

**ARTICLE 24:05**  
**SPECIAL EDUCATION**

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**24:05:13:01. Definitions.** Terms defined in § 24:43:01:01 and in SDCL 13-37-1 have the same meaning when used in this article. In addition, terms used in this article mean:

(1) "Adult services," services pertaining to independent living, vocational development, preemployment services, or employment services designed for persons 16 years of age or older;

(2) "Approved program," a written description of a ~~school district's~~ LEA's, state agency's, special education school's, or community support provider's policies and procedures for implementing its special education program that is found by the department to comply with this article;

(3) "At no cost," the provision of specially designed instruction without charge to the parent except for incidental fees that are normally charged to students without disabilities or their parents as a part of the regular education program;

(4) "Brailist," a person who produces materials in Braille by the use of a manual Braille writer, slate and stylus, or computer;

(5) "Braille teacher," an individual who assists classroom teachers in the instruction of reading and writing through the use of Braille;

(6) "Business day," Monday through Friday, except for federal and state holidays, unless holidays are specifically included in the designation of business day;

(7) "Community support provider," "CSP," a nonprofit facility as defined in SDCL 27B-1-17(4);

(8) "Consent,":

(a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in the parent's native language, or other mode of communication;

(b) The parent understands and agrees in writing to the carrying out of the activity for which the parent's consent is sought, and the consent describes that activity and lists the records, if any, that will be released and to whom;

(c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at anytime;

(d) If a parent revokes consent, that revocation is not retroactive, it does not negate an action that has occurred after the consent was given and before the consent was revoked; and

(e) If the parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the ~~local education agency~~ LEA is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent;

(9) "Core academic subjects," English, reading, language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography;

(10) "Day," calendar day unless otherwise indicated as a business day or school day;

(11) "Day school program," a specialized program provided in a facility, a ~~school district~~ LEA, or a cooperative center that a child attends during the day, returning home at night;

(12) "Department," the Department of Education;

(13) "Early childhood special education program," a program specially designed to meet the unique needs of children with disabilities, birth through five years of age, including center-based instruction, home-based instruction, and instruction in hospitals and institutions;

(14) "Eligible student," a person through the age of 21 years who is a resident of the state of South Dakota and who requires special education or special education and related services because of the person's educational needs;

(15) "English Learner" as the term is defined in ESSA;

~~(15)~~ (16) "Every Student Succeeds Act," "ESSA," the federal reauthorization of Elementary and Secondary Education Act as codified at 20 U.S.C. § 6301 et seq., December 10, 2015, and 34 C.F.R. Part 200, published in the Federal Register on July 2, 2019;

~~(16)~~ (17) "Extraordinary cost funds," amounts set aside by the secretary pursuant to SDCL 13-37-40;

~~(17)~~ (18) "High cost program," a program in which:

- (a) Students have been identified as eligible for special education and related services;
- (b) Each student in the program has an IEP;
- (c) The cost of providing special education instruction and related services is more than fifty thousand dollars in excess of the total revenues credited to the special education fund of the ~~school-district~~ LEA referenced in SDCL 13-37-8.10; and

(d) The ~~district~~ LEA incurs the costs referenced in subdivision (c) due to the intensity, frequency, and diversity of the special education needs of one or more of the students in the program;

~~(18)~~ (19) "High cost student," a student who meets the following criteria:

- (a) The student has been identified as eligible for special education and related services;
- (b) The student has an IEP;
- (c) The cost of providing special education instruction and related services for the student is at least twice the funding allocation for the student as defined in SDCL 13-37-35.1; and

(d) The ~~district~~ LEA incurs the costs referenced in subdivision (c) due to the intensity, frequency, and diversity of the special education needs of the student;

~~(19)~~ (20) "Homeless children," the term, homeless children and youths, as defined in section 725 (42 U.S.C. § 11434a) of the McKinney-Vento Homeless Assistance Act, 42 U.S.C. § 11431 et seq., as amended to ~~January 1, 2009~~ December 10, 2015;

~~(20)~~ (21) "Individuals with Disabilities Education Act," "IDEA," the federal Individuals with Disabilities Education Act as codified at ~~20 U.S.C. §§ 1411 through 1420~~ 20 U.S.C. § 1400 et seq., December 3, 2004, and 34 C.F.R. Part 300, published in the Federal Register on August 14, 2006, December 1, 2008, and February 14, 2013 and as amended December 10, 2015;

~~(21)~~ (22) "~~Individual educational program~~ Individualized education program," "IEP," a written statement for a specific child with a disability, in accordance with chapter 24:05:27, based on a full and individual evaluation of the child and developed by an IEP team;

~~(22)~~ (23) "Individualized education program team," "IEP team," ~~as used in this article, the term, individualized education program team, or IEP team, means~~ the group of individuals described in § 24:05:27:01.01 that is responsible for developing, reviewing, ~~or~~ revising, and implementing an IEP for a child with a disability;

(24) "Individualized family service plan," "IFSP," a written plan for providing early intervention services to a child and to the child's family pursuant to chapter 24:14:13;

~~(23)~~ (25) "Least restrictive environment," a learning environment for a child in need of special education or special education and related services, including a child placed in a public or private institution or another care facility, that includes to the maximum extent appropriate children who are not in need of special education or special education and related services, as determined through the child's ~~individual educational program~~ IEP;

~~(24) "Limited English proficient," as the term is defined in section 9101(25) of the ESEA;~~

~~(25)~~ (26) "Local education agency," "LEA," a school district or other public authority under supervision of the department established by state law for the purpose of providing free public education on a regional basis which also provides special education and related services to children with disabilities within the state of South Dakota;

~~(26)~~ (27) "National Instructional Materials Access Center," "NIMAC," the center established pursuant to section 674(e) of the IDEA;

~~(27)~~ (28) "National Instructional Materials Accessibility Standard," "NIMAS," as the term is defined in section 674(e)(3)(B) of the IDEA;

(29) "Native language," when used with respect to an individual who is limited English proficient, means the following:

(a) The language normally used by that individual, or, in the case of a child, the language normally used by the parents of the child, except as provided in paragraph (29)(b) of this section.

(b) In all direct contact with a child (including evaluation of the child), the language normally used by the child in the home or learning environment.

(1) For an individual with deafness or blindness, or for an individual with no written language, the mode of communication is that normally used by the individual (such as sign language, Braille, or oral communication).

~~(28)~~ (30) "Policy," a rule, regulation, or standard enacted by a ~~school-district~~ LEA board;

~~(29)~~ (31) "Physical education," the development of physical and motor fitness and fundamental motor skills and patterns through individual and group games and sports, including intramural and lifetime sports, special physical education, adapted physical education, movement education, and motor development;

~~(30)~~ (32) "Related services," services that support the provision of special education, including transportation and those developmental, corrective, and other supportive services determined by an IEP team to be required for an eligible child to benefit from special education;

~~(31)~~ (33) "Residential school program," an approved specialized program provided in a facility that a child attends 24 hours a day;

(34) "School day" calendar day when school is in session a full day or some portion thereof;

~~(32)~~ (35) "Scientifically based research," as the term is defined in ESSA;

~~(33)~~ (36) "Secretary," the secretary of the Department of Education;

~~(34)~~ (37) "Self-contained program," a specialized instructional environment for eligible children in need of special education or special education and related services who require intensive instructional procedures;

(38) "Services plan," a written statement that describes the special education and related services the LEA will provide to a parentally-placed child with a disability enrolled in a private school who has been designated to receive services, including the location of the services and any transportation necessary

~~(35)~~ (39) "Special education," instruction specially designed to meet the unique needs of a student with disabilities at no cost to parents or guardians, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals, institutions, and other settings;

~~(36)~~ (40) "Specially designed instruction," adapting, as appropriate to the needs of an eligible student, the content, methodology, or delivery of instruction;

(a) To address the unique needs of the child that result from the child's disability; and

(b) 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.

~~(37)~~ (41) "Standard deviation," a statistical measure of variation derived by squaring each deviation in a set of scores, taking the average of these scores, and then taking the square root of the results;

~~(38)~~ (42) "Supplemental aid," a program in which:

- (a) Students have been identified as eligible for special education and related services;
- (b) Each student in the program has an IEP; and
- (c) The cost of providing special education instructions and related services is in excess of the total revenues credited to the special education fund of the ~~school district~~ LEA referenced in SDCL 13-37-8.10;

(43) "Supplementary aids and services," aids, services, and other supports that are provided in regular education classes, other education-related settings, and in extracurricular and nonacademic settings, to enable children with disabilities to be educated with nondisabled children to the maximum extent appropriate.

~~(39)~~ (44) "Travel training," instruction provided, as appropriate, to children with significant cognitive disabilities, and any other children with disabilities who require this instruction to enable them to develop an awareness of the environment in which they live and to learn the skills necessary to move effectively and safely from place to place within that environment (e.g., in school, in the home, at work, and in the community);

~~(40)~~ (45) "Vocational education," organized educational programs which are directly related to the preparation of individuals for paid or unpaid employment or for additional preparation for a career requiring other than a baccalaureate or advance degree;

~~(41)~~ (46) "Universal design," as the term is defined in section 3 of the Assistive Technology Act of 1998, 29 U.S.C. § 3002, as amended to January 1, 2009; and

~~(42)~~ (47) "Ward of the state," a child who, as determined by the state where the child resides, is a foster child, a ward of the state, or in the custody of a public child welfare agency. Ward of the state does not include a foster child who has a foster parent who meets the definition of a parent in § 24:05:13:04.

**Source:** 16 SDR 41, effective September 7, 1989; 18 SDR 158, effective March 31, 1992; 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 23 SDR 63, effective November 4, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009; 40 SDR 40, effective September 11, 2013; 40 SDR 102, effective December 4, 2013; 40 SDR 202, effective June 2, 2014; 46 SDR 149, effective July 6, 2020.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1, 13-37-1.2, 13-37-40, 13-37-41.

**24:05:13:02. Free appropriate public education (FAPE) defined.** ~~For purposes of this article, the term, free~~ Free appropriate public education, or FAPE, includes special education and related services which meet the following requirements:

- (1) Are provided at public expense, under public supervision and direction, and without charge;
- (2) Meet the standards of the ~~state board in this article~~ Board of Education Standards and the implementing regulations for Part B of the ~~Individuals with Disabilities Education Act as in effect December 3, 2004, and 34 C.F.R. Part 300, published in the Federal Register on August 14, 2006, and December 1, 2008~~ IDEA;

(3) Include preschool, kindergarten, elementary school, and secondary school education in South Dakota; and

(4) Are provided in conformity with an ~~individual educational program~~ IEP and this article.

FAPE shall be made available to any eligible individual child with a disability who needs special education and related services even though the child has not failed or been retained in a course or grade and is advancing from grade to grade. FAPE shall also be provided to eligible children with disabilities who have been suspended or expelled ~~from school~~ consistent with chapters 24:05:26 and 24:05:26.01. The determination that a child is eligible under this article must be made on an individual basis by an IEP team: following the appropriate procedures as set out in this article.

**Source:** 16 SDR 41, effective September 7, 1989; 18 SDR 158, effective March 31, 1992; 20 SDR 33, effective September 8, 1993; transferred from subdivision 24:05:13:01(10), 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:14:01. Interagency agreements.** The department shall develop and implement interagency agreements with the Departments of Social Services, Health, Human Services, and Corrections for the purpose of describing the role that each of these agencies plays in providing or paying for special education or related services for children with disabilities. These interagency agreements shall define the financial responsibility and other responsibilities of each agency for providing children with disabilities with free appropriate public education a FAPE, establish

procedures for resolving interagency disputes among agencies that are parties to the agreement, and establish conditions, terms, and procedures under which ~~local educational agencies~~ LEAs may initiate proceedings in order to secure reimbursement from agencies that are parties to the agreement or otherwise implement the provisions of the agreement.

The financial responsibility of each noneducational public agency described in this section, including the state Medicaid agency and other public insurers of children with disabilities, precedes the financial responsibility of ~~local educational agencies~~ LEAs or the state agency responsible for developing the child's ~~individualized education program~~ IEP.

This section does not allow an agency to reduce medical and other assistance available to children with disabilities to receive services that are also part of a ~~free appropriate public education~~ FAPE or to alter the requirements and eligibility of a child with disabilities under Title V, maternal and child health; Title XIX, Medicaid; or Title XXI of the Social Security Act; or under any other public benefits or insurance program including those required by federal statute.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:14:01.02. Obligation of noneducational public agencies.** If any public agency other than an educational agency is otherwise obligated under federal or state law, or assigned responsibility under state policy or pursuant to § 24:05:14:01, to provide or pay for any services that are also considered special education or related services such as assistive technology devices and services, related services described under § 24:05:27:16, supplementary aids and services, and

transition services described under § 24:05:27:13.02, that are necessary for providing a ~~free~~ ~~appropriate public education~~ FAPE to children with disabilities within the state, the public agency shall fulfill that obligation or responsibility, either directly or through contract or other arrangements pursuant to § 24:05:14:01.

A noneducational public agency may not disqualify an eligible service for Medicaid reimbursement because that service is provided in a school context.

If a public agency other than an educational agency fails to provide or pay for the special education and related services described in this section, the ~~school district~~ LEA or state agency responsible for developing the student's IEP shall provide or pay for these services to the student in a timely manner. The ~~school district~~ LEA or state agency may then ~~claim~~ seek reimbursement for the services from the public agency that failed to provide or pay for these services and that agency shall reimburse the ~~school district~~ LEA or state agency in accordance to the terms of the interagency agreements described in § 24:05:14:01.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:14:01.03. Children with disabilities covered by public benefits or insurance.** A public agency may use the Medicaid or other public benefits or insurance programs in which a student participates to provide or pay for services required under this article as permitted under the public benefits or insurance program, except as provided in this section. With regard to services required to provide aFAPE to an eligible student under this article the public agency:

(1) May not require parents to sign up for or enroll in public benefits or insurance programs in order for their student to receive aFAPE under Part B of the IDEA;

(2) May not require parents to incur an out-of-pocket expense such as the payment of a deductible or co-pay amount incurred in filing a claim for services provided pursuant to this article, but pursuant to § 24:05:14:01.06, may pay the cost that the parent otherwise would be required to pay;

(3) May not use a student's benefits under a public benefits or insurance program if that use would:

(a) Decrease available lifetime coverage or any other insured benefit;

(b) Result in the family paying for services that would otherwise be covered by the public benefits or insurance program and that are required for the student outside of the time the student is in school;

(c) Increase premiums or lead to the discontinuation of benefits or insurance; or

(d) Risk loss of eligibility for home and community-based waivers, based on aggregate health-related expenditures;

(4) Must provide written notification to the student's parents pursuant to § 24:05:14:01.04; and

(5) Must obtain written parental consent consistent with § 24:05:29:13 before accessing a student's or parent's public benefits or insurance for the first time specifying:

(a) Personally identifiable information, as defined in § 24:05:29:02(12), that may be disclosed (e.g., records or information about the services that may be provided to a particular student);

(b) The purpose of the disclosure (e.g., billing for services under this article);

(c) That disclosure will be made to the state Medicaid agency; and

(d) That the parent understands and agrees that the public agency may access the parent's or student's public benefits or insurance to pay for services under this article.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 40 SDR 40, effective September 11, 2013.

**General Authority:** SDCL 13-37-1.1.

**24:05:14:01.04. Use of public benefits or insurance -- Annual notification.** A public agency, before accessing a student's or parent's public benefits or insurance for the first time, and annually thereafter, must provide written notification consistent with § 24:05:30:06 to the student's parents that includes a statement:

(1) Of the parental consent and no cost requirements in § 24:05:14:01.03;

(2) That parents have the right under FERPA, as defined in § 24:05:29:02(1), and Part B of the IDEA to withdraw their consent to disclosure of their student's personally identifiable information to the state Medicaid agency at any time; and

(3) That the withdrawal of consent or refusal to provide consent under FERPA and Part B of the IDEA to disclose personally identifiable information to the state Medicaid agency does not relieve the ~~school district~~ LEA of its responsibility to ensure that all required services are provided at no cost to the parents.

**Source:** 40 SDR 40, effective September 11, 2013.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:14:01.06. Use of ~~part B~~ Part B of the IDEA funds for insurance costs.** If a public agency is unable to obtain parental consent to use the parent's private insurance, or public benefits or insurance if the parent would incur a cost for a specified service required under this article, to ensure aFAPE, the public agency may use funds obtained through Part B of the IDEA to pay for the service.

To avoid financial cost to parents who otherwise would consent to use private insurance, or public benefits or insurance if the parent would incur a cost, the public agency may use funds obtained through Part B of the IDEA to pay the cost the parents otherwise would have to pay to use the parent's benefits or insurance (e.g., the deductible or co-pay amounts).

Proceeds from public benefits or insurance or private insurance may not be treated as program income for purposes of 34 C.F.R. § 80.25.

If a public agency spends reimbursements from federal funds (e.g., Medicaid) for services under this article, those funds are not considered "state or local" funds for purposes of the maintenance of effort provisions in this article.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 40 SDR 40, effective September 11, 2013.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:14:13. Performance goals and indicators.** The department shall have in effect established goals for the performance of children with disabilities in the state that:

(1) Promote the purposes of Part B of ~~the Individuals with Disabilities Education Act~~ the IDEA;

(2) Are the same as the state's objectives for progress by children in its definition of adequate yearly progress, including the state's objectives for progress by children with disabilities, under the [ESEA ESSA](#);

(3) Address graduation rates and dropout rates, as well as such other factors as the state may determine; and

(4) Are consistent, to the extent appropriate, with any other goals and academic standards for children established by the state.

The department shall have in effect established performance indicators that the state shall use to assess progress toward achieving the above goals including measurable annual objectives for progress by children with disabilities under the [ESEA ESSA](#). Annually, the department shall report to the U.S. Secretary of Education and the public on the progress of the state, and of children with disabilities in the state, toward the goals established under this section, which may include elements of the reports required under the [ESEA ESSA](#).

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:14:14. Participation in assessments.** All children with disabilities shall be included in all general state and district-wide assessment programs, including assessments described in the [ESEA ESSA](#), with appropriate accommodations and alternate assessments if necessary and as indicated in their respective IEPs. As appropriate, the department or ~~local educational agencies~~ [LEAs](#) shall develop guidelines for the provision of appropriate accommodations.

The department's or ~~local educational agencies~~ LEAs' guidelines for the provision of appropriate accommodations shall:

- (1) Identify only those accommodations for each assessment that do not invalidate the score;
- and
- (2) Instruct IEP teams to select, for each assessment, only those accommodations that do not invalidate the score.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:14:14.01. Alternate assessments.** As appropriate, the department or ~~local educational agency~~ LEA shall develop and implement alternate assessments and guidelines for the participation of children with disabilities in alternate assessments for those ~~children~~ who cannot participate in regular assessments even with accommodations as indicated in their respective ~~individualized education programs~~ IEPs. The alternate assessments and guidelines shall provide for alternate assessments that:

- (1) Are aligned with the state's challenging academic content standards and challenging student academic achievement standards;
- (2) If the state has adopted modified academic achievement standards permitted under the regulations promulgated to carry out the ~~ESEA~~ ESSA, measure the achievement of children with disabilities against those standards; and

(3) If the state has adopted alternate academic achievement standards permitted under the regulations promulgated to carry out the ~~ESEA~~ ESSA, measure the achievement of children with the most significant cognitive disabilities against those standards.

As appropriate, the department or ~~local educational agency~~ LEA shall provide IEP teams with a clear explanation of the differences between assessments based on grade-level academic achievement standards and those based on modified or alternate academic achievement standards, including ~~any~~ the possible effects of federal, state or local policies on the student's education resulting from taking an alternate assessment based on alternate or modified academic achievement standards, such as whether ~~only satisfactory performance on a regular assessment~~ the student would ~~qualify a student~~ meet the requirements for a regular high school diploma.

As appropriate, the department or ~~local educational agency~~ LEA shall ensure that parents of students selected to be assessed based on alternate or modified academic achievement standards are informed that their child's achievement will be measured based on alternate or modified academic achievement standards and may impact their ability to meet the requirements for a regular high school diploma.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:14:16. Suspension and expulsion rates.** The department shall examine data, including data disaggregated by race and ethnicity, from ~~local education agencies~~ LEAs and other state agencies, as appropriate, to determine whether significant discrepancies are occurring in the rate of long-term suspensions and expulsions of children with disabilities among ~~local educational~~

~~agencies~~ LEAs in the state or compared to the rates for nondisabled children within the agencies. If discrepancies are occurring, the department shall review and, if appropriate, revise or require the affected LEA or state agency to revise its policies, procedures, and practices relating to:

- (1) The development and implementation of ~~individualized education programs~~ IEPs;
- (2) The use of positive behavioral interventions and supports; and
- (3) Procedural safeguards to ensure that these policies, procedures, and practices comply with ~~the Individuals with Disabilities Education Act, Part B,~~ Part B of the IDEA.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:14:19. State advisory panel -- Membership.** The advisory panel must consist of members appointed by the Governor, or any other official authorized under state law to make such appointments, be representative of the state population, and be composed of individuals involved in, or concerned with, the education of children with disabilities, including:

- (1) Parents of children with disabilities, ages birth through 26;
- (2) Individuals with disabilities;
- (3) Teachers;
- (4) Representatives of institutions of higher education that prepare special education and related services personnel;
- (5) State and local education officials, including officials who carry out activities under subtitle B of title VII of the McKinney-Vento Homeless Assistance Act, as amended to ~~January 1,~~ 2009 December 10, 2015;

- (6) Administrators of programs for children with disabilities;
- (7) Representatives of other state agencies involved in the financing or delivery of related services to children with disabilities;
- (8) Representatives of private schools;
- (9) Not less than one representative of a vocational, community, or business organization concerned with the provision of transition services to children with disabilities;
- (10) A representative from the state child welfare agency responsible for foster care; and
- (11) Representatives from the state juvenile and adult corrections agencies.

A majority of the members of the panel must be individuals with disabilities or parents of children with disabilities, ages birth through 26.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:14:21. Prohibition on mandatory medication.** State and ~~school-district~~ LEA personnel may not require parents to obtain a prescription for substances identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act, as amended to January 1, 2007, for a child as a condition of attending school, receiving an evaluation under chapter 24:05:25, or receiving services under this article.

Nothing in this section may be construed to create a ~~federal~~ prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians related to a student's academic and functional performance, or behavior in the classroom

or school, or related to the need for evaluation for special education or related services under chapter 24:05:22 related to child find.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

## CHAPTER 24:05:15

### STATE COMPLAINTS

#### Section

- 24:05:15:01 Repealed.
- 24:05:15:02 Complaint.
- 24:05:15:02.01 Remedies.
- 24:05:15:03 Complaint procedure.
- 24:05:15:04 Repealed.
- 24:05:15:05 Complaint against a ~~school-district~~ LEA.
- 24:05:15:06 Time limits.
- 24:05:15:07 Information about complaint procedures.
- 24:05:15:08 Complaints and due process hearings.

**24:05:15:02. Complaint.** A complaint is a written signed statement by an individual or organization, including an individual or organization from another state, containing a statement that the department of education or a ~~school-district~~ LEA has violated a requirement of ~~federal~~ Part B of the IDEA or state statutes, rules, or regulations that apply to ~~a~~ an educational program and a

statement of the facts on which the complaint is based. The complaint must allege a violation that occurred not more than one year before the date the complaint is received by the department. The written signed statement shall also include:

- (1) The signature and contact information for the complainant; and
- (2) If alleging violations with respect to a specific child:
  - (a) The name and address of the residence of the child;
  - (b) The name of the school the child is attending;
  - (c) In the case of a homeless child or youth, available contact information for the child and the name of the school the child is attending;
  - (d) A description of the nature of the problem of the child, including facts related to the problem; and
  - (e) A proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:15:03. Complaint procedure.** An organization or individual may file a written, signed complaint with the ~~state director of special education department~~. The party filing the complaint shall forward a copy of the complaint to the ~~school district~~ LEA serving the child at the same time the party files the complaint with the department.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:15:05. Complaint against a ~~school-district~~ LEA.** If the complaint is against a ~~school~~ district LEA, the following steps shall be taken:

(1) The state director of special education shall appoint a complaint investigation coordinator from the department's special education programs. The coordinator and any consultants may conduct an independent ~~on-site~~ investigation if it determines that one is necessary;

(2) The complainant may submit additional information, either orally or in writing, about the allegations in the complaint;

(3) The ~~school-district~~ LEA may respond to the complaint, including, at a minimum:

(a) At the discretion of the ~~school-district~~ LEA, a proposal to resolve the complaint; and

(b) An opportunity for a parent who has filed a complaint and the ~~school-district~~ LEA to voluntarily engage in mediation consistent with this article;

(4) The complaint coordinator and any consultants shall make a recommendation to the state director of special education;

(5) After reviewing all relevant information, the state director of special education shall make an independent determination as to whether the complaint is valid, what corrective action is necessary to resolve the complaint, and the time limit during which corrective action is to be completed. The state director of special education shall submit a written report of the final decision to all parties involved;

(6) The written report shall address each allegation in the complaint, contain findings of fact and conclusions, and include reasons for the final decision;

(7) If the complaint is ~~valid~~ substantiated, the state director of special education shall find the ~~school-district~~ LEA out of compliance with federal and state statutes and rules;

(8) If corrective action is not completed within the time limit set, including technical assistance and negotiations, the department shall withhold all federal funds applicable to the program until compliance with applicable federal and state statutes and rules is demonstrated by the ~~school-district~~ LEA;

(9) When the ~~school-district~~ LEA demonstrates completion of required correction action, the department's ~~Office~~ Division of Finance and Management shall be notified by the state director of special education, and all moneys withheld shall be paid to the ~~school-district~~ LEA; and

(10) Documentation supporting the corrective actions taken by a ~~school-district~~ LEA shall be maintained by the department's ~~special-education programs~~ Office of Special Education and incorporated into the state's monitoring process.

**Source:** 16 SDR 41, effective September 7, 1989; 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 35 SDR 165, effective December 23, 2008; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**Cross-Reference:** Department of Education Rules 34 C.F.R. §§ 300.151-153.

**24:05:15:06. Time limits.** All complaints must be resolved within 60 days after receipt of the complaint by the state director of special education except as stated in this section. The time limit of 60 days may be extended only under exceptional circumstances as determined by the state director of special education, such as the need for additional time to provide necessary information. Under these circumstances, an extension of time may not exceed 30 days in any one instance.

In addition, the 60-day time limit may be extended, if the ~~parent, individual, or organization party that filed the complaint~~ and the ~~school-district~~ LEA involved in the complaint agree to engage in mediation or other alternative resolution methods in order to attempt to resolve the issues specified in the complaint.

**Source:** 16 SDR 41, effective September 7, 1989; 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:15:07. Information about complaint procedures.** The department's special education programs shall inform parents and other interested individuals, including parent training centers, protection and advocacy agencies, independent living centers, and other appropriate entities about the state's complaint procedures by taking the following actions:

- (1) Conducting parent surveys through the state's monitoring process;
- (2) Providing copies of the state's procedures to parent and advocacy groups across the state;
- (3) Notifying ~~local school districts~~ LEAs through statewide memoranda;

- (4) Presenting state procedures at statewide conferences; and
- (5) Disseminating copies to parent training and information centers, independent living centers, protection and advocacy agencies, and other appropriate entities.

**Source:** 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:15:08. Complaints and due process hearings.** If a written complaint is received that is also the subject of a due process hearing under this article or contains multiple issues, of which one or more are part of that hearing, the department shall set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action must be resolved using the time limit and procedures described in this chapter.

If an issue is raised in a complaint filed under this section that has previously been decided in a due process hearing involving the same parties the hearing decision is binding on that issue and the department shall inform the complainant to that effect. A complaint alleging a **school district's LEA's** failure to implement a due process decision must be resolved by the department.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.

**Law Implemented:** SDCL 13-37-1.

## CHAPTER 24:05:16

## PERSONNEL DEVELOPMENT AND STANDARDS

### Section

24:05:16:01	Repealed.
24:05:16:02	Repealed.
24:05:16:03	Repealed.
24:05:16:04	Repealed.
24:05:16:05	Staff development component in <del>school district's</del> <u>LEA's</u> comprehensive plan.
24:05:16:06	Repealed.
24:05:16:07	Repealed.
24:05:16:08	Repealed.
24:05:16:08.01	Repealed.
24:05:16:08.02	Repealed.
24:05:16:08.03	Repealed.
24:05:16:09	Repealed.
24:05:16:10	Repealed.
24:05:16:11	Repealed.
24:05:16:12	Repealed.
24:05:16:13	Repealed.
24:05:16:14	Repealed.
24:05:16:15	Repealed.
24:05:16:16	Personnel qualifications.
24:05:16:16.01	Paraprofessionals and assistants.
24:05:16:16.02	Repealed.

24:05:16:16.03 Requirements for qualified special education teachers -- Teaching core academic subjects.

24:05:16:16.04 Requirements for qualified special education teachers -- General.

24:05:16:16.05 Requirements for qualified special education teachers -- Teaching to alternate achievement standards.

24:05:16:16.06 Requirements for qualified special education teachers -- Teaching multiple subjects.

24:05:16:16.07 Right of action.

24:05:16:17 Repealed.

24:05:16:18 Repealed.

24:05:16:19 Early childhood special education teacher.

24:05:16:20 Employment and advancement of qualified individuals with disabilities

**24:05:16:05. Staff development component in ~~school district's~~ LEA's comprehensive plan.** The staff development section of each ~~school district's~~ LEA's comprehensive plan shall include information to demonstrate that:

(1) All personnel necessary to carry out Part B of ~~the Individuals with Disabilities Education Act~~ the IDEA within the jurisdiction of the ~~district~~ LEA are appropriately and adequately prepared; and

(2) ~~District~~ LEA policies and procedures are consistent with the requirements of this chapter and ~~the federal Every Student Succeeds Act, as amended on December 10, 2015~~ ESSA.

