

STATEMENT OF CONSIDERATION
RELATING TO 707 KAR 1:340

Kentucky Board of Education, Department of Education
(Not Amended After Comments)

I. A public hearing was scheduled on the above regulation for July 22, 2021 at 10:00 a.m., Eastern Time, in the State Board Room, Kentucky Department of Education, 300 Sower Boulevard, 5th Floor, Frankfort, Kentucky but was cancelled when no one registered to attend or attended the hearing.

II. The following individuals submitted written comments:

<u>Name and Title</u>	<u>Agency/Organization/Entity/Other</u>
Judith L. Bradley, Managing Partner	JackBeNimble

III. The following people from the promulgating administrative body responded to written comments:

Name and Title

Gretta Hylton, Associate Commissioner, Office of Special Education and Early Learning
Todd Allen, General Counsel, Office of Legal Services
Ashley Lant, Deputy General Counsel, Office of Legal Services
David Wickersham, Office of Special Education and Early Learning

IV. Summary of Comments and Responses

1) Subject Matter: Statutory authority recommendation.

(a) Comment: The commenter requested the addition of the following language to the Statutory Authority section of the regulation: “to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education.”

(b) Response: The agency has carefully reviewed this comment. KRS 13A.220(4)(e) prescribes the form and content that must follow the words “STATUTORY AUTHORITY” in an administrative regulation and explains that the administrative body shall list all statutes and other enactments authorizing the promulgation of the administrative regulation. Because the language that the commenter recommends be adopted is not a statute or an enactment authorizing the promulgation of the administrative regulation, KDE declines to make the recommended addition.

2) Subject Matter: Parent participation in meetings.

(a) Comment: The commenter requested the addition of language to state that “parent” as used in the regulation means “parent” as defined in 707 KAR 1:002.

(b) Response: The agency has carefully reviewed this comment. In seeking amendment, KDE has not proposed to change the portion of the regulation addressed by this comment. 34 C.F.R. 300.30 expansively defines the word “parent” for the purposes of the Individuals with Disabilities Education Act. Furthermore, 707 KAR 1:002 apply to 707 KAR 1:340 without reference to the definitions chapter.

KRS 13A.120(2)(f) explains that an administrative body may not promulgate a regulation when a statute sets forth a comprehensive scheme of regulation of the particular matter. Because the federal regulation establishes a comprehensive and governing definition, KDE declines to make the recommended addition. No amendments have been made in response to this comment.

3) Subject Matter: Replace “ARC” with “meetings”.

(a) Comment: The commenter recommended the deletion of the acronym “ARC” to establish that parents may participate in other meetings regarding their child.

(b) Response: KDE has carefully considered this comment. In seeking amendment, KDE has not proposed to change the portion of the regulation addressed by this comment. KRS 13A.120(2)(i) explains that agencies may not promulgate an administrative regulation that modifies or vitiates a statute or its intent. Because the procedural safeguards established in federal regulation specifically address individual education program (IEP) team meetings (defined in 707 KAR 1:002(1)(1) as “admissions and release committee” or “ARC”), KDE may not modify the federal statute by expanding procedural safeguards to other meetings not protected by federal law. No amendments have been made in response to this comment.

4) Subject Matter: Clarify acronym “ARC” as “Admissions and Release Committee”.

a) Comment: The commenter recommended that defining an acronym during its first use would be helpful to a reader who may not be familiar with Kentucky terminology.

b) Response: KDE has carefully considered this thoughtful comment. In seeking amendment, KDE has not proposed to change the portion of the regulation addressed by this comment. 707 KAR 1:340 is Kentucky’s Procedural Safeguards regulation. 707 KAR 1:002 provides definitions to be used in chapter 707 of the Kentucky administrative regulations regarding special education and provides a definition, in 707 KAR 1:002(1)(1) for “admissions and release committee” or “ARC”. Because the clarifying language already appears in this chapter of the Kentucky Administrative Regulations, KDE declines to repeat it here. No amendments have been made in response to this comment.

5) Subject Matter: The conduct of an independent educational evaluation.

a) Comment: The commenter recommended that the regulation include language specifying that an independent educational evaluation must be “conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.”

b) Response: KDE has carefully considered this comment. In seeking amendment, KDE has not proposed to change the portion of the regulation addressed by this comment. 707 KAR 1:002 provides definitions to be used in chapter 707 of the Kentucky administrative regulations regarding special education and provides a definition, in 707 KAR 1:002(1)(33), for independent educational evaluations. Because the clarifying language already appears in this chapter of the Kentucky Administrative Regulations, KDE declines to repeat it here. No amendments have been made in response to this comment.

