

# **Policies and Procedures in accordance with the Individuals with Disabilities Education Improvement Act, 2004**



**OFFICE OF EXCEPTIONAL CHILDREN**

**MARCH 2011**

The South Carolina Department of Education does not discriminate on the basis of race, color, national origin, sex, or disability in admission to, treatment in, or employment in its programs and activities. Inquiries regarding the nondiscrimination policies should be made to the director of the Office of Human Resources, 1429 Senate Street, Columbia, SC 29201, 803-734-8505.

## **Introduction**

The policies and procedures in this document are provided to meet the requirement of § 300.100, “A State is eligible for assistance under Part B of the Act for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets the conditions in §§ 300.101 through 300.176.”

This document is not intended to replace reference to all regulations under the IDEA or State Board of Education Regulations 43-243, 43-243.1 or other applicable state or federal statutes and regulations.

For the purposes of this document and the convenience of the reader, the term local education agency (LEA) is used instead of “public agency”. This term included local districts and other programs that provide special education and related services, unless specifically excluded in the regulations.

### **§ 300.101 Free appropriate public education (FAPE)**

A free appropriate public education is available to all children residing in the state between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

### **§ 300.102 Limitation—exception to FAPE for certain ages**

The obligation to make FAPE available to all children with disabilities does not apply with respect to children aged 18 through 21 who, in the last educational placement prior to their incarceration in an adult correctional facility, were not actually identified as being a child with a disability under § 300.8 and did not have an IEP under Part B of the Act.

### **§ 300.103 FAPE-methods and payment**

The State will cost share certain residential placements upon prior approval and adherence to all requirement of the application process.

### **§ 300.104 Residential placement**

When 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 the parents.

### **§ 300.105 Assistive technology**

The state will ensure that LEAs make available assistive technology devices or assistive technology services, or both, to the child with a disability if required as part of the child's (1) special education (2) related services or (3) supplementary aids and services.

### **§ 300.106 Extended school year services**

Extended school year (ESY) services are available to provide FAPE when the IEP team determines that the services are necessary for the provision of FAPE to the child. Disputes regarding ESY services are addressed under expedited due process hearings.

### **§ 300.107 Nonacademic services**

The state ensures that each LEA provides supplementary aids and services determined appropriate and necessary by the child's IEP team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children with disabilities an equal opportunity for participation in those services and activities.

### **§ 300.108 Physical education**

South Carolina law requires physical education for students in grades 1-8, and one credit in grades 9-12 (S.C. Ann. Code § 59-29-10). The state ensures that LEAs provide children with disabilities physical education, specially designed if necessary.

### **§300.109 Full educational opportunity goal (FEOG)**

The state has established the goal of providing full educational opportunity to all children with disabilities, aged birth through 21. The State Performance Plan delineates the timeline for compliance and performance goals. The South Carolina Department of Education (SCDE) is responsible for ensuring FAPE to children with disabilities aged 3 through 21. First Steps is responsible for ensuring educational opportunity to children with disabilities birth to three.

### **§300.110 Program options**

The state ensures that each LEA takes steps to ensure that its children with disabilities have available to them the variety of educational programs and services available to nondisabled children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

### **§ 300.111 Child find.**

The state ensures that all children with disabilities who reside in the state, including children with disabilities who are homeless children or are wards of the state, and children with disabilities attending private schools, regardless of the severity of their disability, and who are in need of special education and related services, are identified, located, and evaluated. Each LEA must develop and implement a practical method to determine which children are currently receiving needed special education and related services.

The state has adopted a definition of developmental delay which is found in SBE 43-243.1. An LEA is not required to adopt and use the term developmental delay for any children within its jurisdiction. If an LEA uses the term developmental delay, the LEA must conform to the definition and age ranges defined in SBE 43-243.1

Child find also must include children who are suspected of being a child with a disability and in need of special education, even though they are advancing from grade to grade and highly mobile children, including migrant children.

### **§ 300.112 Individualized education programs (IEP)**

The state ensures that LEAs develop, review, and revise an IEP, or an IFSP that meets the requirements of section 636(d) of the Act for each child with a disability in accordance with §§ 300.320 through 300.324, except as provided in § 300.300(b)(3)(ii).

### **§ 300.113 Routine checking of hearing aids and external components of surgically implanted medical devices**

The state ensures that:

(a) *Hearing aids.* Each public agency must ensure that hearing aids worn in school by children with hearing impairments, including deafness, are functioning properly.

(b) *External components of surgically implanted medical devices.* (1) Subject to paragraph (b)(2) of this section, each public agency must ensure that the external components of surgically implanted medical devices are functioning properly.

(2) For a child with a surgically implanted medical device who is receiving special education and related services under this part, a public agency is not responsible for the post-surgical maintenance, programming, or replacement of the medical device that has been surgically implanted (or of an external component of the surgically implanted medical device).

### **§ 300.114 LRE requirements**

The state has in effect policies and procedures to ensure that LEAs in the state meet the LRE requirements of this part. The IEP team of a child with a disability who has been convicted as an adult and is incarcerated in an adult prison may modify the child's IEP or placement if the state has demonstrated a bona fide security or compelling penological interest that cannot otherwise be accommodated.

Each LEA 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 that 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.

The state's funding mechanism does not result in placements that violate the requirements of this section. The state does not use a funding mechanism by which funds are distributed on the basis of the type of setting in which a child is served, or 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.

### **§ 300.115 Continuum of alternative placements**

Each LEA 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). Each LEA must make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

### **§ 300.116 Placements**

In determining the educational placement of a child with a disability, including a preschool child with a disability, each LEA 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 must be made in conformity with the LRE provisions of this subpart. The child's placement must be determined at least annually, be based on the child's IEP, and be 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. 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

### **§ 300.117 Nonacademic settings**

In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and nonacademic services, each LEA must ensure that each child with a disability participates with nondisabled children in the extracurricular services and activities to the maximum extent appropriate to the needs of that child. The LEA must ensure that each child with a disability has the supplementary aids and services determined by the child's IEP Team to be appropriate and necessary for the child to participate in nonacademic settings.

### **§ 300.118 Children in public or private institutions**

The state ensures that placement in the least restrictive environment is effectively implemented, including, if necessary, making arrangements with public and private institutions (such as a memorandum of agreement or special implementation procedures).

The SCDE has the responsibility of ensuring that the requirements of Part B of the Act are met with respect to students with disabilities who are convicted as adults under state law and incarcerated in adult prisons (S.C. Ann. Code § 59-36-20).

### **§ 300.119 Technical assistance and training activities**

The state carries out activities to ensure that teachers and administrators in all LEAs are fully informed about their responsibilities for implementing services in the least restrictive environment and are provided with technical assistance and training necessary to assist them in this effort.

### **§ 300.120 Monitoring Activities**

The state carries out activities to ensure that services in the least restrictive environment are implemented by each LEA. If there is evidence that an LEA makes placements that are inconsistent with the least restrictive environment requirements, the state will review the LEA's justification for its actions and assist in planning and implementing any necessary corrective action.

### **§ 300.121 Procedural safeguards**

Each LEA must establish, maintain, and implement procedural safeguards that meet the requirements of §§ 300.500 through 300.536. Parents and guardians have the right to inspect and obtain copies of any and all information that is subject to collection and to appeal the accuracy of any such information. The access of unauthorized persons to personally identifiable information without parental consent is forbidden. Interested parties may contact the appropriate agency/organization to determine the location of personally identifiable information. One person in each LEA and participating agency/organization has responsibility for having access to the information. If the parents so request, it is required that personally identifiable information be destroyed following the termination of services to the student. Parents will be notified prior to the collection and destruction of personally identifiable information. Parents have the right to have a representative inspect and review records pertaining to their child, provided the parents give written authorization of such to the public agency. Parents are also entitled to receive explanations, or interpretations of information pertaining to their children. Upon specific request, parents will receive a list of names of persons to whom personally identifiable information has been released, the type of information released, and the purpose for which it was released. Copies of a LEA/agency's printed policies and procedures developed to ensure confidentiality will be given to parents upon request.

Each school shall annually notify parents of their rights under FERPA. The notice must inform parents or adult students that they have the right to

- Inspect and review the student's education records;
- Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;
- Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that § 99.31 of FERPA authorize disclosure without consent; and

- File a complaint under §§ 99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of FERPA.
- The procedure for exercising the right to inspect and review education records.
- The procedure for requesting amendment of records.

The LEA may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights. The LEA shall effectively notify parents who have a primary or home language other than English. (34 CFR § 99.7) This notice should adequately inform parents prior to any identification, location, or evaluation activity taking place.

LEAs are to ensure that parents have the opportunity to be members of the IEP team that makes decisions on the educational placement of their child. Every child with a disability aged 3-21 is entitled to receive a free, appropriate, public education (FAPE). Parent rights are intended to ensure that children receive a FAPE.

Parents must be provided notice of meetings related to eligibility, evaluation, reevaluation, IEP development, provision of a FAPE for their child and educational placement decisions, to ensure that they have the opportunity to participate in the meetings. The LEA must make reasonable efforts to ensure that the parents understand, and have the opportunity to participate in these meetings, including arranging for an interpreter for parents with deafness, or for parents whose native language is other than English. The parent and the LEA may agree to use alternative means of meeting participation, such as video conferences or conference calls.

These meeting requirements do not apply to informal or unscheduled conversation of LEA personnel 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.

A placement decision may be made by a group without the involvement of a parent, if the LEA 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.

After an initial evaluation is completed, if the parents disagree with the LEA's evaluation, they have the right to ask for an independent educational evaluation at public expense. If the parent obtains an independent educational evaluation at public expense or provides the agency with an evaluation obtained at private expense, the results of the evaluation shall be considered by the LEA, if it meets the LEA's criteria, in any decision made with respect to the provision of a FAPE to the child.

### **Independent Educational Evaluation**

Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the LEA responsible for the education of the child in question. Public expense means that the LEA either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.

If the parent requests an independent educational evaluation the LEA must either

- Provide information to the parent about where an independent educational evaluation can be obtained, the agency criteria (which may include qualifications of examiners and location to obtain the evaluation);

- Ensure that the evaluation is provided at public expense, unless the special education due process hearing officer determines that the independent educational evaluation did not meet agency criteria; or
- Initiate a due process hearing to show that the LEA's evaluation was appropriate.

If a parent requests an independent educational evaluation, the LEA may ask the reason for the objection to the public evaluation. However, the explanation by the parent cannot be required, and the LEA cannot unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.

A due process hearing officer would determine whether the LEA must pay for the independent educational evaluation. If the LEA's evaluation is found to be appropriate and the parents still want an independent educational evaluation, the expense is the responsibility of the parents. When an independent educational evaluation is conducted, the LEA or a special education due process hearing officer, or both must consider the results of the independent educational evaluation in decisions made with respect to a FAPE for the child.

If an independent educational evaluation is provided at public expense, the criteria under which the evaluation is obtained must be the same as the criteria that the LEA uses when it initiates an evaluation. These criteria may include the location of the evaluation and the qualifications of the examiner. The credentials of the independent evaluator or evaluators must be comparable to the LEA's evaluators. The LEA may set reasonable limitations on the costs for which it will be responsible. The LEA may have to exceed those costs if necessary to ensure that the independent educational evaluation meets the child's unique needs.

### **Prior Written Notice**

One of the procedural safeguards afforded to parents is the required Prior Written Notice (PWN) of certain proposed special education actions. This notice must be provided to parents within a reasonable amount of time before the date the LEA proposes or refuses to initiate or change the

- identification,
- evaluation,
- educational placement of their child, or
- provision of a FAPE to their child. (34 CFR § 300.503(a))

Also, if at any time subsequent to the initial provision of special education and related services, the parent of a child revokes consent in writing for the continued provision of special education and related services the public agency may not continue to provide special education and related services to the child, but must provide prior written notice before ceasing the provision of services. (34 CFR § 300.300(b)(4)(i))

The PWN provided to parents for each proposed special education action must contain specific information:

- a description of the action proposed or refused;
- an explanation of why the LEA proposes or refuses to take the action;
- a description of each evaluation procedure, assessment, record, or report the LEA used as basis for proposed or refused action;
- a description of the other options the IEP team considered and reasons why they were rejected;

- a description of any other factors relevant to the proposal or refusal; a statement that the parents have parental rights under the law; and
- a list of sources for parents to contact to assist in understanding their rights.

Additionally, if the PWN is to propose to conduct an initial evaluation or a reevaluation, the notice must describe any evaluation procedures that the LEA proposes to conduct (34 CFR § 300.304(a)(1)).

The PWN is to be provided in language understandable to the general public, and in the native language of the parent unless it is clearly not feasible to do so. Additionally, if the native language or other mode of communication of the parent is not a written language, the LEA must take steps to ensure that (a) the notice is translated orally, or by other means, to the parent in his or her native language or other mode of communication (such as sign language); (b) the parent understands the content of the notice; and (c) there is written documentation that these requirements are met. (34 CFR § 300.503(b)(c))

PWN must be sent at the conclusion of the meeting (prior to the implementation of any changes decided upon or refusal to make changes). This PWN provides information about what changes will be implemented or what changes the IEP team refused to make.

