

Questions and Answers On Individualized Education Programs (IEPs), Evaluations, and Reevaluations

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The final regulations for the reauthorized Individuals with Disabilities Education Act (IDEA) were published in the Federal Register on August 14, 2006, and became effective on October 13, 2006. Since publication of the final regulations, the Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education has received requests for clarification of some of these regulations. This is one in a series of question and answer documents prepared by OSERS to address some of the most important issues raised by requests for clarification on a variety of high-interest topics. Generally, the questions, and corresponding answers, presented in this Q&A document required interpretation of IDEA and the regulations and the answers are not simply a restatement of the statutory or regulatory requirements. The responses presented in this document generally are informal guidance representing the interpretation of the Department of the applicable statutory or regulatory requirements in the context of the specific facts presented and are not legally binding. The Q&As are not intended to be a replacement for careful study of IDEA and the regulations. The statute, regulations, and other important documents related to IDEA and the regulations are found at <http://idea.ed.gov>.

The development and implementation of an individualized education program (IEP) that addresses the unique needs of each child with a disability and that assists schools and parents in focusing instruction are at the core of the IDEA. IDEA and the final Part B regulations include significant changes related to the content of IEPs (including content related to secondary transition and State and districtwide assessments), IEPs for children with disabilities who transfer from one public agency to another public agency within the same school year, IEP meetings and participants in those meetings, and changes to IEPs following the annual IEP meeting. The reauthorized IDEA also includes significant changes related to parental consent for initial evaluations and reevaluations.

This Q & A document will be updated as further requests for clarification are received.

A. Secondary Transition

Authority: The requirements for the content of the IEP related to secondary transition are found in the regulations at 34 CFR §300.320(b).

Question A-1: Must an IEP include measurable postsecondary goals based on age appropriate transition assessments for every 16-year-old student with a disability regardless of the student's skill levels relating to education, employment and training?

Answer: Yes. Under 34 CFR §300.320(b), the IEP for each child with a disability, must, 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, include: (1) appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and (2) the transition services (including courses of study) needed to assist the child in reaching those goals. This requirement applies, whether or not the child's skill levels related to training, education, and employment are age appropriate. The IEP Team must, however, develop the specific postsecondary goals for the child, in light of the unique needs of the child as determined based on age appropriate transition assessments of the child's skills in these areas.

Question A-2: May community access skills be included in the IEP as independent living skills?

Answer: It depends. The IEP Team must determine whether it is necessary to include appropriate measurable postsecondary goals related to independent living skills in the IEP for a particular child, and – if so – what transition services are needed to assist the child in reaching those goals. Under 34 CFR §300.43, "transition services" are defined as "a coordinated set of activities for a child with a disability" "to facilitate movement from school to post-school activities," and include among other activities, "independent living, or community participation." Based on the assessment of the student's independent living skills, the IEP Team would need to determine whether transition services in the form of community access skills are necessary for the child to receive a free appropriate public education (FAPE). If so, those skills must be reflected in the transition services in the child's IEP.

Question A-3: If an IEP Team chooses to address transition before age 16 (for example, at age 14) are the same standards required?

Answer: Yes. The regulations provide, at 34 CFR §300.320(b), that 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, the IEP must include-- (1) Appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and (2) The transition services (including courses of study) needed to assist the child in reaching those goals. If the IEP Team for a particular child with a disability determines that it is appropriate to address the requirements of 34 CFR §300.320(b) for a child who is younger than age 16, then the IEP for that child must meet the requirements of 34 CFR §300.320(b).

Question A-4: Section 300.320(b)(1) requires that appropriate postsecondary transition goals be measurable. Must we measure goals once a student has graduated or has aged out?

Answer: There is no requirement for public agencies to measure postsecondary goals once a child is no longer eligible for FAPE under Part B of the Act. Under 34 CFR §300.101, FAPE must be made available to all children residing in the State in mandatory age ranges. However, the obligation to make FAPE available does not apply to children who have graduated from high school with a regular high school diploma (34 CFR §300.102(a)(3)) or to children who have exceeded the mandatory age range for provision of FAPE under State law (34 CFR §300.102(a)(2)). When a child's eligibility for FAPE pursuant to Part B terminates under these circumstances, in accordance with 34 CFR §300.305(e)(3), the local educational agency (LEA) must provide a "summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals." However, this provision does not require the LEA to provide services to the child to meet these goals.

B. Transfer of Students with IEPs from One Public Agency to a New Public Agency

Authority: The requirements for IEPs for students who transfer from one public agency to another public agency within the same school year are found in the regulations at 34 CFR §300.323(e), (f), and (g).

