

ARKANSAS DEPARTMENT OF EDUCATION
SPECIAL EDUCATION AND RELATED SERVICES
9.00 DUE PROCESS
July 2013

9.01 GENERAL RESPONSIBIITY OF PUBLIC AGENCIES

It shall be the responsibility of each public agency providing special education and related services to establish, maintain, and implement procedural safeguards that meet the requirements of this part and 34 CFR 300.500 - 300.536.

9.02 OPPORTUNITY TO EXAMINE RECORDS; PARENT PARTICIPATION IN MEETINGS

9.02.1 Opportunity to Examine Records.

9.02.1.1 The parents of a child with a disability must be afforded, in accordance with the procedures of §§ 16.01 - 16.09 of these regulations and 34 CFR 300.613 - 300.621, an opportunity to -

9.02.1.2 Inspect and review all education records with respect to -

A. The identification, evaluation, and educational placement of the child; and

B. The provision of FAPE to the child.

9.02.2 Parent participation in meetings.

9.02.2.1 The parents of a child with a disability must have any opportunity to participate in meetings with respect to –

A. The identification, evaluation, and educational placement of the child; and

B. The provision of FAPE to the child.

9.02.2.2 Each public agency shall provide notice consistent with § 8.06.1.1A and 8.06.2.1 of these regulations and 34 CFR 300.322(a)(1) and (b)(1) to ensure that parents of children with disabilities have the

opportunity to participate in meetings described in § 9.02.2.1 of this part.

9.02.2.3 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 or response to a parent proposal that will be discussed at a later meeting.

9.02.3 Parent involvement in placement decisions.

9.02.3.1 Each public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.

9.02.3.2 In implementing the requirements of § 9.02.3.1 of this part, the public agency must use procedures consistent with the procedures described in §§ 8.06.1.1 and 8.06.2.1 of these regulations and 34 CFR 300.322(a) through (b)(1).

9.02.3.3 If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency must use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.

9.02.3.4 A placement decision may be made by a group without the involvement of a parent, if the public agency is unable to obtain the parent's participation in the decision. In this case, the public agency must have a record of its attempt to ensure their involvement

9.03 INDEPENDENT EDUCATIONAL EVALUATION

9.03.1 General.

9.03.1.1 The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to §§ 9.03.2 - 9.03.5 of this part.

9.03.1.2 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 applicable for independent educational evaluations as set forth in § 9.03.5 of this part.

9.03.1.3 For the purposes of this part -

A. 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; and

B. 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, consistent with § 5.02 of these regulations and 34 CFR 300.103.

9.03.2 Parent right to evaluation at public expense.

9.03.2.1 A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraph 9.03.2.2 – 9.03.2.4 of this section.

9.03.2.2 If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either -

A. File a due process complaint to request a hearing to show that its evaluation is appropriate; or

B. Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing under § 10.00 of these regulations and 34 CFR 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

9.03.2.3 If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

9.03.2.4 If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public 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 filing a due process complaint to request a due process hearing to defend the public evaluation.

9.03.2.5 A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

9.03.3 Parent-Initiated Evaluations.

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 -

9.03.3.1 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

9.03.3.2 May be presented by any party as evidence at a hearing on a due process complaint under these regulations regarding that child.

9.03.4 Requests for evaluations by hearing officers.

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

9.03.5 Agency Criteria.

9.03.5.1 If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

9.03.5.2 Except for the criteria described in § 9.03.5.1 of this part, a public agency may not impose conditions or time lines related to obtaining an independent educational evaluation at public expense.

9.04 PRIOR NOTICE BY PUBLIC AGENCY; CONTENT OF NOTICE

9.04.1 Notice.

9.04.1.1 Written notice that meets the requirements of § 9.04.2 of this part must be given to the parents of a child with a disability a reasonable time before the public agency -

- A. Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
- B. Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

9.04.1.2 If the notice described under § 9.04.1.1 of this part relates to an action proposed by the public agency that also requires parental consent under § 9.06 of these regulations and 34 CFR 300.300, the agency may give notice at the same time it requests parent consent.

