

“Prior Written Notice” Reminders

Prompted by guidance from the Department of Public Instruction (DPI), and the changing circumstances throughout the 2020-2021 school year, districts are engaging in many discussions with parents and guardians regarding students’ school programs, including the type and amount of instruction. Virtual meetings, online instruction, social distancing, and other public health requirements have all affected the way districts develop and revise individualized education programs (IEPs) under the Individuals with Disabilities Education Act (IDEA). Knowing this, districts should ensure that special education teams are aware of and understand the requirement in federal and state law to provide appropriate “prior written notice” (PWN) when making or refusing to make changes to students’ programming under IDEA and state law. The purpose of this article is to set forth the basic requirements of such notice and to identify key concepts for ensuring legal compliance.

The Basic Requirements*

The concept of “prior written notice” is often not well understood. At its core, it is a requirement for a district to provide parents with written notice, within a reasonable amount of time, before a district proposes or refuses:

- to initiate or change the identification, evaluation, or educational placement of a student; or
- the provision of a free appropriate public education (FAPE) to a student.

This obligation must be broadly applied, and is required following many commonly occurring situations, such as:

- evaluation, reevaluation, or a district’s refusal to evaluate;
- development of initial IEP;
- refusal to pay for independent educational evaluation (IEE);
- proposal or refusal to place student in residential placement;
- proposal or refusal to provide transportation;
- proposal or refusal to change a student’s services; or
- any other specific proposal or refusal by a district with which a parent or guardian does not agree.

Whenever prior written notice is required, it must include all seven items below:

1. A description of the action proposed or refused by the district.
2. An explanation of why the district proposes or refuses to take the action.
3. A description of each evaluation procedure, assessment, record, or report the district used as a basis for the proposed or refused action.
4. A description of any other options that the district considered and the reasons why those options were rejected.
5. A description of other factors that are relevant to a district's proposal or refusal.
6. A statement that parents have protection under the procedural safeguards of special education law and, if the notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained.
7. A list of other sources for parents to contact to obtain assistance in understanding the provisions of special education law.

Also, if the notice proposes to evaluate or reevaluate the child, the notice must contain the names of the evaluators, if known.

The Format of the Notice

Three rules must be followed when writing a PWN:

1. Write the PWN in language understandable to the general public;
2. Provide the PWN in the native language of the parent or other mode of communication of the parent, unless it is clearly not feasible to do so; and,
3. If the native language or other mode of communication of the parent is not a written language, take steps to ensure that (1) the notice is translated orally or by other means to the parent in his or her native language or other mode of communication, and (2) the parent understands the content of the notice. The district must maintain written evidence of having complied with the requirements in (1) and (2).

Beyond the requirements above, neither federal nor state law demands a specific format for the notice. Further, DPI has not developed a template solely for this purpose, concluding instead that several of its other sample forms incorporate the required elements of PWN. These include: the Evaluation and Reevaluation Notices (IE-1 through IE-3 and RE-1 through RE-5), the Determination and Notice of Placement (P-1 and P-2), Notice of Graduation (P-3), Notice of Ending of Services Due to Age (P-4), Notice of Cessation of Special Education in Response to Parental Revocation of Consent (P-6), and Notice of Response to an Activity Requested by Parent (M-1).

In some instances, however, not all required elements of PWN can be adequately addressed by use of DPI's sample forms. The forms do not provide individual prompts for each required element in the notice such as description of each evaluation procedure, assessment, record, or report the district used in deciding to propose or refuse the action. Further, many of these forms do not provide sufficient space to fully document the IEP team's considerations and explain the cogent reasoning needed to support a district's decision, a critical step that was underscored in the United States Supreme Court's decision in *Endrew F.*

Because of the continuing pandemic, DPI has acknowledged that parents and districts may be able to agree on placement and services outside of an IEP team meeting and document that agreement in DPI’s special education form I-10. If an I-10 is used, a separate PWN would not be necessary but districts are encouraged to provide a detailed explanation of the parties’ agreement in the I-10 and to revise the P-2 (placement page) when required under DPI’s recent guidance.

In all other circumstances, districts are advised to send parents a separate document drafted solely for the purpose of providing PWN, which addresses each of the required elements set forth above, including considerations driven by the public health emergency. To this end, districts may elect to use the [template attached to this article](#) as a starting point and carefully revise it to reflect the considerations unique to the student.

Section 504 of the Rehabilitation Act of 1972 also requires notice to parents, guardians, and students although the applicable regulation does not specify that the notice must be “written.” Despite no clear requirement, we would encourage districts to incorporate the above prior written notice procedures into their Section 504 protocol for two reasons. First, the Section 504 regulation on notice and other procedural safeguards specifically states: “Compliance with the procedural safeguards of [IDEA] is one means of meeting this requirement.” Second, providing a prior written explanation of the reason for a district’s decision ensures that the “notice” required by Section 504 is documented should the District need to prove compliance at a later date.

If you have questions about the attached template or prior written notice in general, our school law team is available to answer your questions or provide additional assistance.

**The requirements for prior written notice may be found at: 34 CFR § 300.503 and Wis. Stats. §§ 115.792(1)(b) and 115.792(2). These requirements are also discussed in DPI’s Forms Guide, December 2019 revision, pages 5-6. The sec. 504 regulation on procedural safeguards, including notice, may be found at: 34 CFR § 104.36.*

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