



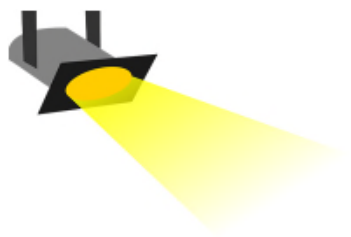
Fagen Friedman & Fulfroft LLP

Spotlight On Practice



Prior Written Notice

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What We'll Focus On. . . .

- ❑ Why Do We Provide a PWN?
- ❑ When Is a PWN Required (Or Not Required)?
- ❑ What Must Be Included in a PWN?
- ❑ What Is the Timeline for Providing a PWN?
- ❑ In What Format Must a PWN Be Provided?
- ❑ What Are the Consequences of Failing to Provide a PWN or Providing an Insufficient PWN?



I. Why Do We Provide a PWN?



Purpose of PWN

- To assist parents in being able to meaningfully participate in their child's education
- To "ensure that a parent understands the special education and related services that a [district] has proposed or refused to provide to a student"

(J.W. v. Fresno Unified School Dist. (9th Cir. 2010) 626, F.3d 431; Letter to Boswell (OSEP 2007) 49 IDELR 196)



Other Purposes of PWN

- To provide comprehensive documentation of proposed and refused actions
- To ensure district and parents fully understand student's educational program
- To ensure that informed parental consent is obtained, as necessary

(Virginia Department of Education, Guidance on Prior Written Notice in the Special Education Process (May 2013))



II. When Is a PWN Required (Or Not Required)?



Legal Standard

- PWN must be given to parents within reasonable time before district proposes or refuses:
 - To initiate or change identification, assessment, or educational placement (including graduation with a standard or advanced diploma) of child; or the provision of FAPE for child

(34 C.F.R. § 300.503(a); Ed Code, § 56500.4, subd. (a))



Legal Standard (cont'd)

- PWN requirement applies whether or not parent has agreed to proposed action
- District must provide PWN regardless of who initiated action to be taken by district

(Letter to Lieberman (OSEP 2008) 52 IDELR 18)



Examples: PWN Required

- Consent for assessment/reassessments
- Refusal to assess
- Refusal to provide IEE
- Finding of ineligibility
- Identification of, or change, in disability category(ies)
- Initial placement determination
- Change of placement/refusal to change placement
- Disciplinary change of placement



Examples: PWN Required

- Proposed IEP
- Addendum or revisions to IEP
- Refusal to provide instructional methodology requested by parents
- Changes in services/accommodations/modifications
- Changes in transportation required for FAPE
- Parental revocation of consent
- Graduation with regular high school diploma
- Termination of services
- Transfer of rights at age of majority



Examples: PWN Not Required

- Changing teacher/provider assignment
- Changing classroom assignment
- Minor curriculum adjustments
- Administration of state and/or district level assessments
- General screenings and observations conducted for instructional purposes



Examples: PWN Not Required

- Evaluating progress on goals
- Use of intervention strategies
- Certain short-term disciplinary removals
- Following meetings that do not result in proposals/refusals related to identification, assessments, placement or provision of FAPE
- **Note:** In some circumstances, districts might want to err on side of caution and provide PWN even if not legally obligated to do so



No Consent to Subsequent Services

- Education Code section 56346 imposes specific obligations on districts when parents do not consent to subsequent IEP after previously consenting to provision of services or when parents consent to provision of certain services but not to all components of a proposed IEP
 - PWN alone is not sufficient (departure from IDEA rules)
 - District must implement components to which parent has consented and file for due process if component(s) to which parent does not consent is necessary to provide FAPE



Case Illustrations

Capistrano Unified School Dist. (OAH 2017)

- Changing math class from online to classroom setting did not require PWN
- But District denied FAPE by not providing PWN when it refused to fund classes at private school

Westminster School Dist. (OAH 2015)

- No PWN required for teacher's decision to make minor adjustments in classroom procedure (extending due date on two assignments)



Case Illustrations (cont'd)

Menifee Union School Dist. (OAH 2017)

- Formal PWN was not required to respond to Parent's request for new speech therapist based on perceived hostility

Victor Valley Union High School Dist. (OAH 2015)

- District was not required to provide Parent with PWN regarding change of location of County's moderate/severe program due to campus closure



Case Illustrations (cont'd)

Palo Alto Unified School Dist. (OAH 2018)

- Because it did not take any action, District was not required to provide PWN in response to demands made by Parent

Los Angeles Unified School Dist. (OAH 2012)

- Failure to provide PWN prior to graduation decision was procedural error, but did not deny FAPE because Parent's knew of District's intent to graduate Student

Tustin Unified School Dist. (OAH 2006)

- No PWN needed to respond to ABA provider's recommendations for additional services



When Is PWN Required?

Practical Essentials

- Staff training is important
 - Conduct periodic training for relevant personnel on what PWN is, when it is needed and why it is important for both district and parents

- Do not overuse simply to document discussions
 - If IEP is being developed over course of several meetings and no decisions have yet been made, do not provide PWN after each meeting while IEP process is still ongoing merely as a means of documenting what took place



When Is PWN Required?

