

# Theme C: Evaluating Children for Disability

## Resources for Trainers C-1

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*Excerpted Discussion  
from the Analysis of Comments and Changes to the Final Regulations:*

### **Initial Evaluation and Parent Consent for Wards of the State**



*This resource is part of NICHCY's training curriculum on IDEA 2004 and the final Part B regulations. See the next page for a description of the curriculum.*



## Initial Evaluation and Parent Consent for Wards of the State

The following text is drawn from pages 46630-46631 of the U.S. Department of Education's commentary in the *Analysis of Comments and Changes* accompanying the publication of IDEA 2004's final regulations on August 14, 2006. These are available online at: [www.nichcy.org/reauth/IDEA2004regulations.pdf](http://www.nichcy.org/reauth/IDEA2004regulations.pdf)

The text includes the *comments* received on the proposed regulations for IDEA, the discussion wherein the Department of Education responds to those comments, and changes made from the proposed regulations to the final regulations. The topic under focus is **parental consent for initial evaluation of a child who is a ward of the State.**

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*Comment:* One commenter recommended that the regulations clarify whether the reference to "parent" in §300.300(a)(2) means "biological or adoptive parent" or anyone who meets the definition of *parent* in §300.30.

*Discussion:* Section 300.300(a)(2) applies to circumstances in which the child is a ward of the State and is not residing with the child's parents, and requires the public agency to make reasonable efforts to obtain parental consent from the parent for an initial evaluation. The reference to "parent," in this context, refers to anyone who meets the definition of *parent* in §300.30, consistent with section 614(a)(1)(D)(iii) of the Act.

*Changes:* None.

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*Comment:* One commenter requested clarification on the interplay between new §300.300(a)(2) (proposed §300.300(a)(2)(ii)), regarding circumstances when the public agency is not required to obtain informed parental consent for an initial

evaluation of a child who is a ward of the State, and the requirements in §300.519(c), which require that a surrogate parent be appointed for a child who is a ward of the State.

*Discussion:* New §300.300(a)(2) (proposed §300.300(a)(2)(ii)), consistent with section 614(a)(1)(D)(iii)(II) of the Act, creates an exception to the parental consent requirements for initial evaluations for a child who is a ward of the State who is not residing with the child's parent if the public agency has made reasonable efforts to obtain the parent's consent, but is unable to discover the whereabouts of the parent, the rights of the parent of the child have been terminated under State law, or the rights of the parent to make educational decisions have been subrogated by a judge under State law and consent for the initial evaluation has been given by an individual appointed by the judge to represent the child. New §300.300(a)(2) (proposed §300.300(a)(2)(ii)) permits the public agency to proceed with the child's initial evaluation without first obtaining the requisite parental consent only in the circumstances detailed in §300.300(a)(2). Therefore, when one or more of the circumstances in §300.300(a)(2) are met and a surrogate has not yet been appointed, the public agency need not postpone the child's evaluation to await the appointment of a surrogate. This is appropriate because in situations involving requests for initial evaluations, in most cases a surrogate parent has not yet been appointed and delaying an initial evaluation until after a surrogate is appointed and has given consent may not be in the best interests of the child. In contrast, in most situations involving consent for reevaluation, a surrogate parent should already have been appointed under §300.519 if no parent can be identified, the public agency has been unable to locate a parent, the child

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is a ward of the State or the child is an unaccompanied homeless youth. Therefore, we do not think it is appropriate to apply the provisions in §300.300(a)(2) to reevaluation situations.

Nothing in this section is intended to relieve a public agency of its obligation to ensure that the rights of a child who is a ward of the State are protected through the appointment of a surrogate parent in accordance with the procedures in §300.519(b) through (h). Once a surrogate parent is appointed in accordance with the procedures in §300.519(b) through (h), that person assumes the responsibilities of a parent under the Act, and the public agency must seek consent from that individual.

Moreover, if a child has a foster parent who can act as a *parent*, as defined in §300.30(a)(2), or a person such as a grandparent or step-parent who is legally responsible for the child's welfare, and that person's whereabouts are known or the person can be located after reasonable efforts by the public agency, parental consent would be required for the initial evaluation.

We believe that the phrase "except as provided in paragraph (a)(2) of this section (regarding consent for wards of the State)" in proposed §300.300(a)(1)(i) may incorrectly convey that a public agency is not required to make reasonable efforts to obtain informed consent from the parent of a child who is a ward of the State, or from a surrogate parent, foster parent, or other person meeting the definition of a *parent* in §300.30(a). Therefore, we will remove the phrase. To clarify that the provisions in §300.300(a)(2) apply only to initial evaluations, and not reevaluations, we will modify both §§300.300(a)(2) and (c)(1).

*Changes:* We have removed the phrase "except as provided in paragraph (a)(2) of this section (regarding consent for wards of the State)" in §300.300(a)(1)(i), for clarity. We have also added

introductory language to specify that it applies only to initial evaluations, and we have changed the cross-reference in §300.300(c)(1) to refer to §300.300(a)(1).

