

PROCEDURAL SAFEGUARDS: SURROGATE PARENTS, NOTICE AND PARENTAL CONSENT

(See also Changes in Initial Evaluation and Reevaluation, Procedural Safeguards: Resolution Meetings and Due Process Hearings, Procedural Safeguards: Mediation, and State Complaint Procedures)

The reauthorized *Individuals with Disabilities Education Act (IDEA)* was signed into law on Dec. 3, 2004, by President George W. Bush. The provisions of the act became effective on July 1, 2005, with the exception of some of the elements pertaining to the definition of a “highly qualified teacher” that took effect upon the signing of the act. The final regulations were published on Aug. 14, 2006. This is one in a series of documents, prepared by the Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education that covers a variety of high-interest topics and brings together the regulatory requirements related to those topics to support constituents in preparing to implement the new regulations.¹ This document primarily addresses significant changes to the preexisting regulatory requirements regarding surrogate parents, notice and parental consent.

IDEA Regulations

1. Revise certain requirements related to the assignment of surrogate parents.

Each public agency must ensure that the rights of a child are protected by determining the need for, and assigning, a surrogate parent whenever:

- No parent (as newly defined at 34 CFR 300.30) can be identified;
- The public agency, after reasonable efforts, cannot locate a parent;
- The child is a ward of the State under the laws of that State; or
- The child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)).

[34 CFR 300.519(a) and (b)] [20 U.S.C. 1415(b)(2)(A)]

In the case of a child who is a ward of the State, the surrogate parent alternatively may be appointed by the judge overseeing the child’s case, provided that the surrogate meets the requirements in 34 CFR 300.519(d)(2)(i) and (e) (that a surrogate parent may not be an employee of the State educational agency (SEA), the local educational agency (LEA), or any other agency that is involved in the education or care of the child but that a person otherwise qualified to be a surrogate parent under the IDEA; i.e., 34 CFR 300.519(d), is not considered

¹ Topics in this series include: Alignment With the *No Child Left Behind (NCLB) Act*; Changes in Initial Evaluation and Reevaluation; Children Enrolled by Their Parents in Private Schools; Discipline; Disproportionality and Overidentification; Early Intervening Services; Highly Qualified Teachers; Identification of Specific Learning Disabilities; Individualized Education Program (IEP) Team Meetings and Changes to the IEP; Individualized Education Program (IEP); Local Funding; Monitoring, Technical Assistance and Enforcement; *National Instructional Materials Accessibility Standard (NIMAS)*; Part C Amendments in *IDEA* 2004; Part C Option: Age 3 to Kindergarten Age; Procedural Safeguards: Surrogates, Notice and Consent; Procedural Safeguards: Mediation; Procedural Safeguards: Resolution Meetings and Due Process Hearings; Secondary Transition; State Complaint Procedures; State Funding; and Statewide and Districtwide Assessments. Documents are available on the *IDEA* Web site at: <http://IDEA.ed.gov>.

an employee of the agency solely because he or she is paid by that agency to serve as a surrogate parent).

[34 CFR 300.519(c)] [20 U.S.C. 1415(b)(2)(A)(i)]

In the case of a child who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs may be appointed as temporary surrogate parents without regard to 34 CFR 300.519(d)(2)(i) (that a surrogate parent may not be an employee of the SEA, the LEA, or any other agency that is involved in the education or care of the child), until a surrogate parent can be appointed that meets all of the requirements of 34 CFR 300.519(d).

[34 CFR 300.519(f)]

The SEA must make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after a public agency determines that the child needs a surrogate parent.

[34 CFR 300.519(h)] [20 U.S.C. 1415(b)(2)(B)]

2. Revise requirements regarding when the procedural safeguards notice must be provided to parents.

A copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents only one time a school year, except that a copy also must be given to the parents:

- Upon initial referral or parent request for evaluation;
- Upon receipt of the first State complaint under 34 CFR 300.151 through 300.153 and upon receipt of the first due process complaint under 34 CFR 300.507 in a school year;
- In accordance with the discipline procedures in 34 CFR 300.530(h) (...on the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must ... provide the parents the procedural safeguards notice); and
- Upon request by a parent.

A public agency may place a current copy of the procedural safeguards notice on its Internet Web site, if a web site exists.

[34 CFR 300.504(a) and (b)] [20 U.S.C. 1415(d)(1)]

3. Add new content requirements for the procedural safeguards notice.

The procedural safeguards notice must include a full explanation of all of the procedural safeguards that relate to (among other things):

- The opportunity to present and resolve complaints through the due process complaint and State complaint procedures, including:
 - o The time period in which to file a complaint;
 - o The opportunity for the agency to resolve the complaint; and
 - o The difference between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures;

- The availability of mediation; ...and
- Civil actions, including the time period in which to file those actions.

[34 CFR 300.504(c)] [20 U.S.C. 1415(d)(2)]

4. Allow a new method of providing required notices, including the procedural safeguards notice.

A parent of a child with a disability may elect to receive notices required by 34 CFR 300.503 (prior notice related to proposals or refusals to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education (FAPE) to the child), 300.504 (procedural safeguards notice), and 300.508 (LEA response to a due process complaint) by an electronic mail communication, if the public agency makes that option available.

[34 CFR 300.505] [20 U.S.C. 1415(n)]

5. Specify that parental consent is required prior to an initial evaluation, the initial provision of services, and a reevaluation.

Initial evaluation and initial provision of services:

The public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under 34 CFR 300.8 must, after providing notice consistent with 34 CFR 300.503 and 300.504, obtain informed consent, consistent with 34 CFR 300.9, from the parent of the child before conducting the evaluation.

