



Legal Counsel for California Schools
and Public Agencies

The Power of Prior Written Notice: When, Why and How to Use It

SONOMA COUNTY SELPA

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Did the LEA Offer of FAPE?

Courts must answer **two questions**:

1. Did the LEA comply with the procedures of IDEA?
2. Did the LEA offer an IEP that is reasonably calculated to enable the child to make progress in light of the child's circumstances?

Board of Education of the Hendrick Hudson Central School Dist., v. Rowley (1982), 458 U.S. 176; Endrew F. v. Douglas County School Dist. RE-1 (2017) 580 U.S. ___, 137 S. Ct. 988.



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Procedural Violations

"Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process as it did upon the measurement of the resulting IEP against a substantive standard." *Rowley*, 458 U.S. at 205.

Because disabled children and their parents are generally not represented by counsel during the IEP process, procedural errors at that stage are particularly likely to be prejudicial and cause the loss of educational benefits.

Therefore, compliance with the IDEA's procedural safeguards "is essential to ensuring that every eligible child receives a FAPE, and those procedures which provide for meaningful parent participation are particularly important."

Amanda J. v. Clark Cty. Sch. Dist., 267 F.3d 877, 891 (9th Cir. 2001).



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Procedural Violations

The state complaint process tends to be one-step, compliance-oriented process of whether or not there was a procedural violation.

Courts follow the two-step process to determine whether a procedural violation rises to a denial of FAPE.



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Procedural Violations of IDEA

Not every procedural violation by a school district amounts to a denial of FAPE.

A hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies -

- Impeded the child's right to a FAPE;
- Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provisions of a FAPE to the parent's child; or
- Caused a deprivation of educational benefits.

34 CFR 300.513 (a)(2).



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What is Prior Written Notice?

A vital component of procedural safeguards that LEAs make available to students with disabilities and their parents.

Providing timely PWN allows a clear record of:

- Decisions that have been made by the LEA **but not yet acted upon**
- The basis for those decisions
- Actions that will or will not be taken



What Should the Prior Written Notice Include?

7 Items

1. Description of action proposed *or* refused by school
2. Explanation of why school proposed or refused to take the action
3. Description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action
4. Statement that parents of the child with a disability have protection under IDEA and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of procedural safeguards can be obtained

34 C.F.R. § 300.503(b).



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What Should the Prior Written Notice Include?

7 Items (continued)

5. Sources for parents to contact to obtain assistance in understanding the provisions of IDEA
6. Description of any other options the IEP team considered and the reasons why those options were rejected
7. Description of the other factors relevant to the school's proposal or refusal

34 C.F.R. § 300.503(b).



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When Should PWN Be Provided?

Whenever an LEA **proposes** or **refuses** to:

1. Initiate or change **identification** of a student.
2. Initiate or change **evaluation** of a student.
3. Initiate or change **educational placement** of a student.
4. Initiate or change the provision of **free, appropriate public education** to a student.

34 C.F.R. § 300.503(a).



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What Circumstances Require PWN?

Identification

- Referral for initial evaluation

Evaluation

- Proposal to evaluate or reevaluate
- Refusal to conduct an evaluation requested by parent
- Granting or refusing request for independent educational evaluation



What Circumstances Require PWN?

Educational Placement

- Initial placement into special education
- Any change in educational placement/LRE
- Exiting from special education
- Graduation with regular diploma
- Disciplinary removal for more than 10 consecutive school days or series of removals
- Disciplinary removal to an interim alternative educational placement for not more than 45 school days



What Circumstances Require PWN?

Provision of FAPE (note: proposals or refusals)

- Increase or decrease in special education or related services
- Changes in accommodations
- Deletion or addition of a related service
- Change in annual goals
- Changes to Behavior Intervention Plan
- Change in how student will participate in statewide and district wide assessments
- Upon notification that parent revokes consent for special education services.



Revocation of Consent

Must be provided within a reasonable time before the district ceases services.

U.S. Dept. of Ed. expects districts to “promptly” respond to receipt of written revocation of consent by providing PWN.

This provides parents the necessary information and time to fully consider the change and determine if they have any additional questions or concerns regarding the discontinuation of services.



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Prior Written Notice for Revocation of Consent

Student v. Roseville Joint Union High School District (OAH No. 2017070292)



Divorced parents.

Father revoked consent for student's special education and related services on November 4, 2015.

The District provided prior written notice of the termination to his Father but not his Mother during a time in which his Parents were divorcing and living apart.

The District terminated his special education on November 5, 2015.

Mother filed due process complaint alleging failure to provide proper PWN denied student FAPE.



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Prior Written Notice for Revocation of Consent

Student v. Roseville Joint Union High School District (OAH No. 2017070292)

For parents with joint legal custody, either parent acting alone has authority to revoke consent for special education services.

Hearing officer held that the notice was not provided to either Parent a **reasonable time** before the termination was effective.

