You Can’t Light a Fire Without a Spark: effectively advocating for children with disabilities in K-12 public schools

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Agenda

- Speaker introductions
- What is Disability Rights Montana (DRM)
- Orienting special education as a civil rights issue
- Key legal requirements protecting students with disabilities and how to use them
- Keys to effective advocacy
- Questions?
Disability Rights are Civil Rights

- The Disability Rights Movement is an outgrowth of the broader civil rights movement that gained significant traction in the 1970s following the Civil Rights Act of 1964.
- In 1972, Geraldo Rivera did an exposé on the Willbrook State School in Staten Island, NYC eventually leading to a consent decree in federal court and closure of the facility.
- The national outcry over the Wilbrook School led to the creation of the P&As.
“Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”

- Chief Justice Earl Warren for the Court
IDEA: built for inclusion

- Following *PARC* and *Mills*, Congress conducts an investigation in 1972 and finds that millions of children with disabilities were not receiving appropriate education.
- On November 19, 1975, Congress enacts PL-94-142, the Education for All Handicapped Children Act of 1975, which later became the Individuals with Disabilities Education Act (IDEA).
- IDEA is amended several times, most recently in 2004.
- IDEA is due for reauthorization
Inclusion was the purpose and intent

The purposes are:

- (1)(A) to ensure that all children with disabilities have available to them a free appropriate public education [FAPE] that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living;
- (B) to ensure that the rights of children with disabilities and parents of such children are protected; and
- (C) to assist States, localities, educational service agencies, and Federal agencies to provide for the education of all children with disabilities;
- (2) to assist States in the implementation of a statewide, comprehensive, coordinated, multidisciplinary, interagency system of early intervention services for infants and toddlers with disabilities and their families;
- (3) to ensure that educators and parents have the necessary tools to improve educational results for children with disabilities by supporting system improvement activities; coordinated research and personnel preparation; coordinated technical assistance, dissemination, and support; and technology development and media services; and
- (4) to assess, and ensure the effectiveness of, efforts to educate children with disabilities.

20 U.S.C § 1400
IDEA: an overview

Five parts:

Part A - General provisions
Part B - Special education for school aged children (3 to 21)
Part C - Early intervention for children under age 3
Part D - Systemic activities to improve education of children with disabilities
Part E - National Center for Education Research (Special Education Research Center)

Our discussion is focused primarily on Part B, which is the most significant part for school-aged children and provides for the Individualized Education Program (IEP).
Part C: Early intervention

- provides for early intervention services for infants up to age three.
- Part C services are not obtained through the school system, they are administered by the Montana Department of Public Health and Human Services (DPHHS) and delivered through a Part C provider.
- In Montana, Part C is called “Montana Milestones.” You can find out more from Wendy Studt, Part C Coordinator, at 406-444-5647 or on the web at: https://dphhs.mt.gov/dsd/developmentaldisabilities/montanamilestones
- You may also be able to get help from your county or tribal health department. A list of the county and tribal health departments in Montana may be found at https://dphhs.mt.gov/publichealth/FCSS/countytribalhealthdepts.
Not just special education: non-discrimination in education

- While IDEA provides a funding stream to support special education, it should not be mistaken for a mere funding law. IDEA is a substantial piece of civil rights legislation “intended by Congress to address and correct institutional segregation of children with disabilities.” *Corey H. v. Bd. of Educ. of City of Chicago*, 995 F. Supp. 900, 907 (N.D. Ill. 1998).

- In addition to IDEA, two other laws create significant protection for students with disabilities in the civil rights context:
  - **Section 504 of the Rehabilitation Act of 1973 (Section 504)**
    
    No otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . . .


  - **Title II of the Americans with Disabilities Act (ADA)**
    
    no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Many other laws apply to students with and without disabilities

- Elementary and Secondary Education Act, Including Title I (now called Every Student Succeeds Act)
- Family Educational Rights and Privacy Act (FERPA);
- Protection of Pupil Rights Amendment (PPRA);
  - Right of parent to inspect surveys, analyses, or evaluations prior to use on the child
  - Prevent gathering of information on certain topics, such as political affiliations, family mental health issues, self-incrimination, etc.
- McKinney-Vento Homeless Assistance Act (McKinney-Vento);
  - Immediate enrollment
  - Continuity of placement
- Equal Educational Opportunities Act
  - Applies to schools
  - race, color, gender, national origin are protected classes
- Civil Rights Act of 1964
  - Race, color, religion, sex, or national origin
- Title IX of the Educational Amendments Act of 1972
  - Sex discrimination in educational programs receiving federal funding
- Federal Constitution, particularly the due process protections of the Fifth and Fourteenth Amendments, the Equal Protection Clause of the Fourteenth Amendment, and the free expression provisions of the First Amendment;
- Montana Constitution, particularly Article II (Declaration of Rights, including individual dignity, equal protection, and due process) and Article X (educational equity);
- Montana Human Rights Act;
- Montana Governmental Code of Fair Practices;
Section 504 and ADA: anti-discrimination

- IDEA is a funding law
- Section 504 and ADA are anti-discrimination laws
- Both apply in public schools
- ADA applies in private and public schools
- Children eligible under IDEA are almost always eligible under ADA and 504, but the opposite is not necessarily true
- No hard line about services that can be provided under IDEA or ADA and 504
Under the ADA and Section 504, a person is protected if they experience “a physical or mental impairment which substantially limits one or more major life activities.” 29 U.S.C. § 705(20)(B) (incorporating definition in 42 U.S.C. § 12102 by reference).

