

# Special Education



## California Foster Youth Education Task Force

Eighth Edition, January 2021

### INTRODUCTION

Children in foster care have the same rights as all other students in regards to special education. Individuals with exceptional needs have a right to a free appropriate public education (FAPE) in the least restrictive environment (LRE).

### WHAT IS SPECIAL EDUCATION?

Special education is specially designed instruction and related services to meet the unique educational needs of children with disabilities. *EC 56031*. Special education includes instruction conducted in the classroom, in the home, in hospitals and institutions, and other settings, and instruction in physical education. *EC 56031(a)*. Special education also includes related services, such as the following:

- Speech-language pathology services
- Audiological services
- Orientation and mobility services
- Adapted physical education
- Physical and occupational therapy
- Vision services
- Specialized driver training instruction
- Counseling and guidance services, including rehabilitation
- Psychological services
- Parent counseling and training
- Health and nursing services
- Social worker services
- Specifically designed vocational education and career development
- Recreation services
- Specialized services for low-incidence disabilities
- Interpreting services

*EC 56363*.

The local educational agency (LEA) in which a student resides is generally the LEA responsible for providing special education services, unless a child's educational rights holder (ERH) determines they will remain in their school of origin. When a child remains in their school of origin, the district of origin is responsible for providing special education services. *EC 56030*. Other LEAs responsible for providing special education may include:

- The Special Education Local Plan Area (SELPA) that serves the geographic area

where the foster youth has been placed in a licensed children's institution or foster family home. *EC 56156.4*

- The county office of education if the area is not served by a SELPA. *EC 56156.4*.
- Charter school. *EC 47641*
- When a foster youth continues to attend their school of origin but is placed in a licensed children's institution or foster family home located in another LEA's boundaries, the school of origin is responsible for the daily provision of services, but the LEA in which the foster youth currently resides has responsibility for the provision of FAPE.
- When a foster youth's ERH determines the youth should retain connection to their school of origin, and the youth is placed for educational purposes in a nonpublic school (NPS) pursuant to their IEP, the NPS will continue to provide for the daily provision of educational and other authorized IEP services to ensure the provision of FAPE until such time that the student can return to the school of origin when a less restrictive environment becomes appropriate.

### FEDERAL AND CALIFORNIA LAW

**Individuals with Disabilities Education Act (IDEA):** The Individuals with Disabilities Education Act (IDEA), reauthorized under the Individuals with Disabilities Education Improvement Act of 2004, is the primary federal program that authorizes state and local aid for special education and related services for children with disabilities. *20 USC 1400 et seq.* The IDEA ensures that all children with disabilities have access to a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet each student's unique needs. IDEA's corresponding federal regulations are found at *34 CFR Part 300*.

**California Law:** California special education statutes, including the Education Code, Government Code, and Welfare and Institutions Code are aligned with the IDEA. *EC5600*.

### PARENT/EDUCATIONAL RIGHTS HOLDER (ERH)

**Parent:** For purposes of special education, a "parent" means any of the following:

- A biological or adoptive parent of a child
- A foster parent if the authority of the biological or adoptive parents to make educational decisions on the child's behalf specifically has been limited by a court order, and the youth is 16 years of age or older and is placed in a planned permanent living arrangement
- A guardian generally authorized to act as the child's parent or authorized to make educational decisions for the child, including a responsible adult appointed for the child in accordance with *WIC 361* and *726*
- A surrogate parent who has been appointed pursuant to *GC 7579.5* or *7579.6*
- A specific person(s) identified by a judicial decree or order identified to make educational decisions on behalf of the child (also called an educational rights holder or ERH). *EC 56028*.

*See Fact Sheet on Educational Decision-Making for Foster Youth for more information.*

### IDENTIFICATION AND ASSESSMENT

**Child Find:** LEAs have a duty to actively and systematically identify, locate, and assess individuals with exceptional needs who may be entitled to special education services. *20 USC 1412(a)(3)*; *EC 56301(a)-(c)*, *34 CFR 300.111*.

#### Assessment

Referral for an assessment for special education starts the process. A referral may be made by anyone, including an individual's parent or guardian, teacher or other service provider, social worker/probation officer, or foster parent, consistent with the limitations Contained in federal law. *EC 56029*.

