STATE BOARD OF EDUCATION
STATE DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION SERVICES
ADMINISTRATIVE CODE

CHAPTER 290-8-9
SPECIAL EDUCATION SERVICES

ANY RULE CONTAINED IN 290-8-9-.01 THROUGH 290-8-9-.11 REQUIRED ONLY BY STATE BOARD OF EDUCATION RULE AND NOT REQUIRED BY FEDERAL AND/OR STATE LAW IS INDICATED IN BOLD ITALICS.

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290-8-9-.00 Definitions.

These definitions are frequently used in the Alabama Administrative Code.

(1) **Consent**. Consent means that:

(a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

(c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at anytime. If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

(2) **Core Academic Subjects**. Core academic subjects means English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography.

(3) **Day; Business Day; School Day.**

(a) Day means calendar day unless otherwise indicated as business day or school day.

(b) Business day means Monday through Friday, except for Federal and State holidays (unless holidays are specifically included in the designation of business day).

(c) School day means any day, including a partial day that children are in attendance at school for instructional purposes. School day has the same meaning for all children in school, including children with and without disabilities.

(4) **Educational Performance.** Educational performance means academic, social/emotional, and/or communication skills.

(5) **Elementary School**. 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.

(6) **Evaluation**. Evaluation means procedures used to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs.

(7) **Free Appropriate Public Education (FAPE)**. 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; and

(d) Are provided in conformity with an individualized education program (IEP) and its requirements.

(8) **Homeless Children**. Homeless children has the meaning given the term homeless children and youths in section 725 (42 U.S.C. 11434a) of the McKinney-Vento Homeless Assistance Act, as amended, 42 U.S.C. 11431 et seq.

(9) **IDEA**. IDEA means the *Individuals with Disabilities Education Act*, as amended.

(10) **Individualized Education Program (IEP)**. Individualized education program or IEP means a written statement for a child with a disability that is developed, reviewed, and revised in accordance with these rules.

(11) **Individualized Family Service Plan (IFSP)**. Individualized family service plan or IFSP means a written plan developed jointly by the family, Early Intervention (EI) service coordinator and providers for eligible children birth to three years and their family.

(12) **Local Education Agency (LEA).**

(a) Local educational agency or LEA 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 or secondary schools in a city, county, township, school district, or other political subdivision of a State, or for a 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:

1. An educational service agency; and

2. Any other public institution or agency having administrative control and direction of a public elementary school or secondary school, including a public nonprofit charter school that is established as an LEA under State law.

(13) **Native Language**.

(a) Native language, when used with respect to an individual who is limited English proficient, means the following:

1. The language normally used by that individual, or, in the case of a child, the language normally used by the parents of the child, except as provided in paragraph (a)2. of this section.

2. In all direct contact with a child (including evaluation of the child), the language normally used by the child in the home or learning environment.

(b) For an individual with deafness or blindness, or for an individual with no written language, the mode of communication is that normally used by the individual (such as sign language, Braille, or oral communication).

(14) **Parent**.

(a) Parent means:

1. A biological or adoptive parent of a child;

2. A foster parent, unless State law, regulations, or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;

3. A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State [in the "legal custody" of a state agency]);

4. An individual acting in the place of a biological 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

5. A surrogate parent who has been appointed in accordance with these rules.

(b) Except as provided in the last paragraph of this section, the biological or adoptive parent, when attempting to act as the parent under these rules and when more than one party is qualified under paragraph (a) of this section to act as a parent, must be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational decisions for the child. If a judicial decree or order identifies a specific person or persons under paragraphs (a)1. through 4. of this section to act as the "parent" of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the "parent" for purposes of this section.

(15) **Participating Agency**. Participating agency means any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under Part B of the IDEA.

(16) **Personally Identifiable**. Personally identifiable means information that contains the name of the child; the child's parent, or other family member; the address of the child; a personal identifier, such as the child's social security number or student number; or a list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

(17) **Public Agency**. Public agency includes the SEA, LEAs, ESAs, nonprofit public charter schools that are not otherwise included as LEAs or ESAs and are not a school of an LEA or ESA, and any other political subdivisions of the State that are responsible for providing education to children with disabilities.

(18) **Related Services**.

(a) General. Related services means transportation and such developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education, and includes speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, early identification and assessment of disabilities in children, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services for diagnostic or evaluation purposes. Related services also include school health services and school nurse services, social work services in schools, and parent counseling and training.

(b) Exception: services that apply to children with surgically implanted devices, including cochlear implants.

1. Related services do not include a medical device that is surgically implanted, the optimization of that device's functioning (e.g., mapping), maintenance of that device, or the replacement of that device.

2. Nothing in paragraph (b)(1) of this section:

(i) Limits the right of a child with a surgically implanted device (e.g., cochlear implant) to receive related services (as listed in paragraph

(a) of this section) that are determined by the IEP Team to be necessary for the child to receive FAPE.

(ii) Limits the responsibility of a public agency to appropriately monitor and maintain medical devices that are needed to maintain the health and safety of the child, including breathing, nutrition, or operation of other bodily functions, while the child is transported to and from school or is at school; or

(iii) Prevents the routine checking of an external component of a surgically implanted device to make sure it is functioning properly.

(c) Individual related services terms defined. The terms used in this definition are defined as follows:

1. Audiology includes:

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lip-reading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of children, parents, and teachers regarding hearing loss; and

(vi) Determination of children's needs for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

2. Counseling services means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

3. Early identification and assessment of disabilities in children means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

4. Interpreting services includes:

(i) The following, when used with respect to children who are deaf or hard of hearing: Oral transliteration services, cued language transliteration services, sign language transliteration and interpreting services, and transcription services, such as communication access real-time translation (CART), C-Print, and TypeWell; and

(ii) Special interpreting services for children who are deaf-blind.

5. Medical services means services provided by a licensed physician to determine a child's medically related disability that results in the child's need for special education and related services.

6. Occupational therapy means services provided by a qualified occupational therapist; and includes:

(i) Improving, developing, or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning if functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

7. Orientation and mobility services:

(i) Means services provided to blind or visually impaired children by qualified personnel to enable those students to attain systematic orientation to and safe movement within their environments in school, home, and community; and

(ii) Includes teaching children the following, as appropriate:

(I) Spatial and environmental concepts and use of information received by the senses (such as sound, temperature and vibrations) to establish, maintain, or regain orientation and line of travel (e.g., using sound at a traffic light to cross the street);

(II) To use the long cane or a service animal to supplement visual travel skills or as a tool for safely negotiating the environment for children with no available travel vision;

(III) To understand and use remaining vision and distance low vision aids; and

(IV) Other concepts, techniques, and tools.

8. Parent counseling and training means assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's IEP or IFSP.

9. Physical therapy means services provided by a qualified physical therapist.

10. Psychological services includes:

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning;

(iv) Consulting with other staff members in planning school programs to meet the special educational needs of children as indicated by psychological tests, interviews, direct observation, and behavioral evaluations;

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents; and

(vi) Assisting in developing positive behavioral intervention strategies.

11. Recreation includes:

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

12. Rehabilitation counseling services means services provided by qualified personnel in individual or group sessions that focus specifically on career development, employment preparation, achieving independence, and integration in the workplace and community of a student with a disability. The term also includes vocational rehabilitation services provided to a student with a disability by vocational rehabilitation programs funded under the *Rehabilitation Act of 1973*, as amended, 29 U.S.C. 701 et seq.

13. School health services and school nurse services means health services that are designed to enable a child with a disability to receive FAPE as described in the child's IEP. School nurse services are services provided by a qualified school nurse. School health services are services that may be provided by either a qualified school nurse or other qualified person.

14. Social work services in schools includes:

(i) Preparing a social or developmental history on a child with a disability;

(ii) Group and individual counseling with the child and family;

(iii) Working in partnership with parents and others on those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school;

(iv) Mobilizing school and community resources to enable the child to learn as effectively as possible in his or her educational program; and

(v) Assisting in developing positive behavioral intervention strategies.

15. Speech-language pathology services includes:

(i) Identification of children with speech or language impairments;

(ii) Diagnosis and appraisal of specific speech or language impairments;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language impairments;

(iv) Provision of speech and language services for the habilitation or prevention of communicative impairments; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language impairments.

16. Transportation includes:

(i) Travel to and from school and between schools;

(ii) Travel in and around school buildings; and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a child with a disability.

(19) **Secondary School**. 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.

(20) **Services Plan**. Services plan means a written statement that describes the special education and related services the LEA will provide to a parentally-placed child with a disability enrolled in a private school who has been designated to receive services, including the location of the services and any transportation necessary, and is developed and implemented in accordance with these rules.

(21) **Special Education.**

(a) General.

1. Special education means specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability, including:

(i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(ii) Instruction in physical education.

2. Special education includes each of the following, if the services otherwise meet the requirements of paragraph (a)1. of this section:

(i) Speech-language pathology services;

(ii) Travel training; and

(iii) Vocational education.

(b) Individual special education terms defined. The terms in this definition are defined as follows:

1. At no cost means that all specially-designed instruction is provided without charge, but does not preclude incidental fees that are normally charged to nondisabled students or their parents as a part of the regular education program.

2. Physical education means:

(i) The development of:

(I) Physical and motor fitness;

(II) Fundamental motor skills and patterns; and

(III) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports); and

(ii) Includes special physical education, adapted physical education, movement education, and motor development.

3. Specially designed instruction means adapting, as appropriate, to the needs of an eligible child under these rules, the content, methodology, or delivery of instruction:

(i) To address the unique needs of the child that result from the child's disability; and

(ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

4. Travel training means providing instruction, as appropriate, to children with significant cognitive disabilities, and any other children with

disabilities who require this instruction, to enable them to:

(i) Develop an awareness of the environment in which they live; and

(ii) Learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community).

5. Vocational education means organized educational programs that are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career not requiring a baccalaureate or advanced degree.

(22) **State Educational Agency (SEA)**. State educational agency or SEA 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.

(23) **Supplementary Aids and Services**. Supplementary aids and services means aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate in accordance with these rules.

(24) **Transition Services**.

(a) Transition services means a coordinated set of activities for a child with a disability that:

1. 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 postsecondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;

2. Is based on the individual child's needs, taking into account the child's strengths, preferences, and interests; and includes:

(i) Instruction;

(ii) Related services;

(iii) Community experiences;

(iv) The development of employment and other post-school adult living objectives; and

(v) If appropriate, acquisition of daily living skills and provision of a functional vocational evaluation.

(b) Transition services for children with disabilities may be special education, if provided as specially designed instruction, or a related service, if required to assist a child with a disability to benefit from special education.

(25) **Ward of the State**.

(a) General. Ward of the State means a child who, as determined by the State where the child resides, is:

1. A foster child;

2. A ward of the State (in the "legal custody" of a state agency); or

3. In the custody of a public child welfare agency.

(b) Exception. Ward of the State does not include a foster child who has a foster parent who meets the definition of a parent in accordance with these rules.

Author: Joseph B. Morton
Statutory Authority: Code of Ala. 1975, Title 16, Chapter 39; 20 U.S.C. 1400 et seq.; 34 CFR §300.
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290-8-9-.01 Child Identification.

(1) **Child Find.**

(a) LEA's serving children with disabilities must develop and implement procedures that ensure that all children within their jurisdiction, birth to twenty-one, regardless of the severity of their disability, and who need special education and related services are identified, located, and evaluated. Child Find also applies to children with disabilities who attend private schools, including children attending religious schools, within the LEA's jurisdiction, highly mobile children with disabilities (e.g., migrant children), homeless children,

or children who are wards of the State and children who are suspected of having a disability and are in need of special education, even though they have not failed, been retained in a course or grade or are advancing from grade to grade.

(b) Child Find includes a practical method of determining which children with disabilities are currently receiving needed special education and related services and is designed to ensure the equitable participation of parentally-placed private school children with disabilities, as well as an accurate count of these children.

(c) Each LEA in which private, including religious, elementary schools and secondary schools are located must, in carrying out the Child Find provisions, include parentally-placed private school children who reside in a state other than the state in which the private schools are located.

(d) For children who are transitioning from Part C to Part B preschool programs, LEA's are required to make FAPE available to each eligible child residing in their jurisdiction no later than the child's third birthday and have an IEP developed and implemented for the child by that date. If the child's third birthday occurs during the summer months, the child's IEP Team will determine when special education services will begin. LEA's must participate in a transition planning conference arranged by the EI service provider in order to experience a smooth and effective transition to preschool programs.

(2) **Special Rule**. The public agency shall ensure that:

(a) Prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and

(b) Data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, was provided to the child's parents.

(3) **Early Intervening Services.**

(a) An LEA may provide early intervening services to students from kindergarten through twelfth grade (with particular emphasis on students in kindergarten through third grade) who need additional academic and behavioral support in order to be successful in the regular education environment prior to referral for special education. In order to provide these coordinated early intervening services, an LEA may not use more than 15% of the money received under IDEA Part B for any fiscal year.

(b) Activities. In implementing coordinated, early intervening services under this section, an LEA may carry out activities that include:

1. Professional development (which may be provided by entities other than LEAs) for teachers and other school staff to enable such personnel to deliver scientifically based academic and behavioral interventions, including scientifically based literacy instruction, and, where appropriate, instruction on the use of adaptive and instructional software; and

2. Providing educational and behavioral evaluations, services, and supports, including scientifically based literacy instruction.

(c) Construction. Nothing in this section shall be construed to either limit or create a right to FAPE under Part B of the IDEA or to delay appropriate evaluation of a child suspected of having a disability.

(d) Reporting. Each LEA that develops and maintains coordinated, early intervening services under this section must annually report to the SEA on:

1. The number of children served under this section who received early intervening services; and

2. The number of children served under this section who received early intervening services and subsequently receive special education and related services under Part B of the IDEA during the preceding two-year period.

(e) Coordination with the Elementary and Secondary Act of 1965 (ESEA). Funds made available to carry out this section may be used to carry out coordinated, early intervening services aligned with activities funded by, and carried out under the ESEA if those funds are used to supplement, and not supplant, funds made available under the ESEA for the activities and services assisted under this section.

(4) **Intervention Strategies in the General Education Class.** Before a child is referred for special education evaluation or concurrently during the evaluation process, intervention strategies must be implemented in the general education program and monitored by the Problem Solving Team (PST) for an appropriate period of time (a minimum of eight weeks), and be determined unsuccessful. This rule may be waived for a child who has severe problems that require immediate attention, for three- and four-year olds, for five-year olds who have not been in kindergarten, for children with articulation, voice, or fluency problems only, for children with a medical diagnosis of traumatic brain injury, and for a child who has been referred by his or her parents.

(5) **Screening for Instructional Purposes**. The screening of a child 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.

(6) **Referral for Initial Evaluation**. Public agencies must develop and implement procedures regarding the processing of referrals for special education evaluations.

(a) A parent of a child or a public agency may initiate a request for an initial evaluation to determine if the child is a child with a disability.

(b) For a parent who makes a verbal referral because he or she is unable to complete a written referral, the public agency must obtain information from that parent and complete the written referral.

(c) Public agencies may not limit referrals by the number per year or the time of year that referrals are accepted.

(d) Information must be gathered to determine if there are any environmental, cultural, language, or economic differences that might mask a student's true abilities and thereby affect the student's performance in the areas evaluated.

(e) The IEP Team must review the referral, including documentation of intervention strategies and processes, and determine in a timely manner if the child will be evaluated for special education services. If the IEP Team determines that the child should not be evaluated for special education services, written notice, that meets the notice requirements in these rules, must be given to the parents and the child must be referred to the BBSST. If the IEP Team determines that the child should be evaluated for special education services, the public agency must obtain the parent's written consent for the evaluation.

Author: Joseph B. Morton
Statutory Authority: Code of Ala. 1975, Title 16, Chapter 39; 20 U.S.C. 1400 et seq.; 34 CFR §300.
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290-8-9-.02 Evaluations.

Public agencies must develop and implement procedures to evaluate those children suspected of having a disability that adversely affects their educational performance and who may need special education (specially designed instruction) and related services.

(1) **Evaluation Requirements.** If the IEP Team determines that the child should be evaluated, the evaluation must be conducted as follows:

(a) Before an initial evaluation can be conducted, the public agency must, after providing notice consistent with these rules, obtain informed written consent as required. Parental consent for initial evaluation must not be construed as consent for initial provision of special education and related services.

1. The public agency must make reasonable efforts to obtain the informed written consent from the parent for an initial evaluation to determine whether the child is a child with a disability. If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue an evaluation through mediation and/or due process in accordance with these rules. The public agency does not violate its Child Find or evaluation obligations if it declines to pursue the evaluation. If a parent of a child who is enrolled in a private school or who is home schooled at their own expense does not provide consent for the initial evaluation or fails to respond to the request, the public agency may not use the override procedures of mediation and/or due process.

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

(i) Despite reasonable efforts to do so, the public agency cannot discover the whereabouts of the parent of the child;

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

(iii) 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.

(b) The public agency has sixty (60) calendar days from the date the public agency receives a parent's signed consent for initial evaluation to conduct and complete an initial evaluation. The public agency has thirty (30) calendar days from the completion of the evaluation to determine initial eligibility. The timeline runs regardless of any scheduled interruptions in the scholastic year or the scheduled summer vacation. EXCEPTION:

(1) The timeline does not apply if the parent of a child repeatedly fails or refuses to produce the child for the evaluation.

(2) The timeline does not apply to the public agency if a child enrolls in a school of another public agency after the relevant timeframe has begun and prior to completion of the initial evaluation. This only applies if the receiving public agency is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and receiving public agency agree to a specific time when the evaluation will be completed.

(c) Before the initial provision of special education and related services to a child with a disability, a full and individual evaluation of the child's educational needs must be conducted.

(d) As part of an initial evaluation and as part of all required reevaluations, the IEP Team and other qualified professionals, as appropriate, must:

1. Review existing evaluation data on the child, including evaluations and information provided by the parents of the child, current classroom-based local, or state assessments and classroom-based observations; and observations by teachers and related services providers; and

2. On the basis of the review of existing evaluation data and input from the child's parents, identify

what additional data, if any, are needed to determine:

(i) Whether the child has a disability, and the educational needs of the child; or, in the case of a reevaluation of a child, whether the child continues to have a disability; and the educational needs of the child;

(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 IEP of the child and to participate, as appropriate, in the general education curriculum.

(e) The public agency must administer any assessments and other evaluation measures as may be needed to produce the data identified by the IEP Team.

(f) When conducting a review as part of an initial evaluation or reevaluation, the IEP Team must conduct its review through a meeting. The parent of a child with a disability and a public agency may agree to use alternative means of meeting participation, such as video conferences and conference calls.

(g) The child must be assessed in all areas related to the suspected disability including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(h) No single measure or assessment may be used as the sole criterion for determining whether the child has a disability or in determining an appropriate educational program for a child.

(i) Tests must be provided and administered in the child's native language or other mode of communication, and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer.

(j) Standardized tests must be validated for the specific purpose for which they are used and administered by trained and knowledgeable personnel in conformance with the instructions provided by the producer of the test.

(k) Testing and evaluation materials and procedures used for the purposes of evaluation and placement of children with disabilities for services must be selected and administered so as not to be discriminatory on a racial or cultural basis. Tests and evaluative materials selected and administered should be sensitive to environmental, cultural, linguistic, and economic differences.

(l) A variety of assessment tools and strategies must be utilized to gather relevant functional, developmental, and academic information, including information provided by the parent, that may assist in determining whether the child is a child with a disability and the content of the child's individualized education program, including information related to enabling the child to be involved and progress in the general curriculum or, for preschool children, to participate in age-appropriate activities.

(m) Technically sound instruments that may assess the relevant contribution of cognitive and behavioral factors in addition to physical or developmental factors must be utilized.

(n) Assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child must be used.

(o) Assessments and other evaluation materials must include those tailored to assess specific areas of educational need and not merely those that are designed to provide a single general intelligence quotient.

(p) Assessments must be selected and administered to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (unless those skills are the factors that the test purports to measure).

(q) Children with special needs, such as those who have significant communication needs, limited English proficiency, hearing impairments, visual impairments, multiple disabilities, language impairments, physical

impairments, etc., must be administered evaluations appropriately developed and/or modified for their needs.

(r) Materials and procedures used to assess a child with limited English proficiency must be selected and administered to ensure that they measure the extent to which the child has a disability and needs special education, rather than measuring the child's English language skills.

(s) If an assessment is not conducted under standard conditions, a description of the extent to which it varied from standard conditions (e.g., the qualifications of the person administering the test or the method of test administration) must be included in the evaluation report.

(t) In evaluating each child with a disability, the evaluation must be sufficiently comprehensive to identify all of the child's special education and related services needs, whether or not commonly linked to the disability category in which the child has been identified.

(u) Interview versions of test instruments that require parental input must be completed by school personnel in conjunction with parents. Interviews may be completed by telephone, home visit, or other mutually agreed upon arrangements if allowed by the test publishers.

(v) Assessments of children with disabilities who transfer from one education agency to another education agency in the same academic year must be coordinated with the child's prior and subsequent schools, as necessary and as expeditiously as possible, to ensure prompt completion of full evaluations.

(2) **Length of Time Evaluations are Valid for Initial Eligibility Determination**. Any evaluation is considered valid for determining initial eligibility for special education services if that evaluation is conducted within one year to the date of the IEP Team meeting to discuss what additional data, if any, is needed to determine eligibility.

(3) **Individual Intellectual Evaluations**. Public agencies must conduct or have conducted individual intellectual evaluations in accordance with the following rules:

(a) Individual intellectual evaluations may only be conducted by clinical psychologists, school psychologists, school psychometrists, clinical psychiatrists, and counselors qualified to administer such evaluations. Graduate students currently enrolled in approved training programs leading to being qualified to

administer individual intellectual evaluations may administer individual intellectual tests as part of training if the test is part of a reevaluation and written reports are approved and cosigned by a person properly qualified.

(b) *The person conducting the individual intellectual evaluation must develop a comprehensive written report.*

(c) The person conducting the individual intellectual evaluation may not independently determine eligibility for special education services.

(4) **Independent Educational Evaluations.** Parents have the right to obtain an independent educational evaluation of their child subject to the following criteria:

(a) Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained and the agency criteria, including the location of the evaluation and the qualifications of the examiner that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to obtain an independent educational evaluation.

