

Special Education Rights of Youth in Foster Care



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Goals

- Generally, to understand the educational rights of children with disabilities and their representatives and the responsibilities of school districts to provide special education services.
- Specifically, to become knowledgeable with respect to:
 - Obtaining and reviewing important school records
 - Requesting evaluations
 - Participating in an ARD meeting
 - Accountability requirements for IEPs
 - Protecting a student's rights during discipline proceedings
 - Ensuring services to transition into adulthood
 - Finding additional resources

Special Education Law and Purpose

- Sources of Special Education Law:
 - IDEA 20 U.S.C. § 1400 et. seq. (34 CFR Part 300)
 - Texas Education Code, Chapters 29 (Special Ed) and Chapter 37 (Discipline)
 - 19 TAC § 89.1001 et. seq. (Commissioner of Education’s Rules and State Board of Education Rules)
- To ensure that all children with disabilities have available to them a free appropriate public education (“FAPE”) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 42 U.S.C. § 1400(d)(1)(A).
- To ensure that the rights of children with disabilities and parents of such children are protected. 42 U.S.C. § 1400(d)(1)(B).

Eligibility

- To be eligible, the student must meet the definition of one of several enumerated disabilities and, “by reason thereof,” need special education and related services. 42 U.S.C. § 1401(3).
- These disabilities include:
 - Mental retardation
 - Hearing impairments, including deafness
 - Speech or language impairments
 - Visual impairments, including blindness
 - Serious emotional disturbance
 - Orthopedic impairments
 - Autism
 - Traumatic brain injury
 - Other health impairments, such as a terminal or chronic disorder or ADHD
 - Specific learning disabilities, such as dyslexia

Entitlement and FAPE

- IDEA guarantees that all students with disabilities age 3 through 21 have the right to a “free and appropriate public education” (FAPE). 21 means 21 at the beginning of a school year. Thus, 22 year olds can often be served in a district.
- The right to a FAPE ends when a student graduates with a regular high school diploma. 34 C.F.R. § 300.102(a)(3)(i). This does not include students who have received a certificate of attendance or a certificate of graduation that is not a regular high school diploma. Id. § 300.102(a)(3)(ii).
- School districts deliver FAPE by providing “special education services” and “related services.”

Services Standards

- Board of Ed. Of the Hendrick Hudson Sch. Dist. v. Rowley, 458 U.S. 176 (1982).
 - The IEP must confer “meaningful benefit,” which means that it must provide for “significant learning.”
 - IEP reasonably calculated to enable the child to benefit.
 - NOT a maximization of child’s potential.

PARENTS AND SURROGATE PARENTS

Who is a Parent?

- A natural, adoptive, or foster parent (unless prohibited).
- A guardian (but not the state if the child is a “ward of the state”).
- An individual acting in place of a natural or adoptive parent (step-parent, grandparent, or other relative) with whom child lives, or an individual legally responsible for child’s welfare.
- A surrogate parent.

Surrogate Parents

If a child is a “ward of the state,” the school district is required within 30 days of discovering a child requires a surrogate parent to make reasonable efforts to appoint a surrogate parent to represent the child.

34 C.F.R. § 300.519

What Does a Surrogate Parent Do?

The surrogate parent may represent child in all matters related to “identification, evaluation, and educational placement of the child; and the provision of FAPE to the child.”

34 C.F.R. § 300.519(g).

Who Cannot be a Surrogate Parent?

- An employee of TEA, the school district, or any agency involved in the care or education of the child (DFPS, TYC/SSLC/RTC, etc.).
- A person with a personal or professional interest that conflicts with the child's.
- A person without knowledge and skills to represent child's interest.