Each ~~school district~~ LEA shall take measurable steps to recruit, hire, train, and retain qualified personnel to provide special education and related services under this ~~article~~ chapter to children with disabilities.

**Source:** 16 SDR 41, effective September 7, 1989; 19 SDR 29, effective August 30, 1992; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 46 SDR 149, effective July 6, 2020.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:16:16. Personnel qualifications.** To ensure that all personnel necessary to carry out the purposes of Part B and Part C of ~~the Individuals with Disabilities Education Act~~ the IDEA are appropriately and adequately prepared and trained, including ensuring that those personnel have the content knowledge and skills to serve children with disabilities, the department shall determine that all personnel providing special education or related services, including related services, paraprofessionals and assistants, early intervention, and early childhood personnel, perform these functions under state-approved or state-recognized certification or licensure or other comparable requirements that apply to the area in which the person is providing special education or related services.

The department shall ensure that related services personnel who deliver services in their discipline or profession meet the requirements of this section. ~~and have not had certification or licensure requirements waived on an emergency, temporary, or provisional basis.~~

All personnel necessary to carry out the purposes of this section shall not have had certification or licensure requirements waived, suspended, or revoked on an emergency, temporary, or provisional basis.

**Source:** 16 SDR 41, effective September 7, 1989; 19 SDR 29, effective August 30, 1992; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:16:16.01. Paraprofessionals and assistants.** Paraprofessionals and assistants who are appropriately trained and supervised in accordance with this section may be used to assist in the provision of special education and related services to children with disabilities under Part B of ~~the Individuals with Disabilities Education Act~~ the IDEA. At a minimum, the following standards must be met:

- (1) Paraprofessionals must have a high school diploma or GED;
- (2) Paraprofessionals must work within defined roles and responsibilities as identified by the ~~school-district~~ LEA;
- (3) Paraprofessionals must work under the supervision of, and be evaluated by, certified staff; and
- (4) Each ~~school-district~~ LEA must describe the training to be provided paraprofessionals in the staff development component of ~~the district's~~ their comprehensive plan under § 24:05:16:05.

**Source:** 26 SDR 150, effective May 22, 2000; 40 SDR 40, effective September 11, 2013.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:16:16.03. Requirements for qualified special education teachers -- Teaching core academic subjects.** For any ~~public~~ LEA elementary school or secondary school special education teacher teaching core academic subjects, the term, qualified, has the meaning given the term in ESSA, except that the requirements for qualified also include:

- (1) The requirements described in § 24:05:16:16.04; and
- (2) The option for teachers to meet the requirements of ESSA by meeting the requirements of §§ 24:05:16:16.05 and 24:05:16:16.06.

The requirements in this section do not apply to teachers hired by private elementary schools or secondary schools, including private school teachers hired or contracted by ~~school districts~~ LEAs to provide equitable services to parentally-placed private school children with disabilities under chapter 24:05:32.

**Source:** 33 SDR 236, effective July 5, 2007; 46 SDR 149, effective July 6, 2020.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:16:16.04. Requirements for qualified special education teachers -- General.** For any ~~public~~ LEA elementary school or secondary school special education teacher teaching in this state, being qualified requires that:

- (1) The teacher has obtained full state certification as a special education teacher, or passed the state special education teacher licensing examination, and holds a license to teach in the state as a special education teacher;

(2) The teacher has not had special education certification or licensure requirements waived, suspended, or revoked on an emergency, temporary, or provisional basis; and

(3) The teacher holds at least a bachelor's degree.

Any public elementary school or secondary school special education teacher teaching in this state who is not teaching a core academic subject is qualified if the teacher meets the requirements in this section.

**Source:** 33 SDR 236, effective July 5, 2007; 46 SDR 149, effective July 6, 2020.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:16:16.06. Requirements for qualified special education teachers -- Teaching multiple subjects.** For any special education teacher, who teaches two or more core academic subjects exclusively to children with disabilities, being qualified means that the teacher may either:

(1) Meet the applicable requirements of the ESSA; or

(2) Meet the applicable certification requirements of ~~ARSD Chapter~~ chapter 24:28.

**Source:** 33 SDR 236, effective July 5, 2007; 46 SDR 149, effective July 6, 2020.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:16:16.07. Right of action.** Notwithstanding any other individual right of action that a parent or student may maintain under this article, nothing in this article creates a right of action on behalf of any individual student or class of students for the failure of a particular state or ~~school~~

~~district LEA~~ employee to be qualified, or to prevent a parent from filing a complaint under chapter 24:05:15 about staff qualifications with the department as provided under this article.

**Source:** 33 SDR 236, effective July 5, 2007; 46 SDR 149, effective July 6, 2020.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:16:19. Early childhood special education teacher.** A ~~school-district LEA~~ that is operating an early childhood special education program must employ a teacher who meets ~~all the requirements of §§ 24:28:19:02, 24:28:20:02, 24:28:21:02, 24:28:22:02, 24:28:23:03, 24:28:24:02, or 24:28:25:03~~ the applicable certification requirements of ARSD 24:28.

**Source:** 18 SDR 158, effective March 31, 1992; 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009; 43 SDR 175, effective July 3, 2017.

**General Authority:** SDCL 13-1-12.1.

**Law Implemented:** SDCL 13-37-1.1.

## CHAPTER 24:05:17

### CHILD COUNT

#### Section

24:05:17:01 State-wide coordination of child find and data collection activities.

24:05:17:02 Federal child count procedures under Part B of ~~the Individuals with Disabilities Education Act IDEA.~~

24:05:17:03 Annual report of children served.

- 24:05:17:04 Reporting of multiple disabilities.
- 24:05:17:05 Children included in report.
- 24:05:17:06 Repealed.
- 24:05:17:07 Repealed.
- 24:05:17:08 Written notice provided by ~~Office of Data Collection~~ the department.
- 24:05:17:09 Return of information.
- 24:05:17:10 Overidentification and disproportionality.

**24:05:17:01. State-wide coordination of child find and data collection activities.** The ~~Office of Educational Services and Supports~~ department, ~~through its special education programs~~, is the state agency responsible for coordinating the planning and implementation of state-wide child find and data collection activities. Child identification procedures are a required component in each ~~school-district~~ LEA's comprehensive plan for special education. The ~~district~~ LEA shall provide information in the form required by the ~~office's special education programs~~ department.

This process combined with the state's federal child count procedures serve as the basis for developing the child identification system for ~~the Individuals with Disabilities Education Act, Part B~~ Part B of the IDEA. These procedures are extended to agencies other than ~~school-districts~~ LEAs through the use of interagency agreements.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:17:02. Federal child count procedures under Part B of the ~~Individuals with Disabilities Education Act IDEA~~.** The ~~Office of Educational Services and Supports department;~~ ~~through its special education programs;~~ shall do the following:

- (1) Direct ~~local educational agencies LEAs~~ and other educational institutions to count the number of children with disabilities receiving special education and related services at the time specified by the U.S. secretary of education on forms provided;
- (2) Obtain certification from each agency and institution that an unduplicated and accurate count has been made;
- (3) Aggregate the data from the count obtained from each agency and institution and prepare the reports required under chapter 24:05:17; and
- (4) Ensure that documentation is maintained which enables the state and the U. S. secretary of education to audit the accuracy of the count.

The data required by the U.S. secretary of education shall be publicly reported by the department in a manner that does not result in disclosure of personally identifiable child data.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:17:05. Children included in report.** The department may include children with disabilities in its report who are enrolled in a school or program which is operated or supported by a public agency and which either provides them with both special education and related services or

provides them only with special education, if a related service is not required, that meet state standards.

In the case of children with disabilities enrolled by their parents in private schools, the ~~public agency~~ LEA provides them with special education or related services, or both, consistent with chapter 24:05:32 that meet state standards.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:17:08.** Written notice provided by ~~Office of Data Collection~~ the department. The ~~Office of Data Collection~~ department shall provide all ~~local education agencies~~ LEAs with written notice of the procedures to be followed in counting the number of eligible children receiving special education and related services under ~~the Individuals with Disabilities Education Act, Part B~~ Part B of the IDEA.

At a minimum, this notice shall include the federal definitions of children with disabilities under ~~the Individuals with Disabilities Education Act, Part B,~~ Part B of the IDEA and the criteria for counting children with disabilities as set out in chapter 24:05:17.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 40 SDR 40, effective September 11, 2013.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**Cross-Reference:** 34 C.F.R. §§ 300.8 and 300.645, August 14, 2006.

**24:05:17:09. Return of information.** ~~Local education agencies~~ LEAs shall return information on counting eligible children to the ~~Office of Data Collection~~ department. Each ~~local school~~ LEA superintendent shall certify in writing that the information provided is an accurate and unduplicated count of children with disabilities receiving special education or special education and related services on December 1 of each school year. If December 1 falls on Saturday or Sunday, the count shall be taken on the first working day following the weekend.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:17:10. Overidentification and disproportionality.** The department shall provide for the collection and examination of data to determine whether any inappropriate overidentification or significant disproportionality based on race and ethnicity is occurring in the state and in ~~districts~~ LEA's of the state with respect to:

- (1) The identification of children as children with disabilities, including the identification of children as children with disabilities in accordance with a particular impairment described in chapter 24:05:24.01;
- (2) The placement in particular educational settings of these children; and
- (3) The incidence, duration, and type of disciplinary actions, including suspensions and expulsions.

In the case of a determination of inappropriate overidentification or significant disproportionality with respect to the identification of children as children with disabilities, or the placement in particular settings of these children, the department shall provide for the review of and, if appropriate, revision of the policies, procedures, and practices used in the identification or placement to ensure compliance with the requirements of Part B of the ~~Individuals with Disabilities Education Act~~ IDEA; require any ~~district~~ LEA identified under this section to reserve the maximum amount of funds allowable to provide comprehensive coordinated early intervening services to serve children in the ~~district~~ LEA, particularly, but not exclusively, children in those groups that were significantly overidentified under this section; and require the ~~district~~ LEA to publicly report on the revision of policies, practices, and procedures described under this section

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

## CHAPTER 24:05:19

### ALLOCATION AND USE OF FUNDS

#### Section

- 24:05:19:01 ~~Local education agency~~ LEA entitlements.
- 24:05:19:01.01 Base payment adjustments.
- 24:05:19:02 Reallocation of ~~local education agency~~ LEA funds.
- 24:05:19:03 Excess cost.
- 24:05:19:04 Nonsupplanting.

- 24:05:19:05 Proscribed use of funds.
- 24:05:19:05.01 Exception to maintenance of effort.
- 24:05:19:05.02 Repealed.
- 24:05:19:05.03 Permissive use of funds.
- 24:05:19:05.04 Repealed.
- 24:05:19:05.05 Adjustment to local fiscal efforts in certain fiscal years.
- 24:05:19:05.06 Early intervening services -- General.
- 24:05:19:05.07 Early intervening services -- Activities.
- 24:05:19:05.08 Early intervening services -- Reporting.
- 24:05:19:05.09 Schoolwide programs -- General.
- 24:05:19:05.10 Schoolwide programs -- Funding.
- 24:05:19:05.11 Schoolwide programs -- Meeting other Part B of the IDEA requirements.
- 24:05:19:06 Repealed.
- 24:05:19:07 Repealed.
- 24:05:19:08 Valid obligations enforceable.
- 24:05:19:08.01 Prohibition against commingling.
- 24:05:19:08.02 State-level nonsupplanting.
- 24:05:19:08.03 Maintenance of state financial support.
- 24:05:19:09 Funds for state administration.
- 24:05:19:10 Allowable costs.
- 24:05:19:11 Use of state agency allocations -- Other state-level activities.
- 24:05:19:12 Repealed.
- 24:05:19:13 Repealed.

**24:05:19:01. LEA entitlements.** From the total amount of funds received by the state education agency under ~~the Individuals with Disabilities Education Act, Part B, Part B of the IDEA~~ for any fiscal year, the department shall distribute any funds not reserved under §§ 24:05:19:09, 24:05:19:10, and 24:05:19:11 to ~~local education agencies~~ LEAs that have established their eligibility under this article for use in accordance with Part B of the IDEA. Beginning with funds that became available on July 1, 2009, the department shall distribute funds to eligible ~~local education agencies~~ LEAs, even if the LEA is not serving any children with disabilities. The department shall distribute these federal funds to ~~local education agencies~~ LEAs according to the following criteria:

- (1) ~~local education agencies~~ LEAs shall receive 75 percent of the amount they would have received under section 611 of IDEA for fiscal year 1999, as that section was then in effect;
- (2) Eighty-five percent of remaining funds shall be allocated to ~~local education agencies~~ LEAs based on the relative numbers of children enrolled in public and private elementary schools and secondary schools within each ~~local education agency's~~ LEA's jurisdiction; and
- (3) Fifteen percent of remaining funds shall be allocated to ~~local education agencies~~ LEAs based on their relative numbers of children living in poverty, as determined by the state education agency.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:19:01.01. Base payment adjustments.** For any fiscal year after 1999, the base payment described in subdivision 24:05:19:01(1) shall be adjusted under the following circumstances:

(1) If a new ~~local-education-agency~~ LEA is created, the department shall divide the base allocation determined under this section for the ~~local-education-agencies~~ LEAs that would have been responsible for serving children with disabilities now being served by the new ~~local-education-agency~~ LEA, among the new ~~local-education-agency~~ LEA and affected ~~local-educational-agencies~~ LEAs based on the relative numbers of children with disabilities ages 3 through 21;

(2) If one or more ~~local-educational-agencies~~ LEAs are combined into a single new ~~local-education-agency~~ LEA, the department shall combine the base allocations of the merged ~~local-educational-agencies~~ LEAs; and

(3) If, for two or more ~~local-educational-agencies~~ LEAs, geographic boundaries or administrative responsibility for providing services to children with disabilities ages 3 through 21 change, the base allocations of affected ~~local-educational-agencies~~ LEAs shall be redistributed among affected ~~local-educational-agencies~~ LEAs based on the relative numbers of children with disabilities ages 3 through 21.

If a ~~local-education-agency~~ LEA received a base payment of zero in its first year of operation, the department shall adjust the base payment for the first fiscal year after the first annual child count in which the ~~local-education-agency~~ LEA reports that it is serving any children with disabilities. The department shall divide the base allocation determined under § 24:05:19:01 for the ~~local-educational-agencies~~ LEAs that would have been responsible for serving children with disabilities now being served by the ~~local-education-agency~~ LEA, among the ~~local-education-agency~~ LEA and affected

~~local education agencies~~ LEAs based on the relative numbers of children with disabilities ages 3 through 21, or ages 6 through 21 currently provided special education by each of the ~~local education agencies~~ LEAs. This requirement takes effect with funds that became available on and after July 1, 2009.

**Source:** 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:19:02. Reallocation of ~~local education agency~~ LEA funds.** If the department determines that a ~~local education agency~~ LEA is adequately providing a ~~free appropriate public education~~ FAPE to all certified children with disabilities residing within the legal boundaries of the ~~district~~ LEA with state and local funds, the department may reallocate a portion or all of a ~~district's~~ LEA's Individuals with Disabilities Education Act, Part B Part B of the IDEA funds that are not needed by that ~~district~~ LEA to provide a FAPE to other ~~districts~~ LEAs in the state which are not adequately providing special education and related services to all its resident certified children with disabilities.

After the department distributes funds to an eligible ~~local education agency~~ LEA that is not serving any children with disabilities, the department shall determine, within a reasonable period of time before the end of the carryover period for the use of federal Part B of the IDEA funds, whether the ~~local education agency~~ LEA has obligated the funds. The department may reallocate any of those funds not obligated by the ~~local education agency~~ LEA to other ~~local education agencies~~ LEAs in the state that are not adequately providing special education and related services

to all children with disabilities residing in the areas served by those other ~~local education agencies~~ LEAs.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:19:03. Excess cost.** A ~~local education agency~~ LEA may only use funds under ~~the Individuals with Disabilities Education Act, Part B, Part B of the IDEA~~ for excess costs of providing special education and related services to certified children with disabilities.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:19:04. Nonsupplanting.** Each ~~local education agency~~ LEA must use ~~Individuals with Disabilities Education Act, Part B~~ Part B of the IDEA funds to supplement other federal, state, and local funds expended for the education of certified children with disabilities. ~~Federal IDEA~~ Part B of the IDEA funds may not be used to supplant state, other federal, and local funds.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:19:05. Proscribed use of funds.** Except as provided in §§ 24:05:19:05.01 and 24:05:19:05.05, ~~Individuals with Disabilities Education Act~~, Part B of the IDEA funds may not be used to reduce the level of expenditures made by a ~~local education agency~~ LEA from local funds below the level of expenditures for the fiscal year immediately preceding the fiscal year for which the ~~local education agency~~ LEA is applying for funds for the education of children with disabilities.

A ~~school district~~ LEA complies with this section for purposes of establishing the ~~school district's~~ LEA's eligibility for an award for a fiscal year if the ~~district~~ LEA budgets, for the education of students with disabilities, at least the same total or per capita amount from either of the following sources as the ~~district~~ LEA spent for that purpose from the same source for the most recent prior year for which information is available:

- (1) Local funds only; or
- (2) The combination of state and local funds.

A ~~district~~ LEA that relies on subdivision (1) of this section for any fiscal year must ensure that the amount of local funds it budgets for the education of students with disabilities in that year is at least the same, either in total or per capita, as the amount it spent for that purpose in the most recent fiscal year for which information is available, and must ensure that the standard in subdivision (1) of this section was used to establish compliance.

The department may not consider any expenditures made from funds provided by the federal government for which the department is required to account to the federal government or for which the ~~district~~ LEA is required to account to the federal government directly or through the department in determining a ~~district's~~ LEA's compliance with the requirements of this section.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:19:05.01 Exception to maintenance of effort.** Notwithstanding the restrictions in § 24:05:19:05, a ~~school-district~~ LEA may reduce the level of expenditures by the ~~district~~ LEA under Part B of ~~the Individuals with Disabilities Education Act~~ the IDEA below the level of those expenditures for the preceding fiscal year if the reduction is attributable to:

- (1) The voluntary departure, by retirement or otherwise, or departure for just cause, of special education or related services personnel;
- (2) A decrease in the enrollment of students with disabilities;
- (3) The termination of the obligation of the ~~district~~ LEA, consistent with this chapter, to provide a program of special education to a particular student with a disability that is an exceptionally costly program as determined by the state, because the student:
  - (a) Has left the jurisdiction of the ~~district~~ LEA;
  - (b) Has reached the age at which the obligation of the ~~district~~ LEA to provide a ~~free appropriate public education~~ FAPE to the student has terminated; or
  - (c) No longer needs the program of special education;
- (4) The termination of costly expenditures for long-term purchases such as the acquisition of equipment or the construction of ~~school~~ facilities; or
- (5) The assumption of cost by the extraordinary costs fund operated by the department under chapter 24:05:33.01.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:19:05.03. Permissive use of funds.** Notwithstanding federal requirements governing excess cost, use of Part B of the IDEA funds to supplement state, local and other federal funds and not supplant those funds, maintenance of effort, and commingling requirements, ~~IDEA-Part B~~ of the IDEA funds provided to a ~~school-district~~ LEA may be used for the following activities:

(1) For the costs of special education and related services and supplementary aids and services provided in a regular class or other education related setting to a student with a disability in accordance with the ~~individual-education-program~~ IEP of the student, even if one or more nondisabled students benefit from these services;

(2) To develop and implement coordinated, early intervening educational services in accordance with this chapter; and

(3) To establish and implement cost or risk sharing funds, consortia, or cooperatives for the ~~school-district~~ LEA itself, or for ~~school-districts~~ LEAs working in a consortium of which the ~~district~~ LEA is a part, to pay for high cost special education and related services.

A ~~school-district~~ LEA may use funds received under Part B of the IDEA to purchase appropriate technology for recordkeeping, data collection, and related case management activities of teachers and related services personnel providing services described in the IEP of children with disabilities, that is needed for the implementation of those case management activities.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:19:05.05. Adjustment to local fiscal efforts in certain fiscal years.**

Notwithstanding the excess cost and maintenance of effort requirements, and the exception regarding early intervening services in this chapter, for any fiscal year for which the allocation received by a district LEA exceeds the amount the district LEA received for the previous fiscal year, the district LEA may reduce the level of expenditures, otherwise required, by not more than 50 percent of the amount of that excess.

If a ~~school-district LEA~~ district LEA exercises the authority under this section, the district LEA must use an amount of local funds equal to the reduction in expenditures under this section to carry out activities that could be supported with funds under the ESEA ESSA regardless of whether the district LEA is using funds under the ESEA ESSA for those activities.

Notwithstanding the requirements of this section, if the department determines that a district LEA is unable to establish and maintain programs of FAPE that meet the requirements of this article or the department has taken action against the district LEA under chapter 24:05:20, the department must prohibit the district LEA from reducing the level of expenditures under this section for that fiscal year.

The amount of funds expended by a district LEA for early intervening services under this chapter shall count toward the maximum amount of expenditures that the district LEA may reduce under this section.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:19:05.06. Early intervening services -- General.** A ~~district~~ LEA may not use more than 15 percent of the amount the ~~district~~ LEA receives under Part B of the IDEA for any fiscal year, less any amount reduced by the ~~district~~ LEA pursuant to § 24:05:19:05.05, if any, in combination with other amounts, which may include amounts other than education funds, to develop and implement coordinated, early intervening services, which may include interagency financing structures, for students in kindergarten through grade 12, with a particular emphasis on students in kindergarten through grade three, who are not currently identified as needing special education or related services, but who need additional academic and behavioral support to succeed in a general education environment.

Nothing in this section either limits or creates a right to a FAPE under Part B of the IDEA or delays appropriate evaluation of a child suspected of having a disability.

Funds made available to carry out this section may be used to carry out coordinated, early intervening services aligned with activities funded by, and carried out under, the ~~ESEA~~ ESSA if those funds are used to supplement, and not supplant, funds made available under the ~~ESEA~~ ESSA for the activities and services assisted under this section.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:19:05.07. Early intervening services -- Activities.** In implementing coordinated, early intervening services, a ~~school-district~~ LEA may carry out activities that include:

(1) Professional development, which may be provided by entities other than **school-districts** **LEAs**, for teachers and other **school** staff to enable such personnel to deliver scientifically-based academic and behavioral interventions, including scientifically-based literacy instruction, and, if appropriate, instruction on the use of adaptive and instructional software; and

(2) Providing educational and behavioral evaluations, services, and supports, including scientifically-based literacy instruction.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:19:05.08. Early intervening services -- Reporting.** Each **school-district** **LEA** that develops and maintains coordinated, early intervening services must annually report to the department on:

- (1) The number of children served who received early intervening services; and
- (2) The number of children served who received early intervening services and subsequently receive special education and related services under Part B of the IDEA during the preceding two-year period.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:19:05.09. Schoolwide programs -- General.** Notwithstanding the provisions of excess cost and maintenance of effort, or any other provision of Part B of the IDEA, a **school**

district LEA may use funds received under Part B of the IDEA for any fiscal year to carry out a schoolwide program, except that the amount used in any schoolwide program may not exceed the amount received by the district LEA under Part B of the IDEA for that fiscal year divided by the number of children with disabilities in the jurisdiction of the district LEA and multiplied by the number of children with disabilities participating in the schoolwide program.

**Source:** 33 SDR 236, effective July 5, 2007; 46 SDR 149, effective July 6, 2020.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1

**24:05:19:05.10. Schoolwide programs -- Funding.** The funds described in § 24:05:19:05.09 are subject to the following conditions:

- (1) The funds must be considered as federal Part B of the IDEA funds for purposes of the calculations required under excess cost, supplementing, and supplanting; and
- (2) The funds may be used without regard to the other requirements of this chapter.

**Source:** 33 SDR 236, effective July 5, 2007; 46 SDR 149, effective July 6, 2020.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:19:05.11. Schoolwide programs -- Meeting other Part B of the IDEA requirements.** Except as provided in § 24:05:19:05.10, all other requirements of Part B of the IDEA must be met by a school-district LEA using Part B of the IDEA funds in accordance with § 24:05:19:05.09, including ensuring that children with disabilities in schoolwide program schools:

- (1) Receive services in accordance with a properly developed IEP; and

(2) Are afforded all of the rights and services guaranteed to children with disabilities under the IDEA.

**Source:** 33 SDR 236, effective July 5, 2007; 46 SDR 149, effective July 6, 2020.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:19:08.02. State-level nonsupplanting.** Except as provided in § 24:05:19:05, federal funds paid to the state under Part B of the ~~Individuals with Disabilities Education Act~~ IDEA, shall be used to supplement and in no case supplant, federal, state, and local funds (including funds that are not under the direct control of the state or ~~local education agencies~~ LEAs) expended for special education and related services provided to students with disabilities.

**Source:** 26 SDR 150, effective May 22, 2000; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:19:08.03. Maintenance of state financial support.** The state may not reduce the amount of state financial support for special education and related services for students with disabilities, or financial support otherwise made available because of the excess costs of educating those students, below the amount of that support for the preceding fiscal year.

In complying with state requirements for commingling, nonsupplanting and maintenance of effort, the state may not use funds paid to it under Part B of the IDEA to satisfy state-law mandated funding obligations to ~~school districts~~ LEAs, including funding based on student attendance, enrollment, or inflation.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:19:11. Use of state agency allocations -- Other state-level activities.** The state may use an amount equal to nine and one-half percent, adjusted cumulatively for inflation each fiscal year, of its allocation that it does not use for administration under §§ 24:05:19:09 and 24:05:19:10 for other state-level activities. Some portion of these funds shall be used to carry out monitoring, enforcement, complaint investigation, and the establishment and implementation of the mediation process required by this article, including providing for the costs of mediators and support personnel.

Funds reserved under this section also may be used to carry out the following activities:

- (1) For support and direct services, including technical assistance, personnel preparation, and professional development and training;
- (2) To support paperwork reduction activities, including expanding the use of technology in the IEP process;
- (3) To assist ~~school districts~~ LEAs in providing positive behavioral interventions and supports and mental health services for children with disabilities;
- (4) To improve the use of technology in the classroom by children with disabilities to enhance learning;
- (5) To support the use of technology, including technology with universal design principles and assistive technology devices, to maximize accessibility to the general education curriculum for children with disabilities;

(6) Development and implementation of transition programs, including coordination of services with agencies involved in supporting the transition of students with disabilities to postsecondary activities;

(7) To assist ~~districts~~ LEAs in meeting personnel shortages;

(8) To support capacity building activities and improve the delivery of services by ~~school~~ districts LEAs to improve results for children with disabilities;

(9) To provide alternative programming for students with disabilities who have been expelled ~~from school~~, and services for students with disabilities in correctional facilities or students enrolled in state-operated or state-supported schools;

(10) To support the development and provision of appropriate accommodations for children with disabilities, or the development and provision of alternate assessments that are valid and reliable for assessing the performance of children with disabilities, in accordance with the ~~ESEA~~ ESSA; and

(11) To provide technical assistance to schools and ~~school districts~~ LEAs and direct services, including supplemental educational services as defined in the ~~ESEA~~ ESSA to children with disabilities, in schools or ~~school districts~~ LEAs identified for improvement under the ~~ESEA~~ ESSA on the sole basis of the assessment results of the disaggregated subgroup of children with disabilities, including providing professional development to special and regular education teachers, who teach children with disabilities, based on scientifically-based research to improve educational instruction, in order to improve academic achievement to meet or exceed the objectives established by the state under the ~~ESEA~~ ESSA.

**Source:** 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**CHAPTER 24:05:20**

**ELIGIBILITY FOR FEDERAL FUNDS**

Section

- 24:05:20:01 Notice of availability of funds.
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- 24:05:20:04 Additional requirements.
- 24:05:20:05 Repealed.
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- 24:05:20:17 Repealed.
- 24:05:20:18 Program monitoring and evaluation.
- 24:05:20:18.01 State monitoring -- Primary focus.
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- 24:05:20:20.01 Repealed.
- 24:05:20:21 Repealed.
- 24:05:20:22 Repealed.
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- 24:05:20:23.01 Hearings on eligibility for federal funds.
- 24:05:20:23.02 Public notice by ~~school district~~ LEA.
- 24:05:20:23.03 State enforcement -- General.
- 24:05:20:23.04 State enforcement -- Determinations.
- 24:05:20:24 Repealed.
- 24:05:20:25 Repealed.
- 24:05:20:26 Repealed.

**24:05:20:01. Notice of availability of funds.** Annually, the state director of special education shall provide written notice to all ~~local education agencies~~ LEAs, state agencies, and applicable cooperatives of the availability of ~~Individuals with Disabilities Education Act, Part B~~ of the IDEA funds.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:02. Form of notice.** The notice in § 24:05:20:01 shall include the following:

- (1) Procedures for applicants to follow in completing and submitting requests for ~~Individuals with Disabilities Education Act, Part B~~ of the IDEA funds;
- (2) The objectives of ~~the Individuals with Disabilities Education Act, Part B program~~ Part B of the IDEA program;
- (3) An offer of technical assistance in completing the request for funds;
- (4) A general description of the state's procedures for reviewing and approving requests; and
- (5) A statement of a ~~local education agency's~~ LEA's obligation to make all documents relating to the eligibility of the ~~district~~ LEA, including the request for funds and any evaluations, periodic program plans, or reports required by the state for ~~the Individuals with Disabilities Education Act, Part B program~~ Part B of the IDEA project available to parents of children with disabilities and to the general public.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:03. Review and approval process.** Requests for funds submitted to the department shall be reviewed ~~by the department's special education programs~~ for consistency with ~~the Individuals with Disabilities Education Act, Part B program~~ Part B of the IDEA requirements.

