

# **SPECIAL EDUCATION HANDBOOK**



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**DISCLAIMER**

Nothing in this handbook constitutes the practice of law or the giving of legal advice.

This handbook is designed to provide parents, teachers, professionals, and those interested in special education a basic overview of special education law in Rhode Island. The information in this handbook is organized to provide the reader with a quick overview, as well as an in-depth synopsis of special education. If you are not familiar with the laws and regulations pertaining to special education in Rhode Island, this handbook should help you gain some familiarity and comfort with the language and structure of those laws and regulations. If you are already familiar with the special education system in Rhode Island, this handbook should provide you with a valuable resource for identifying laws and regulations from a variety of sources that may pertain to the special needs of those receiving special educational services in Rhode Island.

As of the date of this publication, the law utilized within is accurate; however, the law can and will change so it is prudent to seek counsel familiar with education law to address your particular circumstances.

# INTRODUCTION

The central feature of all education law is the right to be educated regardless of the way you learn. No matter how complex or confusing the regulations and rules surrounding this central idea may appear, it is important to remember this central proposition. Navigating what may appear to be an impossible and ever changing maze of laws and regulations at the state and federal level is frustrating for both the novice and the expert, but you should always keep in mind that these laws and regulations are an attempt to protect the right to be educated regardless of the way you learn.

The right to be educated gives rise to certain responsibilities. These responsibilities are not only for those providing the education, but for those receiving the education as well. Therefore, the function of the many laws and regulations surrounding special education is to provide everyone involved with a clear outline of their respective responsibilities.

It is important that you understand your rights and responsibilities. Conflicts will often arise about who is responsible for what, and whether those responsibilities have been met. Knowing your rights and responsibilities from the start can save you a great deal of time and frustration because you can more easily determine realistic goals for you or your child's education.

## PART I: GENERAL OVERVIEW

The law concerning the provision of educational services to young people with special needs in Rhode Island is governed by laws and regulations from a number of sources. You may at first find yourself confused about how these various laws relate to each other, but that is all right because it is confusing. To begin with, you should recognize several fundamental distinctions.

### **Federal & State Law**

Much of the law surrounding special education is passed by the United States Congress, which distributes federal funds to states so long as they follow certain rules. This kind of law is codified in the United States Code and is often the original source for special education law. If Congress did not pass such laws, then each state could create its own independent laws. This was the case at one time in history, but the period before federal special education laws is almost universally viewed as a time marked by a shameful failure to properly educate children with special needs. Congress responded to this failure through a variety of legislation which will be more carefully discussed in this handbook.



Different states have different needs, and Rhode Island is no exception. So, the Rhode Island General Assembly, the legislative body in Rhode Island, has passed laws to address the specific educational needs of Rhode Islanders as well. These laws are codified in the Rhode Island General Laws. While these laws may differ in certain ways from the federal laws, they must be consistent with Congressional intentions to pass the laws, otherwise Rhode Island would not be eligible to receive federal funding through Congress' acts.

## **Statutes & Regulations**

In addition to laws passed by the Congress and the General Assembly, there are also regulations "promulgated" by the United States Department of Education and the Rhode Island Board of Regents for Elementary and Secondary Education.<sup>1</sup> The regulations are specifically drafted by the departments that legislators intended to have oversight of the legislation that was enacted into law. These regulations provide the details about how a law is to be implemented based on the departments' interpretation of the legislation. This particular aspect of the legal process is necessary because even though the legislators may know that a problem exists and needs to be fixed, they do not necessarily know how. The legislators rely on the departments, who have the expertise in the area, to determine how to implement the changes. Therefore, the regulations are much more detailed than the legislative acts passed by Congress and the General Assembly.

For the purposes of this handbook, the distinction between laws and regulations will not be that important. In theory, a regulation can be more easily challenged than a law, though the older a regulation the harder to challenge. Your day-to-day interaction with special education will not likely involve challenging a regulation, and so you should not spend too much time worrying about the distinction. It is important, however, that you understand that there are both special education laws and regulations, and that you may need to know the substance of each.

## **State & Local Education**

The distinction between your local school board and the Rhode Island Department of Secondary and Elementary Education (RIDE) is probably one with which you have familiarity. RIDE is the designated State Education Agency (SEA) in Rhode Island. In other words, RIDE has the responsibility in Rhode Island to monitor and make certain that Local Education Agencies (LEA) abide by federal and state law when providing education to children.

At the moment, there are thirty-nine (39) different cities and towns in Rhode Island. Each of these cities and towns, or school districts, is designated as a LEA. The

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<sup>1</sup> In these footnotes, "RIDE Reg." refers to the state special education regulations, the Regulations of the Board of Regents for Elementary and Secondary Education Governing the Education of Children with Disabilities, found at R.I. Code R. 08 010 002.

LEA is responsible for the provision of education to children, as well as adherence to federal and state laws and regulations, in that LEA. And, there are several other schools — such as the Rhode Island School for the Deaf<sup>2</sup> — that the Rhode Island General Assembly has legislatively defined as LEAs, even though they may not be a city or town by themselves.

These LEAs will develop their own rules to implement the laws and regulations referred to above. These rules may be in writing, or they may be by custom. You will be working closely with educators and administrators at this level to develop educational strategies and to implement those strategies, and you will need to be aware of these local customs and rules. **Under no circumstances should these local customs and rules interfere with the state or federal laws and regulations mentioned above, and you may occasionally have reason to challenge such rules and customs.**

## **PART II:**

# **THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)**

### **Generally**

IDEA originated as the Education For All Handicapped Children Act in 1975. Since 1975, Congress has reauthorized this act several times, most recently in 2004. IDEA has one central premise: all disabled children have the right to a "**free appropriate public education**," or "FAPE" for short. From the central premise that all disabled children must be afforded a free appropriate public education, IDEA sets out requirements that disabled children be identified, that their needs be evaluated, that a plan be created addressing those needs, and that FAPE be provided in accordance with that plan.

### **The Law of Special Education Under IDEA**

The provisions within IDEA are often broken into five logical steps, and those are the basic steps that will be employed in this handbook. They are:

- A. IDENTIFICATION OF CHILDREN WITH DISABILITIES
- B. EVALUATION AND REEVALUATION OF CHILDREN WITH DISABILITIES
- C. CREATION OF AN "INDIVIDUALIZED EDUCATION PLAN" (IEP)
- D. PLACEMENTS
- E. "PROCEDURAL SAFEGUARDS": DISPUTE RESOLUTION

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<sup>2</sup> R.I. Gen. Laws § 16-26-3.1(c)(2) ("The School for the Deaf shall be operated as a local education agency and shall be governed by a board of trustees.").

This is a sensible way to divide up the law because it recognizes distinct stages in the special education process. On the other hand, you should keep in mind that this is not a perfect system. These steps are not necessarily in the order that you will encounter each one, and they are not necessarily entirely distinct. "Procedural safeguards" in particular involve the process for dealing with disputes that arise during the process, and such disputes might arise at any stage. As a basic framework, however, these steps can be a useful way to divide and discuss the laws and regulations of IDEA.

## **A. IDENTIFICATION OF CHILDREN WITH DISABILITIES**

This identification is perhaps the most important issue that needs to be resolved under special education law because the provisions of IDEA only apply to children with disabilities. The phrase "**child with a disability**" is defined by special education laws and regulations in a particular way. This is important to keep in mind because the definition of "child with a disability" may not always make sense to you. A child may have a disability as determined by a physician or therapist but not be a child with a disability for purposes of IDEA. You must look to special education laws and regulations to know whether a particular child is entitled to the rights and protections provided under IDEA.

There are essentially three aspects to consider when determining whether a particular person is a child with a disability. Those three factors are **(1) age, (2) type of disability, and (3) necessity of services.**<sup>3</sup> In some ways these factors will appear relatively straightforward, and in some ways they are. You will generally know how old a child is, you will eventually have an evaluation of the disability, and presumably that evaluation will also determine the need for special education services. Each of these categories, however, can give rise to disagreements and differing opinions. For instance, the age of a child who may receive special education services in Rhode Island is between 3 and 21 years *and* the child must not have successfully completed high school. You can probably guess that disagreements may arise about whether a child has successfully completed high school. These kinds of disagreements may arise concerning any of the three factors, and the best place to start in resolving these disagreements is a clear understanding of the law.

### **1. Age**

To be a child with a disability in Rhode Island, regulations currently require that a child be between the ages of 3 and 21 *and* that the child has not yet completed high school. If a child has graduated from high-school at the age of 19, that child is no longer eligible for services under IDEA. In addition, if a child has reached the age of 21, that child is no longer eligible for services under IDEA, regardless of whether he or she has graduated. In other words, a child is eligible under IDEA until the child either reaches age 21 or completes high school, whichever comes first.

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<sup>3</sup> RIDE Reg. § 300.8.

The possibility also exists that a child may receive services before age three through **early intervention services**.<sup>4</sup> State regulations require that transition planning be put in place to ensure a smooth transition from these early intervention services to pre-school services by age 3.<sup>5</sup>

## 2. Type of Disability

Rhode Island's current regulations spell out a number of specific disabilities which qualify a child for services under IDEA.<sup>6</sup> In addition, the regulations leave some room under broader categories to classify children who have less specific disabilities but who qualify for special education services nonetheless. The determination of whether a child's disability qualifies her/him for special education services under IDEA spills over into the evaluation process discussed later in this handbook because you cannot know the type of disability a child is experiencing without first evaluating that child.<sup>7</sup>

All classifications are somewhat general. For example, one person who experiences a disability on the "autism spectrum" may have special needs which differ greatly from another person diagnosed with the same or similar disability. In addition, any individual person may exhibit the outward signs of more than one category of disability. People are complex, and people with disabilities are no exception. The bottom line is that disagreements may arise concerning the classification of a child's disability, and you have the right to challenge any such classification.<sup>8</sup>

Rhode Island regulations provide for categories of disabilities for purposes of IDEA:

- Mental Retardation<sup>9</sup>
- Hearing Impairment<sup>10</sup>
- Speech/Language Impairment<sup>11</sup>
- Visual Impairment<sup>12</sup>
- Emotional Disturbance<sup>13</sup>

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<sup>4</sup> RI Department of Human Services Regulations § 0322.

<sup>5</sup> RIDE Reg. § 300.124.

<sup>6</sup> RIDE Reg. § 300.8.

<sup>7</sup> See Part II Section B of this Handbook.

<sup>8</sup> See Part II Section E of this Handbook.

<sup>9</sup> RIDE Reg. § 300.8(c)(6). "Mental Retardation" is a very specific diagnosis characterized by "subaverage" intelligence and difficulty with adaptation which becomes noticeable during the child's development. Sometimes referred to as "MR."

<sup>10</sup> RIDE Reg. § 300.8(c)(3) and (c)(5). "Hearing Impairment" includes permanent and fluctuating hearing impairments. "Deafness" is defined separately in the regulations and is severe to the point of impairing linguistic processing.

<sup>11</sup> RIDE Reg. § 300.8(c)(11). "Speech/Language Impairment" is a communication disorder. Examples include stuttering, impaired articulation, and voice impairment or language impairments.

<sup>12</sup> RIDE Reg. § 300.8(c)(13). "Visual Impairment" is an impairment that exists even with correction and includes both partial sight and blindness.

<sup>13</sup> RIDE Reg. § 300.8(c)(4). "Emotional Disturbance" is a broad term which includes problems learning that cannot be pinpointed to some intellectual, sensory, or health factor. The regulations specifically



- Orthopedic Impairment<sup>14</sup>
- Autism Spectrum Disorder<sup>15</sup>
- Traumatic Brain Injury<sup>16</sup>
- Other Health Impairment<sup>17</sup>
- Specific Learning Disability<sup>18</sup>
- Deaf Blindness<sup>19</sup>
- Multiple Disabilities<sup>20</sup>

The footnotes for each of the above categories include a general definition and examples where appropriate. Refer to the Procedural Safeguards section of this handbook for your options in bringing and resolving a challenge to a classification decision.<sup>21</sup>

### **3. Necessity of Services**

To be considered a child with a disability for purposes of IDEA, a child must actually *need* special education services. Special education is a specially designed education that provides for an educational setting and curriculum that addresses the unique needs of a child with a disability.<sup>22</sup> If the needs associated with a particular child's disability are met through the regular curriculum, then the child is not a "child with a disability" for purposes of IDEA. This does not mean that a child does not have a disability, but rather that the child's disability does not fit the definition of disability within IDEA. Services may still be available under 504 or the ADA.<sup>23</sup>

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include schizophrenia under emotional disturbance, but are unclear about other issues that might fall under this category. The term is not synonymous with "socially maladjusted."