34 C.F.R. § 300.519(d)(2).

Surrogate Parent Procedures

- The Texas Education Agency must develop procedures to ensure that surrogate parents:
 - complete a training program (within 90 days of appointment)
 - visit the child and the child's school
 - consult with persons involved in the child's education, including teachers, caseworkers, court-appointed volunteers, guardian ad litem, attorney ad litem, foster parents, and caretakers
 - review the child's educational records
 - attend the child's ARD committee meetings
 - exercise judgment in pursuing the child's interests
 - exercise the child's due process rights

Court's Authority to Appoint Surrogate Parent

The court having jurisdiction over a foster child may appoint a surrogate parent for a foster child.

34 C.F.R. 300.519(c)

CASA as Surrogate Parent

- Under Section 107.031(c) of the Texas Family Code, a CASA volunteer may serve as surrogate parent if:
 - The child is under the conservatorship of the Department;
 - CASA volunteer is the child's guardian ad litem; and
 - The foster parent is not acting as the child's parent under Section 29.815 of the Texas Education Code.
 - The court or the school may appoint CASA. Schools are often eager to appoint a willing volunteer, so let the school know CASA is available.

Why CASA?

- Opportunity for continuity.
- A volunteer who knows the child.
- Must report to the court
- Already has a professional relationship with DFPS and the attorney ad litem

RECORDS

Records

- Parents have a right to see and copy all records about child's education.
- To Receive Records
 - A Parent can write a letter to school principal asking for list of all records school keeps. Then, write a letter identifying which records you want to review.
 - All records must be made available within 45 days. But, if ARD or due process meeting is scheduled in less time, you must be able to view records beforehand
 - For AI to obtain records, send record request with a release signed by the parents.

Records

- If the Records Are Incorrect
 - May ask the school to make a correction. Within a reasonable time, the school must let it be known they will make the change.
 - If the school refuses to make the change, right to a (1) hearing and (2) to have statement included in record.

REFERRALS, EVALUATIONS, AND RE-EVALUTATIONS

Evaluations

- Referral
- Notice of Rights
- Evaluation
 - If school does not think a child needs to be evaluated, they must send written notice about their decision and the parent's rights.
 - Parent must consent to evaluation, 20 U.S.C. §1414(a)(1)(D)(ii)(II)
 - But, not everything is an evaluation. Screening a student for most appropriate instruction strategies is not an evaluation for special education and does not require notice or consent. 20 U.S.C. § 1414 (a)(1)(E)
 - School must conduct initial evaluation within 60 days of receiving parental consent.

Evaluations

- Determine
 - Whether child has disability
 - Student's educational needs resulting from disability
- Report Should Include Assessment of
 - Educational Needs
 - Levels of achievement
 - Problem areas
 - Comparison to other students
 - Reason for any problems
 - Need for Related and Other Special Services
 - Examples: Occupational therapy, speech therapy, physical therapy, assistive technology, counseling, and transportation.
 - Need for Positive Behavioral Supports

Using Evaluations

- Parents and advocates should review before ARD
 - Make sure they are accurate and complete.
 - If a subject is not addressed at all or in sufficient detail, request additional testing.
- If confused
 - Ask person at school who did tests.
 - View www.wrightslaw.com

Independent Educational Evaluations (IEE)

- Used if you disagree with ANY evaluation.
- How do you get one? Notify school officials that you want an independent educational evaluation (IEE) and you want the school to pay for it.
- School must pay for one independent evaluation for each school evaluation with which the parent disagrees.
 - unless the school asks for a due process hearing to show its evaluation was appropriate.
- ARD Committee must consider IEEs.

Timelines for Reevaluation

- The school shall ensure reevaluation if:
 - school determines that educational or related services needs, including improved academic achievement and functional performance of the child, warrant reevaluation;
 - if the child's parents or teacher requests a reevaluation.
- A reevaluation shall occur:
 - not more than once a year, unless the parent and school agree otherwise; and
 - at least once every 3 years, unless the parent and the school agree a reevaluation is unnecessary.
 - 20 U.S.C. § 1414 (a)(2)(A)(B)

Consent for Reevaluation

Each school shall obtain informed parental consent prior to conducting any reevaluation except parent consent is not required if the school can demonstrate that it had taken reasonable measures to obtain consent and the child's parent has failed to respond.

