



## DOES YOUR CHILD NEED AN IEP?

Published in Birmingham Parent  
By SHANE T. SEARS, J.D.  
June 9, 2014

Does your child have any of the following disabilities: autism, Asperger Syndrome, ADD/ADHD, Down Syndrome, Tourette Syndrome, intellectual disability, developmental delay, learning disability, speech or language impairments, emotional disturbance, learning disability, visual or hearing impairment, physical impairments, traumatic brain injury, epilepsy, diabetes, sickle cell anemia, asthma, tuberculosis, or a disability that adversely affects your child's social or educational performance?

! If so, your child may qualify for an individualized education program ("IEP") under the Individuals with Disabilities Education Act ("IDEA"),

a federal law ensuring a free and appropriate education ("FAPE") to children with disabilities. Advise your public school system that your child has a disability that may qualify him or her for free special education and related services such as physical therapy, occupational therapy, or speech services.



### THE IDEA

The IDEA provides federal assistance to states that provide FAPE to children who have disabilities by offering each eligible student special education and related services under an IEP. 20 U.S.C. § 1412(a)(1)(A). States and the local education agencies ("LEA" or public school system) are required to locate, evaluate, and identify children, from birth to twenty-one years of age, that are in need of special education services ( a process under the IDEA known as "Child Find"). 20 U.S.C. §1412(a)(3)(A). Child Find also applies to children with disabilities who are home-schooled, attend private schools, including children attending religious schools, migrant children, homeless children, and children who are wards of the state. Id.

### THE IEP AND PARENTAL PARTICIPATION

Once your child has been qualified as having a disability, the LEA must develop an IEP that complies with the IDEA. 20 U.S.C. §1412(a)(4). The school and parents must develop the IEP together.

The IDEA considers parental participation a key part of the IEP development process and makes parents mandatory members of the IEP team. 34 CFR 300.321(a)(1). The IDEA requires districts to provide for meaningful parental participation in the IEP meeting which includes: (1) consideration of parents' suggestions and, to the extent appropriate, incorporating those suggestions into the IEP; and, (2) consideration of any independent educational evaluations (IEE), a discussion of placement options, and answering parents' questions. See, *Deal v. Hamilton County Bd. of Educ.*, 42 IDELR 109 (6th Cir. 2004), cert. denied, 110 LRP 46999 , 546 U.S. 936 (2005), on remand, 46 IDELR 45 (E.D. Tenn. 2006), aff'd, 49 IDELR 123 (6th Cir. 2008) and Board of Educ. of Waterford-Halfmoon Union Free Sch. Dist., 20 IDELR 1092 (SEA NY 1994).

Although parents are considered "equal" participants in the IEP process, they do not have veto power over decisions made during the IEP team meetings. Nor is there any "majority vote" rule for IEP team meetings. If the team cannot reach consensus, the public agency must provide the parents with prior written notice of the agency's proposals or refusals, or both, regarding the child's educational program. 34 CFR 300.503 (a); Letter to Richards, 55 IDELR 107 (OSEP 2010); and *Buser v. Corpus Christi Indep. Sch. Dist.*, 20 IDELR 981 (S.D. Tex. 1994), aff'd, 22 IDELR 626 (5th Cir. 1995). See SmartStart: IEPs -- Parent Input.

### FLOOR OF OPPORTUNITY AND EDUCATIONAL BENEFIT

The IEP for the child must be reviewed annually, i.e., at least once each It also must be "reasonably calculated to enable the child to receive educational benefits." *Draper v. Atlanta Indep. Sch. Sys.* 518 F.3d 1275, 1279 (11th Cir. 2008). The IDEA requires that IEPs include a reasonably accurate assessment of students and meaningful goals. *Jefferson County Bd of Educ. v. Lolita*, 62 IDELR 2, 20 (September 30, 2013). Furthermore, the IEP must meet the child's "unique" needs, and the IEP team is not to assume that all children in special education are capable of meeting state goals for a particular grade. Id. at 21. The point of requiring measurable goals in an IEP is to measure the child's progress and determine if the program did what it was intended to do and whether the child met that goal. Id.

## **FLOOR OF OPPORTUNITY AND EDUCATIONAL BENEFIT**

The IEP for the child must be reviewed annually, i.e., at least once each It also must be “reasonably calculated to enable the child to receive educational benefits.” *Draper v. Atlanta Indep. Sch. Sys.* 518 F.3d 1275, 1279 (11th Cir. 2008). The IDEA requires that IEPs include a reasonably accurate assessment of students and meaningful goals. *Jefferson County Bd of Educ. v. Lolita*, 62 IDELR 2, 20 (September 30, 2013). Furthermore, the IEP must meet the child’s “unique” needs, and the IEP team is not to assume that all children in special education are capable of meeting state goals for a particular grade. *Id.* at 21. The point of requiring measurable goals in an IEP is to measure the child’s progress and determine if the program did what it was intended to do and whether the child met that goal. *Id.*

An “educational benefit” does not mean that the school system has to “maximize” your child’s potential. An “educational benefit” has simply been defined by the courts as being “a basic floor of opportunity” that affords ‘some’ educational benefit. *Walker Cty School Dist. v. Bennett*, 203 F.3d 1293, 1296 (11th Cir. 2000)(citing, *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982)).

## **CHALLENGING THE IEP AND REQUESTING AN IEE**

If a parent disagrees with the school’s evaluation and findings, the parent can request an independent education evaluation (“IEE”) at public expense. 34 CFR 300.502(b)(1). The IEE will be paid for by the public school system and the evaluation is conducted by a qualified examiner not employed by the public school system that is responsible for the education of the child. 34 CFR 300.502(a)(3)(i).

After the IEE has been completed, the school system will review the results (often with the individual that conducted the IEE) and conduct a meeting with the child’s parents. If the results are favorable, the parent should request that the expert’s recommendations for goals and services be included in the child’s IEP.

## **FILING A DUE PROCESS COMPLAINT**

The parent of the child may also file a due process complaint if he or she disagrees with the IEP, evaluations, or findings by the school. The due process complaint must be requested within two years of the date the parent knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. § 1415(f)(3)(c). The two-year statute does not apply if the parent was prevented from requesting the hearing due to specific misrepresentations by the LEA that it had resolved the problem or if the LEA was withholding information from the parent. 20 U.S.C. § 1415(f)(3)(D).

The due process hearing is usually conducted by an administrative law judge (ALJ) or hearing officer. Either the parent or school system has a right to challenge or appeal the decision of the ALJ or hearing officer in state or federal court. 20 U.S.C. §1415(i)(2)(A).

## **FINAL ANALYSIS**

If your child has a disability which adversely affects his or her social or educational performance, request (in writing) that the special education department for your public school system conduct testing to determine if he or she qualifies for special education services. Also, forward the results of any testing and current diagnoses from your child’s private physician, psychologist, or psychiatrist to the school district. If your child is being seen by someone who is maintaining therapy notes, ensure that those notes are maintained as confidential and not to be shared with school personnel.

If your request is ignored, denied, or the test results seem skewed, consult with an attorney in your state that is familiar with special education law to assist your child in obtaining special education services.