

**Case No. 21-35242**

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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S.C., by and through her mother and next friend, K.G.,

*Plaintiff-Appellant,*

v.

Lincoln County School District.

*Defendant-Appellee.*

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On appeal from the United States District Court  
for the District of Oregon  
D.C. No. 6:20-cv-02277-MC  
(Honorable Michael McShane)

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**OPENING BRIEF OF APPELLANTS**  
**S.C., et al.**

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## **INTRODUCTION**

This is an appeal of the district court's denial of S.C.'s motion seeking emergency relief to enforce a final decision of the Oregon Department of Education. S.C. seeks to enforce the remedial order which was issued by an administrative law judge (ALJ) after S.C. exhausted administrative procedures under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415. The ALJ, acting on behalf of the State, determined the Lincoln County School District had deprived S.C. of a free appropriate public education (FAPE) during the 2018-19 and 2019-20 school years. The ALJ concluded the District had engaged in a "broad and extensive range of procedural errors" and committed "multiple substantive violations of the IDEA" that deprived S.C. of the free appropriate public education (FAPE) that she is entitled to receive under IDEA.

S.C. has a severe form of Prader-Willi Syndrome (PWS), a rare genetic disorder that affects the function of the hypothalamus, disrupting the body's appetite control center, as well as anxiety, major depressive disorder, and developmental delays. The ALJ concluded that S.C. needs a total food secure (TFS) environment at school to decrease her anxiety sufficiently enough for her to learn and receive educational benefit. During the two-year period at issue, S.C.'s food-related anxiety and resulting inappropriate behaviors escalated significantly.



Her escalation was directly related to the District's refusal to provide a food-secure educational environment school-wide.

As a remedy for the District's failure to provide FAPE, the ALJ ordered the District to place S.C. at a residential school that specializes in providing a food-secure educational environment for students with conditions such as PWS, the Latham Center, by February 6, 2021. The District has refused, claiming that it has developed an educational program that provides FAPE and addresses the inadequacies identified by the ALJ in her order. S.C. disputes this contention. Nonetheless, the District has determined, unilaterally, that it is not required to comply with the State's placement order.

The district court denied S.C.'s request for injunctive relief to enforce the order, mistakenly holding that S.C. needed to pursue additional administrative remedies before the remedy she obtained in the first administrative proceeding can be enforced. The district court's refusal to enforce the ALJ's order is depriving S.C. of the remedy and appropriate education she is entitled to receive under the IDEA. Three months have now passed since the date the S.C. was to have been placed at Latham under the ALJ's order. Each day she is deprived of that educational placement, S.C. is being harmed. S.C. urgently seeks this Court's intervention to order immediate injunctive relief, protecting her rights under IDEA and preventing irreparable harm.

### **JURISDICTION**

This appeal arises from an Opinion and Order denying Appellant's Motion for a Stay Put Injunction, or in the Alternative, Preliminary Injunction entered on March 22, 2021. ER 6. Appellant sought to enforce the remedy awarded by an administrative law judge after the ALJ had determined that S.C. was denied the free appropriate public education to which she is entitled under the Individuals with Disabilities Education Act (IDEA).

The District Court had jurisdiction under 28 U.S.C. § 1331. Appellant, S.C., timely filed a Notice of Appeal on April 1, 2021. ER 4. This Court has jurisdiction over the Order under 28 U.S.C. § 1292(a)(1) which permits interlocutory appeals from orders denying preliminary injunctive relief.

### **STATUTORY AND REGULATORY AUTHORITIES**

Pertinent legal authorities appear in the Addendum.

### **ISSUE PRESENTED**

1. Whether the district court erred in denying S.C.'s motion for injunctive relief to enforce an administrative order for educational placement at Latham Center under IDEA's stay-put provision while the District's appeal was

pending or, now that the District has withdrawn its appeal and the order is final, under IDEA's mandate requiring a final order to be implemented.

### **STATEMENT OF THE CASE**

S.C. is a 14-year-old, eighth-grade student at one of the District middle schools. She has a rare genetic disorder, Prader-Willi Syndrome (PWS), that affects the function of the hypothalamus and disrupts the body's appetite control center. ER 22, ¶¶ 2, 3. S.C. is on the severe end of the spectrum of those affected with this condition. ER 22, ¶ 6; ER 53, ¶ 192. As a result of this disorder, S.C. has an insatiable appetite and is relentlessly driven to eat more food. ER 22, ¶ 3. S.C. has been diagnosed with anxiety and major depressive disorder. ER 22, ¶ 2. She also has developmental delays. ER 22, ¶ 3.

S.C. experiences increased anxiety when food is present either in her classroom or in other parts of the school. ER 23, ¶8. She is so sensitive to the presence of food that her anxiety increases when she knows other students are eating different or desirable food in a room nearby. ER 42, ¶145. In turn, her high levels of anxiety trigger inappropriate behaviors. ER 84; ER 56, ¶ 212; ER 22, ¶¶ 4-6; ER 23, ¶ 8; ER 24, ¶¶ 15-18; ER 26, ¶ 33; ER 27, ¶ 42; ER 37, ¶ 111, 115; ER 42, ¶ 145; ER 93, ¶ 8. S.C.'s inappropriate behaviors include disrobing, skin picking, fecal smearing, aggression toward self and others, and elopement. ER 24, ¶¶ 21, 22; ER 26, ¶¶ 33, 39; ER 31, ¶¶ 75, 76, 77, 80; ER 32, ¶ 84, 89; ER 34, ¶

100; ER 61. It is undisputed that by January 2020, S.C.'s PWS condition and food-related anxiety had moved to the severe end of the continuum. ER 53, ¶192; ER 26, ¶ 35; ER 76.

At the heart of this educational dispute is S.C.'s need for a total food secure (TFS) environment at school in order to receive FAPE. "TFS is a term used by the professionals who treat people with PWS to refer to a system where food is present only during meal times and that food is locked up and out of sight in all other areas/times. In a school setting, there is no food during instruction, special events, or anywhere in the school building except during meal times in the cafeteria." ER 23, ¶ 14. The extent of TFS required depends on the severity of PWS in the individual. ER 24, ¶ 15.

K.G., S.C.'s mother, asked the District on many occasions to provide a TFS environment at school, but the District refused. ER 76; ER 28, ¶¶ 49, 50; ER 29, ¶ 63; ER 30, ¶¶ 68-70; ER 32, ¶¶ 87-88; ER 37, ¶¶ 110, 111; ER 38, ¶ 121; ER 42, ¶ 145. After the District refused, and as S.C.'s educational situation became more dire, K.G. requested the District place S.C. at Latham Center. ER 76. She explained to the team that Latham is a residential school that provides total food security and if S.C. were placed there, she could attend school without experiencing anxiety over food. ER 38, ¶ 121. The District rejected residential

placement at Latham, claiming that it was providing FAPE in the public school setting. ER 42, ¶ 144; ER 51, ¶ 186; ER 121.

In May 2020, K.G. requested a due process hearing to challenge the appropriateness of her daughter's education, pursuant to 20 U.S.C. §1415(b)(6).

ER 19. An ALJ from the Office of Administrative Hearings for the Oregon Department of Education was appointed and conducted a hearing in October 2020. ER 19. The hearing lasted over 50 hours and included testimony from 14 expert witnesses. ER 20-21.

After considering all the evidence, the ALJ ruled that the District failed to provide S.C. with FAPE during the two-year period preceding the filing of the due process complaint, from May 21, 2018 – May 21, 2020. ER 57, 82, 86. The ALJ concluded that S.C. needs a total food secure (TFS) environment to obtain meaningful educational benefit and further, that placement at “Latham Center is reasonably calculated to enable Student to receive educational benefit and is an appropriate placement for Student.” ER 85.

Neither party is appealing this decision. This is a final order of the Oregon Department of Education. Thus, the ALJ's findings and conclusions are final and binding.

It is undisputed, then, that “the District engaged in a broad and extensive range of procedural errors that denied Student a FAPE” and committed “multiple

substantive violations of the IDEA that resulted in a denial of FAPE during the period at issue.” ER 82. Those violations included:

1. District failed to reevaluate S.C. ER 58, 62.
2. District failed to develop appropriate IEPs in December 2018, December 2019, and January 20, resulting in violations that were both substantive and procedural. ER 70.
  - “Present levels of academic achievement and functional performance” (PLAAFP) were not sufficiently detailed to enable the team to create proper annual goals and supports. ER 65
  - Annual goals in reading, math, writing, and behavior were inadequate. ER 66.
  - IEPs offered were insufficient because they failed to include necessary supports, services and specially designed instruction (SDI), particularly in relation to S.C.’s behaviors and food protocols. ER 68.
  - District failed to meet her unique needs in the area of behavior by the failure to develop a behavior intervention plan. ER 70.
3. District changed S.C.’s placement to a placement that was not in the least restrictive environment or appropriate. ER 76.
4. District provided services that “fell significantly short of the services required by the Student’s IEP,” thus denying Student meaningful educational benefits. ER 77.
5. District committed several procedural errors that rose to a denial of FAPE.
  - Repeatedly failed to provide “prior written notice” (PWN), resulting in a denial of K.B.’s right to meaningfully participate in S.C.’s educational program, including when the District: 1) changed S.C.’s placement to the self-contained SLC classroom

full-time, 2) refused to change S.C.'s placement to Latham Center, 3) denied K.G.'s multiple requests for a one-to-one aide, and 4) denied K.G.'s request for requested extended school year (ESY) services. ER 78-79.

- Failed to provide adequate progress reports to enable K.G. to participate meaningfully in the IEP process. ER 80-81.

In fashioning an appropriate remedy, the ALJ considered the District's past failures to provide FAPE, S.C.'s current educational needs, K.G.'s request that the District be ordered to fund a residential placement at Latham, and the District's proposed educational placement for S.C. as set forth in its most recent IEP. ER 83-84. After analyzing the relevant factors for determining the appropriateness of residential placement under IDEA, the ALJ concluded that "Latham Center is necessary for educational purposes." ER 83-85. Specifically, the Final Order requires:

The District is to pay the cost of enrolling the Student at the Latham Center, including non-medical care, room and board, for the period commencing on the first day of the winter 2021 semester until the District provides TFS in school-wide setting along with an IEP which addresses all of the inadequacies identified in this order or the next annual IEP which appears to be September 2021.

ER 86.<sup>1</sup>

Days after the administrative decision was issued, the District notified counsel for S.C. that "the District declines to pay for Latham and will have no

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<sup>1</sup> The first day of the winter semester was February 6, 2021.

involvement in enrolling S.C. at Latham.” ER 96. True to its word, the District has refused to pay for or make the placement at Latham. The District justifies its refusal based on the fact that the ALJ ruled only on FAPE violations for the time period prior to May 2020, and based on its contention that the IEP developed in September 2020 provides FAPE. ER 14. The District further claims it is providing S.C. with TFS. ER 14, 96.

S.C. contends the District is in violation of the Final Order, in that it has neither paid for Latham, nor provided school-wide total food security, nor provided an IEP that remedies the inadequacies identified by the ALJ. Due to the urgency of S.C.’s situation and risk of irreparable harm, S.C. filed a complaint seeking enforcement of the Final Order under IDEA, 20 U.S.C. §§ 1400 *et seq.*, and 42 U.S.C. § 1983. ER 6.

The district court denied S.C.’s motion on March 22, 2021. ER 4-18. The district court characterized S.C.’s request for enforcement of the ALJ’s order as an adjudication of the adequacy of District’s offer of FAPE contained in the September 2020 IEP. Thus, the court ruled S.C. needs to first exhaust administrative remedies as to that IEP and declined to enforce the ALJ’s Final Order for placement. ER 17-18.

The ALJ decision reflects that she considered the contents of the September 2020 IEP. The ALJ admitted the September 2020 IEP into evidence because she



determined the District's placement proposal was "very relevant" in fashioning an appropriate remedy. ER 21, ER 97: 9-25. The Final Order describes the contents of the September 2020 IEP in several places. ER 45, ¶ 153; ER 48, ¶ 166; ER 49, ¶ 174; ER 50-51, ¶¶ 181, 186; ER 54, ¶¶ 199, 200. The ALJ allowed witnesses to testify about the contents of the IEP and opine whether it would meet S.C.'s educational needs. ER 55, ¶ 201; ER 199-201, 204-210, 212-213, 216-221 (Dr. McTighe); ER 135-136, 170-176 (Susan Van Liew); ER 184-185 (Karole Pickett); ER 198 (Julie Turner); ER 229 (Maygen Blessman, LCSW); ER 234-240, 242-243, 245-252 (Taffy Perucci); ER 278-290 (Carol Quirk, Ph.D.); ER 259 (Stefanie Gould). She evaluated the District's proposed placement, as set forth in the September IEP, when deciding an appropriate remedy. ER 84.

The ALJ concluded that when the team met in September 2020 to develop the IEP, the District declined K.G.'s request to make changes to the food security protocol and instead proposed placement in the SLC 100% of the time. ER 42, ¶ 145. She concluded that the District proposed that S.C. be restricted to the SLC classroom the entire day to maintain food security, not only for the remainder of her time in middle school (2020-21 school year), but also for high school. ER 55, ¶¶ 202, 203; ER 84; ER 170. Consistent with these findings, the ALJ concluded that the District, "in its most recent IEP," refused to provide a TFS outside the

SLC.” ER 84. She found further that, under the District’s proposal, S.C. would “have no contact with students other than those in the SLC.” ER 55, ¶ 202, ER 84.

Although the September 2020 IEP stated there would be school-wide food security, the ALJ did not find any evidence that the District actually had a plan to do so. ER 84. As the ALJ found, the District refused to change the food protocol in the September 2020 IEP to be more specific. ER 42, ¶ 145. The District had never attempted to provide TFS and the superintendent, who speaks with principals on a regular basis, never spoke with the Newport Middle School (NMS) principal or other staff about food security or protocols. ER 53, ¶ 193; ER 56, ¶¶ 210, 213; ER 84.

After considering the entire record, including the September 2020 IEP and testimony about it, the ALJ held District’s “placement offer” was not appropriate to meet S.C.’s needs. ER 83. The ALJ concluded S.C. needs a TFS educational environment to decrease her anxiety sufficiently enough for her to learn. ER 76; ER 56, ¶¶ 206, 207; ER 84; ER 24, ¶ 15. She determined that the District’s plan of restricting S.C. to a single classroom would not be the least restrictive environment or appropriate. ER 56, ¶ 209; 84.

As part of her analysis, the ALJ considered the relevant factors for determining the appropriateness of residential placement under the IDEA. She concluded that “Latham Center is necessary for educational purposes.” ER 83-85.

At Latham, S.C. “would be able to eat, learn, and attend extra-curricular events specifically designed for students who need TFS in order to reduce inappropriate behaviors due to food exposure related anxiety.” ER 84. Latham provides TFS throughout its entire campus and works with the neighboring community to provide food security that enables access to hundreds of extracurricular opportunities. ER 55, ¶204; ER 84.

Finally, the ALJ also considered the equities. She observed that K.G. had been persistent and diligent in expressing concerns regarding S.C.’s behaviors, needs, lack of progress, placement, and was open to discussion about any available options with the District. ER 83. “The District, by contrast, repeatedly ignored information on Student’s PWS behaviors and supports, and failed to implement material supports from Student’s IEP.” ER 83.

### **SUMMARY OF ARGUMENT**

S.C. sought and obtained appropriate relief under IDEA for the Lincoln County School District’s denial of FAPE over a period of two years. The ALJ ordered the District to fund S.C.’s residential placement at Latham Center beginning February 1, 2021, both as a remedy for the past denial of FAPE and because the ALJ determined S.C. requires placement at Latham to receive FAPE.

The district court's denial of S.C.'s Motion for a Stay Put Injunction, or in the Alternative, Preliminary Injunction seeking injunctive relief to enforce the Final Order of the Oregon Department of Education is legal error. The district court misinterprets IDEA's remedial and review structure in concluding S.C. cannot obtain emergency relief to enforce the administrative decision.

Once the ALJ determined Latham was educationally necessary and the appropriate placement for S.C., it became her "then current educational placement." *Burlington Sch. Comm. v. Dept. of Educ.*, 471 U.S. 359, 372 (1985).

For the time period that the District's appeal of the administrative decision was pending, S.C. was entitled to be placed at Latham under IDEA's "stay-put" provision, which provides that during the pendency of any legal proceedings under IDEA, the child shall remain in the then-current educational placement "unless the State . . . and the parents otherwise agree." 20 U.S.C. § 1415(j); *Burlington*, 471 at 359 (placement deemed appropriate and ordered by the hearing officer constitutes an agreement by the State to the change in placement).

After the District withdrew its appeal, the ALJ's order became a final order of the Oregon Department of Education. 20 U.S.C. § 1415(i)(1)(B); 34 CFR § 300.514(d). The placement required by the final order is binding on the parties and must be implemented.