20 U.S.C. § 1414(c)(3)

THE ARD/IEP PROCESS

Admission, Review and Dismissal (ARD) Meeting

- When
 - Meets at least once a year to develop student's Individual Educational Program (IEP)
 - Parent must receive notice 5+ school days before meeting and school must attempt to work with parent's schedule

Admission, Review and Dismissal (ARD) Meeting

- Who attends
 - Members of Committee:
 - Parents and Student
 - Representative of school district knowledgeable about special ed services
 - 1+ special ed teacher
 - 1+ regular ed teacher (if student is or may be in regular ed classes)
 - Someone who can interpret evaluations.
 - Member does not have to be present if school and parents agree in writing 20 U.S.C. § 1414(d)(1)(c)(i) and (iii). But, if member's area of curriculum or related services is being discussed, member must provide written input to committee before meeting 20 U.S.C. § 1414(d)(1)(c)(i) and (iii)

IEPs

- IEPs must include:
 - Present levels of academic achievement and functional performance; and
 - A statement of measurable annual goals including both academic and functional goals. 20 U.S.C. § 1414(d)(1)(A)(i)(I)(II)
 - In simple terms, IEPs must address: goals, placement, FBAs and BIPs where appropriate, related services, transition services and supplements.

Placement

- The School must ensure “that to the maximum extent appropriate, children with disabilities...are educated with children who are not disabled” and have access to the “general curriculum.” 20 U.S.C. § 1412(a)(5)
- Special classes, separate schooling or other removal of children with disabilities from the regular educational environment must only occur if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.
- But, presumption for mainstreaming may be overcome if “child is so disruptive in a regular classroom that the education of other students is significantly impaired.” 34 CFR 300.550-556 (comment).

Accommodations and Alternate Assessments

- The child's IEP must include:
 - a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on state and district wide assessments, or
 - if the IEP Team determines that the child shall take an alternate assessment on a particular state or district-wide assessment, a statement of why the child cannot participate in the regular assessment and how the particular alternate assessment selected is appropriate for the child.
- 20 U.S.C. § 1414 (d)(1)(A)(i)(VI)(aa)(bb)

Assistive Technology

- As part of the program development process, the IEP team must "consider whether the child needs assistive technology devices and services." [34 CFR 300.324](#) (a)(2)(v) and provide all assistive technology devices and services required for the student to receive FAPE.
- Does not generally include eye glasses, hearing aides or cochlear implants.
- Can include computers, calculators, and communication boards and devices.

Changes to the IEP

- In making changes to a child's IEP after the annual ARD/IEP meeting for a school year, the parent and the school district may agree not to convene an ARD/IEP meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the child's current IEP. 20 U.S.C. § 1414(d)(3)(D)
- Changes to the IEP may be made either by the entire ARD/IEP team or, as provided in 20 U.S.C. § 1414 (d)(3)(D), by amending rather than redrafting the entire IEP. Upon request, a parent shall be provided with a revised copy of the IEP with the amendments incorporated. 20 U.S.C. § 1414(d)(3)(F)

BEHAVIOR AND DISCIPLINE

“Zero Tolerance” is Not the Law in Texas Anymore

- HB 171 passed and Texas Education Code 37.001(a) was amended in Sept. 2009 to require that in all disciplinary removals, schools “consider” the following:
 - self-defense
 - intent or lack of intent at the time the student engaged in the conduct
 - a student ’s disciplinary history
 - a disability that substantially impairs the student ’s capacity to appreciate the wrongfulness of the student ’s conduct.

Federal Law (IDEA) Provides More Protection for Longer Removals

- Removal from class for more than 10 consecutive school days; OR
- Removals form a pattern (because they total 10+ days/ year, the behavior is substantially similar, and removals are close in time.



Examples of Disciplinary Placements:

- Suspension
- Disciplinary Alternative Education Program (DAEP)
- Expulsion
- In-school Suspension
 - Counts toward time of removal if student does not receive services specified by IEP, is not afforded opportunity to continue to appropriately progress in general curriculum, or does not receive same access to non disabled students.