Question B-1: What if a student whose IEP has not been subject to a timely annual review, but who continues to receive services under that IEP, transfers to another public agency in the same State? Is the new public agency required to provide FAPE from the time the student arrives?

Answer: If a child with a disability was receiving special education and related services pursuant to an IEP in a previous public agency (even if that public agency failed to meet the annual review requirements at 34 CFR §300.324(b)(1)(i)), and transfers to a new public agency in the same State and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must, pursuant to 34 CFR §300.323(e) provide FAPE to the child (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency either - (1) Adopts the child's IEP from the previous public agency; or (2) Develops, adopts, and implements a new IEP that meets the applicable requirements in 34 CFR §§300.320 through 300.324.

Question B-2: What options are available when an out-of-state transfer student cannot produce an IEP, and the parent is the source for identifying "comparable" services?

Answer: The regulations require, at 34 CFR §300.323(g), that, to facilitate the transition for a child described in 34 CFR §300.323(e) and (f) - (1) 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 34 CFR §99.31(a)(2); and (2) The previous public agency in which the child was enrolled must take reasonable steps to promptly respond to the request from the new public agency.

If, after taking reasonable steps to obtain the child's records from the public agency in which the child was previously enrolled, including the IEP and any other records relating to the provision of special education or

related services to the child, the new public agency is not able to obtain the IEP from the previous public agency or from the parent, the new public agency is not required to provide services to the child pursuant to 34 CFR §300.323(f). This is because the new public agency, in consultation with the parents, would be unable to determine what constitutes comparable services for the child, since that determination must be based on the services contained in the child's IEP from the previous public agency. However, the new public agency must place the child in the regular school program and conduct an evaluation pursuant to 34 CFR §§300.304 through 300.306, if determined to be necessary by the new public agency. If there is a dispute between the parent and the new public agency regarding whether an evaluation is necessary or regarding what special education and related services are needed to provide FAPE to the child, the dispute could be resolved through the mediation procedures in 34 CFR §300.506 or, as appropriate, the due process procedures in 34 CFR §§300.507 through 300.516. Once a due process complaint notice requesting a due process hearing is filed, under 34 CFR §300.518(b), the child would remain in the regular school program during the pendency of the due process proceedings.

Question B-3: Is it permissible for a public agency to require that a student with a disability who transfers from another State with a current IEP that is provided to the new public agency remain at home without receiving services until a new IEP is developed by the public agency?

Answer: Under 34 CFR §300.323(f), if a child with a disability (who had an IEP that was in effect in a previous public agency in another State) transfers to a public agency in a new State, and enrolls in a new school within the same school year, the new public agency (in consultation with the parents) must provide the child with FAPE (including services comparable to those described in the child's IEP from the previous public agency), until the new public agency - (1) Conducts an evaluation pursuant to 34 CFR §§300.304 through 300.306 (if determined to be necessary by the new public agency); and (2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in 34 CFR §§300.320 through 300.324.

Thus, the public agency must provide FAPE to the child when the child enrolls in the school in the public agency in the new State, and may not deny services to the child pending the development of a new IEP.

Question B-4: What is the timeline for the receiving public agency to adopt an IEP from a previous public agency or to develop and implement a new IEP?

Answer: Neither the Act nor the regulations establish timelines for the new public agency to adopt the child's IEP from the previous public agency; or to develop, adopt, and implement a new IEP. However, consistent with 34 CFR §300.323(e) and (f), the new public agency must take these steps within a reasonable period of time to avoid any undue interruption in the provision of required services.

C. IEP Team Membership and IEP Meetings

Authority: The requirements for IEP Team membership are found in the regulations at 34 CFR §300.321.

The requirements for IEP meetings are found in the regulations at 34 CFR §300.323(c)(1), and §300.324(a), (b) and (c).

Question C-1: May the representative of the public agency be excused from an IEP Team meeting?

Answer: Under 34 CFR §300.321(e)(1), the public agency representative is not required to attend an IEP Team meeting in whole or in part, if the parent of the child with a disability and the public agency agree, in writing, that the attendance of the member is not necessary because the meeting will not be dealing with curriculum or related services about which this member is knowledgeable.

As provided at 34 CFR §300.321(e)(2) (see also §300.321(a)(4)), a representative of the public agency may be excused from an IEP meeting, in whole or in part, when the meeting does involve a modification to or discussion of the member's area of the curriculum or related services, if-- (i) The parent, in writing, and the public agency consent to the excusal; and (ii) The member submits, in writing to the parent and the IEP Team, input into the development of the IEP prior to the meeting.