A person is also protected from discrimination (but not entitled to a FAPE) if they are regarded as having a disability or have a record of disability. 28 C.F.R. § 35.108(a)(1).

This definition is intended to be construed very broadly in favor of “expansive coverage.” Id. at § 35.108(a)(2).

Impairments that are episodic or in remission are covered, if they would meet the definition of disability while active. Id. at § 35.108(d)(1)(iv).

Whether an impairment meets the definition is determined “without regard to the ameliorative effects of mitigating measures” (e.g. a wheelchair, medication, or talk therapy) except ordinary eyeglasses. Id. at § 35.108(d)(1)(viii) (emphasis added).
IDEA Part B: Eligibility

- (i) the student must meet the age and residency requirements that all students need to meet to attend the public school;
- (ii) the student must not have already earned a regular high school diploma;
- (iii) and the student must meet the definition of a “child with a disability” under IDEA.
  - Meet criteria of one of the 13 categories of disability defined in Montana regulations at A.R.M. §§ 10.16.3010 through 10.16.3022
  - the disability adversely affects the child’s educational performance such that she needs “special education” as that term is defined in IDEA. A.R.M. § 10.16.3007.
“Adversely affects educational performance”

- This term is defined in Montana regulations as follows:

  “Adversely affect the student’s educational performance” means that there is evidence that measures of student performance (e.g., achievement tests, grades, behavioral or developmental assessments, classroom based assessment, observations, progress monitoring, or criterion-referenced tests, etc.) indicate a pattern of educational, developmental, or functional attainment or achievement below the student’s age or grade level based on state approved K-12 content standards that can wholly or in part be attributed to the disabling condition.

  A.R.M. § 10.16.3008 (emphasis added).

- Common misinterpretations of this regulation unlawfully restrict eligibility beyond what IDEA requires.
Child “needs” special education and related services

- “Educational performance” is not limited to academic performance. A child can “need” special education and related services even if the child is receiving satisfactory grades.

- “General education is what is provided to non-disabled children in the classroom. Special education, on the other hand, is ‘specially designed instruction’ to meet the unique needs of a child with a disability.”

  L.J. by and through Hudson v. Pittsburg Unified Sch. Dist., 850 F.3d 996, 1004 (9th Cir. 2017) (student with ADHD and mental health issues who received counseling, behavior supports, and other accommodations “needed” special education).

- Educational performance includes other domains, including social, emotional, and behavioral development. These domains are also incorporated into curriculum standards.

- Services do not need to be provided by a special education teacher or designed by a special educator in order to be special education and related services.
Evaluations: the foundation of IEPs

- Because IDEA has more stringent eligibility requirements than Section 504, where there is a “reason to suspect” a child might qualify under IDEA (even thought the child may also qualify under Section 504) a comprehensive evaluation under IDEA should be completed immediately. See *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1121-22 (9th Cir. 2016).

- The school must provide prior written notice when it either decides not to evaluate the child or that the child is not eligible under IDEA. 34 C.F.R. § 300.503(a)(2).

- If the Evaluation team determines the child does not meet criteria for IDEA, the team should immediately consider whether the child is eligible under Section 504, and, if so, develop a 504 plan for the child. See 34 C.F.R. §§ 104.32 and 104.35.

- The parents should consider whether they disagree with the district’s decision not to evaluate or that the child is not eligible and consider requesting an Independent Educational Evaluation to determine the child’s eligibility and educational needs.

- Even though a school district is required to “identif[y], locate[], and evaluate[]” every child who may be a child with a disability, parents should not wait for the district to start the evaluation process. See 20 U.S.C. § 1412(a)(3). Parents should send a written request to evaluate and provide consent to evaluate as soon as they become concerned their child might experience a disability. A form to request a comprehensive educational evaluation is available at: [https://www.disabilityrightsmt.org/education-resources/](https://www.disabilityrightsmt.org/education-resources/)

- Reevaluations must occur at least once every three years and not more than once per year unless the parent and the district agree otherwise. 20 U.S.C. § 1414(a)(2).
Obtaining appropriate evaluations

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Request for Evaluation

[DATE]

[Name of Principal]
[School Address]
[City, State Zip Code]

VIA CERTIFIED MAIL (No. ____________________________)

Re: Evaluation Request for [insert child’s name], DOB: [insert date of birth]

Dear [Mr./Ms.] [Name of Principal],

I am writing as the parent of [insert child’s name] (“Student”) to request a comprehensive psycho-educational evaluation for the above named child. The child is in the ___ grade and lives within the boundaries of the ___________________ school district. I suspect that the student may have a disability in the areas listed below which adversely affects the student's educational performance to the degree that the student needs special education and related services:

1. [list all of child’s suspected disabilities, needs, educational deficits]
2. [academic needs]
3. [behavior needs]

I hereby give my consent to all testing of Student needed to assess all areas of suspected disability, including but not limited to those identified above. Please provide a proposed evaluation plan to me immediately. Your assistance with this request is appreciated. If you have any questions, please contact me at [phone number and/or email]. Thank you in advance for your anticipated cooperation in this matter.