Suspension: Disciplinary Placement Less than 10 Days

- School must hold a conference with parent(s), principal, teacher (if teacher was involved in removal), and student.
- Student must receive:
 - Oral or written notice of reason for removal
 - An opportunity to explain his or her version of what happened
- **Additionally:**
 - School can not suspend the student out of school for more than 3 consecutive days. There's no limit to the number of times of suspensions during a school year. However, a series of 3 day removals during the course of the school year may be considered a change in placement giving rise to IDEA protections.

Disciplinary Placement Over 10 Days

- School must:
 - Notify parent of disciplinary decision and give them a copy of their [procedural safeguards](#) on the same day the school decides to take the disciplinary action.
 - Assemble parents and relevant ARD members for a [manifestation determination](#) review.

Manifestation Determination Review

- The ARD committee must decide if the student's conduct:
 - Was caused by, or had a direct and substantial relationship to the student's disability; OR
 - Was the direct result of the school's failure to implement the student's IEP.

Manifestation Determination Review – If Yes

- If yes: The student's conduct is a manifestation of the student's disability and the school must:
 - Conduct a functional behavioral assessment (FBA)
 - Implement a behavior intervention plan (BIP); and
 - Return the student to his prior placement.
- **EXCEPTION:** Even if conduct was a manifestation, if the behavior involved drugs, weapons, or substantial bodily injury, the student can be placed in a DAEP for up to 45 days.

Manifestation Determination Review – If No

- Disciplinary procedures applied to non-disabled students may be applied.

What is a Functional Behavioral Assessment (FBA)?

- Evaluations used to develop positive behavioral supports and a Behavior Intervention Plan (BIP)
 - All behavior serves a function. An FBA attempts to determine what function a student's unacceptable behavior serves. It tries to determine what the student "gets" or "avoids" through the unacceptable behavior.
 - An FBA does not simply describe a behavior. It identifies the biological, social, affective, and environmental factors that initiate, sustain, or end the behavior in question

What is an FBA?

- Once the underlying function of the unacceptable behavior is identified, the FBA identifies strategies to:
 - Help the student engage in an acceptable replacement behavior that “gets” the student what he wants
 - Decrease the student’s desire to “avoid” the environment/situation causing the unacceptable behavior (Behavior used to “avoid” is often related to lack of appropriate academic services. A good FBA will address academic services.)

When Should an FBA Be Conducted?

- ARD committee must consider providing positive behavioral interventions when a student's behavior impedes his learning or the learning of others. In order to identify effective interventions, an FBA should be conducted.
- An FBA is required when disciplinary removal is due to conduct that is found to be a manifestation of a student's disability.

Who Conducts an FBA?

- Behavior Specialist or Psychologist
 - NOTE: IDEA does not say who is qualified to conduct FBAs. Commonly, schools ask teachers to complete checklists to help determine what causes behaviors. While this information may be a helpful part of the FBA, checklists alone are not FBAs.

Where Does the Information in an FBA Come From?

- Direct observation made by the evaluator in the environments where the behavior(s) typically occur. Evaluator should spend at least a few days observing student in these settings.
- Student interview (and reinforcement surveys)
- Teacher interviews (and written input)
- Review of special education records and disciplinary data

Common Components of a Quality FBA

- Background information (narrative)
- Detailed description of:
 - Direct observations (each behavior at issue should be described as well as the environment, what happened prior to each behavior, and what happened after each behavior.)
 - Student interview
 - Teacher interview
 - Data collection (e.g. how often each behavior occurred, how often the same events occurred prior to each behavior, how often the same events occurred after each behavior)

Common Components of a Quality FBA

- Functional Hypothesis
 - Description of what the student may be getting (e.g. attention, control) or avoiding (e.g. embarrassment, frustration) through the unacceptable behavior
 - Description of acceptable behaviors that could serve the same purpose for the student
 - Description of positive strategies to promote acceptable behaviors that serve the same purpose
 - Description of positive strategies to reduce the student's desire to avoid situations/environment