(b) A public agency may not impose conditions or timelines related to obtaining an independent educational evaluation, except as described in (a) above.

(c) For purposes of this section:

1. Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

2. Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.

(d) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an individual evaluation(s) (e.g., OT, PT, achievement) obtained by the public agency. If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either file a due process hearing request to show that its evaluation is appropriate or ensure that the independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing that the

evaluation obtained by the parent did not meet agency criteria. If the final decision in a due process hearing is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(e) If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child, and may be presented by any party as evidence at a due process hearing regarding that child.

(f) If a due process hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(g) If the parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he/she objects to the agency's evaluation. However, the explanation by the parent may not be required and the public agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend its evaluation.

(h) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an individual evaluation(s) with which the parent disagrees.

(5) **Out-of-State Evaluations**. Decisions regarding out-of-state evaluations used to determine initial eligibility for special education services and the length of time these evaluations are valid, are at the discretion of the public agency.

(6) **Reevaluation**.

(a) Once the initial evaluation to determine whether a child has a disability is completed, any subsequent evaluation is considered to be a reevaluation that requires parental consent as described herein and in accordance with the consent procedures. However, for students who transfer from out of state, any evaluation conducted is an initial evaluation that requires notice and consent procedures in accordance with the procedures for initial evaluation.

(b) A reevaluation must be conducted if the IEP Team determines that the education or related services needs, including improved academic achievement and functional

performance of the child warrant a reevaluation, or if the child's parent or teacher requests a reevaluation. The public agency must maintain written documentation of the IEP Team's decision regarding reevaluation and a copy must be given to parent.

(c) Reevaluations shall not occur more than once a year, unless the parent and the public agency agree otherwise, and must occur at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary.

(d) 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 educational needs of the child, the public agency must provide written notice to the child's parents of that determination; and the reasons for the determination; and the right of the parents to request an assessment to determine continued eligibility. The public agency will not be required to conduct an assessment to determine continued eligibility, unless requested to do so by the child's parents.

(e) Public agencies must obtain parental consent prior to obtaining additional evaluation data as part of the reevaluation of a child with a disability, unless the public agency can document reasonable efforts (at least two attempts) to obtain consent with no response from the parent. If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures of mediation and/or due process. The public agency does not violate its Child Find or evaluation obligations if it declines to pursue mediation and/or due process.

(f) A reevaluation is not required before a child with a disability exits school due to graduation with a regular or advanced diploma or reaching the maximum age of eligibility (21), but prior written notice must be given. A regular high school diploma does not include an alternative degree that is not fully aligned with the State's academic standards, such as a certificate or a general educational development credential (GED). The public agency must provide the child a summary of his or her academic achievement and functional performance including recommendations on how to assist the child in meeting the child's postsecondary goals.

(g) A public agency must evaluate a child with a disability before determining that a child is no longer a child with a disability.

(h) To the extent possible, the public agency should encourage the consolidation of reevaluation meetings with other IEP Team meetings for the child.

(7) **Other Consent Requirements Regarding Evaluations**.

(a) Parental consent is not required before:

1. Reviewing existing data as part of an evaluation or a reevaluation; or

2. Administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.

(b)1. If a parent of a child who is home schooled or placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or the reevaluation, or the parent fails to respond to a request to provide consent, the public agency may not use the mediation and or due process override procedures; and

2. The public agency is not required to consider the child as eligible for services.

(c) The public agency must document its attempts to obtain parental consent.

(8) **State and District wide Assessments**. Public agencies must develop and implement procedures to ensure that every child with a disability is provided the opportunity to participate in the same state and district wide assessments as his or her nondisabled peers. The IEP Team must also determine appropriate accommodations, if necessary, for the child's participation. These accommodations must be documented through the IEP Team process. If the public agency administers district wide assessments in addition to the state required assessments, the public agency is responsible for developing an alternate assessment for the district wide assessment should it be determined by the IEP Team that the child will participate in an alternate assessment.

Author: Joseph B. Morton
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290-8-9-.03 Disability Definitions, Criteria, And Minimum Required Evaluative Components.

Each public agency must develop and implement procedures to identify and evaluate children suspected of having a disability that adversely affects their educational performance and who, as a result, may need special education (specially designed instruction) and related services. The evaluations listed in this rule are the required minimum evaluations to be administered prior to determining initial eligibility for special education services. Professional judgment should be used to determine if the results of any of the required evaluations are reliable sources of information or if other assessment data may prove to be more accurate indicators of the child's level of functioning. The IEP Team may determine, on a case-by-case basis, that other evaluations are needed. Vision and hearing screenings (traditional or functional, as appropriate) must be the first evaluations conducted for all children suspected of having a disability, unless otherwise indicated.

(1) **Autism.**

(a) Definition. Autism means a developmental disability that significantly affects verbal and nonverbal communication and social interaction generally evident before age three (3) that adversely affects educational performance. This includes other pervasive developmental disorders. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or changes in daily routines, and unusual responses to sensory experiences. Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disability, as defined in these rules. A child who manifests the characteristics of autism after age three (3) could be identified as having autism if the criteria herein are satisfied.

(b) Criteria.

1. Evidence that vision/hearing screening results are satisfactory prior to proceeding with evaluations.

2. Score on a rating scale (normed for the appropriate diagnostic group) indicating the presence of an autism spectrum disorder.

3. Medical, clinical, psychiatric, or school psychologist evaluation, or an assessment by a qualified person (e.g., psychometrist) trained in the area of autism evaluation.

4. Evidence that communication/language skills and/or social skills adversely affect educational performance.

5. Evidence of current characteristics/behaviors typical of an autism spectrum disorder.

(c) Minimum Evaluative Components.

1. Vision/hearing screening.

2. A normed rating scale that is used to document the presence of an autism spectrum disorder.

3. Comprehensive evaluation and report to be completed by a medical doctor, clinical psychiatrist, school psychologist or other qualified person (i.e., psychometrist) trained in the area of autism evaluation.

4. Communication/language evaluation and a behavior rating scale and/or an adaptive behavior rating scale. Additional performance measures may include developmental, intellectual, achievement (individual or group), motor, criterion-referenced tests, curriculum-based assessments, work samples, portfolios, observation.

5. Observation in both a structured and an unstructured school environment or natural setting and a structured interview with the parent/primary caregiver for all students in Grades K-12. An observation in a natural setting and a structured interview with the parents/primary caregiver for all preschool aged children.

(2) **Deaf-Blindness**.

(a) Definition. Deaf-Blindness means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and

educational needs that they cannot be accommodated in special education programs solely for children with deafness or children with blindness.

(b) Criteria.

1. Audiological data indicating that the individual has a hearing impairment.

2. Optometric and/or ophthalmic data indicating that the individual has a visual impairment.

3. Evidence of severe communication needs and evidence of severe educational needs related to the functional use of hearing and vision.

(c) Minimum Evaluative Components.

1. Audiological evaluation.

2. Optometric/Opthalmic evaluation.

3. Performance measures such as developmental scores, diagnostic test(s), observations, communication evaluations, orientation and mobility assessments that document how the impairment adversely affects the educational performance of the child.

(3) **Developmental Delay**.

(a) Definition. Developmental Delay means a delay that adversely affects daily life and/or educational performance in one or more of the following developmental areas:

1. Adaptive,

2. Cognitive,

3. Communication,

4. Social or emotional, and/or,

5. Physical, and results in the need for special education and related services. A child may become eligible for this area of disability on his or her third birthday. A child identified with a developmental delay must be reevaluated prior to his or her ninth birthday to determine continued eligibility for special education services. At age nine, a child can no longer be eligible in the area of developmental delay and must be eligible in another area of disability in order to continue

special education services. If a child turns nine during the school year and is eligible for an area of disability, that child may continue to receive special education services in his or her current program for the remainder of that school year. A child who turns nine during the school year and is not eligible for another area of disability will be served in general education programs for the remainder of the school year.

(b) Criteria.

1. Evidence that vision/hearing screening results are satisfactory prior to proceeding with evaluations.

2. The standard score in one developmental domain must be at least two standard deviations below the mean (70 or below) on a standardized, norm-referenced instrument; or the standard scores on two or more developmental domains must be at least one and a half standard deviations below the mean (77 or below) on a standardized, norm-referenced instrument.

3. Scores obtained according to the requirements in 2. of this section must be validated by supporting evaluations in the same identified area(s) of delay. If the standard score on the first instrument yields a delay of at least two standard deviations (70 or below) in one or more domains, then at least one domain must be validated (70 or below) by another norm-referenced or criterion-referenced instrument. If the standard score on the first instrument yields a delay of at least one and a half standard deviations (77 or below) in two or more domains, at least two of the domains must be validated (77 or below) by another norm-referenced or criterion-referenced instrument. When using a criterion-referenced instrument that does not yield standard scores, age equivalent scores may be used to determine the percent of delay and must be converted to standard scores. The score must be at least a 30% delay (two standard deviations below the mean) in one domain or a 25% delay (one and a half standard deviations below the mean) in two or more domains.

4. Evidence that the developmental delay adversely affects the child's performance in age-appropriate activities must be documented.

(c) Minimum Evaluative Components.

1. Vision/hearing screening.

2. A standardized, norm-referenced instrument(s) that evaluates all five developmental domains.

3. An additional standardized, norm-referenced instrument(s) or a criterion-referenced instrument that supports the one or two identified areas of delay from the first instrument according to the requirements.

4. Evidence of adverse effect.

(i) A family interview documenting strengths, needs, and concerns.

(ii) An observation of the child in an age-appropriate environment.

(d) Public agencies may identify children in another disability area instead of using the area of developmental delay. However, if a public agency chooses to use the term developmental delay, which may only be used for ages 3-9, the agency must use the criteria above.

(4) **Emotional Disability.**

(a) Definition. Emotional Disability means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:

1. An inability to learn that cannot be explained by intellectual, sensory, or health factors;

2. An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

3. Inappropriate types of behavior or feelings under normal circumstances;

4. A general pervasive mood of unhappiness or depression; or

5. A tendency to develop physical symptoms or fears associated with personal or school problems. Emotional disability includes schizophrenia. The term does not include children who are socially maladjusted, unless it is determined that they have an emotional disability as defined herein.

(b) Criteria.

1. Evidence that vision/hearing screening results are satisfactory prior to proceeding with evaluations.

2. Evidence that the problem is not due to intellectual, sensory, or health factors.

3. Standard scores (total or composite) on two out of three of the same norm-referenced behavior rating scale must be at least two standard deviations above or below the mean (70, depending on the rating scale). Ratings from three or more scales will be obtained from at least three independent raters, one of whom may be the parent or the child through a self-report.

4. Evidence that the emotional disability adversely affects the child's academic performance and/or social/emotional functioning in the school environment.

5. Evidence that the emotional disability is exhibited over a long period of time (typically six months) and to a marked degree, and that the child's educational performance is adversely affected.

6. Observational data that documents the emotional disability in two or more educational settings.

(c) Minimum Evaluative Components.

1. Vision/hearing screening.

2. Individual intellectual evaluation.

3. Administration of three of the same norm-referenced behavior rating scale by three or more independent raters who have had knowledge of the child for at least six weeks. One of the raters may be the parent or the child. If a self-report is used, it must be a version of the same behavior rating scale.

4. Individual educational achievement evaluation and a statement of how the impairment adversely affects the child’s academic performance and/or the child’s social/emotional functioning .

5. Documentation that the emotional disability is exhibited over a long period of time (typically six months) to a marked degree that adversely affects educational performance. Documentation must include teacher, parent and/or child interview(s); documentation of environmental, socio-cultural, and/

or ethnic information (e.g., Environmental, Cultural and Economic Concerns checklist); and at least one of the following:

(i) Observation of the child in an educational environment other than the required observation.

(ii) Counselor reports.

(iii) Language evaluation.

(iv) Anecdotal records from classroom teacher(s) or other LEA personnel.

(v) Documentation may also include at least one of the following, if available:

(I) Clinical psychological/psychiatric reports.

(II) School psychologist reports.

(III) Medical reports.

6. Observation by a qualified professional in two or more educational settings (one structured setting and one unstructured setting).

(d) Reevaluation for continued eligibility in the area of emotional disability. At the first reevaluation, if the IEP Team determines that additional data are needed and after conducting the assessments, the student no longer meets all criteria for emotional disability, the IEP Team must choose one of the following options:

1. Based on existing evaluation data and/or additional data gathered, and documentation that student's behavior does not adversely affect educational performance, the IEP Team must determine that the student is no longer eligible for special education services in the area of emotional disability.

2. Based on existing data and/or additional data gathered, the IEP Team may determine that the student continues to be eligible in the area of emotional disability based on the student's continued need for intensive support. The IEP Team must include on the eligibility report a written description of all behavioral strategies/interventions that are currently in place for the student. The IEP Team may determine that the student continues to be eligible for special education services in the area of

emotional disability based on existing data and/or additional data gathered even though all criteria are not met (including scores two standard deviations above or below the mean, depending on the instrument, on two out of three behavior rating scales). The IEP Team may use this option only once at reevaluation. At the next reevaluation for continued eligibility, the IEP Team may not determine the student eligible for emotional disability unless all criteria are met (including scores two standard deviations above or below the mean, depending on the instrument, on two out of three behavior rating scales).

(5) **Hearing Impairment**.

(a) Definition. Hearing Impairment means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance. This term includes both deaf and hard-of-hearing.

(b) Criteria.

1. Evidence that vision screening results are satisfactory prior to proceeding with evaluations.

2. Audiological data indicating that the child has a hearing impairment.

3. Evidence that the educational performance is adversely affected by the disability.

(c) Minimum Evaluative Components.

1. Vision screening.

2. Audiological evaluation.

3. Performance measures such as group or individual intelligence scores, individual/group education achievement and/or diagnostic test(s), classroom observation, review of child's existing records (i.e. attendance, health).

(6) **Intellectual Disability.**

(a) Definition. Mental Retardation means significantly subaverage general intellectual functioning existing concurrently with significant limitations in adaptive behavior and manifested during the developmental period that adversely affects the child's educational performance.

(b) Criteria.

1. Evidence that vision/hearing screening results are satisfactory prior to proceeding with evaluations.

2. Total or full-scale intelligence quotient must be at least two standard deviations below the mean (70 or below).

3. Adaptive behavior scales.

(i) Total score on at least one adaptive behavior scale must be at least two standard deviations below the mean (70 or below). A school version of an adaptive behavior scale is required to be completed. The public agency must make reasonable efforts to obtain a home version of the adaptive behavior scale. If a home version is not obtained, a second school version is required. The school version(s) and the home version of the adaptive behavior scale must be conducted using the same instrument. The home version of the adaptive behavior scale can be completed by the parent through a home visit, parent/teacher conference, telephone interview, or other mutually agreed upon arrangement. It is the responsibility of the public agency to ensure that the parent receives the assistance needed to complete the adaptive behavior scale. The public agency must make at least two attempts to have the parent complete the home version of the adaptive behavior scale within the sixty (60) days of receiving parental consent for initial evaluation and document such attempts on the eligibility report. However, the absence of a home version of the adaptive behavior scale must not delay the eligibility determination timeline.

(ii) For students with individual intellectual scores in the significant cognitive disability range (55 and below), the total score on at least one adaptive behavior scale must be at least 1.5 standard deviations below the mean (77 or below). As in 3(i) above, a school version of an adaptive behavior scale is required and reasonable efforts to obtain a home version must be made.

4. Evidence that the disability adversely affects educational performance. (Note: Achievement scores at least one standard deviation below the mean should confirm and validate the intellectual functioning and adaptive behavior scales).

5. Determination of any environmental, cultural, language, or economic differences that might mask the

student's true abilities. If at least one concern is noted, the team must consider administering a non-traditional intelligence test.

(c) Minimum Evaluative Components.

1. Vision/hearing screening.

2. Individual intellectual evaluation.

3. Individual adaptive behavior evaluation (Note: School and home versions must be conducted using the same instrument).

4. Individual educational achievement evaluation (Note: Screening instruments may not be used to determine eligibility).

5. Environmental, cultural, language, and economic information.

(d) Exception to the current rule. Minority students in the seventh grade and older in the 2000-2001 school year and who were identified prior to July 1, 1999, will continue to be reevaluated under the criteria in this exception rule. Non-minority students in the fourth grade and older in the 2000-2001 school year and who were identified prior to July 1, 1999, will continue to be reevaluated under the criteria in this exception rule. However, if a qualified team, including the parent, deems it appropriate to use the criteria in the current rule, they may do so, but written justification for this action must be documented in the eligibility report.

1. Definition. Intellectual Disability means significantly subaverage general intellectual functioning resulting in or associated with concurrent impairments in adaptive behavior and manifested during the developmental period that adversely affects the student's educational performance. Students classified as having intellectual disability must have a total or full-scale intelligence quotient of seventy (70) or below and deficits in overall adaptive behavior.

2. Evaluations Required.

(i) Vision and hearing screening.

(ii) Adaptive behavior scale.

(iii) Individual educational achievement and/or diagnostic test(s).

(iv) Individual intellectual evaluation.

(v) Professional judgment should be used to determine if the results of any of the above evaluations are reliable sources of information, or if other assessment data (e.g. developmental scales, systematic observation) may prove to be a more accurate indicator of the student's level of functioning.

(7) **Multiple Disabilities**.

(a) Definition. Multiple Disabilities means concomitant impairments (such as intellectual disability-blindness, or intellectual disability-orthopedic impairment), the combination of which causes such severe educational needs that they cannot be accommodated in special education programs solely for one of the impairments. Multiple disabilities does not include deaf-blindness.

(b) Criteria. The child must meet all eligibility criteria for two or more areas of disabilities as defined in these rules. Eligibility criteria for the two or more areas of disabilities must be documented on the eligibility report.

(c) Minimum Evaluative Components. Refer to minimum evaluative components required under each area of disability.

(8) **Orthopedic Impairment**.

(a) Definition. Orthopedic Impairment means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by a congenital anomaly, impairments caused by disease (e.g., poliomyelitis, bone tuberculosis), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures). If a medical diagnosis is presented, the medical diagnosis alone is not enough to justify being identified in the area of orthopedic impairment. The impairment must adversely affect the educational performance of the child.

(b) Criteria.

1. Evidence that vision/hearing screening results are satisfactory prior to proceeding with evaluations.

2. Evidence of an orthopedic impairment.

3. Performance measures that document how the child's disability affects his or her involvement and progress in the general education curriculum or, for preschool children how the disability affects the child's participation in age-appropriate activities.

4. A statement providing evidence that the orthopedic impairment adversely affects educational performance, and for initial evaluation for special education services only, evidence of interventions/ accommodations that have been tried in regular education class(es) or the natural environment (for preschool children) but were deemed unsuccessful.

(c) Minimum Evaluative Components.

1. Vision/hearing screening.

2. Documentation of the orthopedic impairment (medical diagnosis/physician's statement).

3. Performance measures such as developmental scores, individual and/or group intelligence scores, individual and/or group educational achievement and/ or diagnostic test(s) scores, classroom observations, motor assessments, criterion-referenced tests, curriculum-based assessments, review of child's existing records (i.e. attendance, health).

4. A statement of how the impairment adversely affects the educational performance of the child, and for initial evaluations for special education services only, documentation of interventions/ accommodations must include a written description of all interventions/accommodations that have been tried in the regular education class(es) or the natural environment (for preschool children) but were deemed unsuccessful. Interventions/ accommodations may be documented through teacher interview(s) that are specific to the child's disability, classroom observation(s) that are specific to the child's disability, health records, anecdotal records, therapy evaluations, and intervention strategies.

(9) **Other Health Impairment**.

(a) Definition. Other Health Impairment means having limited strength, vitality or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder,

diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette Syndrome. If a medical diagnosis is presented, the medical diagnosis alone is not enough to justify being identified in the area of other health impairment. The impairment must adversely affect the educational performance of the child.

(b) Criteria for Other Health Impairment.

1. Evidence that vision/hearing screening results are satisfactory prior to proceeding with evaluations.

2. Evidence of a health impairment.

3. Performance measures that document how the child's disability affects his or her involvement and progress in the general education curriculum, or for preschool children, how the disability affects the child's participation in age-appropriate activities.

4. A statement providing evidence that the health impairment adversely affects the educational performance of the child and, for initial evaluation for special education services only evidence of interventions/accommodations that have been tried in regular education class(es) or the natural environment (for preschool children) but were deemed unsuccessful.

(c) Minimum Evaluative Components for Other Health Impairment.

1. Vision/hearing screening.

2. Documentation of the health impairment (medical diagnosis/statement).

3. Performance measures such as developmental scores, individual and/or group intelligence scores, individual and/or group education achievement and/or diagnostic test(s) scores, classroom observations, motor assessments, criterion-referenced tests, curriculum-based assessments, review of child's existing records, (i.e. attendance, health).

4. A statement of how the impairment adversely affects the educational performance of the child and, for initial evaluations for special education services only, documentation of interventions/ accommodations must include a written description of all interventions/accommodations that have been tried in the regular education class(es) or the natural

environment (for preschool children) but were deemed unsuccessful. Interventions/ accommodations may be documented through teacher interview(s) that are specific to the child's disability, classroom observation(s) that are specific to the child's disability, health records, anecdotal records, therapy evaluations, and intervention strategies.

(d) Criteria for Other Health Impairment - Attention Deficit Disorder (ADD) or Attention Deficit Hyperactivity Disorder (ADHD).

1. Evidence that vision/hearing screening results are satisfactory prior to proceeding with evaluations.

2. Evidence that the health impairment adversely affects the educational performance of the child.

3. Standard scores (total or composite) on two out of three of the same norm-referenced scale designed specifically to determine the presence of ADD or ADHD must be at least two standard deviations above or below the mean (70, depending on the rating scale). Ratings from three or more scales must be obtained from at least three independent raters, one of whom may be the parent.

4. For initial evaluations only, evidence of interventions/accommodations that have been tried in regular education class(s) or the natural environment (for preschool children) but were deemed unsuccessful.

(e) Minimum Evaluative Components for Other Health Impairment - ADD or ADHD.

