

QUICK REFERENCE ON SPECIAL EDUCATION:

A GUIDE FOR CHILD ADVOCATES IN MASSACHUSETTS

DETERMINING ELIGIBILITY FOR SPECIAL EDUCATION

- **Initial Referral:** In MA, a parent, any person in a care giving position, or any person in a professional position can refer a student to be evaluated for special education. Write to the director of special education for the school district to request an evaluation; get proof of delivery of the written request. Keep a copy of the written request.
- **Evaluation:** Within **five** days of receipt of the referral, the school district must send an evaluation consent form to the parent. This document lists the evaluations that will be performed by the district in order to determine if the student qualifies for special education. The consent must be signed and returned before the school can perform testing. **School must test in all areas related to the suspected disability.** The form has a space for parents to request additional testing. Keep a copy and get proof of delivery. After receipt of consent form, the school district has **30** school working days to complete the evaluations. The parent (s)/person with signing rights can *in writing*, request copies of the written reports from the evaluations and the district must provide them with copies at least two days prior to the team meeting. Districts must re-evaluate students every three years.
- **Eligibility Determination Team Meeting:** This meeting must be held within **45** school working days of the district's receipt of the signed evaluation consent form. At the meeting, the team will review the evaluations and ask the following questions: Does the student have a disability (see 603 CMR 28.02(7))? If yes, is the student making effective progress in school? If no, is the lack of progress a result of the disability? If yes, does the student require specially designed instruction to make progress or require related services to access the general curriculum? If yes, then the student is eligible for special education. **Note:** the District must ensure that the IEP Team includes the parent(s)/person with signing rights, a representative from the district knowledgeable about and able to commit district resources, an individual able to interpret test results, a special education teacher, a regular education teacher, etc. See 34 CFR 300.321. The parent is an equal and important part of the Team, and if the parent does not agree with proposed services/placement, the Team is not in agreement. A student is invited to participate in the Team meeting at the age of 14.
- **Finding of No Eligibility:** A parent can reject a finding of ineligibility. This should be done in writing as soon as possible after the finding of ineligibility has been made. Options then include requesting an independent evaluation, going to mediation, or appealing to the Bureau of Special Education Appeals (BSEA).
- **Request for an Independent Evaluation:** If unsatisfied with the district's testing, the parent can request that the district fund an independent evaluation. If student is eligible for free/reduced cost lunch, district must pay in full; otherwise parent submits financial information, and may pay sliding scale fee. Within **10** school days from the time the school district receives the report of the independent evaluation, the Team shall reconvene and consider the evaluation and whether a new or amended IEP is appropriate. If district pays for some or all of the evaluation, the results must be shared with the school.
- **Timeline for Requesting an Independent Evaluation:** A parent or person with signing rights must request the independent evaluation in writing within 16 months after the date of the school district's evaluation, see 603 CMR 28.04(5)(c)(6).

BASIC RIGHTS OF SPECIAL EDUCATION STUDENTS

- All students deemed eligible for special education have a right to a **free, appropriate public education in the least restrictive environment** (FAPE in the LRE).
- **FAPE:** special education services that allow a student to access public education. Access must be meaningful and sufficient to confer benefit. Services must be provided through an **individualized education program (IEP)** that enables the student to make effective progress and that must be designed to develop the student's educational potential.
- **LRE:** to the maximum extent appropriate, students with disabilities should be educated with typical peers and according to the statewide curriculum frameworks. Special classes or separate schooling should occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

THE INDIVIDUALIZED EDUCATION PROGRAM (IEP)

- A written document which details evaluation results, current performance levels, goals based on specific areas of the curriculum, and specific services and accommodations to be provided to the student. Student may also receive accommodations for standardized testing (MCAS); any testing accommodations must mirror the accommodations provided for in other parts of the IEP.
- The IEP is created at a team meeting. The parent then has the choice to accept, reject, or partially accept/reject the IEP, and accept or reject the placement. Any of the services accepted should be immediately implemented. If the IEP is not acceptable in its entirety, it is best to partially reject the IEP, in order to ensure delivery of any new services that the parent approves.

TRANSITION PLANNING

- When a student on an IEP turns 14, a district must provide the student with transition services and invite him to take part in Team meetings.
- Transition services: a coordinated set of activities... focused on improving academic and functional Achievement ...to facilitate the child's movement to post-school activities. 34 CFR 300.43 (2006).
- The IEP should include a Transition Planning Form, which describes the student's post-secondary goals and the skills needed to achieve these goals.
- The district must complete a **688 referral** to the appropriate agency if the student will require services beyond age 22 (DMH, DDS, MRC, etc).

PLACEMENT

- A special education **placement** is the setting where the student will receive his special education services.
- Types of placements: full inclusion, partial inclusion, resource room, substantially separate classroom, day school, residential school.
- Placement should be determined **AFTER** the Team determines what services the student needs to make effective progress.
- The parent must consent to a change of placement. If the parent rejects a placement, the student has **stay put rights** and will remain at the last accepted placement until the disagreement is resolved.
- Specific location of the placement is also a team determination.

504 PLANS

- For students not eligible for an IEP, 504 plans allow for accommodations to give a student with a disability equal access to school and curriculum.
- Authorized under Section 504 of the Rehabilitation Act of 1973 and the ADA.
- To be eligible, student must have a physical or mental impairment that substantially limits one or more major life activities.
- Major life activities include walking, learning, concentrating, communicating, thinking, speaking, etc.
- 504 plans do not provide specially designed curriculum like an IEP, only accommodations.
- No **stay put rights** exist under a 504 plan.