<sup>14</sup> RIDE Reg. § 300.8(c)(8). "Orthopedic Impairment" can be congenital or caused by disease or accident. Some major examples would include cerebral palsy, amputation, and bone tuberculosis.

<sup>15</sup> RIDE Reg. § 300.8(c)(1). "Autism Spectrum Disorder" includes a wide range of developmental disabilities which significantly effect communication and social interaction. Some examples include autism, Asperger's disorder, and Rett's disorder. This, like mental retardation, is a well established category and requires a number of specific diagnoses. The regulations do not require the symptoms to appear before age 3, though some diagnostic manuals may require otherwise.

<sup>16</sup> RIDE Reg. § 300.8(c)(12). "Traumatic Brain Injury" specifically includes injuries to the brain, not including birth trauma, caused by some external force and which result in one of a number of impairments to cognitive, social, and behavioral areas. It does not include degenerative or congenital disorders. Often referred to as "TBI."

<sup>17</sup> RIDE Reg. § 300.8(c)(9). "Other Health Impairment" includes impairments to strength, vitality, and alertness which are caused by a chronic problem. Significantly, this category includes ADD, ADHD, diabetes, epilepsy, and many other such disorders.

<sup>18</sup> RIDE Reg. § 300.8(c)(10). See Section B.4.

<sup>19</sup> RIDE Reg. § 300.8(c)(2). "Deaf-Blindness" refers to a simultaneous hearing and sight impairment for which neither the usual hearing or sight impairment curriculum by itself would be sufficient.

<sup>20</sup> RIDE Reg. § 300.8(c)(7). "Multiple Disabilities" means, as you might expect, two or more disabilities the combination of which causes educational needs which could not be addressed by a program directed at just one of the disabilities.

<sup>21</sup> See Part II Section E of this Handbook.

<sup>22</sup> RIDE Reg. § 300.39.

<sup>23</sup> See Part IV, "Section 504 of the Rehabilitation Act of 1973 and the Americans with Disabilities Act and ADA," beginning on page 39 of this Handbook.

When considering whether a child needs special education services you may discover that certain services, called **related services**, are not considered special education services and need for those services alone will not qualify a child for services under IDEA.<sup>24</sup> The distinction between special education itself and services merely related to special education is by no means clear. In theory, related services involve transportation, testing, counseling, and other services that assist a child in benefiting from the special education services themselves.

Caveat: Remember a child might have disabilities that fit into one of the categories in the regulations, and yet a LEA might determine that the child does not need or would not benefit from special education services. If you are told that your child is not a child with a disability for purposes of IDEA, you have a right to know how the LEA came to that determination. You want to know upon which of the three factors the LEA based its decision so that you know how to continue the process. Knowing these factors will help you decide where any actual disagreement lies and how to focus your limited energy and resources. This knowledge will also allow you to begin to consider a possible appeal of the LEA's decision at either the State Complaint<sup>25</sup> or Due Process Complaint<sup>26</sup> levels.

## **B. EVALUATION OF CHILDREN WITH DISABILITIES**

Once an evaluation establishes that a child has need of special education and related services, the goal is to create a comprehensive **individualized education program**, commonly referred to as an “**IEP**,” that establishes exactly what educational strategies and services will best meet a child's unique needs.<sup>27</sup> But the decision to evaluate or reevaluate a child may result in the denial of services under IDEA if it is determined that the child's needs are already being met. Needless to say, a lot is at stake in the evaluation process, and you will need to be familiar with your rights and responsibilities in this area.

A few distinctions about the evaluation process will be helpful to keep in mind before beginning this section. First, it is important to remember that an **initial evaluation** may follow different procedures than a **reevaluation**. Second, while an initial evaluation is a necessary step in the process of creating an IEP, an **IEP Team** does much more than just evaluation.<sup>28</sup> Finally, a special education evaluation is not necessarily the same as an evaluation a doctor or psychologist might administer. In other words, an evaluation in the special education context is not necessarily an attempt to give a child a specific medical or psychological diagnosis, but rather to identify the

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<sup>24</sup> RIDE Reg. § 300.34.

<sup>25</sup> See Part II Section E of this Handbook.

<sup>26</sup> See Part II Section F of this Handbook.

<sup>27</sup> See Section C for a more comprehensive discussion of the IEP.

<sup>28</sup> See Section C for a more comprehensive discussion of the IEP.

need for special education services and the type of services that would be appropriate.<sup>29</sup>

The discussion of Rhode Island law in this section will be broken into the following categories: *Referral for Evaluation*, *Initial Evaluation*, and *Reevaluation*. As is often repeated in this handbook, the division of special education law into sections and categories is a helpful way to gain understanding, but you may find that your particular problems and issues do not fit neatly into any single category.

## 1. **Referral for Evaluation**

The first step in the evaluation process is a referral for evaluation by a parent, a teacher, or some other educational professional familiar with a student who feels that the student may require special education services. This is a separate issue from the outcome of the evaluation. The issue here is whether to initiate an evaluation at all. An **evaluation team** must meet to determine if an evaluation is necessary within 10 school days after receipt of a referral for special education services.<sup>30</sup> The LEA then has ten (10) days to commence an initial evaluation, and sixty (60) days to complete the evaluation.<sup>31</sup> Prior to commencement of an initial evaluation, however, a number of situations may arise:

- **Parent Refuses Consent**: A LEA is required to obtain parental consent before conducting an initial evaluation. However, if a parent refuses to consent to the evaluation, the LEA may initiate a due process hearing or mediation to advocate for an evaluation.<sup>32</sup> A hearing officer can order an evaluation despite parental refusal of consent. **Important**: While an evaluation may be ordered without parental consent, initial special education services cannot be provided absent parental consent, and a LEA may not use the procedural safeguards process to override a parent's refusal to consent to special education services.
- **LEA Refuses to Conduct Evaluation**: A LEA may determine that an evaluation is not necessary. A parent who disagrees with this determination may exercise their rights under the Procedural Safeguards to initiate a due process hearing, mediation, or a resolution session to dispute the LEA's refusal to evaluate.<sup>33</sup>
- **LEA Fails to Act**: Schools are busy places, and it is entirely possible that a referral will be lost in the shuffle. A simple follow up reminder is most likely all that will be required to resolve this kind of situation. You should not wait long, however, because if you or someone else has sent a referral to a LEA, you should expect a response within the required time period. If the LEA has not

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<sup>29</sup> See Section A for a more comprehensive discussion of eligibility for services.

<sup>30</sup> RIDE Reg. § 300.301(c).

<sup>31</sup> RIDE Reg. § 300.301(c).

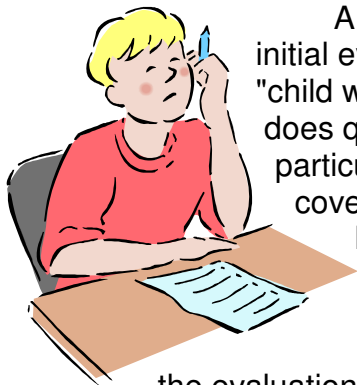
<sup>32</sup> RIDE Reg. § 300.300(a)(3).

<sup>33</sup> See Part II Section E of this Handbook.

responded within the required time period, you should take action immediately. Do not be shy about reminding a LEA about a referral.

- LEA Agrees to Conduct Evaluation: This is the most likely response to a referral for initial evaluation. A LEA has little interest in entering into a conflict before an evaluation is conducted because the LEA, just like everyone else, has very little information to go on before an evaluation has been conducted.

## 2. The Initial Evaluation



An initial evaluation serves two inter-related functions. First, an initial evaluation provides whether a particular student qualifies as a "child with a disability" for purposes of IDEA.<sup>34</sup> Second, if that student does qualify for services, the initial evaluation provides insight into the particular needs and deficits of that child. This second step is covered more fully in the section of this handbook discussing the IEP<sup>35</sup> because this step involves more long-term educational planning and objectives.

As part of the process of determining the needs of the child, the evaluation team must determine what **evaluation data** is needed in addition to information gathered from past evaluations, parents, and teachers. Once the evaluation team has determined what additional information it must gather, the evaluation team will initiate the needed examinations, tests, and/or interviews.<sup>36</sup> Again, a number of possible situations may arise at this stage:

- Student is Determined Ineligible for Services: An evaluation team may ultimately determine that a child does not qualify as a "child with a disability" for purposes of IDEA. You do have the right to challenge such a determination through the Procedural Safeguards discussed later in this handbook.<sup>37</sup> In any circumstance, you should save the written record of the student's evaluation and the explanation of exactly how the evaluation team came to its determination of ineligibility.
- Student or Parent Disagrees With Assessment of Needs: Even if a child is qualified to receive services under IDEA, you may disagree with the assessments arrived at by the evaluation team. For instance, you may believe that your child has a specific learning disability that is not addressed by the initial evaluation, or you may feel that your child's particular needs are not properly addressed in some other way. You may also feel that the evaluation has identified a need that your child does not have, such as a particular learning disability. In this instance you have a number of options.

<sup>34</sup> See Section A for a more in-depth discussion of eligibility under IDEA.

<sup>35</sup> See Part II Section C of this Handbook.

<sup>36</sup> RIDE Reg. § 300.533.

<sup>37</sup> See Part II Section E of this Handbook.

You may choose to ask for an **independent educational evaluation**.<sup>38</sup> This is an evaluation done by a "qualified examiner" who is not employed by the LEA. You may also ask that the school pay for this independent educational evaluation **at public expense**.<sup>39</sup> A parent is eligible for one (and only one) independent educational evaluation at public expense each time the LEA conducts an evaluation with which the parent disagrees.<sup>40</sup> However, the LEA may choose to initiate a due process hearing to defend the evaluation done by its own personnel. Remember, the LEA must either initiate a hearing to defend its own evaluation or pay for an independent evaluation, but it cannot simply ignore your request. Also, if it is determined at a due process hearing that the LEA's evaluation is appropriate, then you may still initiate an independent evaluation at your own expense. The bottom line is that you can get a second opinion from an outside examiner and, if the evaluation meets "agency criteria," its results must be considered by the LEA in any decision made with respect to the provision of FAPE to the child with a disability.<sup>41</sup>

- **LEA: Requires Additional Evaluations:** A LEA may find that it cannot acquire all the information necessary for a proper evaluation using the LEA's own professionals. In this instance, the school may initiate its own independent evaluation. A school initiated independent evaluation must always be paid for at public expense.

### **3. Reevaluation**

From time to time, as a child progresses in her/his education, that child will need to be reevaluated to determine whether the current IEP is effective and whether any new or different issues have arisen since the previous evaluation. The purpose of the reevaluation is to determine what is working and what needs to be changed. You should keep in mind that an IEP team might meet quite frequently, and might even make adjustments and amendments to an IEP with the consent of the parents and the LEA without conducting a full scale evaluation. In other words, IEP team meetings are usually not reevaluation meetings.

Parental consent is required for a reevaluation unless the reevaluation will focus only on documentation and other information already gathered during the course of special education and the initial evaluation, a process known as a **paper evaluation**. However, if a parent fails to respond to notification of a pending reevaluation, the LEA may conduct the evaluation without the parent's consent, so long as the LEA can demonstrate it made "reasonable efforts" to obtain such consent and the child's parent

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<sup>38</sup> RIDE Reg. § 300.502.

<sup>39</sup> An evaluation done at public expense must meet the Agency Criteria. RIDE Reg. § 300.502(e). You will need to ask the school district for those criteria, which must be the *exactly the same* as the criteria used when the school district initiates its own independent educational evaluation.

