for [*him/her] to return to school. Third, please refrain from including [*insert child's name] in your truancy reports. [*His/her] absences are not intentional, but result from [*His/her] disability.

Please provide a response to these requests in writing no later than one week from today. Thank you for your prompt attention to this matter.

Sincerely,

[*insert your name]

cc: [*insert City Attorney- send copy of this letter to this person]

cc: [*County Attorney, - send copy of this letter to this person]

j. REQUEST FOR GRADUATION REQUIREMENTS

This form is used to request information about a District's graduation requirements.

[Patty Parent]
[500 Main St.]
[Any Town, MT] [59000]
Phone: [406-555-5555]

[DATE]

[Name of Principal]
[School Address]
[City, State Zip Code]

VIA CERTIFIED MAIL (No. _____)

Re: Public Records Request

Dear [Mr./Ms.] [Name of Principal],

I am making this public record request under Article II, Section 9 of the Montana Constitution and Montana Code Annotated § 2-6-1003, et seq. Please provide me with a true, correct and complete copy of the current version of the following documents:

1. all school policies and procedures adopted by the school board related to student graduation;
2. all school policies and procedures setting forth the district's graduation requirements.

Please produce the public records requested no later than [specify date at least seven days from the date of this letter]. Thank you in advance for your anticipated cooperation in this matter.

Sincerely,

[insert your name]

k. REQUEST FOR SCHOOL BOARD POLICIES

This form is used to request information about a District's policies and procedures and may be limited to policies and procedures about a certain topic (e.g. student discipline).

[Patty Parent]
[500 Main St.]
[Any Town, MT] [59000]
Phone: [406-555-5555]

[DATE]

[Name of Principal]
[School Address]
[City, State Zip Code]

VIA CERTIFIED MAIL (No. _____)

Re: Public Records Request

Dear [Mr./Ms.] [Name of Principal],

I am making this public record request under Article II, Section 9 of the Montana Constitution and Montana Code Annotate § 2-6-1003, et seq. Please provide me with a true, correct and complete copy of the current version all school policies and procedures adopted by the school board [you may limit this request to a specific subject by saying “all school policies and procedures adopted by the school board relating to _____”].

Please produce the public records requested no later than [specify date at least seven days from the date of this letter]. Thank you in advance for your anticipated cooperation in this matter.

Sincerely,

[insert your name]