

**DELAWARE DEPARTMENT OF EDUCATION  
EXCEPTIONAL CHILDREN AND EARLY CHILDHOOD  
GROUP**

**SPECIAL EDUCATION RIGHTS  
OF  
PARENTS AND CHILDREN**

**DELAWARE PROCEDURAL SAFEGUARDS NOTICE  
Under the Individuals with Disabilities Education Improvement Act, Part B,  
and Federal and State Regulations Governing Special Education**

**September 10, 2007**

**This document amends the October 15, 2002 Procedural Safeguards  
Notice of the Delaware Department of Education**

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# **NOTICE OF PROCEDURAL SAFEGUARDS**

## **SPECIAL EDUCATION RIGHTS OF PARENTS AND CHILDREN**

*Under the Individuals With Disabilities Education Act, Part B  
and Federal and State Regulations Governing Special Education*

### **WHAT ARE PROCEDURAL SAFEGUARDS?<sup>1</sup>**

This information provides you as parents, legal guardians, and surrogate parents of children with disabilities from three (3) years of age through age twenty (20) with an overview of your educational rights, sometimes called “procedural safeguards”. This information is your Notice of Procedural Safeguards as required under the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”) and Delaware Department of Education regulations. This notice is also provided for students who are entitled to these rights at age eighteen (18).

This Notice of Procedural Safeguards must be given to you at least one (1) time a school year, and:

- The first time your child is referred for a special education evaluation;
- Any time you request your child receive a special education evaluation;
- The first time you file a due process complaint in a school year;
- The first time you file a State complaint in a school year;
- Each time an IEP meeting is convened for your child;
- Each time you request a copy of the Notice of Procedural Safeguards;
- Any time a decision is made by the school district to change your child’s placement due to your child’s violation of the school code of conduct (if your child is entitled to the disciplinary protections of the IDEA).

### **WHAT IS THE IDEA?**

The IDEA is a federal law that requires school districts to provide a free appropriate public education to eligible children with disabilities. A “free appropriate public education” is often called “FAPE.” It means that special education and related services are to be provided as described in an individualized education program or “IEP” and under public supervision to your child at no cost to you.

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<sup>1</sup>The term “school district” is used throughout this document to describe any public education agency responsible for providing your child’s special education program.

## **CAN I PARTICIPATE IN DECISIONS ABOUT MY CHILD'S EDUCATION?**

You have the right to request your child receive a special education evaluation. You must be given the opportunity to participate in any decision-making meeting regarding your child's special education program. You are a member of your child's IEP team and have the right to participate in team meetings about the identification, evaluation, and educational placement of your child and other matters relating to your child's free appropriate public education. The school district must make sure you have adequate notice of such meetings. It must also make sure that you are able to participate in the meetings, including methods like telephone and conference calls when parents can not be physically present, and arranging for an interpreter for parents with deafness, or whose native language is not English.

A "meeting" does *not* include informal conversations among school district staff, conversations about teaching methodology or lesson plans if those issues are not addressed in your child's IEP, or preparation to develop a proposal or respond to a parent's proposal that will be discussed at a later meeting.

A placement decision may be made without your involvement if the school district is unable to obtain your participation. In this case, the school district must have a record of its attempts to obtain your involvement.

## **WHERE CAN I GET MORE HELP?**

When you have a concern about your child's education, it is important that you call or contact your child's teacher or administrators to talk about your child and any problems you see. Staff in your school district can answer questions about your child's education, your rights, and procedural safeguards. When you have a concern, this informal conversation often solves the problem and helps to maintain open communication. Additional resources are listed at the end of this document to help you understand the procedural safeguards.

# **NOTICE, CONSENT, EVALUATION, AND ACCESS**

## **PRIOR WRITTEN NOTICE**

### **WHEN IS NOTICE NEEDED?**

The school district must inform you about proposed evaluations of your child in a “Prior Written Notice” that is understandable and in your native language or other mode of communication, unless it is clearly not feasible to do so. This notice must be given no less than ten (10) business days before the school district proposes to (or refuses to) initiate or change the identification, evaluation, or educational placement of your child with special needs or the provision of a free appropriate public education. But, in cases involving a change of placement for a disciplinary removal, this notice must be provided no less than three (3) business days before the school district proposes to change the child’s placement.

### **WHAT WILL THE NOTICE TELL ME?**

The Prior Written Notice must include the following:

1. A description of the action proposed or refused by the school district;
2. An explanation of why the action was proposed or refused by the school district;
3. A description of any other options the IEP team considered and the reasons those options were rejected;
4. A description of each evaluation procedure, assessment, record or report the school district used as a basis for the proposed or refused action;
5. A description of any other factor relevant to the action proposed or refused;
6. A statement that parents of a child with a disability are protected by the procedural safeguards. If the Prior Written Notice is not sent because of an initial referral for evaluation, it must also tell you how you can obtain a copy of the Notice of Procedural Safeguards;
7. Sources for you to contact to obtain help in understanding the IDEA and Department of Education regulations; and
8. A full explanation of the procedural safeguards available to you.

### **CAN I RECEIVE NOTICE BY ELECTRONIC MAIL?**

If your school district offers parents the choice of receiving documents by E-mail, you may choose to receive the Prior Written Notice and Notice of Procedural Safeguards by E-mail.

## PARENT CONSENT

### **WHEN IS MY APPROVAL REQUIRED?**

You must give informed, written consent before the school district can proceed with your child's first special education evaluation. The school district must make reasonable efforts to obtain your informed consent for an initial evaluation to decide whether your child is a child with a disability. However, your consent for initial evaluation does not mean that you have also given your consent for the school district to start providing special education and related services to your child.