9.04.2 Content of Notice.

The notice required under § 9.04.1 of this part must include -

- 9.04.2.1 A description of the action proposed or refused by the agency;
- 9.04.2.2 An explanation of why the agency proposes or refuses to take the action;
- 9.04.2.3 A description of other options that the IEP team considered and the reasons why those options were rejected;
- 9.04.2.4 A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- 9.04.2.5 A description of other factors that are relevant to the agency's proposal or refusal;
- 9.04.2.6 A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and
- 9.04.2.7 Sources for parents to contact to obtain assistance in understanding the provisions of this part.

9.04.3 Notice in understandable language.

- 9.04.3.1 The notice required under § 9.04.1 of this part must be -
 - A. Written in language understandable to the general public; and
 - B. Provided 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.

- 9.04.3.2 If the native language or other mode of communication of the parent is not a written language, the public agency must take steps to ensure -
- A. That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;
 - B. That the parent understands the content of the notice; and
 - C. That there is written evidence that the requirements in § 9.04.3.2A and B of this part have been met.

9.05 PROCEDURAL SAFEGUARDS NOTICE

9.05.1 General.

9.05.1.1 A copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents, only one time a school year, except that a copy also must be given to the parents, at a minimum -

- A. Upon initial referral or parent request for evaluation;
- B. Upon receipt of the first State complaint under 34 CFR 300.151 – 300.153 and upon receipt of the first due process complaint under 34 CFR 300.507 in a school year;
- C. In accordance with the discipline procedures in 34CFR 300.530(h); and
- D. Upon request by a parent.

9.05.2 Internet Web site. A public agency may place a current copy of the procedural safeguards notice on its Internet Web site if a Web site exists.

9.05.3 Contents.

9.05.3.1 The procedural safeguards notice must include a full explanation of all of the procedural safeguards available under §§ 9.00, 13.00, and 16.00 of these regulations and 34 CFR 300.148, 300.151 through 300.153, 300.300, 300.502 through 300.503, 300.505 through 300.518, 300.520, 300.530 through 300.536 and 300.610 through 300.625 relating to -

- A. Independent educational evaluation;
- B. Prior written notice;
- C. Parental consent;
- D. Access to educational records;
- E. Opportunity to present and resolve complaints through the due process complaint and State complaint procedures, including –
 - 1. The time period in which to file a complaint;
 - 2. The opportunity for the agency to resolve the complaint; and
 - 3. 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 child's placement during the pendency of any due process proceedings;
- G. Procedures for students who are subject to placement in an interim alternative educational setting;
- H. Requirements for unilateral placement by parents of children in private schools at public expense;

- I. The availability of Mediation under 34 CFR 300.506 and § 10.00 of these regulations;
- J. Hearings on due process complaints, including requirements for disclosure of evaluation results and recommendations;
- K. Civil actions, including the time period in which to file those actions; and
- L. Attorneys' fees.

9.05.4 Notice in understandable language.

The notice required under § 9.05.1 of this part must meet the requirements of § 9.04.3 of these regulations and 34 CFR 300.503(c).

9.05.5 Electronic Mail

A parent of a child with a disability may elect to receive notices required by 34 CFR 300.503, 300.504, and 300.508 by an electronic mail communication, if the public agency makes that option available.

9.06 PARENTAL CONSENT

9.06.1 Parental consent for initial evaluation.

9.06.1.1 The public agency proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under 34 CFR 300.8 must, after providing notice consistent with 34 CFR 300.503 and 300.504, obtain informed consent, consistent with 34 CFR 300.9, from the parent of the child before conducting the evaluation.

9.06.1.2 Parental consent for initial evaluation must not be construed as consent for initial provision of special education and related services.

9.06.1.3 The public agency must make reasonable efforts to obtain the informed consent from the parent for an

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

9.06.1.4 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 –

- A. Despite reasonable efforts to do so, the public agency cannot discover the whereabouts of the parent of the child;
- B. The rights of the parents of the child have been terminated in accordance with State law; or
- C. 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.