6) Subject Matter: Independent educational evaluation: Description of hearing officer.

a) Comment: The commenter recommended that KDE not use the term “due process hearing officer” and instead use the term “hearing officer”, as the IDEA does not refer to ‘due process hearing officers’.”.

b) Response: KDE has carefully considered this comment. In seeking amendment, KDE has not proposed to change the portion of the regulation addressed by this comment. 34 C.F.R. 300.502 addresses independent educational evaluations. 34 C.F.R. 300.502(b)(2) explains that if a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either (i) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) ensure that an independent educational evaluation is provided at public expense unless the public agency demonstrates in a hearing under 34 C.F.R. 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

Option (i) dictated by 34 C.F.R. 300.502 explicitly requires the filing of a due process complaint, an independent educational evaluation, or a hearing under 34 C.F.R. 300.507, which addresses filing a due process complaint. Any dispute, then, is resolved by forfeit or by a due process complaint or hearing. It follows that use of the term “due process hearing officer” is consistent with 34 C.F.R. 300.502. Because the regulation does not conflict with the IDEA, KDE declines to make the recommended change.

7) Subject Matter: ARC meeting notice: other invited individuals.

a) Comment: The commenter recommended that KDE change notice provisions to provide that parents be advised “that they may, at their discretion, invite other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate” to the ARC meeting.

b) Response: KDE has carefully considered this comment, which regards Section 3 of the regulation. The regulation provides that the meeting notice “Inform parents of the ability to invite other individuals who have knowledge or special expertise regarding the child as appropriate”. 34 C.F.R. 300.322(b)(ii) requires that the notice inform the parents of provisions relating to the participation of other individuals on the IEP team who have knowledge or special expertise about the child.

Kentucky has addressed ARC membership in 707 KAR 1:320(3), which provides that a local education agency must ensure that the ARC for each child with a disability includes “[a]n individual who has knowledge or special expertise regarding the child at the discretion of the parent or the LEA” and “[related services personnel, as appropriate]”. While the comment is well

taken, it is addressed in a different regulation and KDE declines to adopt repetitive text in this regulation.

8) Subject Matter: ARC meeting notice: provisions regarding postsecondary goals and transition services.

a) Comment: The commenter requested the addition of parentheses to clarify the meaning of “if determined appropriate by the ARC”.

b) Response: KDE has carefully considered this comment. 34 C.F.R. 300.322(b)(2) governs information to be provided to parents when postsecondary goals and transition services are to be discussed. In addressing the issue, the federal regulation uses the phrase: “[f]or 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...”

This regulation addresses the issue using this phrase: “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 ARC...” The only difference between the federal provision and the Kentucky provision is the replacement of “IEP Team” with “ARC”. Because the provisions are otherwise identical, and because 707 KAR 1:002(1)(1) explains that Kentucky uses ARC to mean the group of individuals responsible for developing, reviewing, or revising an individual education program (IEP) for a child with a disability. KDE declines to make the requested change.

9) Subject Matter: ARC meeting notice: clarifying whether all meetings of a child 16 or older will relate to postsecondary goals and transition services.

a) Comment: The commenter recommended that the notice replace the word “that” with “whether” or “if” the specific meeting regards postsecondary goals and transition services.

b) Response: KDE has carefully reviewed this comment. 34 C.F.R. 300.322(b)(2) governs information to be provided to parents when postsecondary goals and transition services are to be discussed. In addressing the issue raised in this comment, the federal regulation uses the phrase: “[f]or 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-(i) indicate-(A) That a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the child...”

Because the governing federal regulation uses the word “that”, this regulation mirrors that use, and KRS 13A.120(2)(i) prohibits KDE from promulgating a regulation that modifies the intent of a statute, KDE declines to make the requested change.

10) Subject Matter: ARC meeting notice: addition of other agencies.

a) Comment: The commenter requested a change of invitees from “[a]ny other agency that will be invited to send a representative” to “any other agency likely to be responsible for providing or paying for transition services...”

b) Response: KDE has carefully considered this comment. 34 C.F.R. 300.322(B)(2)(i)(B)(ii) explains that “[f]or 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...[i]dentify any other agency that will be invited to send a representative.” Because this regulation and 34 C.F.R. 300.322(B)(2)(i)(B)(ii) use the same phrase to describe this class of possible invitees, and because KRS 13A.120(2)(i) prohibits KDE from promulgating a regulation that modifies the intent of a statute, KDE declines to make the requested change.

11) Subject Matter: Representation of Children.

a) Comment: The commenter requested the addition of language to permit a child who has reached the age of majority and has not been declared incompetent but does not have the ability to provide informed consent with respect to their educational program to appoint a parent or other appropriate individual to represent their educational interests.

b) Response: KDE has carefully considered this comment. In seeking amendment, KDE has not proposed to change the portion of the regulation addressed by this comment. 34 C.F.R. 300.520 governs the transfer of parental rights at the age of majority. That federal regulation establishes, in section (a), a General rule and in section (b) a Special rule.

The General rule explains that “[a] state may provide that, when a child with a disability reaches the age of majority under State law that applies to all children (except for a child with a disability who has been determined to be incompetent under State law...[a]ll rights accorded to parents...transfer to the child.”