**Source:** 16 SDR 41, effective September 7, 1989; 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:04. Additional requirements.** In addition to the content requirements of the request for funds itself, reviewers from the ~~department's special education programs~~ department shall take into account a ~~local education agency's~~ LEA's failure to correct an identified deficiency found through state monitoring or a complaint investigation, consider any decision made in a due process hearing which was adverse to the ~~local education agency~~ LEA, and consider any previous decisions that resulted in the withholding of funds.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:07. Notification of grant award.** Once the request for funds is approved, the ~~state director of special education and the Office of Finance and Management~~ department shall notify a ~~local education agency~~ LEA, in writing, of the following:

- (1) The amount of the grant;
- (2) The period during which the ~~local education agency~~ LEA may obligate funds; and
- (3) The federal requirements that apply to the grant under article 24:05.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:08. Amendments to requests.** If a ~~local education agency~~ LEA makes a significant amendment to its request for funds, the ~~local education agency~~ LEA shall follow the procedures provided in § 24:05:20:02 for submitting an original request. The review and approval process, at the state level, shall be the same as that used for an initial request for funds.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:09. Project evaluation and monitoring.** The department shall annually evaluate projects approved under ~~the Individuals with Disabilities Education Act, Part B program~~ Part B of the IDEA through the review and analysis of required reports submitted by ~~local education agencies~~

LEAs including information on the use of Part B of the IDEA funds and the performance of children with disabilities on state performance indicators and goals. In addition, the ~~department's special education programs staff~~ department shall review the implementation of ~~local education agency~~ the LEA Part B of the IDEA projects during the state's monitoring process.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:10. Consolidated requests.** The department may require ~~local education agencies~~ LEAs to submit a consolidated request for payments under ~~the Individuals with Disabilities Education Act, Part B program~~ Part B of the IDEA if it determines that an individual request will be disapproved because the ~~local education agency~~ LEA is unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of children with disabilities.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:12. Additional requirements for consolidated requests.** In addition to the requirements of §§ 24:05:20:01 to 24:05:20:11, inclusive, the following provisions are applicable. The department shall also annually notify those ~~districts~~ LEAs within the state that may be required to submit a consolidated request:

- (1) A consolidated request must meet the same minimum requirements as a single ~~district~~ LEA request and must be signed by the superintendent of each participating ~~school-district~~ LEA;
- (2) ~~School-districts~~ LEAs participating in a consolidated request are jointly responsible for implementing a program of ~~free appropriate public education~~ FAPE for all their students with disabilities, including the least restrictive environment requirements;
- (3) Noncompliance with ~~the Individuals with Disabilities Education Act~~, Part B of the IDEA requirements by any single ~~school-district~~ LEA participating in a consolidated request constitutes noncompliance by all districts involved;
- (4) Each ~~school-district~~ LEA participating in a consolidated request must use an accounting system that permits identification of the costs paid for under its subgrant;
- (5) Excess cost for a consolidated request shall be computed on the basis of the average of the combined minimum amounts each ~~school-district~~ LEA spends for elementary school and secondary school students; and
- (6) The state may not make a subgrant that exceeds the sum of the entitlements of the separate ~~local education agencies~~ LEAs.

The provisions of this section only apply to the submission of a consolidated request for ~~Individuals with Disabilities Education Act~~, Part B of the IDEA funds. They are not applicable to the establishment of cooperative educational service units.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:13. Direct service by department.** The department may not distribute funds to a ~~local education agency~~ LEA if the ~~local education agency~~ LEA, in any fiscal year, meets any one of the following conditions:

(1) Has not provided the information needed to establish the eligibility of the ~~district~~ LEA or state agency, or elected not to apply for its Part B allotment, under Part B of the IDEA;

(2) Is unable to establish and maintain programs of ~~free appropriate public education~~ FAPE that meet the requirements of this article;

(3) Is unable or unwilling to be consolidated with one or more ~~local educational agencies~~ LEAs in order to establish and maintain those programs; or

(4) Has one or more children with disabilities who can best be served by a regional or state program or service-delivery system designed to meet the needs of those children.

The department shall use undistributed funds to ensure a ~~free appropriate public education~~ FAPE to children with disabilities residing in the area served by the ~~local education agency~~ LEA. If the local allotment is not sufficient to ensure a FAPE, the department may use whatever funding sources are available in the state to meet the FAPE requirements.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:14. Direct services.** The department may provide special education and related services directly by contract or through other arrangements and at locations it considers appropriate. The excess cost requirements do not apply to the department. The manner in which the education

and services are provided must be consistent with the requirements of ~~the Individuals with Disabilities Education Act~~, Part B of the IDEA, ~~34 C.F.R. Part 300, including the least restrictive environment provisions.~~

**Source:** 16 SDR 41, effective September 7, 1989; 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:14.01. Excess cost requirements defined.** "Excess costs" are those costs that are in excess of the average annual per student expenditure in a ~~local education agency LEA~~ during the preceding school year for an elementary school or secondary school student.

Excess costs must be computed after deducting amounts received under Part B of the IDEA; ~~Part A of Title I of Elementary and Secondary Act of 1965 as amended to January 1, 2007, or under Parts A and B of Title III of that Act; ESSA~~, and any state or local funds expended for programs that would qualify for assistance under any of those parts but excluding any amounts for capital outlay or debt service.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:18. Program monitoring and evaluation.** In conjunction with its general supervisory responsibility under ~~the Individuals with Disabilities Education Act~~, Part B of the IDEA,

the ~~special education programs of the Office of Educational Services and Support~~ Department shall monitor agencies, institutions, and organizations responsible for carrying out special education programs in the state, including any obligations imposed on those agencies, institutions, and organizations.

The department shall ensure:

(1) That the requirements of this article are carried out;

(2) That each educational program for children with disabilities administered within the state, including each program administered by any other state or local agency, but not including elementary schools and secondary schools for Indian children operated or funded by the Secretary of the Interior:

(a) Is under the general supervision of the persons responsible for educational programs for children with disabilities in the department; and

(b) Meets the educational standards of the state education agency, including the requirements of this article; and

(3) In carrying out this article with respect to homeless children, the requirements of the McKinney-Vento Homeless Assistance Act, as amended to ~~January 1, 2009~~ December 10, 2015, are met.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:18.02. State monitoring -- Quantifiable indicators and priority areas.** The department shall monitor ~~school districts~~ LEAs using quantifiable indicators in each of the following priority areas, and using such qualitative indicators as are needed to adequately measure performance in those areas:

- (1) Provision of aFAPE in the least restrictive environment;
- (2) Department exercise of general supervision, including child find, effective monitoring, the use of resolution meetings, mediation, and a system of transition services as defined in this article and article 24:14; and
- (3) Disproportionate representation of racial and ethnic groups in special education and related services, to the extent the representation is the result of inappropriate identification.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:18.04. State performance plan -- Data collection.** The department shall collect valid and reliable information as needed to report annually to the U.S. Secretary of Education on the indicators established by the U. S. Secretary of Education for the state performance plan.

If the U. S. Secretary of Education permits the department to collect data on specific indicators through state monitoring or sampling, and the department collects the data through state monitoring or sampling, the department shall collect data on those indicators for each ~~school district~~ LEA at least once during the period of the state performance plan.

Nothing in Part B of the IDEA authorizes the development of a nationwide database of personally identifiable information on individuals involved in studies or other collections of data under Part B of the IDEA.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:18.05. State use of targets and reporting.** The department shall use the targets established in the state's performance plan and the priority areas described in § 24:05:20:18.02 to analyze the performance of each ~~school district~~ LEA.

The department shall:

(1) Report annually to the public on the performance of each ~~school district~~ LEA on the targets in the state performance plan as soon as practicable but no later than 120 days following the department's submission of its annual performance report to the U.S. Secretary of Education; and

(2) Make the state performance plan, annual performance reports, and the department's annual reports on the performance of each ~~local education agency~~ LEA available through public means, including by posting on the website of the department, distribution to the media, and distribution through public agencies.

If the department collects performance data through state monitoring or sampling, the department shall include in its report the most recently available performance data on each ~~district~~ LEA, and the date the data were obtained.

The department shall report annually to the U.S. Secretary of Education on the performance of the state under the state performance plan.

The department may not report to the public or the U.S. Secretary of Education any information on performance that would result in the disclosure of personally identifiable information about individual children, or that is insufficient to yield statistically reliable information.

**Source:** 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:20. Deficiency correction procedures.** The department shall require ~~local education agencies~~ LEAs to correct deficiencies in program operations that are identified through monitoring as soon as possible, but no later than one year from written identification of the deficiency. The department shall order agencies to take corrective actions and to submit a plan for achieving and documenting full compliance.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:23. Compliance.** If a ~~school-district~~ LEA either fails to voluntarily take steps to correct an identified deficiency or fails to take any of the corrective actions specified by the department or incorporated in a corrective action plan submitted by the ~~school-district~~ LEA and approved by the department, the department must notify the ~~school-district~~ LEA of the following:

(1) The failure to voluntarily correct an identified deficiency constitutes a failure on their part to administer their special education program in compliance with federal law;

(2) The actions the department intends to take in order to enforce compliance with state and federal law;

(3) The right to a hearing prior to the department's exercise of its enforcement responsibility; and

(4) The consequence the department's enforcement action would have on continued and future state and federal funding of that ~~school district's~~ LEA's special education programs.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:23.01. Hearings on eligibility for federal funds.** The applicant's chief executive officer may file a hearing request as follows:

(1) The applicant must request the hearing within 30 days after the action of the department;

(2) Within 30 days after it receives a request, the department shall hold a hearing on the record pursuant to SDCL chapter 1-26 and shall review its action;

(3) No later than 10 days after the hearing the department shall issue its written ruling, including findings of fact and reasons for the ruling;

(4) If the department determines that its action was contrary to state or federal statutes or rules that govern the applicable program, the department shall rescind its action;

(5) If the department does not rescind its final action after a review, the applicant may appeal to the U. S. secretary of education. The applicant shall file a notice of the appeal with the U. S. secretary of education within 20 days after the applicant has been notified by the department of the results of the department's review. If supported by substantial evidence, the decision of the department is final;

(6) The U.S. secretary of education may also issue interim orders to the department as necessary and appropriate pending appeal or review; and

(7) If the U.S. secretary of education determines that the action of the department was contrary to the ~~Individuals with Disabilities Education Act~~ IDEA and implementing regulations, the secretary shall issue an order to the department to take appropriate action.

The department shall make available to the applicant during regular business hours all records of the department pertaining to any review or appeal it is conducting under this section, including records of other applicants.

If the department does not comply with any provision of this section, or with any order of the U.S. secretary of education, the secretary shall immediately terminate all assistance to the department under the ~~Individuals with Disabilities Education Act~~ IDEA or issue such other orders deemed appropriate to achieve compliance.

**Source:** 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:23.02. Public notice by ~~school-district~~ LEA.** Any ~~school-district~~ LEA in receipt of a notice described in § 24:05:20:23 shall, by means of public notice, take the measures necessary to bring the pendency of an action pursuant to § 24:05:20:23 to the attention of the public within the jurisdiction of the ~~district~~ LEA.

**Source:** 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:23.03. State enforcement -- General.** If the department determines that a ~~school~~ district LEA is not meeting the requirements of Part B of the IDEA, including the targets in the state's performance plan, the department shall prohibit the ~~district~~ LEA from reducing the ~~district's~~ LEA's maintenance of effort under chapter 24:05:19 for any fiscal year.

Nothing in this chapter restricts the department from using any other authority available to it to monitor and enforce the requirements of Part B of the IDEA.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:23.03. State enforcement -- General.** If the department determines that a ~~school~~ district LEA is not meeting the requirements of Part B of the IDEA, including the targets in the state's performance plan, the department shall prohibit the ~~district~~ LEA from reducing the ~~district's~~ LEA's maintenance of effort under chapter 24:05:19 for any fiscal year.

Nothing in this chapter restricts the department from using any other authority available to it to monitor and enforce the requirements of Part B of the IDEA.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:20:23.04. State enforcement -- Determinations.** On an annual basis, based on ~~local-district~~ LEA performance data, information obtained through monitoring, ~~visits~~, and other information available, the department shall determine whether each ~~school-district~~ LEA meets the requirements and purposes of Part B of the IDEA. If the department determines, for two consecutive years, that a ~~school-district~~ LEA needs assistance in implementing the requirements of Part B of the IDEA, the department shall take one or more of the following actions:

(1) Advise the ~~district~~ LEA of available sources of technical assistance that may help the ~~district~~ LEA address the areas in which the ~~district~~ LEA needs assistance. Assistance may include assistance from the department's ~~special education programs~~ Office of Special Education, other offices of the department, other state agencies, technical assistance providers approved by the department, and other federally-funded nonprofit agencies. The department shall require the ~~district~~ LEA to work with appropriate entities. Such technical assistance may include:

(a) The provision of advice by experts to address the areas in which the ~~district~~ LEA needs assistance, including explicit plans for addressing the area for concern within a specified period of time;

(b) Assistance in identifying and implementing professional development, instructional strategies, and methods of instruction that are based on scientifically-based research;

(c) Designating and using distinguished superintendents, principals, special education administrators, special education teachers, and other teachers to provide advice, technical assistance, and support; and

(d) Devising additional approaches to providing technical assistance, such as collaborating with institutions of higher education, educational service agencies, national centers of technical assistance supported under Part D of the IDEA, and private providers of scientifically-based technical assistance; and

(2) Identify the ~~district~~ LEA as a high-risk grantee and impose special conditions on the ~~district's~~ LEA's grant under Part B of the IDEA.

If the department determines, for three or more consecutive years, that a ~~district~~ LEA needs intervention in implementing the requirements of Part B of the IDEA, the department shall require the ~~district~~ LEA to prepare a corrective action plan if the department determines that the ~~district~~ LEA should be able to correct the problem within one year or withhold, in whole or in part, any further payments to the ~~district~~ LEA under Part B of the IDEA.

Notwithstanding the provisions of this section, if the department determines that a ~~district~~ LEA needs substantial intervention in implementing the requirements of Part B of the IDEA or that there is a substantial failure to comply with any condition of the ~~district's~~ LEA's eligibility under Part B of the IDEA, the department shall withhold, in whole or in part, any further payments to the ~~district~~ LEA under Part B of the IDEA.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.

**CHAPTER 24:05:21**  
**COMPREHENSIVE PLANS**

Section

- 24:05:21:01 ~~Local education agency~~ LEA comprehensive plans -- Contents.
- 24:05:21:01.01 Exception for prior policies and procedures.
- 24:05:21:01.02 Amendments to policies and procedures.
- 24:05:21:02 Approval of special education program -- Content of review.
- 24:05:21:03 Comprehensive plans serve as ~~district's~~ LEA's eligibility for federal funds.
- 24:05:21:04 Purchase of instructional materials.
- 24:05:21:05 Records regarding migratory children with disabilities.

**24:05:21:01. ~~Local education agency~~ LEA comprehensive plans -- Contents.** Each ~~local education agency~~ LEA must have a current comprehensive plan approved by the ~~school~~ LEA board on file with the district superintendent or designee. Documentation supporting the implementation of the local ~~school-district's~~ LEA's comprehensive plan shall be maintained by the district for review by ~~Special Education Programs staff~~ the department during ~~on-site~~ monitoring. ~~visits.~~ Districts LEAs shall update comprehensive plans consistent with § 24:05:21:01.02 and recertify their content annually.

Comprehensive plans shall establish compliance with this article and ~~the Individuals with Disabilities Education Act,~~ Part B of the IDEA, and must include the following:

- (1) Policy on the availability of a FAPE;
- (2) Policy on the availability of assistive technology;

- (3) Policy on the availability of extended school year services;
- (4) Full program service goals and procedures, including a timetable for accomplishing the goals;
- (5) Ongoing child identification procedures;
- (6) Evaluation, parental consent, and placement procedures;
- (7) Procedures for the development, annual review, and revision of the **individual educational program IEP** for each child;
- (8) Procedures for the provision of nonacademic services and program options;
- (9) Procedures for the provision of physical education;
- (10) Policies on routine checking of hearing aids and external components of surgically implanted medical devices;
- (11) Procedures for least restrictive environment;
- (12) Policies and procedures on confidentiality of information;
- (13) Procedural safeguards, including the following:
  - (a) Opportunity to examine records;
  - (b) Independent educational evaluation;
  - (c) Prior notice and parent consent;
  - (d) Resolution process;
  - (e) Impartial due process hearing;
  - (f) Civil action and reasonable attorney's fees;
  - (g) Child status during procedures;
  - (h) Surrogate parent procedures;
  - (i) Parent participation in meetings;

- (j) Procedural safeguards notice;
- (k) Mediation;
- (l) Parent notice and disclosure;
- (m) Transfer of parental rights;
- (n) Discipline procedures;
- (o) Procedures for evaluation and determination of eligibility; and
- (p) Procedures for evaluating specific learning disabilities;
- (14) Procedures for private school placement;
- (15) Procedures for voluntary enrollment in nonpublic schools;
- (16) Staff development procedures;
- (17) Procedures for the employment of special education personnel who have the special education endorsement as required in § 24:02:03:21 or 24:02:03:21.01;
- (18) Policy on purchase of instructional materials;
- (19) Policy on prohibition on mandatory medication;
- (20) Policies on the use of Part B of the IDEA funds;
- (21) Policy on records regarding migratory children with disabilities;
- (22) Policy on transition from ~~IDEA~~, Part C of the IDEA, infants to toddlers with disabilities, to preschool;
- (23) Policy on performance goals and indicators;
- (24) Procedures for participation in assessments;
- (25) Public information; and
- (26) Student information management system.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:21:01.01. Exception for prior policies and procedures.** If a ~~local education agency~~ LEA has on file with the department policies and procedures that demonstrate compliance with this article, including any policies and procedures filed under Part B of ~~the Individuals with Disabilities Education Act~~ the IDEA as in effect before December 3, 2004, the department shall consider the ~~school district~~ LEA to have met the requirements for purposes of receiving assistance under Part B of ~~the Individuals with Disabilities Education Act~~ the IDEA.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:21:01.02. Amendments to policies and procedures.** Policies and procedures submitted by a ~~local education agency~~ LEA in accordance with this article remain in effect until it submits to the department modifications that the agency decides are necessary. The department may require a ~~local education agency~~ LEA to modify its policies and procedures, but only to the extent necessary to ensure the ~~district's~~ LEA's compliance with Part B of the ~~Individuals with Disabilities Education Act~~ IDEA if:

(1) After December 3, 2004, the provisions of Part B of the ~~Individuals with Disabilities Education Act~~ IDEA or its implementing regulations are amended;

(2) There is a new interpretation of Part B of the ~~Individuals with Disabilities Education Act~~ IDEA by federal or state courts; or

(3) There is an official finding of noncompliance with federal or state law or regulations.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:21:02. Approval of special education program -- Content of review.** The ~~department's special education programs~~ department shall approve special education programs that meet the standards of the ~~South Dakota Board of Education~~ Board of Education Standards. Each ~~local education agency~~ LEA shall submit eligibility information each school year. The ~~local education agency~~ LEA shall be notified of approval or disapproval by letter from the ~~department's special education programs~~ department. The review shall include the following:

- (1) Recertification of current comprehensive plan;
- (2) Certified personnel; and
- (3) Number of certified children served.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:21:03. Comprehensive plans serve as ~~district's~~ LEA's eligibility for federal funds.**

The information required in an agency's comprehensive plan coupled with statements of expenditures, descriptions of the annual use of ~~IDEA~~, Part B of the IDEA funds, and certification of federal assurances establish a ~~local education agency's~~ LEA's eligibility for funds under the ~~Individuals with Disabilities Education Act~~, Part B of the IDEA.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:21:04. Purchase of instructional materials.** A ~~school-district~~ LEA that chooses to coordinate with the National Instructional Materials Access Center (NIMAC), when purchasing print instructional materials, must acquire those instructional materials in the same manner, and subject to the same conditions as the department under § 24:05:14:17. Nothing in this section requires a ~~school-district~~ LEA to coordinate with the NIMAC.

If a ~~school-district~~ LEA chooses not to coordinate with the NIMAC, the ~~district~~ LEA shall provide an assurance to the department that the ~~district~~ LEA will provide instructional materials to blind persons or other persons with print disabilities in a timely manner.

Nothing in this section relieves a ~~district~~ LEA of its responsibility to ensure that children with disabilities who need instructional materials in accessible formats but are not included under the definition of blind or other persons with print disabilities who need materials that cannot be produced from NIMAS files, receive those instructional materials in a timely manner.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:21:05. Records regarding migratory children with disabilities.** A ~~school-district~~ LEA shall cooperate in the U.S. Secretary of Education's efforts under ESSA to ensure the linkage of records pertaining to migratory children with disabilities for the purpose of electronically exchanging, among the states, health and educational information regarding those children.

**Source:** 33 SDR 236, effective July 5, 2007; 46 SDR 149, effective July 6, 2020.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

#### **CHAPTER 24:05:22**

#### **CHILD IDENTIFICATION**

##### Section

- 24:05:22:01 ~~Distriet~~ LEA required to identify children in need of special education or special education and related services.
- 24:05:22:02 Minimum procedures.
- 24:05:22:03 Certified child.
- 24:05:22:04 Services for children less than three years of age.
- 24:05:22:04.01 Services to children age three to twenty-one, inclusive.
- 24:05:22:05 Services to children age twenty-one.

**24:05:22:01. ~~Distriet~~ LEA required to identify children in need of special education or special education and related services.** Each ~~school-district~~ LEA shall develop and utilize a

system for the identification, location, and evaluation of children in need of special education or special education and related services. The system must include all children residing within the jurisdiction of the ~~district~~ LEA who are ages birth through 21 regardless of the severity of their disability, including children in all public and private agencies and institutions, private schools, including religious schools, and children receiving alternative instruction under SDCL 13-27-3 within the legal boundaries of the ~~district~~ LEA. The requirements of this section apply to:

- (1) Wards of the state and highly mobile children with disabilities such as migrant children and homeless children; and
- (2) Children who are suspected of being children with disabilities under this article and in need of special education, even though they are advancing from grade to grade.

**Source:** 16 SDR 41, effective September 7, 1989; 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-1-12.1, 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:22:02. Minimum procedures.** At a minimum, a ~~local school district's~~ LEA's procedure for implementing its child identification system must include the following:

- (1) The name and title of the individual responsible for the coordination, implementation, and documentation of the system;
- (2) A written description of the ~~district's~~ LEA's annual public awareness campaign for informing the parents of children residing within the legal boundaries of the ~~district~~ LEA and other interested parties located within the jurisdiction of the ~~district~~ LEA, including all public and

private agencies and institutions, private schools, including religious schools, and children receiving alternative instruction under SDCL 13-27-3;

(3) The establishment of procedures for collecting, maintaining, and reporting current and accurate data on all child identification activities which must be ongoing and include children not currently enrolled in the ~~public school education~~ LEA program. These procedures must be as follows:

- (a) In written form;
- (b) Contained in each ~~district's~~ LEA's special education comprehensive plan; and
- (c) Describe each child identification activity for which the ~~district~~ LEA is responsible;

and

(4) A practical method of determining which children are currently receiving needed special education or special education and related services.

Documentation supporting the implementation of a ~~local school district's~~ LEA's child identification system shall be maintained by the ~~district~~ LEA for review by Office of Special Education staff during ~~on-site~~ monitoring ~~visits~~ and must include annual child count data submitted to the department for approval.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:22:03. Certified child.** A certified child is a child in need of special education or special education and related services who has received a multidisciplinary evaluation and has an

~~individual education program IEP formulated developed~~ and approved by ~~a local placement committee an IEP team~~. Documentation supporting a child's disabling condition as defined by Part B of ~~the Individuals with Disabilities Education Act the IDEA~~ must be maintained by ~~the school district LEA~~ for verification of its annual federal child count. This definition applies to all eligible children ages 3 to 21, inclusive, and to only those children under the age of 3 who are in need of prolonged assistance.

**Source:** 16 SDR 41, effective September 7, 1989; 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:22:04. Services for children less than three years of age.** Each ~~school district~~ LEA shall provide special education or special education and related services for children less than three years of age who are in need of prolonged assistance.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:22:04.01. Services to children age three to twenty-one, inclusive.** A child's eligibility for special education or special education and related services continues from age 3 through completion of an approved ~~public or nonpublic school secondary program secondary school with a regular high school diploma~~ or through ~~age 21~~ the completion of the fiscal year that

the student becomes 21 years of age, as designated in that child's ~~individual education program~~ IEP as set out in SDCL 13-37-1.

**Source:** 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:22:05. Services to children age twenty-one.** A student who is enrolled in school a LEA and becomes 21 years of age during the fiscal year shall have free school privileges during the school for the remainder of the fiscal year.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996.

**General Authority:** SDCL 13-1-12.1, 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

## **CHAPTER 24:05:23**

### **REQUIREMENTS FOR CHILD EVALUATORS**

#### Section

24:05:23:01 Educational evaluator.

24:05:23:02 Psychological evaluator.

24:05:23:03 Psychiatric evaluator.

24:05:23:04 Speech-language evaluator.

24:05:23:05 Audiological evaluator.

24:05:23:06 Medical evaluator.

24:05:23:07 Occupational therapy evaluator.

24:05:23:08 Physical therapy evaluator.

24:05:23:09 Vision evaluator.

**24:05:23:01. Educational evaluator.** An educational evaluator must possess a valid ~~teaching certificate certification or licensure~~ and ~~must have training in individual and group tests to be administered.~~ be qualified and trained in the administration, scoring, and interpretation of the individual and/or group tests to be administered.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 40 SDR 40, effective September 11, 2013.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**Cross-Reference:** Accreditation and school improvement, art 24:43.

**24:05:23:02. Psychological evaluator.** A psychological evaluator must be a school psychologist certified by the department. ~~or a school psychological examiner certified by the department. A school psychological examiner's report must be co-signed by a certified school psychologist. A psychological evaluation includes, but is not limited to, formally assessing an individual's behavior, personality, psychological, or cognitive abilities. Written evaluation reports must be completed and signed by a certified school psychologist.~~

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**Cross-Reference:** Psychologists, SDCL chapter 36-27A.

## CHAPTER 24:05:24

### REFERRAL PROCEDURES

#### Section

- 24:05:24:01 Referral.
- 24:05:24:02 Duties of a ~~district~~ LEA after referral.
- 24:05:24:03 Duties of a ~~district~~ LEA after informal review.
- 24:05:24:04 Documentation of referrals not evaluated.

**24:05:24:01. Referral.** Referral includes any written request which brings a student to the attention of a ~~school-district~~ LEA administrator (building principal, superintendent, or special education director) as a student who may be in need of special education. A referral made by a parent may be submitted verbally, but it must be documented by a ~~district~~ LEA administrator.

Other sources of referrals include the following:

- (1) Referral through screening;
- (2) Referral by classroom teacher;
- (3) Referral by other ~~district~~ LEA personnel;
- (4) Referral by other public or private agencies; and
- (5) Referral by private schools, including religious schools.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:24:02. Duties of a ~~school~~ district LEA after referral.** Upon receiving a referral, the ~~school~~ district LEA shall conduct an informal review or may proceed with the evaluation process. An informal review includes a conference, if appropriate and necessary, either in person or by telephone, with the person making the referral and a review of the student's school record.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:24:03. Duties of a district LEA after informal review.** If, after an informal review arising from a parental referral, the district LEA determines that no evaluation is necessary, the district LEA shall inform the parents of its decision and the reasons for the decision. It shall also inform the parents of their due process rights.

If after informal review, the district LEA determines that further evaluation is necessary, the district LEA shall conduct a full and individual evaluation with the consent of the parents.

**Source:** 16 SDR 41, effective September 7, 1989; 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**Cross-Reference:** Procedural safeguards, ch 24:05:30.

**24:05:24:04. Documentation of referrals not evaluated.** All referrals of students that do not result in evaluation must be documented by the district LEA.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

## **CHAPTER 24:05:24.01:01**

### **ELIGIBILITY CRITERIA**

#### Section

24:05:24.01:01	Students with disabilities defined.
24:05:24.01:01.01	Manual defined.
24:05:24.01:02	Repealed.
24:05:24.01:03	Autism spectrum disorder defined.
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24:05:24.01:28	Criteria for language disorder.
24:05:24.01:29	Traumatic brain injury defined.
24:05:24.01:30	Vision loss including blindness defined.
24:05:24.01:31	IEP team override

**24:05:24.01:01. Students with disabilities defined.** Students with disabilities are students evaluated in accordance with chapter 24:05:25 and this chapter as having autism spectrum disorder, deaf-blindness, deafness, hearing loss, cognitive disability, multiple disabilities, orthopedic impairment, other health impairments, ~~emotional disturbance~~ emotional behavioral disability, specific learning disabilities, speech or language impairments, traumatic brain injury, or

vision loss, including blindness, which adversely affects educational performance, and who, because of those disabilities, need special education or special education and related services. If it is determined through an appropriate evaluation, under chapter 24:05:25, that a student has one of the disabilities identified in this chapter, but only needs a related service and not special education, the student is not a student with a disability under this article. If, consistent with this chapter, the related service required by the student is considered special education, the student is a student with a disability under this article.

**Source:** 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 41 SDR 37, effective September 4, 2014.

**General Authority:** SDCL 13-1-12.1, 13-37-1, 13-37-1.1, 13-37-28, 13-37-46, 13-37-47, 13-37-52.

**Law Implemented:** SDCL 13-1-12.1, 13-37-1, 13-37-1.1, 13-37-1.2, 13-37-28, 13-37-46, 13-37-47, 13-37-52.

**24:05:24.01:03. Autism spectrum disorder defined.** Autism spectrum disorder is a developmental disability that significantly affects verbal and nonverbal communication and social interaction and results in adverse effects, generally evident before age three, on the child's educational performance.

Other characteristics often associated with autism spectrum disorder are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

The term does not apply if the student's educational performance is adversely affected primarily because the student has an ~~emotional disturbance~~ emotional behavioral disability defined under § 24:05:24.01:16.

**Source:** 20 SDR 33, effective September 8, 1993; transferred from § 24:05:25:27.01, 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 41 SDR 37, effective September 4, 2014.