<sup>40</sup> RIDE Reg. § 300.502(b)(5).

<sup>41</sup> RIDE Reg. § 300.502(c)(1).

has failed to respond.<sup>42</sup> To satisfy this "reasonable efforts" requirement, the LEA must document its attempts to obtain parental consent with, e.g., detailed records of telephone calls made or attempted and the results of such calls, copies of correspondence sent to parents and any responses received, and detailed records of visits made to the parent's home or place of employment and the results of those visits.<sup>43</sup> In any case, a reevaluation may not occur more often than once a year, unless the parent and the LEA agree otherwise. A reevaluation must occur **at least** once every three years, unless the parent and the LEA agree that a reevaluation is unnecessary.<sup>44</sup>

#### **4. Evaluating Specific Learning Disabilities: "Severe Discrepancy" vs. "RTI"**

A significant amount of controversy and uncertainty surrounds the issue of determining whether a child has a **specific learning disability**. Concern amongst politicians and LEAs has arisen over diagnosis of certain learning disabilities and the social danger posed to children put into special education classes without the opportunity to be educated or to interact with peers in the regular classroom. As a result of this concern IDEA was amended in 2004 to change the requirements for identifying and responding to specific learning disabilities. The definition of specific learning disability remains the same — a disorder in one or more of the "basic psychological processes" involved in understanding and using language.<sup>45</sup> The 2004 amendment changes the way in which those children should be identified and responded to in the regular classroom environment.

The method required for identifying specific learning disabilities before the 2004 changes to IDEA was known as the "**severe discrepancy standard**." This standard required: (1) that the child not be performing at an appropriate level in one of the specific areas of reading, writing, or mathematics and (2) that a severe discrepancy exist between the child's actual functioning and her/his ability in that area. In other words, a child could be determined to have a specific learning disability under the severe discrepancy standard if the child was not performing at an age appropriate level despite the ability to do so because the child has a disorder that impairs the basic mental processes used to read and understand language. The result was a "severe discrepancy" between how well the child *is* learning and how well the child *could* learn.

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<sup>42</sup> RIDE Reg. § 300.300(c).

<sup>43</sup> RIDE Reg. §§ 300.300(d)(5) and 300.300.322(d). Thus, "reasonable efforts" likely require LEAs to document more than merely one telephone call or voicemail to a parent.

<sup>44</sup> RIDE Reg. § 300.303(b).

<sup>45</sup> RIDE Reg. § 300.8(c)(10). Specific learning disability is defined as "a disorder in one or more of the basic psychological processes involve din understanding or in using language, spoken or written, that may manifest itself in an imperfect ability to listen, think, speak, ready, write, spell, or to do mathematical calculations." It includes conditions such as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. It does not include learning problems that are primary the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, of environmental, cultural, or economic disadvantage. RIDE Reg. § 300.8(c)(10).

In response to the 2004 changes to IDEA, the RIDE special education regulations have made two major changes in this area. First, LEAs are not required to employ the severe discrepancy standard.<sup>46</sup> Second, LEAs must employ a **response to intervention (RTI)** approach.<sup>47</sup> More specifically, an appropriately constituted team<sup>48</sup> can determine that a child has a "specific learning disability" if:

- (1) Even when he or she is provided with age-appropriate learning experiences and instruction, the child does not achieve adequately for the child's age/grade-level/span expectations in at least 1 of 8 areas of language, reading, writing, and math;<sup>49</sup> AND
- (2) When using a process based on the child's "response to scientific, research-based intervention" (RTI),<sup>50</sup> the child does not make sufficient progress to meet age/grade-level expectations in at least 1 of the 8 areas; AND
- (3) The discrepancy is not the result of (a) a visual, hearing, or motor disability; (b) mental retardation; (c) emotional disturbance; (d) cultural factors; (e) environmental or economic disadvantage; or (f) limited English proficiency.<sup>51</sup>

This brings us to the less than clear question: What exactly is the RTI approach? As the changes to IDEA are new, the precise ways in which RIDE and LEAs will chose to implement and enforce this approach will only be answered over time. The best thing you can do for now is to keep the following steps in mind. These steps have been synthesized from state special education regulations, as well as RTI resources and guidance identified on RIDE website.<sup>52</sup>

- The broader process is broken into two steps:
  - First: Is there a suspicion of disability?
  - Second: Is there a specific learning disability?
- Suspicion of Disability?:

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<sup>46</sup> RIDE Reg. § 300.307(a)(1).

<sup>47</sup> RIDE Reg. § 300.309(a)(2).

<sup>48</sup> The team must consist of the child's parents and a team of qualified professionals, including the child's regular teacher (or, if he or she does not have one, a regular classroom teacher qualified to teach a child of his/ her age), and at least one person qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher. RIDE Reg. § 300.308.

<sup>49</sup> The eight relevant areas are oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, and mathematics problem solving. RIDE Reg. § 300.309(a)(1).

<sup>50</sup> RIDE Reg. § 300.309(a)(2).

<sup>51</sup> RIDE Reg. § 300.309(a)(3).

<sup>52</sup> RIDE Reg. § 300.307-§ 300.311; *See also* RI Dept. of Elementary & Secondary Education, INTERIM GUIDANCE REGARDING SERVICE DELIVERY AND LEARNING DISABILITY IDENTIFICATION: POST-IDEA REAUTHORIZATION, PENDING-RHODE ISLAND REGULATION REVISION, 3<sup>RD</sup> EDITION (June 2006) (available at <http://www.ritap.org/rti/content/interim%20guidance.pdf>) (hereafter, "Interim Guidance"); Rhode Island Technical Assistance Project website at <http://www.ritap.org/rti>.

- (1) Have interventions (of appropriate type, progression, and intensity) been implemented with "fidelity"<sup>53</sup>?
    - The team needs information to answer this question, including documentation from multiple instructional and behavioral interventions of the student's rate of learning, gaps between the student's performance and expectations, and the intensity of instruction required — all within the context of the student's learning environment.<sup>54</sup>
    - If sufficient information has not yet been gathered, the team needs to decide what precisely needs be done before determining whether or not there is a suspicion of a disability.
  - (2) Given the student's responses to interventions, is it suspected that the student might have a disability? If not, the team will consult and continue supports within general education. If yes, they will consider with any additional evaluations are necessary before proceeding to the next step.
- Is there a Specific Learning Disability?:
- (1) Does the evidence indicate that the student does not achieve adequately for the child's age in at least 1 of 8 areas of language, reading, writing, and math?<sup>55</sup>
  - (2) Is the primary cause for this student's distinct needs something other than a "specific learning disability"?
    - Primary causes that must be ruled out include: a visual, hearing, or motor disability; mental retardation; emotional disturbance; cultural factors; environmental or economic disadvantage; or Limited English proficiency.<sup>56</sup> In addition, the underachievement cannot be due to a lack of appropriate instruction in reading or math.<sup>57</sup>
- **REMEMBER:** Even if a child is found to have a "Specific Learning Disability," his or her need for special education services will still need to be demonstrated in order for the child to be found eligible for such services.

Do not feel overwhelmed. The words and concepts in this area are unclear at best, and we do not know what sort of resources will be provided to achieve all of the classroom assessment and interventions mandated by this process. You will quite likely hear professionals and others talk about "scientifically based interventions," "evidence based determinations," and "evaluative data."<sup>58</sup> These are all just ways of

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<sup>53</sup> RIDE Reg. § 300.311(a)(8).

<sup>54</sup> The child and his or her academic performance and behavior must be observed in the child's learning environment (including the regular classroom setting). RIDE Reg. § 300.310.

<sup>55</sup> Note that, in its Interim Guidance, RIDE's position is that the child's needs in one or more of these eight areas will need to be greater than 90% to 95% of age appropriate peers.

<sup>56</sup> RIDE Reg. § 300.309(a)(3).

<sup>57</sup> RIDE Reg. § 300.309(b).

<sup>58</sup> Response To Intervention emphasizes the use of tests and methods which have been statistically researched, which explains the emphasis on being "scientifically based." Just be aware that the response



saying that the new approach requires that teachers gather evidence from classroom performance and tests that shows that the child is not learning appropriately; however, this does not necessarily explain how that will be done or more importantly who will provide the time, money, and personnel to gather all of this information. As a result, the true implications of the "Response To Intervention" approach are simply not clear at this time.

There are still a few things you can take away from this discussion. First, while a child may be required to remain in the regular classroom longer as a result of this new approach, you still have the right to question the school and to initiate a due process hearing if the LEA refuses to make an evaluation or you disagree with the ultimate outcome of an evaluation. Second, a LEA must document the methods used in making a determination and the ultimate basis of that determination.<sup>59</sup> In other words, a school should be able to explain why it has determined that a child does not have a specific learning disability for purposes of IDEA, and it should be able to provide the data they used to come to that conclusion. If you are not satisfied with the responses given or actions taken, you have the right to challenge the LEA. In addition, the school should have a plan to address the child's needs in the classroom.<sup>60</sup> Finally, Response to Intervention does not prevent a formal request for evaluation, and that request must stick to the same timeline as any other formal evaluation.<sup>61</sup> **Response to Intervention should not be used as a delay tactic.**

### **C. CREATION OF AN "INDIVIDUALIZED EDUCATION PROGRAM"**

If the entire purpose of special education is to allow all children, regardless of the way they learn, to receive a free public education ("FAPE"), then the Individualized Education Program (referred to in this section as the **IEP**) is the centerpiece of the special education process. The IEP sets out goals, accommodations, and educational strategies specifically designed to meet the needs of the particular children in the **least restrictive environment** possible. The IEP is the blueprint off of which educators and administrators must work as they attempt to meet a particular special education student's needs. The IEP is an important tool for protecting the rights of special education students because the LEA and its educational professionals are required to follow it. As a parent, student, teacher, or educational professional, you should be particularly concerned that a student's IEP is clear and appropriate.

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to intervention approach may require more tests and changes in the general education classroom before a child can be determined learning disabled.

<sup>59</sup> RIDE Reg. § 300.311.

<sup>60</sup> RIDE Reg. § 300.311(a)(7) ("If the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, [the eligibility determination documentation must include] recommendations for tailoring instruction and interventions to support the child's progress"); RIDE Reg. § 300.311(a)(8)(ii)(A).

<sup>61</sup> RIDE Reg. §§ 300.309(c) & 300.309(a)(8)(C). See also The National Center for Learning Disabilities, A PARENTS GUIDE TO RESPONSE-TO-INTERVENTION ([http://www.ncld.org/images/stories/downloads/parent\\_center/rti\\_final.pdf](http://www.ncld.org/images/stories/downloads/parent_center/rti_final.pdf)) (containing a general discussion of the Response to Intervention approach and the continuing protections under IDEA).

## 1. IEP Content

The idea behind an IEP is to provide a clearly written plan to be followed by all of the teachers and professionals involved in the education of a child with special needs. By using the required team approach, various professional and personal perspectives can be represented in the IEP. In addition, the IEP ensures that a special needs student is consistently provided with the free appropriate public education to which she/he is entitled. REMEMBER: The public agency must give the parent a copy of the child's IEP at no cost to the parent and not later than ten (10) calendar days after an IEP has been developed for the child and after the receipt of a request for a copy of the IEP.<sup>62</sup>

The contents of a student's IEP can be broken into three general areas: (1) Current Status, (2) Goals, and (3) Strategies. In other words, where is the student now, what is the student trying to achieve, and how will the student get there? You should avoid the temptation to focus exclusively on any one area of the IEP because each area has a significant impact on the circumstances of a student's education. The IEP team should take the time to address each of these areas with care.

- Current Status: An IEP should contain a description of a student's present levels of academic achievement and functional performance, including how the child's disability affects the child's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled children).<sup>63</sup> This area of the IEP will play a prominent role moving forward. The specific needs and goals of a particular child may affect the services for which that child is eligible, the degree to which that child is afforded testing accommodations, whether that child can be suspended or expelled, and many other issues. Importantly, this area of the IEP should also explain clearly how a child's disability affects her/his ability to function in the regular classroom environment, which in turn will affect the degree to which a child can be removed from the general education population. In other words, the current status portion of the IEP should give relatively clear guidance on what constitutes the least restrictive environment for that child.

