

# The Individuals with Disabilities Education Act (IDEA)

## **Citations:**

20 U.S.C.A. § 1400 *et seq*

34 C.F.R. Part 300

N.C.G.S. 115C-106.1 *et seq*

NC 1500: Policies Governing Services for Children with Disabilities (Amended October 2013, by NC Department of Public Instruction)

## **Purpose of IDEA:**

Ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities. 20 USC § 1400(c)(1)

## **One Sentence Description for 3-21 year olds:**

IDEA is a federal entitlement program for children who have a qualifying disability such that they receive a “free appropriate public education” in the “least restrictive setting” through the provision of special education and supportive services as designated in their “individual education programs.”

## **What is a Disability Under IDEA?**

There are 14 categories of disability under the federal IDEA and the disabling condition must not only exist but it must require that the student need special education and related services. Most of the disability categories also require that disability cause an adverse effect on the student’s educational performance. (34 C.F.R. 300.8)

Autism	Traumatic Brain Injury (TBI)	Visual Impairment including blindness
Emotional Disability (ED)	Specific Learning Disability (SLD)	Other Health Impairment (OHI)
Speech or Language Impairment	Orthopedic Impairment	Hearing Impairment including deafness
Deaf – Blind	Intellectual Disability (ID) (formerly Mental Retardation)	Multiple Disabilities (MD)
Deafness	Developmental Delay [in N.C. only children 3 – 7 y.o., See N.C.G.S. 115C-106.3(2)]	

Students identified with a disability under IDEA receive specialized instruction and supportive services that are reasonably calculated to lead to an educational benefit. Education includes academic, functional and developmental skills, thereby looking beyond academic performance. Students eligible under IDEA are entitled to a Free Appropriate Public Education (FAPE) [20 U.S.C. §1412(a)(1); N.C.G.S. 115C-107.1(a)] in the Least Restrictive Environment (LRE) [20 U.S.C. § 1412(a)(5); N.C.G.S. 115C-107.2(b)(2)]. -107.6(d).

Every student receiving services under IDEA must have an annual Individual Education Program (IEP). Decisions regarding evaluations, eligibility (and under what disabling condition), services (type, frequency and duration), location of services (LRE) and manifestation determinations, in disciplinary removals exceeding ten (10) school days in one school year are made by the IEP Team.

Parents are equal participants of the IEP Team. 20 U.S.C. §§ 1414(d)(1)(B)(i); 1414(e) and 1415(b)(1); 34 CFR 300.327; NC 1503-2.2(c)(2); NC 1503-5.3; NC 1504-1.2. Decisions are made by consensus. If consensus cannot be reached, the school administrator conducting the meeting makes the decision. Parents have procedural due process rights giving them standing to appeal IEP Team decisions regarding eligibility, services (FAPE), location of program (LRE), and manifestation determinations. The due process procedures involve stand alone mediation, a complaint process, or an administrative hearing, with the right to appeal the hearing decision to state or federal court. 20 U.S.C. §§ 1412(a)(6)(A); 1415(d)(2).

In addition to these procedural protections for parents on behalf of their children, parents must provide informed consent for evaluations. 20 U.S.C. §§ 1414(a)(1)(d)(i)(I) and 1414(c)(3); NC 1503-1(a); NC 1503-1(c). Evaluations must use a variety of assessment tools to gather relevant functional, developmental, and academic information about the student and must include information provided by the parent. NC 1503-2.5(b). Parents have a right to request an “independent educational evaluation” (IEE) at public expense if they disagree with the school district’s evaluation of their child (20 U.S.C. §1415(d)(2)(A); NC 1504-1.3). Parent may provide an evaluation that was not obtained in the special education referral process, and that evaluation must be considered by the school district if it meets the district’s criteria. NC 1504.1.3(c). Parents must also give consent for the initial provision of special education services and can revoke consent for the receipt of special education services for their children at any time. 20 U.S.C. §1414(a)(1)(D)(i)(II); NC 1503-1(b)(1), NC 1503-1(b)(4). 34 CFR 300.300

Because a parent is an equal participant in the IEP team, the parent must be provided advance notice of the meeting, and the meeting must be scheduled at a mutually agreed on time and place. NC 1503-4.3(a). A parent may participate by alternative methods, such as video or telephone conference. 34 CFR 300.328; NC 1503-4.3(c); 1503-5.4; 1504-1.2(c)(3). If the parent does not attend, the school district must maintain a record of its attempts to arrange a mutually agreed on time and place. NC 1503-4.3(d).