## Special Education (continued)



When a verbal referral is made, staff of the LEA shall offer assistance to the individual making a verbal request to ensure the request will be received in writing. *5 CCR 3021*. All referrals to school staff shall be written and include (1) a brief reason for the referral and (2) documentation of the resources of the regular education program that have been considered, modified, and when appropriate, the results of intervention. This documentation shall not delay the timelines for completing the assessment plan or assessment. *5 CCR 3021*.

In response to the request for an assessment, the LEA may provide: (1) a written refusal to assess or (2) an assessment plan. *EC 56321 and 56500.4*. If an assessment is to be conducted, the parent/ERH shall be given an assessment plan within 15 calendar days of the referral for assessment, not counting days between the student's regular school sessions or terms or days of school vacation in excess of five schooldays from the date of receipt of the referral, unless the parent agrees in writing to an extension. *EC 56321*. If the child demonstrates any evidence that they have a disability (e.g., mental health diagnosis or failing grades), an LEA likely cannot refuse to conduct the assessment because they will meet the legal standard of a "suspected disability," which is the low threshold required to qualify for an assessment.

Generally, a child cannot be assessed without written consent of a parent/ERH. Exceptions may apply if:

- A child is a ward of the court (in limited circumstances) *20 USC 1414(a)(1)(D)*; or
- The LEA prevails at a due process hearing. *EC 56321, 56381(f), 56506*.

The parent/ERH has 15 calendar days to provide written consent to the proposed assessment. *EC 56321(c), 56043(b)*.

The initial Individualized Education Program (IEP) team meeting to determine eligibility must be held within 60 calendar days (not school days) of receipt of written consent to assessment, not including summer vacation or school breaks of more than five days. *EC 56344(a), 56043(c)*.

When a child with a disability transfers from one LEA to another in the same academic year, the LEAs must work together to complete the assessments within the 60-day timeline, unless the ERH agrees in writing to give them more time. *20 USC 1414(b)(3)(D)*; *EC 56320(i)*.

A parent/ERH has the right to obtain, at public expense, an independent educational evaluation (IEE) of the child from qualified specialists if the parent disagrees with the assessment conducted by the LEA. *EC 56329(b)*.

### Eligibility for Special Education Services

Two conditions must be met:

1. The child has an impairment adversely affecting educational performance that requires special education.
2. The impairment fits into one of the qualifying categories of disabilities:
  - Intellectual Disabilities;
  - Hearing Impairment;
  - Deafness;
  - Speech or Language Impairment;
  - Visual Impairment (including blindness);
  - Deaf-Blind;
  - Emotional Disturbance;
  - Orthopedic Impairment;

- Autism;
- Traumatic Brain Injury;
- Other Health Impairment;
- Specific Learning Disability; or
- Multiple Disabilities.

*20 USC 1401(3)*; *EC 56026*.

A complete reevaluation, followed by a triennial IEP meeting, must be conducted every three years, or more frequently upon request. *20 USC 1414(a)(2)(B)*, *EC 56381 and 56043(k)*.

*Age*: Students may be eligible for special education from birth to age 22. Regional centers are required to provide special education/early intervention services from birth to age 3 (see Early Care and Education Fact Sheet). LEAs are required to provide special education services for eligible students ages 3 to 22, or when the student receives their diploma, whichever comes first. Generally a student must be found eligible for

## THE IEP MEETING

### Individualized Education Program

An IEP is a written document for each individual with exceptional needs that describes the student's present levels of academic achievement and functional performance, learning goals, school placement, and services. *EC 56032, 56345, and CFR 300.320*. The IEP is developed, reviewed, and revised by the "IEP team" during "IEP meetings." The IEP document is a contract that guarantees what services a student is required to receive.

When the student reaches age 16, the IEP shall address postsecondary goals and transition services. *EC 56341.5(e), 56043(g)(1), 56345.1*.

As appropriate and necessary, the LEA must provide opportunities to involve students with disabilities in nonacademic and extracurricular activities, including athletics, recreational, special interest groups/clubs, and employment. *EC 56345.2*.