The current status of the child *does not* necessarily require a description of a child's specific disability or diagnosis. The focus should be not on the label or diagnosis, but on the particular needs of the child. Does the child have difficulty communicating verbally? Does the child have difficulty maintaining attention? Does the child have particular skills and talents that should be encouraged or that help the child to overcome deficits, for instance computer skills or musical ability? **Remember, the IEP is not a medical document, but rather an educational tool. An IEP may be made available to a wide group of people, and you may not want to release irrelevant private details to such a broad group.** Think about what information will be necessary for an educator to do her/his job, and include only that information.

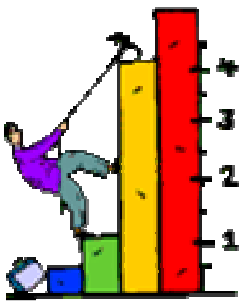
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<sup>62</sup> RIDE Reg. § 300.322(f).

<sup>63</sup> RIDE Reg. § 300.320(a)(1).

Certain medical information may be necessary to facilitate education at school, particularly medical conditions that may require attention during school hours. Other information may be irrelevant and should not be included in an IEP.

- **Goals:** An IEP must clearly state measurable annual goals, including academic and functional goals and short-term objectives of the particular student's program, aligned (where applicable) to the child's personal literacy and individual learning plan.<sup>64</sup> What do you hope to achieve with this IEP? The word "benchmarks" is often used when discussing this area of an IEP. This is just another way to say that an IEP must describe how the child's progress towards meeting the annual goals will be measured.<sup>65</sup> For instance, if an IEP sets a goal of achieving "minimum proficiency" in reading, it should also explain how to measure minimum proficiency.



You should remember a couple of things about this. First, do not be afraid to ask exactly how a goal will be tested. Will the child read aloud? Will the child's memory be tested? Who will do the "grading?" Second, not every goal can be tested precisely against a benchmark, or at least not easily. If one of your goals involves interpersonal skills, *e.g.* eye contact during conversation, this is not necessarily measured using a precise standard. Instead, you may need to rely on subjective evaluations. While annual goals should be measurable in some way, you should not be dissuaded from including a goal you feel is important in an IEP just because it is not easy to measure. Be creative, and work with the IEP team to find a way to measure it.

The IEP must also include a description of when and how periodic reports on the progress the child is making towards annual goals will be provided — *e.g.*, through the use of quarterly or other periodic reports, concurrent with the issuance of report cards, etc..<sup>66</sup>

- **Strategies:** Teachers, administrators, and other professionals will need to know how to achieve the goals described in an IEP. The IEP should describe exactly how the particular student's educational plan will be different from what is provided in the general education context. It must include a statement of the special education and related services, the supplementary aids and services, and the program modifications or supports that will be provided to the particular child.<sup>67</sup> In addition, the IEP should describe the degree to which

<sup>64</sup> RIDE Reg. § 300.320(a)(2).

<sup>65</sup> RIDE Reg. § 300.320(a)(3)(i).

<sup>66</sup> RIDE Reg. § 300.320(a)(3)(ii).

<sup>67</sup> RIDE Reg. § 300.320(a)(4).

the student will be provided services outside of the regular education classroom.<sup>68</sup>

In addition to explaining the kinds of educational strategies that will be provided, an IEP should explain who will provide those services. Some accommodations and teaching strategies may be implemented by a regular education teacher, while others may be provided by a special education teacher or another school professional like a speech or occupational therapist. It is important to spell out the responsibilities of the various school personnel that will be involved in implementing the IEP.

When considering what strategies to implement, it is important to remember that different accommodations and strategies will require different degrees of detailed explanation. For instance, a speech therapy program might be described in general terms that relate to the goal, like improving pronunciation. On the other hand, something like a test taking accommodation may need to be described in some detail. This will vary greatly depending on the kind of strategy or accommodation and the specific goal. If there is something specific which you feel that teachers and professionals should be doing, it should be spelled out in the IEP.

**Assistive technology** needs should also be clearly addressed in the IEP. An assistive technology device is any item, piece of equipment, or product system that is used to increase, maintain, or improve a child's functional capabilities.<sup>69</sup> Everything from a computer that helps a child communicate to devices that assist a child in eating might fall into this assistive technology category.<sup>70</sup> The IEP should be specific about exactly what devices are needed, and exactly when and how they are to be used. In addition, the IEP should provide for assistive technology services where appropriate. Such services directly assist a child with a disability in the selection, acquisition, or use of an assistive technology device, and can include training or technical assistance for a child, his/her family, and other individuals who provide services to or are otherwise substantially involved in the major life functions of the child.<sup>71</sup>



## 2. The IEP Team

The IEP team is the group of people who will work together to create the IEP. Federal and state regulations specify who must be a member of the IEP team, though a certain degree of flexibility is built in. Essentially, the law sets out the minimum

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<sup>68</sup> RIDE Reg. § 300.320 (a)(5).

<sup>69</sup> RIDE Reg. § 300.5.

<sup>70</sup> Note that the definition of "assistive technology" specifically excludes surgically implanted medical device or the replacement of such a device.

<sup>71</sup> RIDE Reg § 300.6.

requirements, but you may choose to exceed those requirements by including additional people in your team.

Generally, a student's IEP team must include at least the following people:

- ✓ The student's parent(s).
- ✓ At least one regular education teacher.
- ✓ At least one special education teacher (or representative of the relevant special education provider).
- ✓ A qualified LEA representative who is: (a) knowledgeable about the availability of the LEA's resources; and (b) has the authority to commit those resources.
- ✓ The child, when appropriate.<sup>72</sup>

In certain cases, the above IEP Team Members can be excused from attending all or part of an IEP meeting. However, such an excusal can only occur with a parent's written consent.<sup>73</sup> More specifically, if his or her area of the curriculum is not being modified or discussed at the meeting, a member can be excused if the parent and the LEA agree, in writing, that the attendance of the member is not necessary. If his or her area of the curriculum is being modified or discussed, an IEP team member must also submit, in writing to the parent and the IEP team, input into the development of the IEP prior to the meeting.<sup>74</sup> **Parents should think very carefully before they consent to the excusal of an IEP team member.**

In addition, other individuals who have knowledge or special expertise about the student can be included in the IEP team at the discretion of the parent or the LEA.<sup>75</sup> For example, you might choose to include more than one special education or regular education teacher. You also may choose to include people who may not fit any of the above descriptions, like a speech therapist. Depending on the needs of the student, it may be appropriate to have a nurse or other medical professional on the IEP team. The question of who should be on a particular student's IEP team is highly individualized, and the makeup of the IEP team may change over time as the needs of the student change. You should remember that, while a LEA may be accustomed to certain types of teachers and professionals on an IEP team, **almost anyone can be on an IEP team.**

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<sup>72</sup> RIDE Reg. § 300.321(a). Note that, in the case of an IEP team meeting about evaluation results, the IEP team must include an individual who can interpret the instructional implications of those results. In the case of an IEP team meeting to consider school-to-post-school transition services, the IEP team must include a representative of the agency that is likely responsible for providing or paying for transition services (provided parent or adult child consents). See RIDE Reg. § 300.321(b)(3).

<sup>73</sup> Although the RIDE Regulations are silent on when this written consent must be obtained, better practice would be for an LEA to obtain it before the meeting otherwise it could inconvenience all involved. The parent always has the right to object to the convening of an IEP meeting when the essential IEP members are not present and to request that a new IEP meeting be scheduled within 10 school days.

<sup>74</sup> RIDE Reg. § 300.321(e).

<sup>75</sup> RIDE Reg. § 300.321(a)(6).

### 3. IEP Meetings

IEP meetings, in which members of the IEP team get together to discuss the creation or modification of the program itself, should occur on a reasonably regular basis, and at least annually.<sup>76</sup> The frequency within which IEP meetings should occur will be related to the needs of the particular student. If a student is making significant progress over a short period, it may be necessary to meet quite often. The same may be true if a student is making little or no progress or is regressing. On the other hand, many students will progress as predicted, and IEP meetings will be less frequent.

Attendance at IEP meetings may also be variable. Some meetings may pertain to an issue for which a particular team member's skills are not relevant. For instance, a speech therapist may not need to attend a meeting which will focus entirely on transportation issues. In addition, as stated above, a team member may be excused from attendance and given the opportunity to participate by written input through a letter or report. However, such excusals from an IEP meeting require the written consent of the parent and LEA.<sup>77</sup>

The LEA is required to notify parents in writing of an upcoming IEP Team meeting at least ten (10) school days prior to the meeting and must hold the meeting at a time and place which is mutually agreed upon.<sup>78</sup> Parents should challenge any assertion by the school or LEA that an IEP meeting must be held at a particular time regardless of the parents schedule or because of the inconvenience of rescheduling. However, an IEP meeting may be conducted without a parent in attendance if the LEA is unable to convince the parents that they should attend and has a record of its attempts to arrange a mutually agreed on time and place.<sup>79</sup>

In addition to ensuring that one or both parents have an opportunity to attend IEP meetings, the LEA must also take whatever steps necessary to ensure that parents can participate<sup>80</sup> and understand the proceedings of the IEP meeting.<sup>81</sup> If a student's parents need an interpreter, the school *must* provide them with one at the meeting. Parents—and often the students—are important decision making members of the IEP team. To help make decisions, they will need to understand what is going on at IEP team meetings and be able to ask questions and have them answered. They are participants rather than mere spectators, so should not be shy about asking questions or asking for the accommodations necessary to fully participate in the meeting.

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<sup>76</sup> LEAs are required to ensure that the IEP team review the child's IEP "periodically, but not less than annually, to determine whether the annual goals for the child are being achieved and . . . [r]evises the IEP, as appropriate." RIDE Reg. § 300.324(b)(1).

<sup>77</sup> RIDE Reg. § 300.321(e). See footnote 68.

<sup>78</sup> RIDE Reg. § 300.322(a). The notice must state purpose, time, and location of meeting. It must also state who will be in attendance and inform parents that other individuals with knowledge or special expertise about the child can be invited to the meeting. See RIDE Reg. 300.322(b).

<sup>79</sup> RIDE Reg. § 300.322(d).

<sup>80</sup> RIDE Reg. § 300.322(a) & (c).

<sup>81</sup> RIDE Reg. § 300.322(e).

Parents (and LEAs) can request IEP meetings to review a student's IEP. When such a request occurs, the IEP meeting must be scheduled by the LEA within ten (10) school days of the request, although parents can agree to waive this 10 school day meeting requirement if such parental waiver is documented by the LEA.<sup>82</sup>

#### 4. IEP Changes

A student's IEP may need to be changed from time to time to reflect progress that a student has made or new needs or situations which arise during the educational process. There are two ways in which an IEP may be changed.<sup>83</sup>

- 1) An IEP may be changed by the entire IEP Team during an IEP Team meeting.
- 2) An IEP can be amended after the annual IEP Team meeting without convening an IEP Team meeting, provided the parent and the LEA agree. In such a situation, the parent and the LEA develop a written document to amend or modify the child's current IEP. The LEA must ensure that the child's IEP Team is informed of the agreed-to changes. Upon request, a parent must be provided with a revised copy of the IEP with the amendments incorporated.

#### 5. Least Restrictive Environment

A major concern when developing a student's IEP is the degree to which a student will be educated outside the regular classroom environment. Federal and state special education law requires that students be educated in the **least restrictive environment ("LRE")** possible.<sup>84</sup> An LEA must ensure, to the maximum extent appropriate, that children with disabilities are educated with children that are not disabled. In addition, removal from a regular education environment can only occur if the nature or severity of the student's disability is such that his or her education cannot be satisfactorily achieved in that environment — even with the use of supplementary aids and services.<sup>85</sup> While the concept of least restrictive environment is relatively straightforward, disagreements often arise about what constitutes the least restrictive environment in any particular case. It is important to remember that the state special education regulations set up a "continuum" of special education placements and services that run from full time placement in a regular education classroom to placement in a residential school focused on special education.<sup>86</sup>

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<sup>82</sup> RIDE Reg. § 300.324(a)(3)(iii).