Practical Essentials

- Know how to respond to revocation of consent
 - Provide PWN “promptly” upon receipt
 - Discontinue services “reasonable” time after providing PWN
 - Detail consequences of revocation (e.g., student will not receive services of any kind, no IDEA disciplinary protections, etc.)
- Remember to provide PWN prior to graduation
 - Required for regular diploma; recommended for certificate of completion



III. What Must Be Included in a PWN?



7 Required Components of PWN

1. Description of action proposed or refused by district

- ❑ Law does not prohibit district from including all proposed or refused actions in single PWN, provided that PWN describes each action that was proposed or refused

2. Explanation of why district proposes or refuses to take the action

- ❑ If there are several reasons for making decision (or refusing parental request), include each reason



7 Required Components of PWN

3. Description of each assessment procedure, assessment, record or report district used as basis for the proposed or refused action

- ❑ Should also include, where relevant, attendance reports, report cards, vocational assessments, teacher reports, RTI summaries, etc.

4. Statement that parents have protection under IDEA procedural safeguards and means by which they can obtain description of safeguards

- ❑ If PWN is result of referral for initial assessment, district must provide procedural safeguard notice with PWN



7 Required Components of PWN

5. Sources for parents to contact to obtain assistance in understanding provisions of IDEA

- ❑ District contact info, CDE, SELPA

6. Description of other options considered by IEP team and reasons why those options were rejected

- ❑ If no other options were considered, explain why

7. Description of other factors that are relevant to proposal or refusal by district

- ❑ Examples can include health or behavioral concerns, language or communication issues, environmental factors



PWN Language Requirements

- PWN must be provided in language understandable to general public, and also in native language of parent, unless it is clearly not feasible to do so
 - If native language or other mode of communication used by parent is not a written language, district must take steps to ensure that:
 - Notice is translated orally or by other means in native language or other mode of communication
 - Parent understands content of notice; and
 - There is written evidence that above two requirements are met

(34 C.F.R. § 300.503(c))



PWN Language Requirements

- Financial cost of compliance should not excuse district from providing PWN in parents' native language
- OAH has consistently stated that parents have right to receive PWN in their native language and any assertion by districts that they have to "ask" is "misplaced"

(71 Fed. Reg. 46692 (Aug. 14, 2006); Student v. Sacramento City Unified School Dist. (OAH 2014) Case No. 201306056234)



Content of PWN: Practical Essentials

- Capture all relevant facts
 - Include and describe all facts related to decision
 - Include background for context (e.g., “This letter is in response to your email in which . . . ”)
- Avoid “legalese” and keep abbreviations to minimum
 - Remember that law requires PWN to be in language understandable to general public
 - Spell out common abbreviations and acronyms, at least on first reference



Content of PWN: Practical Essentials

- Not too long, not too short
 - Refrain from leaving blanks or using “N/A”
 - But too much detail might be damaging at due process
- Proofread for accuracy
 - Fix mistakes or typos by sending “corrected” PWN



IV. What Is the Timeline for Providing a PWN?



Reasonableness Standard

- PWN must be provided within “reasonable time” of proposed or refused action
- Law does not define “reasonable”
 - USDOE: What is “reasonable” depends on specific circumstances as long as parents have enough time to consider and respond
- Other timelines might apply
 - 15-day timeframe to respond to assessment request
 - 10-days for response to due process complaint

(34 C.F.R. § 300.503(a); Ed. Code, § 56500.4; 71 Fed. Reg. 46691 (Aug. 14, 2006); Letter to Chandler (OSEP 2012) 59 IDELR 110)



Case Illustration

Los Angeles Unified School Dist. (OAH 2012)

- District responded to Parent's request for NPS placement by offering to conduct assessment so that it could make informed decision
- District contended it was entitled to reserve its decision pending completing of assessment and, since Parent never signed assessment plan, it was not required to provide PWN
- ALJ disagreed: "District cannot avoid its responsibility to inform [Parent] within a reasonable time of whether it intended to grant her request for change in placement"



Before or After IEP Meeting?

- PWN documents decisions made by district and is intended to give parents adequate notice before decisions are implemented
- Providing PWN in advance of – or in lieu of – IEP team meetings could suggest that district's decisions were made without parent input (i.e., predetermined)

(J.G. v. Douglas County School Dist. (9th Cir. 2008) 552 F.3d 786; 71 Fed. Reg. 46691 (Aug. 14, 2006))



Case Illustrations

Folsom Cordova Unified School Dist. (OAH 2014)

- Parents claimed District denied FAPE by not sending PWN, in advance of IEP meeting, of its intent to exit Student
- ALJ: No exiting decision was made until meeting, so District could not have sent PWN until after meeting took place

Fresno Unified School Dist. (OAH 2014)

- District sent PWN purporting to change Student's placement to different adult transition program
- District denied FAPE by not convening IEP meeting
- New placement was substantially different from District's prior offer and could not be accomplished through PWN