In the case of reevaluations, the school district must document it made reasonable attempts to obtain your consent. If you as the parent do not respond to these attempts, the school district may proceed with the reevaluation without your consent.

If you refuse consent for initial evaluation or reevaluation, the school district may continue to seek these evaluations by using mediation or the due process hearing procedure.

You must give informed, written consent before the school district can provide special education and related services to your child for the first time. The school district must make reasonable efforts to obtain your informed consent to provide special education and related services to your child. If you refuse consent for your child to receive special education and related services for the first time, or if you do not respond to a request to provide such consent, the school district is not required to have an IEP meeting or develop an IEP for your child. In addition, the school district may not use mediation or the due process hearing procedure to obtain your agreement or a ruling that it may provide special education and related services to your child.

Your consent is *not* required to review existing information as part of the evaluation process, or to administer tests that are given to all children (unless consent is required for all children). Your consent to any activity is voluntary and may be revoked at any time, but revoking your consent does not negate any action taken while the school district had your consent.

The school district may not use your refusal to consent to one service or activity to deny you or your child any other service, benefit, or activity.

### **WHAT IF MY CHILD IS A WARD OF THE STATE?**

If your child is a ward of the State and not living with either parent, the school district does not need consent from a parent for an initial evaluation if:

- The school district cannot locate the parent after making reasonable efforts to do so;

- Parental rights have been terminated in accordance with State law; or
- A judge has assigned the rights to make educational decisions to a person other than the parent, and consent for an initial evaluation has been given by the person appointed to represent the child.

## SURROGATE PARENT APPOINTMENT

### **WHAT IF THE PARENT CANNOT BE IDENTIFIED OR LOCATED?**

School districts must ensure that an individual is assigned to act as a surrogate parent for the parents of a child with a disability when a parent cannot be identified and the school district cannot discover the whereabouts of a parent. A surrogate parent may also be appointed if a child has been determined to be a ward of the state, or an unaccompanied homeless youth.

## INDEPENDENT EDUCATIONAL EVALUATIONS

### **CAN MY CHILD BE TESTED INDEPENDENTLY AT THE DISTRICT'S EXPENSE?**

Independent evaluation means an evaluation conducted by a qualified examiner who is not employed by the school district. You have the right to ask for and obtain an independent educational evaluation for your child at public expense if you disagree with an evaluation of your child obtained by the school district, subject to the following:

If you request an independent evaluation of your child at public expense, the school district must either: (1) file a due process complaint to request a hearing to show its evaluation was appropriate, or (2) provide an independent evaluation at public expense.

If the school district files a due process complaint to request a hearing and the final decision is that the school district's evaluation is appropriate, you still have the right to an independent evaluation, but not at public expense.

The school district must respond to your request for an independent evaluation and provide you information about where to obtain the evaluation. The school district may ask why you object to its evaluation, but you are not required to provide an explanation. The IEP team must consider independent evaluations when making decisions about your child's free appropriate public education. You or the school district may present the independent evaluation as evidence at a due process hearing regarding your child.

The school district may not unreasonably delay providing the independent educational evaluation or initiating a hearing to defend the public evaluation. If the district requests a hearing and prevails, you still have the right to an independent educational evaluation, but not at public expense.

If an independent evaluation is at public expense, the criteria for the evaluation must be the same criteria the school district uses when it initiates an evaluation, such as the location of the evaluation and the qualifications of the evaluator. Otherwise, the school district may not impose additional conditions or timelines related to obtaining the evaluation at public expense.

You are entitled to only one independent evaluation of your child at public expense each time your school district conducts an evaluation of your child with which you disagree.

## ACCESS TO EDUCATIONAL RECORDS

### **CAN I EXAMINE MY CHILD'S EDUCATIONAL RECORDS?**

You have the right to inspect and review all of your child's education records without unnecessary delay, including prior to a meeting about your child's IEP, before a due process hearing, or before a Resolution Meeting. The school will let either parent see the records unless an appropriate court order directing otherwise is given to the school.

You have these rights concerning your child's education records:

1. On request, the school must tell you what kinds of records are collected, maintained or used concerning your child, and where the records are kept.
2. You must be allowed to review these records before the IEP or any other meeting where identification, evaluation or educational placement of your child is an issue, or before a hearing.
3. The school must allow you to review the records promptly, and in no case longer than forty-five (45) days after you request to see them.
4. When you request information from the records, the school may not charge a fee to search for the records.
5. The school must give an explanation of the information in the records, if requested.
6. When copies of the records are requested, they must be provided at reasonable cost.

7. The school may not refuse to provide copies of a student's records if refusing would prevent you from accessing the records.
8. The school may not allow you to see information on any other student except your child.
9. You may allow another person to review your child's records on your behalf.
10. If you find an error in your child's records, you may ask the school to change the information and add a statement to the records describing the disagreement. The school must make a decision on your request within a reasonable time. If the school refuses to change the records as you requested, it must tell you so and advise you that you have the right to a hearing to challenge the records.
11. The school must keep a record of parties obtaining access to your child's education records, including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.
12. With some exceptions, the school must obtain your consent before disclosing personally identifiable information concerning your child.
13. The school district must inform you when personally identifiable information collected, maintained, or used is no longer needed to provide educational services to your child. The information must be destroyed at your request. However, a permanent record of your child's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

Additional information about how school districts maintain student records and about the rights of students and parents under the Family Educational Rights and Privacy Act of 1974 ("FERPA") is available in the Delaware Department of Education regulations.