<sup>83</sup> RIDE Reg. § 300.324(a)(4) & (6).

<sup>84</sup> RIDE Reg. § 300.114. Please note that an exception is provided for children with disabilities in adult prisons. See RIDE Reg. §§ 300.114 and 300.324(d)(2).

<sup>85</sup> RIDE Reg. § 300.114(b).

<sup>86</sup> RIDE Regs. §§. 300.115, 300.115(A), 300.115(B), and 300.115(C).

## D. PLACEMENTS

Placements are typically addressed under the auspices of Least Restrictive Environment (LRE).<sup>87</sup> When children cannot be taught in a regular education environment, LEAs must provide children with disabilities alternate placements that meet their needs.<sup>88</sup> These alternate placements include homebound or hospital instruction.<sup>89</sup>

To determine the placement of a child with a disability every LEA must make certain that the following occurs. First, the placement decision must be made by an IEP team that includes parents and other people knowledgeable about the child and is made in conjunction with the LRE requirements.<sup>90</sup> And second, that the placement is determined at least annually, is based on the child's IEP and is as close to home as possible.<sup>91</sup> You **always** have the right to challenge a change of placement for an otherwise eligible child with a disability. And, the LEA is required to provide you with written notice ten (10) days before the child's placement is changed.<sup>92</sup>

Example: A child could live in the City of Providence, but attend school at a placement in another City or Town, or in another state.

Example: When a child is placed in one school in a city or town, but then is moved to a different school in the same city or town, this may be a change in placement, if the new school is not providing the identical special education and related services described in the IEP. Some LEAs refer to this as a "change in venue," but no such terminology exists in IDEA. All of the procedural requirements, as mentioned later in this Handbook, apply to any change of placement, and you may challenge a placement change regardless of the school's definition of the change.

Also, the issue of graduation and the requirements for graduation are issues which may arise from time to time in the context of placement. The key thing to remember is that graduation of a child who would otherwise continue to be eligible for services under IDEA is a **change of placement**.<sup>93</sup> It is important to remember that children who are not eligible to graduate may still be awarded a certificate and be allowed to participate in graduation ceremonies *and* continue to receive a free appropriate public education until they reach the age of 21.<sup>94</sup> The bottom line is that you may be sent a notification by the school that a child will be graduating, which will be accompanied by a copy of the procedural safeguards discussed later in this handbook.

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<sup>87</sup> RIDE Reg. § 300.114.

<sup>88</sup> RIDE Reg. § 300.115.

<sup>89</sup> RIDE Reg. § 300.115(C).

<sup>90</sup> RIDE Reg. § 300.116(a).

<sup>91</sup> RIDE Reg. § 300.116(b).

<sup>92</sup> RIDE Reg. § 300.503.

<sup>93</sup> RIDE Reg. § 300.102(a).

<sup>94</sup> RIDE Reg. § 300.101(a)(i).



If you believe that your child is not an appropriate candidate for graduation, you should *act immediately* to challenge the local education agency's determination.<sup>95</sup>

## **E. "PROCEDURAL SAFEGUARDS": DISPUTE RESOLUTION**

This section of the handbook deals with what to do when you disagree with the LEA regarding special education. **Remember, the most important step for protecting your rights is to know what those rights are.** The substance of most rights afforded under IDEA and state special education law can be found in the various sections of this handbook.

This section deals with one kind of right: the right to have your disagreement addressed and, if necessary, to have it addressed by a neutral decision maker. To reiterate, "Procedural Safeguards" refers to the procedures and rules which allow a parent, child, or appropriate interested party, to notify the LEA of a concern, to ask that a concern be addressed, and if necessary to ask that a neutral decision maker decide the issue.

There is a perfectly natural tendency among parents and students to focus on Procedural Safeguards as the only means to satisfy their concerns. It is important to remember, however, that most Procedural Safeguards exist to resolve disputes which simply cannot be resolved by other means. While it is important to understand your procedural rights and to understand the formal process for resolving disputes, most problems may be able to be resolved informally through advocacy and compromise. Almost nobody who goes through a full blown due process hearing is eager to repeat the experience. It is time consuming, costly, and always carries the risk of uncertainty.

It is generally more desirable to resolve disputes before they reach the due process stage, unless the parties involved simply cannot be satisfied. Remember, the important dispute resolution tool you have is knowledge of your rights. A parent or student who knows her/his rights will be more persuasive, more efficient, and will be much more likely to get a mutually acceptable outcome before reaching the due process stage. That being said, exercising your right to an impartial due process hearing may be the only means to achieve a free appropriate public education for your child. If you have been an effective advocate and you reach the due process stage, you will be well prepared because you will be familiar with the dispute and the substance of your rights.

Procedural safeguards follow a very ordered timeline. It is important to remember that the system of notices, hearings, and deadlines set out under IDEA for Procedural Safeguards **are not generally flexible**. Once the process is initiated, it will move forward in compliance with the timeline set out under IDEA. If at all possible, **you should be clear about your goals, your evidence, and the availability of resources before you initiate a due process complaint.**

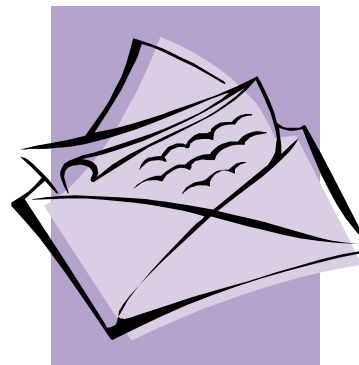
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<sup>95</sup> RIDE Reg. § 300.102(a)(i).

## 1. Procedural Safeguard Notice

A key piece of the due process requirements in IDEA is that schools must inform parents and students about their rights to complain and to have their complaints heard. This notice must contain a full explanation of the Procedural Safeguards discussed in this section and must include an explanation of all the rights and procedures afforded to parents under this area of IDEA.<sup>96</sup> This notice must contain information about rights regarding:

- Independent educational evaluations
- Consent
- Prior written notice
- Access to educational records,
- Due process hearings and appeals,
- Deadlines for making complaints,
- Availability of mediation,
- "Stay Put"
- Interim Alternative Educational Settings,
- Requirements for unilateral placement by parents of children in private schools at public expense,
- Requirements for disclosing evaluation results and recommendations
- Civil actions
- State special education complaints
- Attorneys' fees.<sup>97</sup>



The notice must be in understandable language and provided in the parent's native language, unless it is clearly not feasible to do so.<sup>98</sup>

A copy of the notice of Procedural Safeguards must be given to a parent at least one time each school year.<sup>99</sup> However, a copy must be given to the parents at each of the following times:

- Upon initial referral or a parent's request for evaluation for IDEA eligibility
- Upon receipt of the first State Special Education Complaint in a school year
- Upon receipt of the first due process complaint in a school year

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<sup>96</sup> RIDE Reg. § 300.504(c).

<sup>97</sup> RIDE Reg. § 300.504(c).

<sup>98</sup> RIDE Reg. § 300.504(d) (incorporating understandable language requirements of 500.503(c)). Please note that if the native language or other mode of communication of the parent is not a written language (e.g., American Sign Language), the LEA must take steps to ensure that the notice is translated orally or by other means to the parent in his or her native language or other mode of communication and that the parent understands the content of the notice. The LEA must have written evidence that such steps have been met. See RIDE Reg. § 300.503(c)(2).

<sup>99</sup> RIDE Reg. § 300.504(a). A parent may elect to receive notices by e-mail, if the LEA makes that options available. RIDE Reg. 300.505.

- Upon a decision to change the placement of a student because of a violation of a code of student conduct<sup>100</sup>
- Upon a request by a parent<sup>101</sup>

A LEA may place a copy of its Procedural Safeguard notice on its internet website.<sup>102</sup>

## 2. Mediation

Parents and schools have the option of using mediation to resolve disputes regarding any special education matter.<sup>103</sup> Mediation is not a step in the due process timeline, but rather a separate tool for resolving disputes.

Mediation is voluntary for all parties. If the parties choose this dispute resolution option, RIDE will appoint a qualified and impartial mediator who is trained in effective mediation techniques and is knowledgeable of the laws and regulations relating to the provision of special education services. During such mediation, the parents sit down with the mediator (a neutral third party) and a representative of the LEA and attempt to reach a legally binding agreement. Remember, mediations are voluntary. If an LEA representative brings his or her attorney to the mediation, and you do not have a lawyer and are uncomfortable proceeding with the mediation unrepresented, you can elect not to proceed with the mediation.

A parent/child may request mediation by contacting RIDE or the local education agency. Mediation cannot be used to deny or delay a parent/child's right to a due process hearing. If resolution is achieved, a written mediation agreement will be made that is enforceable in court. Mediation can occur at almost any time during the due process timeline, including before due process has been filed. A parent can request mediation at the same time that they file for due process. The due process timeline may be able to be delayed to allow for mediation, if both parties agree in writing to continue the mediation beyond the typical 30-day "resolution period."<sup>104</sup> However, the due process timeline should be regarded as virtually set in stone and should not be initiated unless a parent is prepared to follow that timeline.

It is important to remember that mediation requires willingness to compromise on both sides of a dispute. It will be a waste of time to attempt mediation if either side cannot be dissuaded from what each view as the ideal outcome. In a successful mediation, everybody typically leaves with some things they like and some things they do not like. Mediation also requires honesty, and, by law, everything said or disclosed during a mediation session is confidential and cannot be used as evidence in any subsequent due process hearing or civil proceeding.<sup>105</sup>

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<sup>100</sup> RIDE Reg. §§ 300.504(a)(3) & 300.530(h).

<sup>101</sup> RIDE Reg. § 300.504(a)(4).

<sup>102</sup> RIDE Reg. § 300.504(b).

<sup>103</sup> RIDE Reg. § 300.506.

<sup>104</sup> RIDE Reg. § 300.510(c)(3).

<sup>105</sup> RIDE Reg. § 300.506(b)(7).

### 3. **Due Process Complaint**

#### a. **Form & Deadlines**

A parent/child or a school system can request a due process hearing to resolve any matter relating to the identification, evaluation or educational placement of the student, or the provision of a free appropriate education (FAPE) to the student.<sup>106</sup> The due process complaint must be filed within two years of the date the parent/child or school knew or should have known about the problem that is the basis for the complaint.<sup>107</sup> A complaint must contain the name of the student, the address of the student's residence, the name of the school the student is attending, a description of the problem (including the facts relating to the problem), and a proposed resolution of the problem.<sup>108</sup> The complaint must be filed with RIDE, and the school must be given notice of the complaint. RIDE will appoint an impartial hearing officer to hear the complaint.

Information about and a model form for requesting a due process hearing can be obtained from RIDE, Office of Special Needs, 255 Westminster Street, Providence, RI 02903, 401- 222-3505; [http://www.ride.ri.gov/Special\\_Populations/Dispute\\_resolution](http://www.ride.ri.gov/Special_Populations/Dispute_resolution).

#### b. **The Stay Put Rule**

Under IDEA, a student's placement generally may not be changed pending an impartial due process hearing unless the parents *and* the LEA consent to the change.<sup>109</sup> This means that once you file for a due process hearing, your child's IEP cannot be substantially altered to affect the child's placement. It also means that you will not be able to change your child's placement without the LEAs consent before the issue has been resolved.

Exceptions to this Stay Put Rule include:

- (1) If the due process complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.<sup>110</sup>
- (2) If the complaint involves an application for special education services from a child who is transitioning from early intervention services because of his or her age, the LEA is not required to continue to provide the early intervention

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<sup>106</sup> RIDE Reg. § 300.507(a)(1).

<sup>107</sup> RIDE Reg. §§ 300.507(a)(2) & 300.507(e). Exceptions may be made to this deadline if the parent was prevented from requesting a hearing due to a specific misrepresentation by the local education agency that it had resolved the problem that was the basis for the complaint or if the local education agency withheld information it was required to provide the parent under IDEA. See RIDE Reg. 300.511(f).

