

## **What Do IDEA 2004, Its Regulations, and the U.S. Department of Education Say About Placement?**

Since their inception, the Individuals with Disabilities Education Act (20 U.S.C 1401 *et seq.*) and implementing regulations (34 C.F.R. 300 *et seq.*) have held that States must provide children with disabilities a Free Appropriate Public Education (FAPE) in the Least Restrictive Environment (LRE). This document summarizes sections of the statute (U.S. Code, or U.S.C), regulations (Code of Federal Regulations, or C.F.R), and U.S. Department of Education interpretation (from the Federal Register, or Fed. Reg) that support and clarify FAPE and LRE.

### **Free Appropriate Public Education**

This means special education and related services that:

- Are provided at public expense and under public supervision and direction;
- Meet the standards of the SEA;
- Include an appropriate preschool, elementary school, or secondary school education in the State; and
- Are provided in conformity with an individualized education program (IEP).

20 U.S.C. 1401(9)), 34 C.F.R §300.17

### **FAPE Requirements**

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

FAPE must available to any 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.

The determination that a child is eligible under this part must be made on an individual basis.

20 U.S.C. 1412(a)(1)(A)), 34 C.F.R. §300.101

The obligation to make FAPE available to all children with disabilities does not apply with respect to children with disabilities who have graduated from high school with a regular high school diploma.

Graduation from high school with a regular high school diploma constitutes a change in placement

20 U.S.C. 1412(a)(1)(B), 34 C.F.R. §300.102

## **FAPE Methods and Payments**

Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, if it is necessary to place a child with a disability in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.

20 U.S.C. 1401(8), 1412(a)(1)), 34 C.F.R. §300.103

## **Residential Placement**

If placement in a public or private residential program is necessary to provide special education and related services to a child with a disability, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

20 U.S.C. 1412(a)(1), 1412(a)(10)(B)), 34 C.F.R. §300.104

The Department of Education has stated:

[This section] is a longstanding provision that applies to placements that are made by public agencies in public and private institutions for educational purposes and clarifies that parents are not required to bear the costs of a public or private residential placement if such placement is determined necessary to provide FAPE. If a public agency determines in an individual situation that a child with a disability cannot receive FAPE from the programs that the public agency conducts and, therefore, placement in a public or private residential program is necessary to provide special education and related services to the child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

In situations where a child's educational needs are inseparable from the child's emotional needs and an individual determination is made that the child requires the therapeutic and habilitation services of a residential program in order to "benefit from special education," these therapeutic and habilitation services may be "related services" under the Act. In such a case, the SEA is responsible for ensuring that the entire cost of that child's placement, including the therapeutic care as well as room and board, is without cost to the parents. However, the SEA is not responsible for providing medical care. Thus, visits to a doctor for treatment of medical conditions are not covered services under Part B of the Act and parents may be responsible for the cost of the medical care.

71 Fed. Reg. 46581

## **Least Restrictive Environment (LRE)**

Each public agency must ensure that:

- To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are 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 classes with the use of supplementary aids and services cannot be achieved satisfactorily.

A State funding mechanism must not result in placements that violate the Least Restrictive Environment requirements.

A State must not use a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability FAPE according to the unique needs of the child, as described in the child's IEP.

If the State does not have policies and procedures to ensure compliance with the LRE and funding requirements of this section, the State must provide the Secretary an assurance that the State will revise the funding mechanism as soon as feasible to ensure that the mechanism does not result in placements that violate LRE.

20 U.S.C. 1412(a)(5)), 34 C.F.R §300.114

In response to suggestions that this regulation be clarified to better serve deaf and hard of hearing students and others with low-incidence disabilities, the Department commented:

The LRE requirements . . . express a strong preference, not a mandate, for educating children with disabilities in regular classes alongside their peers without disabilities . . .

With respect to the recommendation that the placement for children who are deaf or hard of hearing be based on the child's communication needs, [the IEP section] . . . clarifies that the IEP Team, in developing the IEP for a child who is deaf or hard of hearing, must consider the child's language and communication needs, opportunities for direct communication with peers and professional personnel in the child's language and communication mode, and the child's academic level and full range of needs, including opportunities for direct instruction in the child's language and communication mode.

With respect to strengthening the continuum of alternative placement requirements, nothing in the LRE requirements would prevent an IEP Team from making a determination that placement in the local school is not appropriate for a particular child. [The continuum of alternative placements section] already requires each public agency to ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services . . .