1. Vision/hearing screening.

2. A statement of how the health impairment adversely affects the educational performance of the child and documentation of performance measures such as individual and/or group intelligence scores, individual and/or group education achievement and/or diagnostic test(s) scores, classroom observations, criterion-referenced tests, curriculum-based assessments, review of child's existing records, (i.e. attendance, health, discipline).

3. Administration of three of the same norm-referenced behavior rating scale, ADD or ADHD scale by three or more independent raters who have had knowledge of the child for at least six weeks. One of the raters may be the parent or the child. If a self-

report is used, it must be a version of the same behavior rating scale, ADD or ADHD scale.

4. For initial evaluations for special education services only, documentation of interventions/ accommodations must include a written description of all interventions/ accommodations that have been tried in the regular education class(es) or the natural environment (for preschool children) but were deemed unsuccessful. Interventions/ accommodations may be documented through teacher interview(s) that are specific to the child's disability, classroom observation(s) that are specific to the child's disability, health records, anecdotal records, therapy evaluations, and intervention strategies.

(10) **Specific Learning Disability.**

(a) Definition. Specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations, including conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Specific learning disability does not include learning problems that are primarily the result of visual, hearing, or motor disabilities, of intellectual disability, of emotional disability, or of environmental, cultural, or economic disadvantage.

(b) General.

1. When determining whether a child has a specific learning disability a public agency will not be required to take into consideration whether a child has a severe discrepancy between intellectual ability and achievement. A public agency may use a process based on the child's response to scientific, research-based intervention. A public agency may use other alternative research-based procedures for determining whether a child has a specific learning disability.

2. For children suspected of having a specific learning disability, the Eligibility Committee and/or IEP Team must also include:

(i) The child's regular education teacher, or

(ii) If the child does not have a regular education teacher, a regular education teacher qualified to teach a child of his or her age, or

(iii) For a child of less than school age, an individual qualified by the SEA to teach a child of his or her age, and

(iv) At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-1anguage pathologist, or remedial reading teacher.

(c) Criteria.

1. Evidence that vision/hearing screening results are satisfactory prior to proceeding with evaluations.

2. A public agency may determine that a child has a specific learning disability if:

(i) The child does not achieve adequately for the child's age or meet State-approved grade-1evel standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child’s age or State-approved grade level standards: oral expression, listening comprehension, written expression, basic reading skills, reading fluency skills, reading comprehension, mathematics calculation, or mathematics problem solving.

(ii) The child does not make sufficient progress to meet age or State-approved grade-1evel standards in one or more of the areas identified in paragraph 2.(i) of this section when using a process based on the child's response to scientific, research-based intervention; or

(iii) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-1evel standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments.

3. The group determines that the existence of specific learning disability is not the result of a visual, hearing, or motor disability; intellectual disability; emotional disability; cultural factors; environmental or economic disadvantage or limited English proficiency.

4. Data to ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math.

5. The public agency must ensure that the child is observed in the child's learning environment (including the regular classroom setting) to document the child's academic performance and behavior in the areas of difficulty.

6. Documentation of work samples in the area of suspected disability.

(d) Minimum Evaluative Components for Specific Learning Disability.

1. Vision/hearing screening.

2. Documentation of a specific learning disability:

(i) Documentation that the child does not achieve adequately for the child's age or meet State-approved grade-1evel standards in one or more of the following areas, when provided with learning experiences and instruction appropriate for the child’s age or State-approved grade level standards: oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, or mathematics problem solving. Public agencies that choose to use the predicted achievement model must use either the table provided by the State Department of Education, Special Education Services, or the predicted achievement tables as provided by test publishers. Obtained achievement scores must be greater than one standard deviation unit or at least 16 points below the predicted achievement score using instruments with a common metric (mean of 100 and standard deviation of 15). Documentation of the severe discrepancy must be included in the written report/eligibility determination. When using the predicted achievement model to calculate the severe discrepancy, administer:

(I) An age-appropriate norm-referenced individually administered intelligence test (full scale score).

(II) An age-appropriate, individually administered, standardized, norm-referenced

achievement test to determine a student's obtained achievement score(s) using one of the following two methods:

I. Using an obtained total test score from the administration of a test of achievement, or using an obtained test score from the administration of a test in the area of suspected disability (e.g., a test of reading, a test of math, a test of written expression, or a test of language).

II. Using obtained composite scores or subtest scores from the administration of two different achievement tests in the same area(s) of suspected disability and /or skill deficit;

(ii) Documentation that the child has participated in a process that assesses the child's response to scientific, research-based intervention including:

(I) The instructional strategies used and the student-centered data collected; and

(II) The documentation that the child's parents were notified about: I. The State's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided; II. Strategies for increasing the child's rate of learning; and III. The parents' right to request an evaluation; or

(iii) Documentation of a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade-1evel standards, or intellectual development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments.

3. Documentation that the existence of specific learning disability is not the result of a visual, hearing, or motor disability; intellectual disability; emotional disability; cultural factors; environmental or economic disadvantage or limited English proficiency must include but is not limited to adaptive behavior scale, behavior rating scale, environmental cultural economic concerns checklist.

4. Data that demonstrate that the child was provided appropriate instruction in regular education settings, delivered by qualified personnel; and data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents.

5. Observation.

(i) The group responsible for determining whether a child has a specific learning disability, must decide to:

(I) Use information from an observation in routine classroom instruction and monitoring of the child's performance that was done before the child was referred for an evaluation; or

(II) Have at least one member of the group conduct an observation of the child's academic performance in the regular classroom after the child has been referred for an evaluation and parental consent is obtained.

(ii) In the case of a child of less than school age or out of school, a group member must observe the child in an environment appropriate for a child of that age.

6. Work samples in the area of difficulty.

(e) Specific documentation for the eligibility determination.

1. For a child suspected of having a specific learning disability, the documentation of the determination of eligibility must contain a statement of:

(i) Whether the child has a specific learning disability;

(ii) The basis for making the determination, including an assurance that the determination has been made in accordance with eligibility requirements;

(iii) The relevant behavior, if any, noted during the observation of the child and the relationship

of that behavior to the child's academic functioning;

(iv) The educationally relevant medical findings, if any;

(v) Whether the child does not achieve adequately for the child's age or to meet State-approved grade-1evel standards; and

(vi) Whether the child does not make sufficient progress to meet age or State-approved grade-1evel standards; or the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, State-approved grade level standards or intellectual development;

(vii) The determination of the group concerning the effects of a visual, hearing, or motor disability; intellectual disability; emotional disability; cultural factors; environmental or economic disadvantage; or limited English proficiency on the child's achievement level; and

(viii) If the child has participated in a process that assesses the child's response to scientific, research-based intervention:

(I) The instructional strategies used and the student-centered data collected; and

(II) The documentation that the child's parents were notified about: I. The State's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided; II. Strategies for increasing the child's rate of learning; and III. The parents' right to request an evaluation.

2. Each group member must certify in writing whether the report reflects the member's conclusion. If it does not reflect the member's conclusion, the group member must submit a separate statement presenting the member's conclusions.

(f) Exception to the current rule. All children referred prior to July 1, 1998, and who have been identified as specific learning disabled using the simple standard score discrepancy criteria will continue to be reevaluated with this exceptions criteria until such time

as the child is no longer eligible for services. However, if a qualified team, including the parent, deems it appropriate to use the current criteria, they may do so, but written justification for this action must be documented in the eligibility report. The simple standard score discrepancy criteria are as follows:

1. Definition. Specific Learning Disabilities means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. Children with specific learning disabilities will demonstrate a severe discrepancy between intellectual ability and achievement in one or more of the following areas: basic reading skills, reading comprehension, mathematical calculation, mathematical reasoning, oral expression, listening comprehension, or written expression.

2. Eligibility Criteria. The eligibility team must consider a variety of criteria in the identification of children with specific learning disabilities. No single criterion or specific number of characteristics can be used in identifying children with specific learning disabilities. Rather, the age-appropriateness of observed behaviors and the frequency, intensity, and duration of a child's learning problems are critical in distinguishing specific learning disabilities from learning problems resulting from such factors as low motivation, underachievement, or inadequate instruction. The eligibility team must consider each of the following criteria in identifying children with specific learning disabilities. These criteria must be documented in the written report of the eligibility team.

(i) Appropriate Learning Opportunities. The eligibility team must determine that children have been provided appropriate learning opportunities commensurate with age and ability level. Prior to referral, efforts should be made in the regular school program to adapt or modify curriculum, materials, and/or instruction to accommodate the child for at least six weeks. These interventions might include, but are not limited to, changes in teaching methods, behavior management strategies, scheduling, grouping, seating arrangements, or consultation with providers of school psychological services. Documentation of prereferral intervention

strategies must be provided for the eligibility team. This should identify the interventions that were implemented and document that the child still failed to achieve. Documentation must be included in the written report of the eligibility team.

(ii) Intellectual Functioning. A total or full-scale score must be used. When school personnel suspect that the intellectual ability is not accurately reflected by an obtained total or full-scale IQ score, other measures or procedures that assess cognitive abilities may be used. This documentation must be included in the written report of the eligibility team.

(iii) Deficit in Achievement. When provided with appropriate learning opportunities, children with specific learning disabilities do not achieve commensurate with age and ability level. Their achievement in one or more of the following areas is below expectancy: basic reading skills, reading comprehension, mathematical calculation, mathematical reasoning, oral expression, listening comprehension, and/or written expression. Assessment of actual achievement must be based on the teacher referral, classroom observation, work samples, individually administered diagnostic tests, and other related information. This documentation must be included in the written report of the eligibility team.

(iv) Severe Discrepancy Between Intellectual Ability and Achievement. Children with specific learning disabilities usually exhibit a severe discrepancy between intellectual ability and achievement/diagnostic test standard scores. The standard score on the individual achievement/ diagnostic test(s) must be at least one standard deviation unit below the child's intelligence quotient through ten years of age and must be at least one and a half standard deviation units below the child's intelligence quotient if the child is eleven years of age or older. This documentation must be included in the written report of the eligibility team.

(v) Exclusion of Other Primary Conditions. The area of specific learning disabilities does not include children whose learning problems are primarily the result of visual, hearing or motor disabilities; mental disabilities; emotional disability; or environmental, cultural or

economic disadvantage. This documentation must be included in the written report of the eligibility team.

3. Evaluations Required.

(i) Vision and hearing screening.

(ii) Behavior rating scale.

(iii) Individual educational achievement and/or diagnostic test(s).

(iv) Individual intellectual evaluation.

(v) Environmental, cultural, and economic concerns checklist.

(vi) At least one team member other than the child's regular teacher must observe the child's academic performance in the regular classroom setting. In the case of a child of less than school age or out-of-school, a team member must observe the child in an environment appropriate for a child of that age.

(vii) Work samples.

(viii) Professional judgment should be used to determine if the results of any of the above evaluations are reliable sources of information, or if other assessment data (e.g. developmental scales, systematic observation) may prove to be a more accurate indicator of the child's level of functioning.

(11) **Speech or Language Impairment**.

(a) Definition. Speech or Language Impairment means a communication disorder in the area of articulation, voice, fluency, or language that adversely affects a child's educational performance.

(b) Criteria.

1. Articulation.

(i) Evidence that vision/hearing screening results are satisfactory prior to proceeding with evaluations.

(ii) Errors are primarily characterized by substitutions, distortions, additions, and

omissions. Phonological errors are in excess of developmental expectations and nondevelopmental processes may be noted. Errors are not stimulable. Connected speech may be unintelligible or may be intelligible only to familiar listeners or within known contexts.

(iii) Children who exhibit a tongue thrust are not eligible for speech/language services unless they also exhibit an associated articulation disorder. Speech/language services are not a required service for children who exhibit tongue thrust only.

(iv) A child does not meet the criteria for an articulation disorder if the sole assessed disability is an abnormal swallowing pattern.

(v) A child does not meet the criteria for an articulation disorder as a result of dialectal patterns or second language acquisition patterns.

2. Voice.

(i) Evidence that vision/hearing screening results are satisfactory prior to proceeding with evaluations.

(ii) The child’s voice is abnormal in vocal quality, pitch, loudness, resonance and/or duration and is inappropriate for the child's age and gender. Deviance is noticeable and distracting to any listener. The disorder adversely affects communication.

(iii) The voice disorder is not the result of a temporary problem such as normal voice change, allergies, asthma, tonsils and/or adenoid removal or other such conditions.

3. Fluency.

(i) Evidence that vision/hearing screening results are satisfactory prior to proceeding with evaluations.

(ii) Abnormally dysfluent speech is observed during conversation and/or structured speaking tasks. Listeners are distracted by the child’s dysfluent speech and distracting concomitant behaviors may be observed. The child may exhibit fear or avoidance of speaking.

(iii) The child’s ability to communicate is adversely affected by the disorder. Developmental dysfluencies attributable to normal maturation patterns are not considered as a disability

4. Language.

(i) Evidence that vision/hearing screening results are satisfactory prior to proceeding with evaluations.

(ii) Syntactic, morphologic, semantic, and/or pragmatic errors are observed. The child’s ability to comprehend or use spoken language is adversely affected.

(iii) A total language standard score or quotient of at least two standard deviations below the mean (70 or below) on a standardized comprehensive language test containing both receptive and expressive components must be obtained.

(iv) Dialectal differences or English as a second language is not considered a language disorder.

(c) Minimum Evaluative Components. Evaluations must be completed in the area of suspected disability as follows:

1. Articulation/Phonological Disorder.

(i) A minimum of one standardized or formal measure that assesses the child's articulation/ phonological skills.

(ii) Written documentation of a stimulability assessment as part of the standardized or formal measure or as a separate assessment.

(iii) Written documentation of the impact of intelligibility on connected speech.

(iv) Written documentation of an examination of oral structures and functioning.

(v) The eligibility team must obtain written documentation from the child’s teacher and/or caregiver that the child’s articulation skills adversely affect his or her involvement and/or progress in the general education curriculum and/ or environment.

(vi) A summary of all required evaluations must be included on the eligibility report.

2. Voice Disorder.

(i) A minimum of one formal measure that assesses the child's pitch, loudness, quality, inflection and resonance.

(ii) A written description of the child's voice patterns in a variety of tasks, in a minimum of two separate settings; one in the classroom and one in a non-structured environment that includes social/ peer interaction. Diagnostic observations should occur over a period of six weeks or less, if appropriate.

(iii) Medical evaluation by a physician, preferably an otorhinolaryngologist (ENT). Written documentation from the physician stating that the child is medically cleared to participate in voice therapy is required prior to the eligibility meeting. The public agency is responsible for the cost of the evaluation if no other means of payment is available.

(iv) The eligibility team must obtain written documentation from the child's teacher and/or caregiver that the voice disorder adversely affects his or her involvement and/or progress in the general education curriculum and/or environment.

(v) A summary of all required evaluations must be included on the eligibility report.

3. Fluency Disorder.

(i) A minimum of one formal measure that assesses the child's dysfluency patterns.

(ii) A written description of the child's speaking patterns in more than one speaking task and in more than one setting.

(iii) Interviews with the child, teachers, and/or parent, documenting strengths and concerns regarding the fluency disorder.

(iv) The eligibility team must obtain written documentation from the child's teacher and/or caregiver that the fluency disorder adversely affects his or her involvement and/or progress in

the general education curriculum and/or environment.

(v) A summary of all required evaluations must be included on the eligibility report.

4. Language Disorder.

(i) A minimum of one standardized or formal comprehensive measure that assesses both receptive and expressive language skills must be administered. A child meets eligibility criteria when the total language standard score or quotient of at least two standard deviations below the mean (70 or below) on a standardized comprehensive language test containing both receptive and expressive components is obtained.

(ii) If the total language standard score does not meet the criteria of at least two standard deviations below the mean (70 or below) then a standard score at least two standard deviations below the mean (70 or below) in one area (receptive or expressive) of a comprehensive language test and a standard score or quotient at least two standard deviations below the mean (70 or below) on an assessment of a specific language component (semantics, syntax, morphology, processing, phonological awareness, or pragmatics) must be used. The assessment of a specific language component must be in the same area as the deficit score on the comprehensive language test (i.e. if the deficit area is in the receptive component, then a test designed to assess receptive skills should be administered). If the standard score or quotient on the second measure is at least two standard deviations below the mean (70 or below), then the child's language disorder meets eligibility criteria.

(iii) The eligibility team must obtain written documentation from the child's teacher and/or caregiver that the child's language impairment adversely affects his or her involvement and/or progress in the general education curriculum and/or environment.

(iv) A summary of all required evaluations in each specific area must be included on the eligibility report.

(12) **Traumatic Brain Injury**.

(a) Definition. Traumatic Brain Injury means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment or both, that adversely affects educational performance. The term applies to open or closed head injuries resulting in impairments in one or more areas such as cognition, language, memory, attention, reasoning, abstract thinking, judgment, problem-solving, sensory, perceptual and motor abilities, psychosocial behavior, physical functions, information processing, and speech. The term does not apply to brain injuries that are congenital or degenerative, or brain injuries induced by birth trauma.

(b) Criteria.

1. Evidence that vision/hearing screening results are satisfactory prior to proceeding with evaluations.

2. Documentation of a traumatic brain injury.

3. Evidence that the traumatic brain injury adversely affects educational performance.

(c) Minimum Evaluative Components. In emergency situations, professional judgment should be used to initially place the child.

1. Vision/hearing screening.

2. Medical/neurological evaluation.

3. Individual educational achievement evaluation to serve as initial post-trauma baseline measure.

(13) **Visual Impairment**.

(a) Definition. Visual Impairment means a visual impairment that, even with correction, adversely affects a child's educational performance. The term includes both partial sight and blindness.

(b) Criteria.

1. Evidence that hearing screening results are satisfactory prior to proceeding with evaluations.

2. Optometric/ophthalmic data indicating that the individual has a visual impairment.

3. Evidence of visual functioning that adversely affects educational performance as evaluated by a certified vision specialist.

(c) Minimum Evaluative Components.

1. Hearing screening.

2. Optometric and/or ophthalmic evaluation indicating that the individual has a visual impairment.

3. Documentation of educational problems that even after appropriate accommodations, the disability continues to affect educational performance. Educational problems may be assessed by a certified vision specialist through one or more of the following:

(i) A learning media assessment,

(ii) Functional vision assessment, and/or

(iii) An orientation and mobility evaluation.

Author: Joseph B. Morton
Statutory Authority: Code of Ala. 1975, Title 16, Chapter 39; 20 U.S.C. 1401(3)(A)(B), 34 CFR§300.
History: **Amended:** August 12, 1980. **Repealed:** April 10, 1986; New: April 10, 1986; effective May 30, 1986. December 13, 1990 deleted preschool caseloads from 290-080-090-.05(11) effective January 21, 1991. August 8, 1991 adopted 290-080-090-.05.48ER effective August 8, 1991. October 10, 1991 adopted ER as regular rule effective November 19, 1991. **Repealed:** June 10, 1993, New: June 10, 1993; effective August 1, 1993. **Amended:** Filed May 20, 1998; effective June 24, 1998. **Repealed and New Rule:** Filed September 9, 1999; effective October 14, 1999 (Ed. Note: This was rule was previously 290-080-090-.04). **Amended:** Filed December 14, 2000; effective January 18, 2001. **Amended:** Filed August 9, 2001; effective September 13, 2001. **Repealed and New Rule:** Filed August 11, 2005; effective September 15, 2005. **Repealed and New Rule:** Filed June 14, 2007; effective July 19, 2007. **Amended:** Filed August 4, 2008; effective September 8, 2008. **Amended:** Filed April 14, 2011; effective May 19, 2011.

290-8-9-.04 Eligibility And Consent For Services.

Public agencies must develop and implement procedures to ensure that children will be properly identified according to the definitions, criteria, and minimum evaluative components set forth in these rules. If a child has a disability but only needs a related service and not specially designed instruction, the child is not considered to be a child with a disability under the IDEA.

(1) **Procedures for Determining Eligibility.** Upon completion of the administration of assessments and other evaluation measures, a group of qualified professionals, including the

parent of the child, or the IEP Team, must determine if a child has a disability and the educational needs of the child within 30 calendar days from the date the public agency completes initial evaluation. When making the determination with respect to each child, the group must:

(a) Be composed of a team of qualified professionals including the parents (Eligibility Committee) or the IEP Team;

(b) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(c) Consider all evaluation information pertaining to the child, so that no single evaluation procedure will be used as the sole criterion for determining eligibility;

(d) Ensure that all evaluation information from (b) above is documented and carefully considered; and

(e) Ensure that a child is not determined to be a child with a disability if the determinant factor is a lack of appropriate instruction in reading [including the essential components of reading instruction as defined in section 1208(3) of the Elementary and Secondary Education Act of 1965 (phonemic awareness, phonics, vocabulary development, reading fluency including oral reading skills, and reading comprehension strategies)], a lack of appropriate instruction in math; the child has limited English proficiency; or the child does not otherwise meet the eligibility criteria for a specific area of disability. Children from various ethnic groups, including speakers of regional dialects, do not have a disability solely because their manner of communicating does not conform to the expectations of the standard English speaking community. In order for a limited English proficient student to be deemed eligible, the eligibility team must determine that the communication disorder exists in the child's native language and is not the result of learning English as a second language. The teaching of English as a second language or general American dialect is not the responsibility of special education.

(f) Use standard scores when determining eligibility for special education.

(g) Reconvene when the public agency or the parents believe that the child’s eligibility should be reviewed.

(h) Determine continued eligibility at least once every three years.

(i) For children suspected of having a specific learning disability, the Eligibility Committee and/or IEP Team must also include:

1. The child's regular education teacher, or

2. If the child does not have a regular education teacher, a regular education teacher qualified to teach a child of his or her age, or

3. For a child of less than school age, an individual qualified by the SEA to teach a child of his or her age, and

4. At least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-1anguage pathologist, or remedial reading teacher.

(2) **Eligibility Report**. An eligibility report must be written for initial eligibility determination for a child with a disability that includes the evaluation information and documentation of eligibility determination and each time a child is reevaluated for continued eligibility.

(a) Each eligibility team member must certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the member must submit a separate statement presenting his or her conclusions. This statement becomes a part of the child's special education record.

(b) A copy of the eligibility report, including information regarding the evaluation data, must be given to the parent at no cost.