<sup>108</sup> RIDE Reg. § 300.508(b).

<sup>109</sup> RIDE Reg. § 300.518.

<sup>110</sup> RIDE Reg. § 300.518(b).

services that the child was receiving, but must provide any special education and related services that are not the subject of the dispute.<sup>111</sup>

- (3) Unless the parent and the SEA or LEA agree otherwise, when a parent appeals an initial decision regarding a child's emergency removal from school, placement in an interim alternative education (IAE) setting, or a related manifestation determination, the child must remain in the IAE pending the decision of the hearing office or until the expiration of 45 school days from placement in the IAE, whichever occurs first.<sup>112</sup>

### **c. Resolution Process**

A "**resolution meeting**"<sup>113</sup> is a generally required piece of the due process procedure. The LEA generally must convene the resolution meeting within fifteen (15) days of receiving notice of a parent's due process complaint,<sup>114</sup> unless: (1) the parent and the LEA agree, in writing, not to have the meeting; or (2) the parent and the LEA agree to use the Mediation Process (section E.3 below) in lieu of the resolution meeting.<sup>115</sup> The purpose of the resolution meeting is for the parent to discuss the due process complaint, so that the LEA has the opportunity to resolve the dispute without the parties having to proceed to a due process hearing.<sup>116</sup> The resolution meeting includes the parent and the relevant member(s) of the IEP Team (determined by the parent and the LEA) who have specific knowledge of the facts identified in the due process complaint.<sup>117</sup> An LEA representative with decision-making authority must be present at the resolution meeting.<sup>118</sup> The LEA is not allowed to bring an attorney to a resolution session *unless* the parents bring an attorney.<sup>119</sup> If the LEA has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.<sup>120</sup>

If a resolution to the dispute is reached at the resolution meeting, the parties must execute a legally binding agreement (a written settlement agreement) spelling out the terms of the resolution. This agreement is signed by both the parent and a duly authorized LEA representative. The agreement is enforceable in court.<sup>121</sup> However, *even if* such a document is executed, either party — *i.e.*, the LEA or the parent — may void (cancel) the agreement within three (3) business days of the agreement's execution.<sup>122</sup>

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<sup>111</sup> RIDE Reg. § 300.518(c).

<sup>112</sup> RIDE Reg. § 300.533.

<sup>113</sup> RIDE Reg. § 300.510.(a).

<sup>114</sup> RIDE Reg. § 300.510(a)(1).

<sup>115</sup> RIDE Reg. § 300.510(a)(3).

<sup>116</sup> RIDE Reg. § 300.510(a)(2).

<sup>117</sup> RIDE Reg. § 300.510(a)(1).

<sup>118</sup> RIDE Reg. § 300.510(a)(1)(i).

<sup>119</sup> RIDE Reg. § 300.510(a)(1)(ii).

<sup>120</sup> RIDE Reg. § 300.510(b)(1).

<sup>121</sup> RIDE Reg. § 300.510(d).

<sup>122</sup> RIDE Reg. § 300.510(e).

#### **d. Impartial Due Process Hearing**

The impartial due process hearing is the culmination the due process protections afforded under IDEA. An impartial due process hearing affords each side the opportunity to present evidence through witnesses and to confront the witnesses presented by the opposing side. Indeed, the due process hearing will look very much like a civil trial, with a hearing officer acting as a judge and with each side often represented by a lawyer. The procedures may be less formal, and there will never be a jury, but the setup is much the same. This is a benefit for parents because they get protections and rights similar to a trial:

- The right to be accompanied and advised by a lawyer<sup>123</sup>
- The right to present evidence<sup>124</sup>
- The right to confront, cross-examine, and compel the attendance of witnesses<sup>125</sup>
- The right to an impartial hearing officer<sup>126</sup>
- The right to a written or (at the option of the parents) electronic record of the hearing provided at no cost to the parents<sup>127</sup>
- The right to "findings of fact" and a written explanation of the decision provided at no cost to the parent<sup>128</sup>
- The right to appeal using the written record and decision<sup>129</sup>
- The right to have a child who is the subject of the hearing present<sup>130</sup>
- The right to open the hearing to the public.<sup>131</sup>

Along with these rights come certain important responsibilities. Before you file for a due process hearing you should ensure that you:

- Contact a lawyer *before* you file, if you plan to be represented by a lawyer
- Know exactly what resolution you are seeking
- Have all the appropriate evaluations and recommendations ready for use
- Know exactly who you would like to have testify (including your experts).
- Be familiar with all applicable timelines and procedures

This advance preparation is all the more important given a significant disclosure requirement that must occur before a due process hearing. At least five (5) business days prior to a due process hearing, each side (the parent and the LEA) is required to disclose to the other side all evaluations they plan to present at the hearing, along with

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<sup>123</sup> RIDE Reg. § 300.512(a)(1). Parties also have the right to be accompanied and advised by "individuals with special knowledge or training with respect to the problems of children with disabilities." *See id.*

<sup>124</sup> RIDE Reg. § 300.512(a)(2).

<sup>125</sup> RIDE Reg. § 300.512(a)(2).

<sup>126</sup> RIDE Reg. § 300.511(c).

<sup>127</sup> RIDE Reg. §§ 300.512(a)(4) and 300.512(c)(3).

<sup>128</sup> RIDE Reg. §§ 300.512(a)(4).and 300.512(c)(3).

<sup>129</sup> The next section discusses appeals more thoroughly.

<sup>130</sup> RIDE Reg. § 300.512(c)(1).

<sup>131</sup> RIDE Reg. § 300.512(c)(2).

any recommendations based on those evaluations.<sup>132</sup> Keep in mind that there are serious consequences to not complying with such disclosure requirements. A hearing officer may prevent either side from using evaluations, recommendations, and any other evidence that has not been properly disclosed in advance of the hearing, unless the other party consents to its use.<sup>133</sup> Parents must be prepared in advance with the evaluations and recommendations that they plan to present at the hearings. It is yet another reason to assess your preparedness before you file a complaint.

**The due process system under IDEA is like an express train: once you get it rolling it will rarely stop until you've reached the destination.** There are strict deadlines incorporated into federal and state special education regulations (including deadlines by which hearing officer must issue his or her decision)<sup>134</sup> that may make hearing officers reluctant to grant continuances or delay the due process proceeding.

**e. Appeal to State/Federal Court**

Any party aggrieved by the decision of a due process hearing officer may bring a civil action in state or federal court. You should consult with an attorney experienced with education law about the appropriate statute of limitations for filing your appeal.



**F. OTHER DISPUTE RESOLUTION TOOLS:**

There are procedures available to parents that are outside of the above-described due process procedure and timelines.

**1. State Special Education Complaint**

A person or an organization may file a written, signed complaint with RIDE when a school has violated a special education requirement of IDEA or the state special education regulations.<sup>135</sup> RIDE must receive the complaint within one year of the time when the violation occurred. In some circumstances, a complaint may be accepted after that date if the violation is continuing. A copy of the complaint should be provided to the school serving the child. Generally, within 60 days of receiving the complaint, RIDE will investigate and issue written findings and conclusions. In its decision, RIDE may order the school to take corrective action to address the needs of the child and to ensure appropriate future services to all children with disabilities. Under existing RIDE regulations, RIDE may authorize compensatory services for a violation that occurred within the three years prior to the complaint being received.

<sup>132</sup> RIDE Reg. § 300.512(b)(1).

<sup>133</sup> RIDE Reg. §§ 300.512(a)(3) & 300.512(b)(2).

<sup>134</sup> RIDE Reg. §§ 300.510(c) & 300.515(a).

<sup>135</sup> RIDE Reg. §§ 300.151-300.153.

This kind of special education complaint is easily used when you as a parent or student feel that the LEA has failed to provide a required procedure or service. For example, if you believe that the LEA has refused to call an IEP meeting when they are required to do so, this may be an appropriate tool to use. Similarly, if an IEP states that a child should receive a particular service three times, a week but the school has only been providing it once a week, filing a Special Education Complaint may be appropriate. However, it is important to remember that this tool is outside of the due process procedures discussed above (i.e., due process complaints and state special education complaints are not the same). You will not get a hearing as a result of filing this complaint. Instead, a special education complaint will initiate a RIDE internal review of the actions or inaction of the local LEA.

Information about the special education complaint procedure can be obtained from RIDE, Office of Special Needs, 255 Westminster Street, Providence, RI 02903-3400, (401) 222-3505; [http://www.ride.ri.gov/Special Populations/Dispute resolution/](http://www.ride.ri.gov/Special%20Populations/Dispute%20resolution/).

## **2. Interim Orders**

Under Rhode Island law, the Commissioner of Elementary and Secondary Education may also issue "Interim Orders"<sup>136</sup> pending a hearing to ensure that a child receives an education in accordance with applicable state and federal laws and regulations. These hearings must be conducted within 5 working days of the request for relief and decided within 5 working days of the completion of the interim order hearing.

The interim order timeline can be considerably faster than a due process hearing timeline. You must remember, however, that interim orders are technically temporary. This means that a parent may still be required to go through a due process hearing even if the outcome is favorable. In practice, interim orders will often represent the final resolution of a dispute.

Requests for an interim order hearing should be directed to the Commissioner of Elementary and Secondary Education, Rhode Island Department of Education, Shepard Building, 255 Westminster Street, Providence, RI 02903-3400.

## **3. Commissioner Hearings<sup>137</sup>**

Rhode Island education statutes provide an opportunity for a hearing before the Commissioner of Elementary and Secondary Education regarding any dispute "arising under any law relating to schools or education." Commissioner hearings are entirely separate from IDEA and are available to all students and parents - not just those receiving special education services. Such hearings are most appropriate for issues outside the scope of the procedural safeguards afforded under IDEA or an issue that does not pertain directly to special education. Such issues might include anything from

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<sup>136</sup> R.I. Gen. Laws. § 16-39-3.2.

<sup>137</sup> R.I. Gen. Laws. §§ 16-39-1 to 16-39-4.



certain non-special-education-related disciplinary issues, to restraint issues, to transportation issues.

Requests for a hearing pursuant to these laws should be directed to the Commissioner of Elementary and Secondary Education, Rhode Island Department of Education, 255 Westminster Street, Providence, RI 02903-3400.

#### **4. United States Department of Education Office of Civil Rights**

The U.S. Department of Education, Office for Civil Rights (“OCR”) enforces rights under Section 504 of the Rehabilitation Act (“§504”) as well the Americans with Disabilities Act (“ADA”). Complaints received by OCR will be investigated, and OCR may order corrective action order as a result of its investigation.<sup>138</sup>

All students covered by IDEA will also be covered by §504.<sup>139</sup> OCR investigates some IDEA violations as §504 violations. For example, a LEA’s failure to provide services identified in an IEP can be treated as a violation of §504 FAPE requirements.<sup>140</sup> OCR will also accept complaints alleging procedural violations, lack of accessibility, failure to accommodate or modify rules, and other kinds of discriminatory treatment.

Complaints to OCR must generally be made within 180 calendar days of the alleged discrimination, unless the time for filing is extended by OCR for good cause.<sup>141</sup> You should also be aware that there may be shorter deadlines if you use an agency’s internal §504 grievance process first.

Complaints may be made using OCR’s electronic complaint form, found at <http://www.ed.gov/about/offices/list/ocr/complianceintro.html>. Complaints may be filed by e-mail, at [ocr@ed.gov](mailto:ocr@ed.gov). They may also be mailed or sent by facsimile to the regional OCR office, the Office for Civil Rights/Boston, U.S. Department of Education, 33 Arch St., Suite 900, Boston, MA 02110. Fax: (617) 289-0150, Phone: (617) 289-0111.

### **G. DISCIPLINE OF SPECIAL EDUCATION STUDENTS**

Federal and state special education laws place notable limitations on the way in which special education students may be disciplined. IDEA is particularly geared towards preventing the long term suspension or expulsion of special education students for disability-related behavior.