# Special Education (continued)

**Who Attends?** The IEP Team consists of one or both parents/ERH, at least one regular education teacher of the student, at least one special education teacher of the student, an LEA representative who is designated to grant or refuse any request made by the ERH, an individual who can interpret the assessment, other individuals with expertise or knowledge about the student's needs invited at the discretion of the LEA or ERH (e.g., social worker), and when appropriate, the student. *20 USC 1414(d)(1)(b); 34 CFR 300.321; EC 56341.*

**What's an IEP Meeting?** At the IEP meeting, a student's eligibility for special education services under IDEA is determined. If a student is found eligible, then an IEP document and plan is developed. The written IEP includes measurable goals and objectives, modifications and accommodations, individualized related services, and behavioral plans, where necessary. *20 USC 1414(d); EC 56345; 5 CCR 3040(b).*

The LEA shall schedule the IEP meeting at a mutually agreed-upon time and place for LEA participants and the parent/ERH. *EC 56341.5(c).* If the parent/ERH cannot attend the IEP meeting, with their consent the LEA shall accommodate the parent/ERH's participation with other methods, such as a video or telephone conference call. *EC 56341.5(g).*

A parent/ERH has the right to audio or electronically record an IEP meeting with 24-hour notice to the LEA. *EC 56321.5, 56341.1(g).* A deaf or non-English-speaking parent/ERH has a right to request an interpreter to ensure that they understand the IEP team discussion. *EC 56341.5(i).*

**To Agree or Disagree?** If the parent/ERH needs time to think over or disagrees with part of an IEP plan, they do not have to sign the document at the IEP meeting. Parents have the right to withhold consent to the IEP document in part or in its entirety. Any part of the IEP document to which the parent/ERH does not consent cannot be implemented, and may become the basis for a due process fair hearing or other dispute resolution option (e.g., a SELPA or LEA-level Alternative Dispute Resolution process). Any part of the IEP that is agreed to should be clearly written on the document. The child's ERH must sign the IEP document before any services can begin. *20 USC 1414; EC 56346.*

## Timelines

A student's IEP must be reviewed at least once annually, or more frequently upon request by the ERH or school. *20 USC 1414(d)(4); EC 56341.1, 56343, 56043.* If a parent requests an IEP meeting outside of the annual review, the LEA has 30 calendar days to hold the IEP meeting. *EC 56343.5.*

When a student who has an IEP is transferred from LEA to LEA within the state, the new LEA shall provide "comparable" services to the existing IEP for the initial 30 days of enrollment. At that time, the LEA shall adopt the previous IEP or must present a new offer of FAPE for the parent/ERH's consent. *EC 56325.*

## PLACEMENT AND SERVICES

### Least Restrictive Environment

FAPE must be provided in the Least Restrictive Environment (LRE). Children with disabilities are to receive an education to the maximum extent appropriate with non-disabled peers and are not to be removed from regular classes unless, even with supplemental aids and services, education in regular classes cannot be achieved satisfactorily. *20 USC 1412(a)(5)(A); EC 56040.1.*

In California, to determine whether a placement represents the LRE for a particular student, the Ninth Circuit Court of Appeals stated a four-factor balancing test, in which the court considers: (1) the educational benefits of placement full-time in a regular class; (2) the non-academic benefits of such placement; (3) the effect the student has on the teacher and children in the regular class; and (4) the costs of mainstreaming the student. *Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H. by & Through Holland, 14 F.3d 1398, 1404 (9th Cir. Cal. Jan. 24, 1994).*

### Continuum of Options

The spectrum of placement options moves from least restrictive to most restrictive:

- Least restrictive placements include full inclusion and mainstreaming with specifically designed instruction and/or related support.
- More restrictive placements may include a specialized setting and related supports.

- Most restrictive placements may include a non-public day program, residential placement, a home hospital program, or services provided in a one-on-one structure.