The process for determining the educational placement for children with low-incidence disabilities (including children who are deaf, hard of hearing, or deaf-blind) is the same process used for determining the educational placement for all children with disabilities. That is, each child's educational placement must be determined on an individual case-by-case basis depending on each child's unique educational needs and circumstances, rather than by the child's category of disability, and must be based on the child's IEP. We believe the LRE provisions are sufficient to ensure that public agencies provide low-incidence children with disabilities access to appropriate educational programming and services in the educational setting appropriate to meet the needs of the child in the LRE.

. . . [W]e agree [that Congress made clear its] intent that State funding mechanisms support the LRE requirements and do not provide an incentive or disincentive for certain placement decisions . . .

71 Fed. Reg. 46585-46586

### **Continuum of Alternative Placements**

Each public agency must ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

The continuum must:

- Include the alternative placements listed in the definition of special education (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions); and
- Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

20 U.S.C. 1412(a)(5)), §300.115

In its Analysis the Department stated "This continuum of alternative placements is intended to ensure that a child with a disability is served in a setting where the child can be educated successfully in the LRE." The Department also stated: ". . . [P]lacement decisions must be based on the individual needs of each child with a disability. Public agencies, therefore, must not make placement decisions based on a public agency's needs or available resources, including budgetary considerations and the ability of the public agency to hire and recruit qualified staff."

71 Fed. Reg. 46587

### **Placements**

In determining the educational placement of a child with a disability each public agency must ensure that:

- The placement decision:

- Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
  - Is made in conformity with the LRE provisions;
- The child’s placement:
  - Is determined at least annually;
  - Is based on the child’s IEP; and
  - Is as close as possible to the child’s home;
- Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;
- In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
- A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

20 U.S.C. 1412(a)(5), §300.116

The Department provided this guidance:

The overriding rule in [the regulation regarding placement] is that placement decisions for all children with disabilities must be made on an individual basis and ensure that each child with a disability is educated in the school the child would attend if not disabled unless the child’s IEP requires some other arrangement. However, [IDEA 2004] does not require that every child with a disability be placed in the regular classroom regardless of individual abilities and needs. This recognition that regular class placement may not be appropriate for every child with a disability is reflected in the requirement that LEAs make available a range of placement options, known as a continuum of alternative placements, to meet the unique educational needs of children with disabilities. This requirement for the continuum reinforces the importance of the individualized inquiry, not a “one size fits all” approach, in determining what placement is the LRE for each child with a disability. The options on this continuum must include the alternative placements listed in the definition of special education . . . (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions). These options must be available to the extent necessary to implement the IEP of each child with a disability. The group determining the placement must select the placement option on the continuum in which it determines that the child’s IEP can be implemented in the LRE. Any alternative placement selected for the child outside of the regular educational environment must include appropriate opportunities for the child to interact with nondisabled peers, to the extent appropriate to the needs of the children . . .

[The Least Restrictive Environment provision] of [IDEA 2004] presumes that the first placement option considered for each child with a disability is the regular classroom in the school that the child would attend if not disabled, with appropriate supplementary aids and services to facilitate such placement. Thus, before a child with a disability can be placed outside of the regular educational environment, the full range of supplementary aids and services that could be

provided to facilitate the child's placement in the regular classroom setting must be considered. Following that consideration, if a determination is made that a particular child with a disability cannot be educated satisfactorily in the regular educational environment, even with the provision of appropriate supplementary aids and services, that child could be placed in a setting other than the regular classroom.

Historically, we have referred to "placement" as points along the continuum of placement options available for a child with a disability, and "location" as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. However, a public agency may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement. It also should be noted that . . . a parent must be given written prior notice . . . a reasonable time before a public agency implements a proposal or refusal to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. Consistent with this notice requirement, parents of children with disabilities must be informed that the public agency is required to have a full continuum of placement options, as well as about the placement options that were actually considered and the reasons why those options were rejected.

[I]t is the Department's longstanding position that maintaining a child's placement in an educational program that is substantially and materially similar to the former placement is not a change in placement.

71 Fed. Reg. 46587-46588

### **State Technical Assistance and Training Activities**

Each SEA must carry out activities to ensure that teachers and administrators in all public agencies:

- Are fully informed about their responsibilities for implementing [the Least Restrictive Environment provisions]; and
- Are provided with technical assistance and training necessary to assist them in this effort.

20 U.S.C. 1412(a)(5)), 34 C.F.R. §300.119

### **Monitoring Activities**

The SEA must carry out activities to ensure that [the Least Restrictive Environment provisions are] implemented by each public agency.

If there is evidence that a public agency makes placements that are inconsistent with the Least Restrictive Environment provisions the SEA must:

- Review the public agency's justification for its actions; and
- Assist in planning and implementing any necessary corrective action.

20 U.S.C. 1412(a)(5)), 34 C.F.R. §300.120

### **Private School Placements by Public Agencies**

Before a public agency places a child with a disability in, or refers a child to, a private school or facility, the agency must initiate and conduct a meeting to develop an IEP for the child.