Sincerely,

[insert your name]

cc: [insert name of district special education director – send copy of this letter to this person]
cc: [insert name of Superintendent – send copy of this letter to this person]
IDEA Part B: Special education and related service for school-aged children

- IDEA Part B provides special education and related services to children in K-12 education, from age 3 through 21.
- **every eligible child is entitled to a**
  - free appropriate public education (FAPE),
  - in the least restrictive environment (LRE),
  - provided according to an Individualized Education Program (IEP), and
  - subject to the parent’s and student’s rights to certain procedural protections.

In K-12 public schools, Section 504 regulations also create a FAPE requirement, however, this is different than the FAPE requirement under IDEA.

Under Section 504 regulations, a FAPE means:

the provision of regular or special education and related aids and services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met and (ii) are based upon [certain procedural protections specified in the regulations]. 34 C.F.R. § 104.33 (emphasis added).

Implementing an IEP under IDEA is one means of meeting Section 504’s FAPE requirement, but it does guarantee that the student has not experienced discrimination in violation of Section 504. See Id.

There is no line in the sand about which services can be provided in an IEP and which services can be provided to a student on a “504 plan”
IDEA FAPE

Under IDEA, a free appropriate public education (FAPE) means:

“. . . special education and related services that—
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
(D) are provided in conformity with the [properly developed IEP] . . . .”

20 U.S.C. § 1401(9) (emphasis added)
IDEA - “Special Education”

- Under IDEA, “special education” means:
  “(1). . . specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—
  (i) Instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
  (ii) Instruction in physical education.” 34 C.F.R. § 300.39(a)(1)

- “Special education” includes speech language and other related services, travel training, and vocational training. Id. at § 300.39(a)(2)

- “Specially designed instruction” means:
  adapting, as appropriate to the needs of an eligible child . . . the content, methodology, or delivery of instruction -
  (i) To address the unique needs of the child that result from the child’s disability; and
  (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.
  Id. at § 300.39(b)(3)
IDEA: procedural and substantive requirements

- IDEA contains both “procedural” and “substantive” requirements. Procedural requirements ensure that the child’s educational rights and the parent’s right to participate in the development of their child’s IEP are protected through a fair process.

- In broad terms, procedural requirements protect the rights of a parent (and student) to: (1) participation in developing their child’s educational program; (2) notification before action is taken regarding the child and (3) an opportunity to be heard before an impartial tribunal (e.g. a judge) when disputes arise. The IDEA contains specific protections that bring these broad concepts to life.

- IDEA’s substantive requirements relate to the quality of the education the school is required to provide a child with a disability. This includes the right to a Free Appropriate Public Education (FAPE) and the right to be educated in the Least Restrictive Environment (LRE).

IDEA: substantive requirements

- Providing all eligible children with a FAPE;
- Identifying children with disabilities through the Child Find requirement;
- Delivering services in the Least Restrictive Environment (LRE);
- Delivering services through “appropriately and adequately trained” personnel;

20 U.S.C. §1412(a)
IDEA - *Endrew F.*- what is “appropriate”

**Standard:** for student not advancing grade to grade in regular curriculum:

- Educational program must be *reasonably calculated* to enable the child to make *progress appropriate* in light of the *child’s circumstances*

**Key Factors:**

- Educational program must be *appropriately ambitious*
- Educational program must be designed to give the child the chance to meet *challenging objectives*

Educational program must be appropriately ambitious with challenging objectives *in light of the child’s circumstances*

- Child’s circumstances means the *child’s individual circumstances* - taking into account the child’s disabilities, needs, strengths, potential and other unique circumstances

- *Reasonably calculated* means there must be some thoughtful design to the educational program to comply with the above requirements. The school must offer “*cogent and responsive*” explanations to support this decision-making.

IDEA - *Endrew F.* - what is “appropriate”

For a child fully integrated in the regular classroom, an IEP typically should . . . be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade” through the general curriculum. *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988, 999-1000 (2017)(internal quotation and citations omitted).

However, for those children who are not fully-integrated into a regular education classroom and for whom grade-level advancement “is not a reasonable prospect[,]” the child’s IEP “need not aim for grade-level advancement. . . . “ *Id.* at 1000.

Instead, “that child’s educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” *Id.* (emphasis added).

“[W]hatever else can be said about it, this standard is markedly more demanding than the [‘]merely more than de minimis[’] test applied by the Tenth Circuit. It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than de minimis progress for those who cannot.”

When all is said and done, a student offered an educational program providing “merely more than de minimis ” progress from year to year can hardly be said to have been offered an education at all. For children with disabilities, receiving instruction that aims so low would be tantamount to “sitting idly ... awaiting the time when they were old enough to ‘drop out.’ ” *Rowley*, 458 U.S., at 179, 102 S.Ct. 3034 (some internal quotation marks omitted). The IDEA demands more. It requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.