**General Authority:** SDCL 13-1-12.1, 13-37-1, 13-37-1.1, 13-37-28, 13-37-46, 13-37-47, 13-37-52.

**Law Implemented:** SDCL 13-1-12.1, 13-37-1, 13-37-1.1, 13-37-1.2, 13-37-28, 13-37-46, 13-37-47, 13-37-52.

**24:05:24.01:05. Evaluation team for autism spectrum disorder.** When evaluating a student for autism spectrum disorder, a ~~school district~~ LEA shall use a multidisciplinary team or group of persons who are trained and experienced in the diagnosis and educational evaluation of persons with autism spectrum disorder.

**Source:** 18 SDR 90, effective November 25, 1991; transferred from § 24:05:25:29, 23 SDR 31, effective September 8, 1996; 41 SDR 37, effective September 4, 2014.

**General Authority:** SDCL 13-1-12.1, 13-37-1, 13-37-1.1, 13-37-28, 13-37-46, 13-37-47, 13-37-52.

**Law Implemented:** SDCL 13-1-12.1, 13-37-1, 13-37-1.1, 13-37-1.2, 13-37-28, 13-37-46, 13-37-47, 13-37-52.

**24:05:24.01:09. Developmental delay defined.** A student three, ~~four, or five~~ years old up to nine years old may be identified as a student with a disability if the student has one of the major disabilities listed in § 24:05:24.01:01 or if the student experiences a severe delay in development and needs special education and related services.

A student with a severe delay in development functions at a developmental level two or more standard deviations below the mean in any one area of development specified in this section or 1.5 standard deviations below the mean in two or more areas of development.

The areas of development are cognitive development, physical development, communication development, social or emotional development, and adaptive development.

A ~~district~~ LEA is not required to adopt and use the term developmental delay for any students within its jurisdiction. If a ~~district~~ LEA uses the term developmental delay, the ~~district~~ LEA must conform to both the department's definition of the term and to the age range that has been adopted by the department.

A ~~district~~ LEA shall ensure that all of the student's special education and related services needs that have been identified through the evaluation procedures described under chapter 24:05:25 are appropriately addressed.

**Source:** 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009; 40 SDR 40, effective September 11, 2013.

**General Authority:** SDCL 13-37-1.1, 13-37-52.

**Law Implemented:** SDCL 13-37-1.1, 13-37-52.

**24:05:24.01:13. Orthopedic impairment defined.** Orthopedic impairment means a severe orthopedic impairment that adversely affects a child's educational performance. The term includes impairments caused by a congenital anomaly, impairments caused by disease (e.g., poliomyelitis, bone tuberculosis), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures).

There must be evidence of the following:

(1) That the student's impaired motor functioning ~~significantly~~ interferes with educational performance;

(2) That the student exhibits deficits in muscular or neuromuscular functioning that significantly limit the student's ability to move about, sit, or manipulate materials required for learning;

(3) That the student's bone, joint, or muscle problems affect ambulation, posture, or gross and fine motor skills; and

(4) That current medical data by a qualified medical evaluator describes and confirms an orthopedic impairment.

**Source:** 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:24.01:16. ~~Emotional disturbance~~ Emotional behavioral disability defined.**

~~Emotional disturbance~~ Emotional behavioral disability is a condition that exhibits one or more of the following characteristics to a marked degree over a long period of time:

(1) An inability to learn that cannot be explained by intellectual, sensory, or health factors;

- (2) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;
- (3) Inappropriate types of behavior or feelings under normal circumstances;
- (4) A general pervasive mood of unhappiness or depression; or
- (5) A tendency to develop physical symptoms or fears associated with personal or school problems.

The term, ~~emotional disturbance~~ emotional behavioral disability, includes schizophrenia. The term does not apply to a student who is socially maladjusted unless the IEP team determines pursuant to § 24:05:24.01:17 that the student has an ~~emotional disturbance~~ emotional behavioral disability.

**Source:** 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:24.01:17. Criteria for ~~emotional disturbance~~ emotional behavioral disability.** A student may be identified as ~~emotionally disturbed~~ having an emotional behavioral disability if the following requirements are met by history or current:

- (1) The student demonstrates serious behavior problems over a long period of time, generally at least six months, with documentation from ~~the school and one or more other sources~~ than one source of the frequency and severity of the targeted behaviors;
- ~~(2) The student's performance falls two standard deviations or more below the mean in emotional functions, as measured in school and home or community on nationally normed~~

~~technically adequate measures; and~~ Symptoms cause clinically significant impairment in social, emotional, behavioral, occupational, or other areas; and

(3) An adverse effect on educational performance is verified through the full and individual evaluation procedures as provided in § 24:05:25:04.

A student may not be identified as having an ~~emotional disturbance~~ emotional behavioral disability if common disciplinary problem behaviors, such as truancy, smoking, or breaking ~~school conduct rules~~ LEA policy, are the sole criteria for determining the existence of an ~~emotional disturbance~~ emotional behavioral disability.

**Source:** 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009; 40 SDR 40, effective September 11, 2013.

**General Authority:** SDCL 13-37-1.1, 13-37-52.

**Law Implemented:** SDCL 13-37-1.1, 13-37-52

**24:05:24.01:18. Specific learning disability defined.** Specific learning disability is a disorder in one or more of the basic psychological processes involved in understanding or in using spoken or written language that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. The term includes such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. The term does not apply to students who have learning problems that are primarily the result of visual, hearing, or motor disabilities; cognitive disability; ~~emotional disturbance~~ emotional behavioral disability; or environmental, cultural, or economic disadvantage.

**Source:** 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:24.01:19. Criteria for specific learning disability.** A group of qualified professionals and the parent of the child may determine that a child has a specific learning disability if:

(1) The child does not achieve adequately for the child's age or does not meet state-approved grade-level standards in one or more of the following areas, if provided with learning experiences and instruction appropriate for the child's age or state-approved grade-level standards:

- (a) Oral expression;
- (b) Listening comprehension;
- (c) Written expression;
- (d) Basic reading skill;
- (e) Reading fluency skills;
- (f) Reading comprehension;
- (g) Mathematics calculation; and
- (h) Mathematics problem solving;

(2)(a) The child does not make sufficient progress to meet age or state-approved grade-level standards in one or more of the areas identified in this section when using a process based on the child's response to scientific, research-based intervention; or

(b) The child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, state-approved grade-level standards, or intellectual

development, that is determined by the group to be relevant to the identification of a specific learning disability, using appropriate assessments, consistent with this article; and

- (3) The group determines that its findings under this section are not primarily the result of:
  - (a) A visual, hearing, or motor disability;
  - (b) A cognitive disability;
  - (c) ~~Emotional disturbance~~ Emotional behavioral disability;
  - (d) Cultural factors;
  - (e) Environmental or economic disadvantage; or
  - (f) Limited English proficiency.

To ensure that underachievement in a child suspected of having a specific learning disability is not due to lack of appropriate instruction in reading or math, the group must consider, as part of the evaluation described in this article, data that demonstrate that prior to, or as a part of, the referral process, the child was provided appropriate instruction in regular education settings, delivered by qualified personnel, and data-based documentation of repeated assessments of achievement at reasonable intervals, reflecting formal assessment of student progress during instruction, which was provided to the child's parents.

The ~~school district~~ LEA must promptly request parental consent to evaluate the child to determine whether the child needs special education and related services, and must adhere to the timeframes described in this article unless extended by mutual written agreement of the child's parents and a group of qualified professionals. The ~~district~~ LEA must request such consent if, prior to a referral, a child has not made adequate progress after an appropriate period of time when provided instruction, as described in this section, and whenever a child is referred for an evaluation.

**Source:** 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:24.01:25. Voice disorder defined.** A voice disorder ~~is characterized by the abnormal production or absence of vocal quality, pitch, loudness, resonance, duration which is inappropriate for an individual's age or gender, or both, occurs when voice quality, pitch, and loudness differ or are inappropriate for an individual's age, gender, cultural background, or geographic location.~~

**Source:** 23 SDR 31, effective September 8, 1996.

**General Authority:** SDCL [13-37-1.1](#).

**Law Implemented:** SDCL [13-37-1.1](#).

**24:05:24.01:27. Language disorder defined.** A language disorder is a reduced ability, whether developmental or acquired, to comprehend or express ideas through spoken, written, or gestural language. The language disorder may be characterized by limited vocabulary, an inability to function through the use of words (pragmatics) and their meanings (semantics), faulty grammatical patterns (syntax and morphology), or the faulty reproduction of speech sounds (phonology). A language disorder may have a direct or indirect ~~affect~~ effect on a student's cognitive, social, emotional, or educational development or performance and deviates from accepted norms. The term language disorder does not include students whose communication problems result solely from a native language other than English or from their dialectal differences.

**Source:** 23 SDR 31, effective September 8, 1996.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1

**24:05:24.01:31. IEP team override.** If the IEP team determines that a student is eligible for special education or special education and related services because the student has a disability and needs special education even though the student does not meet specific requirements in this chapter, the IEP team must include documentation in the record as follows:

(1) The record must contain documents that explain why the standards and procedures that are used with the majority of students resulted in invalid findings for this student;

(2) The record must indicate what objective data were used to conclude that the student has a disability and is in need of special education. These data may include test scores, work products, self-reports, teacher comments, previous tests, observational data, and other developmental data;

(3) Since the eligibility decision is based on a synthesis of multiple data and not all data are equally valid, the team must indicate which data had the greatest relative importance for the eligibility decision; and

(4) The IEP team override decision must include a sign-off by the IEP team members agreeing to the override decision. If one or more IEP team members disagree with the override decision, the record must include a statement of why they disagree signed by those members.

The ~~district~~ LEA director of special education shall keep a list of students on whom the IEP team override criteria were used to assist the state in evaluating the adequacy of student identification criteria.

**Source:** 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

## **CHAPTER 24:05:25**

### **EVALUATION, CONSENT, AND PLACEMENT PROCEDURES**

#### Section

- 24:05:25:01 Evaluation, consent, eligibility, and placement procedures required.
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- 24:05:25:07 Additional procedures for evaluating specific learning disabilities.
- 24:05:25:08 Additional group members for specific learning disabilities.
- 24:05:25:09 Repealed.
- 24:05:25:10 Repealed.
- 24:05:25:11 Observation for specific learning disabilities.
- 24:05:25:12 Documentation of eligibility for specific learning disabilities.
- 24:05:25:13 Group members to certify report in writing.
- 24:05:25:13.01 Response to intervention model.
- 24:05:25:14 Repealed.
- 24:05:25:15 Repealed.
- 24:05:25:16 Parent participation.
- 24:05:25:16.01 Participation of student in IEP team meeting.
- 24:05:25:16.02 Required student invitation.
- 24:05:25:17 Conduct of IEP team without parents.
- 24:05:25:18 Action to ensure parent understands.
- 24:05:25:19 Parents to receive copy of ~~individual education program~~ IEP.
- 24:05:25:20 IEP team to evaluate, interpret, and explain.
- 24:05:25:21 IEP team to determine placement.
- 24:05:25:22 IEP team to develop ~~individual education program~~ IEP.
- 24:05:25:23 Decisions of IEP team.
- 24:05:25:24 Repealed.
- 24:05:25:25 Repealed.

24:05:25:26 Extended school year authorized.

24:05:25:27 Transferred.

24:05:25:27.01 Transferred.

24:05:25:28 Repealed.

24:05:25:29 Transferred.

24:05:25:30 Transferred.

**24:05:25:01. Evaluation, consent, eligibility, and placement procedures required.** Each ~~school-district~~ LEA shall establish and implement procedures which meet the requirements of this chapter, including nondiscriminatory practices, parental consent, initial evaluation, evaluation procedures, eligibility procedures, placement procedures, and reevaluation.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:25:02.01. Parental consent for initial evaluation.** Any ~~school-district~~ LEA proposing to conduct an initial evaluation to determine whether a child qualifies as a child with a disability shall, after providing notice consistent with chapter 24:05:30, obtain informed consent from the parent of the child before conducting the evaluation.

Parental consent for initial evaluation may not be construed as consent for initial provision of special education and related services.

The ~~school-district~~ LEA shall make reasonable efforts to obtain the informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability.

To meet the reasonable efforts requirement in this section, the ~~district~~ LEA shall document its attempts to obtain parental consent using the procedures in § 24:05:25:17.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:25:02.02. Consent for ward of the state.** For initial evaluations only, if the child is a ward of the state and is not residing with the child's parent, the ~~school-district~~ LEA is not required to obtain informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability if:

(1) Despite reasonable efforts to do so, the ~~district~~ LEA cannot discover the whereabouts of the parent of the child;

(2) The rights of the parents of the child have been terminated in accordance with state law;  
or

(3) The rights of the parent to make educational decisions have been subrogated by a judge in accordance with state law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.

To meet the reasonable efforts requirement in this section, the ~~district~~ LEA shall document its attempts to obtain parental consent using the procedures in § 24:05:25:17.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:25:02.03. Use of procedural safeguards to obtain parental consent.** If the parent of a child enrolled in ~~public school~~ a LEA or seeking to be enrolled in ~~public school~~ a LEA does not provide consent for initial evaluation under this section, or the parent fails to respond to a request to provide consent, the ~~district~~ LEA may, but is not required to, pursue the initial evaluation of the child by using the procedural safeguards in this article, including the mediation procedures or the due process procedures, if appropriate, except to the extent inconsistent with state law relating to such parental consent.

The ~~school district~~ LEA does not violate its obligation under child find in this article and the requirements in this chapter regarding parental consent, evaluation, and reevaluation if the ~~district~~ LEA declines to pursue the evaluation.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:25:02.04. Other consent requirements.** Other consent requirements include the following:

- (1) Parental consent is not required before:
  - (a) Reviewing existing data as part of an evaluation or a reevaluation; or
  - (b) Administering a test or other evaluation that is administered to all children unless, before administration of the that test or evaluation, consent is required of parents of all children;

(2) A ~~school-district~~ LEA may not use a parent's refusal to consent to one service or activity under this section to deny the parent or child any other service, benefit, or activity of the ~~school~~ district LEA, except as required by this article;

(3) If a parent of a child who is receiving alternative instruction under SDCL 13-27-3 or placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or the reevaluation, or if the parent fails to respond to a request to provide consent, the ~~school-district~~ LEA may not use the consent override procedures in chapter 24:05:30 including mediation and due process hearing procedures. The ~~school-district~~ LEA is not required to consider the child as eligible for services under chapter 24:05:32.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:25:03. Preplacement evaluation.** Before any action is taken concerning the initial placement of a child with disabilities in a special education program, a full and individual initial evaluation of the child's educational needs must be conducted in accordance with the requirements of this chapter. Initial evaluations must be completed within 25 school days after receipt by the ~~district~~ LEA of signed parent consent to evaluate unless other timelines are agreed to by the ~~school~~ administration LEA and the parents.

Written evaluation reports, determination of eligibility, and conducting an IEP team meeting must be completed within 30 days from the end of the 25 school day evaluation timeline. If another timeline for completing the evaluation process is agreed to by the parent and ~~school~~ administration LEA, the written evaluation reports, determination of eligibility, and conducting an

IEP team meeting must be completed within 30 days from the end of agreed upon evaluation timeline.

Consistent with the consent requirements in this section, either a parent of a child or a ~~school district~~ LEA may initiate a request for an initial evaluation to determine whether the child is a child with a disability.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**Cross-Reference:** Procedural safeguards, ch 24:05:30.

**24:05:25:03.02. Exception to initial evaluation timeline.** The timeline described in § 24:05:25:03 does not apply to a ~~school district~~ LEA if:

(1) The parent of a child repeatedly fails or refuses to produce the child for the evaluation;  
or

(2) A child enrolls in ~~a school of~~ another ~~school district~~ LEA after the relevant timeline in § 24:05:25:03 has begun, and before a determination by the child's previous ~~school district~~ LEA as to whether the child is a child with a disability.

The exception in this section applies only if the subsequent ~~school district~~ LEA is making sufficient progress to ensure a prompt completion of the evaluation, and the parent and subsequent ~~school district~~ LEA agree to a specific time when the evaluation will be completed.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:25:03.04. Evaluation procedures -- Notice.** The ~~school-district~~ LEA shall provide notice to the parents of a child with a disability, in accordance with this article, that describes any evaluation procedures the ~~district~~ LEA proposes to conduct.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:25:04. Evaluation procedures -- General.** ~~School-Districts~~ LEAs shall ensure, at a minimum, that evaluation procedures include the following:

(1) Assessments and other evaluation materials are provided and administered in the child's native language or by another mode of communication and in the form most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally, unless it is clearly not feasible to so provide or administer. In addition, assessments and other evaluation materials:

(a) Are used for the purposes for which the assessments or measures are valid and reliable; and

(b) Are administered by trained and knowledgeable personnel in conformance with the instructions provided by their producer;

(2) Assessments and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(3) Assessments are selected and administered so as best to ensure that if an assessment is administered to a child with impaired sensory, manual, or speaking skills, the assessment accurately reflects the child's aptitude or achievement level or whatever other factors the assessment purports to measure, rather than the child's impaired sensory, manual, or speaking skills except where those skills are the factors which the assessment purports to measure;

(4) No single measure or assessment is used as the sole criterion for determining eligibility or an appropriate educational program for a child;

(5) A variety of assessment tools and strategies are used to gather relevant functional, developmental, and academic information about the child, including information provided by the parents, that may assist in determining:

(a) Whether the child is a child with a disability; and

(b) The content of the child's IEP, including information related to enabling the child:

(i) To be involved in and progress in the general education curriculum; or

(ii) For a preschool child, to participate in appropriate activities;

(6) Technically sound instruments, assessment tools, and strategies are used that:

(a) May assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors; and

(b) Provide relevant information that directly assists persons in determining the educational needs of the child;

(7) The child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities; and

(8) The evaluation is sufficiently comprehensive to identify all of the child's special education and related ~~services~~ service's needs, whether or not commonly linked to the disability category in which the child has been classified.

Assessments of children with disabilities who transfer from one ~~school-district~~ LEA to another ~~school-district~~ LEA in the same school year are coordinated with those children's prior and subsequent ~~schools~~ LEAs, as necessary and as expeditiously as possible, consistent with § 24:05:25:03.01, to ensure prompt completion of full evaluations.

**Source:** 16 SDR 41, effective September 7, 1989; 18 SDR 158, effective March 31, 1992; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1, 13-37-30.

**24:05:25:04.02. Determination of needed evaluation data.** As part of an initial evaluation, if appropriate, and as part of any reevaluation, the ~~individual-education-program~~ IEP team required by § 24:05:27:01.01 and other qualified professionals as appropriate with knowledge and skills necessary to interpret evaluation data, shall:

(1) Review existing evaluation data on the child, including:

(a) Evaluations and information provided by the parents of the child;

(b) Current classroom-based local or state assessments and observations; and

(c) Observations by teachers and related services providers; and

(2) Based on the above review and input from the student's parents, identify what additional data, if any, are needed to determine:

- (a) Whether the student has a particular category of disability as described in this article;
- (b) The present levels of academic achievement and related developmental needs of the student; and
- (c) Whether the student needs special education and related services.

The ~~school district~~ LEA shall administer assessments and any other evaluation materials as may be needed to produce the data required to make the determinations listed in subdivision (2) of this section. If no additional data are needed to make the determinations listed in subdivision (2) of this section, the ~~school district~~ LEA shall notify the student's parents of this fact and the reasons for this decision. The group described in this section may conduct its review without a meeting.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:25:04.03. Determination of eligibility.** Upon completing the administration of assessments and other evaluation measures as required by this chapter, the ~~individual education program~~ IEP team and other qualified individuals required by § 24:05:25:04.02 shall determine whether the student is a student with a disability, and shall determine the educational needs of the child, as defined in this article. The ~~school district~~ LEA shall provide a copy of the evaluation report and the documentation of determination of eligibility at no cost to the parent. A student may not be determined to be a student with a disability if the determinant factor for that decision is lack of appropriate instruction in reading, including the essential components of reading instruction as

defined in ESSA, or lack of appropriate instruction in math or limited English proficiency and if the student does not otherwise meet the eligibility criteria under chapter § 24:05:24.01.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 46 SDR 149, effective July 6, 2020.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:25:05. Eligibility and placement procedures.** In interpreting evaluation data for the purpose of determining eligibility and determining the educational needs of the child, in making placement decisions, including decisions regarding preschool children, each ~~school district~~ LEA shall do the following:

- (1) Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;
- (2) Ensure that information obtained from all of these sources is documented and carefully considered;
- (3) Ensure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options;
- (4) Ensure that the placement decision is made in conformity with the least restrictive environment rules in chapter 24:05:28; and
- (5) Ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child.

If a determination is made that a child is disabled and needs special education and related services, an ~~individual education program~~ IEP must be developed for the child in accordance with this article.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:25:06. Reevaluations.** A ~~school district~~ LEA shall ensure that a reevaluation of each child with a disability is conducted in accordance with this chapter if the ~~school district~~ LEA determines that the educational or related service needs, including improved academic achievement and functional performance, of the child warrant a reevaluation or if the child's parents or teacher requests a reevaluation.

A reevaluation conducted under this section may occur not more than once a year, unless the parent and ~~district~~ LEA agree otherwise, and must occur at least once every three years, unless the parent and the ~~district~~ LEA agree that a reevaluation is unnecessary.

Reevaluations must be completed within 25 school days after receipt by the ~~district~~ LEA of signed consent to reevaluate unless other time limits are agreed to by the ~~school administration~~ LEA and the parents consistent with § 24:05:25:03.

Each ~~school district~~ LEA shall follow the procedures under § 24:05:25:04.02 when reevaluating a student for the additional purposes of:

(1) Determining whether the child continues to have a disability and determining the educational needs of the child;

(2) Determining the present levels of academic achievement and related developmental needs of the child;

(3) Determining whether the child continues to need special education and related services; and

(4) Determining whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP and to participate, as appropriate, in the general education curriculum.

If no additional data ~~are~~ is needed to determine continuing eligibility and the child's educational needs, the ~~district~~ LEA shall notify the parents of that determination and reasons for it and of the right of the parent to request an assessment, for purposes of determining the child's educational needs under this article, and to determine continuing eligibility. The ~~school-district~~ LEA is not required to conduct an assessment unless requested to do so by the child's parents. However, a ~~school-district~~ LEA shall follow the procedures in this chapter before determining that the child is no longer a child with a disability. The evaluation procedures described in this chapter are not required before the termination of a child's eligibility under this article due to graduation from ~~secondary school~~ secondary school with a regular high school diploma, or exceeding the age eligibility for a FAPE.

**Source:** 16 SDR 41, effective September 7, 1989; 17 SDR 30, effective August 27, 1990; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 32 SDR 41, effective September 11, 2005; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:25:06.01. Consent for reevaluation.** Before conducting a reevaluation of an eligible child, parental consent is required, unless:

(1) The ~~school-district~~ LEA can demonstrate that it has taken reasonable measures to obtain consent, and the child's parent has failed to respond; and

(2) The ~~school-district~~ LEA documents its efforts to obtain consent by using the procedures consistent with § 24:05:25:17.

If the parent refuses to consent to the reevaluation, the ~~school-district~~ LEA may, but is not required to, pursue the reevaluation by using the consent override procedures described in chapter 24:05:30 including mediation and due process hearing procedures.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:25:07. Additional procedures for evaluating specific learning disabilities.** In order for a ~~school-district~~ LEA to certify a child as learning disabled for purposes of the federal child count, requirements in §§ 24:05:24.01:19 and 24:05:25:08 to 24:05:25:13, inclusive, must be met and documented in a child's record.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, September 8, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**Cross-Reference:** Child count, ch 24:05:17.

**24:05:25:11. Observation for specific learning disabilities.** The ~~school-district~~ LEA shall ensure that the child is observed in the child's learning environment, including the regular classroom setting, to document the child's academic performance and behavior in the areas of difficulty.

The group described in this section, in determining whether a child has a specific learning disability, shall:

(1) Use information from an observation in routine classroom instruction and monitoring of the child's performance that was done before the child was referred for an evaluation, as in a response to intervention model; or

(2) Have at least one member of the group conduct an observation of the child's academic performance in the regular classroom after the child has been referred for an evaluation and parental consent, consistent with this chapter, is obtained, as in a discrepancy model.

If a child is less than school age or out of school, a group member must observe the child in an environment appropriate for a child of that age.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:25:12. Documentation of eligibility for specific learning disabilities.** For a child suspected of having a specific learning disability, the documentation of the determination of eligibility shall contain a statement of:

(1) Whether the child has a specific learning disability;

(2) The basis for making the determination, including an assurance that the determination has been made in accordance with this section;

(3) The relevant behavior, if any, noted during the observation of the child and the relationship of that behavior to the child's academic functioning;

(4) The educationally relevant medical findings, if any;

(5) Whether:

(a) The child does not achieve adequately for the child's age or does not meet state-approved grade-level standards; and

(b) The child does not make sufficient progress to meet age or state-approved grade-level standards; or the child exhibits a pattern of strengths and weaknesses in performance, achievement, or both, relative to age, state-approved grade level standards or intellectual development;

(6) The determination of the group concerning the effects of a visual, hearing, or motor disability; cognitive disability; ~~emotional disturbance~~ emotional behavioral disability; cultural factors; environmental or economic disadvantage; or limited English proficiency on the child's achievement level;

(7) If the child has participated in a process that assesses the child's response to scientific, research-based intervention:

(a) The instructional strategies used and the student-centered data collected; and

(b) The documentation that the child's parents were notified about:

(i) The state's policies regarding the amount and nature of student performance data that would be collected and the general education services that would be provided;

(ii) Strategies for increasing the child's rate of learning; and

(iii) The parents' right to request an evaluation;

(8) If using the discrepancy model, the group finds that the child has a severe discrepancy of 1.5 standard deviations between achievement and intellectual ability in one or more of the eligibility areas, the group shall consider regression to the mean in determining the discrepancy; and

(9) If using the response to intervention model for eligibility determination, the group shall demonstrate that the child's performance is below the mean relative to age or state approved grade level standards.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:25:13.01. Response to intervention model.** ~~School districts~~ LEAs that elect to use a response to intervention model as part of the evaluation process for specific learning disabilities shall submit to the state for approval a formal proposal that at a minimum addresses the provisions in § 24:05:25:12.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:25:16. Parent participation.** Each ~~district~~ LEA shall take steps to ensure that one or both parents of the child are present at each IEP team meeting or are afforded the opportunity to participate. The ~~district~~ LEA shall notify parents of the meeting early enough to ensure that they will have an opportunity to attend, scheduling the meeting at a mutually agreed-upon time and place. The

notice to the parents shall state the purpose, time, and location of the IEP team meeting and who will be in attendance and inform the parents of the provisions relating to the participation of other individuals on the IEP team who have knowledge or special expertise about the child, including information related to the participation of the Part C service coordinator or other representatives of the Part C system at the initial IEP Team meeting for a child previously served under Part C of the IDEA.

If a purpose of the IEP team meeting is the consideration of postsecondary goals and transition services for a student, the notice must also address the provisions of § 24:05:25:16.01.

If parents cannot attend, the ~~district~~ LEA shall use other methods to ensure participation, including individual or conference telephone calls consistent with § 24:05:27:08.04.

**Source:** 16 SDR 41, effective September 7, 1989; 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**Cross-Reference:** Transition services, § 24:05:27:13.02.

**24:05:25:16.01. Participation of student in IEP team meeting.** If a purpose of the IEP team meeting is the consideration of postsecondary goals and transition services for a student, and if the meeting is for a child with a disability beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP team, the notice also must:

(1) Indicate that a purpose of the meeting is the consideration of the postsecondary goals and transition services for the student;

(2) Indicate that the ~~district~~ LEA will invite the student; and

(3) To the extent appropriate, with the consent of the parents or a student who has reached the age of majority, identify any other agency that is likely to be responsible for providing or paying for transition services and that will be invited to send a representative.

Parental consent, or the consent of an eligible student who has reached the age of majority under state law, must be obtained before personally identifiable information is released to officials of participating agencies providing or paying for transition services.

**Source:** 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:25:16.02. Required student invitation.** The ~~district~~ LEA shall invite a student with a disability to attend the student's IEP team meeting if a purpose of the meeting is the consideration of the postsecondary goals for the student and the transition services needed to assist the student in reaching those goals.

If the student does not attend the IEP team meeting, the ~~district~~ LEA shall take other steps to ensure that the student's preferences and interests are considered.

**Source:** 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**Cross-Reference:** Transition services, § 24:05:27:13.02.

**24:05:25:17. Conduct of IEP team without parents.** An IEP team meeting may be conducted without a parent in attendance if the ~~district~~ LEA is unable to convince the parents that they should attend. The ~~district~~ LEA must have written documentation of its attempts to arrange a mutually agreed upon time and place, such as the following:

(1) Detailed records and dates of telephone calls made or attempted to parents and the results of those calls;

(2) Detailed copies of dated correspondence sent to the parents and any responses received; and

(3) Detailed records and dates of visits made to the parent's home or place of employment and the results of those visits.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:25:18. Action to ensure parent understands.** The ~~district~~ LEA shall take whatever action is necessary to ensure that the parent understands the proceedings at the IEP team meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:25:19. Parents to receive copy of ~~individual education program IEP~~.** The ~~district~~ LEA shall give the parents a copy of the ~~individual education program IEP~~, at no cost.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:25:22. IEP team to develop ~~individual education program IEP~~.** If the child is determined to be in need of special education or special education and related services, the IEP team shall develop an appropriate ~~individual education program IEP~~ for the child. At the beginning of each school year thereafter, the ~~district~~ LEA must have in effect an IEP for each child with disabilities within its jurisdiction. For children beginning at age three, an IEP shall be in effect by that date. If a child's third birthday occurs during the summer, the IEP team shall determine the date when services under the IEP will begin. All IEPs shall be developed in accordance with the provisions of this article.

**Source:** 16 SDR 41, effective September 7, 1989; 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**Cross-Reference:** ~~Individual educational program IEP~~, ch 24:05:27.

**24:05:25:23. Decisions of IEP team.** All decisions of the IEP team shall be made jointly by the parents and ~~school~~ LEA personnel through the IEP process and specified on the child's IEP. An IEP must be in effect before special education and related services are provided to a child and must be implemented as soon as possible following a placement committee meeting.