Failure to provide prior written notice to Mother deprived Student of a FAPE because it deprived the Mother of significant participation in decisions affecting his special education and deprived him of educational benefits.

Student was awarded compensatory education.



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Summer Transfer Students

Letter to Siegel, 119 LRP 6129 (OSEP February 21, 2019)



An LEA has discretion to decide whether it is necessary under the circumstances to convene an IEP team meeting before the first day of school for a student who transferred LEAs during the summer.

If a parent requests that the new LEA convene an IEP meeting prior to the start of the school year and the new LEA refuses to do so, the new LEA is required to provide **prior written notice** to the parent of the refusal.

OSEP explained that the prior written notice must include, among other required content, an explanation of why the LEA determined that conducting the meeting is not necessary to ensure the provision of services to the student.

Is There Any Circumstance When PWN is *NOT* Required?

- Screening
- Minor discretionary decisions by a district with regard to a student's curriculum or assignment of teachers
- Evaluation of progress on goals
- Change in location of the program/service
- Change in personnel
- Disciplinary removals for less than 10 school days
- Matriculating from elementary to middle or middle to high school



When Should PWN Be Provided?

Within a reasonable period of time

34 C.F.R. § 300.503(a).

U.S. Department of Education stated:

“We do not believe that it is necessary to substitute a specific timeline to clarify what is meant by the requirement that the notice be provided within a reasonable period of time, because we are not aware of significant problems in the timing of prior written notices. In addition, prior written notice is provided in a wide variety of circumstances for which any one timeline would be too rigid and, in many cases, might prove unworkable.”



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Analysis of Comments and Changes (71 Fed.Reg. 46691 (Aug. 14, 2006).)

What's a "Reasonable" Period of Time?

Depends on the circumstances.

If there is something complex going on or the parents are new to the process, it might be beneficial to provide PWN sooner than would normally be the case.

OSEP explained in *Letter to Chandler*, 59 IDELR 110 (OSEP 2012), the notice must be provided so that parents have **enough time to fully consider the change and respond to the action before it is implemented.**

Where LEAs tend to get themselves into a bind is when they send the notice after the fact or around the last minute.



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Can the IEP Serve as PWN?

MAYBE.

“There is nothing in the [IDEA] or these regulations that would prohibit a public agency from using the IEP as part of the prior written notice so long as the document(s) the parent receives meet all the requirements in Sec. 300.503.”

Analysis of Comments and Changes (71 Fed.Reg. 46691 (Aug. 14, 2006).)



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Can the IEP Serve as PWN?

Ask yourself... Does the child's IEP include all 7 required components of PWN?

If not, provide parents a PWN along with a copy of the IEP to ensure all components are covered.



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Is PWN Still Required if Team Agrees to Changes in an IEP Team Meeting?

YES

Providing such notice following an IEP team meeting allows the parent time to fully consider the change and determine if he/she has additional suggestions, concerns, or questions.



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Is PWN Limited to Changes with which Parent Disagrees?

NO.

Nothing in IDEA indicates that the PWN requirement is related to a parent's position on any changes proposed or refused by LEA.



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Is PWN Required Before Conducting an IEP Meeting?

NO.

Generally, no proposal or refusal exists until the IEP team has made its decisions.

However, a meeting notice must be sent prior to the meeting.



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Can You Use PWN to Bypass an IEP Meeting?

NO.

When a parent makes a specific request (e.g., increased speech services), schedule an IEP meeting to discuss to avoid claims of predetermination.



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Can You Use PWN to Bypass an IEP Meeting?

Case Example: Fresno Unified Sch. Dist., OAH Case Nos. 2013010033/2012120631

During an IEP, District presented a placement offer of four different schools to Student. Later, District sent a PWN proposing to change Student's placement to his local school. However, the notice also included an extensive four-week transition plan to help Student transition to the new school.

OAH ruled that, while the PWN provided notice of a proposed change to Student's placement, District cannot use it to bypass the requirement to hold a new IEP team meeting. In this case, District changed its placement offer from four schools to one school and added an entirely new item, the extensive four-week transition plan. These proposals were not in the earlier IEP. The overall effect was that the PWN changed District's placement offer from the earlier IEP, without a corresponding IEP team meeting, which subsequently denied Parents participation in the development in Student's educational program.



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Procedural Requirement of a Formal IEP Offer

The formal IEP offer may be clarified by a prior written notice.

20 U.S.C. § 1415(b)(2)(B)(3); 34 C.F.R. 300.503; *Union School District v. Smith* (9th Cir. 1994), 15 F.3d 1519.



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Is PWN Required Even When IEP Team is Awaiting Additional Information Before Making a Decision?

YES.

LEAs must provide timely PWN, even if awaiting additional information, such as updated assessment information.



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Is PWN Required Even When IEP Team is Awaiting Additional Information Before Making a Decision?