In amending a child’s IEP, the parent of a child with a disability and the LEA representative may agree not to convene an IEP team meeting for the purpose of making those changes, and instead may develop a written document to amend or modify the child’s current IEP. Even when using the IEP amendment process, the LEA must provide PWN of any changes agreed upon in the IEP. 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:

- (1) Upon initial referral or parent request for evaluation;
- (2) Upon receipt of the first State complaint under §§ 300.151 through 300.153 and upon receipt of the first due process complaint under § 300.507 in a school year;
- (3) In accordance with the discipline procedures in § 300.530(h); and
- (4) Upon request by a parent.

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

## **Notice**

The procedural safeguards notice must include a full explanation of all of the procedural safeguards available under § 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:

- Independent educational evaluations;
- Prior written notice;
- Parental consent;
- Access to education records;
- Opportunity to present and resolve complaints through the due process complaint and State complaint procedures, including—
  - The time period in which to file a complaint;
  - The opportunity for the agency to resolve the complaint; and

- The difference between the due process complaint and the state complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures;
- The availability of mediation;
- The child's placement during the pendency of any due process complaint;
- Procedures for students who are subject to placement in an interim alternative educational setting;
- Requirements for unilateral placement by parents of children in private schools at public expense;
- Hearings on due process complaints, including requirements for disclosure of evaluation results and recommendations;
- State-level appeals (if applicable in the state);
- Civil actions, including the time period in which to file those actions; and
- Attorneys' fees.

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

## **Mediation**

The mediation process is voluntary for both the parents and the LEA. Mediation may not be used to deny or delay a parent's right to a due process hearing, or any other parent right. Mediation is conducted by a qualified, impartial mediator who is trained in effective mediation techniques. The SCDE is responsible for the costs of mediation. This cost is handled by the state's paying directly for the training of all mediators and by the flow through of the IDEA funds that may be used by the LEA for all aspects of the mediation process, including the costs of meetings to encourage mediation. Mediation must be provided in a timely manner and at a location that is convenient for both parties in the dispute.

Agreements reached during mediation must be in writing and must include the resolution of each issue for which agreement was reached. Every mediation agreement must also include a statement that

- Discussions during mediation must be kept confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings;
- Each party understands that the agreement is legally binding upon them; and
- The agreement may be enforced in state or federal court of competent jurisdiction.

When parents or LEA personnel disagree about a special education issue, either party may request mediation. However, both parties must agree to use this process. Mediation may be requested even after a due process hearing request has been filed. In this case, mediation must be completed within the due process timeline, and mediation may not be used to delay the parents' right to due process. However, the due process hearing timeline may be extended by the due process hearing officer for a specific period of time during the mediation process if requested by the parties (34 CFR § 300.515(c)).

Once both parties agree in writing to mediation, the mediation session should occur within fourteen calendar days. The LEA selects a mediator on a random or rotational basis. If the mediator is not selected on a random or rotational basis, both parties must be involved in and agree to the selection of the mediator. If the LEA and parents do not agree on the assignment of the mediator, the LEA or parents should contact the Office of General Counsel at the SCDE so that a mediator can be appointed by the SCDE from the approved list. The SCDE maintains this list of qualified mediators who are knowledgeable in laws and regulations relating to the provision of special education and related services.

The LEA provides parents with information concerning the mediation process and information identifying the mediator. The mediator provides parents with his or her contact information and notifies both parties as to the date, time, location, and purpose for mediation. The location must be convenient to the parties and should be acceptable to everyone. A neutral location is preferred. In some cases where neutral sites are not readily available, mediations can be held on LEA property. The mediator also answers any questions about the process and may request additional information from the parties.

In order to be considered trained and qualified, mediators must fulfill the following requirements:

1. Be knowledgeable in laws and regulations relating to the provision of special education and related services;
2. May not be an employee of the SCDE, any state agency that provides a FAPE for children with disabilities, or the LEA that is involved in the education or care of the child; and
3. Must not have a personal or professional interest that conflicts with the person's objectivity.

If the IEP is changed by adding the mediation agreement, the IEP team may write a new IEP or amend the existing IEP to reflect the mediation agreement. The LEA is responsible for following up with the required notice and consent forms. The revised IEP is then implemented. If the mediation agreement is not part of the IEP the LEA must ensure that any person responsible for implementing the agreement is informed of their responsibilities. If the mediation is not successful, the mediator may declare that the mediation is at impasse and suggest that both parties consider other methods for dispute resolution, such as filing a complaint or requesting a due process hearing.

The LEA must maintain copies of any forms or other formal written documentation generated by the mediation process. The LEA must send a copy of the mediation request form and of the written agreement reached by the parties to the Office of General Counsel. A sample mediation request form may be found on the OEC website.

### **Due Process Hearing**

The LEA, the parents of a child with a disability, or the student (if the student is age 18 or older) has the right to file a due process hearing complaint. A special education due process hearing may be initiated to resolve differences about a child's identification, evaluation, educational placement, or provision of a FAPE. The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint. There are two exceptions to this timeline including when an LEA has misrepresented that it has resolved the problem or the LEA has withheld information that it was legally required to give to the parent (34 CFR§ 300.507(a)(2)).

To request a due process hearing, the party filing the complaint sends a copy of the due process hearing request to the other party and to the Office of General Counsel. This notice is confidential and must contain the following information:

- name of the child;
- address of the child's residence (or in the case of a homeless child or youth, available contact information for the child);
- name of the school the child is attending;
- description of the nature of the problem and the facts that form the basis of the complaint; and
- a proposed resolution of the problem.

When the LEA receives this request for a due process hearing, LEA personnel are required to

- inform parents about mediation;
- inform parents of free or low-cost legal services; and
- provide a copy of the Parent Rights document for the first due process complaint in the school year (34 CFR§ 300.504).

The LEA's responsibility is to maintain a current list of trained, qualified special education due process hearing officers. This list must include the names and qualifications of the special education due process hearing officers who are available.

The LEA is responsible for conducting due process hearings in accordance with all federal and state requirements, including assigning special education due process hearing officers. The LEA is required to appoint a special education due process hearing officer within 10 calendar days of receiving or initiating a hearing request. A special education due process hearing officer can have no personal or professional interest that would conflict with his or her objectivity. The special education due process hearing officer may not be an employee or former employee (an officer, agent, LEA board official) of the LEA that is responsible for the child's education. The special education due process hearing officer must have knowledge and understanding of the IDEA and legal interpretations pertaining to law; have knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and have knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice. The special education due process hearing officer must be at least 21 years of age and be a high school graduate (or hold an equivalent credential). Only persons who have been trained by the SCDE may be special education due process hearing officers. If a special education due process hearing officer does not adhere to the federal and state regulations or policies and procedures, including all timelines, he or she will be removed from the list of qualified hearing officers.

Parents or attorneys representing the parents have the right to raise an objection as to the special education due process hearing officer appointed by the LEA on the basis of a potential bias or personal or professional conflict. If the determination is made by the special education due process hearing officer that a potential bias or conflict exists, he or she must remove himself/herself and the LEA must go to the next name of the list of persons qualified to serve as special education due process hearing officers.

### **Resolution meeting**

When the parent has requested a due process hearing, the LEA must schedule a resolution meeting to occur within 15 calendar days of receiving the due process requests. The LEA must convene a resolution meeting with the parent, the member or members of the IEP team who have specific knowledge of the facts identified in the complaint, and a representative of the LEA who has the authority to make binding decisions on behalf of the LEA. The parent and the LEA determine which members of the IEP team will attend the meeting. The LEA may not include their attorney unless the parents bring their attorney.

The purpose of this meeting is for the parent of the child to discuss and explain the complaint, including the facts that form the basis of the complaint. The LEA then has an opportunity to resolve the complaint. If the meeting results in a resolution of the complaint, the parties develop a legally binding written agreement that both the parent and the representative of the LEA signs. The agreement is, by law, enforceable in any state or federal court of competent jurisdiction. However, the law also permits either party to void the agreement within 3 business days of the date the agreement was signed. The resolution agreement must be signed by the parent and a representative of the LEA that has the authority to bind the LEA.

If a resolution of the complaint is not reached at the meeting and the LEA has not resolved the complaint to the satisfaction of the parent within 30 calendar days of the LEA's receipt of the complaint, the due process hearing procedures will be implemented and all of the applicable timelines for a due process hearing will commence. This includes the issuance of a written decision within 45 calendar days after the end of the resolution period. If no resolution is reached during the resolution session and the parties do not believe they can reach a mutually agreeable resolution, the parties may contact the special education due process hearing officer to request the timeline start prior to the end of the 30-day resolution period.

The parent's failure to participate in a resolution meeting when he or she has not waived the resolution process or requested to use mediation will delay the timelines for the resolution process and due process until the meeting is held (34 CFR§ 300.510(b)(3)). In addition, if the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented) the LEA may, at the conclusion of the 30 day resolution period, request that the special education due process hearing officer dismiss the parents' due process complaint (34 CFR§ 300.510(b)(4)).

If an LEA fails to hold and participate in a resolution meeting within 15 days of receiving a due process complaint, the parent may request the special education due process hearing officer to begin the due process hearing and commence the 45 day timeline for its completion (34 CFR§ 300.510(b)(5)).

A resolution meeting, however, is not required if the parent and the LEA agree, in writing, to waive the resolution meeting, or they agree to use mediation to attempt to resolve the complaint. If no resolution is reached at during the session, the parties may contact the special education due process hearing officer and request the timeline start.

If the LEA fails to conduct the resolution session within the required 15 calendar days (7 calendar days if the hearing is expedited) and the parties have not agreed in writing to waive the resolution sessions or the parents have not requested mediation in lieu of the resolution session, this is an issue of noncompliance and the SCDE must issue a written finding of noncompliance relative to this matter.

#### *Prehearing requirements*

The party receiving a due process hearing request must send the party filing the request a response that specifically addresses the issues raised in the complaint within 10 calendar days of receiving the complaint.

If either the LEA or the parent believes that a due process complaint it has received does not meet the legal notice requirements, the party may submit to the special education due process hearing officer a sufficiency challenge. The sufficiency challenge must be submitted within 15 calendar days of the date of the party's receipt of the due process complaint. The special education due process hearing officer has up to 5 calendar days from the receipt of the sufficiency challenge to determine whether or not the original complaint notice is sufficient. The special education due process hearing officer shall immediately notify the parents and the LEA in writing of his or her decision.

If the LEA has not sent a PWN to the parent regarding the problem described in the parent's due process complaint notice, the LEA, within 10 days of receiving the complaint, must send to the parent a response that includes: (1) an explanation of why the agency proposed or refused to take the action raised in the complaint; (2) a description of other options that the IEP team considered and the reasons why those options were rejected; (3) a description of each evaluation procedure, assessment, record, or report

the agency used as the basis for the proposed or refused action; and (4) a description of the other factors that are relevant to the agency's proposed or refused action (34 CFR § 300.508(e)(1)).

A party may amend its due process complaint notice only if: (a) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a resolution meeting; or (b) the special education due process hearing officer grants permission not less than 5 days before a due process hearing occurs. When a complaint is amended the timelines start over.

Within 5 business days prior to a hearing, each party must disclose to the other party any evidence the party plans to use at the hearing, including all evaluations and recommendations based on the evaluation that they intend to use at the hearing. Failure to provide this evidence to the other party in a timely fashion gives the other party a right to request that the special education due process hearing officer prohibit the introduction of the evidence at the hearing.

If the LEA and the parent agreed to the resolution meeting but have not resolved the issues within 30 days of the date the due process complaint was received, the hearing may begin. Note that the meeting is required unless the parent and the LEA agree to waive it. Also, note that, if both parties agree in writing to waive the resolution meeting, the 45 calendar day timeline to complete the due process hearing begins the day after the written agreement is signed.

### **Conducting a due process hearing**

The due process hearing must be held at a time and place reasonably convenient to the parent of the child and must be a closed hearing, unless the parent requests an open hearing. The parties shall be notified in writing of the time and place of the hearing at least 5 days prior to the hearing. Both parties have the right to be present at the hearing, as well as be accompanied and advised by legal counsel and people who have special knowledge about children with disabilities.

Parties have the right to confront and cross-examine witnesses who appear in person at the hearing, either voluntarily or as a result of a subpoena by the special education due process hearing officer. Under S. C. Code Ann. § 59-33-90 (2004), special education due process hearing officers have the authority to issue subpoenas related to meeting the requirements set forth in the IDEA. Each party may present witnesses in person or present their testimony by affidavit if the due process hearing officer agrees, including expert medical, psychological or educational testimony. Each party has a right to prohibit the other party from raising any issue at the hearing that was not raised in the due process complaint notice or in a prehearing conference held prior to the hearing.

Both parties have the right to have a written or, at the option of the parent, an electronic, verbatim record of the hearing. They also have the right to a written, or at the option of the parent, electronic decision, including the findings of facts and conclusions. Both the record of the hearing and the decision of the special education due process hearing officer must be provided at no cost to the parents.

### **Reaching a decision**

The 45 day timeline for completion of a due process hearing starts on the day after *one* of the following events occurs:

- both parties to the due process proceedings agree, in writing, to waive the resolution meeting;
- the parties begin a resolution meeting or a mediation but agree, in writing, that resolution of their dispute is not possible before the end of the 30 day resolution period; or

- both parties agreed, in writing, to continue to engage in mediation beyond the end of the 30 day resolution period, but later, one, or both, of the parties withdraws from the mediation.