# HOW DISPUTES ARE RESOLVED

## MEDIATION

### **CAN I REQUEST MEDIATION TO RESOLVE MY DISPUTE WITH THE DISTRICT?**

The Department of Education offers mediation to assist you in resolving disputes with the school district concerning the provision of special education to your child. The Department of Education will provide you information about mediation services. Mediation is a voluntary way to resolve disputes and is conducted by a qualified and impartial person trained in strategies that help people come to agreement over difficult issues. Mediation gives parents and school districts the opportunity to resolve disagreements and work out acceptable solutions in an informed, non-adversarial context. Mediation is provided at no cost, but both parents and the school district must agree to try mediation before it can be attempted. Mediation may *not* be used to delay your right to a due process hearing.

Mediation will be scheduled in a timely manner and held at a place that is convenient for you and the school district. You are permitted to be accompanied and advised at mediation by an individual of your choice. If a school district is involved in mediation, it must send a district representative with authority to make decisions and commit resources to agreed upon services. Discussions that occur during mediation are confidential and cannot be used in any future due process hearing or civil proceeding in any Federal court or Delaware court.

If you resolve your dispute through mediation, the parents and school district must sign a legally binding agreement that sets forth the resolution, and states that all discussions that occurred at mediation will remain confidential and may not be used as evidence in a due process hearing. A written signed mediation agreement is enforceable in any state court of competent jurisdiction or in a district court of the United States.

The Department has established a voluntary mediation system through the Conflict Resolution Program at the University of Delaware. The Department offers mediation in circumstances other than when a due process complaint has been filed. You have the right to request mediation to resolve a disagreement with the school district.

For further information on mediation, contact the Special Education Partnership for the Amicable Resolution of Conflict (SPARC), at the Conflict Resolution Program, 177 Graham Hall, Institute for Public Administration, University of Delaware, Newark, Delaware 19716, (302) 831-8158.

## DUE PROCESS HEARING

### **WHEN IS A DUE PROCESS HEARING AVAILABLE?**

You have the right to request an impartial due process hearing regarding the identification, evaluation, and educational placement of your child, or the provision of a free appropriate education to your child. School districts may also request hearings.

### **HOW DO I REQUEST A DUE PROCESS HEARING?**

You need to file a written due process complaint. The complaint must include:

- Your child's name;
- The address of your child's residence;
- The name of the school your child is attending;
- If your child is a homeless child or youth, the child's contact information and the name of the child's school;
- A description of the nature of the problem, including facts relating to the problem; and
- A proposed resolution to the problem to the extent known and available to you.

The due process complaint must be filed within two (2) years of the date you knew or should have known about the alleged action that forms the basis of the due process complaint. However, this requirement does not apply if you could not file a due process complaint within this timeline because:

- The school district specifically misrepresented it had resolved the problem forming the basis of the complaint; or
- The school district withheld information it was required to provide to you under the IDEA.

The complaint must be signed by you, by the child's guardian, or by legal counsel. The complaint must be sent to:

Secretary of Education  
Department of Education  
John G. Townsend Building  
401 Federal Street, Suite 2  
Dover, Delaware 19901

You must also send a copy of the due process complaint to the school district at the same time you send it to the Secretary of Education. The Department of Education has developed a form to assist parents in filing a due process complaint. A copy of that form is attached to the back of this Notice.

You may not raise issues at the due process hearing that are not stated in your due process complaint (unless the school district agrees).

When a due process complaint is received, the Secretary of Education will appoint a hearing panel (or single hearing officer in the case of expedited hearings) and tell you who has been appointed. The Secretary will also provide information on low cost legal assistance, the availability of mediation, and a copy of this Notice of Procedural Safeguards.

### **HOW LONG DOES A DUE PROCESS HEARING TAKE?**

As a general rule, the due process hearing must be held and a decision issued within forty-five (45) days from the date the Department of Education receives your due process complaint. However, the forty-five (45) day timeline is suspended at various periods throughout the proceedings. These periods are discussed in more detail below.

In addition, the hearing panel, for good cause, may grant specific extensions of time at the request of you or the school district. The hearing panel must, however, reach a final decision and send it to you and the school district within fifteen (15) days of the date of the hearing, or within fifteen (15) days of any post-hearing argument.

### **WHAT IF MY DUE PROCESS COMPLAINT DOES NOT INCLUDE ALL REQUIRED INFORMATION?**

In order to have a due process hearing, your due process complaint must contain all the information listed above. The complaint will be considered sufficient unless the school district notifies you and the hearing panel in writing, within fifteen (15) days of receiving the complaint, that it does not contain all the required information.

Within five (5) days of receiving the school district's notice, the hearing panel must decide if your due process complaint contains all the required information, and notify you and the school district immediately.

## **CAN I MAKE CHANGES TO MY DUE PROCESS COMPLAINT AFTER IT IS FILED?**

You can make changes to your due process complaint only if:

- The school district approves of the changes in writing and is given the chance to resolve the due process complaint through a Resolution Meeting; or
- By no later than five (5) days before the due process hearing begins, the hearing panel gives you permission to make the changes.

If you make changes to your due process complaint, the timelines for the Resolution Meeting and Resolution Period (discussed below) start again on the date the amended complaint is filed.

## **MUST THE SCHOOL DISTRICT RESPOND TO MY DUE PROCESS COMPLAINT?**

If the school district has not already sent you prior written notice concerning the issues in your complaint, the district must, within ten (10) days of receiving your complaint, send to you a response that includes:

1. An explanation of why the school district proposed or refused to take the action raised in the due process complaint;
2. A description of other options the IEP team considered and the reasons why those options were rejected;
3. A description of each evaluation procedure, assessment, record, or report the school district used as the basis for the proposed or refused action; and
4. A description of the other factors that are relevant to the school district's proposed or refused action.

## **WHAT ARE MY DUE PROCESS RIGHTS?**

When you request a due process hearing, you have the right to:

1. Have a fair and impartial hearing before a three (3) member hearing panel (or a single hearing officer in the case of expedited hearings) appointed from a Registry of Impartial Hearing Officers maintained by the Department of Education.
2. Be represented by an attorney or accompanied and advised by individuals who have special knowledge or training about children with disabilities.