**Source:** 16 SDR 41, effective September 7, 1989; 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:25:26. Extended school year authorized.** The ~~district~~ LEA shall provide extended school year services to eligible children if the IEP team determines on an individual basis that such services are necessary for the provision of a FAPE.

An IEP pursuant to chapter 24:05:27 shall be developed and implemented by the IEP team that addresses the need for extended school year services. The IEP team shall determine the length of the school day and duration of extended school year services based on the individual child's needs.

In implementing the requirements of this section, a ~~district~~ LEA may not:

- (1) Limit extended school year services to particular categories of disability;
- (2) Unilaterally limit the type, amount, or duration of those services; or
- (3) Apply a regression/recoupment criterion to children in need of prolonged assistance.

As used in this section, the term, extended school year services, means special education and related services that meet the standards of the state and are provided to a student with a disability

beyond the normal school year of the ~~district~~ LEA, in accordance with the student's IEP and at no cost to the parents of the student.

**Source:** 16 SDR 41, effective September 7, 1989; 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

## CHAPTER 24:05:26

### SUSPENSION

#### Section

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- 24:05:26:13 Repealed.
- 24:05:26:14 Protections for students not yet eligible.
- 24:05:26:15 Referral to and action by law enforcement and judicial authorities.

**24:05:26:01. Suspension ~~from school~~.** The suspension of ~~pupils~~ students in need of special education or special education and related services includes the general due process procedures

used for all ~~pupils~~ students as found in chapter 24:07 and the additional steps in the process specified in this chapter that a district LEA must take if the student is receiving special education or special education and related services under an individualized education program IEP.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 23 SDR 63, effective November 4, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1, 13-32-4.

**Law Implemented:** SDCL 13-37-1.1, 13-32-4.

**Cross-Reference:** Student due process, art 24:07.

**24:05:26:01.01. Suspension ~~from school~~ -- Definitions.** Terms used in this chapter and chapter 24:05:26.01 mean:

(1) "Controlled substance," a drug or other substance identified under SDCL 34-20B-11 to 34-20B-26, inclusive;

(2) "Dangerous weapon," a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury. The term does not include a pocket knife with a blade of less than 2 1/2 inches in length;

(3) "Illegal drug," a controlled substance, but does not include such a substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under SDCL 34-20B-11 to 34-20B-26, inclusive, or under any provision of federal law; and

(4) "Serious bodily injury," bodily injury that involves:

(a) A substantial risk of death;

(b) Extreme physical pain;

(c) Protracted and obvious disfigurement; or

(d) Protracted loss or impairment of the function of a bodily member, organ, or mental faculty.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:01.02. Case-by-case determination.** ~~School~~ LEA personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this chapter, is appropriate for a student with a disability who violates a LEA's code of student conduct.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:02. Short-term suspension procedure.** If a short-term suspension from a class, classes, or school is anticipated because of a ~~pupil's~~ student's violation of a policy, the procedure in § 24:07:02:01 applies.

**Source:** 16 SDR 41, effective September 7, 1989; 22 SDR 97, effective January 22, 1996; 23 SDR 31, effective September 8, 1996.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:02.01. Change of placement for disciplinary removals.** For purposes of removal of a student with a disability from the student's current educational placement under this chapter, a change of placement occurs if:

- (1) The removal is for more than ten consecutive school days; or
- (2) The student is subjected to a series of removals that constitute a pattern because:
  - (a) They cumulate to more than ten school days in a school year;
  - (b) Of factors such as the length of each removal, the total amount of time the student is removed, and the proximity of the removals to one another; and
  - (c) The student's ~~behavior~~ conduct is substantially similar to the student's ~~behavior~~ conduct in previous incidents that resulted in the series of removals.

The ~~public-agency~~ LEA determines on a case-by-case basis whether a pattern of removals constitutes a change of placement. This determination is subject to review through due process and judicial proceedings.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:02.02. Removals -- Ten school days or less.** To the extent removal would be applied to students without disabilities, including alternative settings, ~~school~~ LEA personnel may order the removal of a student with a disability from the student's current placement to an appropriate interim alternative educational setting or another setting, or they may order suspension for not more than ten consecutive school days, for any violation of a LEA's code of student conduct. Additional removals of not more than ten consecutive school days in that same school year may be ordered for

separate incidents of misconduct if those removals do not constitute a change of placement under § 24:05:26:02.01.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:02.03. Required services -- No change of placement.** A ~~school-district~~ LEA need not provide services during periods of removal under § 24:05:26:02.02 to a student with a disability who has been removed from his or her current placement for ten school days or less in that school year, if services are not provided to a student without disabilities who has been similarly removed. If a student with a disability has been removed from his or her current placement for more than ten school days in that school year, and the removal is not for more than ten consecutive school days and is not a change in placement, the ~~district~~ LEA, for the remainder of the removals, shall provide services to the extent necessary to enable the student to participate in the general curriculum and to progress toward meeting the goals set out in the student's IEP. ~~School~~ LEA personnel, in consultation with at least one of the student's teachers, shall determine the extent to which services are necessary to enable the student to participate in the general curriculum and to progress toward meeting the goals set out in the student's IEP.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:03. Written report required.** If a long-term suspension is anticipated because of a ~~pupil's~~ student's violation of a policy, the procedure in § 24:07:03:01 applies.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 23 SDR 63, effective November 4, 1996.

**General Authority:** SDCL 13-37-1.1, 13-32-4.

**Law Implemented:** SDCL 13-37-1.1, 13-32-4.

**24:05:26:05. Right of waiver.** The ~~pupil~~ student, if of the age of majority or emancipated, or the ~~pupil's~~ student's parent may waive the right to a hearing in writing to, the superintendent. If the hearing is not waived, the hearing shall be held on the date, time and place set in the notice unless a different date, time, and place are agreed to by the parties.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 23 SDR 63, effective November 4, 1996.

**General Authority:** SDCL 13-37-1.1, 13-32-4.

**Law Implemented:** SDCL 13-37-1.1, 13-32-4.

**24:05:26:06. Hearing procedure.** The ~~school~~ LEA board is the hearing board and shall conduct the hearing in the following manner:

- (1) The ~~school~~ LEA board shall appoint a ~~school~~ LEA board member or a person who is not an employee of the ~~school-district~~ LEA as the hearing officer;
- (2) Each party may make an opening statement;
- (3) Each party may introduce evidence, present witnesses, and examine and cross-examine witnesses;

- (4) Each party may be represented by an attorney;
- (5) The ~~school~~ LEA administration shall present its case first;
- (6) The hearing is closed to the public. The ~~school~~ LEA board shall make a verbatim record of the hearing by means of an electronic or mechanical device;
- (7) Witnesses may be present only when testifying. All witnesses must take an oath or affirmation administered by the ~~school~~ LEA board president or business manager;
- (8) Each party may raise objections; however, objections are limited to relevancy and scope of the question;
- (9) The hearing officer shall admit all relevant evidence; however, the hearing officer may limit unproductive or repetitious evidence;
- (10) The hearing officer may ask questions of witnesses and may allow other ~~school~~ LEA board members to interrogate witnesses;
- (11) Each party may make a closing statement;
- (12) After the hearing, the ~~school~~ LEA board shall continue to meet in executive session for deliberation. No one other than the hearing officer may meet with the ~~school~~ LEA board during deliberation. The ~~school~~ LEA board may seek advice during deliberation from an attorney who has not represented any of the parties to the hearing. Consultation with any other person during deliberation may occur only if a representative of the ~~pupil~~ student is present; and
- (13) The decision of the ~~school~~ LEA board must be based solely on the evidence presented at the hearing and must be formalized by a motion made in open meeting. The motion shall omit the name of the ~~pupil~~ student and shall state the reason for the LEA board's action. The ~~school~~ LEA board shall notify the ~~pupil's~~ student's parents or a ~~pupil~~ student who is 18 years of age or

older or an emancipated minor in writing of the decision. The notice shall state the length of the suspension.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 23 SDR 63, effective November 4, 1996.

**General Authority:** SDCL 13-37-1.1, 13-32-4.

**Law Implemented:** SDCL 13-37-1.1, 13-32-4.

**24:05:26:07. Right of appeal.** The ~~pupil~~ student may appeal an adverse decision by the ~~school~~ LEA board to the circuit court.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 23 SDR 63, effective November 4, 1996.

**General Authority:** SDCL 13-37-1.1, 13-32-4.

**Law Implemented:** SDCL 13-37-1.1, 13-32-4.

**24:05:26:08. Attendance policies.** The attendance policy of a ~~school-district~~ LEA may not exclude a ~~pupil~~ student from a class or from a school for more than ten days without providing due process pursuant to this chapter.

**Source:** 16 SDR 41, effective September 7, 1989; 22 SDR 97, effective January 22, 1996; 23 SDR 31, effective September 8, 1996; 23 SDR 63, effective November 4, 1996.

**General Authority:** SDCL 13-37-1.1, 13-32-4.

**Law Implemented:** SDCL 13-37-1.1, 13-32-4.

**24:05:26:08.01. Authority of ~~school~~ LEA personnel -- Weapons, drugs, and serious bodily injury.** ~~School-LEA~~ personnel may remove a student to an appropriate interim alternative setting for not more than 45 school days, without regard to whether the ~~behavior~~ conduct is determined to be a manifestation of the student's disability, if:

(1) The student carries a weapon to or possesses a weapon at school, on school premises, or at school or to a school function under the jurisdiction of a state or ~~local-education-agency~~ LEA;

(2) The student knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school, on school premises, or at a school function under the jurisdiction of a state or ~~local-educational-agency~~ LEA; or

(3) The student has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the state ~~education-agency~~ or a ~~school-district~~ LEA.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:08.02. Authority of hearing officer.** A hearing officer under this article hears and makes a determination regarding an appeal under this chapter. In making the determination under this section, the hearing officer may:

(1) Return the student with a disability to the placement from which the student was removed if the hearing officer determines that the removal was a violation of this chapter or that the student's ~~behavior~~ conduct was a manifestation of the student's disability; or

(2) Order a change of placement of the student with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the student is substantially likely to result in injury to the student or to others.

The procedures under this section may be repeated if the ~~school-district~~ LEA believes that returning the student to the original placement is substantially likely to result in injury to the student or to others.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:08.03. Parental notification.** On the date on which the decision is made to make a removal that constitutes a change of placement of a student with a disability because of a violation of a LEA's code of student conduct, the ~~school-district~~ LEA shall notify the parents of that decision and provide the parents the procedural safeguards notice described in chapter 24:05:30.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:09. Referral to IEP team for long-term suspension of ~~pupils~~ students.** If a ~~pupil~~ student identified as in need of special education or special education and related services

pursuant to SDCL 13-37-1 is the subject of long-term suspension, a referral shall be made by the superintendent or chief administering officer to the district's IEP team.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 23 SDR 63, effective November 4, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1, 13-32-4.

**Law Implemented:** SDCL 13-37-1.1, 13-32-4.

**24:05:26:09.03. Manifestation determination review requirement.** Within ten school days of any decision to change the placement of a student with a disability because of a violation of a LEA's code of student conduct, the school-district LEA, the parent, and relevant members of the student's IEP team, as determined by the parent and the district LEA, shall review all relevant information in the student's file, including the student's IEP, any teacher observations, and any relevant information provided by the parents to determine:

- (1) Whether the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; or
- (2) Whether the conduct in question was the direct result of the school-district's LEA's failure to implement the IEP.

The conduct must be determined to be a manifestation of the student's disability if the district LEA, the parent, and relevant members of the student's IEP team determine that a condition in either subdivision (1) or (2) of this section was met.

If the district LEA, the parent, and relevant members of the student's IEP team determine that the condition described in subdivision (2) of this section was met, the district LEA shall take immediate steps to remedy those deficiencies.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:09.04. Determination that behavior conduct was a manifestation.** If the school-district LEA, the parent, and relevant members of the IEP team determine that the conduct was a manifestation of the student's disability, the IEP team shall either:

(1) Conduct a functional behavioral assessment, unless the district LEA had conducted a functional behavioral assessment before the behavior conduct that resulted in the change of placement occurred, and implement a behavioral intervention plan for the student; or

(2) If a behavioral intervention plan already has been developed, review the behavioral intervention plan and modify it, as necessary, to address the behavior conduct.

In addition, and except as provided in § 24:05:26:08.01, the IEP team shall return the student to the placement from which the student was removed, unless the parent and the district LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:09.05. Determination that behavior conduct was not manifestation of disability -- Additional authority of school LEA personnel.** For disciplinary changes in placement that would exceed ten consecutive school days, if the behavior conduct that gave rise to the violation of the school code policy is determined not to be a manifestation of the student's

disability pursuant to this chapter, ~~school~~ LEA personnel may apply the relevant disciplinary procedures to students with disabilities in the same manner and for the same duration as the procedures would be applied to students without disabilities, except as provided in this section.

A student with a disability who is removed from the student's current placement pursuant to this section or § 24:05:26:08.01 must:

(1) Continue to receive educational services, as provided in this article, so as to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP; and

(2) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the ~~behavior~~ conduct violation so that it does not recur.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:09.06. Appeal.** The parent of a student with a disability who disagrees with any decision regarding placement under this chapter or with the manifestation determination, or a ~~school-district~~ LEA that believes that maintaining the current placement of the student is substantially likely to result in injury to the student or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to this article.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:09.07. Placement during appeals.** If an appeal under this chapter has been made by either the parent or the ~~school-district~~ LEA, the student must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period specified in § 24:05:26:08.01 or 24:05:26:09.05, whichever occurs first, unless the parent and the state education agency or ~~school district~~ LEA agree otherwise.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:09.08. Expedited hearing -- Procedures.** If a hearing is requested under this chapter, the parents or the ~~school-district~~ LEA involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of this article, except as provided in this section.

The department shall arrange the expedited due process hearing, which must occur within 20 school days of the date of the complaint requesting the hearing is filed. The hearing officer shall make a determination within ten school days after the hearing.

Unless the parents and ~~school-district~~ LEA agree in writing to waive the resolution meeting described in this section, or agree to use the mediation process described in chapter 24:05:30:

(1) A resolution meeting must occur within seven days of receiving notice of the due process complaint; and

(2) The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint.

The decisions on expedited due process hearings are appealable consistent with chapter 24:05:30.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:14. Protections for students not yet eligible.** A student who has not been determined to be eligible for special education and related services under this article and who has engaged in behavior conduct that violated any rule or code of conduct policy of the school-district LEA, including any behavior conduct described in this chapter, may assert any of the protections provided for in this article if the school-district LEA had knowledge that the student was a student with a disability before the behavior conduct that precipitated the disciplinary action occurred. A school-district LEA is deemed to have knowledge that a student is a student with a disability if:

- (1) The parent of the student has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the student, that the student is in need of special education and related services;
- (2) The parent of the student has requested an evaluation of the student pursuant to this article; or
- (3) The teacher of the student, or other personnel of the district LEA or other public agency has expressed specific concerns about a pattern of behavior conduct demonstrated by the student directly to the LEA director of special education of the district or to other supervisory personnel of the district LEA.

A ~~district~~ LEA is not deemed to have knowledge that the student is a student with a disability under this section, if the parent of the student has not allowed an evaluation of the student pursuant to this article, or has refused services under this article, or the ~~district~~ LEA conducted an evaluation consistent with this article and determined that the student was not a student with a disability.

If the ~~district~~ LEA does not have knowledge that a student is a student with a disability before taking disciplinary measures against the student, the student may be subjected to the same disciplinary measures as measures applied to students without disabilities who engaged in comparable ~~behaviors~~ conduct consistent with this chapter.

If a request is made for an evaluation of a student during the time period in which the student is subjected to disciplinary measures under this chapter, the evaluation must be ~~conducted~~ completed in an expedited manner. Until the evaluation is completed, the student shall remain in the educational placement determined by ~~school authorities~~ LEA personnel, which can include suspension or expulsion without educational services. If the student is determined to be a student with a disability taking into consideration information from the evaluation ~~conducted~~ completed by the ~~district~~ LEA and information provided by the parents, the ~~district~~ LEA shall provide special education and related services in accordance with the provisions of this article including the discipline procedures and ~~free appropriate public education~~ FAPE requirements.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26:15. Referral to and action by law enforcement and judicial authorities.**

Nothing in Part B of ~~the Individuals with Disabilities Education Act~~ the IDEA prohibits a ~~school district~~ LEA or other public agency from reporting a crime committed by a student with a disability to appropriate authorities or to prevent state law enforcement and judicial authorities from exercising their responsibilities with regard to the application of federal and state law to crimes committed by a student with a disability.

A ~~school district~~ LEA or other public agency reporting a crime committed by a student with a disability shall ensure that copies of the special education and disciplinary records of the student are transmitted for consideration by the appropriate authorities to whom it reports the crime. A ~~school district~~ LEA reporting a crime under this chapter may transmit copies of the student's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act, as amended to January 8, 2009.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**CHAPTER 24:05:26.01**

**EXPULSION**

Section

24:05:26.01:01      Expulsion ~~from school~~.

24:05:26.01:01.01      Case-by-case determination.

24:05:26.01:02      Written report required.

- 24:05:26.01:03 Request and notice of hearing.
- 24:05:26.01:04 Right of waiver.
- 24:05:26.01:05 Hearing procedure.
- 24:05:26.01:06 Right of appeal.
- 24:05:26.01:07 Attendance policies.
- 24:05:26.01:07.01 Authority of ~~school~~ LEA personnel -- Weapons, drugs, and serious bodily injury.
- 24:05:26.01:07.02 Authority of hearing officer.
- 24:05:26.01:07.03 Parental notification.
- 24:05:26.01:08 Referral to IEP team for expulsion of students.
- 24:05:26.01:08.01 Applicability of suspension procedures.
- 24:05:26.01:09 Repealed.
- 24:05:26.01:10 Repealed.
- 24:05:26.01:11 Repealed.
- 24:05:26.01:12 Repealed.
- 24:05:26.01:13 Protections for students not yet eligible.
- 24:05:26.01:14 Referral to and action by law enforcement and judicial authorities.

**24:05:26.01:01. Expulsion ~~from school~~.** The expulsion of students in need of special education or special education and related services includes the general due process procedures used for all students as found in chapter 24:07 and the additional steps in the process specified in this chapter that a ~~district~~ LEA must take when the student is receiving special education or special education and related services under an ~~individual education program~~ IEP.

**Source:** 23 SDR 179, effective April 29, 1997; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-32-1, 13-32-4, 13-37-1.1.

**Law Implemented:** SDCL 13-32-1, 13-32-4, 13-37-1.1.

**Cross-Reference:** Student due process, art 24:07.

**24:05:26.01:01. Case-by-case determination.** ~~School~~ LEA personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this chapter, is appropriate for a student with a disability who violates a ~~code of student conduct~~ LEA policy.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26.01:02. Written report required.** If an expulsion is anticipated because of a student's violation of ~~rules, policies or for insubordination or misconduct,~~ LEA policy or misconduct, the procedure in § 24:07:04:01 applies.

**Source:** 23 SDR 179, effective April 29, 1997.

**General Authority:** SDCL 13-32-4, 13-37-1.1.

**Law Implemented:** SDCL 13-32-4, 13-37-1.1.

**24:05:26.01:03. Request and notice of hearing.** If the superintendent finds grounds for expulsion ~~from school~~, the procedure in § 24:07:04:02 applies.

**Source:** 23 SDR 179, effective April 29, 1997.

**General Authority:** SDCL 13-32-4, 13-37-1.1.

**Law Implemented:** SDCL 13-32-4, 13-37-1.1.

**24:05:26.01:04. Right of waiver.** A competent student, if of the age of majority or emancipated, or the student's parent may waive the right to a hearing in writing to the superintendent. If the hearing is not waived, the hearing shall be held on the date and at the time and place set in the hearing notice unless a different date, time, and place are agreed to by the parties. If the hearing is waived in writing, the ~~school~~ LEA board may consider the matter at a regular or special meeting without further notice to the student or the student's parents.

**Source:** 23 SDR 179, effective April 29, 1997.

**General Authority:** SDCL 13-1-12.1.

**Law Implemented:** SDCL 13-32-4, 13-37-1.1.

**24:05:26.01:05. Hearing procedure.** The ~~school~~ LEA board is the hearing board and shall conduct the hearing in the following manner:

- (1) The ~~school~~ LEA board shall appoint a ~~school~~ LEA board member or a person who is not an employee of the ~~school-district~~ LEA as the hearing officer;
- (2) Each party may make an opening statement;
- (3) Each party may introduce evidence, present witnesses, and examine and cross-examine witnesses;
- (4) Each party may be represented by an attorney;
- (5) The ~~school~~ LEA administration shall present its case first;

(6) The hearing is closed to the public. The ~~school~~ LEA board shall make a verbatim record of the hearing by means of an electronic or mechanical device or by court reporter. This record and any exhibits must be sealed and must remain with the hearing officer until the appeal process has been completed;

(7) Witnesses may be present only when testifying. All witnesses must take an oath or affirmation administered by the ~~school~~ LEA board president, hearing officer, or other person authorized by law to take oaths or affirmations;

(8) Each party may raise any legal objections to evidence;

(9) The hearing officer shall admit all relevant evidence; however, the hearing officer may limit unproductive or repetitious evidence;

(10) The hearing officer may ask questions of witnesses and may allow other ~~school~~ LEA board members to interrogate witnesses;

(11) Each party may make a closing statement;

(12) After the hearing, the ~~school~~ LEA board shall continue to meet in executive session for deliberation. No one other than the hearing officer may meet with the ~~school~~ LEA board during deliberation. The ~~school~~ LEA board may seek advice during deliberation from an attorney who has not represented any of the parties to the hearing. Consultation with any other person during deliberation may occur only if a representative of the student is present; and

(13) The decision of the ~~school~~ LEA board must be based solely on the evidence presented at the hearing and must be formalized by a motion made in open meeting. The motion shall omit the name of the student and shall state the reason for the LEA board's action. The ~~school~~ LEA board shall notify the student's parent or parents or a student who is 18 years of age or older or

who is an emancipated minor in writing of the decision. The notice shall state the length of the expulsion.

**Source:** 23 SDR 179, effective April 29, 1997.

**General Authority:** SDCL 13-32-4, 13-37-1.1.

**Law Implemented:** SDCL 13-32-4, 13-37-1.1.

**24:05:26.01:06. Right of appeal.** The student may appeal an adverse decision by the ~~school~~ LEA board to the circuit court.

**Source:** 23 SDR 179, effective April 29, 1997.

**General Authority:** SDCL 13-32-4, 13-37-1.1.

**Law Implemented:** SDCL 13-32-4, 13-37-1.1.

**24:05:26.01:07. Attendance policies.** The attendance policy of a ~~school-district~~ LEA may not exclude a student from one or more classes or from a school for more than ten consecutive school days without providing the due process procedures in this chapter or chapter 24:07:03.

**Source:** 23 SDR 179, effective April 29, 1997.

**General Authority:** SDCL 13-32-4, 13-37-1.1.

**Law Implemented:** SDCL 13-32-4, 13-37-1.1.

**24:05:26.01:07.01. Authority of ~~school~~ LEA personnel -- Weapons, drugs, and serious bodily injury.** ~~School-district~~ LEA personnel shall follow the procedures under § 24:05:26:08.01 if an expulsion is anticipated because of a student's violation of ~~rules or policies~~ policy pertaining to weapons and drugs.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26.01:07.02. Authority of hearing officer.** The authority of a hearing officer, in an expedited due process hearing, described under § 24:05:26:08.02, applies if an expulsion is anticipated because a student's ~~behavior~~ conduct is substantially likely to result in injury to the student or to others.

**Source:** 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:26.01:07.03. Parental notification.** On the date on which the decision is made to make a removal that constitutes a change of placement of a student with a disability because of a violation of a code of student conduct, the ~~school-district~~ LEA must notify the parents of that decision and provide the parents the procedural safeguards notice described in chapter 24:05:30.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

## CHAPTER 24:05:27

### ~~INDIVIDUAL EDUCATIONAL PROGRAM~~ IEP

Section

- 24:05:27:01 Repealed.
- 24:05:27:01.01 IEP team.
- 24:05:27:01.02 Development, review, and revision of ~~individualized education program~~ IEP.
- 24:05:27:01.03 Content of ~~individualized education program~~ IEP.
- 24:05:27:01.04 Access to IEP.
- 24:05:27:01.05 IEP team attendance.
- 24:05:27:01.06 Initial IEP team meeting for ~~infants and toddlers~~ children served under Part C of the IDEA.
- 24:05:27:02 IEP team meeting date.
- 24:05:27:03 IEP team to determine related services.
- 24:05:27:04 Determination of related services.
- 24:05:27:04.01 Parental consent for services.
- 24:05:27:04.02 Parental refusal to consent -- ~~School-district~~ LEA obligations.
- 24:05:27:04.03 Parental withdrawal of consent for services.
- 24:05:27:05 Hearing aid.
- 24:05:27:05.01 External components of surgically implanted medical devices.
- 24:05:27:06 Medical services.
- 24:05:27:07 Transportation.
- 24:05:27:08 Yearly review and revision of ~~individual educational programs~~ IEP.
- 24:05:27:08.01 Agreement to change IEP.
- 24:05:27:08.02 Amendments to IEP.
- 24:05:27:08.03 Consolidation of IEP team meetings.
- 24:05:27:08.04 Alternative means of meeting participation.

- 24:05:27:09 Repealed.
- 24:05:27:10 ~~Individual educational programs~~ IEPs for students placed in private schools.
- 24:05:27:11 Repealed.
- 24:05:27:12 Graduation requirements.
- 24:05:27:13 Repealed.
- 24:05:27:13.01 Agency responsibilities for transition services.
- 24:05:27:13.02 Transition services.
- 24:05:27:14 Repealed.
- 24:05:27:15 Repealed.
- 24:05:27:15.01 IEPs for student transfers within state.
- 24:05:27:15.02 IEPs for student transfers from another state.
- 24:05:27:15.03 Transmittal of records for student transfers.
- 24:05:27:16 Related services provided at no cost.
- 24:05:27:16.01 Rehabilitation counseling services.
- 24:05:27:16.02 Services applicable to surgically implanted device.
- 24:05:27:17 Employment of Braille teacher.
- 24:05:27:18 Assistive technology device.
- 24:05:27:19 Assistive technology service.
- 24:05:27:19.01 Universal design.
- 24:05:27:20 Availability of assistive technology.
- 24:05:27:21 Transition to preschool program.
- 24:05:27:22 Occupational therapy defined.
- 24:05:27:23 Criteria for occupational therapy.

- 24:05:27:24 Physical therapy defined.
- 24:05:27:25 Criteria for physical therapy.
- 24:05:27:26 Incarcerated students in adult prisons.
- 24:05:27:27 Modifications to IEPs for students in adult prisons.

**24:05:27:01.01. IEP team.** Each ~~school-district~~ LEA shall ensure that the IEP team for each student with disabilities include the following members:

- (1) The parents of the student;
- (2) Not less than one regular education teacher of the student if the student is, or may be, participating in the regular education environment;
- (3) Not less than one special education teacher of the student or, if appropriate, at least one special education provider of the student;
- (4) A representative of the ~~school-district~~ LEA who:
  - (a) Is qualified to provide, or supervise the provision of specially designed instruction to meet the unique needs of students with disabilities;
  - (b) Is knowledgeable about the general education curriculum; and
  - (c) Is knowledgeable about the availability of resources of the ~~school-district~~ LEA;
- (5) An individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in subdivisions 2 to 6, inclusive, of this section;
- (6) At the discretion of the parent or the ~~school-district~~ LEA, other individuals who have knowledge or special expertise regarding the student including related services personnel as appropriate;
- (7) If appropriate, the student; and

(8) Transition services participants as described in §§ 24:05:25:16.01 and 24:05:25:16.02.

The determination of the knowledge or special education expertise of any individual described in this section shall be made by the party (parents or ~~district LEA~~) who invited the individual to be a member of the IEP team. A ~~district LEA~~ may designate another ~~district LEA~~ member of the IEP team to also serve as the ~~district LEA~~ representative, if the criteria in this section are satisfied.

**Source:** 26 SDR 150, effective May 22, 2000; 32 SDR 41, effective September 11, 2005; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:01.02. Development, review, and revision of ~~individualized education program IEP~~.** In developing, reviewing, and revising each student's ~~individualized education program IEP~~, the team shall consider the strengths of the student and the concerns of the parents for enhancing the education of their student, the results of the initial or most recent evaluation of the student, the academic, developmental, and functional needs of the student. The ~~individualized education program IEP~~ team also shall:

(1) In the case of a student whose behavior impedes his or her learning or that of others, consider the use of positive behavioral interventions and supports and other strategies to address that behavior;

(2) In the case of a student with limited English proficiency, consider the language needs of the student as these needs relate to the student's ~~individualized education program IEP~~;

(3) In the case of a student who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the team determines, after an evaluation of the student's reading and writing skills, needs, and appropriate reading and writing media (including an evaluation of the student's future needs for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the student;

(4) Consider the communication needs of the student and, in the case of a student who is deaf or hard of hearing, consider the student's language and communication needs, opportunities for direct communications with peers and professional personnel in the student's language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the student's language and communication mode; and

(5) Consider whether the student requires assistive technology devices and services.

The regular education teacher of a student with a disability, as a member of the ~~individualized education program IEP~~ team, must, to the extent appropriate, participate in the development, review, and revision of the student's ~~individualized education program IEP~~, including the determination of appropriate positive behavioral interventions and supports and other strategies for the student and the determination of supplementary aids and services, program modifications, and supports for ~~school~~ LEA personnel that will be provided for the student consistent with subdivision 24:05:27:01.03(3).

Nothing in this section requires the team to include information under one component of a student's ~~individualized education program IEP~~ that is already contained under another component of the student's ~~individualized education program IEP~~. No additional information may be required to be included in a student's IEP beyond what is explicitly required in this section.