A special education due process hearing officer may grant extensions of time upon request of either party unless the due process hearing is an expedited hearing. The request must be in writing. Extensions should only be granted for good cause. The concept of good cause does not include negligence, inconvenience, or lack of preparation on the party of the parties. The special education due process hearing officer must notify the parties in writing of the decision to grant or deny the extension request. If the request is granted, the decision must also include a definite date for the timeline to resume.

After the close of the special education due process hearing, the special education due process hearing officer must render a decision on the matter, including findings of fact and conclusions, within 10 calendar days. The decision must be written or, at the option of the parent, must be an electronic decision. Any action of the special education due process hearing officer resulting from a due process hearing shall be final, subject to appeal and review.

A written decision of the result of any hearing must be provided to the LEA and must be sent by certified mail to the parent or attorney of the child. In addition, the special education due process hearing officer must delete personally identifiable information from the report and send a copy to the Office of General Counsel, which must make the decision available to the Special Education Advisory Council. (34 CFR§ 300.509(d))

### **Appealing the due process decision**

If the LEA or the parents are dissatisfied with the decision of the special education due process hearing officer, either party may file a notice of appeal with the Office of General Counsel not later than 10 calendar days after the date of the receipt of the written decision. A request for an extension to file an appeal (beyond the 10-day time limit) must be made in writing to the Office of General Counsel within 5 days of the receipt of the local decision. Within ten business days of receiving a request for an extension to file an appeal, the state-level review officer may grant the request for good cause shown. The concept of “good cause” may not include negligence or a matter of low priority in filing the request for appeal. In no event will the state-level review officer grant an extension of more than 20 days beyond the original 10-day timeline.

The appeal should include a statement of the decision of the local due process hearing officer, the specific points being appealed, copies of all items entered as evidence, and the names and addresses of the parents if the LEA is appealing the decision. The appealing party may also include written arguments. When parents appeal the decision, the LEA must provide a statement of the decision and copies of all items entered as evidence. The LEA must also provide a written transcript of the local due process hearing to the Office of General Counsel. The Office of General Counsel must appoint a state-level hearing officer and submit to the state-level hearing officer the request for appeal, the transcript, and any other relevant documentation.

The state-level due process hearing officer must conduct an impartial review of the hearing and make an independent decision based on the review. The review officer must conduct the review according to the following requirements:

- Examine the entire hearing record; an audiotape of the hearing must be made. The LEA must have court reporter to record the proceedings. The LEA is responsible for ensuring that the transcript of the proceedings will be available as required by the state appeal procedures; this

includes the provision of advance notice to the court reporter concerning the appeal timelines and the possible need for a quick turnaround

- Ensure that the procedures at the hearing were consistent with the requirements of due process;
- Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in 34 CFR § 300.512 apply; and
- Afford the parties an opportunity for oral or written arguments, or both, at the discretion of the reviewing official.

The decision of the state-level review officer is final unless either party chooses to bring a civil action in either state or federal district court of competent jurisdiction. Personally identifiable information is also deleted from the report, and is made available to the Special Education Advisory Council and to the public by the Office of General Counsel.

### **Stay-put**

While the due process hearing is pending, the student involved in the complaint must remain ("stay-put") in the current educational placement, unless

- The parents and the LEA agree to a different placement.
- The proceedings arise in connection with the initial admission of the child to school, in which case the child will be placed in the appropriate regular education classroom or program, unless otherwise directed by a special education due process hearing officer because a child's behavior is substantially likely to result in injury to the student or to others.
- The student is in an IAES for disciplinary reasons. (34 CFR § 300.533)

If the due process hearing involves an evaluation or initial services under Part B for a child who is transitioning from Part C services to Part B services and is no longer eligible for Part C services because the child has turned age three, the LEA is not required to provide the Part C services that the child was receiving. However, if the child is found eligible for special education services and related services under Part B, and the parent consents to the initial provision of special education and related services, then the LEA must provide those special education and related services that are not in dispute between the parent and the LEA.

### **Civil action**

After a local due process hearing, or an appeal of that hearing, is completed either the parents or the LEA may pursue a civil action through a state or federal court for reimbursement of attorneys' fees. Federal and state regulations allow the civil action by either party (34 CFR § 300.516).

### **Attorney's fees**

If the parents prevail in the due process hearing or upon appeal, a court may award some or all of the attorney's fees parents have paid in conjunction with the due process hearing. Only a court can award attorney fees to the parents and only if the parents are the prevailing parties. Although the special education due process hearing officer has no authority to order attorney's fees, the hearing officer must find that the party seeking attorney's fees is a prevailing party in the action. There may be limitations, however, on the amount of attorney fees ordered by the court. For example, if the court finds that the parents prolonged the process or if the fees charged are more than the hourly rate usually charged, the judge has the authority to reduce the award requested by the parents.

The LEA may be awarded attorney fees if a parent files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation. The LEA may be awarded attorney fees if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation. In determining the amount of the reimbursement of attorney fees, the judge must follow the IDEA regulations (34 CFR § 300.517).

### **Expedited due process hearings**

Whenever a due process hearing is requested by a parent to appeal a decision regarding placement for disciplinary reasons, a manifestation determination, or a decision concerning extended school year services or when the hearing is requested by an LEA that believes maintaining the current placement of a child is substantially likely to result in injury to that child or to others, the hearing is considered to be expedited. The LEA is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed. The hearing officer must make a determination within 10 school days after the hearing.

Unless the parents and LEA agree in writing to waive the resolution meeting or agree to use the mediation process a resolution meeting must occur within 7 days of receiving notice of the due process complaint; and the due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint.

If the LEA fails to conduct the resolution session within the required 7 calendar days for an expedited hearing and the parties have not agreed in writing to waive the resolution sessions or the parents have not requested mediation in lieu of the resolution session, this is an issue of noncompliance and the SCDE must issue a written finding of noncompliance relative to this matter.

The decisions from expedited due process hearings are appealable consistent with 34 CFR § 300.514. When an appeal is made by either the parents or the LEA, the child must remain in the IAES pending the decision of the special education due process hearing officer or until the expiration of the time period (period of disciplinary removal if the behavior is not a manifestation of the disability or period due to removal for special circumstances – drugs, weapons, or serious bodily injury), whichever occurs first, unless the parent and LEA agree otherwise.

### **State Complaints**

Any individual or organization may file a complaint if they believe that the LEA is not complying with federal or state laws or regulations relating to special education. The complaint must allege a violation that has occurred not more than one year prior to the date the complaint is received by the SCDE.

The complaint must be in writing and signed by the person or representative of the organization making the complaint. The complaint must include a statement that the LEA is not complying with the requirements of the IDEA and/or the SBE special education regulation, 43-243, and it must give the facts upon which that statement is based. The signature and contact information for the complainant and if alleging violations with respect to a specific child:

- the child's name and address of residence, or other contact information if the child is a homeless child or youth;
- the contact information for the person filing the complaint;

- the name of the school the child is attending;
- a description of the nature of the problem involving the child, including facts related to the problem; and
- a proposed resolution to the problem, if a possible resolution is known and available to the complainant.

The party filing the complaint must forward a copy of the complaint to the LEA against which the allegations are made at the same time the complaint is filed with the Office of General Counsel. The OEC website includes a sample form that may be used, but is not required, to file a complaint.

If a complaint is received that is part of a due process hearing, or the complaint contains multiple issues of which one or more are part of such a hearing, the state must set aside the complaint, or any part of the complaint, that is being addressed in the due process hearing until the hearing is over. Any issue in the complaint that is not a part of the due process hearing must be resolved through the complaint process.

The complaint investigator at the SCDE must resolve a complaint within 60 calendar days from the date the complaint is received by both parties unless exceptional circumstances exist or the parents and LEA agree to extend the time to engage in mediation or in other alternative means of dispute resolution. During the 60 days, the complaint investigator must carry out an independent investigation, including an on-site investigation if necessary; give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint; provide the LEA with the opportunity to respond to the complaint; review all relevant information and make an independent determination as to whether the LEA is violating a requirement of the IDEA, the applicable state and federal regulations, or state or LEA policies and procedures; and issue a written decision.

After the investigation, the complaint investigator issues a written decision addressing each of the allegations in the complaint. The written decision includes: (a) findings of fact and conclusions; (b) the reasons for SCDE's final decision; and (c) any corrective action or actions that are required including the specific period of time within which each corrective action must be completed. The written decision is final and not subject to appeal although both parties retain all rights to mediation and/or due process hearing to further pursue the matter. There is no reconsideration of a decision rendered during the state-level complaint investigation process.

When the corrective actions are completed by the LEA, the complaint investigator sends a letter of completion to the LEA with a copy to the person making the complaint. At that point, the complaint file is closed. Any findings made by the complaint investigator during the course of the investigation that are not directly related to the student named in the complaint are forwarded to the General Supervision and Program Units in the OEC for follow up.

### **Surrogate parents**

The LEA must assign an individual to act as a surrogate parent when

- No parent (as defined above) can be identified;
- The LEA, after reasonable efforts, cannot locate a parent;
- The child is a ward of the state under the laws of that state; or
- The child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11434a(6)).

The LEA must have a method for determining whether a child needs a surrogate parent and for assigning a surrogate parent to the child. The LEA must maintain a list of people eligible to serve as surrogate parents. The LEA may compensate or make arrangements for the compensation of surrogate parents when they are utilized. A surrogate parent is not an employee of the LEA solely because he or she is paid to serve as a surrogate. Surrogate parents will be selected by the LEA. A surrogate parent may live outside the LEA as long as he or she meets the necessary requirements.

Any employee of an LEA or public agency, the SCDE, a residential treatment facility (RTF), group home, hospital, or any physician, judicial officer, or other person whose work involves the education or treatment of children and who knows a child needing special education services and knows that the parents or guardians are either not known or cannot be located or that the child is a ward of the state, may file a request for assignment of a surrogate parent. This request must be made to the LEA involved in the child's educational process. In the case of a child who is a ward of the state, the surrogate parent may be appointed by the judge overseeing the child's case, as long as the surrogate meets the requirements listed below.

A surrogate parent may be removed when a parent appears to represent the child or revokes consent or when the child is no longer eligible for special education services. A person serving as a surrogate parent may resign at any time by submitting his or her resignation in writing to the LEA.

The LEA must ensure that a person selected as a surrogate parent

- Is not an employee of the SEA, the LEA, or any other agency that is involved in the education or care of the child;
- Has no personal or professional interest that conflicts with the interest of the child the surrogate parent represents; and
- Has knowledge and skills that ensure adequate representation of the child.

The surrogate parent may represent the child in all matters relating to the identification, evaluation, and educational placement of the child and the provision of a FAPE.

In the case of a child who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs may be appointed as temporary surrogate parents without regard to the requirements, until a surrogate parent can be appointed that meets all of the requirements. The LEA must make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after determining that the child needs a surrogate parent.

In cases where a parent is unresponsive, lives a great distance from their child's LEA, or is incarcerated, the LEA may obtain written authorization from the parent to appoint a surrogate parent to represent the child after the initial consent for placement has been obtained. Parent permission for the appointment of a surrogate parent must be voluntary and explicitly authorized in writing and is revocable at any time. The surrogate parent, once appointed, may then represent the child until such time as the parent revokes authorization.

### **Age of Majority**

On or before the student's 17th birthday, the IEP of the student must contain a statement that the student has been informed that at age 18, he or she has attained the age of majority in South Carolina and all parent rights transfer to him/her. Thus, at age 18, students become their own educational decision makers.

When a student reaches the age of majority, LEA personnel must provide all required special education notices to both the student and to the parents and obtain informed consent for specified special education actions from the student (same requirements as for parents). Parents are not entitled to attend the IEP meeting; however, either the LEA or the student may, but are not required to, invite the parents to attend IEP meetings as persons who are knowledgeable about the student.

The only situation in which all rights do not automatically transfer to the student at age 18 is when a court has judged the student to be unable to fulfill his or her responsibilities (determined the student to be “incompetent”). When this has occurred, the LEA must provide PWN and obtain informed consent from the person whom the court has appointed as the legal guardian. LEAs may provide parents information about other options and resources about this topic.

Once rights have been transferred to the student, he or she may be able to execute a power of attorney under S. C. Code Ann. § 62-5-501 (Supp. 2008). This regulation allows a person who is not affected by a disability to execute a power of attorney to grant another party the right to act as the agent or attorney-in-fact for the person. The term “disability” here means cause for a protective order which involves the appointment of a conservator or other protective order by the court to act on behalf of an individual. The term does not relate to whether the person has a disability as defined by the IDEA. There are additional requirements under this statutory provision that must be met.

## **Discipline**

School officials may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate IAES, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct, as long as those removals do not constitute a change of placement or total more than 30 days as reflected in state law (S.C. Code Ann. §59-63-2004). The school need not provide educational services during the first 10 days of removal in a school year, unless it provides educational services to a child without disabilities who is similarly removed.