If a school district refuses to implement an administrative order for placement, a student or parent may bring an action directly to district court for enforcement of that order. *Porter v. Bd. of Trustees of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064, 1069-70 (9<sup>th</sup> Cir. 2002).

The district court's ruling that S.C. must first exhaust administrative remedies regarding an IEP developed while S.C.'s due process complaint for denial of FAPE was pending misconstrues IDEA's administrative exhaustion requirements. The district court's approach would create a never-ending process, immersing a student in litigation perpetually, without any relief in sight. *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 117 (1st Cir. 2003).

Additional administrative exhaustion is not required before a court can enforce a valid administrative order. *Porter*, 307 F.3d at 1070-1071. It is contrary to IDEA's review scheme and undercuts the integrity of the administrative process to require a student to exhaust administrative remedies each time the District proposes a new IEP. *Nieves-Marquez*, 353 F.3d at 116. It would also be contrary to IDEA's requirement that an administrative order is final unless appealed in a civil action. *Id.* It could trap a student in a never-ending cycle of litigation. *M.S. v. Utah Sch. for the Deaf & Blind*, 822 F.3d 1128, 1136 (10<sup>th</sup> Cir. 2016).

The ALJ ordered placement at Latham because she determined it is educationally necessary and an appropriate placement under IDEA. ER 83-85. She

also outlined conditions that must exist before S.C. returns to public school. The District contends that the IEP it developed in September 2020 addresses the inadequacies identified by the ALJ. Thus, the court mistakenly characterized the posture of this case as a dispute over the appropriateness of the September 2020 IEP and, for that reason, determined additional administrative exhaustion was required before it could enforce the ALJ's order. ER 17-18. This is not accurate.

Structurally, the Final Order requires placement at Latham Center *first*. ER 86. It is not an either-or option. S.C. is first entitled to enforcement of the order for placement. Moreover, the District presented the September IEP to the ALJ as a potential alternative to residential placement. And the ALJ has already rejected the IEP's proposed placement and ordered placement at Latham instead.

The court also erred when it summarily concluded that S.C. could not obtain injunctive relief to enforce the ALJ's order under 42 U.S.C. §1983.

The district court's denial of injunctive relief is contrary to IDEA's entire statutory scheme and is depriving S.C. of the free appropriate public education the ALJ determined was necessary and appropriate. Each day she remains in an inappropriate placement and is unable to receive the educational services she needs, she is at great risk of irreparable harm.

## **STANDARD OF REVIEW**

A district court's interpretation of the IDEA is subject to *de novo* review. *Ashland Sch. Dist. v. Parents of Student R.J.*, 588 F.3d 1004 (9<sup>th</sup> Cir. 2009). Legal errors also require *de novo* review. *Amanda J. v. Clark Cty. Sch. Dist.*, 267 F.3d 877, 887 (9<sup>th</sup> Cir. 2001). Mixed questions of law and fact under IDEA are reviewed *de novo*. *Id* at 887.

This Court reviews the district court's factual determinations for clear error. *Id* at 887. A finding of fact is clearly erroneous when, although evidence in the record may support it, “the reviewing court is left with a definite and firm conviction that a mistake has been committed.” *Id*.

## **ARGUMENT**

### **I. District Court Erred in Denying S.C.'s Request to Enforce the Due Process Hearing Decision for Placement**

#### **A. Legal Framework: IDEA's Comprehensive Remedial Scheme Creates Enforceable Substantive and Procedural Rights**

IDEA's purpose is “to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] which emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; . . .” 20 U.S.C. § 1400(d)(1)(A). It is a comprehensive remedial scheme that “creates a ‘right, enforceable in federal court, to the free appropriate public education

required by the statute.” *Porter*, 307 F.3d at 1069 (quoting *Smith v. Robinson*, 468 U.S. 992, 1002, n. 6 (1984)).

States must comply with the statutory mandate in exchange for federal assistance provided by IDEA. 20 U.S.C. §1412(a)(1). To meet their FAPE obligation, schools must provide “specially designed” instruction and related services to meet a child’s “unique needs” through an individualized education program (IEP). 20 U.S.C. §§ 1401(9)(D), (29) & (14).

The IEP is a comprehensive statement of student’s educational needs and instruction and services that will be employed to meet those needs. *Burlington*, 471 U.S. at 368. It is the “centerpiece of the statute’s educational delivery system for disabled children.” *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S. Ct. 988, 994 (2017) (internal quotations and citations omitted); 20 U.S.C. §§ 1401(14), 1414(d). The IEP is the “means by which special education and related services are tailored to the unique needs of a particular child.” *Endrew F.*, 137 S. Ct. at 1000 (internal quotations and citations omitted).

In *Endrew F.*, the Supreme Court held that the standard for a school district to meet its FAPE obligation “is markedly more demanding than the ‘merely more than *de minimis*’ test.” *Id.* at 1000. Instead, FAPE “requires an educational program reasonably calculated to enable a child to make progress appropriate in



light of the child’s circumstances.” *Id.* at 1001. The IEP must be “appropriately ambitious,” and objectives must be “challenging.” *Id.* at 1000.

Just as important as substantive compliance is compliance with IDEA’s procedures. *Bd. of Educ. of Hendrick-Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982) (The importance of IDEA’s elaborate, highly specific procedural safeguards “cannot be gainsaid”). IDEA’s procedural safeguards are designed to protect the rights of disabled children and their parents. They are “central to the IDEA process, not a mere afterthought.” *M.C. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1195 (9th Cir. 2017).

Chief among those safeguards is the right to “an impartial due process hearing.” 20 U.S.C. § 1415(f)(1)(A). At the conclusion of the administrative process, any aggrieved party may seek redress in state or federal court. 20 U.S.C. § 1415(i)(2)(A).

“Once a due process hearing [*sic*] issues an order that is not appealed by either party, the IDEA requires that the order be treated as ‘final.’” *Porter*, 307 F.3d at 1071 (citing 20 U.S.C. § 1415(i)(1)(A)). If a school district refuses to implement the order, a parent may bring an action directly to district court to enforce that order. *Id.* at 1069-70 .

**B. ALJ's Final Order Changed S.C.'s Educational Placement; District Court Erred in Denying Injunctive Relief to Enforce Order**

The district court's denial of S.C.'s request for injunctive relief to enforce the Oregon Department of Education's Final Order was legal error. It is contrary to IDEA's entire statutory scheme and purpose. When a school district has refused to implement the placement ordered by the ALJ following a due process hearing, this Court has been clear that a student may bring an action in district court to enforce that order. *Porter*, 307 F.3d at 1069-70. The IDEA does not require additional exhaustion. *Id.*, at 1070-1071.

The court also erred when it summarily concluded that S.C. could not obtain injunctive relief to enforce the ALJ's order under 42 U.S.C. §1983.

**1. Latham Center Is S.C.'s Current Educational Placement**

After an extensive hearing in which 14 expert witnesses testified, the ALJ concluded that "the District's placement offer was not appropriate to meet Student's needs." ER 83. She determined, instead, that "Latham Center is necessary for educational purposes." ER 85. Consistent with the IDEA standard for FAPE, the ALJ ruled that "placement at Latham Center is reasonably calculated to enable Student to receive educational benefit and is an appropriate placement for this Student." ER 85. The final order grants K.G.'s request for educational placement and orders the District to fund S.C.'s placement at Latham beginning on February 6, 2021 (first day of winter semester).

The District is to pay the cost of enrolling the Student at the Latham Center, including non-medical care, room and board, for the period commencing on the first day of the winter 2021 semester until the District provides TFS in school-wide setting along with an IEP which addresses all of the inadequacies identified in this order or the next annual IEP which appears to be September 2021.

ER 86.

Driving this dispute is the ALJ's language indicating the placement could be changed in the future should certain conditions be met. By its wording, the ALJ gives the District an opportunity to return S.C. to public school at some future time. But, the order *first* requires the District to place S.C. at Latham Center.

Once the Oregon Department of Education, through the ALJ, determined that placement at Latham was necessary for S.C. to receive FAPE, Latham became S.C.'s educational placement. *Burlington*, 471 U.S. at 372 (a placement "deemed appropriate" and ordered by the hearing officer "would seem to constitute an agreement by the State to the change in placement"); *Clovis Unified Sch. Dist. v. California Office of Administrative Hearings*, 903 F.2d 635, 641 (9<sup>th</sup> Cir. 1990) (once the State educational agency decides the parents' chosen placement was the appropriate placement, it became the "then current educational placement.").

The *Burlington* and *Clovis* courts reached this conclusion within the context of determining a child's "then-current educational placement" within the meaning of 20 U.S.C. § 1415(j). Commonly known as the "stay-put" provision, §1415(j) provides that during the pendency of any legal proceedings under IDEA, the child

shall remain in the then-current educational placement “unless the State . . . and the parents otherwise agree.” 20 U.S.C. § 1415(j). In cases such as this, where a state level administrative decision “agrees with the child’s parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents.” 34 C.F.R. § 300.518(d).

K.G. asked the ALJ to find that S.C. needs placement at Latham and order the District to pay for it. ER 83. The ALJ, on behalf of the Oregon Department of Education, agreed that Parent’s requested placement was necessary for S.C. to receive FAPE and ordered the District to make the placement. ER 85-86. By law, this constitutes an agreement between Parent and the State that Latham is S.C.’s educational placement.

The District initially filed an appeal of the ALJ’s decision while K.G.’s request for injunctive relief was pending before the district court. As there were pending proceedings, the stay-put provision directly applied. Latham Center was S.C.’s then-current educational placement within the meaning of §1415(j).

The stay-put provision acts as an automatic injunction and does not require the application of the standards required for a preliminary injunction. *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1037 (9<sup>th</sup> Cir. 2009). The automatic nature of this provision “acts as a powerful protective measure to prevent disruption of the child’s education throughout the dispute process.” *Id.* at 1040.

The automatic nature of the stay-put provision shows Congress's sense that there is a heightened risk of irreparable harm inherent in removing a child to an inappropriate educational setting. Or, as in this case, it shows Congress's concern about irreparable harm if the child is maintained in an inappropriate placement after the hearing officer finds a denial of FAPE and orders the placement requested by the parent. *See, Burlington*, 471 U.S. at 372; *Clovis*, 903 F.2d at 641. The district court erred in failing to enforce the stay-put provision.

When the District subsequently withdrew its appeal, the ALJ decision became final. 20 U.S.C. § 1415(i)(1)(B); 34 CFR § 300.514(d). The placement ordered by the ALJ was, and is, S.C.'s current educational placement. The lack of a continued appeal triggering the "stay-put" provision does not diminish S.C.'s right to the educational placement ordered by the ALJ.

The statute's definition of "then-current educational placement" in 20 U.S.C. § 1415(j) "must be read not in isolation but in light of the overall structure and intent." *Nieves-Marquez* 353 F.3d at 116 (citing *United States v. Morton*, 467 U.S. 822, 828 (1984)). The legal conclusion that an ALJ's decision constitutes agreement by the State and the District to the educational placement ordered applies with equal force to a final order. "Congress could not have intended for a school system to be in a *better* position under IDEA when it refuses to comply with

a final administrative order . . . than when it exercises its statutory right to appeal from the order.” *Id.* at 116 (emphasis in original, internal citations omitted).

While the length of time S.C. is entitled to remain at Latham may lack clarity, a reasonable reading of the order is that the ALJ envisioned S.C. would be educated at Latham *at least* for the winter semester, and more likely for approximately 8 months or more until the next annual IEP is due to be developed in September 2021.

Regardless of the length of time S.C. is entitled under the final order to remain at Latham, the order clearly changes S.C.’s educational placement from the public school to Latham. This change in placement has significant educational and legal consequences for S.C. Notably, the ALJ declined to address other remedies S.C. sought, stating those remedies were “unnecessary” because “this order provides for residential placement.” ER 85. The ALJ ruled that Parent’s requests related to placement in public school, *i.e.* comprehensive evaluations, IEP meetings with necessary experts to produce appropriate IEPs, and training for District staff, were unnecessary because she anticipated her order for placement at Latham would be implemented. ER 85.

In the event additional administrative procedures, including an evidentiary hearing, are required to determine whether a new IEP complies with the ALJ’s order, S.C. would be entitled to the protections of the “stay-put” provision. Under

20 U.S.C. § 1415(j), S.C. would be entitled to remain at Latham throughout the entirety of the administrative and any subsequent judicial proceedings.

The district court's refusal to enforce implementation of the ordered placement is depriving S.C. of the stability and benefits of the residential placement the ALJ determined was necessary for FAPE. It is also depriving her of significant legal protections designed to ensure that she does not lose day after irreplaceable day of education. "[L]ost education is a substantial harm, and that harm is exactly what the IDEA was meant to prevent." *S.V. v. Sherwood Sch. Dist.*, 254 F.3d 877, 881-882 (9<sup>th</sup> Cir. 2001), quoting *Strawn v. Missouri Bd. of Educ.*, 210 F.3d 954, 957 (8<sup>th</sup> Cir. 2000).

## **2. District Court's Denial of Injunctive Relief to Enforce the Final Order Is Contrary to IDEA's Entire Statutory Scheme and Explicit Requirements**

The district court's failure to enforce the ALJ's Final Order for S.C.'s educational placement contravenes IDEA's entire structure for resolving disputes, as well as its core purpose of providing an appropriate education to meet the unique needs of each child and enable that child to make appropriate progress. *See, Endrew F.*, 137 S. Ct. at 1001.

Much of the error in the district court's ultimate decision can be traced to its mistaken framing of the dispute. The district court found that "the crux of the disagreement here is actually whether the September 2020 IEP denies FAPE (and

therefore violates the ALJ's order that the District provide a FAPE by correcting the deficiencies the ALJ noted in the earlier IEPs)." ER 17. The court's characterization of the dispute originates from the District's bald claim that its September 2020 IEP provides FAPE, so it need not make the residential placement ordered by the ALJ. ER 96. The District's position is both factually and legally unsound. In failing to enforce the ALJ's order for residential placement, the district court has misinterpreted the IDEA and committed legal error.

a. School District Does Not Have Authority to Unilaterally Decide It Is Providing FAPE and Not Required to Abide by Remedy Order

The IDEA does not give a school district the unilateral authority to decide when it is providing FAPE or when it can be relieved of the obligation to implement an ordered educational placement. The Sixth, Tenth, and D.C. Circuits have held that delegating a hearing officer's authority to a school district is prohibited by IDEA. *M.S. v. Utah Sch. for the Deaf & Blind*, 822 F.3d 1128, 1135 (10<sup>th</sup> Cir. 2016) (holding that delegating the issue of residential placement to student's IEP team is at odds with 20 U.S.C. § 1415); *Bd. of Educ. of Fayette Cty. v L.M.*, 478 F.3d 307, 317-18 (6<sup>th</sup> Cir. 2007) (noting the case "raises the fundamental issue of whether the details of a compensatory-education award can be remanded to the [IEP team] and still comply with the statutory scheme of the IDEA" and answering that question in the negative); *Reid ex rel. Reid v. D.C.*, 401 F.3d 516, 521, 526-27 (D.C. Cir. 2005) (concluding that a hearing officer's award



of compensatory education that allowed the student's IEP team to "reduce or discontinue" the compensatory education as it saw fit was inconsistent with IDEA's statutory scheme).

The courts in *Reid*, *L.M.*, and *M.S.* held that because the IDEA prohibits due process hearings from being conducted by an employee of the agency involved, the hearing officer may not delegate her authority to individuals specifically barred from performing the hearing officer's functions. Such delegation is at odds with IDEA's review scheme. *Reid*, 401 F.3d at 526; *L.M.*, 478 at 317; *M.S.*, 822 F.3d at 1036.

In essence, that is the authority the District claims for itself here. Merely because the District made a "colorable argument that the Sept. 2020 IEP addresses the ALJ's concerns," the court allowed the District to escape its obligation to implement the ordered educational placement. ER 16. The end result is that the court allowed the District to decide for itself whether it is providing FAPE and whether it will place S.C. at Latham, in violation of IDEA.

As the 10<sup>th</sup> Circuit observed, such an approach could trap S.C. "in an endless cycle of costly and time-consuming litigation." *M.S.*, 822 F.3d at 1136. By delegating the placement issue to the school, the student "will have no recourse but to seek another due process hearing, and potentially file another federal lawsuit should the IEP team refuse to place M.S. at Perkins [residential placement]." *Id.*

b. The Development of a New IEP Does Not Relieve the District of the Duty to Implement a Remedy Ordered for Previous IDEA Violations

The district court reasoned that because the ALJ “made no ruling that the September 2020 IEP would not in fact address the deficiencies,” it could not enforce the remedy ordered by the ALJ. ER 17-18. Erroneously, the court determined S.C. must exhaust administrative procedures regarding the September 2020 IEP before she could obtain compliance with the remedy already obtained for the District’s previous denial of FAPE. ER 18.