[34 CFR 300.300(a)(1)(i)] [20 U.S.C. 1414(a)(1)(D)(i)(I)]

A public agency that is responsible for making FAPE available to a child with a disability must obtain informed consent from the parent of the child before the initial provision of special education and related services to the child.

[34 CFR 300.300(b)(1)] [20 U.S.C. 1414(a)(1)(D)(i)(II)]

The public agency must make reasonable efforts to obtain the informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability and for the initial provision of special education and related services to the child. Parental consent for initial evaluation must not be construed as consent for initial provision of special education and related services.

[34 CFR 300.300(a)(1)(ii)-(iii) and (b)(2)] [20 U.S.C. 1414(a)(1)(D)(i)(I)]

Reevaluation:

Except as set out below, the public agency must obtain informed parental consent prior to conducting any reevaluation of a child with a disability, in accordance with 34 CFR 300.300(a)(1) (i.e., after providing notice consistent with 34 CFR 300.503 and 300.504 and the parental consent must be consistent with 34 CFR 300.9).

The informed parental consent for reevaluations need not be obtained if the public agency can demonstrate that:

- It made reasonable efforts to obtain such consent; and

- The child's parent has failed to respond.

[34 CFR 300.300(c)(1)(i) and (2)] [20 U.S.C. 1414(a)(1)(D)(i)(II)]

Reasonable efforts:

To meet the reasonable efforts requirements regarding efforts to get parental consent for initial evaluation, initial provision of services and reevaluation, the public agency must document its attempts to obtain parental consent by methods such as:

- Detailed records of phone calls made or attempted and the results of those calls;
- Copies of correspondence sent to the parents and any responses received; and
- Detailed records of visits made to the parent's home or place of employment and the results of those visits.

[34 CFR 300.300(d)(5)]

6. Clarify that parental consent is not required for tests or other evaluations that are given to all children.

Parental consent is not required before administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.

[34 CFR 300.300(d)(1)]

7. Add a new parental consent provision for an initial evaluation of a ward of the State.

For initial evaluations only, if the child is a ward of the State and is not residing with the child's parent, the public agency is not required to obtain informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability if:

- Despite reasonable efforts to do so, the public agency cannot discover the whereabouts of the parent of the child;
- The rights of the parents of the child have been terminated in accordance with State law; or
- The rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.

[34 CFR 300.300(a)(2)] [20 U.S.C. 1414(a)(1)(D)(iii)]

8. Specify when LEAs may and may not use the dispute resolution procedures in section 615 (subpart E) to obtain parental consent for evaluations and initial services.

Initial evaluation:

If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation, or the parent fails to respond to a request to provide consent for an initial evaluation under 34 CFR 300.300(a)(1), the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards in subpart E of Part 300 (including the mediation procedures under 34 CFR 300.506 or the due process procedures under 34 CFR 300.507 through 300.516), if appropriate, except to the extent inconsistent with State law relating to such parental consent.

The public agency does not violate its obligations under 34 CFR 300.111 and 300.301 through 300.311 (child find and evaluations) if it declines to pursue the evaluation.
[34 CFR 300.300(a)(3)] [20 U.S.C. 1414(a)(1)(D)(ii)(I)]

Initial provision of services:

If the parent of a child fails to respond or refuses to consent to the initial provision of special education and related services under 34 CFR 300.300(b)(1), the public agency may not use the procedures in subpart E of Part 300 (including the mediation procedures under 34 CFR 300.506 or the due process procedures under 34 CFR 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child.
[34 CFR 300.300(b)(3)] [20 U.S.C. 1414(a)(1)(D)(ii)(II)]

If the parent of the child refuses to consent to the initial provision of special education and related services, or the parent fails to respond to a request to provide consent for the initial provision of special education and related services, the public agency:

- Will not be considered to be in violation of the requirement to make available a free appropriate public education (FAPE) to the child for the failure to provide the child with the special education and related services for which the public agency requests consent; and
- Is not required to convene an IEP Team meeting or develop an IEP under 34 CFR 300.320 and 300.324 for the child for the special education and related services for which the public agency requests such consent.

[34 CFR 300.300(b)(4)] [20 U.S.C. 1414(a)(1)(D)(ii)(III)]

Reevaluation:

If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures described in 34 CFR 300.300(a)(3) (i.e., the procedural safeguards in subpart E including the mediation procedures under 34 CFR 300.506 or the due process procedures under 34 CFR 300.507 through 300.516). The public agency does not violate its obligation under 34 CFR 300.111 and 300.301 through 300.311 (child find and evaluations) if it declines to pursue the evaluation or reevaluation.
[34 CFR 300.300(c)(1)(ii) and (iii)] [20 U.S.C. 1414(c)(3)]

9. Specify that LEAs may not use the dispute resolution procedures in section 615 (subpart E) to obtain parental consent for the initial evaluation or the reevaluation of a child who is home schooled or who is placed and funded by the parents in a private school.

If a parent of a child who is home schooled or placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or the reevaluation, or the parent fails to respond to a request to provide consent, the public agency may not use the consent override procedures (described in 34 CFR 300.300(a)(3) and (c)(1)) (i.e., the procedural safeguards in subpart E including the mediation procedures under 34 CFR 300.506 or the due process procedures under 34 CFR 300.507 through 300.516). The public agency is not required to consider the child as eligible for services under 34 CFR 300.132

through 300.144 (provision of services to parentally-placed private school children with disabilities).
[34 CFR 300.300(d)(4)]