Timeline for PWN: Practical Essentials

- Document parental receipt
 - Law does not require districts to obtain written receipt of confirmation that parents have received PWN
 - But confirmation of receipt is best practice for proof that the PWN was provided within “reasonable time”
- Avoid appearance of predetermination
 - Avoid sending PWN prior to IEP meeting
 - Do not provide staff with draft of proposed PWN in advance of meeting



Timeline for PWN: Practical Essentials

- “Reasonable time” does not mean “immediately”
 - No obligation to send PWN immediately after receiving parent’s request or immediately following IEP meeting
 - Law allows “reasonable time” to contemplate and prepare thorough and compliant PWN
- But do not wait too long
 - Do not postpone issuing PWN while trying to “work it out” with parents
 - This can lead to potential FAPE violation



V. In What Format Must a PWN Be Provided?



In Writing

- PWN, by its definition, must always be in writing
 - Law does not provide any format requirements as long as PWN is in writing
- Providing parents with verbal notice as substitute for PWN does not fulfill IDEA requirements, regardless of whether verbal notice is substantively proper

(34 C.F.R. § 300.503; Ed. Code, § 56500.4; Union School Dist. v. Smith (9th Cir. 1994) 15 F.3d 1519, cert. denied, (1994) 513 U.S. 965)



IEPs and Assessment Plans as PWN

- USDOE: Nothing in IDEA prohibits district from using IEP as PWN so long as document provided to parents meets all legal content requirements
- OAH has held that assessment plan can serve as PWN provided content requirements are met

(71 Fed. Reg. 46540, 46691 (Aug. 14, 2006); Student v. San Diego Unified School Dist. (OAH 2018) Case No. 2017100067)



Case Illustrations

Goleta Unified School Dist. (OAH 2017)

- District was not required to send separate PWN after IEP meeting because it was not obligated to repeat its position that Parent's placement request was not LRE
- IEP document fully reflected the consideration of Parents' placement request and met all other PWN requirements

A.B. v. San Francisco USD (N.D. Cal. 2008)

- District did not have to respond via PWN to Parent's letters concerning placement at private camp after District had developed IEP, which satisfied PWN, offering SDC placement



Case Illustrations (cont'd)

Sacramento School Dist. (OAH 2014)

- IEP did not provide “plain language” explanation of why District refused to retain Student in elementary school

Tehachapi Unified School Dist. (OAH 2015)

- IEP did not qualify as PWN because it did not provide basis of denial of Parent’s request for behavioral assessment

Los Angeles Unified School Dist. (OAH 2015)

- Regardless of whether IEP was sufficient to serve as PWN of District’s refusal to place Student at NPS, no denial of FAPE resulted because Parents were aware of District’s position



Format of PWN: Practical Essentials

- Do not “cut and paste”
 - If sending letter, avoid taking shortcuts by copying from PWNs sent to parents of other students
 - Could damage relations with parents and compromise privacy (FERPA)

- Ensure IEP incorporates all required information
 - Description of other options considered
 - Information regarding procedural safeguards and sources for parents to contact in obtaining assistance



VI. What Are the Consequences of Failing to Provide a PWN or Providing an Insufficient PWN?



Consequences of Failing to Provide PWN (or Insufficient PWN)

- Failing to provide PWN (or providing untimely or insufficient PWN) is procedural violation
- Results in denial of FAPE only if:
 - Impeded student's right to FAPE;
 - Significantly impeded parent's opportunity to participate in decision-making process; or
 - Caused deprivation of educational benefits

(W.G. v. Board of Trustees of Target Range School Dist. No. 23 (9th Cir. 1992) 960 F.2d 1479; Ed. Code, § 56505; 20 U.S.C. § 1415(f)(3))



Consequences of Failing to Provide PWN (or Insufficient PWN)

- Potential remedies when violation rises to level of denial of FAPE:
 - Reimbursement for private placement or privately obtained services
 - May include transportation costs for both parents and student
 - Compensatory education
 - Can include payment for specific services student requires due to missed educational opportunity
 - Can include continued funding of private placement

(Ed. Code, § 56175; 34 C.F.R. § 300.148; 34 C.F.R. § 300.516(c)(3))



Consequences of Failing to Provide PWN (or Insufficient PWN)

- Potential remedies when violation rises to level of denial of FAPE:
 - Order requiring modification of district practices or staff training
 - E.g., three hours of training to all staff regarding “the need to provide [a PWN] of any proposed changes to, or refusals to change, a student’s placement”
 - Attorney fees when parents are prevailing party

(Student v. Capistrano Unified School Dist. and Capistrano Unified School Dist. v. Student (OAH 2017) Case Nos. 2016100466 and 2017030402, 117 LRP 24357)



Take Aways . . .



Mastering essentials of what triggers PWN and how PWN should be constructed is crucial

- Provides clear record of district's decision-making process
- Helps ensure parents understand rationale by which such decisions were made, and all factors that were considered in making them



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