Allowing IEP Team members to be excused from attending an IEP Team meeting is intended to provide additional flexibility to parents in scheduling IEP Team meetings and to avoid delays in holding an IEP Team meeting when an IEP Team member cannot attend due to a scheduling conflict. Although the public agency, not the parent, determines the specific personnel to fill the roles of the public agency's required participants at the IEP Team meeting, the public agency remains responsible for conducting IEP meetings that are consistent with the IEP requirements of the Act and the regulations. Accordingly, it may not be reasonable for a public agency to agree or consent to the excusal of the public agency representative if that individual is needed to ensure that decisions can be made at the meeting about commitment of agency resources that are necessary to implement the child's IEP that would be developed, reviewed, or revised at the IEP Team meeting.

Question C-2: Must the public agency receive consent from a parent to excuse multiple regular education teachers if at least one regular education teacher will be

in attendance?

Answer: No. As provided in 34 CFR §300.321(a)(2), the public agency must ensure that the IEP Team includes “[n]ot less than one regular education teacher of the child (if the child is, or may be, participating in the regular education environment) ...” Neither the Act nor the regulations require that an IEP Team include more than one regular education teacher. Therefore, if the IEP Team includes not less than one regular education teacher of the child, the excusal provisions of 34 CFR §300.321(e)(2) would not apply to additional regular education teachers.

Question C-3: If the regular education teacher were excused from attending the IEP meeting, would an alternate regular education teacher be required to attend?

Answer: If the public agency designates a particular regular education teacher as the person who will participate in the IEP Team meeting pursuant to 34 CFR §300.321(a)(2), and that individual is excused from the meeting consistent with the requirements of 34 CFR §300.321(e)(1)-(2), the public agency is not required to include a different regular education teacher in the IEP Team meeting.

Question C-4: May a State establish additional regulations to ensure parents’ rights are protected with regard to excusal of IEP Team members?

Answer: Yes, but with certain caveats. A State may establish additional requirements to ensure that parents’ rights are protected with regard to excusal of IEP Team members, so long as those additional requirements are consistent with the requirements of 34 CFR §300.321(e)(1) and (2), and do not diminish the right of parents to agree in writing or consent in writing to such excusal. Further, if a State establishes requirements that exceed those required by Part B of the Act and the Federal regulations, the State would be required by 34 CFR §300.199(a)(2), to identify in writing to the local educational agencies (LEAs) located in the State and to the Secretary that such rule, regulation or policy is a State-imposed requirement, which is not required by Part B of the Act and Federal regulations. However, a State must allow a parent and a public agency to agree in writing or consent in writing to excuse a member of the IEP Team, and this provision cannot be made optional for States. A State may not restrict, or otherwise determine, when an IEP Team member can be excused from attending an IEP Team meeting, or prohibit the excusal of an IEP Team member when the public agency and parent agree or consent to the excusal.

Question C-5: May State law or regulations regarding IEP Team membership and IEP Team meeting attendance requirements exceed those of IDEA?

Answer: Yes, but with certain caveats. A State may establish laws or regulations for IEP Team membership and IEP Team meeting attendance, but must ensure that in doing so it does not establish provisions that reduce parent rights or are otherwise in conflict with the requirements of Part B of the Act and the Federal regulations. Further, as required by 34 CFR §300.199(a), each State that receives funds under Part B of the Act must-- (1) Ensure that any State rules, regulations, and policies conform to the purposes of this part; (2) Identify in writing to LEAs located in the State and the Secretary any such rule, regulation, or policy as a State-imposed requirement that is not required by Part B of the Act and Federal regulations; and (3) Minimize the number of rules, regulations, and policies to which the LEAs and schools located in the State are subject under Part B of the Act.

Question C-6: Must an IEP Team document in writing that they considered all of the requirements of 34 CFR §300.324, regarding the development, review, and revision of IEPs?

Answer: Section 300.112 requires that the State ensure that an IEP, or an individualized family service plan (IFSP) that meets the requirements of section 636(d) of the Act, is developed, reviewed, and revised for each child with a disability. Section 300.201 requires public agencies to have in effect policies and procedures established under 34 CFR §§300.101 through 300.163 and §§300.165 through 300.174, which include the requirements related to developing, reviewing, and revising an IEP for each child with a disability in 34 CFR §300.324. While the Act and these regulations generally do not specify what documentation must be maintained consistent with the requirements of 34 CFR §300.324, States and public agencies are required to maintain records to show compliance with the Act and the regulations, in accordance with 34 CFR §76.731 of the Education Department General Administrative Regulations (EDGAR).

Question C-7: How must a public agency document that IEP Team members have been informed of changes to the IEP?