Under this reasoning, a school district could avoid having to comply with a placement order by continually drafting a new IEP and making a “colorable argument” that the IEP negates the need to comply with a final remedy order. A student would indeed be trapped in a perpetual litigation process and never receive appropriate relief.

The defendants made a similarly infirm argument in *Nieves-Marquez*. Defendants there claimed that the administrative order was valid only for the school year at issue, and that the student must exhaust remedies with respect to an IEP developed after the one(s) at issue in the hearing before he may seek review of the original order. *Nieves-Marquez*, 353 F.3d at 117. The First Circuit rightly observed that this approach would create a never-ending process, capable of repetition, evading review. *Id.* at 117; *see also, Rowley*, 458 U.S. 176 at 186 n. 9.

Judicial review of IDEA claims invariably takes more than nine months to complete in addition to the time it takes to complete state administrative proceedings. *Rowley*, 458 U.S. at 186 n. 9. Under IDEA, federal courts have jurisdiction to redress IDEA claims from school years that have ended and to apply relief to future school years. *Id.*

This is precisely what the ALJ did here – ordered relief for the current school year to redress IDEA claims from the preceding two school years. The order for a change of placement is consistent with the broad discretion granted to courts and hearing officers in fashioning a remedy for IDEA violations under 20 U.S.C. § 1415(e)(2). *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 237-238 (2009); *Burlington*, 471 U.S. at 369. The only limit is that the remedy must be “‘appropriate’ in light of the purpose of the Act.” *Id.* The District cannot displace or negate a remedy already ordered by drafting a new IEP it alone considers appropriate. *See, Ojai Unified Sch. Dist. v. Jackson*, 4 F.3d 1467, 1476 (9th Cir. 1993) (“if the views of school personnel regarding an appropriate educational placement for a disabled child were conclusive, then administrative hearings conducted by an impartial decisionmaker would be unnecessary”).

The district court’s determination that additional exhaustion is required is contrary to prior rulings in this Circuit. In *Porter*, this Court ruled that additional administrative exhaustion is not required to enforce a valid administrative order.

*Porter*, 307 F.3d at 1070-1071. “[C]lear congressional demarcation of an end point to due process procedures weighs heavily in our conclusion that Congress did not intend” to require additional exhaustion requirements before a court could enforce the administrative order. *Id.* at 1071.

It is contrary to IDEA’s review scheme to require a student to exhaust administrative remedies with respect to every new proposal before being entitled to enforcement of the remedy already obtained after exhausting administrative remedies. “It would undercut the integrity of the administrative process, which parties are required to exhaust.” *Nieves-Marquez*, 353 F.3d at 116.

Requiring a claimant to exhaust additional administrative procedures before being entitled to enforce the final order obtained in the first administrative proceeding “would be contrary to Congress’s instruction that the administrative order be final unless appealed in a civil action.” *Id.* at 116.

The court’s denial of injunctive relief, if allowed to stand, would render the guarantee of FAPE meaningless. *See, Id.* (holding a court is not powerless under IDEA to issue injunctive relief when the school system neither appeals from nor complies with a valid administrative order). Undermining the finality of administrative orders, as the district court’s ruling does, “will produce long delays, contrary to IDEA’s policies favoring prompt resolution of disputes in order to

expedite the provision of FAPE to children who may be at a formative stage in their intellectual development.” *Id.*

c. The ALJ Rejected the September 2020 IEP As a Viable Remedy

The court’s finding that the ALJ “made no ruling that the September 2020 IEP would not in fact address the deficiencies” does not negate the remedy the ALJ did order for the District’s multiple violations of IDEA and failure to provide FAPE. ER 17-18. Allowing a district to evade compliance with a remedial order by continually drafting new IEPs and claiming they address the deficiencies identified in a prior administrative proceeding is contrary to IDEA.

But it is also important to note that the ALJ here did, in fact, consider the contents of the September 2020 IEP. She allowed evidence about the IEP for the express purpose of determining an appropriate remedy and prospective placement for S.C. She weighed both K.G.’s request that the District be ordered to fund a residential placement at Latham and the District’s proposed educational placement for S.C. as set forth in its “most recent IEP.” ER 83-84. Ultimately, the ALJ ordered placement at Latham Center as the remedy and declined to order implementation of the September 2020 IEP.

Granted, the ALJ did not specifically adjudicate whether the September 2020 IEP provided FAPE, as it did not exist when K.G. initiated due process in May 2020 and was not the focal point of her complaint. However, the District had

developed the IEP by the time of the October hearing and the ALJ admitted it into evidence. She allowed witnesses to be questioned about it. ER 21, ER 97-128, 130-132; ER 139; ER 160-161; ER 231-232. She ruled that if the District is indicating it can provide services to S.C. without having to provide residential placement, then testimony about its proposed placement is relevant. ER 139:16-23. “As to the remedy, placement is absolutely an issue.” ER 98: 6-7; ER 76, 83-84.

She specifically referenced the fact that the District “rejected residential placement again in September” and ruled that the September IEP content and placement offered at that meeting “is very definitely relevant.” ER 97: 9-25. Ultimately, the ALJ held the District’s proposal in the September IEP to place S.C. in the SLC full-time was not appropriate. ER 83-84. So, although the September 2020 IEP was not the subject or focus of S.C.’s complaint, the ALJ did analyze its contents and rejected it as an appropriate remedy.

Finally, the District cannot argue in good faith that its September 2020 IEP addresses “all of the inadequacies identified in this order.” ER 86. The Final Order identifying the inadequacies was not issued until three months later, in December 2020. It defies reason to believe the District anticipated, before the hearing and before the decision, every infirmity the ALJ would identify with its educational program and placement.

The District's position that the September 2020 IEP resolves all the inadequacies identified by the ALJ implodes by simply comparing the September 2020 documents to the Final Order. The ALJ found that the District had not sufficiently evaluated S.C., in that it failed to gather relevant functional, developmental, and academic information. ER 62. The September 2020 IEP is not based on necessary evaluations and does not include any plan to conduct the evaluations. ER 97-129. The ALJ determined the amount of specialized instruction minutes for writing, reading, and math in IEPs from December 2019 through January 2020 was not "sufficient to advance Student appropriately toward her [academic] goal[s]." ER 50-51, ¶¶ 175-180; ER 67. The September 2020 IEP calls for the same number of minutes of specialized instruction that the ALJ ruled were insufficient to provide FAPE. ER 50-51, ¶ 181. Her findings show that S.C. had not progressed on these skills to suddenly render the insufficient minutes adequate. ER 43-45.

Nor can the District claim, as it does, that it is providing TFS "and has done so since March 13, 2020." ER 96. On the contrary, the ALJ specifically held the District was not providing TFS school wide as needed by S.C. and as defined by PWS professionals during the very time period (after March 13, 2020) that the District claims it was providing TFS. ER 76, 84. As the ALJ noted, the District

“attempted to provide what they *understood* was the necessary level of TFS.” ER 53, ¶ 194 (emphasis added), which the ALJ found inadequate. ER 84.

Moreover, NMS principal, Aaron Belloni, testified that “he would provide TFS on a school-wide basis only if ordered to do so by this tribunal.” ER 84. Thus, the evidence contradicts the District’s self-serving assertion that it had been implementing TFS school-wide since March 13, 2020. Mr. Belloni’s testimony is an admission that the District was *not* providing TFS school-wide at any time prior to the hearing. ER 84.

**C. District Court Erred in Failing to Consider and Grant Injunctive Relief under Section 1983**

The district court erred as a matter of law when it summarily concluded that S.C. could not obtain injunctive relief under 42 U.S.C. §1983 to enforce the ALJ’s order. ER 12, fn. 6. Section 1983 provides a remedy to individuals deprived of their federal statutory rights, such as those guaranteed under the IDEA. *Crumpton v. Gates*, 947 F.2d 1418, 1420 (9<sup>th</sup> Cir. 1991). This statute was designed to further the well-established axiom that there should not be a wrong without a remedy. Since administrative courts have no authority to enforce their own orders under the IDEA, § 1983 provides an avenue to get relief awarded after prevailing at hearing.

The holding in *Blanchard v. Morton Sch. Dist.*, 509 F.3d 934 (9<sup>th</sup> Cir. 2007), which the district court relies on in denying S.C. a remedy under § 1983, does not preclude an action for injunctive relief. The Court’s holding in *Blanchard* is that



§1983 does not create “a cause of action for *money damages* under the IDEA for lost earnings and suffering of a parent pursuing IDEA relief.” *Id.* at 936-937 (emphasis added). That is very different from the facts presented here, in which S.C. seeks only injunctive relief to enforce a remedial order.

In an education case more on point, plaintiffs brought claims under § 1983 and IDEA for prospective injunctive relief to enforce the hearing officer’s decision. *Porter*, 307 F.3d at 1068. This Court reversed the district court’s dismissal of those claims and remanded for a determination of appropriate injunctive relief. *Id.* at 1075. Under *Porter*, §1983 is a viable means of seeking injunctive relief to enforce a final administrative order in an IDEA case.

The court also erred in failing to evaluate whether S.C. met the criteria for granting a preliminary injunction relief, specifically: (1) the likelihood of succeeding on the merits; (2) the likelihood of irreparable harm in the absence of preliminary relief; (3) the balance of equities; and (4) public interest. *Winter v. Nat. Res. Defense Council, Inc.*, 555 U.S. 7, 20 (2008). Evaluating the facts of this case in light of the *Winter* standard compels an order enforcing the administratively ordered placement change.

S.C. won at the lower level. A remedy was awarded. Therefore, S.C. is likely to succeed on the merits which satisfies the first of the *Winter* criteria. A prevailing student’s right to have a hearing officer’s decision carried out is a “right

secured by the laws of the United States.” *Robinson v. Pinderhughes*, 810 F.2d 1270, 1274-1275 (4<sup>th</sup> Cir. 1987). District does not have the option to simply ignore the administrative order. *Cf. Johnson ex rel Johnson v. Special Educ. Hearing Officer*, 287 F.3d 1176, 1180-1181 (9<sup>th</sup> Cir. 2002) (denying motion for preliminary injunction on the basis that there was little likelihood of successfully reversing stay put determined by hearing officer).

S.C. also meets the second prong of the *Winter* standard. The District’s refusal to implement the residential placement the ALJ determined was necessary and appropriate places S.C. at great risk of irreparable harm. Educating a child in an inappropriate setting causes a heightened risk of irreparable harm. *Joshua A.*, 559 F.3d at 1040; *see also, Burlington*, 471 U.S. at 361 (recognizing the years lost while parties dispute an IEP are “years critical to the child’s development.”). An inappropriate program for even a few months can make a world of difference in harm to a child’s educational development. *Nieves-Marquez*, 353 F.3d at 121-122 (internal citations omitted); *see also, Plyler v. Doe*, 457 U.S. 202,221 (1982) (recognizing the lasting impact of being deprived of an appropriate education).

Courts across the country concur that a FAPE deprivation in and of itself causes irreparable harm. *See e.g., Sanchez v. Grandview Sch. Dist. No. 200*, Case No. 0-3118, 2011 WL 797769 \*4 (E.D. Wash., Feb. 28, 2011) (“...delay is to the detriment of a child who has done nothing but ask for educational opportunities.

Each day that passes without an appropriate education plan...is another day in which he falls farther behind in school, and farther from being able to read, communicate, and meaningfully participate in society.”)

Considering this substantial harm, S.C. also meets the balance of equities factor. A student’s receipt of an appropriate education takes priority over a school district’s financial interest, thereby tilting the balance of equities in S.C.’s favor. *Florence Co. Sch. Dist. Four v. Carter*, 510 U.S. 7, 15 (1993). The longer the Final Order remains unenforced, S.C. will continue to suffer harm from the delayed receipt of FAPE, whereas District suffers no harm. This further tips the equity scale in S.C.’s favor. *Sherwood Sch. Dist.*, 254 F.3d at 881. District’s obstructive behavior should also be factored into assessing the equities. *See, Lopez v. District of Columbia*, 355 F.Supp.2d 392, 401 (D. D.C. Jan. 26, 2005) (when equities weighed equally, tuition reimbursement ordered to prevent rewarding a district whose actions harmed a child).

Finally, it is in the public interest to enforce an order designed to provide a student FAPE, particularly when it involves ensuring appropriate placement. *Burlington*, 471 U.S. at 370. To hold otherwise runs contrary to the purpose of the IDEA and has the potential to render administrative decisions meaningless. *Id.* The district court’s denial in this case interferes with the public policy interest of school districts complying with the mandates of the IDEA.

In summary, S.C. meets the criteria to have been awarded injunctive relief pursuant to § 1983 to enforce the Final Order.

## **II. REMEDY REQUESTED**

K.G. respectfully requests that this Court find that Latham Center is, and has been since February 6, 2021, S.C.'s current educational placement, despite the District's refusal to implement the placement. K.G. requests also that, upon issuance of a decision in this matter, the District be ordered to pay the cost of enrolling the Student at the Latham Center, including non-medical care, room, and board, immediately.

K.G. further requests that this Court clarify and enforce the Final Order to effectuate the purpose of the IDEA and the ALJ's award. The ALJ determined that residential placement at Latham is educationally necessary and reasonably calculated to provide S.C. FAPE under IDEA. It is reasonable to conclude the ALJ intended for S.C. to remain at Latham for at least eight months (from February 6, 2021, the first day of the winter semester, to September 17, 2021, the date the next annual IEP is due), or possibly longer. Given the lack of clarity regarding the length of the placement ordered by the ALJ and S.C.'s need for stability and continuity in her educational program and further, given the length of time S.C. has been deprived of the residential placement the District was ordered to provide,

K.G. respectfully requests that this Court enforce the Final Order consistent with the ALJ's intent, and order S.C.'s placement at Latham for a minimum of one year.

K.G. further asks the Court to order that S.C. must remain at Latham until Parent and the District agree to a different placement or until the District demonstrates at an evidentiary hearing (and through IDEA procedures until a final determination is made) that it has developed an IEP that addresses all of the inadequacies identified by the ALJ and is prepared, willing, and able to implement TFS, as that term is defined by PWS professionals, on a school-wide basis.

Considering the District's unilateral refusal to comply with the Final Order, K.G. seeks to ensure that the District is prohibited from unilaterally removing S.C. from her educational placement either without agreement from Parent or without a final determination through IDEA's procedures that the District's offer of placement and IEP will provide S.C. FAPE.

Under IDEA, courts have broad powers to remedy the failure of a school district to provide FAPE to a child. 20 U.S.C. § 1415(i)(1)(C)(iii). Those powers extend to interpreting and enforcing a hearing officer's order in a manner that effectuates the purpose of the IDEA and the hearing officer's award. *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260, 273 (3<sup>rd</sup> Cir. 2014).

In *D.E.*, the administrative order required the school district to reimburse D.E.'s parents for compensatory education services they obtained or "should the

parties agree,” the school district may set up a fund that the parents may draw upon for educational services. *Id.* at 272. The school district refused to agree to set up the fund, and D.E.’s parents contended they could not afford to front the costs of the services the district was obligated to have provided him for free under IDEA. *Id.* at 272-273. The district court declined to interpret the administrative decision in a manner that would have enabled *D.E.* to obtain the educational services without first fronting the costs of those services. *Id.* at 272.

The Third Circuit refused to uphold the district court’s interpretation of the hearing officer’s award because it was “inconsistent with public policy principles underlying the IDEA, and effectively provided Central Dauphin a way to escape liability for its past IDEA violations.” *Id.* at 273. “We cannot uphold such an interpretation, as doing so would ‘create an enormous loophole’ in a school district’s obligations under the IDEA, while ‘substantially weaken[ing] the protections for students.’” *Id.* Therefore, the Court concluded that the district court “erred in finding that D.E.’s claims sought to rewrite, rather than enforce, the administrative decision.” *Id.* (quoting *D.F. v. Collingswood Borough Bd. of Educ.*, 694 F.3d 488, 497 (3<sup>rd</sup> Cir. 2012)).

Likewise, in this case, the district court interpreted the ALJ’s placement order in a manner that was inconsistent with IDEA’s purpose and underlying policies and effectively provided the District a way to escape liability for its IDEA

violations. The district court created an enormous loophole in the District's obligations and substantially weakened the protections for S.C. For that reason, K.G. seeks a more specific articulation of the ALJ's placement order that effectuates the policies of the IDEA and the ALJ's award. The entirety of the decision demonstrates that the ALJ clearly envisioned placement at Latham Center for at least several months, if not longer.