## **REFERRAL**

Parents or school personnel who suspect a child has a disability may refer the child for special education by providing a written referral to a school administrator or teacher that states the

reason for the referral and addresses his or her specific concerns and the child's current strengths and needs. NC 1503-2.1. If an oral request is made by the parent, the school shall assist the parent in completing a written referral. NC 1503-2.2(b).

## **EVALUATION**

The district must ensure that a student who is referred for special education and related services receives a comprehensive evaluation in all suspected areas of a disability. 20 USC § 1414(b)(3)(B))

- Think "FAD"
  - Functional,
  - Academic and
  - Developmental

Evaluations must also include information about the child that is provided by parent. 20 USC §1414(b)(2)(A).

A copy of the evaluations must be given to the parent prior to the IEP Team meeting. 20 USC 1414(b)(4)(B).

A parent may also provide outside evaluations of the child to the school district in order to allow the IEP Team to consider that information when it is making determinations regarding needed evaluations, eligibility, IEP services and placements, and manifestation determinations for the child. 20 U.S.C. § 1414(c)(1)(A)(1); NC 1503-2.6(a)(1)(i).

## **DISMISSAL FROM SPECIAL EDUCATION**

In order to dismiss a child from special education eligibility, the school must reevaluate the child pursuant to the evaluation procedures under IDEA. 20 USC 1414(c)(5)(A); NC 1503-2.6(e). In reviewing the reevaluation, the IEP Team must determine that the student no longer qualifies as a student under IDEA. The student may still have a disability but may not require special education and related services.

### Graduation/Age Out

Eligibility for special education and related services in North Carolina ends upon high school graduation or the school year in which the student turns 22, whichever occurs first.

When a student graduates with a regular diploma or ages out, the schools must provide the student with a summary of his/her academic achievement and functional performance, including recommendations on how to assist the child in meeting his/her post-secondary goals. 20 USC §1414(c)(5)(B)(ii).

## WHO IS THE PARENT/DECISION-MAKER FOR CHILDREN IN DSS CUSTODY?

A parent is defined as the natural, adoptive, foster parent [unless state law prohibits the foster parent from serving as a parent, NC 1500-2.24(a)(2)], legal guardian (but specifically prohibits the State if the child is ward of the State), or an individual who is legally responsible for the child's welfare or who is acting in the place of a natural or adoptive parent. 20 USC § 1401(23). North Carolina prohibits therapeutic foster parents from acting as such. NC 1504-1.20(d)(1).

If the child is a "ward of the state," a **surrogate parent** must be appointed to act as the parent, with all the rights, responsibilities and protections afforded by IDEA to a parent. 20 U.S.C. § 1415(b)(2)(A); 34 C.F.R. § 300.519(a)(3); NC 1504-1.20(g). The definition of parent includes "a surrogate parent" who has been appointed as such pursuant to procedures under IDEA. G.S. 115C-106.3(14)(e); N.C. 1500-2.24(a)(5). A surrogate parent is someone acting in place of natural/adoptive parent who the child lives with, or who is legally responsible for the child. The role of the surrogate parent is to protect the rights of child and one is appointed when:

- the child's parents are unknown or cannot be located after making reasonable efforts,
- the student is a ward of the state and the parents' rights have been terminated or their rights to make educational decisions have been terminated by the court, or
- the child is an unaccompanied homeless youth.

NC 1504-1.20(a).

### Appointment

The surrogate parent must be appointed within 30 calendar days of when the school district is aware that a surrogate parent is needed. 20 U.S.C. §1415(b)(2)(B); 34 C.F.R. § 300.519(h); G.S. 115C-109.2(c)(3); NC 1504-1.20(h). A surrogate parent may be appointed one of two ways:

1. "by the judge overseeing the child's care" (court order in A/N/D action) See: 20 U.S.C.A. § 1415(b)(2)(A)(i); 34 C.F.R. § 300.519(c); NC 1504-1.20(c), or
2. by the educational agency [16 NCAC 06H.0108; NC 1504-1.20(b)]

Criteria for selection of surrogate parent require that the surrogate parent

- Has no personal or professional interest that conflicts with the interest of the child the surrogate parent represents; and
- Has knowledge and skills that ensure adequate representation of the child.

34 C.F.R. § 300.519(d)(2)(ii) and (iii); NC 1504-1.20(d)(2) and (3)

Although DSS has legal custody under a District Court Order and makes decisions and consents to services for a child in its custody, DSS directors and case workers cannot be the surrogate parent for special education purposes under IDEA. The surrogate parent "*shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child.*" 20 U.S.C.A. § 1415(b)(2)(A); 34 C.F.R. § 300.519(d)(2)(i); NC 1504-1.20(d)(1). In addition, although N.C.G.S. 7B-903(a)(2)(c)

authorizes a DSS who has a child in its legal custody as a result of a disposition after an adjudication of abuse, neglect or dependency to arrange for, provide or consent to educational evaluation or treatment, DSS cannot do this in the context of special education matters for that child as a result of the federal law. See Attorney General Thornburg Opinion dated March 12, 1986 addressing the conflict between state and federal law.

