

Special Education EXPEDITED Due Process Procedures - Fact sheet

An **expedited** due process hearing can be requested by filing a "Due Process Complaint Notice" for the following reasons: If the parent does not agree with the results of a manifestation determination of the local education agency (LEA) to change the placement of a child with a disability; if the parent disputes a disciplinary change of placement; if the parent disputes an interim alternative placement ordered by the LEA; if the LEA believes that it is dangerous for a student to remain in the current educational placement; or if the parent disagrees with the LEA's recommendation on extended school year (ESY) for the student, A due process hearing will not proceed until all required information is provided and procedures followed.

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.

Preliminary Meeting/Resolution Session. Before a due process hearing will take place, the LEA must convene a preliminary meeting, unless the parent and LEA agree in writing to waive it or agree to use mediation, with the parent and the relevant member or members of the Individualized Education Program (*I*EP) Team who have specific knowledge of the facts identified in the Due Process Complaint Notice in an attempt to resolve those issues without the need to proceed to a due process hearing. This preliminary meeting must be convened within seven (7) days of the LEAs receiving the parents 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 preliminary 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 preliminary 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 Hearings. For due process requests based on disciplinary placement, the due process hearing may proceed, unless the matter has been resolved to the satisfaction of both parties, and must occur within twenty (20) **school** days of the date the request was filed. The Hearing Officer must make a determination within ten (10) **school** days after the hearing.

For due process requests regarding ESY issues, the hearing will be held, and the Hearing Officer's decision will be written and sent to the parties no later than thirty (30) days after the due process request is made.

Disclosure of Evaluations and Recommendations. Not less than two (2) business days prior to an expedited 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.

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 regarding 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.

Attorneys Fees. A court, in its discretion, may award reasonable attorneys 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 parents 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 fee awards. Parents should consult with their legal counsel regarding these matters. The following rules apply: Attorneys 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 attorneys' 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. Attorneys' 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 attorneys fees. The Court may reduce the amount of any attorneys' fee award when:

the parent, or the parents' attorney, during the course of the action or proceeding unreasonably protracted the final resolution of the controversy; the amount of the attorneys 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.

Childs Status during Administrative Proceedings. Except for discipline cases, which are explained below, while the due process case or appeal in court is occurring, the child must remain in his or her present educational placement unless the parent and LEA agree otherwise. If the decision of the Hearing Officer agrees with the child's parent that a change of placement is appropriate, that placement must be treated as an agreement between the LEA and the parent. If the due process hearing involves an application for initial admission to public school, the child, with the parental consent, must be placed in the public school program until completion of all the proceedings, unless the parent and LEA agree otherwise.

For cases involving discipline issues and a change in placement for a student, the LEA may remove a student to an interim alternative educational setting for not more than forty-five (45) **school** days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child – (1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function; (2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function; (3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function.

(7/2010)