



WISCONSIN LEGISLATIVE COUNCIL ACT MEMO

2005 Wisconsin Act 258
[2005 Senate Bill 529]

Special Education

GENERAL BACKGROUND

The statutes define a child with a disability as a child who, because of any of 10 specified conditions, needs special education and related services. The statutes establish a process by which children are referred for evaluation, evaluated, and, if appropriate, an individualized education program (IEP) is established and an educational placement is made. The Division for Learning Support, Equity, and Advocacy in the Department of Public Instruction (DPI) and the responsible local educational agency (LEA) (commonly, but not always, the school district where the child resides) have various duties, including the requirement that the LEA appoint an IEP team for each child referred for evaluation. The IEP team includes the child's parents¹ and certain other categories of persons. The statutes also set forth: DPI's duties; an LEA's duties, an IEP team's duties; contents of an IEP; the process (including timelines) for developing or changing an IEP and making an educational placement; the rights of parents (including procedural safeguards); and a process for handling disputes.

Wisconsin receives federal funding under the federal Individuals with Disabilities Education Act (IDEA) which was reauthorized in 2004. In addition to making substantive changes, IDEA 2004 required that states identify any requirement imposed by state law that was not required under federal law and then minimize the number of such requirements.

2005 Wisconsin Act 258 includes changes recommended by a group of stakeholders representing various interest groups convened by DPI to discuss IDEA 2004 and what changes should be made to subch. V, ch. 115, Stats. (Wisconsin special education law), in response to IDEA 2004.

¹ "Parent" is broadly defined for this purpose and includes, among others, a legal guardian or person acting as a parent of the child. [s. 115.76 (12), Stats.]

This memo provides a brief description of the Act. For more detailed information, consult the text of the law and related legislative documents at the Legislature's Web site at: <http://www.legis.state.wi.us/>.

2005 WISCONSIN ACT 258

In addition to various technical changes (principally to change cross-references to federal law under IDEA 2004) and minor changes, Wisconsin Act 258 does the following:²

1. DPI Duties

- a. Repeals the requirement that DPI approve special education plans for LEAs and instead: (1) requires DPI to determine an LEA's eligibility for special education funding, including determining whether an LEA is failing to comply with any of the requirements of the LEA's plan submitted to DPI; and (2) requires that the LEA's plan submitted to DPI include assurances that the LEA has in effect policies, procedures, and programs that comply with state and federal law. [SECTIONS 8, 13, 18, 20, and 21.]
- b. Repeals the requirement that DPI maintain and make information available to the public about special education and related services. [SECTION 10.]
- c. Requires DPI to develop and maintain a performance plan in accordance with federal law. [SECTION 10.]
- d. Requires DPI to establish and maintain qualifications to ensure that personnel necessary to carry out special education laws are appropriately and adequately prepared and trained, in accordance with federal law. Also, requires DPI to require that LEAs take measurable steps to recruit, hire, train, and retain high qualified personnel to provide special education and related services. [SECTION 11.]
- e. With respect to data that DPI examines to determine if there are significant discrepancies occurring in the rate of long-term suspensions and expulsions for children with disabilities, requires that it include data disaggregated by race and ethnicity. [SECTION 12.]

2. LEA Duties

- a. Requires an LEA to seek to obtain informed consent from a child's parent before providing special education and related services to the child. Specifies that if the parent denies consent, the LEA may not provide special education and related services. Specifies that if the parent denies consent or does not respond to a request for consent, the LEA: (1) is not in violation of the requirement to make a free appropriate public education (FAPE) available; and (2) is not required to convene an IEP team meeting or develop an IEP for the child. [SECTION 74.]
- b. Specifies that for a child with a disability under age three who is participating in the early intervention program operated by a county or under contract with a county, the LEA is not required to provide the child with a FAPE. [SECTION 14.]
- c. Changes the LEA responsible for serving children with disabilities enrolled in private schools from the LEA where the child resides to the LEA where the private school is located. [SECTION 16.]

² References to SECTION numbers are to the SECTION numbers in the Act.

- d. Requires an LEA to establish not only written policies and procedures to implement the state and federal special education law, but also written programs to do so. [SECTION 17.]
- e. Repeals most of the specific components that must be included in the plan the LEA submits to DPI, but requires the plan to include: (1) assurances that the LEA has in effect policies, procedures, and programs consistent with state and federal special education law; (2) information about the LEA's plan to ensure that all personnel necessary to carry out the requirements of the state and federal special education law are appropriately and adequately prepared; (3) data regarding children with disabilities that is required to be collected or reported to comply with federal special education law; and (4) any other information DPI requires to permit review of the plan. [SECTIONS 19 to 23.]
- f. Repeals the requirement that an LEA annually provide a special education performance report to all parents and to DPI. [SECTION 24.]
- g. Requires that for funds the LEA provides to charter schools with which it contracts, the distribution must be on the same basis as special education funds provided to the LEA's other schools (including proportional distribution based on enrollment of children with disabilities) and at the same time that the LEA distributes other federal funds to the LEA's other schools. [SECTION 25.]
- h. Modifies the circumstances under which an LEA may be required to reimburse a parent for private school placement by the parent. [SECTIONS 76 to 80.]