NOTE: These provisions do not prevent a DSS case worker from being an IEP Team member. 20 U.S.C. § 1414(d)(1)(B)(vi).

### Consent and Wards of the State

For initial evaluations only, if the child is a ward of the state and does not reside with a parent, the LEA is not required to obtain informed consent from the parent if the LEA cannot locate the parent after using reasonable efforts to do so or the rights of the parents to make educational decisions have been removed by a judge, and the consent for initial evaluation was given to an individual appointed by the judge to represent the child. NC 1503-1(a)(2).

### **RECORDS**

A parent has a right to examine and all records and participate in meetings regarding his or her child's identification, evaluations, educational placement, and provision of a FAPE. G.S. 115C-109.3(a); NC 1504-1.2.

Similarly, surrogate parents must receive a copy of evaluations completed by the school district [20 U.S.C. §1414(b)(4)(B)]. A surrogate parent has access to the child's educational records as if he or she is the parent (34 CFR 300.613 and 300.501; NC 115C-109.3). Access to records must be provided to the surrogate parent, upon request, in a reasonable period of time, which is deemed to be 45 days (34 C.F.R. 300.613) or before an IEP Team meeting is held if the date is less than 45 days from the receipt of request [ G.S. 115C-109.3(b)]. The school district can charge a nominal fee for copies of the records, unless the fee effectively prevents the parents from exercising their right to inspect and review the records. (34 C.F.R. 300.617)

The parents right to inspect and review records includes the right to have a representative inspect and review the records (NC 1505-2.4(b)(3)). A school may presume a parent has authority to inspect and review records relating to his or her child unless it has been advised that the parent does not have such authority under state law. NC 1505-2.4(c).

Under NC law, parents upon request are entitled to have records, data, and information fully explained , interpreted, and analyzed for them by school staff, unless a court order states otherwise. G.S. 115C-109.3(b)

## **TRANSFER STUDENTS**

If a student is in the process of being evaluated under IDEA and transfers schools in the same school year, the two school districts must coordinate that process. 20 U.S.C. §§ 1414(c)(1)(A)(i) and 1414(b)(3)(D); NC 1503-2.5(c)(5).

If a student receives services under IDEA and transfers school districts, the new school must provide comparable services that are contained in the student's IEP until the new school district holds an IEP Team meeting to adopt or amend the IEP the student transferred with. 20 U.S.C. § 1414(d)(2)(c)(i). The new school must consult with the parents. NC 1503-4.4(e).

Both school districts must take reasonable steps to promptly request and respond to request for the transfer of the student's educational records. 20 U.S.C. § 1414(d)(2)(c)(ii).

### Programs operated by DHHS or DJJ of DPS

If a child requires a FAPE while attending a program under the supervision of or operated by DHHS or DJJ of DPS, the local school district shall confer with the DHHS or DJJ of DPS staff to discuss both agency's participation in a meeting to determine the appropriateness of child's placement in that program and the development of the child's IEP. N.C.G.S. 115C-107.6(b).

## **DISCIPLINE: Additional Procedural Protections Required Under IDEA**

### The Manifestation Determination

These procedures are required when a student with a disability experiences a change of placement due to disciplinary action. A change of placement is when a student is removed from school for 10 consecutive school days in the same school year or 10 cumulative school days in a school year that the IEP Team determines is a change in placement. This is because the series of short-term removals are related in behavior, times, etc. When there is a change of placement, a "manifestation determination" is required.

Participants for a manifestation determination must include a parent and relevant members of the child's IEP Team (as determined by parent and school). The participants must review all relevant information in student's file, including the IEP, teacher observations and other relevant information provided by the parents. 20 USC 1415(k)(1)(E). Two questions are considered, and there if either one is answered yes, a manifestation exists. The questions are:

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

20 SC 1415(k)(1)(E)(i) and (ii)

Again, if one of the questions is answered yes, a manifestation is found. In that case, the student must have a functional behavior assessment and a behavior intervention plan (BIP) must be implemented or modified as necessary to address the child's behavior, and the student must be returned to the placement (s)he was removed from unless the parent and school agree to a different placement. 20 USC 1415(k)(1)(F).