3. Present evidence of your own and confront and cross-examine witnesses testifying against you.
4. Require witnesses to be present.
5. Prohibit evidence (including witness testimony) from being presented at the hearing unless it was disclosed to you at least five (5) business days before the hearing (or, two (2) business days if the hearing is expedited).
6. Be told about evaluations and resulting recommendations that have been completed at least five (5) business days before the hearing (or, two (2) business days if the hearing is expedited).
7. Receive a written or an electronic verbatim record of the hearing at public expense.
8. Receive a written or an electronic decision from the hearing panel or officer.
9. Have your child present at the hearing.
10. Have the hearing open or closed to the public.
11. Have the hearing conducted at a time and place that is reasonably convenient to you and your child.

### **DOES MY CHILD’S PLACEMENT CHANGE DURING THE PROCEEDINGS?**

Except as described under “SCHOOL DISCIPLINE AND PLACEMENT PROCEDURES” below, a child involved in any due process hearing or judicial proceeding regarding a due process complaint must remain in his or her current educational placement unless you and the school district agree on another arrangement. This is often called the “stay put” rule. If the due process complaint involves initial admission to a public school, your child will be placed in a public school program with your consent until all proceedings are complete.

If the due process complaint involves an application for initial services under Part B of the IDEA from a child who is transitioning from being served under Part C of the IDEA to Part B of the IDEA and who is no longer eligible for Part C services because the child has turned three (3), the school district is not required to provide the Part C services the child has been receiving. If the child is found eligible under Part B of the IDEA and you consent for the child to receive special education and related services for the first time, then pending the outcome of the proceedings, the school district must provide those special education and related services that are not in dispute (i.e., those which you and the school district agree upon).

Finally, if the hearing panel agrees with you that a change of placement is appropriate, the new placement will be treated as if it were one you and the district agreed to for purposes of deciding your child's educational placement during any related court proceedings.

## **WHAT IS A RESOLUTION MEETING?**

Within fifteen (15) days of receiving notice of your due process complaint, the school district must convene a Resolution Meeting. A Resolution Meeting is a meeting between you and the school district concerning your due process complaint. It provides you an opportunity to discuss your complaint with the school district, and it gives the school district a chance to resolve your dispute.

The Resolution Meeting must include you and the relevant members of your child's IEP team who have specific knowledge of the facts identified in your due process complaint. You and the school district determine the relevant members of the IEP team to attend the meeting. However, the meeting must include a school district representative who has decision-making authority on behalf of the school district. The meeting may not include the school district's attorney unless you are accompanied by an attorney.

You and the school district must participate in the Resolution Meeting unless:

- You and the school district agree in writing to waive the Resolution Meeting; or
- You and the school district agree to use the mediation process offered by the University of Delaware's Special Education Partnership for the Amicable Resolution of Conflict (i.e., "SPARC").

## **WHAT IS THE RESOLUTION PERIOD?**

If you and the school district agree to participate in the Resolution Meeting, the forty-five (45) day timeline is suspended to give both parties a chance to resolve the dispute. If, however, the school district has not resolved the due process complaint to your satisfaction within thirty (30) days of its receipt, the forty-five (45) day timeline recommences and the due process hearing may occur. This thirty (30) day period is sometimes referred to as the "Resolution Period".

## **WHAT HAPPENS IF I DO NOT PARTICIPATE IN THE RESOLUTION MEETING?**

It depends. If you and the school district have not agreed to waive the Resolution Meeting or use mediation instead, your failure to participate in the Resolution Meeting will delay the timelines for the due process hearing. If the school district is not able to obtain your participation in the Resolution Meeting after making reasonable efforts to do so, the school district may, at the end of the thirty (30) day Resolution Period, request the hearing panel dismiss your due process complaint.

Otherwise, if you and the school district agree in writing to waive the Resolution Meeting, then the forty-five (45) day timeline for the due process hearing starts the next day.

After the start of mediation or the Resolution Meeting, but before the end of the thirty (30) day Resolution Period, if you and the school district agree in writing that no agreement is possible, then the forty-five (45) day timeline for the due process hearing starts the next day.

If you and the school district agree to use the mediation process at the end of the thirty (30) day Resolution Period, both parties can agree in writing to continue the mediation until an agreement is reached. However, if either you or the school district withdraws from the mediation process, then the forty-five (45) day timeline for the due process hearing starts the next day.

### **WHAT IF THE SCHOOL DISTRICT FAILS TO HOLD THE RESOLUTION MEETING?**

If the school district fails to hold the Resolution Meeting within fifteen (15) days of receiving notice of your due process complaint, you may request the hearing panel to order the forty-five (45) day hearing timeline begin.

If you and the school district resolve your dispute at the Resolution Meeting, you and the school district must develop a legally binding agreement that is:

- Signed by you and a school district representative with authority to bind the school district; and
- Enforceable in any Delaware court of competent jurisdiction or in a district court of the United States.

Either you or the school district may, however, void the agreement within three (3) business days of signing it.

### **WHAT WILL THE DUE PROCESS HEARING DECISION CONTAIN?**

The due process hearing decision must include findings of fact and conclusions of law. In addition, the hearing panel's decision on whether your child received a free, appropriate public education must be based on substantive grounds. If you alleged the school district violated the procedural requirements of the IDEA, the hearing panel may find that your child did not receive a free, appropriate public education, but only if the procedural violations:

- Impeded your child's right to a free, appropriate public education;

- Significantly impeded your opportunity to participate in the decision-making process regarding the providing of a free, appropriate public education to your child; or
- Caused a deprivation of educational benefit.