3. IEP Team Membership

- a. Regarding the members of an IEP team, modifies the requirement with respect to the special education teacher to require that the teacher have recent training or experience related to the child's known or suspected area of special education needs. (Prior law required extensive and recent training and experience related to the child's known or suspected disability.) [SECTION 28.]
- b. Regarding the members of an IEP team, clarifies that the LEA representative who is qualified to provide, or supervise the provision of, special education services and is knowledgeable about the curriculum and the LEA's available resources must also be authorized by the LEA to commit the LEA's available resources. [SECTION 29.]
- c. If a child is attending school in a nonresident school district under the full-time open enrollment program or in certain tuition waiver cases, requires that the IEP team include at least one person designated by the school board of the resident school district who has knowledge or special expertise about the child. (Prior law required this for the initial evaluation or reevaluation and development of the IEP.) [SECTIONS 45 and 68.]

4. IEP Team Meetings

- a. Provides that an IEP team member is not required to attend an IEP team meeting if the parent and LEA agree (parent's agreement must be in writing) that the member's attendance is unnecessary because the member's area of curriculum or related service is not being modified or discussed at the meeting. [SECTION 33.]

- b. Provides that an IEP team member may be excused from attending all or part of an IEP team meeting that involves a modification or discussion of the member's area of curriculum or related service if the parent and LEA consent (parent's consent must be in writing) and the member submits his or her input to the parent and IEP team before the meeting. [SECTION 33.]
- c. Provides that after the annual IEP meeting for the school year: (1) the entire IEP team may make changes to the IEP; or (2) the parent and LEA may agree not to convene the IEP team to make changes and instead develop a written document to modify the IEP. The LEA must give the parent a copy of the revised IEP. [SECTION 69.]

5. IEPs

- a. Provides that if an IEP team determines that a child with a disability will have appropriate accommodations to participate in a statewide or LEA assessment, the IEP must state them. Also provides that if an IEP team determines that a child will take an alternate assessment, the IEP must include a statement as to why the child cannot participate in regular assessment and why alternate assessment is appropriate. [SECTIONS 15 and 59.]
- b. Requires an IEP to state measurable annual goals, including academic and functional goals. (Prior law required measurable annual goals, including benchmarks or short-term objectives.) [SECTION 54.] However, for a child who takes alternate assessments aligned with alternate achievement standards, requires the IEP to describe benchmarks or short-term objectives. [SECTION 55.]
- c. Requires an IEP to state the child's present level of academic achievement and functional performance, rather than the present level of educational performance. [SECTION 53.]
- d. Requires the IEP's statement of special education and related services and supplementary aids and services to be provided to be based on peer-reviewed research to the extent practicable. [SECTION 56.]
- e. With respect to IEP provisions relating to transition: (1) repeals the requirement for a statement when the child turns 14, and annually thereafter, about courses of study to prepare for a successful transition; (2) repeals the requirement for a statement beginning at least when the child is 16, and annually thereafter, about needed transition services; and (3) creates a requirement beginning not later than the first IEP that will be in effect when the child turns 14, and updated annually thereafter, for a statement about appropriate, measurable postsecondary goals based on age-appropriate transition assessments related to training, education, employment and, where appropriate, independent living skills and for a description of transition services, including courses of study, needed to assist in reaching these goals. [SECTION 60.]
- f. Repeals the required timing and content of progress reports to parents, and requires the IEP to state when periodic reports on a child's progress toward attaining annual goals will be provided to the parents. [SECTION 63.]
- g. In developing an IEP, additionally requires that the academic, developmental, and functional needs of a child be considered. [SECTION 64.]

- h. For a child whose behavior impedes the child's or other children's learning, requires the IEP team to consider the use of strategies to address that behavior, rather than requiring this consideration "when appropriate." [SECTION 65.]
- i. Specifies that the special education statute does not require information in an IEP beyond what is explicitly required in s. 115.787, Stats. [SECTION 72.]

