

## 902 KAR 30:180. Procedural safeguards.

RELATES TO: KRS 200.672, 20 U.S.C. 1439, 34 C.F.R. 303.400 to 303.460

STATUTORY AUTHORITY: KRS 194A.050, 200.660

NECESSITY, FUNCTION, AND CONFORMITY: KRS 200.660 requires the Cabinet for Health and Family Services to administer all funds appropriated to implement provisions of KRS 200.650 to 200.676, to enter into contracts with service providers, and to promulgate administrative regulations. This administrative regulation establishes procedural safeguards for facilities participating in First Steps, Kentucky's Early Intervention System.

### Section 1. Definitions.

(1) "Consent" means:

(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 consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

(c) The parent understands that the granting of consent is voluntary and may be revoked at any time.

(2) "Native language" means the language or mode of communication normally used by the parent of a child eligible for or participating in First Steps.

(3) "Personally identifiable" means that information includes:

(a) The name of the child, the child's parent, or other family member;

(b) The address of the child;

(c) A personal identifier, such as the child's or parent's Social Security Number; or

(d) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

### Section 2.

(1) In accordance with 34 C.F.R. 303.400 through 303.460, the parents of a child eligible for the Kentucky Early Intervention Program shall be afforded the opportunity to inspect and review records relating to evaluations and assessments, eligibility determinations, the development and implementation of IFSPs, individual complaints dealing with the child, and any other records maintained by First Steps staff about the child and the child's family.

(2) Prior written notice.

(a) Prior written notice shall be given to the parents of an eligible child at least seven (7) days before the Point of Entry (POE) staff or service provider proposes or refuses to initiate or change the identification, evaluation, or placement of the child, or the provision of appropriate early intervention services to the child and the child's family.

(b) The notice shall be in sufficient detail to inform the parents about:

1. The action that is being proposed or refused;

2. The reasons for taking the action;

3. All procedural safeguards that are available to the parent; and

4. The complaint procedures under 34 C.F.R. 303.510-303.512, including a description of how to file a complaint and the required timelines under those procedures.

(c) The written prior notice shall be:

1. Written in language understandable to the general public; and

2. Provided in the native language of the parents, unless it is clearly not feasible to do so.

(d) If the native language or other mode of communication of the parent is not a written language, the POE staff, or designated service provider, shall take steps to ensure that:

1. The notice is translated orally or by other means to the parent in the parent's native language or other mode of communication;

2. The parent understands the notice; and

3. There is written evidence that the requirements of this paragraph have been met.

(e) If a parent is deaf or blind, or has no written language, the mode of communication shall be that normally used by the parent (which may include sign language, Braille, or oral communication).

(3) Parent consent.

(a) Written parental consent shall be obtained before:

1. Conducting the initial evaluation and assessment of a child; and

2. Initiating the provision of early intervention services.

(b) If consent is not given, the POE shall make reasonable efforts to ensure that the parent understands:

1. The nature of the evaluation and assessment or the services available; and

2. That the child will not receive the evaluation and assessment or services unless consent is given.

(5) The parents of an eligible child may determine if they, their child, or other family members will accept or decline any early intervention service, and may decline a service after first accepting it, without jeopardizing other early intervention services.

### Section 3. Representation of Children and Surrogate Parents.

(1) Each POE shall ensure that the rights of an eligible child are protected if:

(a) A parent, as defined in 902 KAR 30:001, Section 1(21), cannot be identified;

(b) The POE, after reasonable efforts, cannot discover the whereabouts of a parent; or

(c) The child is a ward of the state.

(2) If the child is a foster child and does not reside with the child's parents, the POE shall make reasonable efforts to obtain the informed consent of the parent for an initial evaluation. The POE shall not be required to obtain parental consent if:

(a) Despite reasonable efforts, the POE cannot discover the whereabouts of the parent;

(b) The rights of the parents have been terminated; or

(c) The rights of the parents to make educational decisions have been subrogated by a court and the consent for initial evaluation has been given by someone appointed by the judge to represent the child.

(3)(a) If more than one (1) party meets the definition of parent under 902 KAR 30:001, Section 1(21), the biological or adoptive parent shall be presumed to be the parent unless the biological or adoptive parent does not have the legal authority to make educational decisions for the child.