*Id.* at 1000-01 (bolding and underlining supplied, italics in original).
The Ninth Circuit has applied the Supreme Court’s new guidance and explained “the school must implement an IEP that is reasonably calculated to remediate and, if appropriate, accommodate the child’s disabilities so that the child can make progress in the general education curriculum . . . taking into account the progress of his nondisabled peers, and the child’s potential.” M.C. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189, 1200-1201 (9th Cir. 2017), cert denied, 128 S. Ct. 556 (internal citation omitted, emphasis supplied).
IDEA: What is an IEP?

An IEP is a:

A comprehensive plan prepared by a child's “IEP Team” (which includes teachers, school officials, and the child's parents), an IEP must be drafted in compliance with a detailed set of procedures. These procedures emphasize collaboration among parents and educators and require careful consideration of the child's individual circumstances. The IEP is the means by which special education and related services are “tailored to the unique needs” of a particular child.


An IEP, by definition, “is not a form document.” *Id.* at 999 (emphasis added). “It is constructed only after careful consideration of the child’s present levels of achievement, disability, and potential for growth.” *Id.*
IDEA: What is in an IEP?

- An IEP begins with understanding the child’s present skills, called their “present levels of academic achievement and functional performance” or PLAAFPs. PLAAFPs tell us where the student is now.

- From the PLAAFPs, we can create goals to explain what growth we want the student to accomplish in each area of need over the 12 month period of the IEP.

- Next, the IEP team has to determine what services, supports, and accommodations the child will need to accomplish, or at least make appropriate progress on, the goals.

- Finally, the team has to determine the setting in which the services will be delivered, keeping in mind the child’s individual needs and the LRE mandate.

- An IEP must also address how a child’s progress will be monitored, how the child will take standardized assessments, where, when and how much services will be delivered, and why, and to what extent, the child will not be included in academic and non-academic activities.

- For a child who will be 16 during the term of the IEP, the IEP must also address transition from school to post-secondary adult life.

IDEA: PLAAFPS

The PLAAFPS are built from the evaluations, the child’s actual performance, and progress monitoring. 20 U.S.C. §§ 1414(d)(1)(A)(i)(l)(aa), 1414(a)(1)(C)(i) and 1414(c)(1).

PLAAFPS should be specific and quantifiable so the IEP team can understand the child’s performance in each area of need, compare this child’s performance with other children his age, and thereby understand this child’s strengths and weakness and design appropriate goals to progress beyond his current PLAAFPS.

In order to ensure full consideration of the child’s needs and full parental participation, PLAAFPS should report data in formats that are easy to understand and compare, including standard scores, percentile ranks, and age- and grade-equivalent. This gives the IEP team (including the parents) an accessible, non-technical understanding of the child’s present abilities and achievement.
IDEA: Advocating Appropriate Goals

- “[The] child’s educational program must be appropriately ambitious in light of his circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives.” *Endrew F.*, 137 S. Ct. at 1000 (emphasis added).

- To meet the *Endrew F.* standard, IEP goals must be **SMART**:
  - **Specific**: The goals should clearly indicate what specific task or skill the student will demonstrate by the specified time. E.g. “behaving in class” is not specific. “Raising hand to ask to leave the classroom and go to the bathroom without any teacher prompt” is specific.
  
  - **Measurable**: We must be able to objectively measure, in a countable (quantitative) way, whether the goal was achieved or not. E.g. “Johnny will raise his hand” vs. “By the end of the current IEP term, Johnny will raise his hand to ask the teacher to leave the classroom to go to the bathroom 90% of the time over 5 one-week trials as measured by teacher data collection and recording.”

  - **Achievable**: The goal must be realistic for the child to achieve based on the student’s “circumstances” but must set a “challenging objective[].”

  - **Relevant**: The goal must relate to the student’s current need specifically. E.g. if the child is proficient in two digit subtraction, but not multiplication, than a two-digit subtraction goal is not relevant.

  - **Timely**: The goal must be specific as to when it will be accomplished. For certain students that will not take standardized assessments, short-term objectives must also be included. See 20 U.S.C. § 1414(d)(1)(A)(i)(l)(cc).
One of the key requirements of IDEA is that a FAPE must be provided in the Least Restrictive Environment. Specifically, the IDEA mandates that:

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. §1412(a)(5) (emphasis added)

LRE includes non-academic settings, such as meals, recess, counseling, athletics, recreation, clubs, and many other categories. 34 C.F.R. §§ 300.107 and 300.117.

A school district must have a “continuum of alternative placements” available to meet the needs of children with disabilities under IDEA. 34 C.F.R. § 300.115. These include “[i]nstruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings.” 34 C.F.R. §§ 300.39; 300.115. The continuum must also “[m]ake provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.” 34 C.F.R. § 300.115(b)(2).
IDEA: LRE, services, and supports

> Since the LRE can only be determined when “appropriate services and supports” are provided, the IEP must include supplementary aids and services and related service necessary for the provision of FAPE.