6. Timeline

Prior law required that an evaluation, an IEP, and an educational placement determination be completed within 90 days of a special education referral unless the parents or DPI granted an extension. The Act includes the following timeline:

- a. Within 15 business days of receiving a special education referral, requires the LEA to send to the child's parents either: (1) a request for consent to evaluate the child; or (2) notice that the LEA has determined that no additional data are necessary. [SECTION 27.]
- b. Within 60 days after an LEA receives parental consent for the evaluation or sends the notice that no additional data are needed, requires the LEA to determine if the child is a child with a disability unless: (1) the child's parent repeatedly fails or refuses to produce the child for an evaluation; or (2) the child has transferred to an LEA after the 60-day period began and, before the previous LEA made the determination, the subsequent LEA is making sufficient progress to ensure prompt completion of the evaluation and the parents and subsequent LEA agree to a specific time for completing the evaluation. [SECTION 30.] If a pupil transfers to another school district in the same school year, the LEA must ensure that the evaluation is coordinated between schools to ensure its prompt completion. [SECTION 47.]
- c. Within 30 days after a determination that the child is a child with a disability, requires the LEA to conduct a meeting to develop an IEP and determine an educational placement. [SECTION 30.]
- d. Provides that, subject to the deadlines above, if the parents or LEA staff determine at any meeting during the process of the evaluation, IEP development, or placement that additional time is needed to permit meaningful parental participation, the LEA must provide it. [SECTION 31.]

7. Evaluations and Reevaluations

- a. Repeals the requirement that the LEA notify parents of the qualifications of the evaluators, but retains the requirement in the statutes that parents be notified of evaluators' names, if known. [SECTIONS 35, 43, and 83.]
- b. Repeals the requirement that each IEP team participant who administers tests, assessments, or other evaluation materials as part of an evaluation or reevaluation prepare a written summary of findings and make it available to all members of the IEP team at an IEP team meeting. [SECTION 46.]
- c. Requires the IEP team to prepare an evaluation report that includes documentation of determination of eligibility, and requires the LEA to give the report, including the documentation of eligibility, to the child's parents. Repeals the requirement that the LEA

ask each IEP team member if he or she wants a copy of the report or wants additional time, and repeals the requirement that the evaluation stop if such a request is made until the copy is provided. [SECTION 49.]

- d. Repeals the requirement that, if an IEP team determines that the child is not a child with a disability, the evaluation report must identify: (1) educational needs of the child; and (2) services offered by the LEA or by other entities that may benefit the child. [SECTION 50.]
- e. Repeals the requirement that a reevaluation be conducted at least once every three years, and instead requires reevaluation at least once every three years unless the parents and LEA agree that it is unnecessary. Provides that the IEP team must conduct a reevaluation if the LEA determines it is warranted based on certain factors (similar to prior law) or if the parent or teacher requests it, but prohibits a reevaluation more frequently than once a year unless the parents and LEA agree otherwise. [SECTION 51.]
- f. Prohibits using any single measure or assessment in conducting an evaluation. (Prior law prohibited using any single procedure.) [SECTION 38.]
- g. Amends provisions relating to the conduct of an evaluation to: (1) refer to assessments and evaluation materials instead of tests; (2) require that, unless clearly not feasible, assessments and evaluation materials be in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally (prior law required tests in the child's native language or other mode of communication unless clearly not feasible); (3) repeal the requirement that standardized tests given to the child have been validated for the specific purpose for which they are used and instead require that assessments and other evaluation material are used for the purposes for which they are valid and reliable; (4) clarify that evaluation data includes local or state assessments and that observations are class-room observations; and (5) specify that the evaluation is also to determine: (a) the educational needs of the child or, in the case of reevaluation, whether the child continues to have such educational needs; and (b) the child's present levels of academic achievement and related developmental needs (rather than present levels of performance and educational needs as under prior law). [SECTIONS 39 to 44 and 48.]
- h. Prohibits a determination that a child is a child with a disability if the determinant factor is lack of appropriate instruction in reading or lack of instruction in math. Retains provision that this determination cannot be made because the child has limited proficiency in English. [SECTION 48.]
- i. Provides that an evaluation is not required before terminating a child's eligibility for special education and related services because of graduation from secondary school with a regular diploma or because the child reached the age of 21. In those cases, requires the LEA to provide the child with a summary of performance and recommendations on how to assist the child in meeting postsecondary goals. [SECTION 51.]

8. Procedural Safeguards

- a. Repeals the requirement that, at any IEP team meeting, the LEA must inform the parents of their right to request additional time or to receive a copy of the evaluation report. However, if requested, requires the LEA to provide to the parents a copy of the most recent evaluation report at any IEP team meeting. [SECTIONS 31 and 32.]

- b. For a child who is a ward of the state: (1) requires an LEA to obtain informed consent in compliance with federal law before conducting an initial evaluation; and (2) provides that a judge overseeing the child's care may appoint a surrogate for the child's parents. [SECTIONS 36, 37, and 81.]
- c. Amends the content and timing of notices provided to parents, including the procedural safeguard notice. Requires that the procedural safeguards notice be provided once a year, but also upon parental request for evaluation, upon the first occurrence of filing for a due process hearing, and upon parental request for the information. (Prior law required that it be provided upon each initial referral for evaluation, each notification of an IEP team meeting, and upon reevaluation.) [SECTIONS 82 to 88.]