If school officials order two or more short-term suspensions of a child with a disability during a school year, these suspensions are not a change in placement for disciplinary reasons if the suspensions do not constitute a pattern of removals.

To determine if a change of placement has occurred, school officials must consider whether the series of suspensions constitutes a pattern of removals. School officials may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements, is appropriate for a child with a disability who violates a code of student conduct. (34 CFR § 300.530(a))

Under 34 CFR § 300.536, when a series of suspensions/removals total more than 10 school days in a school year, school officials should determine whether a pattern of removals has developed by considering:

- Whether the child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals
- Other factors such as
  - The length of each removal,
  - The total amount of time the child has been removed, and

- The proximity of the removals to one another.

School officials have the authority to make the determination of whether a series of short-term suspensions of a child with a disability constitute a change in placement for disciplinary reasons. This determination is subject to review through due process proceedings.

Schools must provide a FAPE to all children with disabilities, including those who are suspended or expelled from school after the 10<sup>th</sup> day of suspension. Nevertheless, children with disabilities like students without disabilities may be given short-term suspensions. As stated previously, the school is not required to provide educational services to children with disabilities during the first 10 cumulative days of suspension in a school year. However, when the total number of school days of suspension in a school year reaches 11, and the current removal is for not more than 10 consecutive school days and is not a change of placement, the school must begin providing educational services. School officials must determine the extent to which special education and related services must be provided to the child beginning on the 11<sup>th</sup> school day of suspension. This is known as the "11<sup>th</sup> day rule." In this situation, "school officials" means a general education administrator, special education director or designee(s), and the child's special education teacher, as specified. Beginning on the 11<sup>th</sup> school day of suspension in a school year, and each school day of suspension thereafter, special education and related services needed for the child must be provided to enable the child to participate in the general education curriculum, although in another setting; and to progress toward meeting the goals set out in the child's IEP.

If the short-term suspension includes the 11<sup>th</sup> cumulative school day of suspension in a school year, necessary services identified by the school officials must be provided. The 11<sup>th</sup> day rule applies, whether or not the 11<sup>th</sup> school day of suspension results in a pattern of removal that constitutes a change of placement.

Additionally, if the child has not had a functional behavioral assessment (FBA) and the LEA has not implemented a BIP for the child, school officials may (but are not required to) determine that the child needs a FBA to address the behavior that resulted in the suspension and to develop a BIP if the assessment suggests such a plan is necessary for the child

To determine if a change of placement has occurred, school officials must consider whether the series of short-term removals (less than 10 consecutive school days) constitutes a pattern of removals. School officials may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements, is appropriate for a child with a disability who violates a code of student conduct. (34 CFR§ 300.530(a))

A removal of a child with a disability is a change of placement when: the removal is for more than 10 consecutive school days; or the removal is one of a series of short-term removals that constitutes a pattern of removals.

There are specific steps to follow when school officials consider either a long-term suspension for more than 10 consecutive school days, an expulsion, or another short-term suspension that cumulates to more than 10 school days and shows a pattern constituting a change of placement (34 CFR§ 300.530(d)(5) and (e)).

- On the date the decision is made to make a removal that constitutes a change of placement of a child with a disability the school must notify the parents of that decision, and provide the parents with a copy of the Parent Rights notice.

- On the 11<sup>th</sup> school day of removal, the school must begin providing appropriate special education and related services. Note that the determination of services needed as a result of a disciplinary change of placement is not made by the school officials as in the previous situations. Instead, the IEP team decides on these services and where they will be provided.
- The school, the parent, and relevant members of the child's IEP team (as determined by the parent and the school) must determine if the child's violation of the school's code of student conduct was a manifestation of his or her disability.
- The school must convene meetings regarding the manifestation determination and services as expeditiously as possible, but no later than 10 school days after the decision to change placement due to disciplinary reasons is made.

When a disciplinary change of placement occurs, the IEP team, including the parent, determines the special education and related services to be provided during the removal. However, parental consent for the disciplinary change in placement is not required.

### **Manifestation Determination**

As soon as practical, but not later than 10 school days after the date on which the decision is made to change the placement of a child with a disability because of a violation of a student code of conduct, the representative of the school, the parent and other relevant members of the child's IEP team, as determined by the parent and the school, must meet to review:

- all of the relevant information in the child's file,
- the child's IEP,
- any teacher observations, and
- any relevant information provided by the parent.

Based on its review of all the relevant information, the group must determine if the conduct in question was:

- a. caused by, or had a direct and substantial relationship to the child's disability; or
- b. the direct result of the school's failure to implement the child's IEP (34 CFR§ 300.530(e)(1)).

If it is determined by the group that the conduct of a child was a result of either "a" or "b" above, then the conduct must be determined to be a manifestation of the child's disability.

#### **2. Determination Behavior WAS a Manifestation of the Disability**

If the school, the parent and other relevant members of the child's IEP team (as determined by the parent and school) determine that the student's behavior was the direct result of the school's failure to implement the IEP, the LEA must take immediate action to remedy those deficiencies.

If the school, the parent and other relevant members of the IEP team (as determined by the parent and school) determine that the child's behavior was a manifestation of the disability, the IEP team must return the child to the placement from which the child was removed, unless the parent and the school agree to a change of placement as part of the modification of the behavioral intervention plan; and either:

- Conduct a functional behavioral assessment, unless the school had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

- If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior.

If it is determined that the child's behavior is a manifestation of the child's disability the child cannot be subject to a long-term removal for the behavior. However, the school and the parents could agree to another setting. Also, even when the behavior is a manifestation of the child's disability the school could request a special education due process hearing officer to order placement in an IAES for up to 45 school days if the LEA can show that maintaining the current placement is substantially likely to result in injury to the child or others.

Requirements for the manifestation determination review, as stated above, are found in Federal regulations (34 CFR§ 300.530(e)).

### 3. Determination Behavior WAS NOT a Manifestation of the Disability

If the IEP team determines the behavior was NOT a manifestation of the child's disability, the LEA may proceed with suspension and expulsion proceedings. Using these proceedings, school officials may remove a child with a disability if it is determined that:

- the conduct of the child violated the code of student conduct;
- the behavior was not a manifestation of the child's disability; and
- the relevant disciplinary procedures applicable to children without disabilities are applied in the same manner and the discipline is for the same duration as would be applied to a child without disabilities.

A child with a disability must continue to receive educational services during the period of a long-term disciplinary removal. These services are determined by the IEP team and must enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP. If the IEP team determines it is appropriate, the child must receive a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur (34 CFR§ 300.530(d)(1))

If the violation of the code of student conduct is not a manifestation of the child's disability, the LEA may transmit the special education and disciplinary records of the child to the school's disciplinary hearing officer for consideration in making the final determination in the disciplinary action. [Note: 34 CFR§ 300.535 only requires transmittal of special education records to appropriate authorities when a crime has been reported.] Even if the school's disciplinary hearing officer determines that the child should be suspended or expelled, the LEA must continue to provide a FAPE for the child.

The IEP team is required to hold a manifestation determination each time a student is removed for more than 10 consecutive days or each time the LEA determines that a series of removals constitutes a change of placement. The latter would occur any time the series of removals total more than 10 days in a school year; the child's behavior is substantially similar to the behavior that resulted in the previous removals; AND because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another. All 3 criteria must be met in order for the behavior to be determined to be a pattern that constitutes a change in placement.

### **Forty five school day IAES (Option for Behavior Related to Weapons, Drugs, And Serious Bodily Injury)**

School officials may remove a child with a disability to an IAES up to 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child

- Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of the LEA or the SBE;
- Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of the LEA or the SBE (tobacco and alcohol are not illegal drugs under this definition); or
- Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the LEA or the state. (34 CFR§ 300.530(g))

When a child has been removed to an IAES, the IEP team must determine what special education and related services are needed and where the services will be provided to enable the child to participate in the general education curriculum, although in another setting, and to progress toward meeting their goals set out in the child's IEP.

Although a manifestation determination review is necessary, this unilateral removal can be made without regard to whether the behavior is determined to be a manifestation of the child's disability. If the IEP team determines that a FBA would be appropriate, one will be conducted. If appropriate, the IEP team will review and revise any existing BIP or develop one with services and modifications that are designed to address the behavior violation so that it does not recur.

When a child commits a violation related to weapons, drugs, or serious bodily injury, the school officials may initially suspend the child for up to 10 school days without educational services (if the suspension includes the 11<sup>th</sup> cumulative day of suspension in the school year, educational services should begin on the 11<sup>th</sup> day). When the IEP team meets, it can determine the location of the IAES and the services to be provided to the child.

On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct (including weapons, drugs or serious bodily injury) the school must notify the parents of that decision, and provide the parents the Parent Rights Notice.

Once the child has been placed in an IAES or otherwise removed for disciplinary reasons, if the school believes that returning the child to the setting specified in the child's IEP would be substantially likely to result in injury to the child or others, the LEA may request an expedited due process hearing to request the hearing officer to order another up to 45 school days placement in the IAES. The burden of proof is on the LEA to justify an additional removal be ordered by the hearing officer.

If the child's parents disagree with any decision regarding the disciplinary placement or the results of the manifestation determination, the parents may appeal the decision by requesting an expedited due process hearing. Additionally, if the LEA believes that maintaining the child's current placement is substantially likely to result in injury to the child or others, the school may request an expedited due process hearing (34 CFR§ 300.532(a)).

A parental request for a due process hearing does not prevent the LEA from seeking judicial relief such as a temporary restraining order or an injunction, when necessary.

## **Resolution Meeting During Expedited Due Process Hearing**

A resolution meeting must occur within 7 days of the school receiving notice of a parent's due process hearing request, unless the parents and school agree in writing to waive the resolution meeting or agree to use the mediation process. The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the school's receipt of the due process complaint.

When an appeal under § 300.532 has been made by either the parent or the LEA, the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period specified in §A300.530(c) or (g), whichever occurs first, unless the parent and the LEA agree otherwise.

A child who has not been determined to be eligible for special education and related services and who has engaged in behavior that violated a code of student conduct may assert any of the protections provided for if the LEA had knowledge that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

Basis of knowledge means a LEA must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred—

- (1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or teacher of the child, that the child is indeed of special education and related services;
- (2) The parent of the child requested an evaluation of the child pursuant to §§ 300.300 through 300.311; or
- (3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the LEA or to other supervisory personnel of the LEA. Exception. A public agency would not be deemed to have knowledge under paragraph (b) of this section if

- (1) The parent of the child has not allowed an evaluation of the child pursuant to §§ 300.300 through 300.311 or as refused services under IDEA; or
- (2) The child has been evaluated in accordance with §§ 300.300 through 300.311 and determined to not be a child with a disability under this part.

The conditions that apply if there is no basis of knowledge are (1) If a public agency does not have knowledge that a child is a child with a disability prior to taking disciplinary measures against the child, the child may be subjected to the disciplinary measures applied to children without disabilities who engage in comparable behaviors. (2) If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures.

Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency must provide special education and related services.

### § 300.122 Evaluation

Children with disabilities are evaluated in accordance with the Act. South Carolina criteria for evaluation and eligibility may be found in SBE 43-243.1.

### § 300.123 Confidentiality of personally identifiable information

Each school shall annually notify parents of their rights under FERPA. The notice must inform parents or adult students that they have the right to

- Inspect and review the student's education records;
- Seek amendment of the student's education records that the parent or eligible student believes to be inaccurate, misleading, or otherwise in violation of the student's privacy rights;
- Consent to disclosures of personally identifiable information contained in the student's education records, except to the extent that § 99.31 of FERPA authorize disclosure without consent; and
- File a complaint under §§ 99.63 and 99.64 concerning alleged failures by the educational agency or institution to comply with the requirements of FERPA.
- The procedure for exercising the right to inspect and review education records.
- The procedure for requesting amendment of records.

The LEA may provide this notice by any means that are reasonably likely to inform the parents or eligible students of their rights. The LEA shall effectively notify parents who have a primary or home language other than English. (34 CFR§ 99.7) This notice should adequately inform parents prior to any identification, location, or evaluation activity taking place.

The SCDE does this by having each public agency accessing funds sign assurances and adopt or establish local policies and procedures consistent with confidentiality requirements. LEAs must have reasonable policies in place to allow parents to review and inspect their child's records. An education record means those records that are directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. Educational records may include, but not limited to

- academic work completed and level of achievement
- attendance data
- scores and test protocols of standardized intelligence, aptitude, and psychological tests
- interest inventory results
- health data
- family background information
- information from teachers or counselors
- observations and verified reports of serious or recurrent behavior patterns
- IEPs
- documentation of notice and consent

The LEA must prevent the disclosure to any unauthorized person of personally identifiable information pertaining to all students. Disclosure is the release, transfer or other communication of records, or the personally identifiable information contained in those records, to any party, by any means, including oral, written, or electronic.

Parents have the right to inspect and review all education records of their children maintained by an educational agency that receives federal funds. This includes all LEAs and private schools that accept

federal funds. The school must comply with a request to inspect records within a reasonable time, not to exceed 45 calendar days.