9.06.2 If the parents of a child with a disability 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 the initial evaluation of the child by using the due process procedures under § 10.00 of these regulations and 34 CFR 300.507-300.516, or the mediation procedures under § 10.00 and 34 CFR 300.506 if appropriate, except to the extent inconsistent with State law relating to parental consent. The public agency does not violate its obligation under 34 CFR 300.111 and 300.301 through 300.311 if it declines to pursue the evaluation.

9.06.3 Parental Consent for Services.

9.06.3.1 A public agency that is responsible for making FAPE available to a child with a disability must obtain informed consent from the parent of the child before the initial provision of special education and related services to the child.

- 9.06.3.2 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.
- 9.06.3.3 If the parent of a child fails to respond or refuses to consent to services under this section, the public agency may not use mediation procedures under 34 CFR 300.506 or due process procedures under 300.507 through 300.516 in order to obtain agreement or a ruling that the services may be provided to the child.
- 9.06.3.4 If the parent of the child refuses to consent to the initial provision of special education and related services, or the parent fails to respond to a request to provide consent for the initial provision of special education and related services, the public agency –
- A. Will not be considered to be in violation of the requirement to make available FAPE to the child for the failure to provide the child with the special education and related services for which the public agency requests consent; and
 - B. Is not required to convene an IEP Team meeting or develop an IEP under 34 CFR 300.320 and 300.234 for the child for the special education and related services for which the public agency requests such consent.

9.06.4 Failure to respond to request for reevaluation.

- 9.06.4.1 Each public agency must obtain informed parental consent, in accordance with 34 CFR 300.300(a)(1), prior to conducting any reevaluation of a child with a disability.
- 9.06.4.2 If the parent refuses to consent to the reevaluation, the public agency may, but it is not required to, pursue the reevaluation by using the consent override procedures described in 34 CFR 300.300(a)(3).

- 9.06.4.3 The public agency does not violate its obligations under 34 CFR 300.311 and 300.301 through 300.311 if it declines to pursue the evaluation or reevaluation.
- 9.06.4.4 Informed parental consent need not be obtained for reevaluation if the public agency can demonstrate that it made reasonable efforts to obtain such consent, and the child's parent has failed to respond.
- 9.06.4.5 To meet the reasonable efforts requirement in § 9.06.3.2 of this part, the public agency must document its attempts to obtain parental consent using the procedures in 34 CFR 300.322(d).

9.06.5 Other Consent Requirements.

- 9.06.5.1 Parental consent is not required before –
 - A. Reviewing existing data as part of an evaluation or reevaluation; or
 - B. 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.
- 9.06.5.2 Limitation.

A public agency may not use a parent's refusal to consent to one service or activity under § 9.06.1 to deny the parent or child any other service, benefit, or activity of the public agency, except as required by this part.
- 9.06.5.3 Parent of a child who is home schooled or placed in a private school by the parents.
 - A. 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 described in this section; and

- B. The public agency is not required to consider the child as eligible for services under 34 CFR 300.132 through 300.144.

9.06.6 Student with disabilities who are covered by public benefits or insurance.

9.06.6.1 Consent. Prior to accessing a student's or parent's public benefits or insurance for the first time, and after providing notification to the student's parents consistent with § 9.06.6.2 of this part, the public agency must obtain written consent from the parent that:

- A. Meets the confidentiality requirements of 34 CFR §§ 99.30 and 300.622, which require that the consent specify the personally identifiable information that may be disclosed (e.g., records or information about the services that may be provided to a particular student), the purpose of the disclosure (e.g., billing for special education services), and the agency to which the disclosure may be made (e.g., the State's public benefits or insurance program, such as Medicaid); and
- B. Specifies that the parent understands and agrees that the public agency may access the parent's or student's public benefits or insurance to pay for special education services provided by the public agency.

