

Special Education Due Process Procedures - Fact Sheet

This document provides general information regarding due process procedures. For additional information, please review the Special Education Dispute Resolution Manual. This can be found on the Office for Dispute Resolution (ODR) website (www.odr-pa.org) or a hard copy will be mailed to interested parties upon request, by calling ODR at 1-800-222-3353.

The parent or local educational agency (LEA) may request a due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education (FAPE) by filing a "Due Process Complaint Notice". A due process hearing will not proceed until all required information is provided and procedures followed.

Timeline for requesting Due Process. The parent or LEA must request a due process hearing through the filing of a Due Process Complaint Notice within two (2) years of the date the parent or the LEA knew or should have known about the alleged action that forms the basis of the Due Process Complaint Notice.

There are limited exceptions to this timeline. This timeline will not apply to the parent if the parent was prevented from requesting the due process hearing due to the specific misrepresentations by the LEA that it had resolved the problem forming the basis of the Due Process Complaint Notice; or if the LEA withheld information from the parent which was required to be provided to the parent.

Service of A Due Process Complaint Notice. A copy of the Due Process Complaint Notice must be sent to the other party and, at the same time, to the Office for Dispute Resolution.

Contents of A Due Process Complaint Notice. The Due Process Complaint Notice must contain, at a minimum, the following information:

1. The name of the child, the address where the child lives, and the name of the school the child is attending;
2. If the child or youth is homeless, available contact information for the child, and the name of the school the child is attending;
3. A description of the nature of the problem, including facts relating to such problem; and
4. A proposed resolution of the problem to the extent known and available to the party filing the Notice.

Challenging Sufficiency of the Due Process Complaint Notice. The Due Process Complaint Notice will be considered to be sufficient unless the party receiving it notifies the Hearing Officer and the other party in writing within fifteen (15) days of receipt that the receiving party believes the Notice does not meet the requirements listed above.

Response to Complaint Notice. If the LEA has not sent a prior written notice (NOREP) to the parent regarding the subject matter contained in the parent's Due Process Complaint Notice, the LEA must send to the parent, within ten (10) days of receiving the Due Process Complaint Notice, a response including the following information: an explanation of why the LEA proposed or refused to take the action raised in the parent's Due Process Complaint Notice; a description of other options the Individualized Education Program (IEP) Team considered, and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report the LEA used as the basis for the proposed or refused action; and a description of the factors that are relevant to the LEA's proposal or refusal.

Filing this response to the parent's Due Process Complaint Notice does not prevent the LEA from challenging the sufficiency of the Due Process Complaint Notice. If the LEA has already sent prior notice (NOREP) to the parent, or it is the parent receiving the Due Process Complaint Notice, then a response to the Due Process Complaint Notice must be sent to the other side within ten (10) days of receipt of the notice. The response should specifically address the issues raised in the Due Process Complaint Notice.

Hearing Officer Determination of Sufficiency of A Due Process Complaint Notice. Within five (5) days of receiving a party's challenge to the sufficiency of the Due Process Complaint Notice, the Hearing Officer must make a determination, based solely on the information contained within the Complaint Notice, whether the notice meets requirements. The Hearing Officer must immediately notify both parties in writing of his or her determination.

Amended Due Process Complaint Notice. Either the parent or a LEA may amend its Due Process Complaint Notice only if: the other party consents in writing to the amendment and is given the opportunity to resolve the issues raised in the Due Process Complaint Notice through a preliminary meeting/resolution session; or the Hearing Officer grants permission for the party to amend the Due Process Complaint Notice. However, the Hearing Officer may grant this permission no later than five (5) days before a due process hearing occurs.

Subject Matter of the Hearing. The party requesting the due process hearing is not permitted to raise issues at the due process hearing that were not raised in the Due Process Complaint Notice (or Amended Due Process Complaint Notice) unless the other party agrees otherwise.