Answer: The regulations provide, at 34 CFR §300.324(a)(4)(i), that, 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. The regulations require, at 34 CFR §300.324(a)(4)(ii), that if changes are made to the child's IEP in accordance with 34 CFR §300.324(a)(4)(i), the public agency must ensure that the child's IEP Team is informed of those changes. While the Act and the regulations do not specify the manner in which public agencies must document compliance with the requirements of 34 CFR §300.324(a)(4)(ii), they must maintain records to show compliance with the requirements of the Act and regulations, in accordance with 34 CFR §76.731 of EDGAR.

Question C-8 Who must participate when an IEP is amended without convening the IEP Team?

Answer: The regulations provide, at 34 CFR §300.324(a)(4)(i) that, 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. The Act and the regulations are silent as to which individuals must participate in making changes to the IEP where there is agreement between the parent and the public agency not to convene a meeting for the purpose of making the changes.

Question C-9 Must a public agency provide a parent with prior written notice when amending an IEP without convening the IEP Team?

Answer: The regulations require, at 34 CFR §300.503(a), that written notice that meets the requirements of 34 CFR §300.503(b) must be given to the parents of a child with a disability a reasonable time before the public agency-- (1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or (2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. This provision applies, even if the IEP is revised without convening an IEP Team meeting, pursuant to 34 CFR §300.324(a)(4).

D. Consent for Initial Evaluation and Reevaluation

Authority: The requirements for consent for initial evaluations and reevaluations are found in the regulations at 34 CFR §300.300(a), (c), and (d)(4). The requirements for reevaluations are found in the regulations at 34 CFR §300.303.

Question D-1: What may a public agency do if a parent does not respond to the public agency's request for the parent's consent to a reevaluation?

Answer: Under 34 CFR §300.300(c)(2), the public agency need not obtain informed parent consent for the reevaluation if the public agency can demonstrate that it made reasonable efforts to obtain consent for the reevaluation, and the child's parent has failed to respond to the request for such consent. Thus, under this regulation, a public agency may conduct a reevaluation of a child with a disability if the public agency can demonstrate that it made reasonable efforts to obtain parent consent for the reevaluation, and the child's parent has failed to respond to the request for consent.

Question D-2: The regulations provide, at 34 CFR §300.303(b)(2), that a reevaluation must occur at least once every three years, unless the parent and the public agency agree that a reevaluation is unnecessary. What options are available to a public agency if a parent refuses to consent to a three-year reevaluation under 34 CFR §300.303(b)(2)?

Answer: The regulations provide, at 34 CFR §300.300(c)(1), that subject to 34 CFR §300.300(c)(2), each public agency-- (i) 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. (ii) 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 described in 34 CFR §300.300(a)(3). (iii) 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 or reevaluation.

If a parent refuses to consent to a three-year reevaluation under 34 CFR §300.303(b)(2), the public agency has the following options:

1. The public agency and the parent may, as provided at 34 CFR §300.303(b)(2), agree that the reevaluation is unnecessary. If such an agreement is reached, the three-year reevaluation need not be

conducted. However, the public agency must continue to provide FAPE to the child.

2. If the public agency and the parent do not agree that the reevaluation is unnecessary, and 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 described in 34 CFR §300.300(a)(3) (the procedural safeguards in subpart E of Part B, including the mediation procedures under 34 CFR §300.506 or the due process procedures under 34 CFR §§300.507 through 300.516), if appropriate, except to the extent inconsistent with State law relating to such parental consent.
3. If the public agency chooses not to pursue the reevaluation by using the consent override procedures described in 34 CFR §300.300(a)(3), and the public agency believes based on existing data that the child does not continue to have a disability or does not continue to need special education and related services, the public agency may determine that it will not continue to provide special education and related services to the child. If the public agency determines that it will not continue to provide special education and related services to the child, the public agency must provide the parent with prior written notice of its proposal to discontinue the provision of FAPE to the child consistent with 34 CFR §300.503(a)(2).

Question D-3: At an initial IEP meeting, may a parent give consent to provide some or all of the services in the IEP?

Answer: If a public agency has provided prior written notice, consistent with 34 CFR §300.503(a)(1), of its proposal to initiate the provision of FAPE, the parent may provide informed consent to the initial provision of special education and related services, consistent with 34 CFR §300.300(b).

Question D-4: May a foster parent provide consent for an initial evaluation even if the biological parent refuses to provide such consent?

Answer: If the biological parent of the child refuses consent for an initial evaluation of the child, and the parental rights of the biological parent have not been terminated in accordance with State law or a court has not designated a foster parent to make educational decisions for the child in accordance with State law, a foster parent may not provide consent for an initial evaluation. See 34 CFR §300.30(b)(1).