The FERPA regulations allow some exceptions to the requirement to obtain parent consent before releasing records. All of these exceptions also apply to the confidentiality requirements in the federal special education regulations (34 CFR§ 300.622(a)). For example, FERPA allows the school to release records to authorized individuals, such as:

- other school officials, including teachers at the school where the student attends, who have a legitimate educational interest (34 CFR § 99.31(a)(1));
- officials of another school, LEA, or postsecondary educational institution where the student is enrolled or seeks or intends to enroll, If (a) the LEA's annual notice included a notice that the LEA forwards education records to other agencies that request records and in which the student seeks or intends to enroll; or (b) the LEA makes a reasonable attempt to notify the parents or the student of the disclosure at the last known address (34 CFR§ 99.31(a)(2)), however no notice is required if the disclosure is initiated by the parent or adult student;
- authorized representatives of the US Comptroller General, US Secretary of Education, and State Educational Agencies in connection with an audit or evaluation of Federal or State supported programs, or for the enforcement or compliance with Federal legal requirements related to those programs (34 CFR § 99.31(a)(3));
- disclosure in connection with financial aid for which the student has applied or received to determine eligibility, amount, or conditions of the aid or to enforce the terms and conditions of the aid (34 CFR§ 99.31(a)(4));
- disclosure to state and local officials to whom the information is specifically allowed to be reported pursuant to state statute (34 CFR§ 99.31(a)(5));
- disclosure to organizations conducting studies for educational agencies to develop, validate or administer predictive tests; administer student aid programs; or improve instruction, but only if the study does not allow personal identification of parents and students to anyone other than representatives of the organization conducting the study, and if the information is destroyed when no longer needed for the purposes for which the study was conducted (34 CFR§ 99.31(a)(6));
- disclosure to accrediting organizations to carry out their functions (34 CFR§ 99.31(a)(7));
- disclosure to a parent of a student who qualifies as a dependent under section 152 of the Internal Revenue Service Code (34 CFR§ 99.31(a)(8));
- disclosure of relevant educational records to a court in a legal action initiated by the LEA against a parent. Also, disclosure to comply with a judicial order or subpoena. However, these disclosures may be made only if the LEA makes a reasonable effort to notify the parents or eligible student of the order or subpoena in advance of compliance with the order or subpoena, unless the order or subpoena states that the existence or contents of the order or subpoena not be disclosed (34 CFR§ 99.31(a)(9));
- disclosure in connection with a health or safety emergency, if knowledge of the information is necessary to protect the health or safety of the student or other individuals (34 CFR§ 99.31(a)(10));
- disclosure of directory information. This is information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed. It includes, but is not limited to, the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees and awards received, and the most previous educational agency or institution attended (34 CFR§ 99.31(a)(11));
- disclosure to the adult student or student of any age if attending a postsecondary school, or to the parents of a student who has not reached 18 years of age and is not attending an institution of postsecondary education (34 CFR§ 99.31 (a)(12)); and

- disclosure of the results of any disciplinary proceeding conducted by an institution of postsecondary education against an alleged perpetrator to an alleged victim of any crime of violence, as defined by § 16 of Title 18, United States Code (34 CFR§ 99.31 (a)(13)); or
- disclosure to a parent of a student attending an institution of post secondary education regarding the illegal use of alcohol (34 CFR§ 300.622(a)).

To ensure protection of education records, the LEA must:

1. Obtain written consent before disclosing personally identifiable information to unauthorized individuals. A parent must provide consent if the child is under 18 years of age (unless one of the exceptions listed above applies).
2. Designate and train a records manager to assure security of confidential records for students with disabilities.
3. Maintain a record or log of all parties obtaining access to education records, including the name of the party, the date access took place, and the purpose of the authorized use.
4. Maintain for public inspection a current listing of names and positions of employees who may have access to personally identifiable information.
5. Ensure the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.
6. Ensure that, if any education record includes information on more than one student, a parent of a child must have the right to inspect and review only the information relating to his or her child, or to be informed of that specific information.
7. Ensure that each person collecting or using personally identifiable information receives training or instruction regarding the policies and procedures governing confidentiality of personally identifiable information. The LEA must maintain a record of the training provided, the person or persons providing the training, dates of the training, those attending, and subjects covered.
8. Provide a parent, upon request, a list of the types and locations of records collected, maintained, or used by the LEA.
9. Respond to any reasonable request made by a parent for an explanation and interpretation of a record.
10. Provide a parent, upon request, access to the child's records, and under certain circumstances, a copy of the records (34 CFR§ 300.613). Most LEAs copy records for parents without charge. However, the law does allow for fees for copies of records made for a parent if the fee does not prevent a parent from exercising the right to inspect and review those records. A fee may not be charged to search for or retrieve information.

Education records include personally identifiable information, and may not be released to another agency or organization without parent consent. However, when a student transfers to another LEA, education records may be forwarded without student or parent consent if the annual FERPA notice to parents includes a statement that these records will be forwarded to the receiving school. Immunization records are included in the educational records (under the annual notification exception) that may also be shared with a receiving school without student or parent consent. By sharing such information between schools, the unnecessary immunization of children can be avoided.

South Carolina schools may NOT withhold records because of fines or other such reasons. The sending LEA is to transfer the original school record to the requesting LEA. The sending LEA should maintain a copy of the educational record that is sent. In addition, South Carolina special education regulations require the sending LEA to immediately transfer the IEP, and any additional educationally relevant information regarding a child with an disability, to the receiving LEA. If the school's annual FERPA notification does not contain a statement that the school sends educational records to a receiving school, it must make a reasonable attempt to notify the parent at the last known address of the parent.

When a child transfers from a LEA in another state to a LEA in South Carolina, the South Carolina school must obtain parental consent to access the records from the LEA in the other state. Education records include personally identifiable information, and may not be released to another agency or organization without parent consent. However, when a student transfers to another LEA, education records may be forwarded without student or parent consent if the annual FERPA notice to parents includes a statement that these records will be forwarded to the receiving school. Immunization records are included in the educational records (under the annual notification exception) that may also be shared with a receiving school without student or parent consent. By sharing such information between schools, the unnecessary immunization of children can be avoided.

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Parents have the right to request that their child's education records be changed if something is inaccurate, misleading, or in violation of the student's rights of privacy. If the school does not agree that the education records should be changed, staff must provide an opportunity for a hearing, following FERPA requirements. The hearing officer would be the school's hearing officer, not a special education due process hearing officer (34 CFR§ 300.618).

Federal auditing requirements necessitate the availability of education records for identified students for 5 years after they exit from special education services. After that period of time, LEAs may destroy records. However, before destroying special education records, the LEA must notify the parent (or the adult student) that the information is no longer needed to provide services to the student and that the school is proposing to destroy them.

Parents may also ask that their child's records be destroyed. However, a permanent record of the following information may be maintained without time limitation:

- A student's name, address, and phone number;
- His or her grades;
- Attendance record;
- Classes attended;
- Grade level completed; and
- Year completed.

### **§ 300.124 Transition of children from the Part C program to preschool programs**

When conducting an initial IEP team meeting for a child who was previously served under the Part C Infant and Toddler program of the federal law, an LEA, at the request of the parent, must send an invitation to attend the IEP meeting to the local Part C services coordinator or other representatives of the Part C system to assist with the smooth transition of services.

Children who are transitioning from the Part C are not required to participate in a Part B screening process at age 3. For children receiving Part C services who may need an initial evaluation to determine eligibility for Part B special education services, the Part C Infant-Toddler Program may make a referral to the LEA. The referral is to be made at least 90 calendar days prior to the child's third birthday and according to the LEA's policy for making a referral for an initial evaluation.

The IEP team may consider the use of an IFSP in place of an IEP for children with a disability ages 3 through 5. The IFSP would be developed in accordance with all of the IEP procedures, but contain the content described in 20 U.S.C. § 1436, Part C. If the LEA and the parents agree to use an IFSP, the LEA must provide the child's parents a detailed explanation of the differences between an IFSP and an IEP, and obtain written informed consent from the parents.

If the LEA uses the IFSP, as stated above, the IFSP must include the natural environments statement required under Part C (34 CFR 303.18; 34 CFR 303.344(d)(1)(ii)). The IFSP must also contain an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills (34 CFR § 300.323(b)).

If the child has participated in the Part C Infant-Toddler Program prior to being determined eligible for early childhood special education services, and already has an IFSP that is in effect, the IEP team may review the content of the child's current IFSP to see if it meets the needs of the child for one year, as identified through the Part B evaluation process. If it does, the IEP team may use the existing IFSP, but must ensure that all of the requirements for the development of an IEP are met, including timelines for development and implementation, and designation of a new current implementation date for the IFSP. If the current IFSP does not meet the needs of the child for one year, the IEP team, including the parent, will develop a new IFSP, or IEP, for the child.

For a child who is transitioning into the Part B early childhood special education services from the Part C early intervention services, the LEA is required to ensure that

- the child is determined eligible under Part B requirements,
- an IEP or IFSP is in effect by the child's 3rd birthday,
- if a child's 3rd birthday occurs during the summer, the child's IEP team must determine the date when services will begin, but not later than the beginning of the school year following the 3rd birthday, and
- a representative of the LEA will participate in transition planning conferences arranged by the Part C program.

### **§§ 300.129 – 300.132 State responsibility regarding children in private schools**

South Carolina defines a private school as: "a school established by an agency other than the state or its subdivisions which is primarily supported by other than public funds, and the operation of whose program rests with other than publicly elected or appointed officials" (S.C. Code Ann. § 59-1-110 (2004)). For purposes of this part, the definition of private schools includes parochial schools and home-school programs.

Additionally, South Carolina includes the following definitions in state law: (1) "Elementary school" means any public school which contains grades no lower than kindergarten and no higher than the eighth; (2) "Secondary school" means either a junior high school or a high school; (3) "High school" means any public school which contains grades no lower than the seventh and no higher than the twelfth;

and (4) “junior high school” shall be considered synonymous with the term “high school” (S.C. Code Ann. § 59-1-150 (2004)).

South Carolina’s statutory definition of “elementary school” does not include preschool programs. Charter schools in South Carolina are considered part of the LEA that authorized the charter school and are not private schools.

When the LEA determines, through the IEP process, that a child with a disability should be placed in a private school or facility, the child’s educational program, including special education and related services, must

- be provided according to an appropriately developed IEP and at no cost to the parents;
- ensure the special education program is provided by staff who meet SCDE personnel standards, including the requirements of §§ 300.18 and 300.156(c) and 300.320 through 300.325 ;
- ensure that the private school provides services consistent with the IDEA requirements and other pertinent federal and state laws and regulations (e.g., in accordance with IEP requirements); and
- ensure that the child has all rights of a child with a disability who is served by the public school.

Before the LEA places a child with a disability in a private school or facility, the LEA must initiate and conduct a meeting to develop an IEP for the child that ensures the provision of a FAPE. The LEA must ensure that a representative of the private school or facility attends the meeting. If a representative cannot attend, the LEA must use other methods to ensure participation by the private school or facility, including individual or conference telephone calls.

After the child with a disability enters the private school or facility, the home LEA that placed the child is responsible for providing a FAPE to the child or ensuring the provision of a FAPE by the private school or facility. The home LEA is the LEA where the child last resided with his or her biological or adoptive parents, legal guardian, or an individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) who was legally responsible for the child’s welfare at the time he or she was referred to or placed in the private school or facility by the LEA. The home LEA must adhere to all federal and state requirements for children with disabilities placed in the private school or facility just as it would for children with disabilities enrolled in and attending a public school within the LEA. This includes the provision of services by highly qualified personnel and applies to children with disabilities who are served through a medical homebound model. As with any other educational placement decision for a child with a disability, decisions about the appropriateness and amount of medical homebound services must be made on an individualized basis by the child’s IEP team.

When a LEA receives notification that a child with a disability was placed in a private school or facility by a state agency, the LEA where the private school or facility is located is required to convene an IEP meeting to develop an appropriate educational program for the child. The LEA where the private school or facility located is also responsible for ensuring that all children with disabilities are actively enrolled in the LEA and participate in state- and district-wide assessments.

S.C. Code Ann. §59-33-90 (2004) states that no agency of the state may place or refer a child with a disability to a private school, RTF, institution, or other alternative residence without first ensuring that the child can receive a FAPE in that setting. In placing children with disabilities, state agencies must obtain advance approval that the educational program of the meets the standards established by the SCDE, except in an emergency situation.

If the parents of a child with a disability, who previously was receiving special education and related services from LEA, enroll their child, without the consent of or referral by the LEA, in a private preschool or a private elementary or secondary school because the parents believe the child was not receiving a FAPE from the LEA, a court or special education due process hearing officer may require the agency to reimburse the parents for the cost of that enrollment only if the hearing officer makes both of the following findings:

- The LEA did not make a FAPE available to the child in a timely manner before the private school enrollment; and
- The private school placement made by the parents is appropriate to meet the needs of the child.

A court or special education due process hearing officer may find that a private school placement by the parents is appropriate for a child although that placement does not meet state standards that apply to special education and related services which are required to be provided by the LEA.