(c) If it is determined that no additional data are needed for continued eligibility, that decision must be documented and a copy of the decision must be given to the parents.

(d) If the parent and the public agency agree that a reevaluation is not necessary, that decision must be documented, maintained, and a copy must be given to the parents.

(3) Age Requirements. The following age requirements apply to the provision of special education and related services:

(a) Preschool children with disabilities by the child's third birth date. Public agencies may not use school admission cut-off dates to deny special education services for eligible preschool children. However, these children may not attend the regular kindergarten program, unless they meet the age requirements.

(b) Children with disabilities who have not earned an Alabama High School Diploma and who have not reached their twenty-first birthday by August 1. These children are entitled to services up to age 21, even if it means that instruction is provided in excess of 12 years. A child who turns 21 on or after August 1 is entitled to begin and complete the school year.

(4) Parental Consent for Services.

(a) A public agency that is responsible for making FAPE available to a child with a disability must obtain written informed consent from the parent of the child before the initial provision of special education and related services to the child. This consent may be obtained after an eligibility determination has been made, but must be obtained prior to the provision of special education and related services.

(b) The public agency must make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child.

(c) If the parent of a child fails to respond to a request for, or refuses to consent to, the initial provision of special education and related services under (a) and (b) of this section, the public agency:

(i) May not use the mediation or due process procedures in order to obtain agreement or a ruling that the services may be provided to the child;

(ii) Will not be considered to be in violation of the requirement to make available FAPE to the child because of the failure to provide the child with the special education and related services for which the parent refuses to or fails to provide consent; and

(iii) Is not required to convene an IEP Team meeting or develop an IEP in accordance with these rules.

(d) If, at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued

provision of special education and related services, the public agency:

(i) May not continue to provide special education and related services to the child, but must provide prior written notice before ceasing the provision of special education and related services;

(ii) May not use the mediation procedures or the due process procedures in order to obtain agreement or a ruling that the services may be provided to the child;

(iii) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services; and

(iv) Is not required to convene an IEP Team meeting or develop an IEP for the child for further provision of special education and related services.

(e) If a parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

(f) Once a child has been determined eligible for special education and related services, the child may receive any service that the IEP Team determines is required after appropriate evaluations have been completed.

(g) Public agencies must ensure that special education and related services are provided to all eligible children even though a child may be earning passing grades and advancing from grade to grade.

Author: Joseph B. Morton
Statutory Authority: Code of Ala. 1975, Title 16, Chapter 39; 20 U.S.C. 1400 et seq.; 34 CFR §300.
History: **Amended:** August 12, 1980. **Repealed:** April 10, 1986; New: April 10, 1986; effective May 30, 1986. December 13, 1990 **Amended:** 290-080-090-.04(4)(a) and (b) changing date to September 1, added .04(4)(d) effective January 21, 1991. August 8, 1991 adopted 290-080-090-.04.47ER effective August 8, 1991. October 10, 1991 adopted ER as regular rule effective November 19, 1991. **Repealed:** June 10, 1993, New: June 10, 1993; effective August 1, 1993. **Repealed and New Rule:** Filed September 9, 1999; effective October 14, 1999 (Ed. Note: This was rule was previously 290-080-090-.05). **Amended:** Filed December 14, 2000; effective January 18, 2001. **Repealed and New Rule:** Filed August 11, 2005;

effective September 15, 2005. **Repealed and New Rule:** Filed June 14, 2007; effective July 19, 2007. **Amended:** Filed April 9, 2009; effective May 14, 2009. **Amended:** Filed April 14, 2011; effective May 19, 2011. **Amended:** October 10, 2013; effective November 15, 2013.

290-8-9-.05 Individualized Education Program (IEP).

Public agencies must develop and implement procedures to ensure that all eligible children have an appropriate IEP based on the child's unique needs and not on the child's disability. This includes children placed in or referred to a private school or facility by the public agency.

(1) **Free Appropriate Public Education (FAPE).**

(a) FAPE must be available to all children 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) Each public agency must ensure that FAPE is available to any individual child with a disability who needs special education and related services, even though the child has not failed or been retained in a course or grade, and is advancing from grade to grade.

(c) The determination that a child described in paragraph (a) of this section is eligible under this part, must be made on an individual basis by the group responsible within the child's public agency for making eligibility determinations.

(2) **Effective Dates for IEPs.**

(a) For children transitioning from Early Intervention to preschool, an IEP must be developed and implemented no later than the child's third birthday. If the child's third birthday occurs during the summer months, the IEP Team will determine when special education services will begin (i.e., during the summer or the first day of school). Justification must be provided when an IEP is not implemented on the child's third birthday.

(b) For all other children, public agencies must have an IEP in effect for each child with a disability within its jurisdiction at the beginning of each school year. A meeting to develop an IEP must be conducted within 30 calendar days of the initial determination that the child needs special education and related services. The IEP must be in effect before special education and related

services are provided to a child and must be implemented as soon as possible following the IEP meeting, unless the meeting occurred during the summer or a vacation period, or where there are circumstances that require a short delay (e.g., working out transportation arrangements or finding a qualified provider). There can be no delay in implementing a child's IEP while determining the payment source for providing or paying for special education and related services.

(c) Special education programs must be in operation for at least the length of the regular school term and school day unless the IEP Team specifies a different length of time based on the individual needs of the child.

(3) IEP Team Membership. The public agency must ensure that the IEP Team for each child with a disability includes the following:

(a) The parents of the child with a disability.

(b) Not less than one regular education teacher of the child if the child is, or may be, participating in the regular education environment. The regular education teacher must, to the extent appropriate, participate in the development, review, and revision of the child's IEP, including assisting in the determination of appropriate positive behavioral interventions and supports and other strategies for the child and the determination of supplementary aids and services, program modifications, and supports for school personnel.

(c) Not less than one special education teacher of the child, or where appropriate, not less than one special education provider of the child.

(d) A representative of the public agency who:

1. Is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities,

2. Is knowledgeable about the general education curriculum,

3. Is knowledgeable about the availability of resources of the public agency. The public agency may designate an LEA member of the IEP Team to also serve as the public agency representative, if the criteria for serving as a public agency representative are met, and

4. Has the authority to commit agency resources and be able to ensure that IEP services will be provided.

(e) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in sections (b) through (d) above.

(f) 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. The determination of the knowledge or special expertise of any individual is made by the party who invites the individual to be a member of the IEP Team.

(g) Whenever appropriate, the child with a disability.

(h) Secondary Transition Services Participants. In addition to the participants specified in (a) through (f) above, if a purpose of the meeting is the consideration of the postsecondary goals for the child and the transition services needed to assist the child in reaching those goals, the public agency must invite the child and, with the consent of the parents or a child who has reached the age of majority, a representative of any other agency that is likely to be responsible for providing or paying for transition services. If the child does not attend the IEP Team meeting, the public agency must take other steps to ensure that the child's preferences and interests are considered.

(i) Early Intervention Representatives. In the case of a child who was previously served under Part C/Early Intervention (EI), an invitation to the initial IEP Team meeting must, at the request of the parent, be sent to the EI service coordinator or other representatives of the EI system to assist with the smooth transition of services.

(4) **IEP Team Attendance**.

(a) A member of the IEP Team, as listed in (3)(b) through (e) above, is not required to attend an IEP Team meeting, in whole or in part, if the parent of a child with a disability and the public agency agree, in writing, that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting.

(b) A member of the IEP Team, as listed in (3)(b) through (e) above, may be excused from attending an IEP Team 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 the parent, in writing, and the public agency consent to the excusal; and the member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to obtaining consent from the parent for the excusal of the required IEP Team member.

(5) **Parental Involvement in IEP Development**.

(a) Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded the opportunity to participate, including the provision of a written notification of the IEP meeting early enough to ensure that they will have an opportunity to attend and scheduling the meeting at a mutually agreed upon time and place.

(b) The notice specified in (a) above must indicate the purpose, date, time, location of the meeting, and who will be in attendance. In addition, the notice must inform the parents that they have the right to bring other individuals who have knowledge or special expertise about the child and that they have the right to request that a Part C service coordinator or other representatives of the Part C/Early Intervention system be invited to attend the initial IEP Team meeting for a child previously served under Part C of the IDEA. For a child with a disability beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, the notice must indicate that a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the child. In cases where transition is addressed, the notice must also indicate that the public agency will invite the student; and identify any other agency that will be invited to send a representative, but only if consent to invite other agencies is obtained from the parent and/or student (if the rights have transferred).

(c) When conducting IEP Team meetings, the parents of a child with a disability and a public agency may agree to use alternative means of meeting participation, such as video conferences and conference calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of reasonable efforts (at least two attempts) to arrange a mutually agreed on time and place such as detailed records of telephone calls made or attempted and the results of those calls, copies of

correspondence sent to parents and any responses received, and detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) Public agencies must take whatever action is necessary to ensure that the parent understands the proceedings at the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

(f) The public agency must give the parent a copy of their child's IEP at no cost.

(6) **IEP Content**. The IEP Team is responsible for reviewing all available assessment data and developing an IEP. In developing each child's IEP, the IEP Team must consider the strengths of the child; the concerns of the parents for enhancing the education of their child; the results of the initial or most recent evaluation of the child; the academic, developmental, and functional needs of the child; and, as appropriate, the results of any general State or district wide assessments. The IEP Team does not have to repeat information in a component of the IEP that is already included in another component. All IEPs must address or include, at a minimum, the following content:

(a) A statement of the child's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children); or for preschool children as appropriate, how the disability affects the child's participation in appropriate activities.

(b) A statement of measurable annual goals, including academic and functional goals, designed to 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 meet each of the child's other educational needs that result from the child's disability. For children with disabilities who take alternate assessments aligned to alternate achievement standards, a description of benchmarks is also required.

(c) 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 to enable the

child to advance appropriately toward attaining the annual goal(s); to be involved and make progress in the general education curriculum; to participate in extracurricular and other nonacademic activities; and to be educated and participate with other children with disabilities and nondisabled children in those activities described herein.

(d) 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 (c) above.

(e) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and district wide assessments and, if the IEP Team determines that the child must take an alternate assessment instead of a particular regular State or district wide assessment of student achievement, a statement of why the child cannot participate in the regular assessment and that the alternate assessment selected is appropriate for the child.

(f) The projected date for the beginning of the services and modifications and the anticipated frequency, location, and duration of those services and modifications.

(g) A description of how the child's progress toward meeting the annual goals 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.

(h) Beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, and updated annually thereafter, appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills and the transition services (including courses of study) needed to assist the child in reaching those goals.

(i) In the case of a child whose behavior impedes the child's learning or that of others, positive behavioral interventions and supports, and other strategies to address that behavior should be developed and implemented.

(j) In the case of a child with limited English proficiency, consideration of the language needs of the child as those needs relate to the child's IEP.

(k) 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.

(l) Consideration of the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consideration of 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 the full range of needs, including opportunities for direct instruction in the child's language and communication mode.

(m) Consideration of whether the child needs assistive technology devices and services.

(n) Beginning not later than one year before the child reaches the age of majority (age 19), the IEP must include a statement that the child has been informed of his or her rights under the IDEA, if any, that will transfer to him or her on reaching the age of majority. However, the public agency must continue to provide notice to the parents any time notice is required.

(o) Academic goals must be written to general education content standards; or Alabama Extended Standards for students with significant cognitive disabilities who are being assessed with the Alabama Alternate Assessment; or Developmental Standards for preschool children with disabilities. Transition goals must be written to Alabama's Transition Standards.

(7) **Accessibility of the Child's IEP**. Each public agency must ensure that the child's IEP is accessible to each regular education teacher, special education teacher, related service provider, and other service provider who is responsible for implementing the IEP. In addition, each teacher and provider must be informed of his or her specific responsibilities related to implementing the child's IEP and the specific accommodations, modifications, and supports that must be provided for the child in accordance with his or her IEP. When

revisions are made to the IEP, the persons responsible for IEP implementation must be informed of the changes.

(8) **IEP Accountability**. Public agencies providing special education services to a child with a disability must provide the services in accordance with the IEP. However, the agency, teacher, or other persons who are responsible for implementing the IEP are not held accountable if a child with a disability does not achieve the growth projected in the annual goal(s), as long as good faith efforts are made to assist the child toward achieving those goal(s).

(9) **Extended School Year Services (ESY)**. The length of a program for a child with a disability may not be limited to the regular school term/year if an interruption in educational services is likely to deny a child FAPE. One criteria that may be considered by the child's IEP Team is if significant regression, caused by an interruption in educational services, renders it unlikely that the child will regain critical skills even after an appropriate recoupment period.

(a) Each public agency must ensure that extended school year services are available as necessary to provide FAPE.

(b) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, that the services are necessary for the provision of FAPE to the child.

(c) A public agency may not limit extended school year services to particular categories of disability; or unilaterally limit the type, amount, or duration of those services. ESY means special education and related services that are provided to a child with a disability beyond the normal school year of the public agency, in accordance with the child's IEP, at no cost to the parents of the child; and meet the standards of the SEA.

(10) **IEPs for Transfer Students**.

(a) In State Transfers. In the case of a child with a disability who transfers within the same school year, who enrolls in a new school, and who had an IEP that was in effect in Alabama, the new public agency, in consultation with the parents, must provide FAPE to a child, including services comparable to those described in the child's previously held IEP, until such time as the new public agency adopts the previously held IEP or develops, adopts, and implements a new IEP.

(b) Out of State Transfers. In the case of a child with a disability who transfers within the same school year, who enrolls in a new school, and who had an IEP that was in

effect in a previous public agency in another state, the new public agency, in consultation with the parents, must provide the child with FAPE, including services comparable to those described in the previously held IEP, until such time as the new public agency conducts a new evaluation (if determined to be necessary by the new public agency) and determines eligibility. If an evaluation is determined to be necessary by the IEP Team, that evaluation will be considered to be an initial evaluation. If the parents refuse consent for the initial evaluation, the public agency may, but is not required to initiate mediation and/or a due process hearing to override the parents' refusal.

(c) The new public agency in which the child enrolls must 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 public agency in which the child was enrolled, and the previous public agency in which the child was enrolled must take reasonable steps to promptly respond to such request from the new public agency.

(11) **IEP Review and Revision**. Each public agency must ensure that the IEP Team:

1. Reviews the child's IEP periodically, but not less than annually, to determine whether the annual goals for the child are being achieved; and

2. Revises the IEP, as appropriate, to address:

(i) Any lack of expected progress toward the annual goals, and in the general education curriculum, if appropriate;

(ii) The results of any reevaluation conducted;

(iii) Information about the child provided to, or by, the parents;

(iv) The child's anticipated needs; or

(v) Other matters.

3. If the parents or the child's teacher has reason to suspect that the IEP needs revision, an IEP meeting may be requested at anytime. The education agency must conduct the IEP meeting within 30 calendar days upon the receipt of the request.

4. Consideration of special factors. In conducting a review of the child's IEP, the IEP Team must consider the special factors described under IEP Content.

5. Requirement with respect to regular education teacher. A regular education teacher of the child, as a member of the IEP Team, must participate in the review and revision of the IEP of the child.

6. In making changes to a child's IEP after the annual IEP Team meeting for a school year, the parent of a child with a disability and the public agency may agree not to convene an IEP Team meeting for the purposes of making those changes, and instead may develop a written document to amend or modify the child's current IEP. Changes to the IEP may be made either by the entire IEP Team at an IEP Team meeting, or by amending the IEP rather than by redrafting the entire IEP. If changes are made to the child's IEP without a meeting of the IEP Team, the public agency must obtain a parent's written agreement to such changes and must ensure that the child's IEP Team is informed of those changes. The parent shall be provided with a revised copy of the IEP with the amendments incorporated.

(12) **Agency Responsibilities for Transition**.

(a) If a participating agency, other than the public agency, fails to provide agreed upon transition services contained in the IEP of a child with a disability, the public agency must, as soon as possible, reconvene the IEP Team to identify alternative strategies to meet the transition objectives for the child set out in the IEP. The public agency's responsibility ends upon the child's receipt of an Alabama High School Diploma or by the child exceeding the age of eligibility for FAPE.

(b) Nothing in this part relieves any participating agency, including a State vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to children with disabilities who meet the eligibility criteria of that agency.

(13) **Exceptions to IEP Requirements for Individuals with Disabilities in Adult Prisons**.

(a) The following IEP requirements do not apply to the IEPs of individuals with disabilities in adult prisons:

1. Participation in state or district wide assessments.

2. Transition, if the incarcerated individual's eligibility for services will end, because of their age, prior to their release from prison based on consideration of their sentence and eligibility for early release.

(b) The IEP Team of a child with a disability who is convicted as an adult under State law and incarcerated in an adult prison may modify the child's IEP or placement if the State has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

(c) Individuals aged 18 to 21 are not entitled to special education and related services if, in their last educational placement prior to incarceration in an adult correctional facility they were not identified as having a disability and did not have an IEP under Part B of the IDEA. This does not apply to individuals aged 18 to 21 who had been identified as a student with a disability and had received services in accordance with an IEP, but who left school prior to their incarceration; or did not have an IEP in their last educational setting, but who had been identified as a student with a disability in accordance with these rules.

(14) **Children with Disabilities who are Covered by Public Benefits or Insurance**.

(a) A public agency may use the Medicaid or other public benefits or insurance programs in which a child participates to provide or pay for services required under these rules, as permitted under the public benefits or insurance program. With regard to services required to provide FAPE to an eligible child, the public agency:

1. May not require parents to sign up for or enroll in public benefits or insurance programs in order for their child to receive FAPE;

2. May not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided, but may pay the cost that the parents otherwise would be required to pay;

3. May not use a child's benefits under a public insurance program if that use would:

(i) Decrease available lifetime coverage or any other insured benefit;

(ii) Result in the family paying for services that would otherwise be covered by the public benefits or insurance program and that are required for the child outside of the time the child is in school;

(iii) Increase premiums or lead to the discontinuation of benefits or insurance; or

(iv) Risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures;

4. Must obtain one time written parental consent, after notifying parents of their rights and protection consistent with these rules and notified annually thereafter. and

5. Inform parents that their refusal to allow access to their public benefits or insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

(b) Children with disabilities who are covered by private insurance. With regard to services required to provide FAPE to an eligible child under these rules, a public agency may access a parent's private insurance proceeds only if the parent provides informed consent consistent with these rules. Parents must be notified annually of their protections and these rules.

(c) Use of Part B funds. If a public agency is unable to obtain parental consent to use the parents' private insurance, or public benefits or insurance when the parents would incur a cost for a specified service required under these rules, to ensure FAPE, the public agency may use its Part B funds to pay for the service. To avoid financial cost to parents who otherwise would consent to use private insurance, or public benefits or insurance if the parents would incur a cost, the public agency may use its Part B funds to pay the cost that the parents otherwise would have to pay to use the parents' benefits or insurance (e.g., the deductible or co-pay amounts).

(d) Proceeds from public benefits or insurance or private insurance. Proceeds from public or private insurance will not be treated as program income for purposes of the IDEA and 34 CFR 80.25. If a public agency spends reimbursements from Federal funds (e.g., Medicaid) for services under these rules, those funds will not be

considered "State or local" funds for purposes of the maintenance of effort provisions under the IDEA.

(e) Construction. Nothing in this part should be construed to alter the requirements imposed on a State Medicaid agency, or any other agency administering a public benefits or insurance program by Federal statute, regulations or policy under title XIX, or title XXI of the Social Security Act, 42 U.S.C. 1396 through 1396v and 42 U.S.C. 1397aa through 1397jj, or any other public benefits or insurance program.

Author: Joseph B. Morton
Statutory Authority: Code of Ala. 1975, Title 16, Chapter 39; 20 U.S.C. 1400 et seq.; 34 CFR §300.
History: **Amended:** August 12, 1980. **Repealed:** April 10, 1986; **New Rule:** April 10, 1986; effective May 30, 1986; July 11, 1989. **Amended:** 290-080-090-.06(4)(b) Extended School Year effective January 21, 1991. August 8, 1991 adopted 290-080-090-.06.49ER effective August 8, 1991. October 10, 1991 adopted ER as regular rule effective November 19, 1991. **Repealed:** June 10, 1993, New: June 10, 1993; effective August 1, 1993. **Repealed and New Rule:** Filed September 9, 1999; effective October 14, 1999 (Ed. Note: This was rule was previously 290-080-090-.06). **Amended:** Filed December 14, 2000; effective January 18, 2001. **Amended:** Filed September 9, 2004; effective October 14, 2004. **Repealed and New Rule:** Filed August 11, 2005; effective September 15, 2005. **Repealed and New Rule:** Filed June 14, 2007; effective July 19, 2007. **Amended:** Filed April 9, 2009; effective May 14, 2009. **Amended:** Filed April 14, 2011; effective May 19, 2011. **Amended:** October 10, 2013; effective November 15, 2013.

290-8-9-.06 Least Restrictive Environment (LRE).

Each public agency must ensure that, to the maximum extent appropriate, children with disabilities ages 3-21, including children in public or private institutions or other care facilities, are educated with children who are nondisabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular education classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(1) LRE Determination. In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must develop and implement procedures to ensure that the child's placement is:

(a) Determined at least annually, by a group that includes the parents of the child,

(b) Based on his or her IEP,

(c) As close as possible to the child's home,

(d) In the school where he or she would be educated if nondisabled, unless the IEP requires some other arrangement,

(e) Selected, giving consideration to any potential harmful effect on the child or the quality of services that he/she needs,

(f) In age-appropriate regular classrooms and not removed based solely on needed modifications in the general education curriculum, and

(g) Is made in conformity with the LRE provisions in this section.

(2) Nonacademic Settings. In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities set forth in these rules, education agencies must ensure that each child with a disability participates with nondisabled children in extracurricular services and activities to the maximum extent appropriate to the needs of the child. The public agency must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings.

(3) LRE Continuum. Public agencies must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services. Provisions must be made for supplementary aids and services in conjunction with placement in the regular education class placement. The continuum of alternative placements must include instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions.

(4) Service Delivery. Students who are provided special education services in settings other than the student's general education classroom (i.e., resource, self-contained) must be provided services as follows:

(a) Elementary students with disabilities may only be served with other elementary school-aged students.