S.C. has been wrongly deprived of the appropriate education she is entitled to receive under IDEA, not only for the two years for which the ALJ found the District had denied FAPE, but also for the 3 months and counting since she was supposed to have been placed at Latham. Unlike families who can afford to make a private placement and seek reimbursement later, S.C. depends on the District complying with the Final Order to fund the placement. Several circuits recognize that "the availability of IDEA remedies should not depend upon whether a student or his parents have the financial means to front the costs of those remedies." *D.E.*, 765 F.3d at 273; *Reid*, 401 F.3d at 522-232 (Without an award of compensatory education, "children's access to appropriate education could depend on their parents' capacity to front its costs — a result manifestly incompatible with IDEA's purpose of ensuring that *all* children with disabilities have available to them a [FAPE]." (internal quotation marks omitted)); *Lester H. v. Gilhool*, 916 F.2d 865, 873 (3d Cir. 1990) ("Congress, by allowing the courts to fashion an appropriate

remedy to cure the deprivation of a child's right to a [FAPE], did not intend to offer a remedy only to those parents able to afford an alternative private education.”); *Miener v. Missouri*, 800 F.2d 749, 753 (8th Cir. 1986) (“We cannot agree with the defendants that they should escape liability for these services simply because [plaintiff] was unable to provide them in the first instance; . . . We are confident that Congress did not intend the child's entitlement to a *free* education to turn upon her parent's ability to 'front' its costs.”).

The district court’s denial of S.C.’s motion for enforcement indeed has made S.C.’s entitlement to FAPE turn upon her mother’s ability to front the costs. The court’s decision has perpetuated and exacerbated the harm already caused by the District’s denial of FAPE and refusal to implement the remedial placement order.

This Court has the authority to address issues directly on appeal, even if the issues were not reached by the district court, and has done so in other IDEA cases for the express purpose of preventing further delay and potential harm to the child. *Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047, 1057 (9<sup>th</sup> Cir. 2012) (concluding that justice would not be served by further delaying resolution of the issue of substantive compliance and holding, based on the record on appeal, that school district had denied FAPE).

For this reason, and for the reasons described above, K.G. respectfully requests that this Court order S.C.’s immediate placement at Latham Center at



public expense, that such placement shall continue for at least one year, and that the District is prohibited from removing S.C. from Latham until Parent agrees or until the District demonstrates through the IDEA's hearing procedures that it is able, willing and prepared to meet with the conditions in the Final Order for S.C.'s return to public school and all such proceedings are exhausted.

### **CONCLUSION**

For the foregoing reasons, S.C. respectfully requests that this Court reverse the district court decision and enter an order requiring the Lincoln County School District to place S.C. at Latham Center immediately, for a period of no less than one year, and further that the matter be remanded to the district court for a determination of any remaining claims in this matter.

### **STATEMENT OF RELATED CASES**

S.C. is not aware of any related cases.

Dated this 26th of April, 2021.

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**CERTIFICATE OF COMPLIANCE**  
**FED. R. APP. P. 32(A)(7)(C)**

1. This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 9824 words, excluding parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of the Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally-spaced typeface using 14-point Times New Roman font.

Dated this 26th of April, 2021.

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**CERTIFICATE OF SERVICE**

United States Court of Appeals Docket Number: 21-35242

I hereby certify that I electronically filed the foregoing **APPELLANTS' BRIEF AND ADDENDUM** with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on DATE.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated this 26th day of April, 2021.

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**ADDENDUM TO APPELLANT'S PRINCIPAL BRIEF**

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## **20 U.S.C. § 1400. Short title; findings; purposes**

### **(a) Short title**

This chapter may be cited as the "Individuals with Disabilities Education Act".

### **(b) Omitted**

### **(c) Findings**

Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

(2) Before the date of enactment of the Education for All Handicapped Children Act of 1975 (Public Law 94–142), the educational needs of millions of children with disabilities were not being fully met because—

(A) the children did not receive appropriate educational services;

(B) the children were excluded entirely from the public school system and from being educated with their peers;

(C) undiagnosed disabilities prevented the children from having a successful educational experience; or

(D) a lack of adequate resources within the public school system forced families to find services outside the public school system.

(3) Since the enactment and implementation of the Education for All Handicapped Children Act of 1975, this chapter has been successful in ensuring children with disabilities and the families of such children access to a free appropriate public education and in improving educational results for children with disabilities.

(4) However, the implementation of this chapter has been impeded by low expectations, and an insufficient focus on applying replicable research on proven methods of teaching and learning for children with disabilities.

(5) Almost 30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by—

(A) having high expectations for such children and ensuring their access to the general education curriculum in the regular classroom, to the maximum extent possible, in order to—

(i) meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children; and

(ii) be prepared to lead productive and independent adult lives, to the maximum extent possible;

(B) strengthening the role and responsibility of parents and ensuring that families of such children have meaningful opportunities to participate in the education of their children at school and at home;

(C) coordinating this chapter with other local, educational service agency, State, and Federal school improvement efforts, including improvement efforts under the Elementary and Secondary Education Act of 1965 [20 U.S.C. 6301 et seq.], in order to ensure that such children benefit from such efforts and that special education can become a service for such children rather than a place where such children are sent;

(D) providing appropriate special education and related services, and aids and supports in the regular classroom, to such children, whenever appropriate;

(E) supporting high-quality, intensive preservice preparation and professional development for all personnel who work with children with disabilities in order to ensure that such personnel have the skills and knowledge necessary to improve the academic achievement and functional performance of children with disabilities,

including the use of scientifically based instructional practices, to the maximum extent possible;

(F) providing incentives for whole-school approaches, scientifically based early reading programs, positive behavioral interventions and supports, and early intervening services to reduce the need to label children as disabled in order to address the learning and behavioral needs of such children;

(G) focusing resources on teaching and learning while reducing paperwork and requirements that do not assist in improving educational results; and

(H) supporting the development and use of technology, including assistive technology devices and assistive technology services, to maximize accessibility for children with disabilities.

(6) While States, local educational agencies, and educational service agencies are primarily responsible for providing an education for all children with disabilities, it is in the national interest that the Federal Government have a supporting role in assisting State and local efforts to educate children with disabilities in order to improve results for such children and to ensure equal protection of the law.

(7) A more equitable allocation of resources is essential for the Federal Government to meet its responsibility to provide an equal educational opportunity for all individuals.

(8) Parents and schools should be given expanded opportunities to resolve their disagreements in positive and constructive ways.

(9) Teachers, schools, local educational agencies, and States should be relieved of irrelevant and unnecessary paperwork burdens that do not lead to improved educational outcomes.

(10)(A) The Federal Government must be responsive to the growing needs of an increasingly diverse society.



(B) America's ethnic profile is rapidly changing. In 2000, 1 of every 3 persons in the United States was a member of a minority group or was limited English proficient.

(C) Minority children comprise an increasing percentage of public school students.

(D) With such changing demographics, recruitment efforts for special education personnel should focus on increasing the participation of minorities in the teaching profession in order to provide appropriate role models with sufficient knowledge to address the special education needs of these students.

(11)(A) The limited English proficient population is the fastest growing in our Nation, and the growth is occurring in many parts of our Nation.

(B) Studies have documented apparent discrepancies in the levels of referral and placement of limited English proficient children in special education.

(C) Such discrepancies pose a special challenge for special education in the referral of, assessment of, and provision of services for, our Nation's students from non-English language backgrounds.

(12)(A) Greater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities.

(B) More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population.

(C) African-American children are identified as having intellectual disabilities and emotional disturbance at rates greater than their White counterparts.

(D) In the 1998–1999 school year, African-American children represented just 14.8 percent of the population aged 6 through 21, but comprised 20.2 percent of all children with disabilities.

(E) Studies have found that schools with predominately White students and teachers have placed disproportionately high numbers of their minority students into special education.

(13)(A) As the number of minority students in special education increases, the number of minority teachers and related services personnel produced in colleges and universities continues to decrease.

(B) The opportunity for full participation by minority individuals, minority organizations, and Historically Black Colleges and Universities in awards for grants and contracts, boards of organizations receiving assistance under this chapter, peer review panels, and training of professionals in the area of special education is essential to obtain greater success in the education of minority children with disabilities.

(14) As the graduation rates for children with disabilities continue to climb, providing effective transition services to promote successful post-school employment or education is an important measure of accountability for children with disabilities.

#### **(d) Purposes**

The purposes of this chapter are—

(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;

(B) to ensure that the rights of children with disabilities and parents of such children are protected; and

(C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;

(2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;

(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 services; and

(4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

(Pub. L. 91–230, title VI, §601, as added Pub. L. 108–446, title I, §101, Dec. 3, 2004, 118 Stat. 2647; amended Pub. L. 111–256, §2(b)(1), Oct. 5, 2010, 124 Stat. 2643.)

## **20 U.S.C. §1401. Definitions**

Except as otherwise provided, in this chapter:

### **(1) Assistive technology device**

#### **(A) In general**

The term "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 functional capabilities of a child with a disability.

#### **(B) Exception**

The term does not include a medical device that is surgically implanted, or the replacement of such device.

### **(2) Assistive technology service**

The term "assistive technology service" means any service that directly assists a child with a disability in the selection, acquisition, or use of an assistive technology device. Such term includes—

(A) the evaluation of the needs of such child, including a functional evaluation of the child in the child's customary environment;

(B) purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by such child;

(C) selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

(D) coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

(E) training or technical assistance for such child, or, where appropriate, the family of such child; and

(F) training or technical assistance for professionals (including individuals providing education and rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of such child.

### **(3) Child with a disability**

#### **(A) In general**

The term "child with a disability" means a child—

- (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) who, by reason thereof, needs special education and related services.

#### **(B) Child aged 3 through 9**

The term "child with a disability" for a child aged 3 through 9 (or any subset of that age range, including ages 3 through 5), may, at the discretion of the State and the local educational agency, include a child—

- (i) experiencing developmental delays, as defined by the State and as measured by appropriate diagnostic instruments and procedures, in 1 or more of the following areas: physical development; cognitive development; communication development; social or emotional development; or adaptive development; and
- (ii) who, by reason thereof, needs special education and related services.

**(4) Repealed. Pub. L. 114–95, title IX, §9215(ss)(1)(A), Dec. 10, 2015, 129 Stat. 2181**

#### **(5) Educational service agency**

The term "educational service agency"—

(A) means a regional public multiservice agency—

(i) authorized by State law to develop, manage, and provide services or programs to local educational agencies; and

(ii) recognized as an administrative agency for purposes of the provision of special education and related services provided within public elementary schools and secondary schools of the State; and

(B) includes any other public institution or agency having administrative control and direction over a public elementary school or secondary school.

#### **(6) Elementary school**

The term "elementary school" means a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law.

#### **(7) Equipment**

The term "equipment" includes—

(A) machinery, utilities, and built-in equipment, and any necessary enclosures or structures to house such machinery, utilities, or equipment; and

(B) all other items necessary for the functioning of a particular facility as a facility for the provision of educational services, including items such as instructional equipment and necessary furniture; printed, published, and audio-visual instructional materials; telecommunications, sensory, and other technological aids and devices; and books, periodicals, documents, and other related materials.

#### **(8) Excess costs**

The term "excess costs" means those costs that are in excess of the average annual per-student expenditure in a local educational agency during the preceding school

year for an elementary school or secondary school student, as may be appropriate, and which shall be computed after deducting—

(A) amounts received—

(i) under subchapter II;

(ii) under part A of title I of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 6311 et seq.]; and

(iii) under part A of title III of that Act [20 U.S.C. 6811 et seq.]; and

(B) any State or local funds expended for programs that would qualify for assistance under any of those parts.

**(9) Free appropriate public education**

The term "free appropriate public education" 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 individualized education program required under section 1414(d) of this title.

**(10) Repealed. Pub. L. 114–95, title IX, §9214(d)(1), Dec. 10, 2015, 129 Stat. 2164**

**(11) Homeless children**

The term "homeless children" has the meaning given the term "homeless children and youths" in section 11434a of title 42.

**(12) Indian**

The term "Indian" means an individual who is a member of an Indian tribe.

**(13) Indian tribe**

The term "Indian tribe" means any Federal or State Indian tribe, band, rancheria, pueblo, colony, or community, including any Alaska Native village or regional village corporation (as defined in or established under the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.)).

**(14) Individualized education program; IEP**

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of this title.

**(15) Individualized family service plan**

The term "individualized family service plan" has the meaning given the term in section 1436 of this title.

**(16) Infant or toddler with a disability**

The term "infant or toddler with a disability" has the meaning given the term in section 1432 of this title.

**(17) Institution of higher education**

The term "institution of higher education"—

(A) has the meaning given the term in section 1001 of this title; and

(B) also includes any college or university receiving funding from the Secretary of the Interior under the Tribally Controlled Colleges and Universities Assistance Act of 1978 [25 U.S.C. 1801 et seq.].

**(18) Limited English proficient**



The term "limited English proficient" has the meaning given the term "English learner" in section 8101 of the Elementary and Secondary Education Act of 1965 [20 U.S.C. 7801].

**(19) Local educational agency**

**(A) In general**

The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary schools or secondary schools.

**(B) Educational service agencies and other public institutions or agencies**

The term includes—

- (i) an educational service agency; and
- (ii) any other public institution or agency having administrative control and direction of a public elementary school or secondary school.

**(C) BIA funded schools**

The term includes an elementary school or secondary school funded by the Bureau of Indian Affairs, but only to the extent that such inclusion makes the school eligible for programs for which specific eligibility is not provided to the school in another provision of law and the school does not have a student population that is smaller than the student population of the local educational agency receiving assistance under this chapter with the smallest student population, except that the school shall not be subject to the jurisdiction of any State educational agency other than the Bureau of Indian Affairs.

**(20) Native language**

The term "native language", when used with respect to an individual who is limited English proficient, means the language normally used by the individual or, in the case of a child, the language normally used by the parents of the child.

**(21) Nonprofit**

The term "nonprofit", as applied to a school, agency, organization, or institution, means a school, agency, organization, or institution owned and operated by 1 or more nonprofit corporations or associations no part of the net earnings of which inures, or may lawfully inure, to the benefit of any private shareholder or individual.

**(22) Outlying area**

The term "outlying area" means the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands.

**(23) Parent**

The term "parent" means—

(A) a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent);

(B) a guardian (but not the State if the child is a ward of the State);

(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

(D) except as used in sections 1415(b)(2) and 1439(a)(5) of this title, an individual assigned under either of those sections to be a surrogate parent.

**(24) Parent organization**

The term "parent organization" has the meaning given the term in section 1471(g) of this title.

**(25) Parent training and information center**

The term "parent training and information center" means a center assisted under section 1471 or 1472 of this title.

**(26) Related services**

**(A) In general**

The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

**(B) Exception**

The term does not include a medical device that is surgically implanted, or the replacement of such device.

**(27) Secondary school**

The term "secondary school" means a nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education, as determined under State law, except that it does not include any education beyond grade 12.

**(28) Secretary**

The term "Secretary" means the Secretary of Education.

**(29) Special education**

The term "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.

### **(30) Specific learning disability**

#### **(A) In general**

The term "specific learning disability" means a disorder in 1 or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations.

#### **(B) Disorders included**

Such term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia.

#### **(C) Disorders not included**

Such term does not include a learning problem that is primarily the result of visual, hearing, or motor disabilities, of intellectual disabilities, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

### **(31) State**

The term "State" means each of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and each of the outlying areas.

### **(32) State educational agency**

The term "State educational agency" means the State board of education or other agency or officer primarily responsible for the State supervision of public elementary schools and secondary schools, or, if there is no such officer or agency, an officer or agency designated by the Governor or by State law.

### **(33) Supplementary aids and services**

The term "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 in accordance with section 1412(a)(5) of this title.

### **(34) Transition services**

The term "transition services" means a coordinated set of activities for a child with a disability that—

(A) is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

(B) is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and

(C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

### **(35) Universal design**

The term "universal design" has the meaning given the term in section 3002 of title 29.

### **(36) Ward of the State**

#### **(A) In general**

The term "ward of the State" means a child who, as determined by the State where the child resides, is a foster child, is a ward of the State, or is in the custody of a public child welfare agency.

**(B) Exception**

The term does not include a foster child who has a foster parent who meets the definition of a parent in paragraph (23).

(Pub. L. 91–230, title VI, §602, as added Pub. L. 108–446, title I, §101, Dec. 3, 2004, 118 Stat. 2652; amended Pub. L. 110–315, title IX, §941(k)(2)(C), Aug. 14, 2008, 122 Stat. 3466; Pub. L. 111–256, §2(b)(2), Oct. 5, 2010, 124 Stat. 2643; Pub. L. 114–95, title IX, §§9214(d)(1), 9215(ss)(1), Dec. 10, 2015, 129 Stat. 2164, 2181.)

## **20 U.S.C. § 1412. State eligibility**

### **(a) In general**

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

#### **(1) Free appropriate public education**

##### **(A) In general**

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

##### **(B) Limitation**

The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children—

- (i) aged 3 through 5 and 18 through 21 in a State to the extent that its application to those children would be inconsistent with State law or practice, or the order of any court, respecting the provision of public education to children in those age ranges; and

- (ii) aged 18 through 21 to the extent that State law does not require that special education and related services under this subchapter be provided to children with disabilities who, in the educational placement prior to their incarceration in an adult correctional facility—

- (I) were not actually identified as being a child with a disability under section 1401 of this title; or

- (II) did not have an individualized education program under this subchapter.

