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# Wisconsin Legislative Council

## INFORMATION MEMORANDUM

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IM-2021-12

### OVERVIEW OF STATE AND FEDERAL SPECIAL EDUCATION LAWS

Federal and state law guarantee certain educational rights for students with disabilities. Under the Individuals with Disabilities Education Act (IDEA), the federal government grants money to the states to facilitate and ensure the appropriate education of children with disabilities. IDEA lays out processes, standards, and activities state educational agencies (SEAs), such as the Department of Public Instruction (DPI), must comply with in order to receive the federal money. State law further clarifies expectations of local educational agencies (LEAs), including school districts.

#### IDEA GENERALLY

##### Children With Disabilities

IDEA provides federal funding to states for the education of children with disabilities, provided states satisfy certain requirements. Under both state and federal law, a person is a “child with a disability” if that person is between three and 21 years old and needs special education and related services because of cognitive disabilities, hearing impairment, speech or language impairments, visual impairments, emotional behavioral disability, orthopedic impairments, autism, traumatic brain injury, other health impairments, learning disabilities, or significant developmental delay. [[20 U.S.C. s. 1401 \(3\)](#) and s. [115.76 \(3\)](#) and [\(5\)](#), Stats.]<sup>1</sup>

“Special education” is specially designed instruction, regardless of where the instruction is conducted, that is provided to meet the unique needs of a child with a disability at no cost to the child or the child’s parents. [[20 U.S.C. s. 1401 \(29\)](#) and s. [115.76 \(15\)](#), Stats.] “Related services” are transportation and such developmental, corrective, and other supportive services as may be required to assist a child with a disability to benefit from special education, including services such as speech-language pathology, interpreting services, physical and occupational therapy, and psychological services. [[20 U.S.C. s. 1401 \(26\)](#) and s. [115.76 \(14\)](#), Stats.]<sup>2</sup>

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<sup>1</sup> Each of these areas of impairment is defined in s. PI [11.36](#), Wis. Adm. Code, and [34 C.F.R. s. 300.8](#).

<sup>2</sup> Under Section 504 of the federal Rehabilitation Act, public schools must also ensure that handicapped students are provided special education and related aids and services, at no cost to them or their parents, that are designed to meet their needs as adequately as the needs on non-handicapped students are met. Section 504 applies to handicapped children, which requires only that a person have a mental or physical impairment and does not require, as IDEA does in the definition of child with disabilities, that as a result of that impairment the child is in need of special education. As a result, handicapped children is a broader category than children with disabilities and a child could qualify for services under Section 504 but not under IDEA. [[29 U.S.C. s. 794](#) and [34 C.F.R. ss. 104.3](#) and [104.33](#).]

## Distribution of Funds

Under IDEA, states receive federal aid in the form of grants to SEAs. DPI is Wisconsin's SEA. To be eligible to receive IDEA funds from the U.S. Department of Education, a state must submit to the Secretary of Education a plan that provides assurances that the state has in effect policies and procedures that ensure the state meets all of the requirements for program participation provided in federal law. [[20 U.S.C. s. 1412 \(a\)](#).]

States that receive funds under IDEA allocate the money to LEAs. For the purposes of Wisconsin's special education laws, "local education agency" or LEA, generally means the school district in which the child with a disability resides. [s. [115.76 \(10\)](#), Stats.] Ultimately, LEAs are responsible for educating children with disabilities. Each LEA's IDEA allocation is determined by a calculation that accounts for the LEA's population, enrollment, and relative number of children living in poverty.<sup>3</sup> [[20 U.S.C. s. 1411 \(f\) \(2\)](#).] LEA eligibility to receive funds depends on the LEA submitting a plan to the SEA that includes assurances that the LEA meets the conditions provided in [20 U.S.C. s. 1413](#).

## PROVISION OF SPECIAL EDUCATION AND RELATED SERVICES

### Free Appropriate Public Education

IDEA requires that every recipient state ensure that a free appropriate public education (FAPE) is available to each child with a disability residing in that state. FAPE means special education and related services that meet all of the following:

- Are provided at public expense and under public supervision and direction.
- Meet the standards set by DPI.
- Include an appropriate preschool, elementary, or secondary education.
- Are provided in conformity with an individualized education program (IEP).