(b) Secondary students with disabilities may only be served with other secondary school-aged students.

Author: Joseph B. Morton

Statutory Authority: Code of Ala. 1975, Title 16, Chapter 39; 20 U.S.C. 1400 et seq.; 34 CFR §300.
History: Amended: August 12, 1980. **Repealed:** April 10, 1986; New: April 10, 1986; effective May 30, 1986. December 13, 1990 added 290-080-090-.07(1)(c) through (e) and .07(2)(b)4. effective January 21, 1991. August 8, 1991 adopted 290-080-090-.07.50ER effective August 8, 1991. October 10, 1991 adopted ER as regular rule effective November 19, 1991. **Repealed:** June 10, 1993, New: June 10, 1993; effective August 1, 1993. **Repealed and New Rule:** Filed September 9, 1999; effective October 14, 1999 (Ed. Note: This was rule was previously 290-080-090-.07). **Amended:** Filed December 14, 2000; effective January 18, 2001. **Repealed and New Rule:** Filed August 11, 2005; effective September 15, 2005. **Repealed and New Rule:** Filed June 14, 2007; effective July 19, 2007.

290-8-9-.07 Other Educational Services And Program Options.

Public agencies must take steps to ensure that children with disabilities have available the variety of educational programs and services available to nondisabled children in the area served by the agency.

(1) **Career/Technical Education.** Each child with a disability must have an equal opportunity to access the full range of the public agency's career/technical education programs, including occupationally specific courses of study, cooperative education, and apprenticeship programs. A representative of career/technical education must be included as a member of the IEP Team for those children with disabilities who have been referred for, or are currently receiving career/technical education. *Children with disabilities must receive a career/technical assessment prior to or as a part of the career/technical placement process as prescribed by the Alabama Career/Technical Education Standards for Quality Programs in Secondary Schools*. The IEP of each secondary child with a disability must show any career/technical education program involvement, as well as needed accommodations and/or modifications made in the program.

(2) **Physical Education.** Children with disabilities must be afforded the opportunity to participate in the regular physical education program available to nondisabled children unless the child is enrolled full-time in a separate facility or needs specially designed physical education as determined by the IEP Team. Physical education services, specially designed if necessary, must be made available to every child with a disability receiving FAPE, unless the public agency enrolls children without disabilities and does not provide physical education to children without disabilities in the same grades.

(a) If specially designed physical education is prescribed in a child's IEP, the public agency responsible for the education of that child must provide the services directly or make arrangements for them to be provided through other public or private programs.

(b) The public agency responsible for the education of a child with a disability who is enrolled in a separate facility must ensure that the child receives appropriate physical education services.

(3) **Nonacademic/Extracurricular Services**.

(a) Public agencies must take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP Team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities. Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies that provide assistance to individuals with disabilities and employment of students, including both employment by the public agency and assistance in making outside employment available.

(b) *The IEP Team will identify the child's courses including supplementary aids and services. Children with disabilities, through his or her IEP, must be provided equal access for participation in nonacademic and extracurricular activities in accordance with Academics First.*

(4) **Routine Checking of Hearing Aids and External Components of Surgically Implanted Medical Devices**. Public agencies must ensure that hearing aids worn in school by children with disabilities are functioning properly. Public agencies must also ensure that the external components of surgically implanted medical devices are functioning properly; but for a child with a surgically implanted medical device who is receiving special education and related services, a public agency is not responsible for the post-surgical maintenance, programming, or replacement of the medical device that has been surgically implanted (or of an external component of the surgically implanted medical device).

(5) **Related Services**. Public agencies must provide related services as defined in these rules that are required to assist children with disabilities to benefit from special education. All related services may not be required for each individual

child. Each IEP Team must determine what related services, if any, are required to assist a child with a disability to benefit from special education. Related services may include, but are not limited to, audiology services, counseling services, including rehabilitation counseling services, early identification and assessment of disabilities in children, interpreting services, medical services (for diagnostic and evaluation purposes only), occupational therapy, parent counseling and training, physical therapy, psychological services, recreation, including therapeutic recreation, speech-1anguage pathology, social work services in schools, school nurse services, school health services, and orientation and mobility services. Related services do not include a medical device that is surgically implanted, the optimization of that device's functioning (e.g., mapping), maintenance of the device, or the replacement of that device. However, nothing limits the right of a child with a surgically implanted device (e.g., cochlear implant) to receive related services as listed above that are determined by the IEP Team to be necessary for the child to receive FAPE. In addition, nothing limits the responsibility of a public agency to appropriately monitor and maintain medical devices that are needed to maintain the health and safety of the child, including breathing, nutrition, or operation of other bodily functions, while the child is transported to and from school or is at school. Finally, nothing prevents the routine checking of an external component of a surgically implanted device to make sure it is functioning properly, as required in number (4) above.

(6) **Assistive Technology**.

(a) Each public agency must ensure that assistive technology devices or assistive technology services, or both, as defined in these rules, are made available to a child with a disability if required as part of the child's special education, related services, or, as supplementary aids and services.

(b) 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 the functional capabilities of a child with a disability.

(c) The term assistive technology does not include a medical device that is surgically implanted, or the replacement of such device.

(d) 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. The term includes:

1. The evaluation of the needs of the child with a disability, including a functional evaluation of the child in the child's customary environment;

2. Purchasing, leasing, or otherwise providing for the acquisition of assistive technology devices by children with disabilities;

3. Selecting, designing, fitting, customizing, adapting, applying, maintaining, repairing, or replacing assistive technology devices;

4. Coordinating and using other therapies, interventions, or services with assistive technology devices, such as those associated with existing education and rehabilitation plans and programs;

5. Training or technical assistance for a child with a disability or, if appropriate, the family of a child with a disability; and

6. Training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of the child with a disability.

(e) On a case-by-case basis, the use of school-purchased assistive technology devices in a child's home or in other settings is required if the child's IEP Team determines that the child needs access to those devices in order to receive FAPE.

(7) **Access to Instructional Materials**. Each public agency must take all reasonable steps to provide instructional materials in accessible formats to children with disabilities who need those instructional materials at the same time as other children receive instructional materials.

(8) **Transportation for Children with Disabilities**. It should be assumed that most children with disabilities receive the same transportation services as nondisabled children.

(a) Children with disabilities have the right to regular transportation services, if regular transportation is provided to students without disabilities. If the IEP Team determines that the child needs special transportation in order to provide FAPE, it is required.

(b) Special transportation includes travel to and from school and between schools, travel in and around school buildings, and specialized equipment (such as special or

adapted buses, lifts and ramps) if required to provide special transportation for a child with a disability.

(c) If transportation is provided for extracurricular activities, children with disabilities must have access to transportation whether it is regular or special.

(d) As with other related services, the public agency must provide transportation as a related service if it is required to assist a child with a disability to benefit from special education. This includes transporting a preschool-aged child to the site at which the public agency provides special education and related services, if that site is different from the site at which the child receives other preschool or day-care services.

(e) The IEP Team must consider how the child's disability affects the child's need for transportation, including determining whether the child's disability prevents the child from using the same transportation provided to nondisabled children, or from getting to school in the same manner as nondisabled children.

Author: Joseph B. Morton
Statutory Authority: Code of Ala. 1975, Title 16, Chapter 39; 20 U.S.C. 1400 et seq.; 34 CFR §300.
History: **Amended:** August 12, 1980. **Repealed:** April 10, 1986; New: April 10, 1986; effective May 30, 1986. August 8, 1991 adopted 290-080-090-.08.51ER effective August 8, 1991. October 10, 1991 adopted ER as regular rule effective November 19, 1991. **Repealed:** June 10, 1993, New: June 10, 1993; effective August 1, 1993. **Repealed and New Rule:** Filed September 9, 1999; effective October 14, 1999 (Ed. Note: This was rule was previously 290-080-090-.08). **Repealed and New Rule:** Filed August 11, 2005; effective September 15, 2005. **Repealed and New Rule:** Filed June 14, 2007; effective July 19, 2007.

290-8-9-.08 Procedural Safeguards.

(1) **Surrogate Parents.** Each public agency must ensure that the rights of a child are protected when no parent can be identified.

(a) Determination of the Need for a Surrogate Parent. A surrogate parent is needed when no parent can be identified; the public agency, after reasonable efforts, cannot locate a parent; or the child is a ward of the State. In the case of a child who is a ward of the State, a surrogate may alternatively be appointed by the judge overseeing the child's case, provided that the surrogate meets the criteria. In the case of an unaccompanied homeless youth as defined in section 725(6) of the *McKinney-Vento Homeless Assistance Act* [42 U.S.C. 11434a(6)], the public agency must appoint a surrogate.

(b) Criteria for Selection of a Surrogate Parent.

1. Public agencies must ensure that the person selected as a surrogate parent:

(i) Is not an employee of the SEA, LEA, or any other agency that is involved in the education or care of the child;

(ii) Has no personal or professional interest that conflicts with the interest of the child he/she represents; and

(iii) Has knowledge and skills that ensure adequate representation of the child.

2. In the case of a child who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs may be appointed as temporary surrogate parents without regard to any of the above provisions, until a surrogate parent can be appointed that meets the criteria for selection of a surrogate parent. A public agency may select as a temporary surrogate a person who is an employee of a nonpublic agency that only provides non-educational care for the child and who meets the surrogate parent criteria.

(c) Assigning a Surrogate Parent. The following procedures must be utilized to ensure the right of a child with a disability to a surrogate parent:

1. Public agencies must have a method for determining whether a child with a disability needs a surrogate parent and for assigning a surrogate parent.

2. If the public agency determines that a surrogate parent is required, the public agency must make reasonable efforts to ensure the assignment of a surrogate parent not more than thirty days from the date the public agency determines the child’s need for a surrogate parent.

(d) A person who otherwise qualifies to be a surrogate parent is not an employee of the agency soley because he or she is paid by the agency to serve as a surrogate parent.

(e) Scope of Surrogate Parent Representation. A surrogate parent may represent children with disabilities in all matters related to the identification, evaluation, educational placement, and the provision of FAPE to the child.

(2) **Records**. Personally identifiable data, information, and records collected or maintained must be stored, retrieved, and utilized for the benefit of children with disabilities in a manner that will ensure confidentiality and privacy rights.

(a) Person Responsible for Records of Children with Disabilities. Participating agencies must appoint one person to assume the overall responsibility for ensuring that personally identifiable information will be safeguarded and confidential. The assigned person will ensure that all agency persons involved in collecting, maintaining, or using the information must receive training or instruction regarding confidentiality requirements.

(b) Confidentiality of Personally Identifiable Information. Each participating agency must protect the confidentiality of personally identifiable information at the collection, storage, disclosure, and destruction stages.

(c) Access to Records by Parents and Their Representatives.

1. Parents may inspect and review all educational records relating to identification, evaluation, and educational placement of the child and the provision of FAPE to the child that are collected, maintained, or used by the participating agency.

2. Parents must be given the opportunity to review their child's educational records without unnecessary delay (not more than 45 days after the request has been made) and before any meeting regarding an IEP or before a due process hearing, or resolution session is conducted.

3. Upon request, parents must be provided copies of their child's records if failure to do so would effectively prevent the parents from exercising their right to inspect and review the records.

4. Upon reasonable request, parents must be given explanations and interpretations of their child's records.

5. Parents may have a representative inspect and review their child's records.

6. The agency may presume that the parents have authority to inspect and review the records of their child unless the agency has been advised that authority has been removed under state laws governing such matters as guardianship, separation, and divorce.

7. With the exception of parents and authorized employees of the participating agency itself, the agency must keep

a record of all other persons who are given access to the educational records. Documentation must include the name of the person given access, date of access, and purpose for access.

8. When a record contains information on more than one child, the parents may inspect and review only the information regarding their child. If the information on their child cannot be isolated for review, the participating agency may inform the parent regarding that portion of the information that pertains to their child.

9. Upon request, the parents must be provided with a list of the types and locations of educational records collected, maintained, or used by the participating agency.

10. The participating agency may provide copies of the child's records, upon parent request; and, may charge parents a fee for copies of the educational records, but not in an amount that would effectively prevent them from exercising their right to inspect and review the records. The fee may not include a charge to search or to retrieve information under this section.

(d) Disclosure Procedures Pertaining to Special Education Records.

1. Each participating agency must maintain for public inspection, a current listing of the names and positions of those employees within the agency who have access to personally identifiable information.

2. Parental consent must be obtained before personally identifiable information is disclosed to parties other than officials of participating agencies.

3. Parental consent is not required before personally identifiable information is released to:

(i) Officials of participating agencies for the purposes of meeting a requirement of Part B of the IDEA. However, the child's parents or eligible child who has reached the age of majority (age 19) must be given prior notice of the transfer of records as required by the *Family Educational Rights and Privacy Act* (FERPA).

(ii) Authorized state or federal officials in conjunction with monitoring or enforcement of legal requirements that relate to the special education program.

(iii) Law enforcement and judicial authorities to the extent permitted by FERPA when the child with a disability has committed a crime.

4. Parental consent, or the consent of an eligible child who has reached the age of majority (age 19), must be obtained before personally identifiable information is released to officials of participating agencies providing or paying for transition services.

5. If a child is enrolled, or is going to enroll in a private school that is not located in the LEA of the parent's residence, parental consent must be obtained before any personally identifiable information about the child is released between officials in the LEA where the private school is located and officials in the LEA of the parent's residence.

(e) Transfer of Records.

1. To facilitate the transition for a child who has transferred from one public agency to another in the same state or from another state, the new public agency in which the child enrolls must 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 public agency in which the child was enrolled, pursuant to FERPA; and the previous public agency in which the child was enrolled must take reasonable steps to promptly respond to such request from the new public agency.

2. Parental consent is not required as a condition for a transfer of special education records from one public agency to another. However, FERPA requires notice to be provided to the child's parents or the student who has reached age 18.

(f) Amendment of Records at Parent's Request.

1. A parent who believes that the information in the education records collected, maintained, or used are inaccurate or misleading or violate the privacy or other rights of the child may request that the participating agency amend the information. The agency must decide on the matter within a reasonable period of time from receipt of request.

2. If the participating agency decides not to amend the information in accordance with the request, written notice must be provided to the parent. The notice must

advise the parent of the right to a local hearing before the agency.

(g) Hearing to Request Amendment of Child's Educational Record.

1. The participating agency must, on request, provide an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

2. If, as a result of the hearing, the participating agency decides that the information is inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it must amend the information accordingly and inform the parent in writing.

3. If, as a result of the hearing, the participating agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, the agency must inform the parent of the right to place in the records a statement commenting on the information or setting forth reasons for disagreeing with the decision of the agency. Any explanation placed in the records must be maintained as part of the records as long as the records or contested portion of the records is maintained by the agency.

4. If the records of the child or the contested portion are disclosed by the participating agency to any party, the explanation must also be disclosed to the party.

5. The hearing must be conducted according to the procedures set forth in FERPA.

(h) Retention and Destruction of the Records of Special Education Children.

1. The public agency must retain a copy of the education records containing personally identifiable information for a period of five (5) years after the termination of the special education program for which they were used.

2. The information must be destroyed at the request of the parents. However, a permanent education record that contains the child's name, address, telephone number, his or her grades, record of attendance for special education services, classes attended, grade level completed, and year completed may be maintained without time limitation.

3. At the end of the five-year retention period, the public agency must inform the parents when personally

identifiable information collected, maintained, or used is no longer needed.

4. Information must be destroyed in a manner whereby confidentiality of the information is maintained.

(i) Disciplinary Information.

1. The public agency may include in the records of a child with a disability a statement of any current or previous disciplinary action that has been taken against the child and transmit the statement to the same extent that the disciplinary information is included in, and transmitted with, the student records of nondisabled children.

2. The statement may include a description of any behavior engaged in by the child that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child.

3. If the child transfers from one school to another, the transmission of any of the child's records must include both the child's current IEP and any statement of current or previous disciplinary action that has been taken against the child to the same extent that disciplinary information is transmitted with the records of nondisabled children.

(3) **Rights for Children**. Public agencies must afford to the child, rights of privacy similar to those afforded to parents regarding records taking into consideration the age of the child and type and severity of the disability. Although the rights of parents under the IDEA transfer to the student at the age of majority (age 19), the rights of parents regarding educational records under FERPA transfer to the student at age 18.

(4) **Parental Notice and Consent**. A public agency must provide notice to parents and obtain consent prior to specific actions.

(a) Parental Consent.

1. Informed written consent must be obtained prior to an initial evaluation; prior to the initial provision of special education and related services; and prior to any reevaluation that requires additional data to be obtained. Consent for initial evaluation must not be construed as consent for the initial provision of services. If the parent of the child with a disability refuses or fails to respond to a request to provide consent for initial evaluation or a reevaluation that

requires evaluation of the child, the public agency may, but is not required to pursue consent by using mediation and/or due process procedures. The public agency does not violate its obligation under Child Find requirements if it declines to pursue an initial evaluation or reevaluation.

2. The public agency must make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child. If the parent of a child fails to respond to a request for, or refuses to consent to, the initial provision of special education and related services, the public agency:

(i) May not use the mediation process or the due process hearing procedures in order to obtain agreement or a ruling that the services may be provided to the child.

(ii) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with the special education and related services for which the parent refuses to or fails to provide consent, and

(iii) Is not required to convene an IEP Team meeting or develop an IEP for the child.

3. If at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency:

(i) May not continue to provide special education and related services to the child, but must provide prior written notice before ceasing the provision of special education and related services;

(ii) May not use the mediation procedures or the due process procedures in order to obtain agreement or a ruling that the services may be provided to the child;

(iii) Will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services.

4. If a parent revokes consent in writing for their child's receipt of special education and related services after the child is initially provided special education

and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

5. A public agency may not use a parent's refusal of informed written consent to deny the parent or child any other service, benefit, or activity of the public agency, except as described in paragraphs 1. and 2. above.

6. Informed written consent is not required:

(i) For reevaluation, if the public agency can demonstrate that it has made reasonable efforts, (at least two attempts) to obtain that consent and the child's parent has failed to respond.

(ii) Before reviewing existing evaluation data as part of an evaluation or reevaluation or administering a test or other evaluation that is administered to all children, unless, before administration of that test or evaluation, consent is required of parents of all children.

(iii) For the type of evaluations listed on the IEP to evaluate the mastery of annual goal(s).

(iv) For initial evaluations only, if the child is a ward of the State and is not residing with the child's parent, the public agency is not required to obtain informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability if despite reasonable efforts to do so, the public agency cannot discover the whereabouts of the parent of the child; the rights of the parents of the child have been terminated in accordance with State law; or the rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.

7. If a parent of a child who is home schooled or placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or the reevaluation, or the parent fails to respond to a request to provide consent, the public agency may not use the consent override procedures of mediation or due process and the public agency is not required to consider the child as eligible for services under these rules.

8. To meet the reasonable efforts requirement regarding consent for initial evaluation, reevaluation and initial provision of services, the public agency must document its attempts to obtain parental consent using the procedures under these rules.

(b) Parental Notice.

1. Written notice must be given to parents a reasonable time before the public agency proposes or refuses to initiate or change the identification, evaluation, educational placement, or the provision of FAPE to a child. Written notice is required when a child graduates from high school with a regular diploma or exits because the child has exceeded the age of eligibility for FAPE.

2. The parental notice must include a description of the action proposed or refused by the agency, the reason for the proposed or refused action, a description of other options the public agency considered and why those options were rejected, a description of each evaluation procedure, assessment, record, or report the public agency used as a basis for the proposal or refusal and a description of any other factors that are relevant to the proposal or refusal. The notice must also include a statement that the parents of the child have protection under the Special Education Rights and if this notice is not an initial referral for evaluation, the means by which a copy of the rights can be obtained, and sources for parents to contact to obtain assistance in understanding the provisions of the notice. To ensure that parents understand the content of each notice, the public agency must provide written notice in language understandable to the general public, provide notice in the native language of the parent or other mode of communication used by the parent unless it is clearly not feasible to do so, and take the necessary steps to ensure, that when the native language or other mode of communication of the parent is not a written language, that the notice is translated orally or by other means to the parent in his or her native language or other mode of communication. Public agencies must ensure that parents understand the content of the notice and maintain written evidence that the notice requirements have been met. Parents may request to receive notices by electronic mail if the public agency provides notices by electronic mail.

(5) **Meetings**. Parents must be provided written notice and an opportunity to participate in meetings regarding identification, evaluation, educational placement, and the provision of FAPE to their child.

(a) A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal that will be discussed at a later meeting.

(b) When conducting IEP Team meetings regarding evaluation, eligibility, IEP development, mediation, due process hearing resolution, and when carrying out administrative matters (such as scheduling, exchange of witness lists, and status conferences), the parent of a child with a disability and a public agency may agree to use alternative means of meeting participation, such as video conferences and conference calls.

(c) An educational placement decision may be made by a group without the involvement of the parents, if the public agency is unable to obtain the parents' participation in the decision. In this case, the public agency must have a record of its attempts to ensure their involvement, including information that is consistent with the requirements of these rules.

(d) The public agency must take whatever action is necessary to ensure that the parents understand and are able to participate in, any group discussions relating to the identification, evaluation, educational placement or provision of FAPE for their child, including arranging for an interpreter for parents with deafness, or whose native language is other than English.

(6) **Special Education Rights**. A current copy of the Special Education Rights is on the SDE's Web site at www.alsde.edu. In addition, a public agency may place the Special Education Rights on its Internet Web site if a Web site exists but still must provide a physical copy to the parent once per school year as required below. In addition, parents may elect to receive notices required under these rules by an electronic mail communication, if the public agency makes that option available. A copy of the Special Education Rights under IDEA must be given to the parents only one time per school year, except that a copy must also be given to the parents:

(a) Upon initial referral or parental request for an initial evaluation,

(b) Upon receipt of the first State complaint under these rules and upon receipt of the first due process hearing request in a school year,

(c) In accordance with the discipline procedures in these rules, and

(d) Upon request by the parent.