##### **(C) State flexibility**

A State that provides early intervention services in accordance with subchapter III to a child who is eligible for services under section 1419 of this title, is not required to provide such child with a free appropriate public education.

**(2) Full educational opportunity goal**

The State has established a goal of providing full educational opportunity to all children with disabilities and a detailed timetable for accomplishing that goal.

**(3) Child find**

**(A) In general**

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

**(B) Construction**

Nothing in this chapter requires that children be classified by their disability so long as each child who has a disability listed in section 1401 of this title and who, by reason of that disability, needs special education and related services is regarded as a child with a disability under this subchapter.

**(4) Individualized education program**

An individualized education program, or an individualized family service plan that meets the requirements of section 1436(d) of this title, is developed, reviewed, and revised for each child with a disability in accordance with section 1414(d) of this title.

**(5) Least restrictive environment**

**(A) In general**



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.

**(B) Additional requirement**

**(i) In general**

A State funding mechanism shall not result in placements that violate the requirements of subparagraph (A), and a State shall not use a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability a free appropriate public education according to the unique needs of the child as described in the child's IEP.

**(ii) Assurance**

If the State does not have policies and procedures to ensure compliance with clause (i), the State shall provide the Secretary an assurance that the State will revise the funding mechanism as soon as feasible to ensure that such mechanism does not result in such placements.

**(6) Procedural safeguards**

**(A) In general**

Children with disabilities and their parents are afforded the procedural safeguards required by section 1415 of this title.

**(B) Additional procedural safeguards**

Procedures to ensure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities for

services under this chapter will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

### **(7) Evaluation**

Children with disabilities are evaluated in accordance with subsections (a) through (c) of section 1414 of this title.

### **(8) Confidentiality**

Agencies in the State comply with section 1417(c) of this title (relating to the confidentiality of records and information).

### **(9) Transition from subchapter III to preschool programs**

Children participating in early intervention programs assisted under subchapter III, and who will participate in preschool programs assisted under this subchapter, experience a smooth and effective transition to those preschool programs in a manner consistent with section 1437(a)(9) of this title. By the third birthday of such a child, an individualized education program or, if consistent with sections 1414(d)(2)(B) and 1436(d) of this title, an individualized family service plan, has been developed and is being implemented for the child. The local educational agency will participate in transition planning conferences arranged by the designated lead agency under section 1435(a)(10) of this title.

### **(10) Children in private schools**

#### **(A) Children enrolled in private schools by their parents**

##### **(i) In general**

To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary schools and secondary schools in the school district served

by a local educational agency, provision is made for the participation of those children in the program assisted or carried out under this subchapter by providing for such children special education and related services in accordance with the following requirements, unless the Secretary has arranged for services to those children under subsection (f):

(I) Amounts to be expended for the provision of those services (including direct services to parentally placed private school children) by the local educational agency shall be equal to a proportionate amount of Federal funds made available under this subchapter.

(II) In calculating the proportionate amount of Federal funds, the local educational agency, after timely and meaningful consultation with representatives of private schools as described in clause (iii), shall conduct a thorough and complete child find process to determine the number of parentally placed children with disabilities attending private schools located in the local educational agency.

(III) Such services to parentally placed private school children with disabilities may be provided to the children on the premises of private, including religious, schools, to the extent consistent with law.

(IV) State and local funds may supplement and in no case shall supplant the proportionate amount of Federal funds required to be expended under this subparagraph.

(V) Each local educational agency shall maintain in its records and provide to the State educational agency the number of children evaluated under this subparagraph, the number of children determined to be children with disabilities under this paragraph, and the number of children served under this paragraph.

## **(ii) Child find requirement**

### **(I) In general**

The requirements of paragraph (3) (relating to child find) shall apply with respect to children with disabilities in the State who are enrolled in private, including religious, elementary schools and secondary schools.

**(II) Equitable participation**

The child find process shall be designed to ensure the equitable participation of parentally placed private school children with disabilities and an accurate count of such children.

**(III) Activities**

In carrying out this clause, the local educational agency, or where applicable, the State educational agency, shall undertake activities similar to those activities undertaken for the agency's public school children.

**(IV) Cost**

The cost of carrying out this clause, including individual evaluations, may not be considered in determining whether a local educational agency has met its obligations under clause (i).

**(V) Completion period**

Such child find process shall be completed in a time period comparable to that for other students attending public schools in the local educational agency.

**(iii) Consultation**

To ensure timely and meaningful consultation, a local educational agency, or where appropriate, a State educational agency, shall consult with private school representatives and representatives of parents of parentally placed private school children with disabilities during the design and development of special education and related services for the children, including regarding—

- (I) the child find process and how parentally placed private school children suspected of having a disability can participate equitably, including how parents, teachers, and private school officials will be informed of the process;
- (II) the determination of the proportionate amount of Federal funds available to serve parentally placed private school children with disabilities under this subparagraph, including the determination of how the amount was calculated;
- (III) the consultation process among the local educational agency, private school officials, and representatives of parents of parentally placed private school children with disabilities, including how such process will operate throughout the school year to ensure that parentally placed private school children with disabilities identified through the child find process can meaningfully participate in special education and related services;
- (IV) how, where, and by whom special education and related services will be provided for parentally placed private school children with disabilities, including a discussion of types of services, including direct services and alternate service delivery mechanisms, how such services will be apportioned if funds are insufficient to serve all children, and how and when these decisions will be made; and
- (V) how, if the local educational agency disagrees with the views of the private school officials on the provision of services or the types of services, whether provided directly or through a contract, the local educational agency shall provide to the private school officials a written explanation of the reasons why the local educational agency chose not to provide services directly or through a contract.

**(iv) Written affirmation**

When timely and meaningful consultation as required by clause (iii) has occurred, the local educational agency shall obtain a written affirmation

signed by the representatives of participating private schools, and if such representatives do not provide such affirmation within a reasonable period of time, the local educational agency shall forward the documentation of the consultation process to the State educational agency.

**(v) Compliance**

**(I) In general**

A private school official shall have the right to submit a complaint to the State educational agency that the local educational agency did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of the private school official.

**(II) Procedure**

If the private school official wishes to submit a complaint, the official shall provide the basis of the noncompliance with this subparagraph by the local educational agency to the State educational agency, and the local educational agency shall forward the appropriate documentation to the State educational agency. If the private school official is dissatisfied with the decision of the State educational agency, such official may submit a complaint to the Secretary by providing the basis of the noncompliance with this subparagraph by the local educational agency to the Secretary, and the State educational agency shall forward the appropriate documentation to the Secretary.

**(vi) Provision of equitable services**

**(I) Directly or through contracts**

The provision of services pursuant to this subparagraph shall be provided—

(aa) by employees of a public agency; or

(bb) through contract by the public agency with an individual, association, agency, organization, or other entity.

**(II) Secular, neutral, nonideological**

Special education and related services provided to parentally placed private school children with disabilities, including materials and equipment, shall be secular, neutral, and nonideological.

**(vii) Public control of funds**

The control of funds used to provide special education and related services under this subparagraph, and title to materials, equipment, and property purchased with those funds, shall be in a public agency for the uses and purposes provided in this chapter, and a public agency shall administer the funds and property.

**(B) Children placed in, or referred to, private schools by public agencies**

**(i) In general**

Children with disabilities in private schools and facilities are provided special education and related services, in accordance with an individualized education program, at no cost to their parents, if such children are placed in, or referred to, such schools or facilities by the State or appropriate local educational agency as the means of carrying out the requirements of this subchapter or any other applicable law requiring the provision of special education and related services to all children with disabilities within such State.

**(ii) Standards**

In all cases described in clause (i), the State educational agency shall determine whether such schools and facilities meet standards that apply to State educational agencies and local educational agencies and that children so served have all the rights the children would have if served by such agencies.

**(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency**

**(i) In general**

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

**(ii) Reimbursement for private school placement**

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

**(iii) Limitation on reimbursement**

The cost of reimbursement described in clause (ii) may be reduced or denied—

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or



(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

**(iv) Exception**

Notwithstanding the notice requirement in clause (iii)(I), the cost of reimbursement—

(I) shall not be reduced or denied for failure to provide such notice if—

(aa) the school prevented the parent from providing such notice;

(bb) the parents had not received notice, pursuant to section 1415 of this title, of the notice requirement in clause (iii)(I);  
or

(cc) compliance with clause (iii)(I) would likely result in physical harm to the child; and

(II) may, in the discretion of a court or a hearing officer, not be reduced or denied for failure to provide such notice if—

(aa) the parent is illiterate or cannot write in English; or

(bb) compliance with clause (iii)(I) would likely result in serious emotional harm to the child.

## **(11) State educational agency responsible for general supervision**

### **(A) In general**

The State educational agency is responsible for ensuring that—

(i) the requirements of this subchapter are met;

(ii) all educational programs for children with disabilities in the State, including all such programs administered by any other State agency or local agency—

(I) are under the general supervision of individuals in the State who are responsible for educational programs for children with disabilities; and

(II) meet the educational standards of the State educational agency; and

(iii) in carrying out this subchapter with respect to homeless children, the requirements of subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.) are met.

### **(B) Limitation**

Subparagraph (A) shall not limit the responsibility of agencies in the State other than the State educational agency to provide, or pay for some or all of the costs of, a free appropriate public education for any child with a disability in the State.

### **(C) Exception**

Notwithstanding subparagraphs (A) and (B), the Governor (or another individual pursuant to State law), consistent with State law, may assign to any public agency in the State the responsibility of ensuring that the requirements of this subchapter

are met with respect to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons.

## **(12) Obligations related to and methods of ensuring services**

### **(A) Establishing responsibility for services**

The Chief Executive Officer of a State or designee of the officer shall ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each public agency described in subparagraph (B) and the State educational agency, in order to ensure that all services described in subparagraph (B)(i) that are needed to ensure a free appropriate public education are provided, including the provision of such services during the pendency of any dispute under clause (iii). Such agreement or mechanism shall include the following:

#### **(i) Agency financial responsibility**

An identification of, or a method for defining, the financial responsibility of each agency for providing services described in subparagraph (B)(i) to ensure a free appropriate public education to children with disabilities, provided that the financial responsibility of each public agency described in subparagraph (B), including the State medicaid agency and other public insurers of children with disabilities, shall precede the financial responsibility of the local educational agency (or the State agency responsible for developing the child's IEP).

#### **(ii) Conditions and terms of reimbursement**

The conditions, terms, and procedures under which a local educational agency shall be reimbursed by other agencies.

#### **(iii) Interagency disputes**

Procedures for resolving interagency disputes (including procedures under which local educational agencies may initiate proceedings) under the agreement or other mechanism to secure reimbursement from other

agencies or otherwise implement the provisions of the agreement or mechanism.

**(iv) Coordination of services procedures**

Policies and procedures for agencies to determine and identify the interagency coordination responsibilities of each agency to promote the coordination and timely and appropriate delivery of services described in subparagraph (B)(i).

**(B) Obligation of public agency**

**(i) In general**

If any public agency other than an educational agency is otherwise obligated under Federal or State law, or assigned responsibility under State policy pursuant to subparagraph (A), to provide or pay for any services that are also considered special education or related services (such as, but not limited to, services described in section 1401(1) relating to assistive technology devices, 1401(2) relating to assistive technology services, 1401(26) relating to related services, 1401(33) relating to supplementary aids and services, and 1401(34) of this title relating to transition services) that are necessary for ensuring a free appropriate public education to children with disabilities within the State, such public agency shall fulfill that obligation or responsibility, either directly or through contract or other arrangement pursuant to subparagraph (A) or an agreement pursuant to subparagraph (C).

**(ii) Reimbursement for services by public agency**

If a public agency other than an educational agency fails to provide or pay for the special education and related services described in clause (i), the local educational agency (or State agency responsible for developing the child's IEP) shall provide or pay for such services to the child. Such local educational agency or State agency is authorized to claim reimbursement for the services from the public agency that failed to provide or pay for such services and such public agency shall reimburse

the local educational agency or State agency pursuant to the terms of the interagency agreement or other mechanism described in subparagraph (A)(i) according to the procedures established in such agreement pursuant to subparagraph (A)(ii).

**(C) Special rule**

The requirements of subparagraph (A) may be met through—

- (i) State statute or regulation;
- (ii) signed agreements between respective agency officials that clearly identify the responsibilities of each agency relating to the provision of services; or
- (iii) other appropriate written methods as determined by the Chief Executive Officer of the State or designee of the officer and approved by the Secretary.

**(13) Procedural requirements relating to local educational agency eligibility**

The State educational agency will not make a final determination that a local educational agency is not eligible for assistance under this subchapter without first affording that agency reasonable notice and an opportunity for a hearing.

**(14) Personnel qualifications**

**(A) In general**

The State educational agency has established and maintains qualifications to ensure that personnel necessary to carry out this subchapter are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities.

**(B) Related services personnel and paraprofessionals**

The qualifications under subparagraph (A) include qualifications for related services personnel and paraprofessionals that—

- (i) are consistent with any State-approved or State-recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services;
- (ii) ensure that related services personnel who deliver services in their discipline or profession meet the requirements of clause (i) and have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis; and
- (iii) allow paraprofessionals and assistants who are appropriately trained and supervised, in accordance with State law, regulation, or written policy, in meeting the requirements of this subchapter to be used to assist in the provision of special education and related services under this subchapter to children with disabilities.

### **(C) Qualifications for special education teachers**

The qualifications described in subparagraph (A) shall ensure that each person employed as a special education teacher in the State who teaches elementary school, middle school, or secondary school—

- (i) has obtained full State certification as a special education teacher (including participating in an alternate route to certification as a special educator, if such alternate route meets minimum requirements described in section 2005.56(a)(2)(ii) of title 34, Code of Federal Regulations, as such section was in effect on November 28, 2008), or passed the State special education teacher licensing examination, and holds a license to teach in the State as a special education teacher, except with respect to any teacher teaching in a public charter school who shall meet the requirements set forth in the State's public charter school law;
- (ii) has not had special education certification or licensure requirements waived on an emergency, temporary, or provisional basis; and
- (iii) holds at least a bachelor's degree..<sup>1</sup>

**(D) Policy**

In implementing this section, a State shall adopt a policy that includes a requirement that local educational agencies in the State take measurable steps to recruit, hire, train, and retain personnel who meet the applicable requirements described in this paragraph to provide special education and related services under this subchapter to children with disabilities.

**(E) Rule of construction**

Notwithstanding any other individual right of action that a parent or student may maintain under this subchapter, nothing in this paragraph shall be construed to create a right of action on behalf of an individual student for the failure of a particular State educational agency or local educational agency staff person to meet the applicable requirements described in this paragraph, or to prevent a parent from filing a complaint about staff qualifications with the State educational agency as provided for under this subchapter.

**(15) Performance goals and indicators**

The State—

(A) has established goals for the performance of children with disabilities in the State that—

- (i) promote the purposes of this chapter, as stated in section 1400(d) of this title;
- (ii) are the same as the State's long-term goals and measurements of interim progress for children with disabilities under section 6311(c)(4)(A)(i) of this title;
- (iii) address graduation rates and dropout rates, as well as such other factors as the State may determine; and
- (iv) are consistent, to the extent appropriate, with any other goals and standards for children established by the State;

(B) has established performance indicators the State will use to assess progress toward achieving the goals described in subparagraph (A), including measurements of interim progress for children with disabilities under section 6311(c)(4)(A)(i) of this title; and

(C) will annually report to the Secretary and the public on the progress of the State, and of children with disabilities in the State, toward meeting the goals established under subparagraph (A), which may include elements of the reports required under section 6311(h) of this title.

## **(16) Participation in assessments**

### **(A) In general**

All children with disabilities are included in all general State and districtwide assessment programs, including assessments described under section 6311 of this title, with appropriate accommodations and alternate assessments where necessary and as indicated in their respective individualized education programs.

### **(B) Accommodation guidelines**

The State (or, in the case of a districtwide assessment, the local educational agency) has developed guidelines for the provision of appropriate accommodations.

### **(C) Alternate assessments**

#### **(i) In general**

The State (or, in the case of a districtwide assessment, the local educational agency) has developed and implemented guidelines for the participation of children with disabilities in alternate assessments for those children who cannot participate in regular assessments under subparagraph (A) with accommodations as indicated in their respective individualized education programs.



**(ii) Requirements for alternate assessments**

The guidelines under clause (i) shall provide for alternate assessments that—

(I) are aligned with the challenging State academic content standards under section 6311(b)(1) of this title and alternate academic achievement standards under section 6311(b)(1)(E) of this title; and

(II) if the State has adopted alternate academic achievement standards permitted under section 6311(b)(1)(E) of this title, measure the achievement of children with disabilities against those standards.

**(iii) Conduct of alternate assessments**

The State conducts the alternate assessments described in this subparagraph.