[[20 U.S.C. s. 1401 \(9\)](#) and s.[115.76 \(7\)](#), Stats.]

The Division for Learning Support (DLS) within DPI is the office responsible for overseeing compliance with IDEA. [s. [115.762 \(3\) \(am\)](#), Stats.] Though DLS must ensure that FAPE is available to every child with a disability in the state, each LEA is responsible for directly making FAPE available to all children located within the LEA. [s. [115.77 \(1m\) \(b\)](#), Stats.]

### Identifying, Locating, and Evaluating Children With Disabilities

Under IDEA, each recipient state must ensure that all children with disabilities who reside in the state are identified, located, and evaluated so that they receive the special education and related services they are entitled to. [[20 U.S.C. 1412 \(a\) \(3\)](#).] This obligation is more commonly known as the state's "child find" responsibility. State law assigns this responsibility to LEAs. [s. [115.77 \(1m\) \(a\)](#), Stats.] For the purposes of child find, LEA means the school district which the child is attending, rather than the school district in which the child resides. [s. [115.77 \(1\)](#), Stats.]

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<sup>3</sup> Whether a child is considered a child living in poverty is determined by the SEA; DPI utilizes the Title I formula as the poverty indicator for the IDEA allocation formula.

## Referrals

Children with disabilities are “found” through special education referrals. A physician, nurse, psychologist, social worker, or administrator of a social agency, who reasonably believes that a child brought before him or her for services is a child with a disability is **required** to refer that child to the LEA for evaluation. [s. [115.777\(1\)\(a\)](#), Stats.] Additionally, a teacher licensed in Wisconsin, who is employed by an LEA, and reasonably believes a child has a disability, is **required** to refer that child to the LEA for evaluation. [s. [115.777\(1\)\(b\)](#), Stats.]

Any person who is not otherwise required to make a referral for a child who the person suspects of having a disability is **permitted** to refer that child to the LEA for evaluation. [s. [115.777\(2\)](#), Stats.]

An LEA must document and date the receipt of each referral and, within 15 business days of receiving a referral, request from the child’s parents consent to evaluate the child for suspected disability. [s. [115.777\(3\)](#), Stats.]

## Formation of IEP Team

Upon receipt of a referral, an LEA must appoint an IEP team for the child. The IEP team is responsible for evaluating the child and, if the team determines the child qualifies as a child with a disability, developing the child’s IEP. The IEP team must include the following individuals:

- At least one regular education teacher of the child, if the child is, or may be, participating in a regular educational environment.
- At least one special education teacher who has recent training or experience related to the child’s known or suspected area of special educational needs or, where appropriate, at least one special education provider of the child.
- A representative of the LEA who is qualified to provide, or supervise the provision of, special education, is knowledgeable about the general education curriculum, and is knowledgeable about and authorized by the LEA to commit the available resources of the LEA.
- At the discretion of the parent or the LEA, other individuals who have knowledge or special expertise about the child, including related services personnel as appropriate.
- An individual who can interpret the instructional implications of evaluations, who may also be any of the above participants.
- The child’s parents.
- Whenever appropriate, the child.
- If the child is attending a public school in a nonresident school district under whole grade sharing<sup>4</sup>, full-time open enrollment<sup>5</sup>, or a special tuition waiver<sup>6</sup>, at least one person designated by the school board of the school district in which the child resides who has knowledge or special expertise about the child.

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<sup>4</sup> See s. [118.50](#), Stats.

<sup>5</sup> Under full-time open enrollment, a child may attend a school that is located in a different school district (nonresident school district). For more information on open enrollment, see Legislative Council, [Open Enrollment in Public Schools](#), Issue Brief (February 2021).

<sup>6</sup> See s. [121.84](#), Stats.

[[20 U.S.C. s. 1414 \(d\) \(1\) \(B\)](#) and s. [115.78\(1m\)](#), Stats.]

## Evaluations

The IEP team is responsible for evaluating the child to determine the child's eligibility for special education and related services, as well as the educational needs of the child. After receiving parental consent to evaluate the referred child, the IEP team has 60 days to determine whether the child is a child with a disability. [[20 U.S.C. s. 1414](#) and s. [115.78 \(2\) \(a\)](#) and [\(3\) \(a\)](#), Stats.]