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<sup>138</sup> 34 C.F.R. §104.6

<sup>139</sup> 34 C.F.R. §104.3(l)(2)

<sup>140</sup> 34 C.F.R. §104.33 (b)(2)

<sup>141</sup> 34 C.F.R. §100.7

## 1. **Allowable Length of Suspension**<sup>142</sup>

### Disciplinary Removals for 10 Days or Less During a School Year

School personnel can remove a special education student who violates a code of student conduct from his or her current school placement for not more than 10 consecutive school days, if the removal is administered in the same manner as it would be to non-disabled student.<sup>143</sup> An LEA may not be required to provide services to a child with a disability during the first 10 school days of removal during a school year, if services are not provided to a child without disabilities who has been similarly removed.<sup>144</sup>

### Disciplinary Removals for More Than 10 Days During a School Year

Removing a special education student from his or her current placement for more than 10 school days for a violation of a code of student conduct is considered a "change of placement."<sup>145</sup> This change of placement occurs on the 11<sup>th</sup> day of a suspension or expulsion accumulated over a school year and is triggered again for each subsequent decision to further suspend the child for additional days. This "change of placement" triggers a variety of procedural safeguards:

- The parent must receive immediate notice of the decision to discipline the student and the applicable procedural safeguards.<sup>146</sup>
- A manifestation determination review must occur within 10 school days
- The child must receive services to the extent necessary to enable the child to appropriately progress in the general curriculum and advance toward achieving the goals set forth in the child's IEP.

### A Note Regarding Emergency Removals in Rhode Island

Under Rhode Island regulations, if school personnel determine that a child with a disability presents an immediate threat to him or herself or to others, the child may be removed from school for the remainder of the school day regardless of the number of days of suspension the child had already accrued during that school year.<sup>147</sup>

## 2. **The Manifestation Determination Review ("MDR")**

The MDR is attended by the LEA, the parent, and relevant members of the child's IEP Team. The MDR team must determine if the conduct in question was a manifestation of the child's disability, because it was either: (1) caused by or had a

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<sup>142</sup> RIDE Reg. § 300.530(b).

<sup>143</sup> RIDE Reg. § 300.530(b).

<sup>144</sup> RIDE Reg. §§ 300.101(d); 300.500(d)(3).

<sup>145</sup> RIDE Reg. § 300.536 and 300.530(d)(4).

<sup>146</sup> RIDE Reg. § 300.530(h).

<sup>147</sup> RIDE Reg. § 300.530(a)(2) & (3).

direct and substantial relationship to the student's disability; or (2) the direct result of the LEA's failure to implement the IEP.<sup>148</sup>

If the behavior is determined to be a manifestation of the child's disability, then the IEP Team must:

- (1) Either conduct a Functional Behavioral Assessment and implement a Behavioral Intervention Plan ("BIP"), or, if a BIP already exists, review the BIP and modify it, as necessary to address the behavior.
- (2) Return the child to the placement from which the child was removed, *unless* the parent and the LEA agree to a change of placement as part of the modification of the BIP *or* "Special Circumstances" (discussed below) warrant removal to an "interim alternate educational setting."<sup>149</sup>

Under "Special Circumstances,"<sup>150</sup> the LEA may remove a student to an "interim alternative educational setting" ("IAE") for not more than 45 school days, regardless of whether the child's behavior is determined to be a manifestation of his or her disability. There are three such Special Circumstances:

- (1) The child brings or possesses a weapon at school, on school premises, or to a school function;
- (2) The child knowingly possesses or uses illegal drugs, or sells or tries to sell a controlled substance, while at school, on school premises, or at a school function
- (3) The child has inflicted "serious bodily injury" (bodily injury which involves a substantial risk of death, extreme physical pain, obvious disfigurement, protected loss or impairment of the function of a bodily member, organ or mental faculty) upon another person while at school, on school premises, or at a school function.

If the behavior in question is determined not to be a manifestation of the child's disability, school personnel may apply the relevant disciplinary procedures to the child in the same manner and for the same duration as it would apply them to children without disabilities.<sup>151</sup> However, the child with a disability must continue to receive educational services, so that he or she can participate in the general education curriculum and progress towards meeting his or her IEP goals. Those services may be provided in an interim alternative educational setting, although it is the IEP Team who ultimately determines the appropriate educational services that will be provided and the IAE<sup>152</sup>

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<sup>148</sup> RIDE Reg. § 300.530(e).

<sup>149</sup> RIDE Reg. § 300.530(f).

<sup>150</sup> RIDE Reg. § 300.530(g).

<sup>151</sup> RIDE Reg. §300.530(c).

<sup>152</sup> RIDE Reg. §§ 300.530(d); 300.531.

### 3. **Appeal & Expedited Due Process Hearing**<sup>153</sup>

A parent who disagrees with any decision regarding a disciplinary "change of placement," IAE, or manifestation determination may appeal the decision by requesting a due process hearing. An LEA may also request such a hearing if it believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others. The hearing officer then has the authority to return the child to the placement from which he or she was removed or to order a change of placement of the child to an appropriate IAE for not more than 45 days if he or she determines that maintaining the current placement would be substantially likely to result in injury to the child or others.

There are some important differences between this type of due process hearing, and the one reviewed in Section E.2.

FIRST: This is an "expedited due process hearing."

- The timeline for the due process hearing officer to schedule an expedited hearing and render decision cannot must not exceed 10 business days from the receipt of the original hearing request, unless he or she grants an extension. Even if such a deadline extension is granted, it cannot exceed 45 calendar days from the receipt of the request.
- The parents and the LEA can agree in writing to either waive the resolution meeting or to use the mediation process. If they do not, the resolution meeting must occur within 7 days of receiving notice of the due process complaint, and, if resolution is not successful, the due process hearing must occur within 15 days of the receipt of the due process complaint.

SECOND: The child must remain in the IAE pending the decision of the hearing office or until the expiration of 45 school days from the placement in the IAE, whichever occurs first.<sup>154</sup>

## **PART III:** **RESTRAINT AND SECLUSION**

The Rhode Island Board of Regents for Elementary and Secondary Education's Physical Restraint Regulations ("Restraint Regulations") govern the use of physical restraint and crisis intervention<sup>155</sup> on all students in publicly funded elementary and

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<sup>153</sup> RIDE Reg. § 300.532.

<sup>154</sup> RIDE Reg. § 300.533.

<sup>155</sup> The Restraint Regulations list three types of restraint within its definition of "physical restraint/crisis intervention" — *i.e.*, "manual restraint" (defined as the use of physical intervention intended to hold a person immobile or limit his/her movement by using body contact only), "seclusion restraint," and

secondary education program (hereafter, "public education programs"),<sup>156</sup> including students served in general education and special education settings. These regulations can be found online at ([http://www.ritap.org/legal/inner/pdfs/ri\\_restraint\\_regs.pdf](http://www.ritap.org/legal/inner/pdfs/ri_restraint_regs.pdf)).

The stated purpose of the Restraint Regulations is to ensure that every student participating in a Rhode Island public education program be free from the unreasonable use of physical restraint and crisis intervention. Physical intervention and restraint should only be used as a crisis intervention for the purpose of preventing harm or injury, and not for the purpose of changing behavior in situations where no protection from harm or injury is needed.<sup>157</sup>

Be informed about the requirements set forth in these regulations and use them to help students enforce their rights to be free of inappropriate restraint at school and to have appropriately developed and implemented Behavioral Intervention Plans.

## **A. USE OF "PHYSICAL RESTRAINT/CRISIS INTERVENTION"**

The Restraint Regulations support the use of physical restraint without parental consent<sup>158</sup> **only in emergency circumstances**, where the school can document that deescalation techniques have been unsuccessful.

Per the Restraint Regulations, physical restraint/crisis intervention may be used only in the following circumstances:

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"chemical restraint" — the last two of which are specifically prohibited. See Restraint Rule 3.20. "Mechanical restraint" (defined in Restraint Rule 3.16 as the use of devices to limit a person's movement as an intervention precipitated by the person's behavior and intended to prevent self-injurious actions) may be considered to be a form of physical restraint, as well. The Restraint Regulations also give us an idea of what is not a physical restraint — *e.g.*, "Instructional Physical Guidance" (like hand-over-hand instruction in writing technique) (Restraint Rule 3.15) and "Time Out" procedures where a staff member remains accessible to the student (Restraint Rule 3.20). "Instructional Physical Guidance" is distinguished from "Forceful Physical Guidance," with the Regulations referring to the latter as "[a]n inappropriate response to a child's perceived misbehavior that consists of an adult/supervisory person physically forcing [the child] to engage in the desired behavior or to comply with a directive." Restraint Rule 3.10 (emphasis added).

<sup>156</sup> Restraint Rule 2.2. Such "public education programs" include all Rhode Island public school districts, regional public school districts, state-operated schools, public charter schools, educational programs operated by the Dept of Children, Youth & Families, Educational Collaborative Programs, and LEAs operating a public education program.

<sup>157</sup> Restraint Rule 2.3.

<sup>158</sup> The Restraint Regulations provide a detailed definition of what constitutes "Parental Consent"<sup>158</sup> — i.e., for parental consent to be considered valid in this context, four requirements must be met: (1) the parent must have been fully informed of all information relevant to the activity for which consent is sought, in his or her native language or other mode of communication; (2) the parent must have understood and agreed **in writing** to the carrying out of the activity; (3) the consent must describe the activity and lists the records (if any) that will be released and to whom; and (4) the parent must have understood that the **granting of consent is voluntary** and may be revoked at any time (Restraint Rule 3.19).

- (1) Non-physical interventions were not or would not be effective; and
- (2) The student's behavior poses a "threat of imminent, serious, physical harm to self and/or others"; and, where applicable,
- (3) The positive reinforcement techniques within the student's Behavioral Intervention Plan have been implemented appropriately and the child has failed to respond.<sup>159</sup>

Be informed: When a child is restrained, find out the type of restraint that was employed and determine whether the method falls into one of the categories that are prohibited by the Restraint Regulations. These **Prohibited Techniques and Physical Restraints** include:

- Physical restraint used as a means of punishment<sup>160</sup>
- Any intervention which is used to or likely to subject an individual to verbal abuse, ridicule or humiliation, physical pain, or excessive emotional trauma.<sup>161</sup>
- "Seclusion"<sup>162</sup> (placing a child alone in a locked room without supervision) or "Seclusion Restraint"<sup>163</sup> (physically confining a student alone in a room or limited space without access to school staff).
  - EXCEPTION: Seclusion that is (1) under constant surveillance and observation; AND (2) documented as part of a previously agreed upon behavioral intervention plan.<sup>164</sup>
- Any intervention that "precludes adequate supervision of the child."<sup>165</sup>
- Any intervention which denies "adequate sleep, food, water, shelter, bedding, or access to bathroom facilities."<sup>166</sup>
- Any restrictive intervention which employs a device that simultaneously immobilizes all arms and legs, like "Prone containment."<sup>167</sup>
  - EXCEPTION: Prone containment that is (1) administered by trained personnel; AND (2) used as a limited emergency intervention; AND (3) documented as part of a previously agreed upon written behavioral intervention plan.
- Any intervention that "deprives the individual of one or more of his or her senses."<sup>168</sup>
- "Corporal Punishment" (the infliction of bodily pain as a penalty for disapproved behavior).<sup>169</sup>

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<sup>159</sup> Restraint Rule 5.1.

<sup>160</sup> Restraint Rule 6.2(a).

<sup>161</sup> Restraint Rule 6.2(d).

<sup>162</sup> Restraint Rule 3.24.

<sup>163</sup> Restraint Rule 3.20(b).

<sup>164</sup> Restraint Rule 6.2(f).

<sup>165</sup> Restraint Rule 6.2 (g).

<sup>166</sup> Restraint Rule 6.2(c).

<sup>167</sup> Restraint Rule 6.2(e).

<sup>168</sup> Restraint Rule 6.2(h).

<sup>169</sup> Restraint Rule 3.6.