### **CAN THE DUE PROCESS HEARING DECISION BE APPEALED?**

Yes. Delaware is a “one tier” state--it offers one level of administrative review, conducted by the due process hearing panel or hearing officer. The hearing decision is final and binding on all parties unless it is appealed by filing a civil action in the United States District Court or in the Family Court of the State of Delaware. You must file any appeal with the court within ninety (90) days from the date of the final decision. The courts can provide you additional information about how to file a civil action.

### **WHO PAYS FOR MY ATTORNEYS’ FEES?**

In any action or proceeding regarding the due process hearing, the court, in its discretion, may award reasonable attorneys’ fees as part of the costs to you as a parent of a child with a disability, if you are the prevailing party. The fees must be based on rates prevailing in the community in which the action arose for the kind and quality of services furnished. Fees may be reduced if:

1. The court finds that you or your attorney unreasonably delayed the final resolution of the controversy;
2. Your attorney’s hourly fee exceeds the prevailing rate in the community for similar work;
3. The time spent and legal services were excessive; or
4. Your attorney did not provide appropriate information in the due process request notice.

Fees will *not* be reduced, however, if the court finds that the State or the school district unreasonably delayed the resolution of the action or there was a violation of the procedural safeguards section of the IDEA.

Attorneys’ fees may *not* be awarded for any meeting of the IEP team unless the meeting is convened because of a due process hearing or judicial action. A Resolution Meeting is not considered a meeting convened as a result of a due process hearing or judicial action. Attorneys’

fees may also be denied if you reject a reasonable settlement offer made by the school district at least ten (10) days before the hearing begins and the hearing decision is not more favorable than the settlement offer.

## **WHO PAYS FOR THE SCHOOL DISTRICT'S ATTORNEYS' FEES?**

In any action or proceeding regarding the due process hearing, the court, in its discretion, may award reasonable attorneys' fees to the prevailing school district or the State to be paid by your attorney if:

- Your attorney filed a complaint or judicial action that is frivolous, unreasonable, or without foundation; or
- Your attorney continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation.

The court may also award reasonable attorneys' fees to the prevailing school district or the State, to be paid by you or your attorney, if the court finds your request for a due process hearing or subsequent judicial action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to unnecessarily increase the costs of the proceedings.

## **STATE COMPLAINT PROCEDURE**

### **ARE THERE OTHER WAYS TO RESOLVE DISPUTES OVER MY CHILD'S EDUCATION?**

In addition to due process hearings and mediation, the Department of Education will investigate and resolve complaints alleging violations of the IDEA (Part B). State complaints may be filed by any person or organization. The Department also must resolve complaints charging that a school district has failed to follow a decision previously rendered by a due process hearing panel or officer.

### **WHAT IS THE DIFFERENCE BETWEEN DUE PROCESS HEARING COMPLAINT AND STATE COMPLAINT PROCEDURES?**

The IDEA and Department of Education regulations set forth separate procedures for State complaints and due process complaints and hearings. In general, any individual or organization may file a State complaint alleging a violation of Part B of the IDEA or Department of Education regulations. However, only you or a school district may file a due process complaint on any matter relating to a proposal or refusal to initiate or change the identification, evaluation, or educational

placement of a child with a disability, or the provision of a free appropriate public education to a child.

In addition, the Department of Education must generally resolve a State complaint within a sixty (60) day timeline. However, a due process hearing panel must hear a due process complaint and issue a written decision within a forty-five day (45) timeline. But, as described more fully herein, the forty-five (45) day timeline is suspended at various periods throughout the proceedings.

## **HOW DO I FILE A STATE COMPLAINT?**

Complaints must be in writing, signed by the complainant, and include:

1. A statement that the school district (or any other public agency) has violated the IDEA or Department of Education regulations;
2. The facts on which the statement is based, including the time frame in which the incident(s) occurred;
3. The signature and contact information for the complainant; and
4. If alleging violations regarding a specific child:
  - (a) The child's name and address of residence;
  - (b) The name of the school the child is attending;
  - (c) In the case of a homeless child or youth, available contact information for the child, and the name of the school the child is attending;
  - (d) A description of the nature of the problem of the child, including facts relating to the problem;
  - (e) A proposed resolution of the problem to the extent known and available to the party filing the complaint at the time it is filed; and
  - (f) A description of the attempts made to resolve the issues prior to the filing of the complaint.

Complaints must allege a violation that occurred not more than one (1) year prior to the date the complaint is received by the Department. Complaints should be sent to:

Martha Toomey, Director  
Exceptional Children & Early Childhood Education Group  
Department of Education  
401 Federal Street, Suite 2  
Dover, DE 19901

The complainant must also send a copy of the complaint to the school district or other public agency serving the child at the same time the complaint is sent to the Department.

### **HOW DOES THE DEPARTMENT HANDLE MY STATE COMPLAINT?**

When the Department receives a complaint, it will:

- Conduct an independent investigation, including an on-site investigation, if it determines that one is necessary.
- Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint.
- Provide the school district with the opportunity to respond to the complaint, including, the chance to make a proposal to resolve the complaint, and an opportunity for the complainant and school district to agree to engage in mediation.
- Review all relevant information and make an independent determination as to whether the school district is violating the IDEA or Department of Education regulations.
- Issue a written decision to the complainant that addresses each allegation in the complaint and includes findings of fact and conclusions, and the reasons for its final decision.

The Department must complete its investigation and issue its written decision within sixty (60) days. The Department may permit an extension of time if exceptional circumstances justify a longer time, or the complainant and school district agree to an extension of time to resolve the matter through mediation or other means. If the Department determines that the school district failed to provide appropriate services, the Department must address how to remediate the denial of services (including, for example, monetary reimbursement or other corrective action) and how to assure appropriate future provision of services for all children with disabilities.