**(D) Reports**

The State educational agency (or, in the case of a districtwide assessment, the local educational agency) makes available to the public, and reports to the public with the same frequency and in the same detail as it reports on the assessment of nondisabled children, the following:

(i) The number of children with disabilities participating in regular assessments, and the number of those children who were provided accommodations in order to participate in those assessments.

(ii) The number of children with disabilities participating in alternate assessments described in subparagraph (C)(ii)(I).

(iii) The number of children with disabilities participating in alternate assessments described in subparagraph (C)(ii)(II).

(iv) The performance of children with disabilities on regular assessments and on alternate assessments (if the number of children with disabilities participating in those assessments is sufficient to yield

statistically reliable information and reporting that information will not reveal personally identifiable information about an individual student), compared with the achievement of all children, including children with disabilities, on those assessments.

**(E) Universal design**

The State educational agency (or, in the case of a districtwide assessment, the local educational agency) shall, to the extent feasible, use universal design principles in developing and administering any assessments under this paragraph.

**(17) Supplementation of State, local, and other Federal funds**

**(A) Expenditures**

Funds paid to a State under this subchapter will be expended in accordance with all the provisions of this subchapter.

**(B) Prohibition against commingling**

Funds paid to a State under this subchapter will not be commingled with State funds.

**(C) Prohibition against supplantation and conditions for waiver by Secretary**

Except as provided in section 1413 of this title, funds paid to a State under this subchapter will be used to supplement the level of Federal, State, and local funds (including funds that are not under the direct control of State or local educational agencies) expended for special education and related services provided to children with disabilities under this subchapter and in no case to supplant such Federal, State, and local funds, except that, where the State provides clear and convincing evidence that all children with disabilities have available to them a free appropriate public education, the Secretary may waive, in whole or in part, the requirements of this subparagraph if the Secretary concurs with the evidence provided by the State.

**(18) Maintenance of State financial support**

**(A) In general**

The State does not reduce the amount of State financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year.

**(B) Reduction of funds for failure to maintain support**

The Secretary shall reduce the allocation of funds under section 1411 of this title for any fiscal year following the fiscal year in which the State fails to comply with the requirement of subparagraph (A) by the same amount by which the State fails to meet the requirement.

**(C) Waivers for exceptional or uncontrollable circumstances**

The Secretary may waive the requirement of subparagraph (A) for a State, for 1 fiscal year at a time, if the Secretary determines that—

- (i) granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the State; or
- (ii) the State meets the standard in paragraph (17)(C) for a waiver of the requirement to supplement, and not to supplant, funds received under this subchapter.

**(D) Subsequent years**

If, for any year, a State fails to meet the requirement of subparagraph (A), including any year for which the State is granted a waiver under subparagraph (C), the financial support required of the State in future years under subparagraph (A) shall be the amount that would have been required in the absence of that failure and not the reduced level of the State's support.

**(19) Public participation**

Prior to the adoption of any policies and procedures needed to comply with this section (including any amendments to such policies and procedures), the State ensures that there are public hearings, adequate notice of the hearings, and an

opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities.

## **(20) Rule of construction**

In complying with paragraphs (17) and (18), a State may not use funds paid to it under this subchapter to satisfy State-law mandated funding obligations to local educational agencies, including funding based on student attendance or enrollment, or inflation.

## **(21) State advisory panel**

### **(A) In general**

The State has established and maintains an advisory panel for the purpose of providing policy guidance with respect to special education and related services for children with disabilities in the State.

### **(B) Membership**

Such advisory panel shall consist of members appointed by the Governor, or any other official authorized under State law to make such appointments, be representative of the State population, and be composed of individuals involved in, or concerned with, the education of children with disabilities, including—

- (i) parents of children with disabilities (ages birth through 26);
- (ii) individuals with disabilities;
- (iii) teachers;
- (iv) representatives of institutions of higher education that prepare special education and related services personnel;
- (v) State and local education officials, including officials who carry out activities under subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.);
- (vi) administrators of programs for children with disabilities;

- (vii) representatives of other State agencies involved in the financing or delivery of related services to children with disabilities;
- (viii) representatives of private schools and public charter schools;
- (ix) not less than 1 representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities;
- (x) a representative from the State child welfare agency responsible for foster care; and
- (xi) representatives from the State juvenile and adult corrections agencies.

**(C) Special rule**

A majority of the members of the panel shall be individuals with disabilities or parents of children with disabilities (ages birth through 26).

**(D) Duties**

The advisory panel shall—

- (i) advise the State educational agency of unmet needs within the State in the education of children with disabilities;
- (ii) comment publicly on any rules or regulations proposed by the State regarding the education of children with disabilities;
- (iii) advise the State educational agency in developing evaluations and reporting on data to the Secretary under section 1418 of this title;
- (iv) advise the State educational agency in developing corrective action plans to address findings identified in Federal monitoring reports under this subchapter; and

(v) advise the State educational agency in developing and implementing policies relating to the coordination of services for children with disabilities.

## **(22) Suspension and expulsion rates**

### **(A) In general**

The State educational agency examines data, including data disaggregated by race and ethnicity, to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities—

- (i) among local educational agencies in the State; or
- (ii) compared to such rates for nondisabled children within such agencies.

### **(B) Review and revision of policies**

If such discrepancies are occurring, the State educational agency reviews and, if appropriate, revises (or requires the affected State or local educational agency to revise) its policies, procedures, and practices relating to the development and implementation of IEPs, the use of positive behavioral interventions and supports, and procedural safeguards, to ensure that such policies, procedures, and practices comply with this chapter.

## **(23) Access to instructional materials**

### **(A) In general**

The State adopts the National Instructional Materials Accessibility Standard for the purposes of providing instructional materials to blind persons or other persons with print disabilities, in a timely manner after the publication of the National Instructional Materials Accessibility Standard in the Federal Register.

### **(B) Rights of State educational agency**

Nothing in this paragraph shall be construed to require any State educational agency to coordinate with the National Instructional Materials Access Center. If a State educational agency chooses not to coordinate with the National Instructional Materials Access Center, such agency shall provide an assurance to the Secretary that the agency will provide instructional materials to blind persons or other persons with print disabilities in a timely manner.

**(C) Preparation and delivery of files**

If a State educational agency chooses to coordinate with the National Instructional Materials Access Center, not later than 2 years after December 3, 2004, the agency, as part of any print instructional materials adoption process, procurement contract, or other practice or instrument used for purchase of print instructional materials, shall enter into a written contract with the publisher of the print instructional materials to—

(i) require the publisher to prepare and, on or before delivery of the print instructional materials, provide to the National Instructional Materials Access Center electronic files containing the contents of the print instructional materials using the National Instructional Materials Accessibility Standard; or

(ii) purchase instructional materials from the publisher that are produced in, or may be rendered in, specialized formats.

**(D) Assistive technology**

In carrying out this paragraph, the State educational agency, to the maximum extent possible, shall work collaboratively with the State agency responsible for assistive technology programs.

**(E) Definitions**

In this paragraph:

**(i) National Instructional Materials Access Center**

The term "National Instructional Materials Access Center" means the center established pursuant to section 1474(e) of this title.

**(ii) National Instructional Materials Accessibility Standard**

The term "National Instructional Materials Accessibility Standard" has the meaning given the term in section 1474(e)(3)(A) of this title.

**(iii) Specialized formats**

The term "specialized formats" has the meaning given the term in section 1474(e)(3)(D) of this title.

**(24) Overidentification and disproportionality**

The State has in effect, consistent with the purposes of this chapter and with section 1418(d) of this title, policies and procedures designed to prevent the inappropriate overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment described in section 1401 of this title.

**(25) Prohibition on mandatory medication**

**(A) In general**

The State educational agency shall prohibit State and local educational agency personnel from requiring a child to obtain a prescription for a substance covered by the Controlled Substances Act (21 U.S.C. 801 et seq.) as a condition of attending school, receiving an evaluation under subsection (a) or (c) of section 1414 of this title, or receiving services under this chapter.

**(B) Rule of construction**

Nothing in subparagraph (A) shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services under paragraph (3).



**(b) State educational agency as provider of free appropriate public education or direct services**

If the State educational agency provides free appropriate public education to children with disabilities, or provides direct services to such children, such agency—

(1) shall comply with any additional requirements of section 1413(a) of this title, as if such agency were a local educational agency; and

(2) may use amounts that are otherwise available to such agency under this subchapter to serve those children without regard to section 1413(a)(2)(A)(i) of this title (relating to excess costs).

**(c) Exception for prior State plans**

**(1) In general**

If a State has on file with the Secretary policies and procedures that demonstrate that such State meets any requirement of subsection (a), including any policies and procedures filed under this subchapter as in effect before the effective date of the Individuals with Disabilities Education Improvement Act of 2004, the Secretary shall consider such State to have met such requirement for purposes of receiving a grant under this subchapter.

**(2) Modifications made by State**

Subject to paragraph (3), an application submitted by a State in accordance with this section shall remain in effect until the State submits to the Secretary such modifications as the State determines necessary. This section shall apply to a modification to an application to the same extent and in the same manner as this section applies to the original plan.

**(3) Modifications required by the Secretary**

If, after the effective date of the Individuals with Disabilities Education Improvement Act of 2004, the provisions of this chapter are amended (or the regulations developed to carry out this chapter are amended), there is a new

interpretation of this chapter by a Federal court or a State's highest court, or there is an official finding of noncompliance with Federal law or regulations, then the Secretary may require a State to modify its application only to the extent necessary to ensure the State's compliance with this subchapter.

**(d) Approval by the Secretary**

**(1) In general**

If the Secretary determines that a State is eligible to receive a grant under this subchapter, the Secretary shall notify the State of that determination.

**(2) Notice and hearing**

The Secretary shall not make a final determination that a State is not eligible to receive a grant under this subchapter until after providing the State—

(A) with reasonable notice; and

(B) with an opportunity for a hearing.

**(e) Assistance under other Federal programs**

Nothing in this chapter permits a State to reduce medical and other assistance available, or to alter eligibility, under titles V and XIX of the Social Security Act [42 U.S.C. 701 et seq., 1396 et seq.] with respect to the provision of a free appropriate public education for children with disabilities in the State.

**(f) By-pass for children in private schools**

**(1) In general**

If, on December 2, 1983, a State educational agency was prohibited by law from providing for the equitable participation in special programs of children with disabilities enrolled in private elementary schools and secondary schools as required by subsection (a)(10)(A), or if the Secretary determines that a State educational agency, local educational agency, or other entity has substantially failed or is unwilling to provide for such equitable participation, then the Secretary

shall, notwithstanding such provision of law, arrange for the provision of services to such children through arrangements that shall be subject to the requirements of such subsection.

## **(2) Payments**

### **(A) Determination of amounts**

If the Secretary arranges for services pursuant to this subsection, the Secretary, after consultation with the appropriate public and private school officials, shall pay to the provider of such services for a fiscal year an amount per child that does not exceed the amount determined by dividing—

- (i) the total amount received by the State under this subchapter for such fiscal year; by
- (ii) the number of children with disabilities served in the prior year, as reported to the Secretary by the State under section 1418 of this title.

### **(B) Withholding of certain amounts**

Pending final resolution of any investigation or complaint that may result in a determination under this subsection, the Secretary may withhold from the allocation of the affected State educational agency the amount the Secretary estimates will be necessary to pay the cost of services described in subparagraph (A).

### **(C) Period of payments**

The period under which payments are made under subparagraph (A) shall continue until the Secretary determines that there will no longer be any failure or inability on the part of the State educational agency to meet the requirements of subsection (a)(10)(A).

## **(3) Notice and hearing**

### **(A) In general**

The Secretary shall not take any final action under this subsection until the State educational agency affected by such action has had an opportunity, for not less than 45 days after receiving written notice thereof, to submit written objections and to appear before the Secretary or the Secretary's designee to show cause why such action should not be taken.

**(B) Review of action**

If a State educational agency is dissatisfied with the Secretary's final action after a proceeding under subparagraph (A), such agency may, not later than 60 days after notice of such action, file with the United States court of appeals for the circuit in which such State is located a petition for review of that action. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which the Secretary based the Secretary's action, as provided in section 2112 of title 28.

**(C) Review of findings of fact**

The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive, but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

**(D) Jurisdiction of court of appeals; review by United States Supreme Court**

Upon the filing of a petition under subparagraph (B), the United States court of appeals shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of title 28.

(Pub. L. 91–230, title VI, §612, as added Pub. L. 108–446, title I, §101, Dec. 3, 2004, 118 Stat. 2676; amended Pub. L. 114–95, title IX, §§9214(d)(2), 9215(ss)(3), Dec. 10, 2015, 129 Stat. 2164, 2182.)

**20 U.S.C. § 1414. Evaluations, eligibility determinations, individualized education programs, and educational placements**

**(a) Evaluations, parental consent, and reevaluations**

**(1) Initial evaluations**

**(A) In general**

A State educational agency, other State agency, or local educational agency shall conduct a full and individual initial evaluation in accordance with this paragraph and subsection (b), before the initial provision of special education and related services to a child with a disability under this subchapter.

**(B) Request for initial evaluation**

Consistent with subparagraph (D), either a parent of a child, or a State educational agency, other State agency, or local educational agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

**(C) Procedures**

**(i) In general**

Such initial evaluation shall consist of procedures—

(I) to determine whether a child is a child with a disability (as defined in 1401 of this title) within 60 days of receiving parental consent for the evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe; and

(II) to determine the educational needs of such child.

**(ii) Exception**

The relevant timeframe in clause (i)(I) shall not apply to a local educational agency if—

(I) a child enrolls in a school served by the local educational agency after the relevant timeframe in clause (i)(I) has begun and prior to a determination by the child's previous local educational agency as to whether the child is a child with a disability (as defined in section 1401 of this title), but only if the subsequent local educational agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent local educational agency agree to a specific time when the evaluation will be completed; or

(II) the parent of a child repeatedly fails or refuses to produce the child for the evaluation.

**(D) Parental consent**

**(i) In general**

**(I) Consent for initial evaluation**

The agency proposing to conduct an initial evaluation to determine if the child qualifies as a child with a disability as defined in section 1401 of this title shall obtain informed consent from the parent of such child before conducting the evaluation. Parental consent for evaluation shall not be construed as consent for placement for receipt of special education and related services.

**(II) Consent for services**

An agency that is responsible for making a free appropriate public education available to a child with a disability under this subchapter shall seek to obtain informed consent from the parent of such child before providing special education and related services to the child.

**(ii) Absence of consent**

**(I) For initial evaluation**

If the parent of such child does not provide consent for an initial evaluation under clause (i)(I), or the parent fails to respond to a request

to provide the consent, the local educational agency may pursue the initial evaluation of the child by utilizing the procedures described in section 1415 of this title, except to the extent inconsistent with State law relating to such parental consent.

**(II) For services**

If the parent of such child refuses to consent to services under clause (i)(II), the local educational agency shall not provide special education and related services to the child by utilizing the procedures described in section 1415 of this title.

**(III) Effect on agency obligations**

If the parent of such child refuses to consent to the receipt of special education and related services, or the parent fails to respond to a request to provide such consent—

(aa) the local educational agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special education and related services for which the local educational agency requests such consent; and

(bb) the local educational agency shall not be required to convene an IEP meeting or develop an IEP under this section for the child for the special education and related services for which the local educational agency requests such consent.

**(iii) Consent for wards of the State**

**(I) In general**

If the child is a ward of the State and is not residing with the child's parent, the agency shall make reasonable efforts to obtain the informed consent from the parent (as defined in section 1401 of this title) of the

child for an initial evaluation to determine whether the child is a child with a disability.

## **(II) Exception**

The agency shall not be required to obtain informed consent from the parent of a child for an initial evaluation to determine whether the child is a child with a disability if—

(aa) despite reasonable efforts to do so, the agency cannot discover the whereabouts of the parent of the child;

(bb) the rights of the parents of the child have been terminated in accordance with State law; or

(cc) 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.

## **(E) Rule of construction**

The screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation for eligibility for special education and related services.

## **(2) Reevaluations**

### **(A) In general**

A local educational agency shall ensure that a reevaluation of each child with a disability is conducted in accordance with subsections (b) and (c)—

(i) if the local educational agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or

(ii) if the child's parents or teacher requests a reevaluation.



## **(B) Limitation**

A reevaluation conducted under subparagraph (A) shall occur—

- (i) not more frequently than once a year, unless the parent and the local educational agency agree otherwise; and
- (ii) at least once every 3 years, unless the parent and the local educational agency agree that a reevaluation is unnecessary.

## **(b) Evaluation procedures**

### **(1) Notice**

The local educational agency shall provide notice to the parents of a child with a disability, in accordance with subsections (b)(3), (b)(4), and (c) of section 1415 of this title, that describes any evaluation procedures such agency proposes to conduct.