In determining whether a child is a child with a disability, the IEP team may not rely on any single measure or assessment and must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information. Additionally, the IEP team must evaluate the child in all areas of suspected disability and must ensure that all evaluation materials used are properly administered, provide relevant information, and are not racially or culturally discriminatory. [s. [115.782 \(2\) \(a\)](#), Stats.]

Upon completing its evaluation, the IEP team must determine whether the child qualifies as a child with a disability and, if the child does, the educational needs of the child. To determine that a child is a "child with a disability," the IEP team must determine that the child: (1) has a disability described by law; and (2) is in need of special education and related services **because of** that disability.

After the IEP team has made its determination, it must prepare an evaluation report that includes documentation of the eligibility for special education. The LEA must provide a copy of this report to the child's parents. [s. [115.782 \(3\)](#), Stats.]

## Developing the IEP

At the beginning of each school year, each LEA must have in place an IEP for each child with a disability. As noted above, IEPs are developed by the IEP team assigned to each child with a disability. [s. [115.78 \(2\) \(b\)](#), Stats.] When developing an IEP, the IEP team must consider the child's strengths, the concerns of the child's parents, and the results of the child's most recent evaluation. [s. [115.78 \(3\)](#), Stats.]

Each IEP must include all of the following:

- *Present level of achievement*: a statement of the child's present level of academic achievement and functional performance.
- *Measurable annual goals*: a statement of measurable annual goals for the child.
- *Measurement of progress*: a statement of how the child's progress toward attaining the annual goals described in the IEP will be measured and when periodic reports on the child's progress toward those goals will be provided to the child's parents.
- *Benchmarks and short-term objectives*: if the child takes alternative assessments aligned with alternate achievement standards, a description of benchmarks or short-term objectives.
- *Statement of services*: a statement of the special education and related services and supplementary aids and services<sup>7</sup>, based on peer-reviewed research to the extent practicable,

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<sup>7</sup> "Supplementary aids and services" means aids, services, and other supports that are provided in regular education classes or other education-related settings to enable a child with a disability to be educated with nondisabled children to the maximum extent possible. [s. [115.76 \(16\)](#), Stats.]

to be provided to, or on behalf of, the child, and a statement of the program modifications or supports for school personnel that will be provided for the child to do all of the following:

- Advance appropriately toward attaining the annual goals.
- Be involved and make progress in the general curriculum and participate in extracurricular and other nonacademic activities.
- Be educated and participate with other children with disabilities and nondisabled children in academic and nonacademic activities.
- *Date to begin services*: the projected date for the beginning of services and modifications and the anticipated frequency, location, and duration of those services and modifications.
- *Inclusion in general curriculum*: an explanation of the extent to which the child will not participate with nondisabled children in regular classes, in the general curriculum, and in extracurricular and other nonacademic activities.
- *Assessment accommodations*: a statement of any individual appropriate accommodations that are necessary to measure academic achievement and functional performance of the child on statewide and LEA-wide assessments, or, if the IEP team determines that the child will take an alternative assessment on a particular statewide or LEA-wide assessment of pupil achievement, a statement of why the child cannot participate in the regular assessment and why the particular alternate assessment selected is appropriate.
- *Civics test*: a statement of whether it is appropriate to administer the civics test required for high school graduation under s. [118.33 \(1m\) \(a\)](#), Stats., to the child and, if it is appropriate, any accommodations that are necessary to measure the child's knowledge of the information required to be on that test.
- *Postsecondary plans and transition services*: when the child is old enough, a description of the child's postsecondary plans and transition services.

[[20 U.S.C. s. 1414 \(d\) \(1\) \(A\)](#) and s. [115.787 \(2\)](#), Stats.]

An LEA must provide a copy of the IEP to the child's parents [s. [115.787 \(3\) \(e\)](#), Stats.] IEPs must be reviewed at least annually to determine whether the child is achieving the annual goals set in the IEP. Upon this review, if it is appropriate, the IEP team must revise the IEP to address lack of progress toward annual goals, the results of any reevaluation, new information provided by the child's parents, and the child's anticipated needs. [s. [115.787 \(4\) \(a\) 2.](#), Stats.]