The due process hearing system and the state complaint procedures are *not* mutually exclusive. You may use *either* the State complaint procedure or the due process hearing system to resolve disputes over your child's education. If the Department receives a State complaint that is already the subject of a due process hearing, the Department must set aside the parts of the complaint that are being addressed in the due process hearing until that hearing is over. In this case, the hearing decision will be binding on the Department's investigation. If a complaint contains some issues that are being addressed in the due process hearing and some that are not, the Department must continue its investigation of the ones that are not being considered in the due process proceedings. In addition, a State complaint alleging a school district's failure to implement a due process hearing decision may also be resolved by the Department.

# **SCHOOL DISCIPLINE AND PLACEMENT PROCEDURES**

## **PROCEDURES FOR DISCIPLINING CHILDREN WITH DISABILITIES**

### **CAN MY CHILD BE SUSPENDED OR EXPELLED?**

Children with disabilities *may* be suspended, expelled, or placed in other alternative interim settings or other settings to the same extent these options would be used for children without disabilities. However, federal and state law require school districts to follow specific rules when disciplining students with disabilities. You have the right to respond to certain disciplinary actions taken with your child.

School administrators can remove a child with a disability who violates a code of conduct from his or her current educational placement to an appropriate interim alternative educational setting, another setting, or suspension, for:

- ten (10) school days in a row during a school year; and
- additional removals of not more than ten (10) school days in a row in the same school year for separate incidents of misconduct, as long as those removals do not constitute a pattern resulting in a change of placement.

### **WILL MY CHILD RECEIVE SERVICES DURING A SUSPENSION OR EXPULSION FROM SCHOOL?**

The school district may remove a child with a disability from the child's current educational placement for a total of ten (10) school days in a school year without providing educational services.

Otherwise, if a child with a disability is removed from his or her educational placement for more than ten (10) school days in a school year, the school district must provide services during any subsequent days of removal that will allow the child to continue to participate in the general education curriculum (although in another setting) and to progress toward meeting the goals of the child's IEP. If the removal is a change of placement for disciplinary reasons, the child's IEP team determines the appropriate services needed. The school district must also provide, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications that are designed to address the behavior so that it does not happen again.

## **WHAT IS A “CHANGE OF PLACEMENT” FOR DISCIPLINARY REASONS?**

The IDEA and Department of Education regulations define when a “change of placement” occurs for disciplinary reasons. A “change of placement” occurs if:

1. The child is removed for more than ten (10) school days in a row in a school year; or
2. The child has been subjected to a series of removals that constitute a pattern because:
  - (a) the series of removals total more than ten (10) school days in a school year;
  - (b) the child’s behavior is substantially similar to the child’s behavior in previous incidents that resulted in the series of removals; and
  - (c) such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another;or
3. The child has been subjected to a series of in-school removals totaling more than ten (10) school days and it deprives the child from meeting the goals set out in the IEP, progressing in the general curriculum (although in another setting), and receiving those services and modifications described in the IEP; or
4. The child has been subjected to a series of removals from transportation resulting in the child’s absence from school for more than ten (10) school days.

Whether a pattern of removals constitutes a change of placement is determined on a case by case basis by the school district.

## **WHAT STEPS MUST THE DISTRICT TAKE TO CHANGE MY CHILD’S PLACEMENT FOR DISCIPLINARY REASONS?**

If the school district decides to change your child’s educational placement for disciplinary reasons, the school district must notify you of its decision, provide you a copy of the Notice of Procedural Safeguards, and conduct a team meeting to determine whether your child’s misconduct was a manifestation of his or her disability. This is referred to as a “Manifestation Determination”. The meeting must take place immediately, if possible, or within ten (10) school days of the district’s decision to take this type of disciplinary action. The school district, the child’s parent, and relevant members of the child’s IEP team must attend the manifestation determination meeting. The team members must also review all relevant information in your child’s file, including the IEP, any teacher observations, and any relevant information provided by you.

## **WHAT HAPPENS AT A MANIFESTATION DETERMINATION MEETING?**

The team members must answer two questions:

- Was the behavioral incident in question caused by, or have a direct and substantial relationship to, your child's disability? or
- Was the behavioral incident in question the direct result of the school district's failure to implement the IEP?

If the team answers "yes" to either question, the behavioral incident must be considered a manifestation of your child's disability.

If the team determines the behavior was the direct result of the school district's failure to implement the IEP, the school district must take immediate action to remedy those deficiencies.

## **WHAT IF THE BEHAVIORAL INCIDENT WAS A MANIFESTATION OF MY CHILD'S DISABILITY?**

If the team determines the behavioral incident was a manifestation of your child's disability, the team must either:

- Conduct a functional behavioral assessment (unless the school district already conducted one before the behavior occurred) and implement a behavior intervention plan for your child; or
- If a behavior intervention plan has already been developed, review the plan, and modify it, as necessary, to address the behavior.

Except as described under "ARE THERE SPECIAL CIRCUMSTANCES WHEN MY CHILD CAN BE PLACED IN AN INTERIM ALTERNATIVE EDUCATIONAL SETTING", the school district must return your child to the placement from which he or she was removed, unless you and the school district agree to another placement.

## **WHAT IF THE BEHAVIORAL INCIDENT WAS NOT A MANIFESTATION OF MY CHILD'S DISABILITY?**

If the behavioral incident was not a manifestation of your child's disability, the school district may apply the same disciplinary procedures to your child in the same manner and for the same duration as it would to children without disabilities, including suspension expulsion.