Resolution Session (applicable to parent requests for due process only). Before a due process hearing will take place, the LEA must convene a resolution meeting, unless both the parent and LEA agree in writing to waive it or agree to use mediation in lieu of the resolution meeting. The purpose of the meeting is to afford the LEA the opportunity to resolve the dispute without the need for a due process hearing. The law requires the relevant member or members of the Individualized Education Program (IEP) Team who have specific knowledge of the facts identified in the Due Process Complaint Notice to attend the meeting. The resolution meeting must be convened within fifteen (15) days of the LEA receiving the parent's Due Process Complaint Notice. A representative of the LEA who has decision-making authority must be present at this meeting. The LEA may not have an attorney attend the meeting unless the parent is also accompanied by an attorney. At the meeting, the parent will discuss the Due Process Complaint Notice, and the LEA will be provided the opportunity to resolve the Due Process Complaint Notice.

If both parties believe the use of a neutral third party will increase the likelihood of reaching agreement at the resolution meeting, the Office for Dispute Resolution (ODR) will send a facilitator upon request. There is no charge to either party for the use of the facilitator.

If the parent and LEA resolve the issues in the Due Process Complaint Notice at the resolution meeting, they must put the agreement terms in writing, and both the parent and a representative of the LEA who has the authority to bind the LEA must sign the agreement. The agreement is a legally-binding document and may be enforced by a court.

Either the parent or LEA may void the agreement within three (3) business days of the date of the agreement. After three (3) days, the agreement is binding on both parties.

Administrative Matters at Preliminary Meetings, Mediation and Due Process. When carrying out administrative matters such as scheduling, exchange of witness lists, and status conferences, the parent and LEA may agree to use alternative means of meeting participation, such as videoconferences and conference calls. The format for any of these activities involving the hearing officer will, to the extent such falls within his or her discretion, be decided by the hearing officer.

Timeline for Completion of Due Process Hearing. If the LEA has not resolved the Due Process Complaint Notice within thirty (30) days of receiving it, or within thirty (30) days of receiving the Amended Due Process Complaint Notice, the due process hearing may proceed and applicable timelines commence. The timeline for completion of due process hearings is forty-five (45) days, unless the Hearing Officer grants specific extensions of time at the request of either party.

Disclosure of Evaluations and Recommendations. No less than five (5) business days prior to a due process hearing, each party must disclose to all other parties all evaluations completed by that date, all recommendations based on those evaluations, as well as all other documents and witnesses, that the offering party intends to introduce or call at the due process hearing. Failure to disclose this information may result in a Hearing Officer prohibiting the party from introducing the information at the hearing unless the other party consents to its introduction.

Due Process Hearing Rights. Generally, special education due process hearings for children with disabilities, or thought to be children with disabilities, must be conducted and held in the LEA at a place and time reasonably convenient to the parent and child involved. The hearing must be an oral, personal hearing and must be closed to the public unless the parent requests an open hearing. If the hearing is open, the decision issued in the case, and only the decision, will be available to the public. If the hearing is closed, the decision will be treated as a record of the child and may not be available to the public. The decision of the Hearing Officer must include findings of fact, discussion, and conclusions of law. Although technical rules of evidence will not be followed, the decision must be based upon the substantial evidence presented at the hearing. A written, or at the option of the parent, electronic verbatim record of the hearing will be provided to the parent at no cost to the parent. Parent may be represented by legal counsel, and/or accompanied to and advised at the hearing by individuals with special knowledge or training with respect to the problems of children with disabilities. Parents or parent representatives must be given access to educational records, including any tests or reports upon which the proposed action is based. A party has the right to compel the attendance of and question witnesses who may have evidence upon which the proposed action might be based. A party has the right to present evidence, witnesses, and to confront and cross-examine opposing witnesses, which includes the presentation of expert medical, psychological or educational testimony.

Hearing Procedures. The hearing officer assigned will inform the parties about procedural matters related to the hearing, and matters relating to hearing management that are within his or her discretion.