> The IEP must contain the following:

> - “a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child,” and
> - “a statement of the program modifications or supports for school personnel that will be provided for the child [to allow the child to:]”
> - “. . . advance appropriately toward attaining the annual goals;”
> - “be involved in and make progress in the general education curriculum[;]”
> - “. . . to participate in extracurricular and other nonacademic activities;”
> - “to be educated and participate with other children with disabilities and nondisabled children . . . .”


> “Supplementary aids and services” means “aids, services, and other supports that are provided in regular education classes or other education-related settings to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate . . .” 20 U.S.C. § 1401(33) (emphasis added).

> “Related services” are typically delivered outside the classroom and mean “. . . transportation, and such developmental, corrective, and other supportive services as may be required to assist a child with a disability to benefit from special education . . . .” Related services can include: speech-language pathology, occupational therapy, physical therapy, counseling, and many other categories. Id. at § 1401(26).

> “Program modifications or supports for school personnel” must be included in the IEP. The IDEA is not expecting teachers to operate miraculously. The IDEA specifically directs IEP teams to consider what program modifications or supports for school personnel might be needed to achieve the IEP goals. For example, a teacher may need specific training on how to implement an appropriate reading program for a student with dyslexia. Or a second teacher, with a specialty in teaching students with hearing impairments, may need to be brought into the general education classroom to assist.
IDEA: LRE and placement

- Placement “refers to the provision of special education and related services rather than a specific place, such as a specific classroom or specific school.” 71 Fed. Reg. 46540, 46687 (Aug. 14, 2006)

- In other words, “placement” is the set of services and supports the student will be provided to allow her to make progress toward the goals. The placement decision, therefore, must come after the PLAAFPS and goals in an IEP are determined, not the other way around.

- The placement decision is “made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options;” and in accordance with the LRE requirements. 34 C.F.R. § 300.116(a).

- The child’s placement must be:
  - determined at least annually;
  - based on the child’s IEP;
  - as close as possible to the child’s home;
  - in the school the child would normally attend if she did not experience a disability unless the child’s IEP requires some other arrangement;
  - based on consideration of “any potential harmful effect on the child or on the quality of services that he or she needs”; and
  - designed to ensure the child is not “not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.”

34 C.F.R. § 300.116(a–e) (emphasis added).
There are several legal standards established by courts around the country to determine what is the LRE for a particular child. See Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989) (two-part test); Roncker v. Walter, 700 F.2d 1058, 1063 (6th Cir. 1983) (portability test); Sacramento City Unified Sch. Dist., Bd. of Educ. v. Rachel H., 14 F.3d 1398, 1404 (9th Cir. 1994).

The Rachel H. test applies in Montana and requires a balancing of the following factors to determine the LRE:

1. the “educational benefits of placement full-time in a regular class”;
2. the “non-academic benefits of such placement”;
3. the effect the child has “on the teacher and children in the regular class”;
4. and the costs of mainstreaming the child.

Id. at 1403-04.
IDEA: Advocating the LRE

- LRE is one of the most important concepts in advocating the civil rights of students with disabilities.
- When the LRE mandate is not followed, students with disabilities are segregated based on something entirely outside of their control. This is no different than segregation on the basis of race.
- Inclusion is a strategy, not an outcome. The outcome is “preparing the student for] further education, employment, and independent living.” 20 U.S.C. § 1400(d)(1)(A)
- Inclusion is the rule, not the exception. LRE mandates that children with disabilities are educated with nondisabled children “to the maximum extent appropriate.”
- When asking whether a child can make educational progress in the regular classroom with his non-disabled peers, the question is not whether the child could make progress without any support or services, but what “supplementary aids and services” could be used to make the general education classroom accessible for the student.
- Although districts are not required to attempt to educate every child in the general education classroom, it is often difficult to justify removal from the regular education classroom unless several properly implemented interventions have been attempted. The general education classroom should be the first placement considered; proceeding down the continuum of alternative placements to more restrictive placements should occur only after the regular classroom placement has been ruled out.
- It is not enough to say “We’ve included the student in the general education classroom, our work here is done.” The child’s participation in the general education classroom must be properly backed with services and supports so the child may make meaningful progress.
IDEA: procedural requirements:

- Procedural safeguards notice
- Comprehensive evaluations
- PWN
- Parental participation
- Parental consent
- Records access.
- Independent Educational Evaluation (IEE).
- Appointment of an educational surrogate.
- Mediation.
- Manifestation Determination.
- State complaint.
- Impartial due process hearing.
- Appeal.
- Stay Put.
- Remedies
- Compensatory education.
- Attorney’s fees and costs.
- Reimbursement for private placement.
IDEA: Key procedural requirements for effective advocacy

- Parental participation
- Parental consent
- Records access
- Independent Educational Evaluation (IEE)
- PWN
- Due process and State Complaints
IDEA defines the terms “parent” very broadly. Anyone within the definition of “parent” has the same rights under IDEA as the child’s biological parent. Under IDEA, “parent” means:

- a **natural, adoptive, or foster parent** of a child
- a **guardian** (but not the State if the child is a ward of the State);
- an **individual acting in the place of a natural or adoptive parent** (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child’s welfare; or
- an individual assigned to be a **surrogate parent**. A “surrogate parent” is an individual appointed (usually by a court) to protect the educational rights of a minor student, such as a child in foster care, who does not have any parents, who is a ward of the state, or whose parents cannot be found.