The agency must ensure that a representative of the private school or facility attends the IEP meeting. If the representative cannot attend, the agency must use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.

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.

If the private school or facility initiates and conducts these meetings, 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 IEP before those changes are implemented.

Even if a private school or facility implements a child's IEP, responsibility for compliance with this part remains with the public agency and the SEA.

20 U.S.C. 1412(a)(10)(B)), 34 C.F.R. §300.325

### **Educational Placements**

Each public agency must ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

20 U.S.C. 1414(e)), 34 C.F.R §300.327

The Department stated that its longstanding position is that "placement refers to the provision of special education and related services rather than a specific place, such as a specific classroom or specific school."

71 Fed. Reg. 46687

## **Discipline Procedures**

The statute, regulations, and Department of Education interpretation go into great detail about the circumstances under which a child may be removed from a setting for disciplinary reasons.

20 U.S.C. 615 (k), 34 C.F.R. § 530-536

## **State Monitoring and Enforcement**

The State must monitor and enforce the implementation of IDEA and annually report on performance.

The primary focus of the State's monitoring activities must be on:

- Improving educational results and functional outcomes for all children with disabilities; and
- Ensuring that public agencies meet Part B requirements, especially those most closely related to improving educational results for children with disabilities.

The State must use quantifiable indicators and such qualitative indicators needed to adequately measure performance in the priority areas and the indicators established by the Secretary of the U.S. Department of Education for State performance plans.

The State must monitor the LEAs located in the State, using quantifiable and qualitative indicators, on:

- Provision of FAPE in the Least Restrictive Environment;
- State exercise of general supervision; and
- Disproportionate representation of racial and ethnic groups in special education and related services.

20 U.S.C. 1416(a), §300.600

To the suggestion that the regulations should stress individualization when determining LRE, the Department stated:

[The statute and regulation] require each public agency to ensure that a continuum of alternative placements (including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions) is available to meet the needs of children with disabilities for special education and related services. The LRE provisions are intended to ensure that a child with a disability is served in a setting where the child can be educated successfully and that placement decisions are individually determined based on each child's abilities and needs.

## **State Performance Plans and Data Collection**

Each State must have in place a performance plan that evaluates the State's efforts to implement the requirements and purposes of Part B of the Act, and describes how the State will improve such implementation. As part of the plan, each State must establish measurable and rigorous targets for the indicators established by the Secretary under the priority areas: Provision of FAPE in the LRE, State exercise of general supervision, an disproportionate representation of racial and ethnic groups in special education and related services.

Each State must collect valid and reliable information as needed to report annually to the Secretary on the indicators established by the Secretary for the State performance plans.

20 U.S.C. 1416(b)), 34 C.F.R. §300.601

The Department stated:

. . . [T]he public should be represented in developing State performance plans . . . Congress stated its expectation that State performance plans, indicators, and targets be developed with broad stakeholder input and public dissemination. OSEP Memo 05-12 requires States to provide information in the overview section of the State performance plan, clarifying how the State obtained broad input from stakeholders on the State performance plan. Furthermore, [the State Advisory Panel sections] clarify the State's responsibility to establish and maintain an advisory panel, whose membership consists of broad and diverse representation, to advise States on many issues, including developing evaluations and reporting on data to the Secretary.

71 Fed. Reg. 46732

## **State Use of Targets and Reporting**

Each State must use the targets established in the State's performance plan and the priority areas (provision of FAPE in the LRE, state exercise of general supervision, and disproportionate representation of racial and ethnic groups in special education and related services) to analyze the performance of each LEA.

The State must:

- Report annually to the public on the performance of each LEA on the targets in the State's performance plan.
- Make the State's performance plan available through public means.
- Report annually to the Secretary on the performance of the State under the State's performance plan.

20 U.S.C. 1416(b), 34 C.F.R. §300.602

## **Disproportionality**

Each State must provide for the collection and examination of data to determine if significant disproportionality based on race and ethnicity is occurring in the State and the LEAs of the State with respect to:

- The identification of children as children with disabilities
- The placement in particular educational settings of these children; and
- The incidence, duration, and type of disciplinary actions.

In the case of a determination of significant disproportionality with respect to the identification of children as children with disabilities, or the placement in particular educational settings of these children, the State must:

- Provide for the review and, if appropriate, revision of the policies, procedures, and practices used in the identification or placement to ensure that the policies, procedures, and practices comply with IDEA requirements; and
- Require the LEA to publicly report on the revision of policies, practices, and procedures.

20 U.S.C. 1418(d)), 34 C.F.R. §300.646