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*Comment:* One commenter recommended that the regulations specify the minimum steps that public agencies must take to obtain consent for initial evaluations from parents of children who are wards of the State. Another commenter recommended that the regulations define "reasonable efforts," as used in new §300.300(a)(1)(iii) (proposed §300.300(a)(2)(i)). One commenter recommended requiring LEAs to maintain documentation of their efforts to obtain parental consent for initial evaluations, including attempts to obtain consent by telephone calls, visits to the parent's home, and correspondence in the parent's native language. Several commenters requested that the requirements in current §300.345(d) be included in new §300.300(a)(2)(i) (proposed §300.300(a)(2)(ii)(A)). Current §300.345(d) requires a public agency to document the specific steps it has taken to arrange a mutually convenient time and place for an IEP Team meeting (*e.g.*, detailed records of telephone calls, any correspondence sent to the parents, visits made to the parent's home or place of employment) and it is crossreferenced in current §300.505(c)(2) to identify documentation of the reasonable measures that an LEA took to obtain consent for a reevaluation.

*Discussion:* We believe it is important to emphasize that a public agency must make reasonable efforts to obtain informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability. This includes the parent of a child who is a ward of the State. Therefore, we will add a new paragraph (a)(1)(iii) to §300.300 to make clear that a public agency must make reasonable efforts to obtain informed parental consent whenever a public agency seeks to conduct an initial

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evaluation of a child to determine whether the child is a child with a disability. This requirement applies to all children including children who are wards of the State. With the addition of this new paragraph, the requirement for public agencies to make reasonable efforts to obtain informed consent from the parent for an initial evaluation for children who are wards of the State in §300.300(a)(2)(i) is no longer necessary and will be removed.

We also agree with the commenters that a public agency should document and make the same reasonable efforts to obtain consent for an initial evaluation from a parent, including a parent of a child who is a ward of the State, that are required when a public agency attempts to arrange a mutually convenient time and place for an IEP Team meeting (e.g., detailed records of telephone calls, any correspondence sent to the parents, visits made to the parent's home or place of employment), and will add a new paragraph (d)(5) to make this clear. We recognize that the statute uses both "reasonable measures" and "reasonable efforts" when referring to a public agency's responsibility to obtain parental consent for an evaluation, initial services, and a reevaluation. We believe these two phrases, when used in this context, have the same meaning and, therefore, have used "reasonable efforts" throughout the regulations related to parental consent for consistency.

*Changes:* We have added a new paragraph (a)(1)(iii) to §300.300 to require a public agency to make reasonable efforts to obtain informed parental consent for an initial evaluation. We will remove §300.300(a)(2)(i) because it is redundant with the new paragraph. Section 300.300(a)(2) has been reformatted consistent with the removal of paragraph (a)(2)(i). We also have added a new paragraph (d)(5) to §300.300 to require a public agency to document its attempts to obtain parental consent using the procedures in §300.322(d).

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*Comment:* A few commenters asked whether a public agency must obtain consent for an initial evaluation from the biological or adoptive parent of the child when there is another person who meets the definition of *parent* in §300.30. Another commenter recommended the regulations clarify whether a public agency must seek informed consent for an initial evaluation from a biological or adoptive parent when a surrogate parent has already been appointed.

*Discussion:* Section 300.30(b)(1) provides that, when more than one party is qualified to act as a parent, the biological or adoptive parent, when attempting to act as the parent under the Act, must be presumed to be the parent, unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.

If a surrogate parent already has been appointed because the public agency, after reasonable efforts, could not locate a parent, the public agency would not have to again attempt to contact other individuals meeting the definition of *parent* in §300.30 to seek consent.

*Changes:* None.

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*Comment:* One commenter recommended that the regulations clarify whether the qualifications of a judge-appointed surrogate parent in §300.519(c) would apply to new §300.300(a)(2)(iii) (proposed §300.300(a)(2)(ii)(C)), regarding consent for an initial evaluation for a child who is a ward of the State.

*Discussion:* Section 614(a)(1)(D)(iii)(II)(cc) of the Act, which is the basis for new §300.300(a)(2)(iii) (proposed §300.300(a)(2)(ii)(C)), provides that the public agency is not required to obtain informed

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consent from the parent for an initial evaluation of a child who is a ward of the State and is not living with the child's parent if 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. This is a special situation, limited only to children who are wards of the State not living with a parent and limited only to the situation of seeking consent for an initial evaluation. A person appointed under this provision is not a surrogate parent as that term is used in these regulations. The requirements of §300.519(c) do not apply to persons authorized to provide consent for initial evaluations under this provision.

It is noteworthy that the provision in new §300.300(a)(2)(iii) (proposed §300.300(a)(2)(ii)(C)) is only a limited exception to the requirement to obtain informed parental consent for an initial evaluation. Most children will not have a surrogate parent already appointed at this stage of their involvement with services under the Act. However, if a child has a surrogate parent appointed under §300.519(c), and the rights of that person to make educational decisions for the child have not been subrogated by a judge under State law, the public agency would have to seek informed parental consent from that person.

*Changes:* None.