If both questions are answered no, there is no manifestation, and the student may be treated as any other student regarding disciplinary action. 20 USC 1415(k)(1)(c). However, educational and related services are required to be provided so as to enable the student to participate in the general curriculum (albeit in another setting) and to progress in meeting the IEP goals. 20 USC 1415(k)(1)(D); NC 1504-2.1(c) and (d). A parent may appeal manifestation determination by requesting a due process hearing. 20 USC 1415(k)(3).

### Interim Alternative Educational Setting (IAES)

School personnel may place a child in an IAES for a maximum of 45 school days regardless of whether a manifestation exists if the student while at school, on school premises or at a school function:

- carries or possesses a weapon as defined by 18 USC 903(g),
- knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, or
- has inflicted on another serious bodily injury, which involves substantial risk of death, extreme physical pain, protracted and obvious disfigurement or protracted loss or impairment of function of a bodily member, organ or mental faculty.

20 USC 1415(k)(1)(G).

Any other basis for an IAES placement can only occur after the school district proves at a due process hearing that the student's staying in his/her current placement is "substantially likely to result in injury" to self or to others. 20 USC 1415(k)(3)(A) and (B)(ii)(II).

The IEP Team determines the IAES; it cannot be a unilateral decision by school administration. 20 USC 1415(k)(2). If a parent disagrees with the appropriateness of the IAES, (s)he may request a due process hearing, which must be expedited. 20 USC § 1415(k)(4)(B). At the conclusion of the 45 school day maximum, unless the parents and school agree otherwise, the child is returned to the placement he or she was in prior to the IAES.

### Suspension and Expulsion – Right to Services

Children who are suspended or expelled who require special education and related services are entitled to continuing education services as provided for under IDEA. N.C.G.S. 115C-107.1(a)(3); NC 1501.1(a).

Homebound instruction" is any instruction outside the school setting. N.C.G.S. 115C-106.3(5a). A student may not be placed on homebound instruction as a result of disciplinary action unless

the IEP Team determines the homebound instruction is the least restrictive alternative environment for the student. If it is determined to be the least restrictive alternative environment, the homebound instruction must be evaluated by designees of the IEP Team on a monthly basis. N.C.G.S. 115C-107.7(b); NC 1504-2.9.

In addition, a referral for special education may occur during or after a student has been suspended or expelled. In that case, the evaluation must be expedited. 20 USC 1415(k)(5)(D).

#### Non-Identified IDEA Students

Students not yet eligible for IDEA may be protected by procedures under IDEA (manifestation determination, IAES, functional behavior assessment and behavior interventions) if school had knowledge that the student had a qualifying disability before the behavior occurred. 20 USC 1415(k)(5)(A).

“Basis of knowledge” is presumed if prior to the behavior that precipitated the disciplinary action the behavior and performance of the child “*clearly and convincingly*” establishes the need for special education. Prior disciplinary infractions alone does not constitute clear and convincing evidence. N.C.G.S. 115C-107.7(c). However, basis of knowledge does include if:

- a parent submitted written concerns that his or her child needs special education and related services to school administration or the child’s teacher,
  - a parent requested evaluation, or
  - a teacher or other school staff expressed specific concerns about the child’s behaviors to the special education director or other school supervisory personnel.
- Exception to basis of knowledge: a parent did not consent to the child’s evaluation, a parent refused special education and related services, or the student was evaluated and determined ineligible for services.

20 USC §1415(k)(5).

#### **Referral to police:**

A school district reporting a crime committed by the child with a disability must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities, so long as the transmittal is consistent with FERPA. NC 1504-2.6.

#### **Incarcerated Students:**

Each LEA must ensure that FAPE is available to students with disabilities incarcerated in local jails who were eligible for FAPE prior to their incarceration. NC 1501-1.1(d).



However, an incarcerated student who is between the ages of 18-21 and was not identified as a student with a disability under IDEA in the school unit prior to his or her incarceration in an adult correctional facility is not entitled to a FAPE. N.C.G.S. 115C-107.1(d); NC 1501-1.2(a)(1)

Students who have been convicted of a crime and are incarcerated in adult prisons are not required to participate in the general assessments and do not have a transition plan if they will age out of special education prior to their release from prison. NC 1503-5.1(d).

### **Disproportionality**

There must be policies and procedures in effect at the State Board of Education and with local educational agencies that children are not disproportionately identified as students with disabilities based upon race and ethnicity. NC 1501-14.5. The State Board of Education must also examine data disaggregated by race and ethnicity to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of students with disabilities. NC 1501-14.1.

Evaluations must be selected and administered so as to not be discriminatory on a racial or cultural basis and must be provided and administered in the child's native language or other mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally (unless it is clearly not feasible to so provide or administer). NC 1503-2.5(c)(1)(i) and (ii).