**Source:** 26 SDR 150, effective May 22, 2000; 32 SDR 41, effective September 11, 2005; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:01.03. Content of ~~individualized education program~~ IEP.** Each student's ~~individualized education program~~ IEP shall include:

(1) A statement of the student's present levels of academic achievement and functional performance, including:

(a) How the student's disability affects the student's involvement and progress in the general education curriculum (i.e., the same curriculum as for nondisabled students); or

(b) For preschool student, as appropriate, how the disability affects the student's participation in appropriate activities;

(2) A statement of measurable annual goals, including academic and functional goals, designed to:

(a) Meet the student's needs that result from the student's disability to enable the student to be involved in and progress in the general education curriculum; and

(b) Meet each of the student's other educational needs that result from the student's disability;

For students with disabilities who take alternate assessments aligned to alternate achievement standards, each student's IEP shall provide a description of benchmarks or short-term objectives;

(3) 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 student, or

on behalf of the student, and a statement of the program modifications or supports for ~~school~~ LEA personnel that will be provided to enable the student:

(a) To advance appropriately toward attaining the annual goals;

(b) To be involved and make progress in the general education curriculum in accordance with this section and to participate in extracurricular and other nonacademic activities; and

(c) To be educated and participate with other students with disabilities and nondisabled students in the activities described in this section;

(4) An explanation of the extent, if any, to which the student will not participate with nondisabled students in the regular class and in activities described in this section;

(5) A statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the student on state and district-wide assessments consistent with § 24:05:14:14. If the IEP team determines that the student shall take an alternate assessment instead of a particular regular state or district-wide assessment of student achievement, a statement of why:

(a) The student cannot participate in the regular assessment; and

(b) The particular alternate assessment selected is appropriate for the student;

(6) The projected date for the beginning of the services and modification described in this section and the anticipated frequency, location, and duration of those services and modifications;

(7) A description of how the student's progress toward the annual goals described in this section will be measured and when periodic reports on the progress the student is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;

(8) Beginning not later than the first IEP to be in effect when the student turns 16, or younger if determined appropriate by the IEP team, and updated annually thereafter, the IEP shall include:

(a) Appropriate measurable postsecondary goals based upon age-appropriate transition assessments related to training, education, employment, and, if appropriate, independent living skills; and

(b) The transition services (including courses of study) needed to assist the student in reaching those goals; and

(9) Beginning not later than one year before a student reaches the age of majority under state law, the student's ~~individualized education program~~ IEP must include a statement that the student has been informed of his or her rights under Part B of the ~~Individuals with Disabilities Education Act~~ IDEA, if any, that will transfer to the student on reaching the age of majority consistent with § 24:05:30:16.01.

**Source:** 26 SDR 150, effective May 22, 2000; 32 SDR 41, effective September 11, 2005; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:01.04. Access to IEP.** Each ~~school district~~ LEA shall ensure that the child's IEP is accessible to each regular education teacher, special education teacher, related services provider, and other service provider who is responsible for its implementation. Each teacher and provider described above is informed of:

(1) His or her specific responsibilities related to implementing the child's IEP; and

(2) The specific accommodations, modifications, and supports that must be provided for the child in accordance with the IEP.

**Source:** 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:01.05. IEP team attendance.** A member of the IEP team described in subdivisions 24:05:27:01.01(2) to (5), inclusive, is not required to attend an IEP team meeting, in whole or in part, if the parent of a student with a disability and the ~~school district~~ LEA agree in writing that the attendance of the member is not necessary because the member's area of the curriculum or related services is not being modified or discussed in the meeting. A member of the IEP team may be excused from attending, in whole or in part, an IEP team meeting that involves a modification to or discussion of the member's area of the curriculum or related services, if:

- (1) The parent and ~~school district~~ LEA consent in writing to the excusal; and
- (2) The member submits, in writing to the parent and the IEP team, input into the development of the IEP before the meeting.

**Source:** 32 SDR 41, effective September 11, 2005; 33 SDR 236, effective July 5, 2007; 40 SDR 40, effective September 11, 2013.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:01.06. Initial IEP team meeting for ~~infants and toddlers~~ children served under Part C of the IDEA.** If a student was previously served under ~~part C~~ Part C, an invitation

to the initial IEP team meeting shall, at the request of the parent, be sent to the ~~part C~~ Part C service coordinator or other representatives of the ~~part C~~ Part C system to assist with the smooth transition of services.

**Source:** 32 SDR 41, effective September 11, 2005; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:03. IEP team to determine related services.** In developing ~~a child's~~ an individual educational program IEP, the members of the IEP team shall determine whether any developmental, corrective, or other supportive services, including transportation, are required to assist a child to benefit from special education. These services must be written into the ~~individual educational program IEP~~ individual educational program IEP as related services.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:04.01. Parental consent for services.** A ~~school district~~ LEA that is responsible for making a ~~free appropriate public education FAPE~~ FAPE available to a student with a disability under this article shall obtain informed consent from the parent of the student before initially providing special education and related services to the student.

The ~~district~~ LEA shall make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child. To meet the

reasonable efforts requirement, the ~~district~~ LEA shall document its attempts to obtain parental consent using the procedures in § 24:05:25:17.

If the parent of the student fails to respond or refuses to consent to services, the ~~school~~ district LEA may not use the procedures in chapter 24:05:30, including the mediation procedures or the due process procedures, in order to obtain agreement or a ruling that the services may be provided to the child.

**Source:** 32 SDR 41, effective September 11, 2005; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:04.02. Parental refusal to consent -- ~~School-district~~ LEA obligations.** If the parent of a student refuses to consent to the initial provision of special education and related services, or the parent fails to respond to a request to provide such consent:

(1) The ~~school-district~~ LEA is not considered to be in violation of the requirement to make available ~~free appropriate public education a~~ FAPE to the student for the failure to provide the student with the special education and related services for which the ~~school-district~~ LEA requests such consent; and

(2) The ~~school-district~~ LEA is not required to convene an IEP meeting or develop an IEP under this chapter for the student for the special education and related services for which the ~~school-district~~ LEA requests such consent.

**Source:** 32 SDR 41, effective September 11, 2005; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:04.02. Parental refusal to consent -- ~~School-district~~ LEA obligations.** If the parent of a student refuses to consent to the initial provision of special education and related services, or the parent fails to respond to a request to provide such consent:

(1) The ~~school-district~~ LEA is not considered to be in violation of the requirement to make available ~~free appropriate public education~~ a FAPE to the student for the failure to provide the student with the special education and related services for which the ~~school-district~~ LEA requests such consent; and

(2) The ~~school-district~~ LEA is not required to convene an IEP meeting or develop an IEP under this chapter for the student for the special education and related services for which the ~~school-district~~ LEA requests such consent.

**Source:** 32 SDR 41, effective September 11, 2005; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:04.03. Parental withdrawal of consent for services.** If, at any time subsequent to the initial provision of special education and related services, the parent of a student revokes consent in writing for the continued provision of special education and related services, the ~~school-district~~ LEA:

(1) May not continue to provide special education and related services to the student, but shall provide prior written notice in accordance with chapter 24:05:30 before ceasing the provision of special education and related services;

(2) May not use the procedures in chapter 24:05:30, including the mediation procedures or the due process procedures, in order to obtain agreement or a ruling that the services may be provided to the student;

(3) Is not considered to be in violation of the requirement to make a FAPE available to the student because of the failure to provide the student with further special education and related services; and

(4) Is not required to convene an IEP team meeting or develop an IEP under this chapter for the student for further provision of special education and related services.

**Source:** 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:05. Hearing aid.** For children with hearing impairments, including deafness, in need of special education who wear hearing aids in school, the IEP team shall include, as a related service, a monitoring schedule in the ~~individual educational program~~ IEP to ensure the proper functioning of these corrective devices.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:05.01. External components of surgically implanted medical devices.** Each ~~school-district~~ LEA shall ensure that the external components of surgically implanted medical devices are functioning properly.

For a child with a surgically implanted medical device who is receiving special education and related services under this article, a ~~school-district~~ LEA is not responsible for the post-surgical maintenance, programming, or replacement of the medical device that has been surgically implanted or of an external component of the surgically implanted medical device.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:07. Transportation.** If transportation is required for the child to benefit from the special education program, transportation shall be written in the ~~individual educational program~~ IEP and provided at no cost to the parent. A ~~district~~ LEA may not require that a parent provide transportation; however, if both parties agree that the parent will provide the transportation, it shall be noted on the ~~individual educational program~~ IEP and the parent shall be reimbursed by the ~~district~~ LEA in accordance with SDCL 13-30-3 and 13-37-8.9.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:08. Yearly review and revision of ~~individual educational programs~~ IEP.**

Each ~~school district~~ LEA shall initiate and conduct IEP team meetings to periodically review each child's ~~individual educational program~~ IEP and, if appropriate, revise its provisions. An IEP team meeting must be held for this purpose annually. The review shall be conducted to determine whether the annual goals for the student are being achieved. The ~~individualized education program~~ IEP shall be revised, as appropriate, to address: any lack of expected progress toward the annual goals and in the general curriculum, if appropriate; the results of any reevaluation conducted; information about the student provided to, or by, the parents; the student's anticipated needs; or other matters.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:08.01. Agreement to change IEP.** In making changes to a student's IEP after the annual IEP meeting for a school year, the parent of a student with a disability and the ~~school district~~ LEA may agree not to convene an IEP meeting for the purposes of making the changes, and instead may develop a written document to amend or modify the student's current IEP. If changes are made to the student's IEP in accordance with this section, the ~~district~~ LEA shall ensure that the student's IEP team is informed of the changes.

**Source:** 32 SDR 41, effective September 11, 2005; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:08.03. Consolidation of IEP team meetings.** To the extent possible, the ~~school district~~ LEA shall encourage the consolidation of reevaluation meetings for the student and other IEP team meetings for the student.

**Source:** 32 SDR 41, effective September 11, 2005.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:08.04. Alternative means of meeting participation.** When conducting IEP team meetings pursuant to this chapter and chapter 24:05:30, and carrying out administrative matters under chapter 24:05:30 (such as scheduling, exchange of witness lists, and status conferences), the parent of a student with a disability and a ~~school district~~ LEA may agree to use alternative means of meeting participation, such as video conferences and conference calls.

**Source:** 32 SDR 41, effective September 11, 2005; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:10. Individual educational programs IEPs for students placed in private schools.** Before a resident ~~school district~~ LEA places or refers a child in need of special education or special education and related services to a private school, facility, or a contracting ~~district~~ LEA, the ~~district~~ LEA shall initiate and conduct an IEP team meeting to develop an ~~individual educational program~~ IEP for the child in accordance with ~~district~~ LEA procedures.

The ~~district~~ LEA shall ensure that a representative of the private school or facility attends the IEP team meeting. If the representative of the private school or facility cannot attend the IEP team meeting, the ~~district~~ LEA shall use other methods to ensure participation, including individual or conference telephone calls.

After a child in need of special education or special education and related services enters a private school or facility, any meetings to review and revise the child's ~~individual-educational program~~ IEP may be initiated and conducted by the private school or facility at the discretion of the ~~district~~ LEA.

If the private school or facility initiates and conducts these meetings, the ~~district~~ LEA shall ensure that the parents and a ~~district~~ LEA representative are involved in any decision about the child's ~~individual-educational program~~ IEP and agree to any proposed changes in the program before those changes are implemented.

Even if a private school or facility implements a child's ~~individual-educational program~~ IEP, responsibility for compliance with this section remains with the ~~school-district~~ LEA and the department.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:12. Graduation requirements.** Completion of an approved secondary ~~special education program~~ school with a regular high school diploma signifies that the student no longer

requires special education services. A regular high school diploma does not include an alternative degree that is not fully aligned with the state's academic standards, such as a certificate or a general educational development credential (GED). Graduation from ~~high school~~ an approved secondary school with a regular high school diploma constitutes a change in placement requiring written prior notice in accordance with this article.

The instructional program shall be specified on the ~~individual educational program IEP~~. The ~~individual educational program IEP~~ shall state specifically how the student in need of special education or special education and related services will satisfy ~~the district's~~ graduation requirements. The IEP team may modify the specific units of credit described in § 24:43:11:02 but may not waive the graduation requirements that are fully aligned with the state's academic standards for the student to receive a regular high school diploma. Parents must be informed through the ~~individual educational program IEP~~ process at least one year in advance of the intent to graduate their child upon ~~completion of the individual educational program meeting the requirements for a regular high school diploma~~ and to terminate services by graduation.

For a student whose eligibility terminates under the above graduation provisions, or due to exceeding the age eligibility for a ~~free appropriate public education FAPE~~, a ~~school district~~ LEA shall provide the student with a summary of the student's academic achievement and functional performance, which shall include recommendations on how to assist the student in meeting the student's postsecondary goals.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 32 SDR 41, effective September 11, 2005; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**Cross-Reference:** Child identification, ch 24:05:22.

**24:05:27:13.01. Agency responsibilities for transition services.** If a participating agency, other than the ~~school-district~~ LEA, fails to provide transition services contained in the IEP of a student with a disability, the ~~school-district~~ LEA responsible for the student's education shall reconvene an IEP team meeting for the purpose of identifying alternative strategies to meet the transition objectives set out in the student's IEP.

Nothing in this section relieves a participating agency, including a state vocational rehabilitation agency, of the responsibility to provide or pay for any transition service that the agency would otherwise provide to students with disabilities who meet the eligibility criteria of that agency.

**Source:** 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:15.01. IEPs for student transfers within state.** If a student with a disability, who had an IEP that was in effect in a previous ~~school-district~~ LEA in the state, transfers to a new ~~school-district~~ LEA in the state, and enrolls in a new ~~school~~ LEA within the same school year, the new ~~school-district~~ LEA, in consultation with the parents, shall provide a FAPE to the student, including services comparable to those described in the student's IEP from the previous ~~school-district~~ LEA, until the new ~~school-district~~ LEA either:

- (1) Adopts the student's IEP from the previous school-district LEA; or
- (2) Develops, adopts, and implements a new IEP that meets the applicable requirements in

this chapter.

**Source:** 32 SDR 41, effective September 11, 2005; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:15.02. IEPs for student transfers from another state.** If a student with a disability, who had an IEP that was in effect in a previous school-district LEA in another state, transfers to a school-district LEA in South Dakota, and enrolls in a new school LEA within the same school year, the new school-district LEA, in consultation with the parents, shall provide the child with a FAPE, including services comparable to those described in the student's IEP from the previous school-district LEA, until the new school-district LEA:

- (1) Conducts an evaluation pursuant to chapter 24:05:25, if determined to be necessary by the new school-district LEA; and
- (2) Develops, adopts, and implements a new IEP, if appropriate, that meets the applicable requirements in this chapter.

**Source:** 32 SDR 41, effective September 11, 2005; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:15.03. Transmittal of records for student transfers.** To facilitate the transition for a transfer student described in §§ 24:05:27:15.01 and 24:05:27:15.02:

(1) The new school LEA in which the student enrolls shall take reasonable steps to promptly obtain the student's records, including the IEP and supporting documents and any other records relating to the provision of special education and related services to the student, from the previous school in which the student was enrolled, pursuant to § 99.31(a)(2) of the federal Family Educational Rights and Privacy Act as amended to January 8, 2009; and

(2) The previous school LEA in which the student was enrolled shall take reasonable steps to promptly respond to the request from the new school LEA.

**Source:** 32 SDR 41, effective September 11, 2005; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:16. Related services provided at no cost.** Consistent with §§ 24:05:27:03 and 24:05:27:04, the district LEA shall provide related services at no cost to the parent. Related services include transportation; speech-language pathology; audiological services; interpreting services; psychological services; physical and occupational therapy; recreation, including therapeutic recreation; early identification and assessment of disabilities in children; counseling services; including rehabilitation counseling; orientation and mobility services; medical services for diagnostic or evaluation purposes; school nurse and school health services designed to enable a student with a disability to receive a ~~free appropriate public education~~ FAPE as described in the IEP of the student; social work services in schools; and parental counseling and training. Related services do not include a medical device that is surgically implanted, the optimization of that device's functioning (e.g. mapping), maintenance of that device, or the replacement of the device.

**Source:** 16 SDR 41, effective September 7, 1989; 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 32 SDR 41, effective September 11, 2005; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:16.02. Services applicable to surgically implanted device.** Nothing in this section:

(1) Limits the right of a child with a surgically implanted device (e.g., cochlear implant) to receive related services listed in § 24:05:27:16 that are determined by the IEP team to be necessary for the child to receive a FAPE;

(2) Limits the responsibility of a ~~school-district~~ LEA to appropriately monitor and maintain medical devices that are needed to maintain the health and safety of the child, including breathing, nutrition, or operation of other bodily functions, while the child is transported to and from school or is at school; or

(3) Prevents the routine checking of an external component of a surgically-implanted device to make sure it is functioning properly, as required in § 24:05:27:05.01.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:20. Availability of assistive technology.** Each ~~school-district~~ LEA shall ensure that assistive technology devices or assistive technology services, or both, are made available to a

child with a disability if they are required as a part of the child's special education or related services or as supplementary aids and services.

On a case-by-case basis, the use of ~~school-purchased~~ LEA purchased assistive technology devices in a child's home or in other settings is required if the student's ~~placement committee~~ IEP team determines that the child needs access to those devices in order to receive a FAPE.

**Source:** 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:27:21. Transition to preschool program.** Each ~~local school district~~ LEA shall develop policies and procedures for the transition of children participating in the early intervention program under Part C of the ~~Individuals with Disabilities Education Act (IDEA)~~ the IDEA who are eligible for participation in preschool programs under Part B of the IDEA.

Each ~~district's~~ LEA's policies and procedures must include the following:

- (1) A description of how the families will be included in the transitional plans;
- (2) Procedures to be used by the ~~district~~ LEA for notifying the local network in which the child resides of the need for transitional planning;
- (3) Procedures for convening, with the approval of the family, a conference between the network, family, and ~~district~~ LEA;
- (4) A requirement for convening the conference at least 90 days, and at the discretion of all parties, not more than 9 months before the child is eligible for the preschool program under Part B of ~~Individual with Disabilities Education Act~~ the IDEA; and

(5) Procedures for reviewing a child's program options for the period beginning with the day a child turns three and running through the remainder of the school year including the development and implementation of an ~~individual education program~~ IEP consistent with this article.

Each affected ~~district~~ LEA shall participate in transition planning conferences arranged by the IDEA, Part C, program.

In the case of a child with a disability, aged three, previously eligible for Part C of IDEA, the IEP team must consider the child's IFSP that contains the IFSP content, including the natural environments statement, described in article 24:14.

**Source:** 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**Cross-Reference:** Procedural safeguards, ch 24:05:30.

**24:05:28:02. Continuum of alternative placements.** Alternative placements which must be made available include the following:

- (1) Regular educational programs with modification;
- (2) Resource rooms;
- (3) Self-contained programs;
- (4) Separate day school programs;
- (5) Residential school programs;
- (6) Home and hospital programs; and
- (7) Other settings.

For each of the programs listed in this section, the IEP team shall determine the extent to which related services are required in order for the child to benefit from the program. The length of the school day must be equal in duration to that of a regular ~~public~~ LEA school day unless an adjusted school day is required to meet the individual needs of the child. The IEP team shall provide for supplementary services, such as resource room or itinerant instruction, to be provided in conjunction with regular class placement, as applicable.

In those cases where placement is made in a separate day school program or residential school program, the ~~district~~ LEA may abide by the school term of the facility in which the child is placed based on the individual needs of the child.

**Source:** 16 SDR 41, effective September 7, 1989; 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:28:03. Factors in determining placements.** Each ~~school-district~~ LEA shall establish and implement procedures which ensure that the following factors are addressed in determining placements:

(1) Each child's educational placement must be individually determined at least annually and must be based on the child's ~~individual education program~~ IEP;

(2) Provisions are made for appropriate classroom or alternative settings necessary to implement a child's ~~individual education program~~ IEP;

(3) Unless a child's IEP requires some other arrangement, the child shall be educated in the school which that child would normally attend if not disabled. ~~Other~~ Another placement shall be as close as possible to the child's home;

(4) Placement in the least restrictive environment will not produce a harmful effect on the child or reduce the quality of services which that child needs; and

(5) A child with a disability is not removed from education in age-appropriate regular classrooms solely because of needed modifications in the general education curriculum.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:28:04. Program options.** Each ~~school district~~ LEA shall take steps to ensure that its children in need of special education or special education and related services have available to them the variety of educational programs and services available to children without disabilities in the area served by the ~~district~~ LEA, including art, music, industrial arts, family and consumer science, and vocational education.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:28:05. Nonacademic and extracurricular services.** Each ~~school-district~~ LEA shall take steps, including the provision of supplementary aids and services determined appropriate and necessary by the child's IEP team, to provide nonacademic and extracurricular services and activities in the manner necessary to afford children in need of special education or special education and related services an equal opportunity for participation in those activities.

Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the ~~district~~ LEA, referrals to agencies which provide assistance to persons with disabilities, and employment of students, including both employment by the ~~district~~ LEA and assistance in making outside employment available.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:28:06. Nonacademic settings.** In providing or arranging for the provision of nonacademic and extracurricular services and activities, including meals, recess periods, and the services and activities listed in this chapter, each ~~school-district~~ LEA shall develop and implement procedures which ensure that each child in need of special education or special education and related services participates with children without disabilities in those services and activities to the maximum extent appropriate to the needs of that child. The ~~district~~ LEA shall ensure that each child with a disability has the supplementary aids and services determined by the child's IEP team to be appropriate and necessary for the child to participate in nonacademic settings.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:28:07. Children in public or private institutions.** Each ~~school-district~~ LEA through its IEP team and ~~individual-education-program~~ IEP procedures, shall ensure that children placed in public or private institutions or other care facilities are educated with children who are not disabled to the maximum extent appropriate.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:28:08. Physical education services.** Physical education services, specially designed if necessary, shall be made available to every child in need of special education or special education and related services, unless the public agency enrolls children without disabilities and does not provide physical education to children without disabilities in the same grades. Each child shall be afforded the opportunity to participate in the regular physical education program available to children without disabilities unless the child is enrolled full time in a separate facility or the child needs specially designed physical education which cannot be provided in the regular physical education program.

If specially designed physical education is prescribed in the child's ~~individual education program IEP~~, the ~~school-district LEA~~ responsible for the education of the child shall provide the services directly or make arrangements for it to be provided through other public or private programs.

For children enrolled in separate facilities, the ~~district LEA~~ responsible for the education of the child shall ensure that the child receives appropriate physical education services.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:28:10. Preschool programs.** The requirements of this chapter apply to all eligible preschool children, ages three through five who are entitled to receive a ~~free appropriate public education FAPE~~.

In each case, the ~~school-district LEA~~ must ensure that placement is based upon each child's ~~individual education program IEP~~ and meets all the other requirements of this chapter.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 46 SDR 149, effective July 6, 2020.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:28:12. Monitoring activities.** The department shall ensure that the provisions of this chapter are implemented by each ~~district LEA~~. If the department finds evidence that a ~~district~~

LEA makes placements that are inconsistent with the requirements for the least restrictive environment in Part B of ~~the Individuals with Disabilities Act~~ the IDEA, the department shall review the ~~district's~~ LEA's justification for its actions and shall assist in planning and implementing any necessary corrective action.

**Source:** 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

## CHAPTER 24:05:29

### CONFIDENTIALITY OF INFORMATION

#### Section

- 24:05:29:01 District LEA policies and procedures on confidentiality of information.
- 24:05:29:02 Definitions.
- 24:05:29:03 Annual notification of rights.
- 24:05:29:04 Access rights.
- 24:05:29:05 Record of access.
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- 24:05:29:08 Fees.
- 24:05:29:09 Amendment of records at parent's request.
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- 24:05:29:15 Destruction of information.
- 24:05:29:16 Children's rights.
- 24:05:29:17 Enforcement.
- 24:05:29:18 Notice to parents.
- 24:05:29:19 Disciplinary information.
- 24:05:29:20 U.S. department use of personally identifiable information.

**24:05:29:01. Distriet LEA policies and procedures on confidentiality of information.**

Each school-district LEA shall develop and implement policies and procedures on the confidentiality of information consistent with this chapter.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:29:02. Definitions.** Terms used in this chapter mean:

(1) "Act," "FERPA," the Family Educational Rights and Privacy Act of 1974, as amended to July 1, 2013, enacted as section 444 of the General Education Provisions Act, as amended to July 1, 2013;

(2) "Attendance," includes:

(a) Attendance in person or by paper correspondence, videoconference, satellite, Internet, or other electronic information and telecommunications technologies for students who are not physically present in the classroom; and

(b) The period during which a person is working under a work-study program;

(3) "Biometric record," as used in the definition of personally identifiable information, a record of one or more measurable biological or behavioral characteristics that can be used for automated recognition of an individual. Examples include fingerprints; retina and iris patterns; voiceprints; DNA sequence; facial characteristics; and handwriting;

(4) "Destruction," physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable;

(5) "Directory information," information contained in an education record of a student which would not generally be considered harmful or an invasion of privacy if disclosed, such as the student's name, address, telephone listing, electronic mail address, photograph, date and place of birth, major field of study, enrollment status (e.g. full time or part time) participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, degrees, honors, and awards received, and the most recent previous educational agency or institution attended. Directory information does not include a student's social security number or student identification number, except as provided in this subdivision. Directory information includes a student identification number, user identification number, or other unique personal identifier used by the student for purposes of accessing or communicating in electronic systems, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number, password, or other factor known or possessed only by the authorized user;

(6) "Disclosure," to permit access to or the release, transfer, or other communication of education records or the personally identifiable information contained in those records to any party, by any means, including oral, written, or electronic means, to any party except the party identified as the party that provided or created the record;

(7) "Education records," records directly related to a student and maintained by an educational agency or institution or by a party acting for the agency or institution. The term does not include the following:

(a) Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record and are not accessible or revealed to any other person except a temporary substitute for the maker of the record;

(b) Records of a law enforcement unit of an educational agency or institution, but only if education records maintained by the agency or institution are not disclosed to the unit and the law enforcement records are maintained separately from education records, maintained solely for law enforcement purposes, and disclosed only to law enforcement officials of the same jurisdiction;

(c) Records related to an individual who is employed by an educational agency or institution that are made and maintained in the normal course of business, are related exclusively to the individual in that individual's capacity as an employee, and are not available for use for any other purpose. Records relating to an individual in attendance at the agency or institution who is employed as a result of the individual's status as a student are educational records and not excepted under this subdivision;

(d) Records on a student who is 18 years of age or older or is attending an institution of postsecondary education that are made or maintained by a physician, psychiatrist, psychologist, or

other recognized professional or paraprofessional acting in a professional capacity or assisting in a paraprofessional capacity; made, maintained, or used only in connection with treatment of the student; and disclosed only to individuals providing the treatment. For the purpose of this section, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution;

(e) Records created or received by an educational agency or institution after an individual is no longer a student in attendance and that are not directly related to the individual's attendance as a student; and

(f) Grades on peer-graded papers before they are collected and recorded by a teacher;

(8) "Eligible student," a student who has reached 18 years of age or is attending an institution of postsecondary education;

(9) "Institution of postsecondary education," an institution that provides education to students beyond the secondary school level;

(10) "Secondary school level," the educational level, not beyond grade twelve, at which secondary education is provided as determined under state law;

(11) "Participating agency," any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under Part B of the IDEA;

(12) "Personally identifiable information," the term includes:

(a) The student's name;

(b) The name of the student's parent or other family members;

(c) The address of the student or student's family;

(d) A personal identifier, such as the student's social security number, student number, or biometric record;

(e) Other indirect identifiers, such as the student's date of birth, place of birth, and mother's maiden name;

(f) Other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the ~~school~~ LEA community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty; or

(g) Information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates;

(13) "Record," any information recorded in any way, including handwriting, print, video or audio tape, film, microfilm, microfiche, and computer media.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009; 40 SDR 40, effective September 11, 2013.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:29:03. Annual notification of rights.** Each ~~school-district~~ LEA shall annually notify parents of students currently in attendance and eligible students currently in attendance at the agency or institution of their rights under the Act and this chapter. The notice must inform the parent or eligible student that the parent or eligible student has a right to do the following:

- (1) Inspect and review the student's education records;
- (2) Seek amendment of the student's education records to ensure that they are not inaccurate, misleading, or otherwise in violation of the student's privacy or other rights;
- (3) Consent to disclosure of personally identifiable information contained in the student's education records, except to the extent that the Act and the regulations in this chapter authorize disclosure without consent; and
- (4) File with the U. S. Department of Education a complaint concerning alleged failures by the agency or institution to comply with the requirements of the Act and this chapter.

The notice shall also include the procedures for exercising the right to inspect and review education records, the procedures for requesting the amendment of records and, if the educational agency or institution has a policy of disclosing education records, a specification of criteria for determining who constitutes a ~~school~~ LEA official and what constitutes a legitimate educational interest.

The ~~district~~ LEA may provide this notice by any means that are likely to inform the parents and eligible students of their rights and that will effectively notify parents of students who have a primary or home language other than English and parents or eligible students who are disabled.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:29:04. Access rights.** Each ~~school-district~~ LEA shall permit parents to inspect and review any education records relating to their student which are collected, maintained, or used by

the agency under this chapter. The agency shall comply with a request without unnecessary delay and before any meeting regarding an ~~individual education program~~ IEP or hearing relating to the identification, evaluation, or placement of the student, or discipline hearing, or resolution session, and in no case more than 45 calendar days after the request has been made.

The right to inspect and review education records under this section includes the following:

- (1) The right to response from the ~~district~~ LEA to reasonable requests for explanations and interpretations of the records;
- (2) The right to request that the ~~district~~ LEA provide copies of the records containing the information if failure to provide these copies would effectively prevent the parent from exercising the right to inspect and review the records; and
- (3) The right to have a representative of the parent inspect and review the records.

The ~~district~~ LEA may presume that the parent has authority to inspect and review records relating to the parent's child unless the agency has been advised that the parent does not have the authority under applicable state law governing such matters as guardianship, separation, divorce, or custody.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**Cross-References:**

Divorce and separate maintenance, SDCL chapter 25-4.