RELEVANT STATUTES AND REGULATIONS

- Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et. seq.
- Section 504 of the Rehabilitation Act of 1973, 29 U.S.C § 794
- M.G.L. c. 71B, Children With Special Needs
- M.G.L. c. 71B, § 3, requires timely and sufficient access of independent evaluators to current and proposed placement, upon parental request
- 603 CMR 28.00: Special Education
- 603 CMR 28.04: Referral and Evaluation
- 603 CMR 28.05: The Team Process and Development of the IEP
- 603 CMR 28.06(6): Instructional grouping requirements
- 603 CMR 28.06(9): Educational Services in Institutional Settings
- 603 CMR 28.08: Continuum of Options for Dispute Resolution
- 603 CMR 228.10: School District Responsibility (programmatic and fiscal)
- 603 CMR 23.00: Student Records
- 603 CMR 23.07(2): Access to Records within 10 Days of Parent Request

RELEVANT CASELAW

- Buckhannon Board & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources, 532 U.S. 598, 600 (2001): Attorney's fees only awarded to a "prevailing party." Settlement agreement not enough. *But see Hutchinson v. Patrick*, 2011 WL 540538 (1st Cir. 2011), which allows attorney's fees for settlement agreements approved by the court with continuing judicial oversight.
- Schaffer v. Weast, 546 U.S. 49 (2005): Burden of proof is placed on party seeking relief.
- Dracut School Committee v. Bureau of Special Education Appeals of the Massachusetts Department of Elementary and Secondary Education et al, 1:09-cv-10966-PBS: Failure to provide appropriate transition services is a denial of FAPE.
- In Re: Swansea Public Schools, BSEA # 07-3824: Hearing officer overturned district's finding that the conduct was not a manifestation of student's disability.
- In Re: Taunton Public Schools, BSEA #09-5294: Residential educational placement is appropriate only when a student requires educational and/or related services during all waking hours in order to make effective educational progress.
- In Re: Westford Public Schools, BSEA #05-0621: Special education and related services must be provided in the least restrictive environment.
- In Re: Worcester, BSEA #09-3109: District must ensure that home-based services are delivered appropriately and effectively as well as included in the IEP, even when another agency is providing the services.
- In Re: Arlington, BSEA #02-1327: Discusses FAPE requirements and discusses balance between specific services available at different schools and least restrictive environment.
- In Re: Medford, BSEA #01-3941: DMR (now DDS) ordered to provide residential services, school district not responsible.
- In Re: Boston Public Schools, BSEA# 06-6542: Ruling outlining the standard for joinder of a state agency.
- In Re: Boston Public Schools BSEA # 04-2506: IEP Team process includes the determination of the actual location of a student's special education services.

DUE PROCESS HEARING AT THE BSEA

- Review the BSEA hearing rules here: <http://www.doe.mass.edu/bsea/laws.html>
- File a hearing request with the BSEA and the opposing party to begin the hearing process. The request must be filed within two years of the action that forms the basis of the complaint.
- The hearing request must include contact information for all parties involved, a description of the issues, all relevant facts, and a statement of relief sought.
- Ensure that the case is ready for hearing before filing. Remember, **BSEA hearing decisions are binding**. Contact any expert witnesses to determine their availability and willingness to testify, make sure all evaluations are complete and have been shared with the school, and consider having an expert observe the student in his current special education program.
- The BSEA also has several pre-hearing dispute resolution options available at: www.doe.mass.edu/bsea/

TIPS FOR ADVOCATES

- As student's attorney, you should identify and contact counsel for the school district for authorization to communicate directly with school personnel.
- Always request a complete copy of the student's education records by writing to the school principal and special education director. Include an authorization for release of information signed by the parent/person with signing rights. Use DESE's Program Quality Assurance as an advocacy tool to ensure school district compliance.
- If a special education student is frequently sent home due to behavior, have the parent keep a log of dates and times this occurs.
- Students with special needs have extra protections when it comes to school discipline. See "Quick Reference Guide on School Discipline" available at: www.clcm.org/schooldiscipline.pdf

HELPFUL WEBSITES:

- IDEA 2004: www.idea.gov
- Massachusetts Department of Elementary and Secondary Education (DESE): www.doe.mass.edu
- Massachusetts Bureau of Special Education Appeals recent decisions and rulings: www.doe.mass.edu/bsea/decisions.html
- DESE's Program Quality Assurance Services: www.doe.mass.edu/pqa/prs
- Wrightslaw Special Education Law and Advocacy: www.wrightslaw.com
- Children's Law Center of Massachusetts: www.clcm.org
- The EdLaw Project: www.edlawproject.org
- Massachusetts Advocates for Children: www.massadvocates.org
- Disability Law Center: www.dlc-ma.org
- Center for Public Representation: www.centerforpublicrep.org
- Center for Law and Education: www.cleweb.org

The **Children's Law Center of Massachusetts** is located at 298 Union Street, Lynn, MA 01901. Contact and information at www.clcm.org or 781-581-1977 (toll-free 1-888-KIDLAW8). This guide was created in conjunction with the **EdLaw Project**, a collaborative initiative of the CLCM and the Youth Advocacy Department of the Committee for Public Counsel Services. EdLaw's office is located at Ten Malcolm X Boulevard, Roxbury MA, 02119. Contact and information at www.edlawproject.org or 617.989.8100. The CLCM is supported by the Mass Bar Foundation, the Massachusetts Legal Assistance Corporation, Boston Bar Foundation, United Way, Bank of America, and Eastern Bank, among other equally generous foundations, corporations, and individual donors. (Rev. 6/13/11)