IDEA: Parental Participation - the key to effective advocacy

- A parent has a right to participate in all meetings regarding the identification, evaluation, placement, and provision of FAPE to the child. 20 U.S.C. § 1415(d)(1)(A).

- A parent is a full member of an IEP team and has the same rights as any other team members (including school officials) to speak in the IEP meeting, to raise concerns, to bring information to the IEP team, and to receive information available to the other team members. 20 U.S.C. § 1414(d)(1)(B)(i).

- A parent must also be a member of any group that makes decisions about the educational placement of the child. 34 C.F.R. § 300.327.

- A parent has a right to bring anyone to the meeting “who has special knowledge or expertise regarding the child” or about the services the child may access or need, and can also include the child’s Part C early intervention provider if the parent requests. This includes an educational advocate or an attorney. 34 C.F.R. § 300.322(b)(1)(ii).
A parent must be given a copy of the child’s IEP at no cost to the parent.

School districts are required to “take steps to ensure that one or both parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to attend. . . .” If a parent cannot be personally present, the district must use other methods to ensure participation, such as via telephone call.

School districts must schedule IEP Team meetings at a “mutually agreed upon time and place;”

School districts must provide notice to the parent of each IEP Team meeting, “early enough to ensure that [the parent] will have an opportunity to attend;

The IEP meeting notice must indicate the purpose, time, place of the meeting, and who will attend.

If a school district intends to bring an attorney to an IEP meeting, the district must indicate that in the meeting notice. If the district does not give advance notice that its attorney will attend the meeting and the attorney shows up, the parent can ask the attorney to leave or reschedule the meeting so the parent has time to retain his own attorney. Unlike a school district, a parent is not required to give notice to the district that she intends to bring someone with her to the IEP meeting, including the parent’s attorney.

School districts “must take whatever action is necessary” to ensure parents understand what is occurring during an IEP meeting, including providing an interpreter at the school’s expense. This could include accommodations for visual or hearing impaired parents.

A school district can only hold an IEP meeting without a parent if the district is unable to convince the parent to attend. The district must keep a record of its attempts to arrange a mutually agreeable time and place, including records of phone calls, correspondence, and visits made to the parents.

34 C.F.R. § 300.322
VIA CERTIFIED MAIL (No. _______________________________)

Re: IEP Team meeting for [insert child’s name], DOB: [insert date of birth]

Dear [Mr./Ms.] [Name of Principal],

I am writing as the educational rights holder [or parent] for [insert child’s name] ("Student") who attends the [insert grade] grade at your school and is currently eligible for special education. I am writing to formally request an IEP team meeting for the purpose of [insert reasons why you want an IEP team meeting at this time].

Accordingly, please send me written notice of a proposed date for the IEP meeting that is within thirty days of the date of this letter. If you have any further questions regarding this correspondence, do not hesitate to contact me. You can reach me at: (phone number) and/or (email). Thank you in advance for your anticipated cooperation in this matter.

Sincerely,

[insert your name]

c: [insert name of district special education director and superintendent – send copies to these people]
IDEA: The parent’s right to access records

- Both IDEA and the Family Educational Rights and Privacy Act (FERPA), guarantee a parent the right to inspect and to review their child’s “educational records. See 20 U.S.C. § 1415(b)(1) and 34 C.F.R. § 300.613 (IDEA); 34 C.F.R. § 99.10 (FERPA).

- “Educational records” are records directly related to the student that are “maintained by an educational agency or a party acting for the agency or institution.” Educational records generally do not include a person’s individual notes that are kept as a memory aid and not shared with or accessible to anyone else. 34 C.F.R. § 99.3.

- Under IDEA, the right to inspect records, includes:
  - the right to a response from the school providing the parent with reasonable explanations and interpretations of the records;
  - the right to copies of the records if the agency’s failure to provide copies “would effectively prevent the parent from exercising their right to inspect and review the records;” and
  - the right to have a parent’s representative, such as the parent’s attorney or advocate, inspect and review the records. 34 C.F.R.§ 300.613(b).

- While IDEA allows the school to charge a fee for copies, the fee cannot “effectively prevent the parent from exercising their right to inspect and review [the] records” and the school cannot charge a fee for time spent searching for the records. 34 C.F.R.§ 300.617.

- Timing of response:
  - Generally, a school must provide records in response to a request “without unnecessary delay.”
  - The school must comply with the records request before any IEP meeting.
  - In no case can the school wait more than 45 days to produce the records, even during the summer break. 34 C.F.R. § 613(a); 34 C.F.R. § 300.11
Consent to the IEP, an important special rule in Montana

- In Montana, there is a special rule that goes above and beyond the requirements of the IDEA.
- Montana regulations require that a school district must obtain written consent for the initial IEP and each annual IEP for a student.
- If the parents and the school cannot agree upon the entire IEP, the new IEP will be implemented in the areas of agreement and the last agreed upon IEP will be implemented in all other areas.
- If the school district cannot obtain parental consent to an IEP “within a reasonable time,” the school district must send the parent a letter indicating that the district will implement the IEP 15 days after the letter. **If the parent does not respond to this letter, the school district will implement the IEP it developed, whether the parent agrees or not**, subject to the parents’ right to a due process hearing. However, if the parent responds to the notice, the school cannot implement the proposed IEP over the parent’s objection.