Jurisdiction and venue of guardianships, SDCL chapter 30-26.

Appointment, qualification, bonds and removal of guardians, SDCL chapter 30-27.

Custody, care and maintenance of wards, SDCL chapter 30-28.

**24:05:29:05. Record of access.** Each ~~school-district~~ LEA shall keep a record of parties obtaining access to education records collected, maintained, or used under this chapter, except access by parents and authorized employees of the ~~district~~ LEA, including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records. A parent or eligible student may inspect this record on request.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:29:07. List of types and locations of information.** Each ~~school-district~~ LEA shall provide parents on request a list of the types and location of education records collected, maintained, or used by the ~~district~~ LEA.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:29:08. Fees.** A ~~school-district~~ LEA may charge a fee for copies of records which are made for parents under this chapter if the fee does not effectively prevent the parents from exercising their right to inspect and review those records. The ~~district~~ LEA may not charge a fee to search for or to retrieve information under this chapter.

**Source:** 16 SDR 41, effective September 7, 1989; 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**Cross-Reference:** Fees, 34 C.F.R. § 300.617.

**24:05:29:09. Amendment of records at parent's request.** A parent who believes that information in education records collected, maintained, or used under this article is inaccurate or misleading or violates the privacy or other rights of the student may request the ~~district~~ LEA which maintains the information to amend the information.

The ~~district~~ LEA shall decide whether to amend the information in accordance with the request within a reasonable period of time after receipt of the request.

If the ~~district~~ LEA decides to refuse to amend the information in accordance with the request, it shall inform the parent of the refusal and advise the parent of the right to a hearing.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:29:10. Opportunity for a hearing.** The ~~district~~ LEA shall, on request, provide an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the student.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:29:11. Hearing procedures.** At a minimum, a district's LEA's hearing procedures must include the following elements:

(1) The hearing must be held within 30 days after the district LEA received the request, and the parent of the student or eligible student shall be given notice of the date, place, and time 5 days in advance of the hearing;

(2) The hearing may be conducted by any party, including an official of the district LEA, who does not have a direct interest in the outcome of the hearing;

(3) The parent of the student or eligible student shall be afforded a full and fair opportunity to present evidence relevant to the issues raised and may be assisted or be represented by individuals of the parent's choice at the parent's own expense, including an attorney;

(4) The district LEA shall make its decision in writing within 30 days after the conclusion of the hearing; and

(5) The decision of the district LEA shall be based solely upon the evidence presented at the hearing and shall include a summary of the evidence and the reasons for the decision.

**Source:** 16 SDR 41, effective September 7, 1989; 17 SDR 30, effective August 27, 1990; 23 SDR 31, effective September 8, 1996.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:29:12. Result of hearing.** If, as a result of the hearing, the district LEA decides that the information is inaccurate, misleading, or otherwise in violation of the privacy or other rights of the student, it shall amend the information accordingly and inform the parents in writing.

If, as a result of the hearing, the district LEA decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the student, it shall inform the parents of the right to place in the records it maintains on the student a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the district LEA.

Any explanation placed in the records of the student under this section must be maintained by the district LEA as part of the records of the student as long as the record or contested portion is maintained by the district LEA. If the records of the student or the contested portion is disclosed by the district LEA to any party, the explanation must also be disclosed to the party.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:29:13. Consent.** Parental consent must be obtained before personally identifiable information is disclosed to parties other than officials of participating agencies collecting or using the information under this article or used for any purpose other than meeting a requirement under this chapter, unless the information is contained in education records and the disclosure is authorized without parental consent under FERPA. The district LEA may not release information from education records to participating agencies without parental consent except as follows:

(1) An educational agency or institution may disclose personally identifiable information from the education records of a student without the written consent of the parent of the student or

the eligible student if the disclosure is to other ~~school~~ LEA officials, including teachers, within the educational institution or ~~local educational agency~~ LEA who have been determined by the agency or institution to have legitimate educational interests or to officials of another school or ~~school~~ system LEA in which the student seeks or intends to enroll, subject to the requirements set forth in subdivision (2) of this section; and

(2) An educational agency or institution that discloses the education records of a student pursuant to subdivision (1) of this section shall make a reasonable attempt to notify the parent of the student or the eligible student at the last known address of the parent or eligible student, unless the disclosure is initiated by the parent or eligible student.

If the agency or institution includes in its annual notice of parent's rights that it is the policy ~~of the public agency~~ to forward education records on request to a school in which a student seeks or intends to enroll, then the ~~public agency~~ ~~or institution~~ does not have to provide any further notice of the transfer of records.

Notwithstanding the FERPA exceptions for releasing information from education records without parental consent including the annual notice provision, if a student is enrolled, or will enroll in a private school that is not located in the ~~district~~ LEA of the parent's residence, parental consent must be obtained before any personally identifiable information about the student is released between officials in the ~~district~~ LEA where the private school is located and officials in the ~~district~~ LEA of the parent's residence.

An educational agency receiving personally identifiable information from another educational agency or institution may make further disclosures of the information on behalf of the educational agency without the prior written consent of the parent or eligible student if the conditions of

subdivisions (1) and (2) of this section are met and if the educational agency informs the party to whom disclosure is made of these requirements.

**Source:** 16 SDR 41, effective September 7, 1989; 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:29:14. Safeguards.** Each ~~school district~~ LEA shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

One official in the district LEA shall assume responsibility for ensuring the confidentiality of any personally identifiable information.

All persons collecting or using personally identifiable information must receive training or instruction regarding the provisions of this chapter concerning personally identifiable information.

Each district LEA shall maintain for public inspection a current listing of the names and positions of those employees within the district LEA who may have access to personally identifiable information on students in need of special education or special education and related services.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:29:15. Destruction of information.** The ~~school-district~~ LEA shall inform parents when personally identifiable information collected, maintained, or used under this chapter is no longer needed to provide educational services to the student.

The information no longer needed must be destroyed at the request of the parents. However, a permanent record of the student's name, address, and phone number, the student's grades, attendance record, classes attended, and grade level completed may be maintained without time limit.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:29:17. Enforcement.** The department shall ensure that all ~~school-districts~~ LEAs in this state comply with the requirements on confidentiality of information through ~~on-site~~ monitoring, approval of comprehensive plans, and complaint resolution. Sanctions for noncompliance include the disapproval of local special education programs and the withholding of state and federal funds.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:29:19. Disciplinary information.** A ~~local-educational-agency~~ LEA shall include in the records of a child with a disability a statement of any current or previous disciplinary action that has

been taken against the child and transmit the statement to the same extent that the disciplinary information is included in, and transmitted with, the student records of nondisabled children.

The statement may include a description of any ~~behavior~~ conduct engaged in by the child that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child.

Consistent with the above policy, if a child transfers from one school to another, the transmission of any of the child's records shall include both the child's current ~~individualized education program~~ IEP and any statement of current or previous disciplinary action that has been taken against the child.

**Source:** 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

## **CHAPTER 24:05:30**

### **PROCEDURAL SAFEGUARDS**

#### Section

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- 24:05:30:02 Opportunity to examine records.
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- 24:05:30:11.01 Reasonable attorneys' fees.
- 24:05:30:12 Hearing rights.
- 24:05:30:12.01 Additional disclosure of information.
- 24:05:30:13 Time limit for and convenience of hearings.
- 24:05:30:14 Child's status during proceedings.
- 24:05:30:15 Surrogate parents.
- 24:05:30:16 Repealed.
- 24:05:30:16.01 Transfer of parental rights.
- 24:05:30:17 Repealed.

**24:05:30:01. General responsibility of ~~school-district~~ LEA.** Each ~~school-district~~ LEA shall establish, maintain, and implement procedural safeguards which meet the requirements of this chapter.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:02. Opportunity to examine records.** The parents of a child in need of special education or special education and related services shall be afforded, in accordance with the procedures in chapter 24:05:29, an opportunity to inspect and review all education records concerning the identification, evaluation, and educational placement of the child and the provisions of a ~~free appropriate public education~~ FAPE to the child.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:02.01. Parent participation in meetings.** The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child and the provision of a ~~free appropriate public education~~ FAPE to the child. Each ~~school district~~ LEA shall provide notice consistent with § 24:05:25:16 to ensure that parents of eligible students be given the opportunity to participate in the meetings described in this article. If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the ~~district~~ LEA shall use other methods to ensure their participation, including individual or conference telephone calls, or video

conferencing. A placement decision may be made by a group without parental involvement, if the ~~district~~ LEA is unable to obtain the parent's participation in the decision. The ~~district~~ LEA must have a record of its attempts to ensure parental involvement.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:02.02. Meetings defined.** For the purposes of § 24:05:30:02.01, a meeting does not include informal or unscheduled conversations involving ~~school-district~~ LEA personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of services provision. In addition, a meeting does not include preparatory activities that ~~school-district~~ LEA personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:03. Independent educational evaluation.** A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the ~~district~~ LEA subject to the conditions in this section.

Each ~~district~~ LEA shall provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the ~~district~~ LEA criteria applicable for independent educational evaluations specified in this section.

If a parent requests an independent educational evaluation, the ~~district~~ LEA may ask for the parent's reason why he or she objects to the ~~public~~ evaluation. However, the explanation by the parent may not be required and the ~~district~~ LEA may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

If the parent requests an independent educational evaluation at public expense, the ~~district~~ LEA must, without unnecessary delay, either file a due process complaint to request a hearing under this chapter to show that its evaluation is appropriate, or ensure that an independent educational evaluation is provided at public expense unless the ~~district~~ LEA demonstrates in a hearing that the evaluation obtained by the parent did not meet ~~district~~ LEA criteria. If the ~~district~~ LEA files a due process complaint to request a hearing under this chapter and the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

A parent is entitled to only one independent educational evaluation at public expense each time the ~~district~~ LEA conducts an evaluation with which the parent disagrees.

If the parent obtains an independent educational evaluation at public expense or shares with the ~~district~~ LEA an evaluation obtained at private expense, the results of the evaluation must be considered by the ~~district~~ LEA, if it meets ~~district~~ LEA criteria, in any decision made with respect to the provision of a ~~free appropriate public education~~ FAPE to the child and may be presented by any party as evidence at a hearing under this chapter regarding that child.

If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense. If an independent evaluation is made at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation

and the qualifications of the examiner, must be the same as the criteria which the ~~district~~ LEA uses when it initiates an evaluation to the extent those criteria are consistent with the parent's right to an independent educational evaluation. Each ~~district~~ LEA shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

For the purposes of this section, the term, independent education evaluation, means an evaluation conducted by a qualified examiner who is not employed by the ~~district~~ LEA responsible for the education of the child in question. For purposes of this section, the term, public expense, means that the ~~district~~ LEA either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent consistent with §§ 24:05:14:01 to 24:05:14:01.05, inclusive.

Except for the criteria described in this section, a ~~district~~ LEA may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:04. Prior notice.** Written notice which meets the requirements of § 24:05:30:05 must be given to the parents five days before the ~~district~~ LEA proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a ~~free appropriate public education~~ FAPE to the child. The five-day notice requirement may be waived by the parents.

**Source:** 16 SDR 41, effective September 7, 1989; 17 SDR 30, effective August 27, 1990; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 28 SDR 105, effective January 31, 2002; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:05. Content of notice.** The notice must include the following:

- (1) A description of the action proposed or refused by the ~~district~~ LEA, an explanation of why the ~~district~~ LEA proposes or refuses to take the action, and a description of any other options the IEP team considered and the reasons why those options were rejected;
- (2) A description of each evaluation procedure, assessment, record, or report that the ~~district~~ LEA uses as a basis for the proposal or refusal;
- (3) A description of any other factors which are relevant to the ~~district~~ LEA 's proposal or refusal;
- (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this article 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; and
- (5) Sources for parents to contact to obtain assistance in understanding the provisions of this article.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:06. Form of notice.** The notice must be written in language understandable to the general public and provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. If the native language or other mode of communication of the parent is not a written language, the ~~local education agency~~ LEA shall take steps to ensure that the notice is translated orally or by other means to the parent in the parent's native language or other mode of communication, that the parent understands the content of the notice, and that there is written evidence that the requirements in this section have been met.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:06.01. Procedural safeguards notice -- Availability.** A copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents only one time a school year, except that a copy must also be given to the parent:

- (1) Upon initial referral or parental request for evaluation;
- (2) Upon request by a parent;
- (3) In accordance with the discipline procedures in chapters 24:05:26 and 24:05:26.01; and
- (4) Upon receipt of the first state complaint under chapter 24:05:15 and first due process complaint under this chapter in a school year.

A ~~district~~ LEA may place a current copy of the procedural safeguards notice on its internet website if a website exists.

**Source:** 26 SDR 150, effective May 22, 2000; 32 SDR 41, effective September 11, 2005; 33 SDR 236, effective July 5, 2007

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:06.02. Procedural safeguards notice -- Contents.** The procedural safeguards notice must include a full explanation of all of the procedural safeguards available under this article and the state complaint procedures relating to:

- (1) Independent educational evaluation;
- (2) Prior written notice;
- (3) Parental consent;
- (4) Access to educational records;
- (5) Opportunity to present and resolve complaints through the due process complaint and state

complaint procedures, including:

- (a) The time period in which to file a complaint;
- (b) The opportunity for the ~~district~~ LEA to resolve the complaint; and
- (c) The difference between the due process complaint and the state complaint procedures,

including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures;

- (6) The child's placement during pendency of any due process complaint;

- (7) Procedures for students who are subject to placement in an interim alternative educational setting;

(8) Requirements for unilateral placement by parents of children in private schools at public expense;

(9) The availability of mediation;

(10) Hearings on due process complaints, including requirements for disclosure of evaluation results and recommendations;

(11) Civil actions, including the time period in which to file those actions; and

(12) Attorneys' fees.

The form of the notice must be consistent with § 24:05:30:06, including written evidence that the requirements in this section have been met.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:06.03. Electronic mail.** A parent of a child with a disability may elect to receive notices required by this chapter by an electronic mail communication, if the ~~district~~ LEA makes that option available.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:07.01. Filing a due process complaint.** A parent or a ~~school-district~~ LEA may file a due process complaint on any matters relating to the identification, evaluation or educational placement of a child with a disability, or the provision of a FAPE to the child.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:07.02. Timeline for filing a due process complaint.** A due process complaint shall allege a violation that occurred not more than two years before the date the parent or ~~school district~~ LEA knew or should have known about the alleged action that forms the basis of the due process complaint.

The timeline described in this section does not apply to a parent if the parent was prevented from filing a due process complaint due to:

(1) Specific misrepresentations by the district that it had resolved the problem forming the basis of the due process complaint; or

(2) The district's withholding of information from the parent that was required under this chapter to be provided to the parent.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:08. Free or low-cost services to parent.** The ~~school-district~~ LEA shall inform the parent of any free or low-cost legal and other relevant services available in the area if the parent or ~~school-district~~ LEA files a due process complaint under this chapter or the parent requests the information.

**Source:** 16 SDR 41, effective September 7, 1989; 17 SDR 30, effective August 27, 1990; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:08.01. Due process complaint notice.** A ~~school-district~~ LEA must have procedures that require either party or the attorney representing a party, to provide to the other party a due process complaint, which must remain confidential. The party filing a due process complaint shall forward a copy to the department.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:08.06. District LEA response to due process complaint.** If the ~~district~~ LEA has not sent a prior written notice under this chapter to the parent regarding the subject matter contained in the parent's due process complaint, the ~~district~~ LEA shall, within ten days of receiving the due process complaint, send to the parent a response that includes:

(1) An explanation of why the ~~district~~ LEA proposed or refused to take the action raised in the due process complaint;

(2) A description of other options that the IEP Team considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, assessment, record, or report the ~~district~~ LEA used as the basis for the proposed or refused action; and

(4) A description of the other factors that are relevant to the district LEA's proposed or refused action.

A response by the district LEA under this section does not preclude the district LEA from asserting that the parent's due process complaint was insufficient, if appropriate.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:08.08. Model forms.** The department shall develop model forms to assist parents and school districts LEAs in filing a due process complaint in accordance with this chapter and a state complaint under chapter 24:05:15. However, the department or a school district LEA may not require the use of the model forms.

Parents, school districts LEAs, and other parties may use the appropriate model forms described in this section, or another form or other document, if the form or document that is used meets, as appropriate, the content requirements in § 24:05:30:08.02 for filing a due process complaint, or the requirements in chapter 24:05:15 for filing a state complaint.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:08.09. Resolution meeting -- Participants.** Within 15 days of receiving notice of the parent's due process complaint, and before the initiation of a due process hearing under this chapter, the district LEA shall convene a meeting with the parent and the relevant member or

members of the IEP team who have specific knowledge of the facts identified in the due process complaint. The meeting:

(1) Shall include a representative of the district LEA who has decision-making authority on behalf of the district LEA; and

(2) May not include an attorney of the district LEA unless the parent is accompanied by an attorney.

The parent and district LEA shall determine the relevant members of the IEP team to attend the meeting.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:08.10. Resolution meeting -- Purpose.** The purpose of the resolution meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the district LEA has the opportunity to resolve the dispute that is the basis for the due process complaint.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:08.11. Resolution meeting -- Waive or mediate.** The resolution meeting need not be held if:

(1) The parent and the district LEA agree in writing to waive the meeting; or

(2) The parent and the ~~district~~ LEA agree to use the mediation process described in this chapter.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:08.12. Resolution period -- General.** If the ~~district~~ LEA has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.

Except as provided in § 24:05:30:08.14, the timeline for issuing a final decision in a due process hearing begins at the expiration of the 30-day period.

Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding the above two paragraphs, the failure of the parent filing a due process complaint to participate in the resolution meeting delays the timelines for the resolution process and due process hearing until the meeting is held.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:08.13. Dismissal of complaint or initiation of hearing.** If the ~~district~~ LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and documented using the procedures in § 24:05:25:17, the ~~district~~ LEA may, at the

conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint.

If the ~~district~~ LEA fails to hold the resolution meeting specified in § 24:05:30:08.09 within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:08.14. Adjustments to 30-day resolution period.** The 45-day timeline for the due process hearing described in this chapter starts the day after one of the following events:

- (1) Both parties agree in writing to waive the resolution meeting;
- (2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible; or
- (3) If, after both parties agree in writing to continue the mediation at the end of the 30-day resolution period, the parent or ~~district~~ LEA withdraws from the mediation process.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:08.15. Written settlement agreement.** If a resolution to the dispute is reached at the meeting described in §§ 24:05:30:08.09 and 24:05:30:08.10, the parties shall execute a legally binding agreement that is:

(1) Signed by both the parent and a representative of the ~~district~~ LEA who has the authority to bind the ~~district~~ LEA; and

(2) Enforceable in any state court of competent jurisdiction or in a district court of the United States.

If the parties execute an agreement pursuant to this section, a party may void the agreement within three business days of the agreement's execution.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:09. Mediation.** Each ~~school-district~~ LEA shall ensure that procedures are established and implemented to allow parties to disputes involving any matter under this article, including matters arising before the filing of a due process complaint, to resolve disputes through a mediation process. Procedures for mediation are as follows:

(1) The ~~district~~ LEA shall ensure that mediation is viewed as voluntary and freely agreed to by both parties and is in no way used to deny or delay an aggrieved party's right to a hearing on a parent's due process complaint, or to deny any other rights afforded under this article; and

(2) The mediation conference is an intervening, informal process conducted in a nonadversarial atmosphere that is scheduled in a timely manner and held in a location that is convenient to the parties in the dispute.

The state shall bear the cost of the mediation process, including the costs of meetings described in § 24:05:30:09.02.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:09.01. Mediator -- Qualified and impartial.** The mediation process shall be conducted by a qualified and impartial mediator who is trained in effective mediation techniques. The department shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services. Mediators shall be selected on a random, rotational, or other impartial basis. An individual who serves as a mediator:

(1) May not be an employee of:

(a) Any ~~school district~~ LEA or state agency that is involved in the education or care of the child; or

(b) The department, if the department is providing direct services to a child who is the subject of the mediation process; and

(2) May not have a personal or professional interest that conflicts with the person's objectivity.

A person who otherwise qualifies as a mediator is not an employee of a ~~district~~ LEA or state agency solely because the person is paid by the department to serve as a mediator.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:09.02. Meeting to encourage mediation.** A ~~school district~~ LEA may establish procedures to offer to parents and ~~schools~~ LEAs who elect not to use the mediation process to meet, at a time and location convenient to the parents, with a disinterested party:

- (1) Who is under contract with a parent training and information center or community parent resource center in the state, or an appropriate alternative dispute resolution entity; and
- (2) Who would explain the benefits of the mediation process and encourage the parents to use the process.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:09.03. Mediation agreement.** If the parties resolve a dispute through the mediation process, the parties shall execute a legally binding agreement that sets forth that resolution and that:

- (1) States that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any federal court or state court; and
- (2) Is signed by both the parent and a representative of the ~~district~~ LEA who has the authority to bind the ~~district~~ LEA.

A written, signed mediation agreement under this section is enforceable in any state court of competent jurisdiction or in a district court of the United States.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:09.04. Impartial due process hearing.** If a due process complaint is received under this chapter, chapter 24:05:26, or chapter 24:05:26.01, the parents or the ~~district~~ LEA involved in the dispute shall have an opportunity for an impartial due process hearing, consistent with the procedures in this article.

The department is responsible for ensuring that a due process hearing is held.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:09.06. Timeline for requesting a due process hearing.** A parent or ~~district~~ LEA shall request an impartial hearing on their due process complaint within two years of the date the parent or ~~district~~ LEA knew or should have known about the alleged action that forms the basis of the due process complaint.

The timeline described in this section does not apply to a parent if the exceptions in § 24:05:30:07.02 exist.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:10. Impartial hearing officer.** A hearing may not be conducted by a person who is an employee of the department or a ~~school-district~~ LEA which is involved in the education or care of the child or by any person having a personal or professional interest that conflicts with the person's objectivity in the hearing.

A hearing officer shall:

(1) Possess knowledge of, and the ability to understand, the provisions of the IDEA, federal and state regulations pertaining to the IDEA, and legal interpretations of the IDEA by federal and state courts;

(2) Possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(3) Possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

An individual who otherwise qualifies to conduct a hearing is not an employee of the department solely because the individual is paid by the department to serve as a hearing officer.

Each ~~school-district~~ LEA shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:10.01. Decision of hearing officer.** Subject to the provisions of this section, a hearing officer's determination of whether a child received a FAPE shall be based on substantive grounds.

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies:

- (1) Impeded the child's right to a FAPE;
- (2) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or
- (3) Caused a deprivation of educational benefit.

Nothing in this section precludes a hearing officer from ordering a ~~district~~ LEA to comply with procedural requirements under this chapter, chapter 24:05:26, and chapter 24:05:26.01.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:11. Appeal of hearing decision -- Civil action.** Any party aggrieved by the decision of the hearing officer under this chapter or chapters 24:05:26 and 24:05:26.01 may bring a civil action with respect to a due process complaint notice requesting a due process hearing under ~~the Individuals with Disabilities Education Act~~ the IDEA, 20 U.S.C. § 1415(i)(2). A civil action may be filed in either state or federal court without regard to the amount in controversy. The party bringing the action has 90 days from the date of a hearing officer's decision to file a civil action. In any action brought under this section, the court:

- (1) Shall review the records of the administrative proceedings;

(2) Shall hear additional evidence at the request of a party; and

(3) Basing its decision on the preponderance of the evidence, shall grant the relief that the court determines to be appropriate.

Nothing in Part B of ~~the Individuals with Disabilities Education Act~~ the IDEA restricts or limits the rights, procedures, and remedies available under the U.S. Constitution, the Americans with Disabilities Act of 1990 as amended to ~~July 1, 2013~~ December 2, 2016, Title V of the Rehabilitation Act of 1973 as amended to ~~July 1, 2013~~ December 10, 2015, or other federal laws protecting the rights of children with disabilities. However, before the filing of a civil action under these laws, seeking relief that is also available under section 615 of the IDEA, the procedures under this chapter for filing a due process complaint must be exhausted to the same extent as would be required had the action been brought under section 615 of the IDEA.

**Source:** 16 SDR 41, effective September 7, 1989; 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 40 SDR 40, effective September 11, 2013.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:11.01. Reasonable attorneys' fees.** In any action or proceeding brought under 20 U.S.C. § 1415, the court, in its discretion, may award reasonable attorneys' fees under 20 U.S.C. § 1415(i)(3) as in effect on ~~December 3, 2004~~ July 1, 2005, as part of the cost to the prevailing party who is the parent of a child with a disability; to the prevailing party who is the state or ~~district~~ LEA against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent

who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or to the prevailing party who is the state or ~~district~~ LEA against the attorney of a parent, or against the parent, if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

Funds under Part B of ~~the Individuals with Disabilities Education Act~~ the IDEA may not be used to pay attorneys' fees or costs of a party related to an action or proceeding under section 615 of the IDEA and this chapter. This does not preclude a ~~district~~ LEA from using ~~IDEA~~, Part B of the IDEA funds for conducting an action or proceeding under section 615 of the IDEA.

A court shall award reasonable attorneys' fees under section 615(i)(3) of the IDEA consistent with the following:

(1) Fees awarded under section 615(i)(3) of the IDEA must be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this section;

(2) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under section 615 of the IDEA for services performed subsequent to the time of a written offer of settlement to a parent if:

(a) The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure (1987) or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(b) The offer is not accepted within 10 days; and

(c) The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement;

(3) Attorneys' fees may not be awarded relating to any meeting of the IEP team unless the meeting is convened as a result of an administrative proceeding or judicial action, or at the discretion of the department for a mediation described in this chapter. A resolution meeting conducted pursuant to this chapter is not considered a meeting convened as a result of an administrative hearing or judicial action or an administrative hearing or judicial action for purposes of this section;

(4) An award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer;

(5) The court reduces, accordingly, the amount of the attorneys' fees awarded under section 615 of the IDEA, if the court finds that:

(a) The parent, or the parent's attorney during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(b) The amount of attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(c) The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(d) The attorney representing the parent did not provide to the ~~school district~~ LEA the appropriate information in the due process complaint in accordance with this chapter.

(6) The provisions of subdivision (5) of this section do not apply in any action or proceeding if the court finds that the State or local agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of the IDEA.

**Source:** 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:12. Hearing rights.** Any party to a hearing, under this chapter or chapters 24:05:26 and 24:05:26.01, has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training concerning the problems of children with disabilities, except that neither party has the right to be represented by a nonattorney or advocate at a hearing;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;

(4) Obtain a written or, at the option of the parents, electronic verbatim record of the hearing; and

(5) Obtain written or, at the option of the parents, electronic findings of fact and decisions.

The public agency department's Office of Special Education shall transmit those findings and decisions, after deleting any personally identifiable information, to the state advisory counsel panel and shall make those findings and decisions available to the public.

Parents involved in hearings must be given the right to have the child who is the subject of the hearing present and open the hearing to the public. The record of the hearing and the findings of fact and decisions must be provided at no cost to the parents.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1, 16-18-1.

**Law Implemented:** SDCL 13-37-1.1, 16-18-1.

**24:05:30:14. Child's status during proceedings.** Except as provided in chapters 24:05:26 and 24:05:26.01, during the pendency of any administrative hearing or judicial proceeding regarding a due process complaint notice requesting a due process hearing pursuant to this chapter, the child involved must remain in the present educational placement unless the state or ~~school district~~ LEA and the parents agree otherwise. If the complaint involves an application for initial admission to ~~public school a~~ LEA, the child, with the consent of the parents, must be placed in the ~~public school program~~ LEA until the completion of all the proceedings.

If the complaint involves an application for initial services under this article from a child who is transitioning from Part C ~~of the IDEA~~ to Part B of the IDEA and is no longer eligible for Part C services because the child has turned three, the ~~district~~ LEA is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services, then the ~~district~~ LEA must provide those special education and related services that are not in dispute between the parent and the ~~district~~ LEA.

If the decision of a hearing officer in a due process hearing agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the state and the parents for purposes of pendency.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:30:15. Surrogate parents.** Each ~~school district~~ LEA shall establish procedures for the assignment of a surrogate parent to ensure that the rights of a child are protected if no parent, as defined in § 24:05:13:04, can be identified and the ~~district~~ LEA, after reasonable effort, cannot locate a parent or if the child is a ward of the state or the child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act, as amended to ~~January 1, 2009~~ December 10, 2015. A ~~district's~~ LEA's method for determining whether a child needs a surrogate parent must include the following:

- (1) The identification of staff members at the ~~district~~ LEA or building level responsible for referring students in need of a surrogate parent;
- (2) The provision of in-service training on the criteria in this section for determining whether a child needs a surrogate parent; and
- (3) The establishment of a referral system within the ~~district~~ LEA for the appointment of a surrogate parent.

If a child is a ward of the state, the surrogate parent alternatively may be appointed by the judge overseeing the child's case, if the surrogate meets the requirements of this section.

The ~~district~~ LEA superintendent or designee shall appoint surrogate parents.

The ~~district~~ LEA shall ensure that a person selected as a surrogate has no personal or professional interest that conflicts with the interest of the child the surrogate represents and has

knowledge and skills that ensure adequate representation of the child. The ~~district~~ LEA is responsible for the training and certification of surrogate parents and shall maintain a list of persons who may serve as surrogate parents.

A person assigned as a surrogate may not be an employee of the department, ~~district~~ LEA, or any other agency that is involved in the education or care of the child.

If a child is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs may be appointed as temporary surrogate parents, without regard to the nonemployee provision above, until a surrogate parent can be appointed who meets all of the requirements of this section.

A person who otherwise qualifies to be a surrogate under the provisions of this section is not an employee of the agency solely because the person is paid by the agency to serve as a surrogate parent.

The surrogate parent may represent the student in all matters relating to the identification, evaluation, educational placement, and provision of a FAPE to the students.

The department shall make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after a ~~district~~ LEA determines that the child needs a surrogate parent.