9. Due Process Hearings

- a. Specifies that a request for a due process hearing is filed by providing the request to the other party with a copy to DPI, rather than filing the request with DPI. [SECTIONS 91 to 93.]
- b. Provides that an LEA may request a due process hearing only to override a parent's refusal to grant consent for an initial evaluation or reevaluation or to contest the payment for an independent educational evaluation. (Under prior law, an LEA could also request a hearing to override a parent's refusal to grant consent for an initial educational placement.) [SECTION 92.]
- c. Provides that if a parent files a request for a due process hearing and the LEA has not previously sent a certain notice to the parent, the LEA must, within 10 days of receiving the hearing request, send certain information to the parent. Also requires the party receiving a hearing request to send to the other party, within 10 days of receiving the hearing request, a written response that addresses the issues raised in the hearing request. [SECTIONS 94 and 95.]
- d. Within 15 days of receiving a hearing request and before a due process hearing, requires an LEA to convene a meeting with the parents and relevant members of the IEP team, unless the LEA and parent agree in writing to waive the meeting or use mediation. At the meeting, requires the parents to discuss their hearing request, and provides that the LEA may resolve the issues. Requires that the meeting include an LEA representative who is authorized to make decisions for the LEA. Prohibits an attorney for the LEA from attending the meeting unless an attorney accompanies the parent. Provides that if issues are resolved at the meeting, a legally binding agreement must be executed, which either the parent or LEA may void within three business days of its execution. [SECTION 98.]

Further provides that if the LEA does not resolve the issues to the satisfaction of the parents within 30 days of receipt of the hearing request, the hearing may occur. [SECTION 98.] Requires the hearing officer to issue a decision within 45 days after the conclusion of this 30-day period, rather than within 45 days after the receipt of the hearing request as under prior law. [SECTION 102.]

- e. Provides that a party filing a hearing request may amend its request only if the other party gives written consent and is given an opportunity to resolve the additional issues at the meeting in item d., above, or if the hearing officer grants permission at least five days before the hearing is scheduled. [SECTION 96.] Provides that the party requesting the hearing may

not raise issues at the hearing that were not raised in the hearing request unless the other party agrees. [SECTION 99.]

- f. Provides that a hearing may not occur unless the hearing request meets certain requirements, and requires the hearing officer to make this determination if an allegation of insufficiency is made. [SECTION 94.]
- g. Requires a hearing officer to base a decision on substantive grounds on a determination of whether the child received a FAPE. If a procedural violation is alleged, provides that a hearing officer may find a child did not receive a FAPE only if procedural inadequacies impeded the child's right to receive a FAPE, significantly impeded the parents' opportunity to participate in the decision making-process regarding providing a FAPE, or caused a deprivation of educational benefits. [SECTIONS 100 and 101.]
- h. Repeals the provision about when a court may award attorney fees and costs to the parent who is the prevailing party in a court action, and instead incorporates federal law regarding this matter. [SECTION 103.]
- i. Imposes additional qualifications on those who may serve as hearing officers. [SECTION 97.]

10. Mediation

- a. Specifies that the written resolution or agreement following mediation must state that all discussions that occurred during mediation are confidential and may not be used in any hearing or civil proceeding. Further specifies that the mediation resolution or agreement is enforceable in court. [SECTION 90.]
- b. Specifies that, for purposes of the mediation statute, a "dispute" also include a disagreement arising before filing for a due process hearing. [SECTION 89.]

11. Definitions

- a. Provides that "related services" also includes interpreting services and school nursing services designed to enable a child to receive a FAPE as described in the child's IEP but does not include a medical device (or the replacement of such) that is surgically implanted. [SECTION 5.] (A child with a disability is a child who, because of any of 10 specified conditions, needs special education and "related services." [s. 115.76 (5) (a), Stats.]) Also, specifies that an "assistive technology device" does not include a medical device (or the replacement of such) that is surgically implanted. [SECTION 2.]
- b. Changes references to "emotional disturbance" as one of the 10 specified conditions in the definition of child with a disability to "emotional behavioral disability." [SECTION 4.]
- c. Specifies that the definition of a "child" includes a child who is homeless, a child who is a ward of the state, county, or child welfare agency, and a child who is attending a private school. [SECTION 3.]

Effective Date: July 1, 2006.

Initial Applicability: The provisions relating to due process hearings in Item 10., above, apply to requests for hearings filed on or after July 1, 2006.

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