A.R.M. § 10.16.3505.
IDEA: Parental Participation - practical implications

- Parents’ right to participate, access records, and withhold consent to an IEP work together to ensure that parents are fully involved in developing their child’s IEP.

- Parents have the right to fully participate in IEP meetings, including seeing all documents (in advance of the meeting), asking questions, and receiving reasonable explanations at IEP meetings. Parents should respectfully ask questions, seek more information and provide input.

- Parents should send records requests before the IEP meeting to ensure they have all information the IEP team will consider at the meeting.

- Parents should request meetings scheduled at a convenient time and place. This could even happen by phone or video.

- Parents should not feel rushed through the IEP. Parents can take as long as they need to fully participate in IEP meetings. This might mean multiple meetings.

- Parents do not need to sign the IEP at the end of the IEP meeting. They are free to take it home, read it, consult with an advocate, expert, attorney, or someone else and then come back to the IEP team.

- In Montana, parents can withhold or partially withhold consent to an IEP. If a parent agrees with parts of the IEP, they can provide partial consent. The parent should write a letter and attach it to the IEP clearly explaining what they do and don’t agree with and should mark the box on the IEP indicating that the parent “consents with exceptions.”
[DATE]

[Name of Principal]
[School Address]
[City, State Zip Code]

VIA CERTIFIED MAIL (No. _____________________________)

Re: IEP meeting for [insert child’s name], DOB: [insert date of birth]

Dear [Mr./Ms.] [Name of Principal],

Thank you for the opportunity to meet with [insert child’s name] on [insert date of IEP meeting]. Based on that meeting, I have the following concerns – list them out [and/or] I need the following information – list it out. I would appreciate a written response to this letter by [insert date]. You can reach me at: [insert phone number] and/or [insert email]. Thank you for your prompt attention to this matter.

Sincerely,

[insert your name]

c: [insert name of district special education director – send copy of this letter to this person]
Signing IEP with Exceptions

[DATE]

[Name of Principal]
[School Address]
[City, State Zip Code]

VIA CERTIFIED MAIL, (No. ____________________________)

Re: IEP for [insert child’s name], DOB: [insert date of birth]

Dear [Mr./Ms.] [Name of Principal],

Thank you for the opportunity to meet with [insert child’s name] on [insert date of IEP meeting] and for the draft proposed IEP dated ______. After reviewing the IEP, I proposed the following changes [list them out]. At present, I can only consent to the proposed IEP with exceptions. Specifically, I do not agree to the following portions of the IEP [list out specifically]. Please understand that I do not agree that this IEP provides a FAPE at this time, but I am signing it with exceptions to ensure that [insert child’s name] can receive at least some services while we continue to work on the IEP. Please include a copy of this letter in [insert child’s name] educational file and attach it to the enclosed IEP signed with exceptions. Please let me know when we can schedule another IEP meeting to discuss my concerns as soon as possible. You can reach me at: [insert phone number] and/or [insert email]. Thank you for your time and consideration.

Sincerely,

[insert your name]

Enc. (as noted)
c: [insert name of district special education director – send copy of this letter to this person]
An independent educational evaluation is an important opportunity for a parent to obtain a “second opinion” when the parent disagrees with a school’s evaluation of their child.

An IEE, is an evaluation “conducted by a qualified examiner who is not employed by the [school district]” and either paid for entirely by the school district or otherwise provided “at no cost to the parent.” A parent has a right to an IEE at public expense “if the parent disagrees with an evaluation obtained by the [school district].” 34 C.F.R. § 300.502

If a parent requests an IEE, the school district only has two choices: either (1) provide the IEE without cost to the parent; or (2) file for an administrative due process hearing asking an administrative judge to determine that the evaluations the district completed were “appropriate” and therefore, there is no need for an IEE. Whatever option the district chooses, it must act “without unnecessary delay.” 34 C.F.R. § 300.502(b)(2).
IDEA: IEEs - practical implications

- A proper evaluation is the foundation to an appropriate IEP. The evaluation informs the PLAAFPS, and the goals are built on the PLAAFPS. Without a proper evaluation, it’s impossible to develop an appropriate IEP.

- The purpose of an evaluation is both to understand the student’s eligibility under IDEA and their educational needs. Often, basic school evaluations are focused on eligibility, with an incomplete exploration of understanding the student’s abilities and educational needs. An IEE provides more detailed information so the team can develop an appropriate IEP.

- A functional behavior assessment is a type of evaluation that gives rise to the right to an IEE. See Letter to Scheinz (OSEP June 7, 2000).

- Issues that often trigger an IEE are autism, specific learning disabilities, brain injuries or other neurological disorders, specific medical conditions, and behavior difficulties.

- IEE requests should be made in writing (see the form available at: https://www.disabilityrightsmt.org/education-resources/)
What is PWN and when is it required?