Case Example: Los Angeles Unified Sch. Dist. (OAH No. 2012060029)

Parents requested an NPS for Student during an IEP meeting. In response, District offered to conduct a comprehensive assessment in order to determine whether the NPS was appropriate. District sent Parents an assessment plan, which the Parents did not sign or return. Parents filed for due process alleging, in part, that the District failed to provide PWN with regard to their NPS request.

District argued that PWN was not yet necessary, because it could not properly make its decision regarding the NPS until the assessment was complete.

OAH ruled for the Parents stating that the District's failure to provide a reasonably timely written notice in response to Mother's request for an NPS placement significantly impeded Mother's opportunity to participate in the decision-making process regarding the provision of FAPE. Therefore, even though the District may have been awaiting the results of the assessment plan before making a decision with regards to the NPS request, it was still required to timely present Parents with a PWN



NPS
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Is PWN Still Required for Amendments to IEPs?

YES, whenever there is a proposal or refusal related to identification, evaluation, placement or the provision of FAPE.

IEP amendment must contain required 7 points of information.



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How Is PWN Communicated?

PWN must be written in a language understandable to the general public.

Providing parents with verbal notice as a substitute for written notice does not fulfill the PWN requirements of IDEA, regardless of whether the verbal notice is substantively proper.



How Is PWN Communicated?

Case Example: -Pikes Peak Bd. of Cooperative Educ. Services, 9 ECLPR 15(SEA CO 2011),

Parent, believing child needed more interaction with typical peers, requested a less restrictive placement.

IEP team agreed to place student in general education class for several weeks for half of the day on a trial basis.

Acceding to parent's wishes, district agreed not to record the change in the IEP, but to refer to it as "an assessment period" after which the team would reconvene.

Then parent filed complaint claiming that the district committed procedural violations.

"Whether a new placement is deemed 'temporary,' 'diagnostic' or an 'assessment period,' under the law, it must be reflected in the IEP,".

District violated IDEA by failing to note the change in the document, although it did so at the parent's request. PWN requirement is unequivocal and recognizes no exceptions for 'personally' notifying parents of the proposed change.



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How Is PWN Communicated?

PWN must be written in the **native language** of the parent or other mode of communication used by the parent unless it is not feasible.

If the native language or other mode of communication is not written language, the school will show evidence of steps taken to translate the PWN orally, that the parent understands the content of the notice, and that the written requirements of the notice have been met. 34 CFR 300.503(c)



How Is PWN Communicated?

Case Example: *Adams County Sch. Dist. 55 IDELR 2010 (SEA CO 2010)*

School failed to provide the parent with adequate PWN in Spanish.

The school claimed that the PWN was the IEP, which fulfilled IDEAs PWN requirement, but they failed to do it in a timely manner and in the parents' native language (Spanish).

The IEP was not provided to the parent until 2 months after the IEP meeting and it was not in Spanish.

Failure to provide the PWN in Spanish contributed to the parents' lack of understanding of the school's offer of FAPE. Therefore, parent was denied a meaningful opportunity to participate in decision making regarding her child's IEP.



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How Is PWN Communicated?

Recommendations:

- Avoid acronyms and abbreviations
- Be concise, specific, and objective
- PWN should serve as stand-alone document
- Acknowledge considerations of parent requests
- Review the PWN with the parent if possible
- Document that the PWN was sent to the parent
- Use assertive language (ie. The district *proposes* or the district *refuses...*)
- Avoid using phrases such as “N/A” or “see above”
- Ensure PWN is dated (and that the date is correct)



Formatting and Writing of PWN

- Neither federal nor state special education regulations specify the format in which prior written notice must be provided.
- Any of the following formats are permissible:
 - Formal letter on letterhead
 - Fill in the blank form
 - Use of the IEP
- Neither federal nor state special education regulations require that the PWN indicate who prepared the PWN or provided it to parent.



Case Example: PWN Failed to Comply with Law

Goleta USD OAH No. 2022020266 (January 3, 2023)

April 20, 2021 – parent sent a letter to District requesting a variety of assessments of student.

Parent filed due process alleging, among other things, that the District’s response denying Parent’s request for assessment failed to comply with law regarding PWN.

District argued:

- It sent a letter on April 25, 2021 denying parent’s request for assessment and offering to convene an IEP team meeting to discuss Parent’s concerns. Held a meeting on May 12 to address concerns. Letter enclosed copy of parent rights. Attached agreed upon IEP from January 21.



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Case Example: PWN Failed to Comply with Law

Goleta USD OAH No. 2022020266 (January 3, 2023)

Hearing officer held that letter fell far short of legal requirements of PWN.

1. Letter was in English, not in parent's native language. While parent sometimes corresponded with District in English, her native language was Spanish.
2. Failed to include any explanation or basis for its refusal to assess.
3. Failed to include a description of each assessment procedure, assessment record or report used as a basis for refusal to assess.
4. Attaching IEP to letter was insufficient because PWN did not explain that the IEP was used as a basis to refuse to assess.



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ANY
QUESTIONS
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