The Special rule is narrower. If, under State law, a child who has reached the age of majority but has not been determined to be incompetent can be determined not to have the ability to provide informed consent with respect to the child’s educational program, then a state must establish procedures for appointing a parent or, if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of the child’s eligibility.

So, the general rule applies unless state law provides a mechanism for a determination that a child, not determined to be incompetent, may yet be determined to lack the ability to provide informed consent.

In Kentucky, matters of legal incompetence and disability are vested, not in the Kentucky Department of Education, but in District Courts under KRS Chapter 387. Under KRS 387.520(1), District Courts shall have exclusive jurisdiction over all proceedings involving a determination of partial disability or disability. KRS 387.510 includes definitions for “disabled” and “partially disabled” and assigns those determination based on an inability to make informed decisions or to have the capacity to manage personal affairs. Notably, these definitions may be applied to individuals aged seventeen years of age or older. At first blush, this suggests that the Special rule, as sought by the commenter, would apply in lieu of the General rule.

However, a close reading of the Kentucky statutes leads to a different conclusion. Under KRS 387.510, a person may be partially or wholly disabled if they are unable to make informed decisions with respect to personal affairs to such an extent that they lacks the capacity to provide for their physical health and safety, including but not limited to health care, food, shelter,

clothing, or personal hygiene; or are unable to make informed decisions with respect to his financial resources to such an extent that they lack the capacity to manage their property effectively by those actions necessary to obtain, administer, and dispose of both real and personal property. Notably absent from this list is decisions about educational programming.

Because Kentucky's laws on partial legal disability and legal disability do not address educational programming decisions, it appears that Kentucky's state law does not provide a mechanism for a determination that a child, not determined to be incompetent, may yet be determined to lack the ability to provide informed consent. Accordingly, the General rule applies: when a child with a disability reaches the age of majority under State law that applies to all children (except for a child with a disability who has been determined to be incompetent under State law)...[a]ll rights accorded to parents...transfer to the child."

KRS 13A.120(2)(g) and (h) provide that an administrative body may not promulgate regulations on any matter that is not clearly within the jurisdiction of the administrative body, or on any matter that is beyond the statutory authority of the body or clearly authorized by statute. As noted, Kentucky's provisions of law regarding partial legal disability and legal disability are vested in the District Courts and in the judicial branch of government. For these reasons, KDE declines to make the suggested addition.

12) Subject Matter: State complaint procedures: filers of complaints.

a) Comment: The commenter recommended replacing the word "parent" with "organization or individual" or with "complainant", expressing concern that federal regulations do not specify that only a parent may file a state complaint or engage in mediation.

b) Response: KDE has carefully considered this comment. In seeking amendment, KDE has not proposed to change the portion of the regulation addressed by this comment. The commenter is correct that 34 C.F.R. 300.151 requires each state educational agency to receive complaints not only from parents, but "any complaint" that is sufficiently detailed and is filed by an organization or individual. However, the federal regulations distinguish between filing procedures and state complaint procedures. 34 C.F.R. 300.152 establishes minimum state complaint procedures. 34 C.F.R. 300.152(a)(3)(ii) requires the state education authority to include "[a]n opportunity for a parent who has filed a complaint and the public agency to voluntarily engage in mediation..." While standing to file a complaint is broadly applied, mediation opportunities are limited to parents. Because the regulation aligns with the federal regulation, and because KRS 13A.120(2)(e), (f), and (i) prohibit the agency from promulgating a regulation where a similar procedure is established, when a statute sets forth a comprehensive scheme of regulation of the particular matter, or when the regulation would modify a statute, KDE declines to make the requested addition.

13) Subject Matter: State complaint procedures: allegations regarding a specific child.

a) Comment: The commenter recommended adding language to provide that information about the name and residence of the child, or contact information if the child is homeless, and the name of the school the child is attending is only required if the complaint alleges violations with respect to a specific child.

b) Response: KDE has carefully considered this comment. In seeking amendment, KDE has not proposed to change this portion of the regulation. 34 C.F.R. 300.153 explains federal requirements for filing a complaint. 34 C.F.R. 300.153(a) requires that a complaint be signed. 34 C.F.R. 300.153(b) requires that the complaint include a statement that a public agency has violated the law, the facts on which the statement is based; and the signature and contact information for the complainant. 34 C.F.R. 300.153(4) explains the additional information required if the complaint alleges violations with respect to a specific child. The federal regulation, then, permits the filing of a complaint alleging violations that do not regard a specific child. This regulation does not contradict those directives. Because, under KRS 13A.120(2)(e) and (f) the agency may not promulgate a regulation where a similar procedure is established in statute and when a statute sets forth a comprehensive scheme of regulation, KDE declines to make the recommended change.

Summary of Statement of Consideration and
Action Taken by Promulgating Administrative Body

The public hearing on this administrative regulation was cancelled; however, written comments were received. The promulgating agency will not amend the regulation in response to comments.