Common Components of a Quality FBA

- Recommendations for BIP
 - Positive strategies for promoting acceptable behaviors that serve the same function.
 - Example: if a student engages in unacceptable behavior to gain attention, the FBA should identify acceptable behaviors to gain attention and strategies to provide opportunities for the student to engage in those acceptable behaviors

Common Components of a Quality FBA

- Recommendations for BIP (continued)
 - Positive strategies for decreasing the student's desire to avoid situations/environment.
 - Example: If the student engages in unacceptable behavior to avoid assignments that are difficult, the FBA should identify increased academic support for the student and strategies to minimize potential for frustration/embarrassment
 - Punishment is not a positive behavioral intervention

What if I Disagree With the Evaluation?

- At the ARD meeting, tell the other Committee members that you disagree with the evaluation (the FBA).
- Notify school officials that you want an independent educational evaluation (IEE).
- School must pay for one IEE unless the school asks for a due process hearing to show its evaluation was appropriate.
- ARD Committee must consider IEE.
- Procedure:
 - Disagree (with evaluation),
 - request IEE,
 - get criteria to me (ask school for criteria for independent evaluators, do not use the ones the school suggests)

Behavior Intervention Plan (BIP)

- Based on Evaluation Data, including an FBA
- Must include positive supports and interventions (these should be described in the FBA)

BIP Tips

- Be specific about each behavior at issue
 - “Jane is aggressive” is not specific.
 - “Jane hits other students at recess when she does not get her way” is specific.
- Target a few key behaviors with specific, individualized interventions
 - “Give Jane an opportunity to exercise control” is not specific.
 - “Give Jane the opportunity to choose the recess activity. Give Jane the opportunity to lead the class discussion” are specific interventions.

BIP Tips

- Describe specific interventions to support the positive behaviors that the student already engages in
- Describe changes that should be made to the environment
- Address effective methods of redirection, modeling, de-escalation as appropriate (Remember, positive behavioral support is as much about changing adult behavior as it is about changing the student's behavior)

BIP Tips

- The Committee needs to determine whether the student can follow all aspects of the Student Code of Conduct. If the student cannot, the BIP should specifically outline exceptions or alternative policies
- Never consent to use of disciplinary removal, law enforcement or restraint. Simply say “I will not agree to the use of disciplinary removal, law enforcement or restraint.” The District may still choose to use these actions; however, you should not agree to them as a part of a BIP.

Education Services During Suspension or Expulsion

- A district may be required to provide a Free Appropriate Public Education (FAPE) during suspensions and expulsions.
- If the removal is less than 10 days, the school is only required to provide the same services it provides to non-disabled students.
- If the removal is for more than 10 days then the school must provide services.
 - The services provided don't have to be exactly the same services but the school must enable the child to continue to participate in the general curriculum.

Discipline of Students not yet Eligible for Special Education

- IDEA may still apply if the school knew your child was disabled before the behavior that caused the disciplinary action occurred.
- Schools have knowledge where:
 - The parent has written the district requesting special education services.
 - The parent has requested a special education evaluation.
 - A child's teacher or other district personnel expressed concerns to other district personnel.
- If the school had "knowledge" then the parent may request an expedited evaluation for IDEA eligibility.
- Schools do not have "knowledge" where the child has been evaluated and determined ineligible or where parent has refused special ed services.

TRANSITION SERVICES

Transition

- Beginning not later than the first IEP to be in effect when the child turns 16* and then updated annually thereafter. The IEP must include:
 - Appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment and independent living skills, where appropriate

* The regulations to IDEA 2004 eliminate age 14 requirements.