(7) **Content of Special Education Rights**. The Special Education Rights notice must meet the requirements of these rules and include a full explanation of all rights relating to:

(a) Independent educational evaluations;

(b) Prior written notice;

(c) Parental consent;

(d) Access to educational records;

(e) Opportunity to request and resolve due process hearings, including the time period in which to request a due process hearing, the opportunity for the agency to resolve the due process hearing, and the difference between the due process complaint and the State complaint procedures including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures;

(f) The availability of mediation;

(g) The child's placement during the pendency of any due process proceedings;

(h) Procedures for children who are subject to placement in an interim alternative educational setting;

(i) Requirements for unilateral placement by parents of children in private schools at public expense;

(j) Due process hearings, including requirements for disclosure of evaluation results and recommendations; Civil actions, including the time period in which to file those actions; and

(l) Attorneys' fees.

(8) **Transfer of Parental Rights at Age of Majority (Age 19)**. When a child with a disability reaches the age of majority (except for a child with a disability who has been determined to be incompetent under Alabama law), the public agency shall provide all notices to both the adult student and the parents. All other rights accorded to parents transfer to the student. The public agency shall notify the student and the parents of the transfer of rights. All rights accorded to parents transfer to students who are incarcerated in an adult or juvenile federal, state, or local correctional institution. If, under Alabama law, a child with a disability who has reached the age of 19, 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 their 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.

(9) **State Complaints/Mediation/Due Process Hearings**. Parents of children with disabilities must be provided with the opportunity to utilize appropriate administrative remedies when they believe that their rights or the rights of their children have been violated or when they disagree with their child's special education services.

(a) Complaint Procedure. When it is believed that the public agency is violating a requirement of Part B of IDEA and 34 CFR Part 300, the special education complaint procedure may be utilized as the appropriate administrative remedy.

1. Procedures for Filing a Complaint with the State Department of Education.

(i) A parent (or organization or individual, including an organization or individual from another State) may file a signed written complaint and send it to the State Superintendent of Education, Attention: Special Education Services, Post Office Box 302101, Montgomery, Alabama 36130-2101. A sample form for filing a State Complaint can be found on the Department of Education's Web site at www.alsde.edu. The use of the form is not required as long as another form or document used meets the State Complaint content requirements set forth herein.

(ii) A signed written complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received.

(iii) The complaint must include, at a minimum:

(I) A statement that a public agency has violated a requirement of Part B of the IDEA,

(II) The facts on which the statement is based,

(III) The signature and contact information for the complainant, and

(IV) If alleging violations with respect to a specific child:

I. The name and address of the residence of the child,

II. The name of the school the child is attending,

III. In the case of a homeless child or youth (within the meaning of the *McKinney-Vento Homeless Assistance Act* (42 USC 11434a(2)), available contact information for the child, and the name of the school the child is attending,

IV. A description of the nature of the problem of the child, including facts relating to the problem, and

IV. A proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed.

(iv) The party filing the complaint must forward a copy of the complaint to the public agency serving the child at the same time the party files the complaint with the Alabama Department of Education. The public agency must provide a copy of the Special Education Rights if this is the first State Complaint filed by the parent in a school year.

2. Procedures for Acting on Complaints.

(i) The State Superintendent of Education will assign a staff member to review and investigate each complaint to determine its validity. If it is determined that the complaint is a possible violation of the IDEA or 34 CFR Part 300, the complaint will be processed.

(ii) The public agency involved must be notified by telephone or fax with a follow-up letter providing the identity of the complainant and the nature of the complaint.

(iii) The public agency **must** submit a written resolution statement, plan of action, or statement of position that addresses the complaint allegations to the State Superintendent of Education, Attention: Special Education Services.

(iv) A parent who has filed a complaint and the public agency may voluntarily agree to engage in mediation pursuant to this rule.

(v) Special Education Services will review all relevant information and make independent

determination as to whether the public agency is violating the IDEA or 34 CFR Part 300.

(vi) If an on-site investigation is determined to be necessary, the public agency will be notified prior to the investigation regarding the nature of the review. The investigation will be conducted by a person(s) selected by the State Superintendent of Education and will not be anyone who is employed by the agency under investigation. The person(s) conducting the investigation must have complete access to all records of the agency that pertain to the special education program.

(vii) The complainant must be given the opportunity to submit additional information, either orally or in writing, regarding the allegations of the complaint.

(viii) A written decision that addresses each allegation and contains findings of fact and conclusions and the reasons for the Department of Education's final decision (subject to confidentiality requirements) will be sent to the complainant.

(ix) The written decision will include procedures such as technical assistance activities, negotiations, and corrective actions to achieve compliance, if needed, for the effective implementation of the final decision.

(x) The entire complaint process, including the letter of findings, must be completed within 60 calendar days from receipt of the complaint. An extension of time may be granted only when it can be established that exceptional circumstances warrant a delay or the parent and the public agency involved agree to extend the time to engage in mediation pursuant to this rule.

(xi) In resolving a complaint in which it has found a failure to provide appropriate services, the Department of Education must address how to remediate the denial of those services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement) and appropriate future provision of services for all children with disabilities.

(xii) If a written complaint is received that is also the subject of a due process hearing or contains multiple issues, of which one or more are part of the hearing, the Department of Education must set aside

any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action must be resolved.

(xiii) If an issue is raised in a complaint that has previously been decided in a due process hearing involving the same parties, the hearing decision is binding and the Department of Education must inform the complainant to that effect.

(xiv) A complaint alleging a public agency's failure to implement a due process decision must be resolved by the Department of Education.

(xv) Once the written decision for a complaint is issued, the decision is final. There is no appeal process.

(b) State Education Agency Mediation Procedures. Any time the public agency and the parents disagree on special education matters, either party may request a mediation.

1. The State Superintendent of Education provides mediation where the parties may resolve their differences involving matters under the IDEA and 34 CFR Part 300.

2. The procedures for mediation must ensure that the mediation process is voluntary on the part of the parties, is not used to deny or delay a parent’s right to a due process hearing or any other rights afforded under the IDEA, and is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

3. The Department of Education will 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. Mediators will be selected on a rotational basis from the list.

4. The Department of Education will bear the cost of the mediation process.

5. Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.

6. If the parties resolve a dispute through the mediation process, the parties must execute a legally binding written agreement that sets forth the resolution. A

written signed mediation agreement is signed by both the parent and a representative of the agency who has the authority to bind the agency. The signed mediation agreement is enforceable in any State court of competent jurisdiction or in a district court of the United States.

7. Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any Federal or State court.

8. An individual who serves as a mediator may not be an employee of any LEA or the Department of Education that is involved in the education or care of the child who is the subject of the mediation process and must not have a personal or professional interest that conflicts with the person’s objectivity. A person who otherwise qualifies as a mediator is not an employee of an LEA or Department of Education solely because he or she is paid by the agency to serve as a mediator.

9. A public agency may establish procedures to offer to parents and schools who elect not to use the Department of Education's mediation process the opportunity to meet, at a time and location convenient to the parents and school, with a disinterested party who is under contract with a parent training and information center or established under Section 671 or 672 of the IDEA, or an appropriate alternative dispute resolution entity, and who would explain the benefits of the mediation process and encourage the parents to use the process. The Department of Education will not establish such procedures.

10. A public agency may not deny or delay a parent’s right to a due process hearing if the parent fails to participate in the meeting to discuss the benefits of mediation.

11. Either party may request mediation by writing to the State Superintendent of Education, Attention: Special Education Services, Post Office Box 302101, Montgomery, Alabama 36130-2101, or by calling Special Education Services at (334) 242-8114 or (334) 242-8406 (TDD). A Special Education Services' staff member will contact the other parties to determine if mediation is desired.

12. If a due process hearing has been requested, or a State complaint has been filed, the parties may agree to use mediation to resolve the need for a due process hearing or to resolve the State complaint.

13. The SEA will allow other state enforcement mechanisms (a State complaint, mediation, or a due process hearing) to seek enforcement of mediation agreements. The use of those mechanisms is not mandatory and must not delay or deny a party the right to seek enforcement of the written agreement in a State court of competent jurisdiction or in a district court of the United States.

(c) Impartial Due Process Hearing Procedures. An impartial due process hearing is available when a parent or the public agency disagrees with any matter relating to a proposal or refusal to initiate or change the identification, evaluation, educational placement of a child or the provision of FAPE to a child. An impartial due process hearing may be requested if the disagreement on which the request for a due process hearing arises out of or relates to an alleged violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the request for a hearing. However, the timelines may be extended if the parent was prevented from requesting a hearing due to specific misrepresentations by the public agency that it had resolved the problem forming the basis of the hearing request or the public agency's withholding of information from the parent that was required to be provided to the parent. The public agency must inform the parent of any free or low-cost legal and other relevant services in the area any time the parent requests the information, or if the parent or public agency initiates a due process hearing. Nothing in this part shall be construed to create a right of action on behalf of an individual student or class of students for the failure of a particular public agency employee to be highly qualified, or to prevent a parent from filing a State complaint about staff qualifications. There is no right to due process solely based upon the failure of a public agency employee to be highly qualified. The party filing the hearing request has the burden of proof with respect to any claimed violation or request for relief.

1. Procedures for Requesting an Impartial Due Process Hearing.

(i) The parent, the attorney or a designated person representing the parent, or an official from the public agency may request an impartial due process hearing by sending a ***signed*** written request to the State Superintendent of Education, Attention: Special Education Services, Post Office Box 302101, Montgomery, Alabama 36130-2101. A copy of the written request for a due process hearing must also be sent to the other party and must remain confidential. The timelines referred to in this section begin when the Department of Education receives the written request.

The Department of Education must forward a copy of the due process hearing request to the other party involved in the hearing.

(ii) When the parent, the attorney representing the parent, or an official from the public agency, files a written request, the request must include the name of the child, the address of the residence of the child, the name of the school the child is attending, a description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem, and a proposed resolution of the problem to the extent known and available to the party at the time. In the case of a homeless child or youth [within the meaning of section 725(2) of the *McKinney-Vento Homeless Assistance Act* (42 U.S.C. 11434a(2)], available contact information for the child and the name of the school the child is attending must be provided in the request. A party may not have a hearing until the party, or the attorney representing the party, files a written request for a hearing that meets the requirements of this rule. A sample form for filing a Request for Due Process Hearing can be found on the Department of Education's Web site at www.alsde.edu. The use of the form is not required, as long as another form or document used meets, as appropriate, the due process request content requirements.

(iii) The written request for a hearing must be deemed to be sufficient unless the party receiving the written request for the hearing notifies the hearing officer and the other party in writing within 15 calendar days of receipt of the due process hearing request that the receiving party believes the request is insufficient. Within five calendar days of receipt of the notification, the hearing officer must make a determination on the face of the written request for a hearing as to whether it meets the requirements for sufficiency and immediately notify the parties in writing of that determination.

(iv) A party may amend its due process request only if the other party consents in writing to such an amendment and is given the opportunity to resolve the issue(s) through a resolution meeting, or the hearing officer grants permission, except that the hearing officer may only grant such permission to amend at any time not later than five calendar days before a hearing begins. If a party files an amended request, the timelines for a resolution meeting and the

thirty-day resolution period begin again with the filing of the amended request.

2. Response to a Request for a Due Process Hearing. If the public agency has not sent prior written notice to the parent regarding the issues contained in the parent's hearing request, the public agency must, within ten calendar days of receiving the request, send to the parent a response that includes an explanation of why it proposed or refused to take the action raised in the hearing request; a description of other options that the IEP Team considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report used as the basis for the proposed or refused action; and a description of the other factors that are relevant to the proposed or refused action. Except as provided, the party receiving a hearing request must, within ten calendar days of receiving the request, send to the other party a response that specifically addresses the issues raised in the hearing request. A response filed by a public agency shall not be construed to preclude the public agency from asserting that the parent's hearing request was insufficient, where appropriate.

3. Resolution Process.

(i) Within 15 calendar days of receiving the parent’s hearing request and prior to the opportunity for a hearing, the LEA must convene a meeting with the parent and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process hearing request. The meeting must include a representative of the public agency who has decision-making authority on behalf of the agency and may not include an attorney of the LEA unless the parent is accompanied by an attorney. The purpose of the meeting is for the parents of the child to discuss the due process hearing request and the facts that form the basis of the request so that the LEA has the opportunity to resolve the issues. The resolution meeting need not be held if the parent and the LEA agree in writing to waive the meeting or they agree to use the State mediation process. The parent and the LEA determine the relevant members of the IEP Team to attend the resolution meeting.

(ii) If the LEA has not resolved the issues to the satisfaction of the parents within 30 calendar days of the receipt of the due process hearing request, the due process hearing may occur and the timeline for issuing a final decision on the hearing request

begins at the expiration of this 30-day resolution period.

(iii) Except where the parties have jointly agreed to waive the resolution meeting or to use mediation, the failure of the parent filing a due process request to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held. If the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented using procedures consistent to those regarding parent participation in IEP meetings), the public agency may, at the conclusion of the thirty-day resolution period, request that the hearing officer dismiss the parent's hearing request.

(iv) If the LEA fails to hold the resolution meeting within 15 calendar days of receiving notice of the hearing request or fails to participate in the resolution meeting, the parent may seek the intervention of the hearing officer to begin the due process hearing timeline.

(v) The 45-day timeline for the due process hearing starts the day after one of the following events:

(I) Both parties agree in writing to waive the resolution meeting,

(II) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible, or

(III) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

(vi) If an agreement is reached as to the issues in the due process hearing request at a resolution meeting, the parties must execute a legally binding agreement that is signed by both the parent and a representative of the public agency who has the authority to bind the agency. The agreement is enforceable in any state court of competent jurisdiction or in a district court of the United States.

(vii) If the parties execute an agreement, a party may void such agreement within three business days of the agreement's execution.

(viii) The SEA will allow other state enforcement mechanisms (a State complaint, mediation, or a due process hearing) to seek enforcement of resolution agreements. The use of those mechanisms is not mandatory and must not delay or deny a party the right to seek enforcement of the written agreement in a State court of competent jurisdiction or in a district court of the United States.

4. The Appointment of a Due Process Hearing Officer. The appointment of the hearing officer must be made by the State Superintendent of Education on a rotational basis.

5. Qualifications of Due Process Hearing Officers. A hearing officer must not be a person who is an employee of the SEA or the LEA that is involved in the education or care of the child, or a person having a personal or professional interest that would conflict with his or her objectivity in a hearing. The hearing officer must possess knowledge of, and the ability to understand the provisions of the IDEA, Federal and State regulations pertaining to the IDEA, and legal interpretations of the IDEA by Federal and State courts; the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice. A person who otherwise qualifies to conduct a hearing is not an employee of the education agency solely because he or she is paid by the education agency to serve as a hearing officer.

6. Subject Matter of Due Process Hearings. The party requesting the impartial due process hearing may not raise issues at the due process hearing that were not raised in the written request for hearing, unless the other party agrees otherwise.

7. Due Process Hearing Rights. Any party to a hearing has the right to:

(i) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities; except that, whether parties have the right to be represented by non-attorneys at due process hearings is determined under State law.

(ii) Present evidence and confront, cross-examine, and compel the attendance of witnesses.

(iii) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days prior to the hearing.

(iv) Obtain a written or, at the option of the parents, electronic, verbatim record of the hearing.

(v) Obtain written, or, at the option of the parents, electronic findings of fact and decisions at no cost.

(vi) Parents involved in hearings must be given the right to have the child who is the subject of the hearing present, open the hearing to the public, and have the record of the hearing and the findings of fact and decisions provided at no cost.

(vii) Have, no less than five business days prior to a hearing, all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing. A hearing officer may bar any party that fails to comply from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

8. Disclosure of Information. At least five business days prior to the hearing, each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering parties evaluations. A hearing officer may bar any party that fails to comply with this requirement from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

9. Parents' Responsibility in Due Process Hearing Procedures.

(i) Prehearing Activities.

(I) Request a due process hearing that pertains to the proposal or refusal to initiate or change the identification, evaluation, educational placement and/or the provision of FAPE to the child; and

(II) Provide, at least five business days before the hearing a list of potential witnesses to the designated hearing officer. Each party is responsible for the attendance of witnesses.

(III) Disclose evidence to the other party at least five business days prior to the hearing. Do not send a copy of the evidence to the designated hearing officer.

(IV) Cooperate with the hearing officer in any business or communication and the planning for a location, date, and time for the hearing.

(V) Inform the hearing officer regarding their decision pertaining to the child's presence at the hearing and to opening the hearing to the public.

(ii) Hearing Activities. Present their case at the hearing.

10. LEA's Responsibility in Due Process Hearing Procedures.

(i) Prehearing Activities.

(I) Inform the parents of any free or low-cost legal and other relevant services available in the area.

(II) Provide a copy of the Special Education Rights to the parent upon receipt of the first occurrence of a filing of a due process hearing request in a school year.

(III) Provide, at least five business days before the hearing a list of potential witnesses to the designated hearing officer. Each party is responsible for the attendance of witnesses.

(IV) Disclose evidence to the other party at least five business days prior to the hearing. Do not send a copy of the evidence to the designated hearing officer.

(V) Provide parents and/or their representative the opportunity to inspect and review their child's educational records without unnecessary delay (not more than 45 calendar days after the request has been made) and before a due process hearing, or resolution meeting is conducted.

(VI) Cooperate with the hearing officer in any business or communication and the planning for a location, date, and time for the hearing.

(VII) Provide prior written notice as required by the notice provisions under the IDEA.

(VIII) Within 15 calendar days of receiving notice of the parent's due process hearing request, and prior to the initiation of a due process hearing, the LEA must convene a meeting with the parent and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process hearing request.

(ii) Hearing Activities. Present the case at the hearing.

11. Department of Education's Responsibility in Due Process Hearing Procedures.

(i) Prehearing Activities.

(I) Appoint a qualified Due Process Hearing Officer.

(II) Provide for a qualified court reporter to make an official transcript of the hearing.

(III) Arrange for an interpreter, as needed.

(IV) Keep a list of persons who serve as hearing officers, which must include a statement of the qualifications of each person.

(ii) Hearing Activities.

(I) Ensure that not later than 45 days after the expiration of the 30-day resolution period or the adjusted time periods, a final decision is reached and a copy of the decision is mailed to each of the parties.

(II) Maintain comprehensive tracking and filing regarding each impartial due process hearing to include, but not be limited to, all written correspondence, evidence, decisions, and transcripts.

(III) Transmit the hearing findings and decisions, after deleting any personally identifiable information, to the Special Education Advisory Panel and make the findings and decisions available to the public.

(IV) Provide for payment of the hearing officer, court reporter, and interpreter.

12. Due Process Hearing Officer's Responsibility in Hearings.

(i) Prehearing Activities.

(I) Ensure that the issues raised in the hearing request pertain to the proposal or refusal to initiate or change the identification, evaluation, educational placement, and/or the provision of FAPE. Identify and dismiss claims and issues that are not justiciable or otherwise properly raised in a due process hearing.

(II) Ensure that the parties to the proceedings have been properly identified, named and served, and have been notified of the hearing and of the claims and issues to be addressed at the hearing.

(III) Notify the Department of Education, Special Education Services, of all interim or final rulings or orders affecting the hearing. This includes, but is not limited to, resolution meeting results, continuances, settlements, or specific extensions of timelines.

(IV) Inform the parties of his or her appointment as the hearing officer.

(V) Inform the parties of the availability of mediation.

(VI) Establish a date, time, and location for the hearing that is reasonably convenient to the parent(s) and child involved.

(VII) Establish a date, at least five business days prior to the hearing, for a prehearing telephone conference to identify the specific issues to be addressed in the hearing.

(VIII) Ensure that the parties understand their rights pertaining to the hearing.

(IX) Utilize written correspondence to notify the parties of hearing procedures and schedules. All telephone calls must be followed by written notification.

(X) Obtain a list of representatives and witnesses from the parties at least five business days prior to the hearing.

(XI) Ensure that the parties have disclosed evidence to each other at least five business days prior to the hearing.

(XII) Inform the parties regarding the format of the hearing.

(XIII) Advise the parties of the confidential nature of the proceedings.

(XIV) Determine if witnesses should be excluded from the hearing room. This may be requested by either party.

(XV) Make sure that the physical arrangement of the hearing room is appropriate.

(XVI) Provide the parties written notice of any specific extensions to the 30 calendar day resolution timeline or the 45 calendar day hearing timeline.

(XVII)Make such rulings as necessary to conduct the hearings.

(ii) Hearing Activities. The hearing officer will conduct the hearing as outlined below:

(I) Call to order.

(II) Opening statement by the hearing officer.

(III) Introductions of himself/herself and principal parties.

(IV) Statement of opened or closed hearing.

(V) Explanation of procedural matters.

(VI) Statement of issue(s) and purpose.

(VII) Swearing in witnesses.

(VIII) Exclusion of witnesses, if requested by either party.

(iii) Presentation of formal testimony.

(I) Explanation of format for presentation of evidence.

(II) Opportunity for opening statements by all of the principal parties. This is not part of the evidence and will not be considered in the decision.

(III) Presentation of written evidence by petitioner followed by the respondent. The written evidence may be presented all together or as needed during the oral testimony. The impartial due process hearing officer will mark each document for identification purposes and must return all exhibits entered into evidence to the State Department of Education, Special Education Services.

(IV) Presentation of oral testimony by petitioner followed by the respondent. Each witness must identify himself/herself by stating the name, address, position, and relationship to the child. Oral testimony will be taken in the following order:

I. Petitioner's Witnesses.

A. Examination by petitioner.

B. Cross-examination by respondent.

C. Reexamination by petitioner.

D. Recross-examination by respondent.

E. Further examination allowed at the hearing officer's discretion.

F. Questions by the hearing officer.

II. Respondent's Witnesses.

A. Examination by respondent.

B. Cross-examination by petitioner.

C. Reexamination by respondent.

D. Recross-examination by petitioner.

E. Further examination allowed at the impartial due process hearing officer’s discretion.

F. Questions by the hearing officer.

(V) General Procedures Pertaining to the Hearing.

I. Only a principal party or their attorney may question witnesses.

II. The hearing officer may dismiss witnesses when it has been determined that neither party has further need for them.

III. The hearing officer may stop unnecessarily hostile or irrelevant pursuits in questioning.

IV. If a principal party fails to appear, the hearing officer may hold the hearing after noting in the record that proper notice was provided, or the hearing may be adjourned or postponed.