A court or special education due process hearing officer may deny or reduce any reimbursement for private school placement by the parents, if the court or special education due process hearing officer makes any of the following findings:

- At the most recent IEP meeting that the parents attended before making the private school placement, the parents did not inform the IEP team that they were rejecting the services or placements proposed by the LEA to provide a FAPE to their child, including a statement of their concerns and their intent to enroll their child in a private school at public expense; or at least 10 business days, including any holidays that occur on a business day, before removal of the child from LEA, the parents did not give written notification to the LEA that they were rejecting the services or placements proposed by the LEA to provide a FAPE to their child, including a statement of their concerns and their intent to enroll their child in a private school at public expense;
- Before the parents' removal of the child from LEA, the LEA provided PWN to the parents of its intent to evaluate the child, including a statement of the purpose of the evaluation that was appropriate and reasonable, but the parents did not make the child available for the evaluation; or
- The actions of the parents in removing the child from the LEA were unreasonable.

A court or special education due process hearing officer must not deny or reduce reimbursement of the cost of a private school placement for failure to provide the notification to the LEA, if the court or special education due process hearing officer makes any of the following findings:

- Compliance with the notification requirement would likely have resulted in physical harm to the child;
- The LEA prevented the parents from providing the required notification; or
- The LEA did not inform the parents of their requirement to notify the school of their intent to remove their child.

A court or special education due process hearing officer, at its discretion, may allow a parent full or partial reimbursement of the costs of a private school placement even though the parent failed to provide the notice required, if the court or hearing officer finds either of the following:

- the parent cannot read or write in English, or
- compliance with the prior notice requirement would likely have resulted in serious emotional harm to the child.

The LEA must be given an opportunity to offer a FAPE to the child before tuition reimbursement can become an issue. The special education due process hearing officers and courts retain their authority under prior case law to award appropriate relief when an LEA fails to provide a FAPE for a child who has not yet received special education and related services.

When children are enrolled by their parents in private schools, the home LEA has a continuing responsibility for child find and must locate, evaluate, and identify children with disabilities in private schools just as they do students who reside in and attend a public school within the jurisdiction of the LEAs. The IDEA also requires the LEA where the private school is located to conduct child find activities to locate children with disabilities attending private elementary and secondary schools that are located in the jurisdiction of the LEA. This includes children with disabilities who reside in another state but attend a private school that is located within the boundaries of an LEA.

In meeting the child find obligation with regard to children with disabilities attending private schools within the LEA boundaries, the LEAs must consult with appropriate representatives of private schools and parents of private school children with disabilities to determine how best to conduct child find activities. The methods chosen to locate, identify, and evaluate must be comparable to methods used for children in LEAs. Additionally, they will determine how parents, teachers, and private school officials will be informed of the process.

The activities undertaken to carry out the child find responsibility must meet the following criteria:

- Be similar to the activities undertaken for exceptional children enrolled in the LEAs;
- Provide for the equitable participation of private school children;
- Provide for an accurate count of children with disabilities enrolled in the private schools; and
- Be completed in a time period comparable to the time for these activities in the LEAs.

There may be times when parents request that both the LEA where they reside and the LEA where the private school is located evaluate their child under child find requirements. Parents may request that the LEA where the family resides conduct an evaluation under its responsibility for the provision of a FAPE at the same time that they request that the LEA where the private school is located evaluate the child. In this situation, the LEAs would need to work with the parents to ensure their understanding of the problems concerning trying to conduct two separate evaluations at the same time.

If the parents of a child who is voluntarily placed in a private school do not provide consent for the initial evaluation or the reevaluation, or the parent fails to respond to a request to provide consent, the school may not use the consent override procedures of mediation or due process, and the school is not required to consider the child as eligible for special education services.

If a child is enrolled, or is going to enroll in a private school that is not located in the parent's LEA of residence, parental consent must be obtained before any personally identifiable information about the child is released between officials in the LEA where the private school is located and officials in the LEA of the parent's residence (34 C.F.R. § 300.622(a)(3)).

When children are enrolled by their parents in private schools, the LEA has continuing responsibility for child find and must locate, evaluate, and identify children with disabilities in private schools just as they do in the LEAs. The IDEA requires the LEA where the private school is located to conduct child find activities to locate children with disabilities attending private elementary and

secondary schools that are located in the jurisdiction of the LEA. This includes children with disabilities who reside in another state but attend a private school that is located within the boundaries of an LEA.

In meeting the child find obligation with regard to children with disabilities attending private schools within the LEA boundaries, the LEAs must consult with appropriate representatives of private schools and parents of private school children with disabilities to determine how best to conduct child find activities. The methods chosen to locate, identify, and evaluate must be comparable to methods used for children in LEAs. Additionally, they will determine how parents, teachers, and private school officials will be informed of the process.

The activities undertaken to carry out the LEA's child find responsibility must meet the following criteria:

- Be similar to the activities undertaken for exceptional children enrolled in the LEA;
- Provide for the equitable participation of private school children;
- Provide for an accurate count of children with disabilities enrolled in the private schools; and
- Be completed in a time period comparable to the time for these activities in the LEAs.

There may be times when parents request that both the LEA where they reside and the LEA where the private school is located evaluate their child under child find requirements. Parents may request that the LEA where the family resides conduct an evaluation under its responsibility for the provision of a FAPE at the same time that they request that the LEA where the private school is located evaluate the child. In this situation, the LEAs would need to work with the parents to ensure their understanding of the problems concerning trying to conduct two separate evaluations at the same time.

If the parents of a child who is voluntarily placed in a private school does not provide consent for the initial evaluation or the reevaluation, or the parent fails to respond to a request to provide consent, the school may not use the consent override procedures of mediation or due process, and the school is not required to consider the child as eligible for special education services.

If a child is enrolled, or is going to enroll in a private school that is not located in the parent's LEA of residence, parental consent must be obtained before any personally identifiable information about the child is released between officials in the LEA where the private school is located and officials in the LEA of the parent's residence (34 C.F.R. § 300.622(a)(3)).

### **§ 300.133 Expenditures**

Each LEA must according to formula, on providing special education and related services to parentally-placed private school children with disabilities. For children aged 3-21, an amount that is the same proportion of the LEA's total subgrant of the Act as the number of private school children with disabilities aged 3 through 21 who are enrolled by their parents in private schools located in the school district served by the LEA.

### **§ 300.134 Consultation**

LEAs must consult with private school representatives, home school representatives, and representatives of parents of parentally-placed private school children with disabilities during the design and development of special education and related services regarding child find, how parentally placed private school and home schooled children suspected of having a disability can participate equitably, how

parents, teachers, and private school officials will be informed of the process, and the determination of the proportionate share of funds, including how those funds were calculated.

The consultation process should include how the process will operate during the year to ensure that parentally placed and home-schooled children with disabilities identified through the child find process can meaningfully participate in special education and related services. The process must include discussion of how, where, and by whom special education and related services will be provided, the types of services, and how special education and related services will be apportioned if funds are insufficient to serve all parentally placed and home schooled children. If the LEA disagrees with the views of the private school or home school representatives on the provision of services, or the types of services, then the LEA will provide a written explanation of the reasons why the LEA chose not to provide services directly or through a contract.

### **§ 300.140 Due process complaints and state complaints**

The state ensures that the procedures in §§ 300.504 through 300.519 under Part B of the IDEA, which include the requirements related to the provision of procedural safeguard notices, mediation, due process hearings, and surrogate parents, apply to due process complaints filed on behalf of parentally-placed private school and home-schooled students with disabilities when the allegation is that an LEA failed to meet the child find requirements set forth in § 300.131. These procedures also apply to due process complaints filed concerning parental consent, evaluations and reevaluations, and the procedures for identifying children with specific learning disabilities in §§ 300.300 through 300.311. The procedures in §§ 300.504 through 300.519 do not apply to due process complaints that an LEA failed to meet the requirements of §§ 300.132 through 300.139, including the provision of services indicated on a student's services plan.

Any due process complaint regarding the child find requirements must be filed with the LEA in which the private school is located and a copy must be forwarded to the SCDE. The due process complaint must meet the requirements set forth in § 300.508.

The state also ensures that an organization or individual may file a signed written complaint under the procedures described in §§ 300.151 through 300.153 under Part B of the IDEA on behalf of parentally-placed private school and home-schooled students with disabilities when the allegation is that the state or an LEA failed to meet the requirements set forth in §§ 300.132 through 300.135 and 300.137 through 300.144. These provisions relate to the requirements for the provision of equitable services through services plans; the expenditure of funds on parentally-placed private school and home-school students with disabilities; and the use of property, equipment, and supplies placed in private schools.

A private school or home-school official who files a complaint under § 300.136(a) must file the complaint with the SCDE in accordance with the procedures in § 300.136(b).

### **§ 300.141 Requirement that funds not benefit a private school**

The state ensures that LEAs may not use funds provided under section 611 or 619 of the IDEA to finance the existing level of instruction in a private school or to otherwise benefit the private school. While LEAs must use funds provided under Part B of the IDEA to meet the special education and related services needs of parentally-placed private school and home-school students with disabilities, the LEA may not use these funds to meet the needs of a private school or the general needs of the students enrolled in the private school or home school program.

### **§ 300.142 Use of personnel**

The state ensures that LEAs may use funds available under sections 611 and 619 of the IDEA to make public school personnel available in nonpublic facilities to the extent necessary to provide services under §§ 300.130 through 300.144 for parentally-placed private school students with disabilities. If the services (that the LEA is using IDEA funds to provide) are not normally provided by the private school, an LEA may use funds available under sections 611 and 619 to pay for the services of an employee of a private school to provide services under §§ 300.130 through 300.144. The employee, however, must perform the services outside of his or her regular hours of duty and the employee must perform the services under public supervision and control.

### **§ 300.143 Separate classes prohibited**

The state ensures that LEAs may not use funds available under section 611 or 619 of the IDEA for classes that are organized separately on the basis of school enrollment or religion of the students if the classes are at the same site and the classes include students enrolled in public schools and students enrolled in private schools.

### **§ 300.144 Property, equipment, and supplies**

The state ensures that LEAs must control and administer the funds used to provide special education and related services under §§ 300.137 through 300.139, and hold title to and administer materials, equipment, and property purchased with those funds for the uses and purposes provided in the IDEA. An LEA may place equipment and supplies in a private school or home school program for the period of time needed for the Part B program. When equipment or supplies are placed in a private or home school program, the LEA must ensure that the equipment or supplies are used only for Part B purposes and can be removed from the private or home school program without remodeling the private school facility or home. An LEA must remove equipment and supplies from a private school or home if the equipment and supplies are no longer needed for Part B purposes or removal is necessary to avoid unauthorized use of the equipment and supplies for other than Part B purposes. An LEA may not use funds under Part B of the IDEA for repairs, minor remodeling, or the construction of private school facilities.

### **§ 300.146 Responsibility of SEA**

The state ensures that any student with a disability who is placed in or referred to a private school or facility by a public agency is provided special education and related services in conformance with an IEP that meets the requirements of §§ 300.18 and 300.156(c) and 300.320 through 300.325; is at no cost to the parents; and meets the IDEA and state's standards that apply to education.

Any student with a disability who is placed in or referred to a private school or facility by a public agency, (such as the Department of Social Services, Department of Mental Health, or Continuum of Care) has all of the rights of a student with a disability who is served by an LEA.

### **§ 300.147 Implementation by SEA**

The state ensures that in implementing § 300.146 of the IDEA, the SCDE shall monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires; disseminate copies of applicable standards to each private school and facility to which a public agency referred or placed a student with a disability; and provide an opportunity for those private schools and facilities to participate in the development and revision of state standards that apply to them.

### **§ 300.148 Placement of children by parents when FAPE is at issue**

The state ensures that disagreements between parents and an LEA regarding the availability of a program appropriate for a student and the question of financial reimbursement are subject to the due process procedures in §§ 300.504 through 300.520 of the IDEA regulations. If the parents of a student with a disability, who was previously receiving special education and related services from an LEA, enrolls their child, without the consent of or referral by the LEA, in a private preschool or a private elementary or secondary school because the parents believe the student was not receiving a FAPE from the LEA, a court or special education due process hearing officer may require the LEA to reimburse the parents for the cost of that enrollment only if the due process hearing officer makes both of the following findings:

1. The LEA did not make a FAPE available to the student in a timely manner before the private school enrollment; and
2. The private school placement made by the parents is appropriate to meet the needs of the child. A court or special education due process hearing officer may find that a private school placement by the parents is appropriate for a child although that placement does not meet state standards that apply to special and general education and related services.

A court or special education due process hearing officer may deny or reduce any reimbursement for private school placement by the parents, if the court or special education due process hearing officer makes any of the following findings:

- At the most recent IEP meeting the parents attended before making the private school placement, the parents did not inform the IEP team that they were rejecting the services or placements proposed by the LEA to provide a FAPE to their child, including a statement of their concerns and their intent to enroll their child in a private school at public expense; or at least 10 business days, including any holidays that occur on a business day, before removing their child from the LEA, the parents did not give written notification to the LEA that they were rejecting the services or placements proposed by the LEA to provide a FAPE to their child, including a statement of their concerns and their intent to enroll their child in a private school at public expense;
- Before the parents' removal of the child from the LEA, the LEA provided prior written notice (PWN) to the parents of its intent to evaluate the child, including a statement of the purpose of the evaluation that was appropriate and reasonable, but the parents did not make the child available for the evaluation; or
- The actions of the parents in removing the child from the LEA were unreasonable.