## Nonpublic Schools

A nonpublic school (NPS) is a private, nonsectarian school that enrolls individuals with exceptional needs pursuant to an Individualized Education Program (IEP). The school must be certified by the Department of Education and meet certain standards set by the Superintendent and Board of Education. *EC 56034.* All nonpublic schools must prepare a School Accountability Report Card (SARC) in the same manner as public schools and include all the same data. *EC 56366(a)(9).* A list of nonpublic schools can be found on the California Department of Education's website at <https://www.cde.ca.gov/sp/se/ds/>. Nonpublic schools are held to the same standards as public schools, including teacher credentials and access to standards-based curriculum, extracurricular activities, and support services. *EC 56366.10.* They are also held to a high accountability standard through regular reports and visits. *EC 56366, 56366.1.*

A student shall not be placed in an NPS unless the severity of the disability is such that education in a regular class with accommodations and modifications cannot be achieved satisfactorily. *EC 56040.1.* The student in foster care must have an IEP which requires such placement as the LRE and the student's ERH must agree to this placement prior to placement in an NPS. *EC 56342.1, 56320.*

When a student is placed in a licensed children's institution (LCI) or Short-Term Residential Therapeutic Program (STRTP) with an on-grounds NPS, the student may attend the on-grounds school only if the IEP team has determined that there is no appropriate public program in the community, the on-grounds program is appropriate and can implement the student's IEP, and the ERH has consented to the placement through the IEP process. *2 CCR 60510(c)(2).*

At least annually, the LEA must consider whether or not the needs of the student continue to be best met at the NPS and whether changes to the IEP are necessary,

## Special Education (continued)

including whether the student may be transitioned to a public school setting. *EC 56366(a)(2)(B)(ii)*. An LCI or STRTP cannot require that a student be identified as an individual with exceptional needs or have an IEP as a condition of residential placement or admission. *EC 56155.7*.

If the student does have an IEP, the LCI cannot require attendance at an NPS owned or operated by an agency associated with the institution. Those services may only be provided if the LEA determines that appropriate public alternative educational programs are not available and the student's ERH agrees to NPS placement in the IEP process. An LCI or STRTP cannot refer a student to or place a student in an NPS. *EC 56366.9*.

An LCI or NPS may not require as a condition of placement that educational authority for a student be designated to that institution, school, or agency, allowing it to represent the interests of the child for educational and related services. An LCI cannot hold educational rights for a youth because it would represent a conflict of interest. *EC 48854*.

### School-Based Mental Health Services (SBMH)

IDEA requires that schools provide the services necessary for a child to access and benefit from their education. School-based mental health services are provided to those students whose social and emotional functioning interferes with progress towards individual goals. In such cases, the IEP team may address the social and emotionally based needs by providing:

- Assessment of mental health needs, including interpretation of assessments and integration of information in service planning;
- Consultation with IEP team providers, student, family, and other staff to develop an appropriate program to serve the youth;
- Positive behavior intervention, including appropriate behavioral support;
- Assessment for and administration and management of medications; and
- Specialized placements such as Day Treatment, Nonpublic or STRTP placement.

This list is not exhaustive. *34 CFR 300.34(a), (c)(2), (c)(8), (c)(10), (c)(14), 300.104; EC 56363(a), (b)(9), (b)(10), (b)(11), (b)(13)*.

Counseling services are provided by qualified social workers, psychologists, school counselors, or other qualified personnel and may include therapeutic counseling when a student requires it. *34 CFR 300.34(c)(2)*.

Some schools call these services other names like "educationally related mental health services." Regardless of what an LEA calls SBMH, they should understand what is being asked for if requesting SBMH services for youth.

### Functional Behavioral Assessment (FBA)

A functional behavioral assessment (FBA) is an assessment of a student's maladaptive behavior. The assessment may include extensive observation of the student and an in-depth analysis of the student's environment and past history. The goal is to determine what triggers the maladaptive behavior, what enables the behavior, and to learn how to best redirect, adapt, or change the behavior through the use of positive intervention strategies. Prior to conducting a functional behavioral assessment, the LEA must obtain consent from the person who holds educational rights. *20 USC 1414(a); EC 56506*.

### Basic Concepts

**Who Conducts the FBA?** Functional behavioral assessments should be conducted by trained and knowledgeable staff. *EC 56320(b), 56525*.