### **(2) Conduct of evaluation**

In conducting the evaluation, the local educational agency shall—

(A) use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining—

- (i) whether the child is a child with a disability; and
- (ii) the content of the child's individualized education program, including information related to enabling the child to be involved in and progress in the general education curriculum, or, for preschool children, to participate in appropriate activities;

(B) not use any single measure or assessment as the sole criterion for determining whether a child is a child with a disability or determining an appropriate educational program for the child; and

(C) use technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors.

### **(3) Additional requirements**

Each local educational agency shall ensure that—

(A) assessments and other evaluation materials used to assess a child under this section—

- (i) are selected and administered so as not to be discriminatory on a racial or cultural basis;
- (ii) are provided and administered in the language and form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is not feasible to so provide or administer;
- (iii) are used for purposes for which the assessments or measures are valid and reliable;
- (iv) are administered by trained and knowledgeable personnel; and
- (v) are administered in accordance with any instructions provided by the producer of such assessments;

(B) the child is assessed in all areas of suspected disability;

(C) assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided; and

(D) assessments of children with disabilities who transfer from 1 school district to another school district in the same academic year are coordinated with such children's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

### **(4) Determination of eligibility and educational need**

Upon completion of the administration of assessments and other evaluation measures—

(A) the determination of whether the child is a child with a disability as defined in section 1401(3) of this title and the educational needs of the child shall be made by a team of qualified professionals and the parent of the child in accordance with paragraph (5); and

(B) a copy of the evaluation report and the documentation of determination of eligibility shall be given to the parent.

**(5) Special rule for eligibility determination**

In making a determination of eligibility under paragraph (4)(A), a child shall not be determined to be a child with a disability if the determinant factor for such determination is—

(A) lack of appropriate instruction in reading, including in the essential components of reading instruction (as defined in section 6368(3) of this title, as such section was in effect on the day before December 10, 2015);

(B) lack of instruction in math; or

(C) limited English proficiency.

**(6) Specific learning disabilities**

**(A) In general**

Notwithstanding section 1406(b) of this title, when determining whether a child has a specific learning disability as defined in section 1401 of this title, a local educational agency shall not be required to take into consideration whether a child has a severe discrepancy between achievement and intellectual ability in oral expression, listening comprehension, written expression, basic reading skill, reading comprehension, mathematical calculation, or mathematical reasoning.

**(B) Additional authority**

In determining whether a child has a specific learning disability, a local educational agency may use a process that determines if the child responds to scientific, research-based intervention as a part of the evaluation procedures described in paragraphs (2) and (3).

**(c) Additional requirements for evaluation and reevaluations**

**(1) Review of existing evaluation data**

As part of an initial evaluation (if appropriate) and as part of any reevaluation under this section, the IEP Team and other qualified professionals, as appropriate, shall—

(A) review existing evaluation data on the child, including—

- (i) evaluations and information provided by the parents of the child;
- (ii) current classroom-based, local, or State assessments, and classroom-based observations; and
- (iii) observations by teachers and related services providers; and

(B) on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine—

- (i) whether the child is a child with a disability as defined in section 1401(3) of this title, and the educational needs of the child, or, in case of a reevaluation of a child, whether the child continues to have such a disability and such educational needs;
- (ii) the present levels of academic achievement and related developmental needs of the child;
- (iii) whether the child needs special education and related services, or in the case of a reevaluation of a child, whether the child continues to need special education and related services; and

(iv) whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the individualized education program of the child and to participate, as appropriate, in the general education curriculum.

**(2) Source of data**

The local educational agency shall administer such assessments and other evaluation measures as may be needed to produce the data identified by the IEP Team under paragraph (1)(B).

**(3) Parental consent**

Each local educational agency shall obtain informed parental consent, in accordance with subsection (a)(1)(D), prior to conducting any reevaluation of a child with a disability, except that such informed parental consent need not be obtained if the local educational agency can demonstrate that it had taken reasonable measures to obtain such consent and the child's parent has failed to respond.

**(4) Requirements if additional data are not needed**

If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability and to determine the child's educational needs, the local educational agency—

(A) shall notify the child's parents of—

- (i) that determination and the reasons for the determination; and
- (ii) the right of such parents to request an assessment to determine whether the child continues to be a child with a disability and to determine the child's educational needs; and

(B) shall not be required to conduct such an assessment unless requested to by the child's parents.

**(5) Evaluations before change in eligibility**

**(A) In general**

Except as provided in subparagraph (B), a local educational agency shall evaluate a child with a disability in accordance with this section before determining that the child is no longer a child with a disability.

**(B) Exception**

**(i) In general**

The evaluation described in subparagraph (A) shall not be required before the termination of a child's eligibility under this subchapter due to graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for a free appropriate public education under State law.

**(ii) Summary of performance**

For a child whose eligibility under this subchapter terminates under circumstances described in clause (i), a local educational agency shall 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.

**(d) Individualized education programs**

**(1) Definitions**

In this chapter:

**(A) Individualized education program**

**(i) In general**

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes—

(I) a statement of the child's present levels of academic achievement and functional performance, including—

(aa) how the child's disability affects the child's involvement and progress in the general education curriculum;

(bb) for preschool children, as appropriate, how the disability affects the child's participation in appropriate activities; and

(cc) for children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks or short-term objectives;

(II) a statement of measurable annual goals, including academic and functional goals, designed to—

(aa) meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and

(bb) meet each of the child's other educational needs that result from the child's disability;

(III) a description of how the child's progress toward meeting the annual goals described in subclause (II) will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(IV) 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—

(aa) to advance appropriately toward attaining the annual goals;

(bb) to be involved in and make progress in the general education curriculum in accordance with subclause (I) and to participate in extracurricular and other nonacademic activities; and

(cc) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this subparagraph;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in subclause (IV)(cc);

(VI)(aa) a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments consistent with section 1412(a)(16)(A) of this title; and

(bb) if the IEP Team determines that the child shall take an alternate assessment on a particular State or districtwide assessment of student achievement, a statement of why—

(AA) the child cannot participate in the regular assessment; and

(BB) the particular alternate assessment selected is appropriate for the child;



(VII) the projected date for the beginning of the services and modifications described in subclause (IV), and the anticipated frequency, location, and duration of those services and modifications; and

(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter—

(aa) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills;

(bb) the transition services (including courses of study) needed to assist the child in reaching those goals; and

(cc) beginning not later than 1 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 chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title.

**(ii) Rule of construction**

Nothing in this section shall be construed to require—

(I) that additional information be included in a child's IEP beyond what is explicitly required in this section; and

(II) the IEP Team to include information under 1 component of a child's IEP that is already contained under another component of such IEP.

**(B) Individualized education program team**

The term "individualized education program team" or "IEP Team" means a group of individuals composed of—

- (i) the parents of a child with a disability;
- (ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);
- (iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;
- (iv) a representative of the local educational agency who—
  - (I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
  - (II) is knowledgeable about the general education curriculum; and
  - (III) is knowledgeable about the availability of resources of the local educational agency;
- (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);
- (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- (vii) whenever appropriate, the child with a disability.

### **(C) IEP Team attendance**

#### **(i) Attendance not necessary**

A member of the IEP Team shall not be required to attend an IEP meeting, in whole or in part, if the parent of a child with a disability and the local educational agency agree that the attendance of such member is

not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

**(ii) Excusal**

A member of the IEP Team may be excused from attending an IEP meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services, if—

(I) the parent and the local educational agency consent to the excusal; and

(II) the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

**(iii) Written agreement and consent required**

A parent's agreement under clause (i) and consent under clause (ii) shall be in writing.

**(D) IEP Team transition**

In the case of a child who was previously served under subchapter III, an invitation to the initial IEP meeting shall, at the request of the parent, be sent to the subchapter III service coordinator or other representatives of the subchapter III system to assist with the smooth transition of services.

**(2) Requirement that program be in effect**

**(A) In general**

At the beginning of each school year, each local educational agency, State educational agency, or other State agency, as the case may be, shall have in effect, for each child with a disability in the agency's jurisdiction, an individualized education program, as defined in paragraph (1)(A).

**(B) Program for child aged 3 through 5**

In the case of a child with a disability aged 3 through 5 (or, at the discretion of the State educational agency, a 2-year-old child with a disability who will turn age 3 during the school year), the IEP Team shall consider the individualized family service plan that contains the material described in section 1436 of this title, and that is developed in accordance with this section, and the individualized family service plan may serve as the IEP of the child if using that plan as the IEP is—

- (i) consistent with State policy; and
- (ii) agreed to by the agency and the child's parents.

### **(C) Program for children who transfer school districts**

#### **(i) In general**

##### **(I) Transfer within the same State**

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.

##### **(II) Transfer outside State**

In the case of a child with a disability who transfers school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in another State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency conducts an evaluation pursuant to subsection (a)(1), if determined to be necessary by such agency, and develops a new IEP, if appropriate, that is consistent with Federal and State law.

**(ii) Transmittal of records**

To facilitate the transition for a child described in clause (i)—

(I) the new school in which the child enrolls shall take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous school in which the child was enrolled, pursuant to section 99.31(a)(2) of title 34, Code of Federal Regulations; and

(II) the previous school in which the child was enrolled shall take reasonable steps to promptly respond to such request from the new school.

**(3) Development of IEP**

**(A) In general**

In developing each child's IEP, the IEP Team, subject to subparagraph (C), shall consider—

(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 evaluation or most recent evaluation of the child; and

(iv) the academic, developmental, and functional needs of the child.

**(B) Consideration of special factors**

The IEP Team shall—

(i) in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

- (ii) in the case of a child with limited English proficiency, consider the language needs of the child as such needs relate to the child's IEP;
- (iii) in the case of a child who is blind or visually impaired, 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;
- (iv) consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child's language and communication needs, opportunities for direct communications with peers and professional personnel in the 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; and
- (v) consider whether the child needs assistive technology devices and services.

**(C) Requirement with respect to regular education teacher**

A regular education teacher of the child, as a member of the IEP Team, shall, to the extent appropriate, participate in the development of the IEP of the child, including the determination of appropriate positive behavioral interventions and supports, and other strategies, and the determination of supplementary aids and services, program modifications, and support for school personnel consistent with paragraph (1)(A)(i)(IV).

**(D) Agreement**

In making changes to a child's IEP after the annual IEP meeting for a school year, the parent of a child with a disability and the local educational agency may agree not to convene an 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.

**(E) Consolidation of IEP Team meetings**

To the extent possible, the local educational agency shall encourage the consolidation of reevaluation meetings for the child and other IEP Team meetings for the child.

**(F) Amendments**

Changes to the IEP may be made either by the entire IEP Team or, as provided in subparagraph (D), by amending the IEP rather than by redrafting the entire IEP. Upon request, a parent shall be provided with a revised copy of the IEP with the amendments incorporated.

**(4) Review and revision of IEP**

**(A) In general**

The local educational agency shall ensure that, subject to subparagraph (B), the IEP Team—

- (i) reviews the child's IEP periodically, but not less frequently than annually, to determine whether the annual goals for the child are being achieved; and
- (ii) revises the IEP as appropriate to address—
  - (I) any lack of expected progress toward the annual goals and in the general education curriculum, where appropriate;
  - (II) the results of any reevaluation conducted under this section;
  - (III) information about the child provided to, or by, the parents, as described in subsection (c)(1)(B);
  - (IV) the child's anticipated needs; or

(V) other matters.

**(B) Requirement with respect to regular education teacher**

A regular education teacher of the child, as a member of the IEP Team, shall, consistent with paragraph (1)(C), participate in the review and revision of the IEP of the child.

**(5) Multi-year IEP demonstration**

**(A) Pilot program**

**(i) Purpose**

The purpose of this paragraph is to provide an opportunity for States to allow parents and local educational agencies the opportunity for long-term planning by offering the option of developing a comprehensive multi-year IEP, not to exceed 3 years, that is designed to coincide with the natural transition points for the child.

**(ii) Authorization**

In order to carry out the purpose of this paragraph, the Secretary is authorized to approve not more than 15 proposals from States to carry out the activity described in clause (i).

**(iii) Proposal**

**(I) In general**

A State desiring to participate in the program under this paragraph shall submit a proposal to the Secretary at such time and in such manner as the Secretary may reasonably require.

**(II) Content**

The proposal shall include—



(aa) assurances that the development of a multi-year IEP under this paragraph is optional for parents;

(bb) assurances that the parent is required to provide informed consent before a comprehensive multi-year IEP is developed;

(cc) a list of required elements for each multi-year IEP, including—

(AA) measurable goals pursuant to paragraph (1)(A)(i)(II), coinciding with natural transition points for the child, that will enable the child to be involved in and make progress in the general education curriculum and that will meet the child's other needs that result from the child's disability; and

(BB) measurable annual goals for determining progress toward meeting the goals described in subitem (AA); and

(dd) a description of the process for the review and revision of each multi-year IEP, including—

(AA) a review by the IEP Team of the child's multi-year IEP at each of the child's natural transition points;

(BB) in years other than a child's natural transition points, an annual review of the child's IEP to determine the child's current levels of progress and whether the annual goals for the child are being achieved, and a requirement to amend the IEP, as appropriate, to enable the child to continue to meet the measurable goals set out in the IEP;

(CC) if the IEP Team determines on the basis of a review that the child is not making sufficient progress toward the goals described in the multi-year IEP, a requirement that the local educational agency shall ensure that the IEP Team carries out a more thorough review of the IEP in accordance with paragraph (4) within 30 calendar days; and

(DD) at the request of the parent, a requirement that the IEP Team shall conduct a review of the child's multi-year IEP rather than or subsequent to an annual review.

### **(B) Report**

Beginning 2 years after December 3, 2004, the Secretary shall submit an annual report to the Committee on Education and the Workforce of the House of Representatives and the Committee on Health, Education, Labor, and Pensions of the Senate regarding the effectiveness of the program under this paragraph and any specific recommendations for broader implementation of such program, including—

(i) reducing—

(I) the paperwork burden on teachers, principals, administrators, and related service providers; and

(II) noninstructional time spent by teachers in complying with this subchapter;

(ii) enhancing longer-term educational planning;

(iii) improving positive outcomes for children with disabilities;

(iv) promoting collaboration between IEP Team members; and

(v) ensuring satisfaction of family members.

### **(C) Definition**

In this paragraph, the term "natural transition points" means those periods that are close in time to the transition of a child with a disability from preschool to elementary grades, from elementary grades to middle or junior high school grades, from middle or junior high school grades to secondary school grades, and from secondary school grades to post-secondary activities, but in no case a period longer than 3 years.

## **(6) Failure to meet transition objectives**

If a participating agency, other than the local educational agency, fails to provide the transition services described in the IEP in accordance with paragraph (1)(A)(i)(VIII), the local educational agency shall reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP.

## **(7) Children with disabilities in adult prisons**

### **(A) In general**

The following requirements shall not apply to children with disabilities who are convicted as adults under State law and incarcerated in adult prisons:

- (i) The requirements contained in section 1412(a)(16) of this title and paragraph (1)(A)(i)(VI) (relating to participation of children with disabilities in general assessments).
- (ii) The requirements of items (aa) and (bb) of paragraph (1)(A)(i)(VIII) (relating to transition planning and transition services), do not apply with respect to such children whose eligibility under this subchapter will end, because of such children's age, before such children will be released from prison.

### **(B) Additional requirement**

If a child with a disability is convicted as an adult under State law and incarcerated in an adult prison, the child's IEP Team may modify the child's IEP or placement notwithstanding the requirements of sections <sup>1</sup> 1412(a)(5)(A) of this title and paragraph (1)(A) if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

### **(e) Educational placements**

Each local educational agency or State educational agency shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

**(f) Alternative means of meeting participation**

When conducting IEP team <sup>2</sup> meetings and placement meetings pursuant to this section, section 1415(e) of this title, and section 1415(f)(1)(B) of this title, and carrying out administrative matters under section 1415 of this title (such as scheduling, exchange of witness lists, and status conferences), the parent of a child with a disability and a local educational agency may agree to use alternative means of meeting participation, such as video conferences and conference calls.

(Pub. L. 91–230, title VI, §614, as added Pub. L. 108–446, title I, §101, Dec. 3, 2004, 118 Stat. 2702; amended Pub. L. 114–95, title IX, §9215(ss)(5), Dec. 10, 2015, 129 Stat. 2182.)

## **20 U.S.C. § 1415. Procedural safeguards**

### **(a) Establishment of procedures**

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

### **(b) Types of procedures**

The procedures required by this section shall include the following:

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

(2)(A) Procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents, which surrogate 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. In the case of—

(i) a child who is a ward of the State, such surrogate may alternatively be appointed by the judge overseeing the child's care provided that the surrogate meets the requirements of this paragraph; and

(ii) an unaccompanied homeless youth as defined in section 11434a(6) of title 42, the local educational agency shall appoint a surrogate in accordance with this paragraph.

(B) The State shall make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate.

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency—

(A) proposes to initiate or change; or

(B) refuses to initiate or change,

the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

(4) Procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so.