## **ARE THERE SPECIAL CIRCUMSTANCES WHEN MY CHILD CAN BE PLACED IN AN INTERIM ALTERNATIVE EDUCATIONAL SETTING?**

A school district may remove a child with a disability to an appropriate interim alternative educational placement when: (1) the child carries a weapon to school, or has a weapon at school, on school premises, or at a function under the authority of the school district or Department of Education ; (2) the child knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, or a function under the authority of the school district or Department of Education; or (3) the child inflicts serious bodily injury upon another person while at school, on school premises, or a function under the authority of the school district or Department of Education. In these situations, the school district may place the child in an interim alternative educational setting for up to forty-five (45) school days without regard to whether the behavior is determined to be a manifestation of the child's disability. The child's IEP team determines the setting. The child must return to their regular placement at the end of the removal.

The interim alternative setting must enable the child to continue to participate in the general curriculum (although in another setting), and to progress toward meeting the goals set out in the child's IEP. It must also include, as appropriate, a functional behavioral assessment, and intervention services and modifications that address the behavior that led to the interim removal and are designed to prevent the behavior from recurring.

The parent of a child with a disability may file a due process complaint to request an expedited due process hearing if the parent disagrees with the district's decision to remove the child to an interim alternative educational setting because of drugs, weapons, or the infliction of a serious bodily injury.

## **ARE THERE OTHER REASONS MY CHILD MAY BE PLACED IN AN INTERIM ALTERNATIVE EDUCATIONAL SETTING?**

The school district may request an expedited due process hearing to place the child in an interim alternative educational setting for up to forty-five (45) school days if the school district believes that maintaining the child in the current placement is substantially likely to result in injury to the child or others. The school district can ask for additional expedited hearings and alternative placements at the end of the first such placement if it believes that continued removal is necessary.

## **WHAT IS AN EXPEDITED DUE PROCESS HEARING?**

As a parent, you are a member of your child's IEP team and will be invited to participate in any IEP team meeting(s). If you disagree with the team's decision regarding the manifestation determination, or you believe that the school district has not complied with these school disciplinary and placement procedures, you may request an expedited due process hearing from the Secretary of Education.

Expedited due process hearings are very similar to the regular due process hearings, but they are heard by a single hearing officer (instead of a three (3) person panel) and *must* occur within twenty (20) school days of the Department's receipt of the due process complaint *without* delays or extensions. The hearing officer must then render a decision within ten (10) school days after the hearing concludes. A Resolution Meeting must occur within seven (7) days of the school district receiving notice of the due process complaint (unless the parents and school district agree in writing to waive the Resolution Meeting or use mediation instead.) The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within fifteen (15) days of the school district's receipt of the due process complaint.

In addition, the time frames for identifying evidence and evaluations are also shorter in an expedited hearing (i.e., two (2) business days instead of five (5)).

In an expedited due process hearing, the hearing officer may:

- Return the child to the placement from which the child was removed if the hearing officer determines the child's behavior was a manifestation of the child's disability, or the removal was a violation of the disciplinary rules; or
- Order a change in placement to an appropriate interim alternative educational setting for not more than forty-five (45) school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

A party may appeal the decision in an expedited due process hearing in the same way as decisions in other due process hearings.

## **DOES MY CHILD'S PLACEMENT CHANGE DURING EXPEDITED DUE PROCESS PROCEEDINGS?**

When the parent or school district have filed a due process complaint for an expedited due process hearing, the child must remain in the interim alternative educational setting pending the decision of the hearing officer (unless the parent and the school district have agreed to another arrangement).

## **DOES MY CHILD HAVE ANY PROTECTIONS IF HE/SHE WERE NOT PREVIOUSLY IDENTIFIED AS NEEDING SPECIAL EDUCATION AND RELATED SERVICES?**

If your child has not been determined eligible for special education and related services and has violated the school district's disciplinary rules, the child may assert any of the procedural safeguards *if* the school district had knowledge that your child was a child with a

disability before the misconduct or behavior occurred.

A school district is considered to have knowledge if, before the behavior that brought about the disciplinary action, the following occurred:

- You expressed concern in writing that your child needs special education and related services to supervisory or administrative personnel of the school district, or your child's teacher;
- You requested an evaluation related to eligibility for special education and related services; or
- Your child's teacher or other school district personnel expressed specific concerns about a pattern of behavior demonstrated by your child directly to the school district's director of special education or to other supervisory personnel.

A school district would not be deemed to have such knowledge if you did not allow an evaluation of your child, you refused special education services, or your child has been evaluated and determined not to be a child with a disability under the IDEA.

If the school district did not know about your child's disability prior to taking disciplinary action, it may discipline your child under the same measures and procedures applied to children without disabilities.

If you request an evaluation for special education services while your child is subject to disciplinary action, the school district must conduct an expedited evaluation. Until the evaluation is done, your child remains in the placement decided by the school district, which may include suspension or expulsion without educational services. If the evaluation results indicate your child qualifies for special education and related services, an appropriate special educational program must be provided to your child, including the procedural protections relating to disciplinary and other removals.

### **CAN THE SCHOOL DISTRICT REPORT MY CHILD'S BEHAVIOR TO A LAW ENFORCEMENT AGENCY?**

If your child has committed a crime, the school district may report it to the appropriate law enforcement agency. State law *requires* school districts to report certain school crimes to a law enforcement agency regardless of whether it involves a child with a disability. The school district must give the law enforcement agency your child's special education and disciplinary records when it reports the crime, to the extent the district is permitted to do so under the Family Educational Rights and Privacy Act ("FERPA"). You can find more information about FERPA in this document in the section called "Access to Educational Records."