### What Is a Behavioral Intervention Plan (BIP)?

A behavioral intervention plan (BIP) is a plan that may be developed when the behavior of a student with a disability impedes their learning, or the learning of others, and the student's IEP team then considers the use of positive behavioral supports and other strategies consistent with 20 USC 1414(d) to address the student's behavior. *EC 56520 et seq.*

### What Interventions Are Appropriate?

Interventions are to be positive in nature. Behavioral interventions do not include procedures that cause pain or trauma. Behavioral interventions respect the individual's human dignity and personal



privacy. Such interventions shall ensure the individual's physical freedom, social interaction, and individual choice. *EC 56520*.

### FBA and BIP Procedures

**When Must the LEA Conduct a FBA and Develop a BIP?** The LEA must conduct a FBA and develop a BIP when one of the following occurs:

- When the IEP team determines a behavior that violates a code of student conduct (i.e., school rule) is a manifestation of the child's disability pursuant to *20 USC 1415(k)(1)(E) & (F)*.
- When a student is removed from their current placement as a result of (a) weapon possession; (b) illegal drug possession/use; or (c) infliction of serious bodily injury, regardless of whether the behavior was a manifestation of the child's disability, so that the behavior does not recur. *20 USC 1415(k)(1)(D)(ii), 34 CFR 300.530*.
- When the student is removed from their placement for more than 10 consecutive school days (i.e., suspension or expulsion), whether or not the behavior is determined to be related to their disability. *20 USC 1415(k)(1)(D)(ii)*.

# Special Education (continued)

If the IEP team determines a behavior that violates a code of student conduct is a manifestation of the child's disability and that the child already has a BIP, the IEP team must review the BIP and modify it, as necessary, to address the behavior. *20 USC 1415(k)(1)(F)*.

**What Happens if There Is a Behavioral Emergency?** Emergency interventions may only be used to control unpredictable, spontaneous behavior that poses clear and present danger of serious physical harm to the individual with exceptional needs or others that cannot be immediately prevented by a less restrictive response. The intervention shall not be used as a substitute for the systemic BIP that is designed to address the target behavior. *EC 56521.1*.

Emergency interventions may not include (1) locked seclusion (unless it is in a facility otherwise licensed or permitted by state law to use a locked room); (2) employment of a device, material, or object that simultaneously immobilizes all four extremities (except that prone containment may be used as an emergency intervention by staff trained in such procedures); or (3) force that exceeds that which is necessary under the circumstances. *EC 56521.1*.

Whenever an emergency intervention is used, the LEA must (1) notify the parent (and residential care provider or foster parent, if appropriate) within one day; (2) immediately forward a Behavioral Emergency Report to the student's file and designated administrator; (3) schedule an IEP meeting within two days for any student without a current behavioral intervention plan to determine the necessity for a functional behavioral assessment and an interim behavioral intervention plan; and (4) schedule an IEP meeting to consider BIP modification, if the student already has a BIP and the incident involves a previously unseen behavior or the previously designed plan is ineffective. *EC 56521.1*.

## PROCEDURAL RIGHTS / DISAGREEMENTS WITH SCHOOLS

Alternative Dispute Resolution (ADR) is an informal method of settling disagreements that may arise in an IEP meeting or with the special education process in many LEAs. ADR provides specific options to support open communication, promote understanding, and reach agreements that support the student and strengthen relationships. ADR is designed to meet the interests of the parties involved that

results in a mutually agreeable outcome, rather than a decision made solely by a third party, hearing officer, or judge.

As noted above, if a parent/ERH disagrees with the IEP assessment conducted by the LEA, the parent/ERH has the right to obtain, at public expense, an independent educational evaluation of the child from qualified specialists. *EC 56329(b)*.

## Compliance Complaint

A parent/ERH may file a compliance complaint with the California Department of Education when the parent/ERH feels that the LEA has violated its duty under a student's IEP or special education laws. Anyone may file a compliance complaint (the individual does not have to hold educational rights for the child). *5 CCR 4650; 5 CCR 4600; EC 56500.2*.

## Due Process

A parent/ERH may file for a due process hearing if they are in disagreement with the LEA regarding:

- Implementation of the child's IEP;
- The student's eligibility for special education;
- Assessments of the student;
- Educational placement of the student; or
- Changes made to the child's IEP without the parent/ERH's approval.