Decision of Hearing Officer. A decision made by a Hearing Officer must be made on substantive grounds, based upon a determination of whether the child received a free appropriate public education (FAPE). In disputes alleging a procedural violation, a Hearing Officer may find that a child did not receive a free appropriate public education (FAPE) only if the procedural inadequacies impeded the child's right to a free appropriate public education (FAPE); significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a free appropriate public education (FAPE) to the parent's child; or caused a deprivation of educational benefits. A Hearing Officer may still order a LEA to comply with procedural requirements even if the Hearing Officer determines that the child received a free appropriate public education (FAPE). The parent may still file a Complaint with the Bureau of Special Education regarding procedural violations.

Civil Action. Either the parent or LEA who disagrees with the findings and decision of the Hearing Officer has the right to file an appeal in state or federal court. Sometimes the issues in a due process case deal not only with special education issues, but also with a child's status and/or claim as a gifted child. In that instance, the final order of the Hearing Officer -- to the extent it deals with issues of giftedness -- can only be appealed to Commonwealth Court. For all other appeals, the party filing an appeal is encouraged to seek legal counsel to determine the appropriate court with which to file an appeal. A party has ninety (90) days from the date of the Hearing Officer's decision to file an appeal in federal court. While this time period for so appealing to Pennsylvania Commonwealth Court is likely the same, since it is unclear whether state rules seeking to establish a uniform thirty (30) day period for filing appeals to that Court apply, a party appealing to it may wish to do so in this shorter time frame.

Attorney's Fees. A court, in its discretion, may award reasonable attorney's fees as part of the costs: to a prevailing party who is the parent of a child with a disability; to a prevailing party who is a State Educational Agency or LEA against the attorney of the parent who files a Due Process Complaint Notice or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of the parent who continued to litigate after the litigation clearly became frivolous, unreasonable or without foundation; or to a prevailing State Educational Agency or LEA against the attorney of the parent, or against the parent, if the parent's Due Process Complaint Notice or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation. Fees awarded will be based on rates prevailing in the community in which the action or proceeding arose for the kind and quantity of attorney services furnished.

The federal law imposes certain requirements upon the parent and LEA and in some circumstances may limit attorney's fee awards. Parents should consult with their legal counsel regarding these matters. The following rules apply: Attorney's fees may not be awarded and related costs may not be reimbursed in any action or proceeding for services performed subsequent to the time of a written offer of settlement to the parent if the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedures, or, in the case of an administrative hearing, at any time more than ten (10) days before the proceeding begins; the offer is not accepted within ten (10) days; and the court finds that the relief finally obtained by the parent is not more favorable to the parent than the offer of settlement. An award of attorney's fees and related costs may be made to the parent who is the prevailing party and who was substantially justified in rejecting the settlement offer. Attorney's fees may not be awarded relating to any meeting of the Individualized Education Program (*IEP*) team unless the meeting is convened as a result of an administrative proceeding or judicial action. A due process resolution session is not considered to be a meeting convened as a result of an administrative hearing or judicial action, nor an administrative hearing or judicial action for purposes of reimbursing attorney's fees. The Court may reduce the amount of any attorney's fee award when:

the parent, or the parent's attorney, during the course of the action or proceeding unreasonably protracted the final resolution of the controversy; the amount of the attorney's fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation and experience; the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or the attorney representing the parent did not provide to the local educational agency the appropriate information in the Due Process Complaint Notice. These reductions do not apply in any action or proceeding if the court finds that the State or LEA reasonably protracted the final resolution of the action or proceeding.

Child's Status during Administrative Proceedings. When a hearing officer agrees with the child's parent that a change of placement is appropriate, the child is afforded that placement even if the LEA files an appeal of the decision. See 34 CFR §518 (d). Within thirty (30) days of the hearing officer decision, an assurance form must be executed by the Superintendent or Chief Executive Officer, and returned to the assigned Office for Dispute Resolution Case Manager, assuring that the child has been afforded the ordered placement regardless of any appeal. Questions about this process should be directed to the LEA's legal counsel.