(5) An opportunity for mediation, in accordance with subsection (e).

(6) An opportunity for any party to present a complaint—

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.

(7)(A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) (which shall remain confidential)—

(i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and

(ii) that shall include—

(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

(II) in the case of a homeless child or youth (within the meaning of section 11434a(2) of title 42), available contact information for the child and the name of the school the child is attending;

(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(IV) a proposed resolution of the problem to the extent known and available to the party at the time.

(B) A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of subparagraph (A)(ii).

(8) Procedures that require the State educational agency to develop a model form to assist parents in filing a complaint and due process complaint notice in accordance with paragraphs (6) and (7), respectively.

### **(c) Notification requirements**

#### **(1) Content of prior written notice**

The notice required by subsection (b)(3) shall 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 this subchapter and, if this notice is 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 this subchapter;

(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.

## **(2) Due process complaint notice**

### **(A) Complaint**

The due process complaint notice required under subsection (b)(7)(A) shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the receiving party believes the notice has not met the requirements of subsection (b)(7)(A).

### **(B) Response to complaint**

#### **(i) Local educational agency response**

##### **(I) In general**

If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include—



- (aa) an explanation of why the agency proposed or refused to take the action raised in the complaint;
- (bb) a description of other options that the IEP Team considered and the reasons why those options were rejected;
- (cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and
- (dd) a description of the factors that are relevant to the agency's proposal or refusal.

## **(II) Sufficiency**

A response filed by a local educational agency pursuant to subclause (I) shall not be construed to preclude such local educational agency from asserting that the parent's due process complaint notice was insufficient where appropriate.

### **(ii) Other party response**

Except as provided in clause (i), the non-complaining party shall, within 10 days of receiving the complaint, send to the complaint a response that specifically addresses the issues raised in the complaint.

## **(C) Timing**

The party providing a hearing officer notification under subparagraph (A) shall provide the notification within 15 days of receiving the complaint.

## **(D) Determination**

Within 5 days of receipt of the notification provided under subparagraph (C), the hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements of subsection (b)(7)(A), and shall immediately notify the parties in writing of such determination.

## **(E) Amended complaint notice**

### **(i) In general**

A party may amend its due process complaint notice only if—

(I) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B); or

(II) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

### **(ii) Applicable timeline**

The applicable timeline for a due process hearing under this subchapter shall recommence at the time the party files an amended notice, including the timeline under subsection (f)(1)(B).

## **(d) Procedural safeguards notice**

### **(1) In general**

#### **(A) Copy to parents**

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only 1 time a year, except that a copy also shall be given to the parents—

(i) upon initial referral or parental request for evaluation;

(ii) upon the first occurrence of the filing of a complaint under subsection (b)(6); and

(iii) upon request by a parent.

#### **(B) Internet website**

A local educational agency may place a current copy of the procedural safeguards notice on its Internet website if such website exists.

## **(2) Contents**

The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to—

- (A) independent educational evaluation;
- (B) prior written notice;
- (C) parental consent;
- (D) access to educational records;
- (E) the opportunity to present and resolve complaints, including—
  - (i) the time period in which to make a complaint;
  - (ii) the opportunity for the agency to resolve the complaint; and
  - (iii) the availability of mediation;
- (F) the child's placement during pendency of due process proceedings;
- (G) procedures for students who are subject to placement in an interim alternative educational setting;
- (H) requirements for unilateral placement by parents of children in private schools at public expense;
- (I) due process hearings, including requirements for disclosure of evaluation results and recommendations;
- (J) State-level appeals (if applicable in that State);

(K) civil actions, including the time period in which to file such actions; and

(L) attorneys' fees.

## **(e) Mediation**

### **(1) In general**

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a complaint pursuant to subsection (b)(6), to resolve such disputes through a mediation process.

### **(2) Requirements**

Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process—

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this subchapter; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) Opportunity to meet with a disinterested party.—A local educational agency or a State agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with—

(i) a parent training and information center or community parent resource center in the State established under section 1471 or 1472 of this title; or

(ii) an appropriate alternative dispute resolution entity,

to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) List of qualified mediators.—The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) Costs.—The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) Scheduling and location.—Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) Written agreement.—In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that—

(i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;

(ii) is signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(iii) is enforceable in any State court of competent jurisdiction or in a district court of the United States.

(G) Mediation discussions.—Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.

**(f) Impartial due process hearing**

**(1) In general**

**(A) Hearing**

Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

**(B) Resolution session**

**(i) Preliminary meeting**

Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint—

(I) within 15 days of receiving notice of the parents' complaint;

(II) which shall include a representative of the agency who has decisionmaking authority on behalf of such agency;

(III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and

(IV) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint,

unless the parents and the local educational agency agree in writing to waive such meeting, or agree to use the mediation process described in subsection (e).

**(ii) Hearing**

If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this subchapter shall commence.

**(iii) Written settlement agreement**

In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is—

(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

**(iv) Review period**

If the parties execute an agreement pursuant to clause (iii), a party may void such agreement within 3 business days of the agreement's execution.

**(2) Disclosure of evaluations and recommendations**

**(A) In general**

Not less than 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing.

**(B) Failure to disclose**

A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

### **(3) Limitations on hearing**

#### **(A) Person conducting hearing**

A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum—

(i) not be—

(I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or

(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) possess knowledge of, and the ability to understand, the provisions of this chapter, Federal and State regulations pertaining to this chapter, and legal interpretations of this chapter by Federal and State courts;

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

#### **(B) Subject matter of hearing**

The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

#### **(C) Timeline for requesting hearing**

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation



for requesting such a hearing under this subchapter, in such time as the State law allows.

**(D) Exceptions to the timeline**

The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to—

- (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
- (ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

**(E) Decision of hearing officer**

**(i) In general**

Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

**(ii) Procedural issues**

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—

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

**(iii) Rule of construction**

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

**(F) Rule of construction**

Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.

**(g) Appeal**

**(1) In general**

If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

**(2) Impartial review and independent decision**

The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such review shall make an independent decision upon completion of such review.

**(h) Safeguards**

Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall be accorded—

- (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
- (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;
- (3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic findings of fact and decisions, which findings and decisions—

(A) shall be made available to the public consistent with the requirements of section 1417(b) of this title (relating to the confidentiality of data, information, and records); and

(B) shall be transmitted to the advisory panel established pursuant to section 1412(a)(21) of this title.

**(i) Administrative procedures**

**(1) In general**

**(A) Decision made in hearing**

A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2).

**(B) Decision made at appeal**

A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2).

**(2) Right to bring civil action**

**(A) In general**

Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

**(B) Limitation**

The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this subchapter, in such time as the State law allows.

### **(C) Additional requirements**

In any action brought under this paragraph, the court—

- (i) shall receive the records of the administrative proceedings;
- (ii) shall hear additional evidence at the request of a party; and
- (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

### **(3) Jurisdiction of district courts; attorneys' fees**

#### **(A) In general**

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

#### **(B) Award of attorneys' fees**

##### **(i) In general**

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs—

- (I) to a prevailing party who is the parent of a child with a disability;
- (II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

**(ii) Rule of construction**

Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

**(C) Determination of amount of attorneys' fees**

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

**(D) Prohibition of attorneys' fees and related costs for certain services**

**(i) In general**

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if—

(I) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(II) the offer is not accepted within 10 days; and

(III) the court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

**(ii) IEP Team meetings**

Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

**(iii) Opportunity to resolve complaints**

A meeting conducted pursuant to subsection (f)(1)(B)(i) shall not be considered—

(I) a meeting convened as a result of an administrative hearing or judicial action; or

(II) an administrative hearing or judicial action for purposes of this paragraph.

**(E) Exception to prohibition on attorneys' fees and related costs**

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

**(F) Reduction in amount of attorneys' fees**

Except as provided in subparagraph (G), whenever the court finds that—

(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A),

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

**(G) Exception to reduction in amount of attorneys' fees**

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

**(j) Maintenance of current educational placement**

Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

**(k) Placement in alternative educational setting**

**(1) Authority of school personnel**

**(A) Case-by-case determination**

School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.

**(B) Authority**

School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate

interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).

**(C) Additional authority**

If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 1412(a)(1) of this title although it may be provided in an interim alternative educational setting.

**(D) Services**

A child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall—

- (i) continue to receive educational services, as provided in section 1412(a)(1) of this title, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and
- (ii) receive, as appropriate, a functional behavioral assessment, behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

**(E) Manifestation determination**

**(i) In general**

Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of



a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall 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 to determine—

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

**(ii) Manifestation**

If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

**(F) Determination that behavior was a manifestation**

If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall—

(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);

(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

### **(G) Special circumstances**

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a 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.

### **(H) Notification**

Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section.

### **(2) Determination of setting**

The interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1) shall be determined by the IEP Team.

### **(3) Appeal**

### **(A) In general**

The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

**(B) Authority of hearing officer**

**(i) In general**

A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

**(ii) Change of placement order**

In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may—

(I) return a child with a disability to the placement from which the child was removed; or

(II) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others.

**(4) Placement during appeals**

When an appeal under paragraph (3) has been requested by either the parent or the local educational agency—

(A) the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(C), whichever occurs first, unless the parent and the State or local educational agency agree otherwise; and

(B) the State or local educational agency shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing.

**(5) Protections for children not yet eligible for special education and related services**

**(A) In general**

A child who has not been determined to be eligible for special education and related services under this subchapter and who has engaged in behavior that violates a code of student conduct, may assert any of the protections provided for in this subchapter if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

**(B) Basis of knowledge**

A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred—

- (i) 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;
- (ii) the parent of the child has requested an evaluation of the child pursuant to section 1414(a)(1)(B) of this title; or
- (iii) the teacher of the child, or other personnel of the local educational agency, 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.

**(C) Exception**

A local educational agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to section 1414 of this title or has refused services under this subchapter or the child has been evaluated and it was determined that the child was not a child with a disability under this subchapter.

**(D) Conditions that apply if no basis of knowledge**

**(i) In general**

If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B) or (C)) prior to taking disciplinary measures against the child, the child may be subjected to disciplinary measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

**(ii) Limitations**

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 this subchapter, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

**(6) Referral to and action by law enforcement and judicial authorities**

**(A) Rule of construction**

Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their

responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

**(B) Transmittal of records**

An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

**(7) Definitions**

In this subsection:

**(A) Controlled substance**

The term "controlled substance" means a drug or other substance identified under schedule I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

**(B) Illegal drug**

The term "illegal drug" means a controlled substance but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act [21 U.S.C. 801 et seq.] or under any other provision of Federal law.

**(C) Weapon**

The term "weapon" has the meaning given the term "dangerous weapon" under section 930(g)(2) of title 18.

**(D) Serious bodily injury**

The term "serious bodily injury" has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18.

**(I) Rule of construction**

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

### **(m) Transfer of parental rights at age of majority**

#### **(1) In general**

A State that receives amounts from a grant under this subchapter may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)—

(A) the agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this subchapter transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this subchapter transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

#### **(2) Special rule**

If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another

appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this subchapter.

**(n) Electronic mail**

A parent of a child with a disability may elect to receive notices required under this section by an electronic mail (e-mail) communication, if the agency makes such option available.

**(o) Separate complaint**

Nothing in this section shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

(Pub. L. 91–230, title VI, §615, as added Pub. L. 108–446, title I, §101, Dec. 3, 2004, 118 Stat. 2715.)



## **28 U.S.C. § 1292. Interlocutory decisions**

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

(2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;

(3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction—

(1) of an appeal from an interlocutory order or decree described in subsection (a) or (b) of this section in any case over which the court would have jurisdiction of an appeal under section 1295 of this title; and

(2) of an appeal from a judgment in a civil action for patent infringement which would otherwise be appealable to the United States Court of Appeals for the Federal Circuit and is final except for an accounting.

(d)(1) When the chief judge of the Court of International Trade issues an order under the provisions of section 256(b) of this title, or when any judge of the Court of International Trade, in issuing any other interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(2) When the chief judge of the United States Court of Federal Claims issues an order under section 798(b) of this title, or when any judge of the United States Court of Federal Claims, in issuing an interlocutory order, includes in the order a statement that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that an immediate appeal from that order may materially advance the ultimate termination of the litigation, the United States Court of Appeals for the Federal Circuit may, in its discretion, permit an appeal to be taken from such order, if application is made to that Court within ten days after the entry of such order.

(3) Neither the application for nor the granting of an appeal under this subsection shall stay proceedings in the Court of International Trade or in the Court of Federal Claims, as the case may be, unless a stay is ordered by a judge of the Court of International Trade or of the Court of Federal Claims or by the United States Court of Appeals for the Federal Circuit or a judge of that court.

(4)(A) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction of an appeal from an interlocutory order of a district court of the United States, the District Court of Guam, the District Court of the Virgin Islands, or the District Court for the Northern Mariana Islands, granting or denying, in whole or in part, a motion to transfer an action to the United States Court of Federal Claims under section 1631 of this title.

(B) When a motion to transfer an action to the Court of Federal Claims is filed in a district court, no further proceedings shall be taken in the district court until 60 days after the court has ruled upon the motion. If an appeal is taken from the district court's grant or denial of the motion, proceedings shall be further stayed until the appeal has been decided by the Court of Appeals for the Federal Circuit. The stay of proceedings in the district court shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary. However, during the period in which proceedings are stayed as provided in this subparagraph, no transfer to the Court of Federal Claims pursuant to the motion shall be carried out.

(e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

(June 25, 1948, ch. 646, 62 Stat. 929; Oct. 31, 1951, ch. 655, §49, 65 Stat. 726; Pub. L. 85–508, §12(e), July 7, 1958, 72 Stat. 348; Pub. L. 85–919, Sept. 2, 1958, 72 Stat. 1770; Pub. L. 97–164, §125, Apr. 2, 1982, 96 Stat. 36; Pub. L. 98–620, title IV, §412, Nov. 8, 1984, 98 Stat. 3362; Pub. L. 100–702, title V, §501, Nov. 19, 1988, 102 Stat. 4652; Pub. L. 102–572, title I, §101, title IX, §§902(b), 906(c), Oct. 29, 1992, 106 Stat. 4506, 4516, 4518.)

**28 U.S.C. § 1331. Federal question**

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

(June 25, 1948, ch. 646, 62 Stat. 930; Pub. L. 85–554, §1, July 25, 1958, 72 Stat. 415; Pub. L. 94–574, §2, Oct. 21, 1976, 90 Stat. 2721; Pub. L. 96–486, §2(a), Dec. 1, 1980, 94 Stat. 2369.)

## **42 U.S.C § 1983**

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

(R.S. § 1979; [Pub. L. 96–170, § 1](#), Dec. 29, 1979, [93 Stat. 1284](#); [Pub. L. 104–317, title III, § 309\(c\)](#), Oct. 19, 1996, [110 Stat. 3853](#).)

### 34 CFR § 300.17

*Free appropriate public education* or *FAPE* means special education and related services that—

- (a) Are provided at public expense, under public supervision and direction, and without charge;
- (b) Meet the standards of the SEA, including the requirements of this part;
- (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.320 through 300.324.

(Authority: 20 U.S.C. 1401(9))

### **34 CFR § 300.514**

**(a) *Finality of hearing decision.*** A decision made in a hearing conducted pursuant to §§ 300.507 through 300.513 or §§ 300.530 through 300.534 is final, except that any party involved in the hearing may appeal the decision under the provisions of paragraph (b) of this section and § 300.516.

**(b) *Appeal of decisions; impartial review.***

(1) If the hearing required by § 300.511 is conducted by a public agency other than the SEA, any party aggrieved by the findings and decision in the hearing may appeal to the SEA.

(2) If there is an appeal, the SEA must conduct an impartial review of the findings and decision appealed. The official conducting the review must—

(i) Examine the entire hearing record;

(ii) Ensure that the procedures at the hearing were consistent with the requirements of due process;

(iii) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 300.512 apply;

(iv) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(v) Make an independent decision on completion of the review; and

(vi) Give a copy of the written, or, at the option of the parents, electronic findings of fact and decisions to the parties.

**(c) *Findings and decision to advisory panel and general public.*** The SEA, after deleting any personally identifiable information, must—

(1) Transmit the findings and decisions referred to in paragraph (b)(2)(vi) of this section to the State advisory panel established under § 300.167; and

(2) Make those findings and decisions available to the public.

**(d) *Finality of review decision.*** The decision made by the reviewing official is final unless a party brings a civil action under § 300.516.

(Authority: 20 U.S.C. 1415(g) and (h)(4), 1415(i)(1)(A), 1415(i)(2))



### **34 CFR § 300.518**

(a) Except as provided in § 300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.

(c) If the complaint involves an application for initial services under this part from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned three, the public agency is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services under § 300.300(b), then the public agency must provide those special education and related services that are not in dispute between the parent and the public agency.

(d) If the hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for purposes of paragraph (a) of this section.

(Authority: 20 U.S.C. 1415(j))