Transition

- The IEP must also include:
 - Transition services needed to assist the child in reaching those goals, including courses of study; and
 - Beginning not later than one year before the child reaches the age of majority under state law, a statement that the child has been informed of the child's rights under this title, if any, that will transfer to him or her on reaching the age of majority.
- 20 U.S.C. §1414(d)(1)(A)(i)(VIII)

Graduation

- Summary of Performance
 - For a child whose eligibility terminates due to receiving a regular diploma or by aging out, the school must provide the child 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.
- 20 U.S.C. § 1414(c)(5)(B)(ii)

RESTRAINT AND SECLUSION

Restraint and Seclusion

- Seclusion: Banned
 - Students may not be confined in a locked box, locked closet, or locked room that: (A) is designed solely to seclude a person; and (B) contains less than 50 square feet of space. Texas Education Code § 37.0021.
- Restraint: Restricted
 - Only allowed in emergency situations, in which student's behavior poses a threat of: (A) imminent, serious physical harm to the student or others; or (B) imminent, serious property destruction (meaning expensive property). 19 T.A.C. §89.1053
 - Notice Requirements See 89.1053(e)
 - Staff Training Requirements See 19 T.A.C. 89.1053(d)

AUTISM

Autism Supplement

- Under the Texas Autism Supplement, the following points must be discussed before creating an IEP for a student with autism:
 - Extended educational programming, including extended-day and extended-year services
 - Daily schedules with minimal unstructured time
 - In-home and community-based training that helps students acquire social and behavioral skills
 - Positive behavioral support strategies
 - Planning for the life, work and education of children of all ages
 - Parent and family training and support
 - Suitable student-to-staff ratios for children during the various stages of learning
 - Communication interventions
 - Social skill supports
 - Professional educator and staff support and training
 - Teaching strategies based on research-based practices, including discrete-trial training and applied behavior analysis

ADMINISTRATIVE REMEDIES: TEA Complaints, Mediation, and Due Process

TEA Complaint Process

- First step is to try to resolve problems with school districts by going to an ARD before complaining to TEA.
- If cannot resolve issue at ARD:
 - Write Letter of Complaint to TEA requesting investigation.
 - State the violations believed to have occurred.
 - State the facts on which complaint is based. Be specific.
 - Attach important documents (ARD Documents, evaluations, etc)
 - Sign the complaint.
 - Mail complaint to:
 - Texas Education Agency
Division of IDEA Coordination
1701 North Congress Avenue
Austin, TX 78701-1494
- TEA has 60 days to determine if law has been broken.

Mediation

- Parents may request mediation whenever there is a complaint or disagreement about special education services.
- Mediation is free.
- To request mediation,
 - Write letter to TEA requesting mediation
 - Include name of school district, name and grade of student, contact information, and a short description of concerns.
- May mail or fax request to:
 - Texas Education Agency
Division of Legal Services
1701 North Congress Avenue
Austin, TX 78701-1494
Telephone: 512.463.9720 | Fax: 512.475.3662

Due Process Hearing

- A parent may request an impartial due process hearing as a last resort when they feel the school district has violated special education laws.
- Resembles a trial, but a lawyer is optional
- Must request hearing within one year of the time they knew of the wrongful action (this is more strict than in some states).
- Parent must first attend “resolution session”
 - Held within 15 days from time district receives hearing request
 - If no agreement is reached within 30 days of hearing request, due process hearing can occur.

FINDING HELP: Resources and Contact Information

How Disability Rights Texas Can Help

- Discipline (Removal, school citations, positive behavior supports)
- Ending and preventing illegal seclusion or restraint
- Inclusion
- Transition Planning
- Assistive Technology
- Advice and Tech Support on other issues
- Appointment as attorney at litem for youth in or at risk of placement in TYC or SSLC (“state school”)

For help, call: (800) 252-9108

Resources

- Special Education Connection
 - <http://www.specialedconnection.com/>
- Wright's Law
 - www.wrightslaw.com
- Texas Education Agency (TEA)
 - Parent Resource Guide
<http://www.tea.state.tx.us/special.ed/resources/>
 - Complaints, Mediations, Due Process Hearings
<http://www.tea.state.tx.us/special.ed/medcom/compinfo.html>