The parent/ERH may file a written complaint with the Office of Administrative Hearings (OAH), Special Education Unit. A copy of the complaint is served on the LEA. After a complaint is filed, the LEA has 10 days to provide a written response. *EC 56502*.

## Stay Put Provision

If the parent/ERH files for a due process hearing, the student must generally remain in their current placement with services listed in the last agreed upon IEP until the disagreement is resolved. This is known as "stay put." *20 USC 1415(j); 34 CFR 300.518; EC 56505(d)*.

## Resolution Session

Within 15 days of the request for due process, the LEA must offer a resolution session between the parent/ERH and an LEA

representative who has authority to bind the LEA to a resolution unless both parties agree to waive the resolution session. The LEA cannot bring an attorney to the resolution session unless the parent/ERH brings an attorney. If the session leads to resolution, the parties sign a binding agreement that can be voided within three days of signing. If the parties do not reach a resolution, the next step is mediation. *EC 56501.5*.

## Mediation

After filing for due process, the parent/ERH has the option to mediate the dispute with the LEA. During the time of this mediation process, the student is generally entitled to remain in their current school placement. An attorney may represent any of the parties at the mediation. Mediation is voluntary. If the parent/ERH proceeds to a mediation with the LEA, OAH will provide a neutral mediator. All discussions are confidential. If no agreement is reached, the parties proceed to hearing. *20 USC 1415e; 34 CFR 300.506, EC 56501(b)(1)-(2); EC 56503*.

## Due Process Hearing

At least five days prior to the hearing, the parent/ERH and the LEA must provide OAH and each other with copies of the following:

- All documents expected to be introduced at the hearing; and
- A list of all witnesses and their general area of testimony that the parties intend to present at hearing. *EC 56505(e)*.

The due process hearing should be conducted at a time and place reasonably convenient to the parent/ERH and the student. *EC 56505(b)*. An impartial hearing officer from OAH should conduct the hearing. *20 USC 1415(f)(3); 34 CFR 300.511(c); EC 56501(b)(4); EC 56505(c)*.

At the hearing, both parties have the right to make oral arguments; present evidence and confront, cross-examine, and compel the attendance of witnesses; have a written or electronic verbatim record of the hearing; and receive a written or electronic decision from the hearing officer. *EC 56505*.

## Examples of Due Process Remedies

- *Compensatory education*: an equitable remedy to make up for education lost due to the LEA's violation of FAPE.

# Special Education (continued)

- *Tuition reimbursement*: parents/ERHs who remove their children to private school may be entitled to reimbursement if they prevail at a due process hearing.

Further evaluations or independent educational evaluations (IEEs).

- Additional services or an increase in existing services.
- Changes in placement.
- Attorneys' fees. *20 USC 1415(i)(3)*.

## OTHER RELEVANT LAWS AND POLICIES

***Student Study Team (SST)***: An SST is a function of general education, not special education, and is governed by LEA policy rather than federal or state law. Schools cannot require parents to have an SST prior to an IEP or referral for special education assessment. Students struggling in school may be referred to an SST. An SST can be the first step towards determining whether a student needs special education services but cannot be required. Once an assessment request is made, the LEA must respond in writing within 15 calendar days. *EC 56321*.

***Section 504*** of the Rehabilitation Act of 1973 provides services to students who have a physical or mental impairment that substantially impairs a major life activity, including learning. *34 CFR 104.3(j)*. Examples of disabilities that may require accommodations and supports in the general education program are asthma, diabetes, ADD, ADHD, and mental health disorders such as anxiety, depression or PTSD. If the student qualifies, the LEA must prepare a plan that outlines special services, accommodations, and modifications that will be implemented to assist the student. Students who qualify under IDEA generally qualify for protections under 504, but there are some students who *only* qualify for 504.



## SIMILARITIES AND DIFFERENCES BETWEEN 504 AND IDEA:

Generally, Section 504 covers a broader group of students than IDEA. Both a 504 plan and an IEP under IDEA require LEAs to provide students with disabilities with FAPE, however there are fewer procedural safeguards under Section 504 plans. While an IEP under IDEA is governed by an extensive body of state and federal laws and regulations, each LEA will have its own Section 504 policy.