9.06.6.2 Notification. Prior to accessing a student's or parent's public benefits or insurance for the first time, and annually thereafter, the public agency must provide the student's parents with written notification, consistent with the requirements of § 9.04.3 of this part and 34 CFR § 300.503(c), that includes:

- A. A statement of the parental consent provisions in § 9.06.6.1 of this part;
- B. A statement that the parents are not required to sign up for or enroll in public benefits or insurance programs in order for their child to receive a free appropriate public education under Part B of the IDEA;
- C. A statement that the parents are not required 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;
- D. A statement that the public agency may not use the student's benefits under a public benefits or insurance program if that use would:
 - 1. Decrease available lifetime coverage or any other insured benefit;
 - 2. 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 student outside of the time the student is in school;
 - 3. Increase premiums or lead to the discontinuation of benefits or insurance; or
 - 4. Risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures;
- E. A statement that the parents have the right, pursuant to 34 CFR Parts 99 and 300, to withdraw their consent to disclosure of their child's personally identifiable information to the agency responsible for the administration

of the State's public benefits or insurance program (e.g., Medicaid) at any time; and

- F. A statement that the withdrawal of consent or refusal to provide consent under 34 CFR Parts 99 and 300 to disclose personally identifiable information to the agency responsible for the administration of the State's public benefits or insurance program (e.g., Medicaid) does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

9.06.7 Students with disabilities who are covered by private insurance.

With regard to services required to provide a free appropriate public education to an eligible student under 34 CFR Part 300, a public agency may access the parents' private insurance proceeds only if the parents provide consent consistent with § 2.12 of these regulations. Each time the public agency proposes to access the parents' private insurance proceeds, the agency must obtain such parental consent, and inform the parents that their refusal to permit the public agency to access their private insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

9.07 TRANSFER OF PARENTAL RIGHTS AT AGE OF MAJORITY

9.07.1 General.

9.07.1.1 When a child with a disability reaches the age of majority under State law that applies to all students (age 18 in Arkansas), except for a student with a disability who has been determined to be incompetent or incapacitated under State law -

- A. The public agency must provide any notice required by Part B of the IDEA and these regulations to both the child and the Parents; and
- B. All other rights accorded to parents under Part B of the IDEA and these regulations transfer to the child; and

- C. All rights accorded to parents under Part B of the IDEA and these regulations transfer to children who are incarcerated in an adult or juvenile, State or local correctional institution.
- D. Whenever a State provides for the transfer of rights under this part pursuant to §9.07.1 A and B of this part, the agency must notify the child and the parent of the transfer of rights. (See form: Letter of Notification of Transfer of Rights.)

9.07.1.2 The LEA must use the procedures established by the State for appointing the parent of a child with a disability, or if the parent is not available, another appropriate individual; to represent the educational interest of the child throughout the period of the child's eligibility under Part B of the Act if, under State law, a child who has reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child's educational program.

9.07.2 Legal Guardianship

9.07.2.1 In accordance with Arkansas Code Annotated §28-65-101 et seq. and §28-65-201 et seq. any person may file a petition for the appointment of himself or herself or some other qualified person as guardian of an incapacitated person.

9.07.2.2 Arkansas Code Annotated §28-65-101(5)(A) defines an "incapacitated person" to mean a person who is impaired by reason of a disability such as mental illness, mental deficiency, physical illness, chronic use of drugs or chronic intoxication to the extent of lacking sufficient understanding or capacity to make or communicate decisions to meet the essential requirements for his or her health or safety or to manage his or her estate.

9.07.2.3 Arkansas Code Annotated §28-65-101(3) defines a

“Guardian” as one appointed by a court to have care and custody of the person or of the estate, or of both, of an incapacitated person.

9.07.2.4 Jurisdiction of Courts

- A. The jurisdiction of the circuit courts over all matters of guardianship, other than guardianships ad litem in other courts, shall be exclusive, subject to the right of appeal. (Arkansas Code Annotated §28-65-107(a))
- B. If a juvenile is the subject matter of an open case filed under the Arkansas Juvenile Code of 1989, §9-27-301 et seq., the guardianship petition shall be filed in that case if the juvenile resides in Arkansas.

9.07.2.5 Rights of Incapacitated Persons

- A. An incapacitated person for whom a guardian has been appointed is not presumed to be incompetent and retains all legal and civil rights except those which have been expressly limited by court order or have been specifically granted by order to the guardian by the court.