A court or special education due process hearing officer must not deny or reduce reimbursement of the cost of a private school placement for failure to provide the notification to the LEA, if the court or special education due process hearing officer makes any of the following findings:

- The LEA prevented the parents from providing the required notification.
- The LEA did not inform the parents of their requirement to notify the school of their intent to remove their child.
- Compliance with the notification requirement would likely have resulted in physical harm to the student.

A court or special education due process hearing officer, at its discretion, may allow a parent full or partial reimbursement of the costs of a private school placement even though the parent failed to provide the required notice, if the court or hearing officer finds either of the following:

- the parent cannot read or write in English, or
- compliance with the prior notice requirement would likely have resulted in serious emotional harm to the child.

Although the LEA must be given an opportunity to offer a FAPE to a student before tuition reimbursement can become an issue, special education due process hearing officers and courts retain their authority under prior case law to award appropriate relief when an LEA fails to provide a FAPE for a child who has not yet received special education and related services.

### **§ 300.149 SEA responsibility for general supervision**

The state ensures that its responsibilities under Part B of the IDEA are met and ensures that it has policies and procedures in effect to comply with the monitoring and enforcement requirements in §§ 300.600 through 300.602 and §§ 300.606 through 300.608. The state ensures that each educational program for students with disabilities administered within the state is under the general supervision of the persons responsible for educational programs for students with disabilities in the SCDE and that each program meets the educational standards of the SCDE and Part B of the IDEA. Additionally, the state's policies and procedures for monitoring and enforcement ensures that the requirements of subtitle B of title VII of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11431 et seq.) are met with respect to homeless children.

### **§ 300.150 SEA implementation of procedural safeguards**

The state ensures that the SCDE, and any other agency that the Governor assigns the responsibility for ensuring that the requirements of Part B of the IDEA are met, has procedures in effect to inform each public agency of its responsibility for ensuring effective implementation of procedural safeguards for the children with disabilities served by that public agency.

### **§ 300.151 Adoption of state complaint procedures**

The state ensures that it has written procedures for resolving any complaint, including a complaint filed by an organization or individual from another state, that meets the requirements of § 300.153. The state widely disseminates its written procedures to parents and other interested individuals, including parent training and information centers, protection and advocacy agencies, independent living centers, and other appropriate entities. These procedures include remedies for denial of appropriate services. In resolving a complaint in which the SCDE finds a failure to provide appropriate services, pursuant to its general supervisory authority under Part B, the SCDE must address the failure to provide appropriate services, including corrective actions appropriate to address the needs of the student (such as compensatory services or monetary reimbursement) and the appropriate future provision of services for all students with disabilities.

If the SCDE determines the LEA is violating or violated a requirement of Part B of the IDEA, state statute, state regulations, or the state's policies and procedures, the complaint cannot be closed until the District submits verification that it completed the required corrective action activities. All corrective actions must be completed as soon as possible but in no case later than the date of the written decision. The SCDE's decision may not be reconsidered or appealed; however, both parties retain any and all rights

provided under federal and state law, including the right to mediation and/or a due process hearing, to further pursue the matters raised in the complaint.

### **§ 300.152 Minimum state complaint procedures**

The state ensures that it will complete all complaint investigations within 60 days after a complaint is filed under § 300.153 of Part B of the IDEA. The SCDE will carry out an independent on-site investigation if it determines that an investigation is necessary; give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint; and provide the LEA with the opportunity to respond to the complaint, including, at a minimum an opportunity for a parent who filed a complaint and the LEA to voluntarily engage in mediation consistent with § 300.506. The LEA may, at its discretion, include a proposal to resolve the complaint in the response to the complaint. The SCDE ensures that it will review all relevant information and make an independent determination as to whether the LEA is violating or violated a requirement of Part B of the IDEA, state statute, state regulations, or the state's policies and procedures and issue a written decision to the complainant that addresses each allegation in the complaint. The written decision must contain findings of fact and conclusions and the reasons for the final decision.

The state shall only permit an extension of the 60-day time limit for the investigation process if exceptional circumstances exist with respect to a particular complaint; or the parent (or individual or organization) and the LEA involved agree to extend the time to engage in mediation pursuant to Part B of the IDEA, or to engage in other alternative means of dispute resolution, such as the IEP facilitation process available through the SCDE. The state ensures that it has procedures for effective implementation of the final decision, if needed, including technical assistance activities; negotiations; and the implementation of additional corrective actions and sanctions to achieve compliance.

If a written complaint is received by the SCDE that is also the subject of a due process hearing under § 300.507 or §§ 300.530 through 300.532, or contains multiple issues of which one or more are part of that hearing, the state must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. Any issue in the complaint that is not a part of the due process action must be resolved using the time limit and procedures described in Part B of the IDEA and these policies and procedures. If an issue raised in a complaint filed under Part B of the IDEA was previously decided in a due process hearing involving the same parties the due process hearing decision is binding on that issue and SCDE must inform the complainant to that effect. A complaint alleging the LEA's failure to implement a due process hearing decision must be resolved by the SCDE.

### **§ 300.153 Filing a complaint**

An organization or individual may file a signed written complaint under the procedures described in §§ 300.151 through 300.152. The complaint must include a statement that LEA violated a requirement of Part B of the IDEA or of these policies and procedures; the facts on which the statement that a violation occurred is based; and the signature and contact information for the complainant. If alleging violations with respect to a specific child the complaint must include the name and address of the residence of the child and the name of the school the child is attending. In the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11434a(2))), the complaint must include available contact information for the child, and the name of the school the child is attending; a description of the nature of the problem of the child, including facts relating to the problem; and a proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed.

The complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received in accordance with § 300.151 of the Part B regulations. The party filing the complaint must forward a copy of the complaint to the LEA serving the child at the same time the party files the complaint with the SCDE.

### **§ 300.154 Methods of Ensuring Services**

The Governor, or his designee, will ensure that an interagency agreement or other mechanism for interagency coordination is in effect between any noneducational public agency and the state, to ensure that all special education and related services needed to ensure a FAPE are provided, including the provision of these services during the pendency of any dispute. Any necessary agreements will include a method for defining the financial responsibility of each agency for providing special education and related services to ensure the provision of a FAPE to children with disabilities. The agreement must also include the conditions, terms, and procedures under which an LEA must be reimbursed by other agencies. The financial responsibility of each noneducational public agency, including the state Medicaid agency and other public insurers of children with disabilities, must precede the financial responsibility of the LEA. Agreements will include procedures for resolving interagency disputes (including procedures under which LEAs may initiate proceedings) under the agreement to secure reimbursement from other agencies or otherwise implement the provisions of the agreement, and policies and procedures for agencies to determine and identify the interagency coordination responsibilities of each agency to promote the coordination and timely and appropriate delivery of services.

If any public agency other than an educational agency is otherwise obligated under federal or state law, or assigned responsibility under state policy to provide or pay for any services that are also considered special education or related services that are necessary for ensuring a FAPE to children with disabilities within the state, the public agency must fulfill that obligation or responsibility, either directly or through contract or other arrangement. A noneducational public agency may not disqualify an eligible service for Medicaid reimbursement because that service is provided in a school context.

If a public agency other than an educational agency fails to provide or pay for the special education and related services, the LEA must provide or pay for these services to the child in a timely manner. The LEA is authorized to claim reimbursement for the services from the noneducational public agency that failed to provide or pay for these services and that agency must reimburse the LEA in accordance with the terms of the interagency agreement described in the above section. These requirements may be met through state statute or regulation; signed agreements between respective agency officials that clearly identify the responsibilities of each agency relating to the provision of services; or other appropriate written methods as determined by the Governor or designee, and approved by the Secretary.

Each LEA may use Medicaid or other public benefits or insurance programs in which a child participates to provide or pay for special education and related services, as permitted under the public benefits or insurance program. With regard to services required to provide a FAPE to an eligible child, the LEA may not require parents to sign up for or enroll in public benefits or insurance programs in order for their child to receive a FAPE; may not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to this part, but may pay the cost that the parents otherwise would be required to pay.

The LEA may not use a child's benefits under a public benefits or insurance program if that use would decrease available lifetime coverage or any other insured benefit; result in the family paying for services that would otherwise be covered by the public benefits or insurance program and that are required for the child outside of the time the child is in school; increase premiums or lead to the discontinuation of benefits or insurance; or risk loss of eligibility for home and community-based

waivers, based on aggregate health –related expenditures. The LEA must obtain parental consent each time that access to public benefits or insurance is sought and notify parents that the refusal to allow access to their public benefits or insurance does not relieve the LEA’s responsibility to ensure that all required services are provided at no cost to the parents.

An LEA may access the parents' private insurance proceeds only if the parents provide consent each time the LEA proposes to access the parents' private insurance proceeds. The LEA must also inform the parents that their refusal to permit the LEA to access their private insurance does not relieve the LEA of its responsibility to ensure that all required services are provided at no cost to the parents. If an LEA is unable to obtain parental consent to use the parents' private insurance, or public benefits or insurance when the parents would incur a cost for a specified service required under this part, to ensure FAPE the public agency may use its Part B funds to pay for the service.

To avoid financial cost to parents who otherwise would consent to use private insurance, or public benefits or insurance if the parents would incur a cost, the LEA may use its Part B funds to pay the cost that the parents otherwise would have to pay to use the parents' benefits or insurance (e.g., the deductible or co–pay amounts).

Proceeds from public benefits or insurance or private insurance will not be treated as program income as described in 34 C.F.R. § 80.25. If an LEA spends reimbursements from federal funds (e.g., Medicaid) for services under this part, those funds will not be considered “State or local” funds for purposes of meeting maintenance of effort requirements.

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

### **§ 300.155 Hearings relating to LEA eligibility**

The state will not make any final determination that an LEA is not eligible for assistance under Part B of the Act without first giving the LEA reasonable notice and an opportunity for a hearing under 34 C.F.R. § 76.401(d) and SBE regulation 43-243.

### **§ 300.156 Personnel qualifications**

The state has established qualifications to ensure that personnel necessary to carry out the purposes of this part are appropriately and adequately prepared and trained, including that those personnel have the content knowledge and skills to serve children with disabilities. The qualifications include qualifications for related services personnel and paraprofessionals that are consistent with any state-approved or state -recognized certification, licensing, registration, or other comparable requirements that apply to the professional discipline in which those personnel are providing special education or related services; and ensure that related services personnel who deliver services in their discipline or profession meet the requirements this section; and have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis.

In meeting the requirements of Part B, paraprofessionals and assistants must be appropriately trained and supervised, in accordance with state law, regulation, or written policy, to assist in the provision of special education and related services to children with disabilities. The state’s requirements for paraprofessionals may be accessed at <http://www.scteachers.org/titleii/newpara.cfm>.

The qualifications described in this section ensure that each person employed as a public school special education teacher in the state who teaches in an elementary school, middle school, or secondary school is highly qualified as a special education teacher by the deadline established in section 1119 (a)(2) of the Elementary and Secondary Education Act (ESEA). The state's qualifications may be accessed at <http://ed.sc.gov/agency/Accountability/Federal-and-State-Accountability/Accreditation/AccreditationofSchoolsandDistricts.html>. The state's qualifications are consistent with the qualifications set forth in federal law.

In implementing this section, the state has adopted a policy that includes the requirement that LEAs in the state take measurable steps to recruit, hire, train, and retain highly qualified personnel to provide special education and related services under this part to children with disabilities. South Carolina's revised state plan, which includes the state's policy, may be accessed at <http://www.scteasers.org/titleii/stateplan.cfm>.

Notwithstanding any other individual right of action that a parent or student may maintain under this part, nothing in this part shall be construed to create a right of action on behalf of an individual student or a class of students for the failure of an LEA employee to be highly qualified, or to prevent a parent from filing a complaint about staff qualifications with the state as provided for under this part.

### **§ 300.157 Performance goals and indicators**

The state has in effect established goals for the performance of children with disabilities that promote the purposes of this part, are the same as the state's objectives for progress by children in its definition of adequate yearly progress, including the state's objectives for progress by children with disabilities, under section 1111(b)(2)(C) of the ESEA, 20 U.S.C. § 6311. The goals address graduation rates and dropout rates, and may include other factors determined by the state. The goals are consistent, to the extent appropriate, with any other goals and academic standards for children established by the state.

The state has in effect established performance indicators that will be used to assess progress toward achieving the goals described in this section, including measurable annual objectives for progress by children with disabilities under section 1111(b)(2)(C)(v)(II)(cc) of the ESEA, 20 U.S.C. § 6311. The state annually reports to the Secretary and the public on the progress of the state, and of children with disabilities in the state, toward meeting these goals. This report may include elements of the reports required under section 1111(h) of the ESEA.

### **§ 300.162. Supplementation of state, local, and other federal funds**

Funds paid to the state under this part must be expended in accordance with all the provisions of this part. Funds under this part must not be commingled with state funds. The state has a separate accounting system that includes an audit trail of the expenditure of these funds.

Funds paid to the state under Part B of the Act must be used to supplement the level of federal, state, and local funds (including funds that are not under the direct control of the state or LEAs) expended for special education and related services provided to children with disabilities under Part B of the Act, and in no case to supplant those federal, state, and local funds. Funds must only be used to pay the excess costs of providing special education and related services to children with disabilities.