PWN is a written statement indicating that a school district intends to make or to decline a change regarding a student covered under IDEA. A parent is entitled to prior written notice (PWN) anytime a school district proposes or refuses to initiate a change to the student’s identification, evaluation, placement, or provision of FAPE. 20 U.S.C. § 1415(b)(3).

When does a “change in placement” occur?

[A] change in educational placement relates to whether the student is moved from one type of program—i.e., regular class—to another type—i.e., home instruction. A change in the educational placement can also result when there is a significant change in the student’s program even if the student remains in the same setting.

N.D. v. Hawaii Dept. of Ed., 600 F.3d 1104, 1116 (9th Cir. 2010)

What information must PWN contain?

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of [IDEA] and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of [IDEA];

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency’s proposal or refusal.

IDEA: procedural requirements: parents’ rights when things go bad (i.e. dispute resolution)

- Dispute resolution and keeping the peace
- OPI Early Assistance Program
  - Negotiation
  - Mediation
  - Facilitated IEP meetings
- State complaint
- Due process complaint
- Federal court and attorney’s fees
- Stay put
IDEA: procedural requirements: student discipline

- Disproportionality
- Violation of student code of conduct
- Change of Placement
- Manifestation determination and expedited appeal
- Functional Behavior Assessment (FBA) and Positive Behavior Intervention and Supports Plan (BIP)
- Interim Alternative Educational Setting (IAES)
- Special circumstances
- Protection of students not yet IDEA eligible
- Discrimination
- Reports to law enforcement
IDEA: procedural requirements: parents’ rights when things go bad (i.e. dispute resolution)

- Dispute resolution and keeping the peace
- OPI Early Assistance Program
  - Negotiation
  - Mediation
  - Facilitated IEP meetings
- State complaint
- Due process complaint
- Federal court and attorney’s fees
- Stay put
How can we be better student advocates?

- PPPPPP - i.e. know your stuff. Be the most prepared (and respectful) person in room and back it up with research, documentation, and reasoning.
- Know the law and how to use “magic words.” Spoon feed when needed.
- Know the student’s record. Organize information in a way that will improve your advocacy.
- Prepare agendas for IEP meetings. Ask for agendas the school has prepared.
- Ask for documents the school has prepared and shared with staff prior to the IEP meeting.
- Know what you are trying to accomplish and how you will make those requests. Plan your approach. Make sure you can justify your requests, preferably with research, data, and expert opinions.
- Plan for logistics. Sometimes you have to do this homework for someone else.
- You are the voice of the student.
- Be a collaborator, but don’t be afraid to ask for what your student needs. Be specific in your requests.
How can we be better student advocates?

- Ask for explanations when a request is denied.
- Be sure the request is written down in the meeting notes. Do not sign the IEP without reviewing the notes. You may ask for the notes to be read back and edited until they are accurate.
- Place outcomes over process and substance over form.
- Speak truth to power, but remember diplomacy often is most effective.
- Build trust:
  - Communicate clearly, openly and as soon as a problem arises
  - Speak to be understood, not just to demonstrate expertise
  - Do not use subterfuges
  - Do not blame students for the symptoms of their disabilities
  - Take time to truly understand needs vs. wants. Stay curious and look for interests (wants vs. needs) and solutions.
How can we be better systems advocates?

- Be an ally. What are our common goals and values?
- Keep an open mind and an open door, be the expert to call.
- Build coalitions. You have strength in numbers.
- Make your collective voice heard. Show up at legislative hearings, write letters to the editor, comment on regulations.
- Advocate for policies that empower children and allow them to receive high-quality services.
- Focus on outcomes, not process.
Resources:

- Disability Rights Montana: Montana’s designated P&A.  [www.disabilityrightsmt.org](http://www.disabilityrightsmt.org)
- Parents Lets Unite for Kids, Montana’s Parent training and information center:  [www.pluk.org](http://www.pluk.org)
- Rocky Mountain ADA Center:  [http://www.rockymountainada.org/](http://www.rockymountainada.org/)
- The Rural Institute on Inclusive Communities at the University of Montana:  [http://www.ruralinstitute.umt.edu/](http://www.ruralinstitute.umt.edu/)
- Council of Parent Attorneys and Advocates, the leading organization for parent attorneys and advocates in the U.S.:  [http://www.copaa.org/](http://www.copaa.org/)
- Wrightslaw provides extensive information about special education law and resources and publishes several excellent books on those topics:  [http://www.wrightslaw.com/](http://www.wrightslaw.com/)
- U.S. Department of Education, Office for Civil Rights enforces Section 504, the ADA and other anti-discrimination laws in schools.  [https://www2.ed.gov/about/offices/list/ocr/index.html](https://www2.ed.gov/about/offices/list/ocr/index.html)
- U.S. Department of Justice, Civil Rights Division enforces ADA and other anti-discrimination laws outside schools:  [https://www.justice.gov/crt](https://www.justice.gov/crt)
Questions?

disability rights montana
formerly Montana Advocacy Program

Voice/TDD 406-449-2344
Toll Free 800-245-4743
Fax 406-449-2418

1022 Chestnut Street
Helena, Montana 59601

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civil rights protection & advocacy system for montana