V. If a witness fails to appear, the hearing can proceed with a notation in the record. If the evidence from the witness is required, it may be taken at a later date. The hearing may be reconvened at a later time to obtain the testimony.

VI. Written evidence provided by a witness who does not appear may be accepted as fact if the other party agrees.

VII. Summary statements by the petitioner will be followed by the respondent. This is not part of the evidence and will not be considered in the decision.

(VI) Closing statements by the hearing officer.

I. When decision can be expected.

II. Availability of the record of the hearing.

III. Appeal procedures.

(iv) Posthearing activities.

(I) Include in the decision.

I. Procedural history.

II. Statement of the facts.

III. Issues presented.

IV. Discussion of issues.

V. Conclusions.

VI. List of all documents introduced as exhibits.

VII. Order.

VIII. Appeal rights, including time limits on the filing of an appeal.

IX. Such matters deemed necessary by the hearing officer to implement the decision.

X. A hearing officer's determination of whether a child received FAPE must be based on substantive grounds. Due process hearing officers shall have no authority to resolve or determine claims or issues or matters arising under State law (other than laws or regulations adopted for the purpose of implementing the requirements of the IDEA), or arising under federal laws other than the IDEA and its implementing regulations. In matters alleging a procedural violation, the hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE; significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or caused a deprivation of educational benefit. Nothing here shall be construed to preclude the hearing officer from ordering an LEA to comply with the procedural safeguards requirements. Nothing in this shall be construed to affect the right of a parent to file a State complaint with the Department of Education.

(II) Send copies of the written decision to all parties and to the State Superintendent of Education, Attention: Special Education Services.

(III) Submit all correspondence, evidence, or any other information collected during the hearing to the State Superintendent of Education, Attention: Special Education Services, for filing and safeguarding.

(v) Extension of Timelines. At the request of either party, the hearing officer may grant extensions for specific amounts of time beyond the periods set for impartial due process hearings. Documentation of extensions must be submitted to the State Department of Education, Special Education Services.

13. Additional Impartial Due Process Hearing Requests. Nothing in this part shall be construed to preclude a parent from filing a separate hearing request on an issue separate from the request already filed. ***All claims that are or that should be known to the party filing the request for due process hearing at the time the initial due process hearing request is filed should be asserted in the same hearing request.***

14. Child's Status During Hearing Proceedings. Subsequent to a request and during the pendency of any administrative or judicial proceeding, the child involved must remain in his or her current educational placement unless the State or the LEA and parents agree otherwise. If the request for hearing 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. If the hearing request involves an application for initial services under Part B of the IDEA for a child who is transitioning from Part C 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 has 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, then the public agency must provide those special education and related services that are not in dispute between the parent and the agency. If the hearing officer 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 pending any subsequent proceedings.

15. Civil Action. The decision made by the hearing office is final except that, any party agreed by the findings and decision has the right to bring a civil action with respect with the due process hearing. In any civil action brought, the court shall receive the records of the administrative proceedings; hear additional evidence at the request of a party; and basing its decision on the preponderance of the evidence, grant the relief that the court determines to be appropriate. The district courts of the United States have jurisdiction of actions brought under section 615 of the IDEA without regard to the

amount in controversy. Nothing here shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the *Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973*, 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 part, the procedures under Ala. Admin Code r. 290-8-9-.08(9) must be exhausted.

16. Timeline for Filing Civil Action. The party bringing the civil action must file a notice of intent to file a civil action within 30 days after receipt of the hearing decision. The party must file the civil action within 30 days of the filing of the notice of intent.

17. Attorneys' Fees. In any action or proceeding brought under the procedural safeguards requirements of IDEA, the court in its discretion may award reasonable attorneys' fees to a prevailing party who is the parent of a child with a disability; to a prevailing party who is a SEA or LEA against the attorney of a parent who files a request for due process hearing 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 to a prevailing SEA or LEA against the attorney of a parent, or against the parent, if the parent's request for a due process hearing 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.

(i) Part B funds may not be used to pay attorneys' fees or costs of a party related to any action or proceeding under the procedural safeguards requirements of the IDEA. However, this does not preclude a public agency from using Part B funds for conducting an action or proceeding. Fees must 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.

(ii) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under the IDEA for services performed subsequent to the time of a written offer of settlement to a parent if the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of a due process

hearing, at any time more than ten calendar days before the proceeding begins, the offer is not accepted within ten calendar days; and the court or hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(iii) Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless the meeting is convened as a result of an administrative proceeding or judicial action. A resolution meeting conducted pursuant to these rules shall not be considered a meeting convened as a result of an administrative hearing or judicial action or an administrative hearing or judicial action for purposes of this section.

(iv) 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.

(v) The court reduces, accordingly, the amount of attorneys' fees awarded if the court finds that:

(I) The parent or 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 LEA the appropriate information in the request for the due process hearing in accordance with these rules.

(V) The provisions of this section do not apply in any action or proceeding if the court finds that the State or the local agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of IDEA.

Author: Joseph B. Morton

Statutory Authority: Code of Ala. 1975, Title 16, Chapter 39; 20 U.S.C. 1400 et seq.; 34 CFR §300.
History: Amended: August 12, 1980. **Repealed:** April 10, 1986; New: April 10, 1986; effective May 30, 1986; July 11, 1989. **Amended:** 290-080-090-.09(4)(c)16. Due Process and 290-80-090-.09(5) Suspension/Expulsion effective August 16, 1989. December 13, 1990 added 290-080-090-.09(2)(c)17. through (iii) effective January 21, 1991. August 8, 1991 adopted 290-080-090-.09.52ER effective August 8, 1991. **Repealed:** June 10, 1993, New: June 10, 1993; effective August 1, 1993. **Repealed and New Rule:** Filed September 9, 1999; effective October 14, 1999 (Ed. Note: This was rule was previously 290-080-090-.10). **Amended:** Filed December 14, 2000; effective January 18, 2001. **Amended:** Filed August 9, 2001; effective September 13, 2001. **Repealed and New Rule:** Filed August 11, 2005; effective September 15, 2005. **Repealed and New Rule:** Filed June 14, 2007; effective July 19, 2007. **Amended:** Filed April 9, 2009; effective May 14, 2009. **Amended:** Filed April 14, 2011; effective May 19, 2011.

290-8-9-.09 Discipline Procedures.

When the IEP Team, including the parents, agrees to a change in placement for disciplinary reasons, there is no requirement to implement the following discipline provisions.

(1) **Authority of School Personnel.**

(a) School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

(b) School personnel under this section may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than ten (10) consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than ten consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement).

(c) After a child with a disability has been removed from his or her current placement for ten (10) school days in the same school year, during any subsequent days of removal the public agency must provide services to the child with a disability who is removed from the child's current placement. The child must continue to receive

educational services, so as 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 receive, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(d) For disciplinary changes in placement that would exceed ten (10) consecutive school days, if 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 this rule, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities. When there is a change of placement, the child must continue to receive educational services, 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 receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur. The educational services may be provided in an interim alternative setting.

(e) A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for ten (10) school days or less in that school year, if it provides services to a child without disabilities who is similarly removed.

(f) After a child with a disability has been removed from his or her current placement for ten (10) school days in the same school year, if the current removal is for not more than ten (10) consecutive school days and is not a change of placement under this rule, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed 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.

(2) **Change of Placement Because of Disciplinary Removals**. The child's IEP Team determines the interim alternative educational setting for services.

(a) For purposes of removals of a child with a disability from the child's current educational placement, a change of placement occurs if the removal is for more than ten (10) consecutive school days, including partial school days of a half day or more, or the child has been subjected to a series of removals that constitute a pattern because the series of removals total more than ten (10) school days in a school year, because the child's behavior is substantially similar to the child's behavior in previous incidents of misconduct that resulted in the series of removals, and because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. The public agency (a minimum of an administrator and the student's special education teacher) determines on a case-by-case basis whether a pattern of removals constitutes a change of placement. This determination is subject to review through due process and judicial proceedings.

(b) Notification. On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice.

(c) Manifestation Determination.

1. Within ten (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 LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must 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 if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability, or if the conduct in question was the direct result of the LEA's failure to implement the IEP.

2. The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that either condition in paragraph one is met.

3. If the LEA, the parent, and relevant members of the child's IEP Team determine that there was a failure to implement the IEP, the LEA must take immediate steps to remedy those deficiencies.

(d) Determination that Behavior was a Manifestation. If the LEA, 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 must:

1. Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment during the previous 18 months before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child, or

2. If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior, and

3. Except as provided in Special Circumstances, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

(e) 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, if the child:

1. Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of the SEA or an LEA,

2. 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 the SEA or an LEA, or

3. Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the SEA or an LEA.

(f) Definitions. For purposes of this section, the following definitions apply:

1. Controlled substance means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

2. 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 or under any other provision of Federal law. 3 Serious bodily injury has the meaning given the term ''serious bodily injury'' under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.

4. Weapon has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

(3) **Appeal**. The parent of a child with a disability who disagrees with any decision regarding disciplinary placement or manifestation determination under these rules, or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a due process hearing request.

(a) Authority of Hearing Officer. A hearing officer hears, and makes a determination regarding an appeal under this section. In making the determination, the hearing officer may return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of disciplinary requirements, or that the child's behavior was a manifestation of the child's disability, or order a change of placement of the 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 the child is substantially likely to result in injury to the child or to others. This process may be repeated if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.

(b) Expedited Due Process Hearing. Whenever a hearing is requested under this rule, the parents or the LEA involved in the dispute must have an opportunity for a due process hearing.

1. The SEA is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the hearing request is received. The hearing officer must make a

determination within ten (10) school days after the hearing.

2. Unless the parents and LEA agree in writing to waive the resolution meeting, or agree to use the mediation process, a resolution meeting must occur within seven days of receiving notice of the due process hearing request, and

3. The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the due process hearing request.

4. The decisions on expedited due process hearings are appealable consistent with the due process hearing rules.

(4) **Placement During Appeals**. When an appeal has been made by either the parent or the LEA under this rule, the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period specified in this rule, whichever occurs first, unless the parent and the SEA or LEA agree otherwise.

(5) **Protections for Children Not Determined Eligible for Special Education And Related Services**.

(a) A child who has not been determined to be eligible for special education and related services under these rules and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in these rules if the public agency had knowledge, as specified below, that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(b) A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred:

1. The parent of the child 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,

2. The parent of the child requested an evaluation of the child pursuant to these rules, or

3. The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern

of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.

(c) Exception. A public agency would not be deemed to have knowledge under paragraph (b) of this section if the parent of the child has not allowed an evaluation of the child, or has refused services under these rules, or the child has been evaluated and determined to not be a child with a disability under these rules.

(d) Conditions that apply if no basis of knowledge.

1. If a public agency does not have knowledge that a child is a child with a disability (in accordance with paragraphs (b) and (c) of this section) prior to taking disciplinary measures against the child, the child may be subjected to the disciplinary measures applied to children without disabilities who engage in comparable behaviors consistent with paragraph 2. that follows.

2. If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures, the evaluation must be conducted in an expedited manner. Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services.

3. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the public agency and information provided by the parents, the agency must provide special education and related services in accordance with these rules.

(6) **Referral to And Action by Law Enforcement and Judicial Authorities**.

(a) Rule of Construction. Nothing in these rules prohibits an agency from reporting an alleged crime committed by a child with a disability to appropriate authorities or prevents 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) Whenever law enforcement or judicial authorities are contacted by a public agency personnel reporting an alleged crime committed by a child with a disability, the

IEP Team must, within two weeks of the child's return to a school setting:

1. Conduct a functional behavioral assessment, unless the LEA has conducted a functional behavioral assessment during the previous 18 months before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child, or

2. If a behavioral intervention plan already has been developed, review the behavioral intervention plan and modify it, as necessary, to address the behavior.

(c) Transmittal of Records.

1. An agency reporting an alleged crime committed by a child with a disability must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

2. An agency reporting an alleged crime under this section may transmit copies of the child's special education and disciplinary records only to the extent that the transmission is permitted by FERPA.

(7) **Bus Suspension**. Whether a bus suspension would count as a day of suspension would depend on whether the bus transportation is a part of the child's IEP. If the bus transportation is a part of the child's IEP, a bus suspension would be treated as a suspension unless the public agency provides the bus service in some other way because that transportation is necessary for the child to obtain access to the location where all other services will be delivered. If the bus transportation is not a part of the child's IEP, a bus suspension would not be a suspension. In those cases, the child and his or her parents would have the same obligations to get the child to and from school as a nondisabled child who had been suspended from the bus. However, education agencies must address whether the behavior on the bus is similar to behavior in a classroom that is addressed in an IEP and whether bus behavior should be addressed in the IEP or in a behavioral intervention plan for the child.

(8) **In-School Suspension**. A day of in-school suspension is not a removal from a child's educational program for disciplinary reasons as long as the child is afforded the opportunity to continue to appropriately participate in the general education curriculum, continue to receive the services specified on the child's IEP, and continue to participate with nondisabled

children to the extent they would have in his or her current placement.

Author: Joseph B. Morton
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290-8-9-.10 Administration.

Each public agency must develop and implement procedures that will ensure that FAPE is available to children with disabilities from ages 3-21.

(1) **Residency**. For children with disabilities who are not residing with their parents or who are enrolled in a program outside the jurisdiction of their residence, the following rules apply.

(a) For children with disabilities who have been determined to be wards of the State or who reside in group homes, detention facilities, nursing homes, and private facilities, it is the responsibility of the LEA where the facility is located to ensure that FAPE is made available. This rule applies to students with disabilities who are incarcerated in local city and county jails. This rule does not apply to students with disabilities who are incarcerated in adult correctional facilities under the Department of Corrections.

(b) The LEA where a child with a disability resides is responsible for offering FAPE to a child with a disability. However, should a parent unilaterally place their child in a day-care center or other program outside of the jurisdiction of residence, the LEA of residence is not responsible for providing FAPE if appropriate services are available in the LEA of residence. If the LEA where the parent unilaterally placed the child has a policy of accepting children from outside its jurisdiction, it will be responsible for ensuring that FAPE is provided to these children in accordance with the LEA's out of district policies. If not, these children would not be entitled to receive FAPE from the LEA where the day-care center or other program is located.

(c) Refer to (8) of this section for specific requirements relating to children unilaterally placed in private elementary or secondary schools by their parents.

(2) **Forms**. I*n the implementation of these rules, education agencies must utilize all forms required by the State Department of Education. Forms are required to be completed and entered into the selected Student Information System (SIS).*

(3) **Special Education Agency Plan for Children with Disabilities**. Public agencies must develop, according to state and federal requirements, a written plan for providing special education and related services. The LEA must make available to parents of children with disabilities and to the general public all documents relating to the eligibility of the agency under Part B of the IDEA.

(4) **General Supervision**. All public agencies that serve children under the IDEA and the Ala. Code Title 16, Chapter 39, will have their programs reviewed by the SEA to determine compliance with federal and state laws regarding special education programs. The State must ensure that when it identifies noncompliance with the requirements by LEAs, the noncompliance is corrected as soon as possible, and in no case later than one year after the State's identification of the noncompliance.

(5) **Withholding of Funds**. When a public agency has failed to provide appropriate educational services to children with disabilities as specified by corrective action, formal complaint resolution, agency plan, or state and/or federal law and regulations, the State Superintendent of Education will invoke the following procedures to withhold the public agency's federal special education funds.

(a) If the public agency does not complete the action within the established timeline, the State Superintendent of Education will notify the public agency of the State Superintendent of Education's intent to withhold all federal special education funds because of the public agency's failure to provide appropriate educational services to the children with disabilities. This notice must also include notification that the public agency may request a hearing before the State Superintendent of Education or his designee in order to address the allegations of failure to provide appropriate educational services to children with disabilities. This hearing must be requested within ten business days of the public agency's receipt of this notification.

(b) A decision of the State Superintendent of Education or designee will be mailed to the public agency within ten business days of the hearing. If the decision rules against the agency, the public agency must be notified that all federal special education funds will be withheld after a period of ten business days from receipt of the

decision. Money will be withheld until the public agency is in compliance.

(c) Within 30 calendar days, any agency having funds withheld must inform the public within the agency's jurisdiction of the pendency of the action. The notice must be a public notice. Failure by the agency to do so will result in the State Superintendent of Education informing the public of the action.

(d) If the agency disagrees with the decision of the State Superintendent of Education, or his designee, the agency can refer the matter to the United States Secretary of Education.

(6) **IEPs for Children with Disabilities Placed in Private Schools by Education Agencies**. The public agency must ensure that children with disabilities who have been placed in or referred to private schools or facilities by the public agency are provided special education and related services in accordance with the child's IEP and at no cost to the parent. Children with disabilities placed by the public agency must be provided an education that meets the standards that apply to education provided by the SEA and LEAs (including the requirements of these rules and Part B of the IDEA, except provisions related to highly qualified and personnel qualifications); and provided all of the rights of a child with a disability who is served by a public agency.

(a) Before the public agency places a child with a disability in, or refers a child to a private school or facility, the public agency must initiate and conduct a meeting to develop an IEP for the child. The public agency must ensure that a representative of the private school or facility attends the meeting. If the representative cannot attend, the public agency must use other methods to ensure participation by the private school, including individual or conference telephone calls.

(b) After a child with a disability enters a private school or facility, any meetings to review and revise the child's IEP may be initiated and conducted by the private school or facility, at the discretion of the public agency.

(c) If the private school or facility initiates and conducts an IEP meeting, the public agency must ensure that the parents and an agency representative are involved in any decision about the child's IEP and agree to any proposed changes in the program before those changes are implemented.

(d) The public agency must ensure that an IEP is developed and implemented for each child with a disability who is enrolled in a private school and receives special education and related services.

(e) Even if a private school or facility implements a child's IEP, the responsibility for compliance with these rules remains with the public agency and the SEA.

(7) **Children in Private Schools Placed by Parents if FAPE is an Issue**.

(a) General. A public agency is not required 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 FAPE available to the child and the parents elected to place the child in a private school or facility. However, the public agency must include these children in the population whose needs are addressed consistent with these rules.

(b) Disagreements Regarding FAPE. Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures in these rules.

(c) 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 an education agency, enroll the child in a private preschool, 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 FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the State and LEA.

(d) Limitation on Reimbursement. The cost of reimbursement may be reduced or denied if:

1. At the most recent IEP Team 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 FAPE to their child, including stating their concerns and their intent to

enroll their child in a private school at public expense; or at least ten 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 education agency of the proposed action.

2. If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements, 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 the evaluation; or

3. Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(e) Notwithstanding the notice requirement in section (d)1. above, the cost of reimbursement shall not be reduced or denied for failure to provide the notice if:

1. Providing the notice would likely result in physical harm to the child;

2. The school prevented the parent from providing the notice, or

3. The parents had not received notice, as required by (d)1. of this section.

(f) The cost of reimbursement may, in the discretion of a court or hearing officer, not be reduced or denied for failure to provide such notice if:

1. The parent is not literate or cannot write in English; or

2. Compliance with the notice requirement in (d)1. of this section would likely result in serious emotional harm to the child.

(8) **Provision of Equitable Services to Children with Disabilities Enrolled by Parents in Private Schools**. No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school. To the extent consistent with their number and location of children with disabilities who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the school district served by the LEA, provision must be made for the participation of private school children with disabilities in

the program assisted or carried out under the IDEA by providing them with special education and related services in accordance with this rule.

(a) Each LEA must locate, identify, and evaluate all children with disabilities who are enrolled by their parents in private, including religious, elementary and secondary schools located in the school district served by the LEA, in accordance with this rule. The Child Find process must be designed to ensure:

1. The equitable participation of parentally-placed private school children; and

2. An accurate count of those children.

(b) In carrying out the Child Find requirements in this section, the LEA must undertake activities similar to the activities undertaken for the agency's public school children.

(c) The cost of carrying out the Child Find requirements in this section, including individual evaluations, may not be considered in determining if an LEA has met its obligation regarding expenditure of its proportionate share, as provided herein.

(d) The Child Find process must be completed in a time period comparable to that for students attending public schools in the LEA.

(e) Each LEA in which private, including religious, elementary and secondary schools are located must, in carrying out the Child Find provisions, include parentally-placed private school children who reside in a State other than the State in which the private schools are located.

(f) An LEA must timely and meaningfully consult with private school representatives and representatives of parents of children with disabilities in private schools located in the geographic jurisdiction served by the LEA during the design and development of special education and related services for children in private schools regarding the following:

1. How these children who are suspected of having a disability can participate equitably, including how parents, teachers, and private school officials will be informed of the process;

2. How the proportionate amount of Federal funds available to serve these children is determined

including the determination of how the amount was calculated;

3. How the consultation process among the LEA, private school officials, and representatives of parents will operate throughout the school year to ensure that children with disabilities identified through the Child Find process can meaningfully participate in special education and related services;

4. How, where and by whom special education and related services will be provided, 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 parentally-placed private school children, and how and when these decisions will be made; and

5. How, if the LEA 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 LEA will provide to the private school officials a written explanation of the reasons why the LEA chose not to provide services directly or through a contract.

(g) When timely and meaningful consultation has occurred, the LEA must 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 LEA must forward the documentation of the consultation process to the SEA.

(h) A private school official has the right to submit a complaint to the SEA that the LEA did not engage in consultation that was meaningful and timely, or did not give due consideration to the views of the private school official. The private school official must provide the basis of the noncompliance by the LEA to the SEA, and the LEA must forward the appropriate documentation to the SEA. If the private school official is dissatisfied with the decision of the SEA, the private school official may submit a complaint to the U.S. Secretary of Education by providing the basis of the noncompliance by the LEA to the Secretary, and the SEA shall forward the appropriate documentation to the Secretary.

(i) The services provided to parentally-placed private school children with disabilities must be provided by personnel meeting the same standards as personnel providing services in the public schools, except that

private elementary and secondary school teachers who are providing equitable services to parentally-placed private school children with disabilities do not have to meet the highly qualified special education teacher requirements. These services must be provided by employees of a public agency, or through contract by the public agency with an individual, association, agency, organization, or other entity.

(j) Special education and related services provided to parentally-placed private school children, including materials and equipment, must be secular, neutral, and nonideological.