To implement an IEP, the LEA must provide an appropriate educational placement in the least restrictive environment. The least restrictive environment means that, to the maximum extent possible, a child with a disability is educated with nondisabled children. [s. [115.79 \(1\) \(b\)](#) and [\(c\)](#), Stats.] Under the principle of least restrictive environment, special classes, special schooling, or other removal of a child with a disability from the regular educational environment only occurs when the nature or severity of the child's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. [s. [115.79 \(1\) \(d\)](#), Stats.]

## Reevaluations

IEP teams must reevaluate children with disabilities at least once every three years, but no more than once per year, unless the child's parent and the LEA agree otherwise. [s. [115.782 \(4\) \(a\) 2.](#), Stats.] Reevaluations follow the same procedures as initial evaluations and must meet the same requirements. [s. [115.782 \(4\) \(a\) 1.](#), Stats.]

## PROCEDURAL SAFEGUARDS

### Notice Requirements

LEAs must provide parents with a procedural safeguards notice at all of the following times: (1) annually; (2) upon a child's initial referral; (3) upon a parent's request for evaluation; (4) upon the filing of a request for a due process hearing; and (5) upon request by the child's parent. [s. [115.792 \(3\)](#), Stats.]

The procedural safeguards notice must be in the parent's native language and contain an explanation of the procedural safeguards available under state and federal law relating to all of the following:

- The right to an independent educational evaluation.
- The right to prior written notice.<sup>8</sup>
- Parental consent to evaluation, special education, and related services.
- Parental access to educational records.
- The opportunity to present and resolve complaints.
- The child's placement during pendency of due process proceedings.
- Procedures for pupils who are subject to placement in interim alternative educational settings.
- Requirements for the unilateral placement by parents of pupils in private schools at public expense.
- Mediation.
- Due process hearings.
- Civil actions and attorney fees.

[[20 U.S.C. s. 1415 \(d\)](#) and s. [115.792 \(3\)](#), Stats.]

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<sup>8</sup> Before taking action regarding a child's special education, LEAs must provide the child's parents with notice of the proposed action; this is commonly referred to as prior written notice. Prior written notice must also be provided when an LEA refuses to take action related to a child's special education (i.e., if a parent requests that the child receive extended school year services and the LEA refuses). [s. [115.792 \(1\) \(b\)](#), Stats.] This notice must be in the native language of the child's parents and must include all of the following:

- A description of the action proposed or refused by the LEA.
- An explanation as to why the LEA proposes or refuses to take the action.
- A description of any other options the LEA considered and reasons why those other options were rejected.
- A description of each evaluation procedure, assessment, record, or report the LEA used as a basis for the proposed or refused action.
- The names of the evaluators, if the notice relates to the evaluation or reevaluation of a child.
- A description of any other relevant factors.
- Sources for parents to contact to obtain assistance in understanding Wisconsin law related to special education.
- A statement that parents have protection under the procedural safeguards of special education law and where they can obtain a copy of the procedural safeguards notice. [[20 U.S.C. s. 1415 \(c\)](#) and s. [115.792 \(1\)](#) and [\(2\)](#), Stats.]

## Mediation

LEAs must ensure that the parents of a child with a disability are offered an opportunity to use mediation if a dispute arises between the parents and the LEA. [s. [115.792\(1\)\(a\)3.](#), Stats.]

Mediation is a dispute resolution process in which a neutral third person, who has no power to impose a decision if all of the parties do not agree to settle the case, helps the parties reach an agreement by focusing on the key issues in a case, exchanging information between the parties, and exploring options for settlement. [ss. [115.797\(1\)\(b\)](#) and [802.12\(1\)\(e\)](#), Stats.]

Parties to special education mediation include the LEA and either a competent adult pupil, or the parent of a child or adult pupil adjudicated incompetent who is the subject of a dispute. [s. [115.797\(1\)\(c\)](#), Stats.] For the purposes of special education-related mediation, “dispute” means any disagreement between parties concerning either the provision of FAPE to a child with a disability or the proposal or refusal to initiate or change the evaluation, IEP, or educational placement of a child with a disability. [s. [115.797\(1\)\(a\)](#), Stats.]