(b) If there is a judicial order that identifies a specific person to act as the parent of a child or to make educational decisions on behalf of a child, the order shall prevail.

(4)(a) A POE shall determine if a child needs a surrogate parent and, if so, shall assign a surrogate parent to the child.

(b) The surrogate parent of the child shall have all the rights afforded parents under 34 C.F.R. Part 303 to make decisions about early intervention issues for a child.

(c) A POE shall ensure the rights of a child are protected by appointing a surrogate parent to make educational decisions for the child if:

1. An individual cannot be identified as a parent;
2. The POE, after reasonable efforts, cannot discover the whereabouts of the parents;
3. The child is a ward of the state; or
4. The child is an unaccompanied homeless child.

(5) The POE shall keep a record of the reasonable efforts made to discover the whereabouts of the parents, including:

- (a) Detailed records of the telephone calls made or attempted and the results of those calls;
- (b) Copies of correspondence sent to the parents and any responses received; and
- (c) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(6) The POE shall have a procedure for selecting surrogates that is approved by the Department of Public Health. The department shall approve a procedure that is established to ensure that a surrogate:

(a) Is not an employee of the Kentucky Department for Public Health, the POE, or any other state agency that is involved in early intervention services or care of the child;

(b) Does not have any personal or professional interest that conflicts with the interests of the child; and

(c) Has knowledge and skills that ensure adequate representation of the child.

(7) A person who is otherwise qualified to be a surrogate parent shall not be considered an employee of the POE solely because he or she is paid by the POE to serve as a surrogate parent.

(8) If a child is an unaccompanied homeless child, appropriate staff of emergency shelters, transitional shelters, or street outreach programs may be appointed as temporary surrogate parents without regard to the criteria listed in subsection (6) of this section until a surrogate parent can be appointed that meets all the requirements of this section.

(9) The POE shall make reasonable efforts to ensure the assignment of a surrogate not more than thirty (30) days after there is a determination by the Point of Entry that the child needs a surrogate.

(10) Responsibilities. A surrogate parent shall represent a child in all matters related to:

- (a) The evaluation and assessment of the child;
- (b) Development and implementation of the child's IFSPs, including annual evaluations and periodic reviews;
- (c) The ongoing provision of early intervention services to the child; and
- (d) Any other rights established under this administrative regulation.

#### Section 4. Mediation.

(1) Each POE shall ensure that procedures are established and implemented to allow parties to disputes involving any matter concerning the identification, evaluation, placement of the child or the provision of appropriate early intervention services to resolve the disputes through a mediation process which, at a minimum, shall be available if a hearing is requested under 34 C.F.R. 303.420.

(2) The POE agency shall use the mediation system established by the Department for Public Health.

(a) Mediation shall be adopted as an option to resolve complaints.

(b) Mediation shall be voluntary and freely agreed to by both parties, and shall not deny or delay a parent's right to a due process hearing to be conducted at any time.

(c) Unless the parent of a child and the cabinet otherwise agree, the child shall continue to receive the early intervention services currently being provided during the interim of any proceeding involving a complaint. If the complaint involves the application for initial services, the child shall receive those services that are not in dispute.

(d) Mediators shall be trained in applicable state and federal law relating to the First Steps program.

(3) Time table for mediation.

(a) Within five (5) working days after a request for mediation is made to the department using a Mediation/Due Process Request Form, the appointment of a mediator shall be made.

(b) Either party may waive the mediation and, if waived, the parents shall be informed by the department within two (2) working days of this decision.

(c) Mediation shall be completed within thirty (30) working days of the receipt by the department of the request for mediation.

(d) At any time during the mediation process, a request for a due process hearing may be initiated.

(e) A copy of the written resolution shall be mailed by the mediator to each party within five (5) working days following the mediation conference. A copy shall also be filed by the mediator with the department. The written resolution shall specify in writing the agreement reached by the parties.

(4) Mediation resolutions shall not conflict with state and federal laws and shall be to the satisfaction of both parties. Satisfaction shall be indicated by the signature of both parties on the written resolution.

(5) Discussions that occur during the mediation process shall be confidential and shall not be used as evidence in any subsequent due process hearing or civil proceeding. The parties to the mediation process shall be required to sign a confidentiality pledge prior to the commencement of the process.