(k) Each parentally-placed private school child with a disability who has been designated to receive services in accordance with this rule must have a services plan that describes the specific special education and related services that the LEA will provide to the child in light of the services that the LEA has determined through the process described in this rule, and it will make available to parentally-placed private school children with disabilities. The services plan must, to the extent appropriate, be developed, reviewed, and revised in accordance with the IEP requirements in these rules. The LEA must ensure that a representative of the religious or other private school attends each meeting. If the representative cannot attend, the LEA must use other methods to ensure participation by the religious or other private school, including individual or conference telephone calls.

(l) If necessary for a child to benefit from or participate in the services provided, transportation must be provided from the child’s school or the child’s home to a site other than the private school, and from the service site to the private school, or to the child’s home, depending on the timing of the services. However, LEAs are not required to provide transportation from the child's home to the private school. The cost of transportation may be included in calculating whether the LEA has met the requirement of spending its proportionate share.

(m) Services may be provided at the child's private school, including a religious school, to the extent consistent with this rule.

(n) Parents may not request a due process hearing regarding the requirements regarding the provisions of the child's services plan, but may request a due process hearing on issues of Child Find requirements, including identification and evaluation. If a hearing is requested,

it must be filed with the LEA in which the private school is located and a copy forwarded to the SEA.

(o) Any complaint that a State or LEA has failed to meet requirements other than Child Find, including the consultation and services plan requirements, must be filed in accordance with the rules governing State complaints.

(p) A complaint filed by a private school official under paragraph (c) above must be filed with the SEA in accordance with the procedures set forth in that paragraph.

(q) Each LEA must after timely and meaningful consultation with the representatives of parentally-placed private school children with disabilities, determine the number of eligible children attending private schools located in the LEA and ensure that the count is conducted on any date between October 1 and December 1, inclusive, of each year. The count must be used to determine the amount that the LEA must spend on providing special education and related services to parentally- placed private school children with disabilities in the subsequent fiscal year. To meet the requirements of the IDEA, each LEA must spend the following on providing special education and related services to private school children with disabilities:

1. For children aged 3-5, an amount that is the same proportion of the LEA's total subgrant under section 619(g) of the IDEA as the number of parentally-placed private school children with disabilities aged 3-5 who are enrolled by their parents in a private, including religious, elementary school located in the school district served by the LEA, is to the total number of children with disabilities in its jurisdiction aged 3-5. Children aged 3-5 are considered to be parentally-placed private school children with disabilities if they are enrolled by their parents in a private, including religious, elementary school that meets the definition of elementary school in State law; and

2. For children aged 3-21, an amount that is the same proportion of the LEA's total subgrant under section 611(f) of the IDEA as the number of private school children with disabilities aged 3-21 who are enrolled by their parents in private, including religious, elementary and secondary schools located in the school district served by the LEA, is to the total number of children with disabilities in its jurisdiction aged 3-21.

3. If an LEA has not expended for equitable services all of the funds described in paragraphs 1. and 2. above by the end of the fiscal year for which Congress appropriated the funds, the LEA must obligate the remaining funds for special education and related services (including direct services) to parentally-placed private school children with disabilities during a carry-over period of one additional year. (See Appendix B to the IDEA regulations for an example of how proportionate share is calculated).

4. State and local funds may supplement and in no case supplant the proportionate amount of Federal funds required to be expended for parentally-placed private school children with disabilities under this rule.

(r) An LEA may not use IDEA funds for classes that are organized separately on the basis of school enrollment or religion of the children if the classes are at the same site and the classes include children enrolled in public schools and children enrolled in private schools.

(s) An LEA may not use IDEA funds to finance the existing level of instruction in a private school or to otherwise benefit the private school. The LEA must use program funds to meet the special education and related services needs of children enrolled in private schools rather than the needs of a private school or the general needs of the children enrolled in a private school.

(t) An LEA may use IDEA funds to make public personnel available in nonpublic facilities to the extent necessary to provide equitable services to children enrolled in a private school, if those services are not normally provided by the private school.

(u) An LEA may use IDEA funds to pay for the services of an employee of a private school if the employee performs the services outside of his or her regular hours of duty, and the employee performs the services under public supervision and control.

(v) A public agency must control and administer the funds used to provide special education and related services to parentally-placed private school children and hold title to and administer materials, equipment, and property purchased with those funds. The public agency may place equipment and supplies in a private school for the period of time needed for the Part B program. The public agency must ensure that the equipment and supplies placed in a private school are used only for Part B purposes and can

be removed from the private school without remodeling the private school facility. The public agency must remove equipment and supplies from a private school if the equipment or supplies are no longer needed for the purposes of the program, or removal is necessary to avoid use of equipment and supplies for other than IDEA Part B purposes.

(w) IDEA funds may not be used for repairs, minor remodeling, or the construction of private school facilities.

(x) Each LEA must maintain in its records and provide to the SEA the number of parentally-placed private school children evaluated, the number of children determined to be eligible children with disabilities, and the number of children served.

(9) **Graduation Activities and Diplomas**. Each student with a disability must be given the opportunity, consistent with the decision of the IEP Team, to participate in the public agency's graduation activities and diploma procedures including the opportunity to earn Carnegie Units.

(a) Each student with a disability who earns the appropriate number of Carnegie Units, based on the approved State courses of study, and passes all portions of the Alabama High School Graduation Exam (AHSGE) must be awarded the Alabama High School Diploma or Alabama High School Diploma with Advanced Endorsement. Students with disabilities as defined by IDEA, including those pursing the Alabama Occupational Diploma (AOD), are eligible to receive the Alabama High School Diploma if they pass all but one subject-area test of the AHSGE, meet all other requirements for graduation, and have the required alternate documentation (which includes documentation of the disability(s) in the area of the one subject area test of the AHSGE that was not passed).

(b) Each student with a disability as defined by IDEA must earn the course credits outlined in Ala. Admin. Code r. 290-3-1-.02(8.1)(g-1). Each student with a disability that is pursuing the AOD must be provided the opportunity to continue working toward earning the AOD if that student is determined, through the reevaluation process, to no longer qualify for special education services.

(c) Each student with a disability who accumulates the required number of Carnegie Units for graduation, but does not pass the AHSGE must be awarded a graduation certificate and afforded the opportunity to participate in public agency activities related to graduation.

(d) Each student with a disability who passes the AHSGE, but does not accumulate the required number of Carnegie Units for graduation must be awarded a graduation certificate and afforded the opportunity to participate in public agency activities related to graduation.

(e) Each student with a disability who successfully completes his or her IEP must be awarded a graduation certificate and afforded the opportunity to participate in public agency activities related to graduation.

(f) Where a student with a disability has participated in graduation activities with nondisabled age-appropriate peers but has not earned an Alabama High School Diploma, that student is entitled to FAPE until he or she exits school with a regular diploma or to age 21.

(g) It is the intent and desire of the State Board of Education that graduation activities and procedures for awarding the standard, advanced or any other diploma or graduation certificate to an eligible student, including a student with a disability, be integrated and identical with no distinctions/ differentiations made in regard to the way the exit document is awarded or presented.

(h) Diploma Requirements. (Refer to Diploma Requirements of Public School Governance AAC Rule 290-3-1-.02(8).

(10) **Reports**. Public agencies that are receiving state and/or federal dollars and are providing special education and related services to students with disabilities must complete reports as required by the SDE, including those relating to the performance of children with disabilities participating in programs carried out under Part B of the IDEA.

(11) **Medication**. State and LEA personnel are prohibited from requiring a child to obtain a prescription for a substance covered under 21 U.S.C. §812 (c) et seq. for a child as a condition of attending school, receiving an evaluation, or receiving services. However, nothing in this provision shall be construed to prohibit teachers and other school personnel from 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.

(12) **Migratory Children with Disabilities**. LEAs shall cooperate with the United States Secretary of Education's efforts under section 1308 of the ESEA to ensure the linkage of records pertaining to migratory children with disabilities to electronically exchanging, among the States, health and educational information regarding those children.

(13) **Funding for Early Intervening Services**.

(a) An LEA may not use more than 15 percent of its Part B funds, in combination with other amounts (which may include amounts other than education funds) to develop and implement coordinated, early intervening services, which may include interagency financing structures for students in grades K-12 (with a particular emphasis on students in K-3) who are not currently identified as needing special education or related services but who need additional academic and behavioral support to succeed in a general education environment.

(b) In implementing these services, an LEA may carry out activities that include professional development (which may be provided by other entities) for teachers and other school staff to enable such personnel to deliver scientifically based academic and behavioral interventions, including scientifically based literacy instruction, and, where appropriate, instruction on the use of adaptive and instructional software; and providing educational and behavioral evaluations, services, and supports, including scientifically based literacy instruction.

(c) Nothing in this section shall be construed to limit or create a right to FAPE or to delay appropriate evaluation of a child suspected of having a disability.

(d) Each LEA that develops and maintains coordinated, early intervening services must report annually to the SEA on the number of students served and the number of students served who subsequently receive special education and related services during the preceding two-year period.

(e) Funds may be used to carry out coordinated, early intervening services aligned with activities funded by and carried out under the ESEA if those funds are used to supplement, and not supplant, funds made available under the ESEA for the activities and services assisted.

(f) Any LEA that is identified by the SEA as having over identification and/or significant disproportionality must use the maximum funds to provide comprehensive coordinated early intervening services.

(g) In the case of a determination of significant disproportionality with respect to the identification of children as children with disabilities, the placement in particular educational settings of these children, and the incidence, duration, or type of disciplinary actions including suspensions and expulsions, the LEA must:

1. Review and, if appropriate, revise the policies, procedures, and practices used in the identification or placement to ensure that the policies, procedures, and practices comply with the requirements of the IDEA;

2. Reserve the maximum amount of funds under the IDEA to provide comprehensive coordinated early intervening services to serve children in the LEA, particularly, but not exclusively, children in those groups that were significantly over-identified under paragraph (f) of this section; and

3. Publicly report on the revision of policies, practices, and procedures described in (g)1. of this section.

Author: Joseph B. Morton
Statutory Authority: Code of Ala. 1975, Title 16, Chapter 39; 20 U.S.C. 1400 et seq.; 34 CFR §300.
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290-8-9-.11 Case Manager For Children With Disabilities.

(1) **Case Manager.** A special education teacher will be assigned as a case manager for a maximum number of student records to ensure the implementation of special education and related services for these students. The number of records to manage does not represent the number of students that a teacher will serve. Those numbers will be determined by the LEA by taking into consideration a number of factors including severity of the needs of the students, location of the services (e.g. general education classroom, resource room), the number of campuses a teacher serves, and

whether all IEPs can be implemented as written. This rule does not apply to teachers providing special education services to students with disabilities in correctional facilities.

(2) **Number of Student Records for Case Managers**. The maximum number of records per teacher is 20; for a speech/language pathologist, the maximum number of records is 30.

(3) **State Monitoring of Case Manager Rule**. To monitor for compliance with the rules (1) and (2) above, the Department of Education will review the total number of students with disabilities and total number of teachers rather than by individual teacher or school.
Author: Joseph B. Morton
Statutory Authority: Code of Ala. 1975, Title 16, Chapter 39; 20 U.S.C. 1400 et seq.; 34 CFR §300.
History: New Rule: Filed September 9, 1999; effective October 14, 1999. **Repealed and New Rule:** Filed August 11, 2005; effective September 15, 2005. (Ed. Note: This rule was previously 290-8-9-.13 as per certification filed August 11, 2005; effective September 15, 2005.) **Repealed and New Rule:** Filed June 14, 2007; effective July 19, 2007.

290-8-9-.12 Gifted.

(1) **Definition**. Intellectually gifted children and youth are those who perform or who have demonstrated the potential to perform at high levels in academic or creative fields when compared with others of their age, experience, or environment. These children and youth require services not ordinarily provided by the regular school program. Children and youth possessing these abilities can be found in all populations, across all economic strata, and in all areas of human endeavor.

(2) **Referral**. Each LEA must develop and implement procedures to ensure that students who exhibit gifted characteristics are referred for gifted services.

(a) Public Notice. Parents, teachers, and students must be informed of referral procedures.

(b) Equity. Efforts must be made to identify students among all populations and socio-economic groups as well as students with disabilities and students who are Limited English Proficient (LEP).

(c) Second Grade Child Find. All second grade students will be observed as potential gifted referrals using a gifted behavior checklist provided by the State Department of Education.

(d) Standard Referral. A student may be referred for consideration for gifted services by teachers, counselors, administrators, parents or guardians, peers, self, and other individuals with knowledge of the student's abilities. Standard referrals may occur at any time for students six years of age and older. Parents must be informed when students are referred.

(e) Gifted Referrals Screening Team (GRST). Each LEA must establish a team(s) to review referrals to determine if further assessment is indicated. Each team should consist of at least three individuals including someone knowledgeable about the student and someone knowledgeable about gifted education.

(3) **Consent**.

(a) Parental Consent for Evaluation. The LEA must obtain written parental consent prior to administering individual assessments.

(b) Parental Consent for Placement. An identified gifted student may be placed in a program for the gifted upon written approval of the parents. Participation in this program is not mandatory should the parent and/or the student choose not to participate.

(c) Rights in Gifted Education. A copy of the rights pertaining to gifted education services must be given to the parents with the consent for screening and/or evaluation.

(4) **Evaluation**. Each LEA must develop and implement procedures to evaluate students referred for gifted services.

(a) Information must be obtained in the following areas:

1. Aptitude. Aptitude should be assessed through an individual or group test of intelligence or creativity. Vision and hearing screening must be completed prior to completing individually administered aptitude assessments (not screeners).

2. Performance. At least three examples of student performance that indicate the student is performing at high levels in academic or creative fields when compared to others of his or her age, experience, or environment must be included.

3. Characteristics. A behavior rating scale designed to assess gifted behaviors should be used.

4. Aptitude Test Selection. Information must be gathered to determine if there are any environmental, cultural,

economic, language differences, or a disabling condition that might mask a student's true abilities and thereby affect student performance in the areas evaluated.

(b) Tests and evaluative materials selected and administered should be sensitive to cultural, economic, and linguistic differences and be administered by qualified personnel under the supervision of an LEA.

(c) For special populations such children with LEP, or sensory or physical impairments, assessments used must be appropriate for their special needs.

(d) For students who exhibit creative thinking abilities the Torrance Test of Creative Thinking (or other creativity assessment with prior approval) must be administered unless the student has been determined eligible with a verbal or nonverbal assessment.

(5) **Eligibility Determination**. Each LEA must establish an Eligibility Determination Team(s) (EDT) to implement procedures to determine eligibility of students for gifted services. Each team should consist of at least three individuals including someone knowledgeable about the student being assessed, someone knowledgeable about gifted students in general, and someone able to interpret the assessment information gathered.

(a) Timeline. Eligibility must be determined within 90 days of receiving parental consent for standard referrals. Referrals generated from the second grade Child Find activity should be completed by the beginning of the student's third grade year.

(b) Notice. The LEAs must provide written notice to parents regarding the eligibility decision.

(c) Eligibility Criteria. Two methods of eligibility determination are available. The student may not be determined ineligible without having the matrix applied.

1. Automatic Eligibility. A student may be determined automatically eligible for gifted services when the obtained full scale/composite IQ score on an individually administered test of intelligence (NOT a screener) is two standard deviations above the mean or higher; or either the Verbal Average Standard score or Figural Creativity Index of the Torrance Tests of Creative Thinking is at or above the 97th national percentile.

2. Matrix of Multiple Criteria. The matrix of multiple criteria developed by the State Department of Education, requires information in the areas described above in (4)(a)1-4 of this section.

(i) Use of other matrices must be approved by the State Department of Education.

(ii) Students with environmental, cultural, economic, or language differences may not be determined ineligible until both verbal and nonverbal abilities have been assessed

(6) **Placement and Service Delivery Options**. LEAs must utilize a variety of service delivery options that may include but are not limited to resource room pull-out, consultation, mentorships, advanced classes, and independent study. Gifted students' need for complexity and accelerated pacing must be accommodated for in the general education program. Accommodations may include strategies such as flexible skills grouping, cluster grouping with differentiation, curriculum compacting, subject and grade acceleration, dual enrollment, and advanced classes. Each LEA must establish and implement a procedure for considering any requests for subject or grade acceleration. The procedures must be approved by the State Department of Education and will be included in the LEA Plan for Gifted.

(a) Modes of service delivery may vary by grade and/or grade level cluster but must be consistent from school to school. In addition, services must be comparable in quality and duration from school to school within an LEA.

(b) Modes of service delivery to each grade level or grade level cluster or the intent to utilize general education staff to teach advanced classes must be approved by the State Department of Education in the LEA Plan for Gifted. In the event that general education staff are utilized, they must be knowledgeable of gifted learners, trained in differentiation, and demonstrate a willingness to address the needs of diverse learners. Exceptions to the modes of service delivery for any grade or grade level cluster require prior state approval.

(c) The recommended modes for services are as follows:

1. Grades K-2—regular classroom accommodations with consultation from a gifted specialist as needed. The general education teacher should be knowledgeable of gifted learners, trained in differentiation, and demonstrate a willingness to address the needs of diverse learners.

2. Grades 3-5/6—resource room pull-out for 3-5 hours a week,

3. Grades 6/7-8—pull-out services including electives and enrichment clusters, and/or, advanced classes in the core content areas.

4. Grades 9-12—advanced classes (including Advanced Placement and International Baccalaureate), electives, dual enrollment (where available), career/college counseling, mentorships, seminars, and independent studies.

(7) **Gifted Education Plan (GEP)**. Each gifted student receiving pull-out services, must have a written plan that describes the services to be provided. GEPs are not required for students receiving services other than pull-out unless there is a specific need. If GEPs are not written for students receiving services in the general education classroom a plan for monitoring the services must be included in the *LEA Plan for Gifted*.

(a) GEP meetings may be held on an individual basis, group basis, or both.

(b) GEP Meeting Notice. School officials must provide prior notice to parents regarding the date, time, and location of the GEP meeting.

(c) Services may begin upon receipt of the parent's written consent. For the student who has been initially identified as gifted, the GEP must be developed and signed within 30 days.

(d) GEP Meeting Participants. Two signatures are required on the GEP. The participants may include the gifted specialist, the parents, the student (when appropriate), and other persons at the discretion of the parents or LEA (i.e. the general education teacher or staff member). When parents cannot attend the GEP meeting, the meeting can be conducted with the gifted specialist (or other staff member responsible for the student's program) and the student (when appropriate).

(e) GEP Content. A GEP for gifted students must contain the following information:

1. Name of Student,

2. Implementation To and From Dates/Grades,

3. Transportation, if appropriate,

4. Placement and Service Delivery Options (i.e., the location of services to be provided),

5. Curricular Options and/or Program Description (i.e., an explanation of the services to be provided),

6. Accommodations in the general education classroom must be provided for the times that gifted students are in pull-out classes. The accommodations form must be completed if the following accommodations are not made:

(i) Student will not be required to make up missed class work,

(ii) If new material is introduced, student will be instructed by peer or teacher in a small group or one-on-one setting,

(iii) If tests are administered, student will take the test when he or she returns to the classroom or at a mutually agreed upon time, and

7. Dated signatures of each GEP Committee member.

(f) GEP Review. GEPs may be reviewed annually but must be reviewed every three years or sooner if the mode of service delivery changes. If the mode of service delivery remains the same during a three-year period (e.g., resource room pull-out services during Grades 3-5) then only one GEP meeting is required. If the parents or the gifted specialist have reason to believe that the GEP needs revision during this time, either party may request a GEP meeting to consider revisions. When a GEP Committee meeting has been requested, the LEA must conduct the meeting within 30 calendar days.

(g) A copy of the GEP must be provided to parents upon request.

(h) Only the GEP Committee can make the determination to interrupt services due to behavioral or academic issues.

(8) **Administration**.

(a) Age Range for Services. An LEA must serve gifted students beginning with those six years of age. Refer to Ala. Code Title 16, Chapter 39§3. An identified gifted student is no longer eligible for services when the student earns an Alabama High School Diploma.

(b) Transportation. Gifted students must not be excluded from services because of inadequate transportation services.

(c) Student Enrollment. Students must be enrolled in the public school in order to be referred, evaluated, and/or to receive gifted services.

(d) Child Count. Gifted students must be included in the LEA's Child Count when all of the following criteria are met:

1. Student is identified by state approved standards, and

2. Services can be documented as of the State capture date for Child Count.

(e) LEA Plan for Gifted Services. LEAs must develop and implement, according to state guidelines, a written plan for serving gifted students. The plan will include:

1. Philosophy,

2. Child Find activities,

3. Screening/eligibility criteria,

4. Service delivery options for each grade level or grade level cluster,

5. Subject and grade acceleration procedures,

6. Teaching assignments and other responsibilities of gifted specialists,

7. Professional development for gifted specialists and general educators,

8. Other information as required by the State Department of Education.

(f) Transfer Students. When gifted students transfer from one school to another within the State of Alabama the receiving LEA must honor the sending LEA's decision if eligibility was determined by State standards. Students transferring from out of state must meet Alabama eligibility criteria.

(g) Responsible Staff Person. Each LEA must designate a person to have the responsibility for the development, supervision, and implementation of gifted services.

(9) **Caseload**. The following numbers are considered to be appropriate when determining caseloads for gifted specialists:

(a) Elementary - 45 total, no more than 15 at one time.

(b) Middle School – 75 total, no more than 15 at one time.

(c) Elementary-Middle combination – 45 total, no more than 15 at one time.

(d) High School – 75 total, no more than 20 at one time.

(10) **Procedural Safeguards**. Each LEA must establish a grievance procedure, consistent with local policy, through which parents and students may resolve concerns regarding identification, evaluation, eligibility, or services for gifted students. When attempts to resolve the issue at the local level fail, parents may utilize the Complaint Procedures, or Mediation Procedures developed by the State Department of Education as an appropriate

administrative remedy for matters pertaining to violations of state law or regulation regarding the identification, evaluation, eligibility, or services for gifted students. To obtain a copy of these procedures, call Special Education Services at (334) 242-8114, or write to Special Education Services, Post Office Box 302101, Montgomery, Alabama 36130-2101.
Author: Joseph B. Morton
Statutory Authority: Code of Ala. 1975, Title 16, Chapter 39; 20 U.S.C. 1400 et seq.; 34 CFR §300.
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