- "Chemical Restraint" ("the administration of medication for the purpose of restraint").<sup>170</sup>

There are also certain safety requirements when using physical restraint/crisis intervention, including:

- The force that is used must be only the amount necessary to protect the student or others from physical injury or harm. The physical restraint must be discontinued as soon as possible.<sup>171</sup>
- The restrained student must not be prevented from breathing or speaking and his or her physical status must be continuously monitored
- The restrained student must be released immediately: (1) once he or she is no longer at risk of causing imminent physical harm to him/herself or others; or (2) if he or she is under "significant physical distress."
- The student's known medical and psychological limitations and behavioral intervention plans must be reviewed and considered.
- Certain follow-up procedures are required after the restraint, including reviewing the incident with the student (as appropriate) to address the behavior that led to the restraint; and the staff who administered the restraint to discuss whether proper restraint procedures were followed.<sup>172</sup>
- Whenever possible, the administration of a physical restraint/crisis intervention must be witnessed by at least one adult who does not participate in the restraint.<sup>173</sup>

## **B. PROCEDURAL REQUIREMENTS**

**1. School & School District Restraint Policies** — Public education programs are required to develop written procedures regarding appropriate responses to student behavior that may require the use of physical restraint/crisis intervention. Such school policies must provide: (1) a description and explanation of the school's method of physical restraint/crisis intervention; (2) a description of the school's training requirements, reporting requirements, and follow-up procedures; and (3) a procedure for receiving and investigating complaints regarding restraint practices.<sup>174</sup> **Be informed:** Ask your child's school for a copy of its physical restraint/crisis intervention policy and thoroughly review it.

**2. Written Report** — When a staff member administers a physical restraint/crisis intervention of a child, he or she is required to inform the school's administration as soon as possible and to submit a written report no later than the next working day.<sup>175</sup> The written report must be detailed — i.e., it must include:

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<sup>170</sup> Restraint Rule 3.20(c).

<sup>171</sup> Restraint Rule 7.2

<sup>172</sup> Restraint Rule 7.2

<sup>173</sup> Restraint Rule 7.1

<sup>174</sup> Restraint Rule 4.1

<sup>175</sup> Restraint Rule 8.1

- Names and job titles of the staff who administered and observed the restraint, as well as the administrator who was informed after the restraint
- Date, time, and duration of the restraint
- Description of the activity that the restrained student, other students, and staff was engaged in immediately before the student was restrained.
- Behavior that prompted the restraint
- Efforts made to deescalate the situation and the alternatives to restraint that were attempted
- Justification for initiating physical restraint/crisis intervention
- Description of the restraint, including the holds used and the reasons they were necessary
- Student's behavior/reactions during the restraint, how the restraint ended, documentation of any injury to the student and staff, and any medical care provided;
- Further actions the school has taken or may take, including disciplinary sanctions and Behavioral Intervention Plans (see below);
- Opportunities for the student's parents to discuss the matter with school officials.<sup>176</sup>

The school administration is required to maintain an ongoing written record of all reported instances of physical restraint,<sup>177</sup> and to provide RIDE with a record of every incident on an annual basis.<sup>178</sup>

**3. Parental Notice** — The student's parents must be informed of the use of restraint as soon as possible and no later than two school days after each incident. The Restraint Regulations do not specify the form of parental notification required — e.g., whether it must be in writing or oral, *etc.* Be informed: Always request a copy of the detailed written report that the staff member who administered the physical restraint submitted to the school's administration after the restraint.

**4. Training of Staff** — Each public education program is required to provide all staff with training regarding the school's physical restraint/crisis intervention policies. Such training must occur at least annually and no later than within the first month of each school year.<sup>179</sup> Generally, only personnel who have such training may administer physical restraint/crisis intervention with students.<sup>180</sup> In addition, identified staff members must receive advanced physical restraint training, so that they can serve as a "school-wide based resource" and assist other staff in ensuring proper administration of

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<sup>176</sup> Restraint Rule 8.3

<sup>177</sup> Restraint Rule 8.1

<sup>178</sup> Restraint Rule 8.4

<sup>179</sup> Restraint Rule 4.2. Employees hired after the school year begins must have such training within the first month of their employment.

<sup>180</sup> Restraint Rule 7.1. However, according to Restraint Rule 7.1, such training requirements "shall not preclude a teacher, employee or agent of a public education program from using reasonable force to protect students, other persons, or themselves from imminent, serious physical harm."



physical restraint and crisis intervention.<sup>181</sup> Be informed: Ask the school principal: (1) when school staff were last trained on physical restraint/crisis intervention, including those who work with your child; and (2) which school staff have received advanced training and how are they involved in the monitoring and instruction of your child's teachers and aids.

### **C. BEHAVIORAL INTERVENTION PLAN**

Once the use of physical restraint has employed on a student, school personnel must determine if the student requires a "Behavioral Intervention Plan" (or "BIP") as part of the student's education program, and, if a BIP already exists, whether it needs to be modified or adjusted.<sup>182</sup> A BIP<sup>183</sup> is a plan that is developed by a team that identifies emotional, social, and/or behavioral goals for a student and sets forth the steps that the school, student, parent, and others will take to positively support the student's progress towards these goals. A BIP is comprised of practical and specific strategies to increase or reduce defined behaviors exhibited the student. It is developed following a "Functional Behavioral Assessment" (or "FBA"),<sup>184</sup> which is a process for gathering information about the behavior, including the circumstances when the behavior occurs, and then developing a theory as to the functional intent of the behavior. Relevant questions to ask at a BIP team meeting include: What is the purpose of the students behavior? What is the plan for teaching the student new ways to meet his or her needs? How should staff react to the student's behavior so as to reinforce appropriate behavior? How should we manage a "crisis situation," and how should that situation be defined? What de-escalation techniques are appropriate? When should the BIP be reviewed, and how should compliance be monitored?

The Restraint Regulations indicate BIPs must be individually designed to meet the needs of all students, including those in special education and general education. The Restraint Regulations also distinguish BIPs from physical restraint/crisis intervention, noting that physical restraint/crisis intervention is not part of a BIP "designed to alter a child's behavior but rather are utilized as one method of preventing harm or injury."<sup>185</sup> Remember, there are certain forms of physical restraint/crisis intervention — i.e., prone containment and seclusion — that are prohibited by the Restraint Regulations unless they are documented as part of the student's previously agreed upon written BIP. Carefully assess whether it is really appropriate to include physical restraint with a student's BIP. Should the student's BIP be focused on *positive* behavioral supports and de-escalation techniques? If you conclude that it is necessary to include restraint in your child's BIP, you should verify that all staff received appropriate physical restraint training as referenced above.

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<sup>181</sup> Restraint Rules 4.3 & 4.4.

<sup>182</sup> Restraint Rule 10.0 & Restraint Rule 1.0

<sup>183</sup> Restraint Rule 3.4

<sup>184</sup> Restraint Rule 3.12

<sup>185</sup> Restraint Rule 1.0

## **D. ENFORCEMENT OF RIGHTS**

The Restraint Regulations require that public education programs develop an internal procedure for receiving and investigating complaints regarding restraint practices.<sup>186</sup>

To challenge alleged violations of the Restraint Regulations, parents can request a hearing before the Commissioner of Elementary and Secondary Education (see description of "Commissioner Hearings" above).

However, if a BIP has been incorporated (*e.g.*, by reference) into an IEP or can otherwise be linked to the provision of FAPE to a student with a disability, the procedural options available to special education students (see Part III) may also be available.

## **PART IV: OTHER LAWS PROTECTING CHILDREN WITH DISABILITIES**

In addition to IDEA, other laws may provide important protections for children with disabilities in educational settings. These other laws include two important civil rights laws for people with disabilities, Section 504 of the federal Rehabilitation Act (§504) and the Americans with Disabilities Act (ADA). These laws provide parents and children with rights that are separate from and in addition to the rights identified in IDEA.

Section 504 is a source of important rights for students with disabilities.<sup>187</sup> The group of students covered by §504 is much broader than those covered under IDEA, and includes students who have a physical or mental impairment that substantially limits one or more major life activities.<sup>188</sup> §504 applies to public schools, *e.g.* LEAs, as well as private schools and other educational entities that receive federal funds.<sup>189</sup>

There are some specific rights provided for by §504 and its implementing regulations. Examples of these rights are:

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<sup>186</sup> Restraint Rule 4.1

<sup>187</sup> §504 is a civil rights statute that predates and was the basis for the Americans with Disabilities Act. It is applicable to private entities that receive federal funding as well as to public entities such as LEAs. 29 U.S.C. §794.

<sup>188</sup> 34 C.F.R. §104.3(j)

<sup>189</sup> 34 C.F.R. §104.3(f) and (k).

- LEAs are required to provide a “free appropriate public education” (FAPE) to students with disabilities. This requirement includes the provision of special education and related services to students with disabilities to meet their individual educational needs as adequately as the needs of non-disabled students are met;<sup>190</sup>
- Schools must ensure that students with disabilities have access to the full range of programs and activities offered to all students. For example, this may require the provision of assistive technology so a student could fully participate in school activities, or the relocation of an activity or program to a physically accessible site for a child with a mobility impairment;<sup>191</sup>
- Schools may also be required to modify their programs and rules. Modifications could include providing alternate test taking procedures, modifying instructional techniques, and making adjustments to policies, like absenteeism policies;<sup>192</sup>
- Students with disabilities cannot be segregated and must be educated “to the maximum extent appropriate” with students who are not disabled;<sup>193</sup>
- LEAs are required to have a procedure to identify students with disabilities and to evaluate their needs;<sup>194</sup>
- Parents have a right to review records, and to an impartial hearing, if they disagree decisions about services under §504;<sup>195</sup> and
- Students with disabilities should not be discriminated against, harassed or otherwise treated differently on the basis of their disabilities.<sup>196</sup>

In addition to the impartial hearing referenced above, disputes regarding services or rights under §504 may be brought by filing a complaint with the U.S. Department of Education, Office of Civil Rights (OCR). See page 33 for a description of the procedures for filing an “OCR complaint.”

Like §504, the Americans with Disabilities Act (ADA) is a civil rights law that provides an additional source of rights for students with disabilities.<sup>197</sup> The group of students covered by the ADA will also be much broader than the students covered by IDEA because the ADA uses a definition of disability similar to §504.<sup>198</sup>

The ADA applies to state and local government entities, and so applies to LEAs. Some of the actions prohibited under the ADA are:

- Offering less than an equal opportunity to participate in programs;
- Providing a service that is not as effective as that provided to others;<sup>199</sup> and

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<sup>190</sup> 34 C.F.R. §104.33

<sup>191</sup> 34 C.F.R. §104.4 and §104.21

<sup>192</sup> 34 C.F.R. §104.33 and §104.4

<sup>193</sup> 34 C.F.R. §104.34

<sup>194</sup> 34 C.F.R. §104.32 and §104.35

<sup>195</sup> 34 C.F.R. §104.36

<sup>196</sup> 34 C.F.R. §104.4(a)

<sup>197</sup> Title II of the ADA begins at 42 U.S.C. §12132

<sup>198</sup> 42 U.S.C. 12102(2), 28 C.F.R. 35.104

<sup>199</sup> 28 C.F.R. 35.130 (b)(1)

- Requiring participation in a separate program or activity;<sup>200</sup> and
- Other discriminatory treatment or harassment on the basis of disability.<sup>201</sup>

OCR investigates complaints under the ADA similarly to §504.<sup>202</sup> Students with disabilities who are covered by IDEA may consider seeking resolution of disputes with LEAs under §504 and the ADA as well. Complaints under §504 or the ADA that are related to IDEA claims may have to be raised at the same time as the IDEA claims because courts have fashioned rules about exhausting IDEA remedies. In other words, courts may require that you use IDEA's procedural safeguards prior to initiating a complaint in federal or state court. An attorney should be consulted as to when and how to raise these kinds of claims.

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<sup>200</sup> 28 C.F.R. §35.130(b)(2) and (d). *See also* 42 U.S.C. §12201(d)

<sup>201</sup> 28 C.F.R. §35.130(a)

<sup>202</sup> 28 C.F.R. §35.170 to §35.174