**Source:** 16 SDR 68, effective October 15, 1989; 21 SDR 39, effective August 28, 1994; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1, 13-37-2.1 13-37-27.

**24:05:30:16.01. Transfer of parental rights.** Consistent with state law, when a child student with a disability reaches the age of majority that applies to all children, except for an eligible child student who has been determined to be incompetent, the following shall occur:

- (1) The school-district LEA shall provide any notice required by this article to both the individual and the parents;
- (2) All other rights accorded to parents under this article transfer to the child student; and
- (3) All rights accorded to parents under this article transfer to children students who are incarcerated in an adult or juvenile, state, or local correctional institution.

If a state transfers rights under this section, the school-district LEA shall notify the individual and the parents of the transfer of rights. If, consistent with state law, an eligible child student is determined not to have the ability to provide informed consent with respect to the educational program of the child student, the school-district LEA shall appoint the parent or, if the parent is not available, another appropriate individual to represent the educational interests of the child student throughout the child's student's eligibility under this article.

**Source:** 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**Source:** 16 SDR 68, effective October 15, 1989; 21 SDR 39, effective August 28, 1994; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1, 13-37-2.1 13-37-27.

**24:05:31:01. Applicability.** The provisions of this chapter apply to eligible children who are or have been placed in or referred to a private school or facility by a ~~school-district~~ LEA as a means of providing special education or special education and related services and to eligible children placed in private schools by their parents when aFAPE is at issue.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:31:02. Responsibility of department.** The department shall ensure that an eligible child who is placed in or referred to a private school or facility by a ~~school-district~~ LEA is provided special education or special education and related services in conformance with an ~~individual-educational program~~ IEP which meets the requirements of this article at no cost to the parents and is provided an education which meets the standards that apply to state and ~~local-school districts~~ LEAs, including the requirements in this chapter, with the exception of requiring qualified special education teachers. The eligible child has all of the rights of a child with a disability served by a ~~school-district~~ LEA.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 46 SDR 149, effective July 6, 2020.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:31:03. Implementation by department.** The department shall do the following to implement this chapter:

(1) Monitor compliance with this chapter through procedures such as written reports, ~~on-site visits~~ monitoring, and parent questionnaires;

(2) Disseminate copies of this chapter to each private school and facility to which a public agency has referred or placed an eligible child; and

(3) Provide an opportunity for those private schools and facilities to participate in the development and revision of state standards which apply to them.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:31:04. Placement of children by parents.** If an eligible child has available a ~~free appropriate public education~~ FAPE and the parents choose to place the child in a private school or facility, the ~~public-agency~~ LEA is not required by this chapter to pay for the child's education, including special education and related services, at the private school or facility. However, the ~~public-agency~~ LEA where the private school is located must include the child in the population whose needs are addressed consistent with chapter 24:05:32.

Disagreements between a parent and a ~~public-agency~~ LEA regarding the availability of a program appropriate for the child and the question of financial responsibility are subject to the due process procedures.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**Cross-Reference:** Procedural safeguards, ch 24:05:30.

**24:05:31:05. Reimbursement for private school placement.** If the parents of an eligible child, who previously received special education and related services under the authority of a ~~school-district~~ LEA, enroll the child in a private preschool, elementary, or secondary school without the consent of or referral by the ~~school-district~~ LEA, a court or a hearing officer may require the ~~school-district~~ LEA to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the ~~school-district~~ LEA has not made a ~~free-appropriate-public~~ education FAPE available to the child in a timely manner before that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the state standards that apply to education provided by the state and ~~districts~~ LEAs.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:31:06. Limitation on reimbursement.** The cost of reimbursement described in § 24:05:31:05 may be reduced or denied if:

(1) At the most recent ~~individualized education program IEP~~ team meeting that the parents attended before removal of the child from the ~~public school LEA~~:

(a) The parents did not inform the ~~individualized education program IEP~~ team that they were rejecting the placement proposed by the ~~school district LEA~~ to provide a ~~free appropriate public education FAPE~~ to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(b) At least ten business days, including any holidays that occur on a business day, before the removal of the child from the ~~public school LEA~~, the parents did not give written notice to the ~~school district LEA~~ of the information described in subsection (a);

(2) Before the parents' removal of the child from the ~~public school LEA~~, the ~~school district LEA~~ informed the parents, through the notice requirements described in chapter 24:05:30, of its intent to evaluate the child, including a statement of the purpose of the evaluation that was appropriate and reasonable, but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:31:07. Exceptions to limitation on reimbursement.** Notwithstanding the notice requirements in § 24:05:31:06, the cost of reimbursement may not be reduced or denied for failure to provide notice if:

(1) Compliance with § 24:05:31:06 would likely result in physical harm to the child;

(2) The ~~school LEA~~ prevented the parent from providing the notice; or

(3) The parents had not received notice, pursuant to chapter 24:05:30, of the notice requirement in § 24:05:31:06.

In addition, the cost of reimbursement, may, in the discretion of the court or a hearing officer, not be reduced or denied for failure to provide this notice if the parents are not literate or cannot write in English or if compliance with this section would likely result in serious emotional harm to the child.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

## **CHAPTER 24:05:32**

### **VOLUNTARY ENROLLMENT IN NONPUBLIC SCHOOLS**

#### Section

24:05:32:01 Responsibility of department.

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- 24:05:32:03.01 Services plan.
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- 24:05:32:03.04 Complaints.
- 24:05:32:04 Repealed.
- 24:05:32:05 Repealed.
- 24:05:32:06 Repealed.
- 24:05:32:07 Repealed.
- 24:05:32:08 Repealed.
- 24:05:32:09 Repealed.
- 24:05:32:10 Repealed.
- 24:05:32:11 Proscribed use of funds.
- 24:05:32:12 Proscribed use of funds for benefit of private school.
- 24:05:32:13 Personnel use authorized.
- 24:05:32:14 Use of private school employees authorized.
- 24:05:32:15 ~~School district~~ LEA to maintain control of property, equipment, and supplies.
- 24:05:32:16 Equipment and supplies to be removed from private schools upon cessation of need.
- 24:05:32:17 Use of program funds for repairs, minor remodeling, or private construction proscribed.
- 24:05:32:18 Repealed.

**24:05:32:01. Responsibility of department.** The department is responsible for ensuring the participation of eligible parentally-placed private school children in the program assisted or carried out under this article consistent with their number and location by providing them with special education and related services in accordance with this chapter including direct services, unless the U.S. Secretary of Education has arranged for services under the by-pass procedures in Part B of the IDEA. The department shall ensure that a services plan is developed and implemented for each private school child with a disability who has been designated by the district LEA in which a private school is located to receive special education and related services under this chapter. For purposes of this chapter, the term, parentally-placed private school children with disabilities, means children with disabilities enrolled by their parents in private, including religious, schools or facilities that meet the state definition of elementary school or secondary school, other than children with disabilities covered under chapter 24:05:31.

**Source:** 16 SDR 41, effective September 7, 1989; 20 SDR 33, effective September 8, 1993; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:32:01.01. Child find.** Each district LEA shall establish a child find process to locate, identify, and evaluate all private school children with disabilities, including religious elementary school and secondary school children and children receiving alternative instruction under SDCL 13-27-3 in schools located in the ~~school district~~ district LEA served by the district LEA. The activities

undertaken to carry out the responsibility for private school children with disabilities must be similar to activities undertaken for children with disabilities in ~~public schools~~ LEAs.

The child find process shall be designed to ensure:

- (1) The equitable participation of parentally-placed private school children; and
- (2) An accurate count of those children.

The child find process shall be completed in a time period comparable to that for students attending ~~public schools in~~ the ~~district~~ LEA consistent with this article.

Each ~~school district~~ LEA in which private, including religious, elementary schools and secondary schools are located shall, in carrying out the child find requirements in this section, include parentally-placed private school children who reside in a state other than the state in which the private schools that they attend are located.

Each ~~school district~~ LEA shall maintain in its records, and provide to the department, the following information related to parentally-placed private school children covered under this chapter: the number of children evaluated; the number of children determined to be children with disabilities; and the number of children served.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:32:01.02. Expenditures.** To meet the requirements of § 24:05:32:01, each ~~school district~~ LEA must spend the following amounts on providing special education and related services including direct services to parentally-placed private school children with disabilities:

(1) For children aged 3 to 21, inclusive, an amount that is the same proportion of the ~~school district~~ LEA's total subgrant under Part B of ~~the Individuals with Disabilities Education Act~~ the IDEA as the number of private school children with disabilities aged 3 to 21, inclusive, who are enrolled by their parents in private, including religious, elementary schools and secondary schools located in the ~~school district~~ LEA served by the ~~district~~ LEA is to the total number of children with disabilities in its jurisdiction aged 3 to 21, inclusive; and

(2) For children aged 3 to 5, inclusive, an amount that is the same proportion of the ~~school district's~~ LEA's total subgrant under Section 619, Preschool, of ~~the Individuals with Disabilities Education Act~~ the IDEA as the number of private school children with disabilities aged 3 to 5, inclusive, who are enrolled by their parents in private, including religious, elementary schools located in the ~~school district~~ LEA served by the ~~district~~ LEA is to the total number of children with disabilities in its jurisdiction aged 3 to 5, inclusive.

If a ~~district~~ LEA has not expended for equitable services all of the funds described in this section by the end of the fiscal year for which Congress appropriated the funds, the ~~district~~ LEA shall obligate the remaining funds for special education and related services, including direct services, to parentally-placed private school children with disabilities during a carry-over period of one additional year.

In calculating the proportionate amount of federal funds to be provided for parentally-placed private school children with disabilities, the ~~district~~ LEA, after timely and meaningful consultation with representatives of private schools, shall conduct a thorough and complete child find process to determine the number of parentally-placed children with disabilities attending private schools located in the ~~district~~ LEA.

State and local funds may supplement and in no case supplant the proportionate amount of federal funds required to be expended for parentally-placed private school children with disabilities under this chapter.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:32:01.03. Child count.** Each school-district LEA shall:

(1) After timely and meaningful consultation with representatives of parentally-placed private school children, determine the number of eligible children attending private schools located in the ~~district~~ LEA; and

(2) Ensure that the count is conducted on any date between October 1 and December 1, inclusive, of each year.

The child count must be used to determine the amount that the school-district LEA must spend on providing special education and related services to private school children with disabilities in the next subsequent fiscal year. Expenditures for child find activities described in § 24:05:32:01.01, including individual evaluations, may not be considered in determining whether the school-district LEA or other public agency has met the requirements of § 24:05:32:01.02. State and ~~local-educational-agencies~~ LEAs are not prohibited from providing services to private school children with disabilities in excess of those required by this section consistent with state law or local policy.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:32:01.04. No individual right to special education and related services.** No parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a ~~public school~~ **LEA**. Decisions about the services that will be provided to eligible private school children with disabilities under this chapter must be made in accordance with §§ 24:05:32:01.06 and 24:05:32:03.01. The ~~school district~~ **LEA** shall make the final decisions with respect to the services to be provided to eligible parentally-placed private school children.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:32:01.05. Consultation.** To ensure timely and meaningful consultation, a ~~school district~~ **LEA**, or, if appropriate, the department shall consult with private school representatives and representatives of parents of parentally-placed private school children with disabilities during the design and development of special education and related services for the children regarding the following:

(1) The child find process, including:

(a) How parentally-placed private school children suspected of having a disability can participate equitably; and

(b) How parents, teachers, and private school officials will be informed of the process;

(2) The determination of the proportionate share of federal funds available to serve parentally-placed private school children with disabilities under this chapter, including the determination of how the proportionate share of those funds was calculated;

(3) The consultation process among the ~~district~~ LEA, private school officials, and representatives of parents of parentally-placed private school children with disabilities, including how the process will operate throughout the school year to ensure that parentally-placed children with disabilities identified through the child find process can meaningfully participate in special education and related services;

(4) How, where, and by whom special education and related services will be provided for parentally-placed private school children with disabilities, including a discussion of:

(a) The types of services, including direct services and alternate service delivery mechanisms;

(b) How special education and related services will be apportioned if funds are insufficient to serve all parentally-placed private school children; and

(c) How and when those decisions will be made; and

(5) How, if the ~~district~~ LEA disagrees with the views of the private school officials on the provision of services or the types of services, whether provided directly or through a contract, the ~~district~~ LEA will provide to the private school officials a written explanation of the reasons why the ~~district~~ LEA chose not to provide services directly or through a contract.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:32:01.06. Written affirmation.** When timely and meaningful consultation, as required by § 24:05:32:01.05, has occurred, the ~~school district~~ LEA shall obtain a written affirmation signed by the representatives of participating private schools.

If the representatives do not provide the affirmation within a reasonable period of time, the ~~school district~~ LEA shall forward the documentation of the consultation process to the department.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:32:01.07. Compliance.** A private school official has the right to submit a complaint to the department that the ~~school district~~ LEA did not engage in consultation that was meaningful and timely or did not give due consideration to the views of the private school official.

If the private school official wishes to submit a complaint, the official shall provide to the department the basis of the noncompliance by the ~~school district~~ LEA with the applicable private school provisions in this chapter. The ~~school district~~ LEA shall forward the appropriate documentation regarding its consultation process to the department.

If the private school official is dissatisfied with the decision of the department, the official may submit a complaint to the U. S. secretary of education by providing the information on noncompliance described in this section. The department shall forward the appropriate documentation regarding the state's decision on the complaint to the U.S. secretary of education.

**Source:** 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:32:03.01. Services plan.** If a child with a disability is enrolled in a religious or other private school, by the child's parent, and will receive special education or related services from the ~~district~~ LEA, the ~~district~~ LEA shall:

(1) Initiate and conduct meetings to develop, review, and revise a services plan for the child, in accordance with § 24:05:32:03.02; and

(2) Ensure that a representative of the religious or other private school attends each meeting. If the representative cannot attend, the ~~district~~ LEA shall use other methods to ensure participation by the private school, including individuals or conference telephone calls.

**Source:** 26 SDR 150, effective May 22, 2000; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:32:03.02. Services provided.** The services provided to parentally-placed private school children with disabilities must be provided by personnel meeting the same standards as personnel providing services in the ~~public schools~~ LEAs except that private elementary school and secondary school teachers who are providing equitable services to parentally-placed private school children with disabilities are not required to meet the qualified special education teacher requirements of this article. Private school children with disabilities may receive a different amount of services than children with disabilities in ~~public schools~~ LEAs. No private school child with a disability is entitled to any service or to any amount of a service the child would receive if enrolled in a ~~public school~~ LEA. Each private school child with a disability who has been designated to receive services under this chapter, must have a services plan that describes the

specific special education and related services that the ~~district~~ LEA will provide to the child in light of the services that the ~~district~~ LEA has determined, through the process described in this chapter, it will make available to private school children with disabilities. The services plan must to the extent appropriate:

- (1) Meet the IEP content requirements with respect to the services provided; and
- (2) Be developed, reviewed, and revised consistent with the IEP provisions in this article.

The provision of services pursuant to this chapter shall be provided by employees of a ~~school~~ district LEA, or through contract by the ~~school~~ district LEA with an individual, association, agency, organization, or other entity.

Special education and related services provided to parentally-placed private school children with disabilities, including materials and equipment, shall be secular, neutral, and nonideological.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 46 SDR 149, effective July 6, 2020.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:32:03.03. Location of services and transportation.** Services provided to eligible parentally-placed private school children may be provided on the premises of a child's private school, including a religious school, to the extent consistent with state law. If necessary for the child to benefit from or participate in the services provided under this chapter, a private school child with a disability must be provided transportation:

- (1) From the child's school or the child's home to a site other than the private school; and

(2) From the service site to the private school, or to the child's home, depending on the timing of the services.

~~Districts~~ LEAs are not required to provide transportation from the child's home to the private school. The cost of transportation described in this section may be included in calculating whether the ~~district~~ LEA has met the requirement of § 24:05:32:01.02.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:32:03.04. Complaints.** The due process hearing and mediation procedures in chapter 24:05:30 do not apply to complaints that a ~~school district~~ LEA has failed to meet the requirements of this chapter, including the provision of services indicated on the child's service plan. The due process hearing and mediation procedures in chapter 24:05:30 apply to complaints that the ~~district~~ LEA has failed to meet the child find requirements in § 24:05:32:01.01, including the parent consent and evaluation requirements in this article. Any due process complaint regarding the child find requirements shall be filed with the ~~school district~~ LEA in which the private school is located and a copy shall be forwarded to the department. Complaints that the department or a ~~school district~~ LEA has failed to meet the requirements of this chapter may be filed under the procedures in chapter 24:05:15 consistent with the procedures in § 24:05:32:01.07.

**Source:** 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 36 SDR 96, effective December 8, 2009.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:32:11. Proscribed use of funds.** A school district LEA may not use IDEA Section 619 Preschool or Part B of the IDEA funds for classes that are organized separately on the basis of school enrollment or religion of the students if the classes are at the same site and the classes include students enrolled in public schools LEAs and students enrolled in private schools.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:32:12. Proscribed use of funds for benefit of private school.** A school district LEA may not use IDEA Section 619 Preschool or Part B of the IDEA funds to finance the existing level of instruction in a private school or to otherwise benefit the private school. The school district LEA shall use funds provided under Part B of ~~the Individuals with Disabilities Education Act~~ the IDEA to meet the special education and related services needs of students enrolled in private schools, but not for:

- (1) The needs of a private school; or
- (2) The general needs of the students enrolled in the private school.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:32:13. Personnel use authorized.** A school-district LEA may use IDEA Section 619 Preschool or Part B of the IDEA funds to make public personnel available in other than public facilities to the extent necessary to provide services designed for students enrolled in a private school if those services are not normally provided by the private school.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:32:14. Use of private school employees authorized.** A school-district LEA may use IDEA Section 619 Preschool or Part B of the IDEA funds to pay for the services of an employee of a private school if the employee performs the services outside regular hours of duty and the employee performs the services under public LEA supervision and control.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:32:15. School-district LEA to maintain control of property, equipment, and supplies.** A school-district LEA shall control and administer the funds used to provide special education and related services under this chapter, and hold title to and administer materials, equipment, and property purchased with those funds for the uses and purposes provided in Part B of the IDEA.

The school district **LEA** may place equipment and supplies in a private school for the period of time needed for the Part B program.

The school district **LEA** shall ensure that the equipment and supplies placed in a private school are used only for the purposes of the Part B program and can be removed from the private school without remodeling the private school facilities.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:32:16. Equipment and supplies to be removed from private schools upon cessation of need.** The school district **LEA** shall remove equipment and supplies from a private school if the equipment and supplies are no longer needed for the purposes of the program authorized under Part B of the IDEA or if removal is necessary to avoid unauthorized use of the equipment or supplies for other than Part B program purposes.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:32:17. Use of program funds for repairs, minor remodeling, or private construction proscribed.** A school district **LEA** shall ensure that **IDEA** Section 619 Preschool or

Part B of the IDEA funds are not used for repairs, minor remodeling, or construction of private school facilities.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:33:07.02. Allowable costs -- Special education fund.** The special education fund of a school district LEA may be used to pay the costs for special education of all children in need of special education or special education and related services served by the school district LEA or for which the school district LEA is financially responsible. These costs may not include the following:

- (1) Salaries and benefits of superintendents, chief executive officers, and principals;
- (2) Utilities;
- (3) Custodial services;
- (4) General transportation services;
- (5) Salaries and benefits for nonspecial education staff;
- (6) Nonspecial education supplies and materials;
- (7) Nonspecial education dues and fees;
- (8) Capital outlay expenditures not directly tied to a student's individual educational program IEP; and
- (9) Contributions and donations.

**Source:** 26 SDR 37, effective September 22, 1999.

**General Authority:** SDCL 13-16-32.

**Law Implemented:** SDCL 13-16-32, 13-37-16.

**24:05:33:07.03. Cooperative educational service unit costs.** A school district LEA may pay, from state and local dollars deposited into the district's LEA's special education fund, the following costs incurred by a cooperative educational service unit, as defined by SDCL 13-5-31, as a result of providing special education or special education and related services:

- (1) Technology services;
- (2) General administrative services;
- (3) Fiscal services;
- (4) Instructional computer equipment;
- (5) Vehicle and vehicle services; and
- (6) Building maintenance and operation.

Items listed in subdivision (1) to (4), inclusive, must be prorated as a percentage of the total revenues of the cooperative educational service unit, but may never exceed the actual cost of providing the service. Items listed in subdivision (5) must be based on a calculated per mile rate based on the type of vehicle. Items listed in subdivision (6) must be based on square footage.

**Source:** 40 SDR 122, effective January 8, 2014.

**General Authority:** SDCL 13-16-32.

**Law Implemented:** SDCL 13-16-32, 13-37-16.

**24:05:33.01:06. Application.** Eligible school district LEA must apply for extraordinary cost funds on forms provided by the secretary. An eligible school district LEA may apply for

extraordinary cost funds based on a high cost student, high cost program, or supplemental aid. In addition, a ~~school district~~ LEA may apply for extraordinary cost funds based on both a high cost student and supplemental aid. However, a ~~school district~~ LEA may not apply for extraordinary cost funds for both a high cost program and supplemental aid and may not apply for extraordinary cost funds for both a high cost student and high cost program.

**Source:** 23 SDR 63, effective January 1, 1997; 40 SDR 102, effective December 4, 2013.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1, 13-37-40 to 13-37-47, inclusive.

**24:05:33.01:07. Required documentation.** A ~~school district's~~ LEA's application for extraordinary cost funds must include the most recent statement of revenues, expenditures, and changes in fund balance, both budgeted and actual, for the portion of the fiscal year completed for special education funds, prepared in accordance with generally accepted accounting principles. Nothing in this section prohibits the department from requesting additional information necessary to review the application.

The Extraordinary Cost Oversight Board and the secretary of the Department of Education may not consider an application for extraordinary costs funds if the ~~school district~~ LEA has outstanding deficiencies which have not been corrected pursuant to chapter 24:05:20, the ~~school district~~ LEA does not use generally accepted accounting principles, or special education revenues and expenditures are not recorded in accordance with the accounting manual provided for in SDCL 4-11-6.

**Source:** 23 SDR 63, effective January 1, 1997; 26 SDR 150, effective May 22, 2000; 33 SDR 236, effective July 5, 2007; 40 SDR 102, effective December 4, 2013.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1, 13-37-40 to 13-37-47, inclusive.

**Cross-References:**

~~individual educational program IEP~~, ch 24:05:27.

Auditing, accounting, and review standards, § 20:37:11:07.

Accounting principles, § 20:37:11:08.

Accounting manual for counties, municipalities, school districts and their agencies, SDCL 4-11-6.

**24:05:33.01:09. Maximum tax levy required.** To be eligible for extraordinary cost funds, a school district **LEA** must levy the maximum amount allowed pursuant to SDCL 13-37-16.

**Source:** 23 SDR 63, effective January 1, 1997; 40 SDR 102, effective December 4, 2013.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1, 13-37-40 to 13-37-47, inclusive.

**24:05:33.01:10. No funding of prior fiscal year special education expenditures.** Extraordinary cost funds shall be used solely to fund special education expenditures referenced in this chapter which occurred in the fiscal year in effect when the district **LEA** submits its application.

**Source:** 40 SDR 102, effective December 4, 2013.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1, 13-37-40 to 13-37-47, inclusive.

**24:05:33.01:11. Funds set aside for supplemental aid applications.** Ten percent of the total appropriation for extraordinary cost funds shall be set aside to fund applications for extraordinary cost funds for supplemental aid. This ten percent total is the maximum amount which can be used to fund applications for extraordinary cost funds for supplemental aid. If applications are in excess of the ten percent, the secretary may adjust or prorate the requested amounts. The maximum allowable request for an individual ~~school district~~ LEA for extraordinary cost funds based on supplemental aid is \$50,000.

Any unallocated funds from the set aside referenced in this section may be used to fund applications for extraordinary cost funds for high cost students or high cost programs as referenced in § 24:05:33.01:12.

**Source:** 40 SDR 102, effective December 4, 2013.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1, 13-37-40 to 13-37-47, inclusive.

**24:05:33.01:13. Reconsideration of extraordinary cost fund applications.** If a ~~school district's~~ LEA's extraordinary cost fund application is denied in whole or in part by the secretary, the ~~school district~~ LEA may submit a written request to the secretary for reconsideration. The request must be submitted via first class United States mail and be postmarked within ten days of receipt of the secretary's decision. The secretary shall issue a decision on the request for reconsideration within ten days of receipt of the request by the secretary. Nothing in this chapter requires the secretary to provide a hearing relating to a ~~district's~~ LEA's original application or request for reconsideration.

**Source:** 40 SDR 102, effective December 4, 2013.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1, 13-37-40 to 13-37-47, inclusive.

**24:05:34:02. Determination of educational program costs for in-state placement of children for whom the state is responsible.** The ~~school district~~ LEA in which the child, under care and custody of the state, resides is responsible for the identification, evaluation, ~~and~~ placement, ~~and provision of a free appropriate public education FAPE of the child~~ pursuant to the rules in this article governing children in need of special education or special education and related services. The state is responsible for the costs of special education or special education and related services.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1, 13-37-8.6.

## CHAPTER 24:05:35

### PROGRAM ALTERNATIVES

#### Section

- 24:05:35:01 ~~District~~ LEA of residence responsible for educational program in juvenile detention facility.
- 24:05:35:02 Repealed.
- 24:05:35:03 Repealed.

**24:05:35:01. ~~Distriet~~ LEA of residence responsible for educational program in juvenile detention facility.** A ~~school-district~~ LEA containing a juvenile detention facility is responsible for providing a ~~free-appropriate-public-education~~ FAPE for ~~children and youth~~ students assigned to the facility by the court.

**Source:** 16 SDR 41, effective September 7, 1989; 23 SDR 31, effective September 8, 1996; 26 SDR 150, effective May 22, 2000.

**General Authority:** SDCL 13-37-1.1.

**Law Implemented:** SDCL 13-37-1.1.

**24:05:36:01. Scope of chapter.** This chapter addresses coordinated early intervening services funded through State Aid for Special Education under SDCL chapter 13-37. Nothing in this chapter is intended to modify any provision in chapter 24:05:19 regarding the use of ~~IDEA-Part B~~ of the IDEA funds for early intervening services.

**Source:** 40 SDR 40, effective September 11, 2013.

**General Authority:** SDCL 13-37-1.1, 13-37-58.

**Law Implemented:** SDCL 13-37-1.1, 13-37-35.1, 13-37-36.3, 13-37-40, 13-37-55 to 13-37-59, inclusive.

**24:05:36:02. Coordinated early intervening services -- Funds available and students served.** A ~~school-district~~ LEA may use up to fifteen percent of the local need, as defined in SDCL 13-37-35.1(18), to develop and implement coordinated early intervening services. Coordinated early intervening services may be provided to students in kindergarten through grade twelve who are not currently eligible for special education and related services pursuant to chapter 24:05:24.01

but need additional academic and behavioral interventions to be successful in general education and to avoid being classified as a student with a disability.

**Source:** 40 SDR 40, effective September 11, 2013.

**General Authority:** SDCL 13-37-1.1, 13-37-58.

**Law Implemented:** SDCL 13-37-1.1, 13-37-35.1, 13-37-40, 13-37-55 to 13-37-59, inclusive.

**24:05:36:04. Application -- Required components.** A ~~school district's~~ LEA's application for coordinated early intervening services funds must include the following components:

- (1) A description of the process used to identify the students to be provided early intervening services;
- (2) The scientifically-based activities and services for which funds will be used;
- (3) A budget for state and local coordinated early intervening services funds including an accounting system for tracking these state and local funds separate from federal funds;
- (4) Assurances that the ~~district~~ LEA will continue to:
  - (a) Provide a FAPE to all students with disabilities consistent with this article; and
  - (b) Meet the maintenance of effort requirements referenced in chapter 24:05:19 for any fiscal year; and
- (5) A description of the process to be used to identify whether a student who receives coordinated early intervening services qualifies to receive special education or special education and related services within two years.

**Source:** 40 SDR 40, effective September 11, 2013.

**General Authority:** SDCL 13-37-1.1, 13-37-58.

**Law Implemented:** SDCL 13-37-1.1, 13-37-35.1, 13-37-40, 13-37-55 to 13-37-59, inclusive.

**24:05:36:05. Application -- Approval criteria.** When determining whether to approve a ~~school-district's~~ LEA's application for early intervening services funding, the department shall consider whether the ~~district~~ LEA has:

- (1) Met the maintenance of effort requirement for the prior two fiscal years;
- (2) Requested no more than fifteen percent of local need;
- (3) Complied with coordinated early intervening reporting for a previous year or years, if applicable;
- (4) Maintained a FAPE for all students with disabilities; and
- (5) Timely corrected all findings of ~~;~~ of the IDEA noncompliance in the prior two school years.

**Source:** 40 SDR 40, effective September 11, 2013.

**General Authority:** SDCL 13-37-1.1, 13-37-58.

**Law Implemented:** SDCL 13-37-1.1, 13-37-35.1, 13-37-40, 13-37-55 to 13-37-59, inclusive.

**24:05:36:06. Annual reporting.** Each ~~school-district~~ LEA must submit the report required by SDCL 13-37-57 by June 30<sup>th</sup> of each school year on forms provided by the department.

**Source:** 40 SDR 40, effective September 11, 2013.

**General Authority:** SDCL 13-3-51, 13-37-1.1, 13-37-58.

**Law Implemented:** SDCL 13-37-1.1, 13-37-35.1, 13-37-40, 13-37-55 to 13-37-59, inclusive.

**24:05:36:07. Eligibility for extraordinary costs -- Availability of funding.** ~~School districts~~ LEAs utilizing state aid for special education funding for the provision of coordinated early intervening services are not eligible for extraordinary costs under chapter 24:05:33.01 for a period of three years following the expenditure of funds under this chapter.

**Source:** 40 SDR 40, effective September 11, 2013.

**General Authority:** SDCL 13-37-1.1, 13-37-58.

**Law Implemented:** SDCL 13-37-1.1, 13-37-35.1, 13-37-40, 13-37-55 to 13-37-59, inclusive.