To initiate mediation, one or both parties must request in writing that DLS arrange for mediation. The request must identify both parties and briefly describe the dispute. [s. [115.797\(2\)\(a\)](#), Stats.] The mediator is appointed by DLS with consent, and sometimes nomination, of the parties. [s. [115.797\(3\)](#), Stats.]

Mediation must occur within 21 days after the mediator is appointed, unless the parties agree otherwise. The parents of the child and two representatives of the LEA may participate in the mediation; other persons may also participate with the consent of both parties. Mediation is entirely voluntary – the mediator and either party may withdraw at any time. Discussions during mediation are confidential and may not be used as evidence in any subsequent hearing or proceeding. [s. [115.797\(5\)](#), Stats.]

If the parties reach a resolution or agreement regarding the dispute, the mediator is responsible for reducing the resolution or agreement to writing and ensuring that each party signs the resolution and receives a copy. This resolution or agreement is legally binding upon the parties and is enforceable in the circuit court for the county in which the LEA is located. [s. [115.797\(6\)](#), Stats.]

## Due Process Hearings

Due process hearings may be initiated by either the LEA or the parent of a child with a disability. An LEA may initiate a due process hearing in two specific instances: (1) to override a parent’s refusal to grant consent for an initial evaluation; and (2) to contest the payment of an independent educational evaluation. A parent of a child with a disability, may initiate a due process hearing to contest the LEA’s refusal or proposal to initiate or change the child’s evaluation, IEP, or educational placement, or to allege that the LEA has not provided the child with a FAPE. A parent must file the request for a hearing within one year of the contested action. A request for a hearing must be provided to the other party and a copy must be sent to DLS. [s. [115.80\(1\)](#), Stats.]

The request for a due process hearing must include all of the following:

- The child's name.
- 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.
- A proposed resolution of the problem.

Within 15 days of filing a request for a hearing, but before the hearing is conducted, the LEA must convene a meeting with the child's parents and the relevant members of the IEP team to discuss the request and the issues documented therein. [s. [115.80 \(2m\) \(a\)](#), Stats.] If during this meeting the parents and the LEA resolve the subject matter of the request, they must execute and sign a legally binding agreement that is enforceable in the circuit court for the county in which the LEA is located. This agreement can be voided by either party within three business days of its execution. [s. [115.80 \(2m\) \(d\)](#), Stats.] If the LEA does not resolve the issues presented by the request to the satisfaction of the child's parents within 30 days of the LEA's receipt of the request, the hearing may occur. [s. [115.80 \(2m\) \(e\)](#), Stats.]

DLS appoints a hearing officer to oversee the due process hearing. Legal counsel and experts for either party are allowed to be present at the hearing. During the hearing, either party may present evidence and confront, cross-examine, and compel the attendance of witnesses. The party that requested the hearing may not raise issues at the hearing that were not raised in the hearing request. [s. [115.80 \(2\)](#) to [\(4\)](#), Stats.]

The hearing officer must issue a decision within 45 days after the first day on which the hearing could be held. [s. [115.80 \(6\)](#), Stats.] The officer's decision must: (1) consist of findings of fact based solely on the evidence received at the hearing and conclusions of law; (2) be based on a preponderance of the evidence; and (3) be made on substantive grounds based on a determination of whether the child has received a FAPE. [s. [115.80 \(5\) \(b\)](#), Stats.] Ultimately, the hearing officer may order whatever remedy is reasonably necessary to bring the parties into compliance with the law. [s. [115.80 \(5\) \(a\)](#), Stats.]

## Civil Actions

An aggrieved party may appeal a due process hearing decision by bringing a civil action in either state or federal court. An action filed in circuit court must be commenced within 45 days after service of the hearing officer's decision. [s. [115.80 \(7\)](#), Stats.]

In any such civil action, the reviewing court must receive the records of the administrative proceedings, hear additional evidence at the request of either party, and grant such relief as the court determines is appropriate. The court's decision must be based on the preponderance of the evidence. [s. [115.80 \(7\)](#), Stats.] The court may award reasonable attorney fees and actual costs. [s. [115.80 \(9\)](#), Stats., and [20 U.S.C. 1415 \(i\) \(3\) \(B\) to \(G\)](#).]

This information memorandum was prepared by Emily Hicks, Staff Attorney, on December 8, 2021.