## CHILDREN ATTENDING PRIVATE SCHOOLS

### **WHEN IS REIMBURSEMENT REQUIRED FOR PRIVATE SCHOOL TUITION?**

Part B of the IDEA does not require a school district to pay for the cost of education, including special education and related services, of your child with a disability at a private school or facility if the school district made a free appropriate public education available to your child and you choose to place the child in a private school or facility. However, the school district where the private school is located must include your child in the population whose needs are addressed under the Part B provisions regarding children who have been privately placed by their parents. Changes to federal law have significantly limited the school district's responsibility to provide services to students whose parents have chosen for them to attend private schools. Federal law now requires that school districts spend only a proportionate share of federal IDEA funds in such circumstances.

The school district and the State may agree to the placement of a child with a disability in a private school or facility in certain situations. Otherwise, if your child previously received special education and related services, you are entitled to reimbursement for costs associated with a private school placement only if a court or hearing panel determines that the school district did not make a free appropriate public education available to your child in a timely manner, and the private school placement is appropriate.

### **WHEN MAY REIMBURSEMENT FOR PRIVATE SCHOOL COSTS BE REDUCED OR DENIED?**

The court or hearing panel may reduce or deny reimbursement for private school costs if you did not make your child available for an evaluation (upon proper notice from the school district) before removing your child from public school. The court may also reduce or deny reimbursement if it finds that you acted unreasonably in removing your child to the private school.

You may also be denied reimbursement if you did not inform the school district that you were rejecting the special education placement proposed by the school district and give notice of your concerns and intent to enroll your child in a private school at public expense. In this case, your notice to the school district must be given either:

- At the most recent IEP meeting you attended before removing your child from the public school; or
- In writing to the school district at least ten (10) business days (including holidays) before removing your child from the public school.

## **WHEN CAN REIMBURSEMENT NOT BE REDUCED OR DENIED?**

A court or hearing panel must not reduce or deny reimbursement to you if you failed to notify the school district of your plans to remove your child because:

- Giving notice would likely result in physical harm to your child;
- The school prevented you from giving notice; or
- You had not received a copy of this Notice of Procedural Safeguards or otherwise been informed of your responsibility to notify the school district of your intention to remove your child from public school.

A court or hearing panel may, in its discretion, not reduce or deny reimbursement to you if you failed to notify the school district of your plans to remove your child because:

- You are not literate or cannot write in English; or
- Giving notice would likely result in serious emotional harm to your child.

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**FOR FURTHER INFORMATION ON YOUR SPECIAL EDUCATION RIGHTS:**

Contact your local Supervisor of Special Education or:

Martha Toomey, Director  
Exceptional Children & Early Childhood Education Group  
Department of Education  
401 Federal Street, Suite 2  
Dover, DE 19901

Telephone: (302) 735-4210  
Fax: (302) 739-2388  
Email: [mtoomey@doe.k12.de.us](mailto:mtoomey@doe.k12.de.us)  
Website: [www.doe.k12.de.us](http://www.doe.k12.de.us)

Additional information about special education and these procedural safeguards is available online at [www.doe.k12.de.us](http://www.doe.k12.de.us). The Delaware Department of Education has published its administrative regulations governing special education online at [www.doe.k12.de.us/programs/specialed/](http://www.doe.k12.de.us/programs/specialed/). Paper copies may also be requested from the Department at the address above.

**ADDITIONAL RESOURCES:**

**Disabilities Law Program:**

New Castle County

Community Services Bldg.  
100 W. Tenth St., Suite 801  
Wilmington, DE 19801  
(302) 575-0660 (voice/TDD)  
1-800-292-7980 (toll free)

Kent County

840 Walker Road  
Dover, DE 19904  
(302) 674-8500 (voice/TDD)  
1-800-537-8383 (toll free)

Sussex County

144 East Market Street  
Georgetown, DE 19947  
(302) 856-0038 (voice/TDD)  
1-800-462-7070 (toll free)

**Parent Information Center of Delaware, Inc.:**

Main Office

5570 Kirkwood Highway  
Wilmington, DE 19808  
[www.picofdel.org](http://www.picofdel.org)

New Castle County residents:  
Phone: (302) 999-7394  
Fax: (302) 999-7637  
E-mail: [picofdel@picofdel.org](mailto:picofdel@picofdel.org)

City of Wilmington residents:  
Phone: (302) 764-3252  
Fax: (302) 764-3371  
E-mail: [picofdel@picofdel.org](mailto:picofdel@picofdel.org)

Kent County residents:  
Phone: 1-888-547-4412 (toll free)  
E-mail: [picofdel@picofdel.org](mailto:picofdel@picofdel.org)

Sussex County residents:  
Phone: (302) 856-9880  
Fax: (302) 856-9882  
E-mail: [picofdel@picofdel.org](mailto:picofdel@picofdel.org)

**Special Education Partnership for the Amicable Resolution of Conflict (SPARC):**

The Conflict Resolution Program  
177 Graham Hall  
Institute for Public Administration  
University of Delaware  
Newark, DE 19716  
(302) 831-8158

**Delaware Volunteer Legal Services, Inc.:**

P. O. Box 7306,  
Wilmington, DE 19803  
(302) 478-8680



I propose the following as a possible resolution of the problem, and believe that it would be available to my child at the present time:

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PERSON FILING THE COMPLAINT:

Telephone number: (W) \_\_\_\_\_ (H) \_\_\_\_\_ (Cell) \_\_\_\_\_

Address if different from above: \_\_\_\_\_

E-Mail: \_\_\_\_\_

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Date

TO FILE YOUR DUE PROCESS COMPLAINT, SEND IT TO:

Secretary of Education  
Department of Education  
John G. Townsend Building  
401 Federal Street, Suite 2  
Dover, Delaware 19901

YOU MUST ALSO SEND A COPY OF YOUR DUE PROCESS COMPLAINT TO THE SCHOOL DISTRICT OR OPPOSING PARTY AT THE SAME TIME YOU SEND IT TO THE SECRETARY OF EDUCATION.