#### Section 5. Due Process Procedures for Parents and Children.

(1)(a) An administrative hearing shall be conducted within fifteen (15) days of receipt of a request for hearing by an impartial hearing officer appointed by the secretary of the cabinet.

(b) The hearing shall be conducted in accordance with the requirements of KRS Chapter 13B.

(c) A recommended decision conforming in content to the requirements of KRS 13B.110 shall be forwarded to the family and the cabinet within ten (10) days of the administrative hearing.

(d) All parties to the appeal shall have five (5) days to file written exceptions to the recommended decision.

(e) A final decision on the recommendation shall be made no later than forty-five (45) days following receipt of the appeal.

(f) Any parent involved in an administrative hearing may:

1. Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to early intervention services for children eligible for the First Steps Program;

2. Present evidence and confront, cross-examine, and compel the attendance of witnesses;

3. Prohibit the introduction of any evidence at the proceeding that has not been disclosed to the parent at least five (5) days before the proceeding;

4. Obtain a written or electronic verbatim transcription of the proceeding; and

5. Obtain written findings of fact and decisions.

(g) Any proceeding for implementing the complaint resolution process established in Section 4 of this administrative regulation shall be held at a time and place that is reasonably convenient to the parent.

(h) Any party aggrieved by the findings and decision regarding an administrative hearing may bring a civil action in state or federal court under 20 U.S.C. 1439(a)(1).

(i) During the pendency of any proceeding involving a hearing under this section, unless the POE and parents of a child otherwise agree, the child shall continue to receive the appropriate early intervention services currently being provided. If the complaint involves an application for initial early intervention services, the child shall receive those services that are not in dispute.

(2) State Complaint Procedures. The procedures established in this subsection shall apply to the Cabinet for Health and Family Services, Department for Public Health as to written complaints submitted pursuant to 34 C.F.R. 303.320 through 303.460.

(a) The complaint shall be submitted on a First Steps Complaint Form and shall include:

1. A statement that the state has violated a requirement of state or federal law; and

2. The facts on which the complaint is based.

(b) The alleged violation shall have occurred not more than one (1) year before the date that the complaint is received by the Department for Public Health unless a longer period is reasonable because:

1. The alleged violation continues for that child or other children; or

2. The complainant is requesting reimbursement or corrective action for a violation that occurred not more than three (3) years before the date on which the complaint is received by the Department for Public Health.

(c) Within sixty (60) calendar days after a complaint is filed, the Department for Public Health shall:

1. Carry out an independent on-site investigation, if the agency determines that an investigation is necessary;

2. Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

3. Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of the Kentucky Early Intervention System;

4. Issue a written decision to the complainant that addresses each

allegation in the complaint and contains:

a. Findings of fact and conclusions; and

b. The reasons for the agency's final decision;

5. Permit an extension of the sixty (60) day time limit only if exceptional circumstances exist with respect to a particular complaint; and

6. Include procedures for effective implementation of the agency's final decision, if needed, including:

a. Technical assistance activities;

b. Negotiations; and

c. Corrective actions to achieve compliance.

(d) If a written complaint is received that is also the subject of a due process hearing or contains multiple issues, of which one or more are part of a due process hearing, the Department for Public Health shall set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. Any issue in the complaint that is not a part of the due process action shall be resolved within the sixty (60) calendar-day timeline using the complaint procedures established in this section.

(e) 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:

a. The hearing decision shall be binding; and

b. The agency shall inform the complainant of that effect.

(f) A complaint alleging a public agency's or private service provider's failure to implement a due process decision shall be resolved by the Department for Public Health.

#### Section 6. Incorporation by Reference.

(1) The following material is incorporated by reference:

(a) First Steps Complaint Form, December 2010; and

(b) Mediation/Due Process Request Form, November 2010.

(2) This material may be inspected, copied, or obtained, subject to applicable copyright law, at the Department for Public Health, 275 East Main Street, Frankfort, Kentucky 40621, Monday through Friday, 8 a.m. to 4:30 p.m.

(23 Ky.R. 3149; eff. 6-16-97; Recodified from 908 KAR 2:180, 10-25-2001; Recodified from 911 KAR 2:180, 5-17-2010.; 37 Ky.R. 538; 1272; 1682; eff. 2-4-2011.)