If the state provides clear and convincing evidence that all children with disabilities have available to them a FAPE, the Secretary may waive, in whole or in part, the requirements of state level non-supplanting, if the Secretary concurs with the evidence provided by the state.

### **§ 300.163 Maintenance of state financial support**

The state will not reduce the amount of state financial support for special education and related services for children with disabilities, or otherwise made available because of the excess costs of educating those children, below the amount of that support for the preceding fiscal year. If the state fails to maintain financial support for special education and related services for children with disabilities, the Secretary reduces the allocation of funds under section 611 of the Act for any fiscal year following the fiscal year in which the State fails to comply with the requirement of paragraph (a) of this section by the same amount by which the State fails to meet the requirement.

The Secretary may waive the requirement for state maintenance of effort, for one fiscal year at a time, if the Secretary determines that granting a waiver would be equitable due to exceptional or uncontrollable circumstances such as a natural disaster or a precipitous and unforeseen decline in the financial resources of the state; or the state meets the standard for a waiver of the requirement to supplement, and not to supplant, funds received under Part B of the Act. If, for any fiscal year, a state fails to meet the requirement of this section, including any year for which the state is granted, a waiver shall be the amount that would have been required in the absence of that failure and not the reduced level of the state's support.

### **§ 300.164 Waiver of requirement regarding supplementing and not supplanting with Part B funds**

Funds paid to the state under Part B of the Act must be used to supplement and increase the level of federal, state, and local funds (including funds that are not under the direct control of the SEA or LEAs) expended for special education and related services provided to children with disabilities under Part B of the Act and in no case to supplant those federal, state, and local funds. The state may use funds it retains for state administration and statewide initiatives, without regard to the prohibition on supplanting other funds.

If the state requests a waiver under this section, it must submit to the Secretary a written request that includes— an assurance that a FAPE is currently available, and will remain available throughout the period that a waiver would be in effect, to all eligible children with disabilities throughout the state, regardless of the public agency that is responsible for providing a FAPE to them. The assurance must be signed by the State Superintendent of Education.

If the state provides evidence that all eligible children with disabilities throughout the state have a FAPE available to them, the Secretary may waive for a period of one year, in whole or in part, the requirement regarding state-level non supplanting, if the Secretary concurs with the evidence provided by the state. Evidence that the state provides the Secretary for consideration must include the basis on which the state has concluded that a FAPE is available to all eligible children, and the procedures that the state will implement to ensure that a FAPE remains available to all eligible children, including the state's procedures Child Find procedures. Additionally, the evidence must include the state's procedures for monitoring public agencies to ensure that they comply with all requirements of this part, the state's complaint procedures and the state's hearing procedures; a summary of all state and federal monitoring reports, and state complaint decisions, and hearing decisions issued within three years prior to the date of the state's request for a waiver under this section, that includes any finding that a FAPE has not been available to one or more eligible children, and evidence that a FAPE is now available to all children addressed in those reports or decisions; and evidence that the state, in determining that a FAPE is currently available to all eligible children with disabilities has consulted with the State advisory panel.

If the Secretary determines that the request and supporting evidence submitted by the state makes a prima facie showing that a FAPE is, and will remain, available to all eligible children with disabilities in

the state, the Secretary, after notice to the public throughout the state, conducts a public hearing at which all interested persons and organizations may present evidence regarding whether a FAPE is currently available to all eligible children with disabilities in the state. The Secretary also determines whether the state will be able to ensure that a FAPE remains available to all eligible children with disabilities if the Secretary provides the requested waiver.

Following the hearing, the Secretary, based on all submitted evidence, will provide a waiver, in whole or in part, for a period of one year if the Secretary finds that the state has provided clear and convincing evidence that a FAPE is currently available to all eligible children with disabilities, and the state will be able to ensure that FAPE remains available to all eligible children with disabilities in the state if the Secretary provides the requested waiver. The Secretary may grant subsequent waivers for a period of one year each, if the Secretary determines that the state has provided clear and convincing evidence that all eligible children with disabilities have, and will continue to have throughout the one-year period of the waiver, a FAPE available to them.

### **§ 300.165 Public participation**

Prior to the adoption of any policies and procedures needed to comply with Part B of the Act (including any amendments to those policies and procedures), the state ensures that there are public hearings, adequate notice of the hearings, and an opportunity for comment available to the general public, including individuals with disabilities and parents of children with disabilities. Before submitting a state plan under this part, the state will comply with the public participation requirements of this section and those in 20 U.S.C. § 1232d(b)(7) § 300.166.

### **§ 300.166 Rule of Construction**

In complying with § 300.162 and § 300.163, the state may not use funds paid to it under this part to satisfy state-law mandated funding obligations to LEAs, including funding based on student attendance, enrollment, or inflation.

### **§ 300.167 State advisory panel**

The state has established and maintains an advisory panel as set forth in this part and S.C. Code Ann. § 59-36-30 (2004) for the purpose of providing policy guidance with respect to special education and related services for children with disabilities in the state.

### **§ 300.168 Membership**

The advisory panel consists of members appointed by the Governor, or any other official authorized under state law to make such appointments, is representative of the state population and is composed of individuals involved in, or concerned with the education of children with disabilities, including

- Parents of children with disabilities (ages birth through 26);
- Individuals with disabilities;
- Teachers;
- Representatives of institutions of higher education that prepare special education and related services personnel;
- State and local education officials, including officials who carry out activities under subtitle B of title VII of the McKinney-Vento Homeless Assistance Act, (42 U.S.C. § 11431et seq.);
- Administrators of programs for children with disabilities;

- Representatives of other state agencies involved in the financing or delivery of related services to children with disabilities;
- Representatives of private schools and public charter schools;
- Not less than one representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities;
- A representative from the Department of Social Services; and
- Representatives from the Department of Juvenile Justice and adult corrections.

The majority of the members of the panel are individuals with disabilities or parents of children with disabilities.

### **§ 300.169 Duties**

The advisory panel advises the state of unmet needs within the state in the education of children with disabilities and comments publicly on any rules or regulations proposed by the state regarding the education of children with disabilities. The Panel also advises the state in developing evaluations and reporting on data to the Secretary under section 618 of the Act; developing corrective action plans to address findings identified in federal monitoring reports under Part B of the Act; and in developing and implementing policies relating to the coordination of services for children with disabilities.

### **§ 300.170 Suspension and expulsion rates**

The state must examine data, including data disaggregated by race and ethnicity, to determine if significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities among LEAs in the state; or compared to the rates for nondisabled children within those agencies. If the discrepancies described in paragraph above are occurring, the state will require the affected LEA to revise its policies, procedures, and practices relating to the development and implementation of IEPs, the use of positive behavioral interventions and supports, and procedural safeguards, to ensure that these policies, procedures, and practices comply with the Act.

### **§ 300.171 Annual description of use of Part B funds**

To receive a grant in any fiscal year the state will annually describe how amounts retained for state administration and state-level activities will be used to meet the requirements of this part and how those amounts will be allocated among the activities to meet state priorities based on input from Leas. If the state's plans for use of its funds for the forthcoming year do not change from the prior year, the state may submit a letter to that effect to meet this requirement.

### **§ 300.172 Access to instructional materials.**

The state has adopted the National Instructional Materials Accessibility Standard (NIMAS), for the purposes of providing instructional materials to blind persons, or other persons with print disabilities, in a timely manner. LEAs shall provide children with disabilities who need instructional materials in accessible formats, but are not included in the definition of blind, or other persons with print disabilities, or who need materials that cannot be produced from NIMAS files, receive those instructional materials in a timely manner. The LEA shall take reasonable steps to provide instructional materials at the same time as other children receive instructional materials.

The state, to the maximum extent possible, will work collaboratively with any other state agencies responsible for assistive technology programs.

### **§ 300.173 Overidentification and disproportionality**

The state has in effect, consistent with the purposes of this part and with section 618(d) of the Act, policies and procedures designed to prevent the overidentification or disproportionate representation by race and ethnicity of children as children with disabilities, including children with disabilities with a particular impairment described in § 300.8. See SBE Regulation 43.243.1

### **§ 300.174 Prohibition on mandatory medication**

The LEA may not require parents to obtain a prescription for substances identified under schedules I, II, III, IV, or V in section 20(c) of the Controlled Substances Act (21 U.S.C. § 812(c)) for a child as a condition of attending school, receiving an evaluation or receiving special education or related services.

### **§ 300.175 SEA as provider of FAPE or direct services**

The state is not the provider of a FAPE or direct services.

### **§ 300.176 Exception for prior state plans**

The state has on file with the Secretary, policies and procedures approved by the Secretary that demonstrate that the state meets the requirements of § 300.100, including policies and procedures filed under Part B of the Act as in effect before December 3, 2004. Modifications to the policies and procedures are submitted to the Secretary, as necessary, in conjunction with the annual application.

### **§ 300.301 Initial Evaluation**

The initial evaluation must be conducted within 60 days of receiving parental consent for evaluation. Verification that all necessary information has been gathered to determine eligibility signals the conclusion of an evaluation.

### **§ 300.306 Determination of Eligibility**

Upon completion of the administration of assessments and other evaluation measures, a group of qualified professionals and the parent of the child determines whether the child is a child with a disability as defined in § 300.8. This determination must be made within 15 days of the conclusion of the evaluation.

### **§ 300.320 Transition**

Beginning not later than the first IEP to be in effect when the child turns 13, or younger if determined appropriate by the IEP Team, and updated annually, thereafter, the IEP must include appropriate postsecondary goals based upon age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills; and the transition services (including courses of study) needed to assist the child in reaching those goals.

### **§ 300.625 Children's rights**

South Carolina recognizes that children are afforded privacy rights similar to those afforded to parents, taking into consideration the age of the child and the severity and nature of the disability. Under

FERPA in 34 CFR 99.5(a), the rights of parents regarding education records are transferred to the student at age 18. The LEA must provide notice to the parent of the transfer of the educational rights.

### § 300.626 Enforcement

Determinations:

The SCDE must annually evaluate LEA's compliance and improvement and make determinations as to the status of each LEA. The SCDE determination process mirrors the process employed by the Office of Special Education Programs (OSEP), United States Department of Education, and is based on the following four elements: (1) analyses of the State Performance Plan Indicators 9, 10, 11, 12, and 13. The state must also examine the (2) validity, reliability, and timeliness of data; (3) uncorrected noncompliance from sources other than SPP indicators; and (4) any fiscal audit findings. These factors are the basis for the LEA's determination. Additionally, in developing the criteria for making determinations, the state must consider the performance of LEAs on performance indicators and any other information available. Based on the state's examination and review of all available data, LEAs will be determined to "Meet Requirements", "Need Assistance", "Need Intervention", or "Need Substantial Intervention".

**Meets Requirements (M):** Any LEA that has met the standards will receive a rating of *Meets*. These LEAs will receive written commendations to the LEA's superintendent, the LEA's board of education, the State Board of Education as well as recognition on the Office of Exceptional Children (OEC) website.

**Needs Assistance (NA):** Any LEA that has not met all of the standards will receive a rating of *Needs Assistance*. If this is the first year the LEA has received a rating of NA, the LEA superintendent and special education director will receive a letter to reinforce the requirement that all findings of noncompliance must be corrected as soon as possible, but in no case later than one year from the date of notification.

If this is the LEA's second year with a rating of NA, in addition to the actions described above, the LEA will be advised of technical assistance resources; required to develop a Plan for Improving Children's Outcomes (PICO); and required to participate in technical assistance sessions in the area(s) identified. The LEA may also be identified as a "high-risk grantee" and have conditions imposed on the use of its IDEA funds by the State. The OEC may also provide focused technical assistance through general supervision activities such as on-site visits and pairing the LEA with a LEA with similar demographics that has shown success in improving outcomes in the identified areas.

**Needs Intervention (NI):** Any LEA that has met fewer standards will receive a rating of *Needs Intervention*. If the LEA received a rating of NI for one year, the LEA must comply with all requirements described in NA. If this is the LEA's second consecutive year with a rating of NI, the OEC will provide on-site general supervision to assist in correcting any outstanding findings of noncompliance, and assist in the review and revision of the PICO.

If the LEA earns a determination of NI for three or more consecutive years, the LEA must comply with all actions for NI AND the state may (a) Require the LEA to enter into a compliance agreement if the state has reason to believe the LEA cannot correct the problem within one year; (b) withhold not less than 20% and not more than 50% of the LEA's IDEA funds each year until the LEA has sufficiently addressed the areas causing NI; and/or (c) Seek to recover funds under section 452 of the General Education Provisions Act OR withhold, in whole or in part, any further payments to the LEA under IDEA.

Any LEA that met none of the standards will receive a rating of *Needs Substantial Intervention*. The LEA must comply with all actions for NI AND the state may (a) Require the LEA to enter into a compliance agreement if the state has reason to believe the LEA cannot correct the problem within one year; (b) withhold not less than 20% and not more than 50% of the LEA's IDEA funds each year until the LEA has sufficiently addressed the areas causing NI ; and/or(c) Seek to recover funds under section 452 of the General Education Provisions Act OR withhold, in whole or in part, any further payments to the LEA under IDEA.