



SPECIAL EDUCATION

DUE PROCESS HEARING PROCEDURES

Delaware Department of Education
John G. Townsend Building
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Dover, DE 19901
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<http://www.doe.k12.de.us>

Exceptional Children Resources

July 2019

OVERVIEW

The Individuals with Disabilities Education Act (IDEA) and corresponding state law provide parents of children with disabilities the right to request an impartial due process hearing regarding the identification, evaluation, or educational placement of their child, or the provision of a free, appropriate public education to their child (FAPE). School districts, charter schools, and other public agencies responsible for providing education to children with disabilities may also request a hearing. The Delaware Department of Education (Department) administers the due process hearing system in accordance with the IDEA and federal and state regulations. The Department has developed this procedures document to inform parents, school districts, charter schools, and other public agencies about the hearing process.

FILING A DUE PROCESS COMPLAINT

A due process complaint may be filed by a parent or public agency responsible for providing education to children with disabilities. Due process hearings are available for any matter related to the identification, evaluation, or educational placement of a child with a disability, or the provision of a free appropriate public education to the child.

A due process complaint must be in writing, signed by the filing party, and include:

- (1) The child's name;
- (2) The address of the child's residence;
- (3) The name of the school the child is attending;
- (4) If the child is a homeless child or youth (under the McKinney-Vento Homeless Assistance Act), available contact information for the child, and the name of the school the child is attending;
- (5) A description of the nature of the problem, including related facts; and
- (6) A proposed resolution to the problem, to the extent known and available to the complainant at the time.

The due process complaint must allege a violation that occurred not more than two (2) years before the date the parent, school district, or charter school knew or should have known about the alleged action that forms the basis of the due process complaint. However, this timeline does not apply if the parent could not file a due process complaint within the timeline because the school district or charter school specifically misrepresented it had resolved the problem forming the basis of the complaint, or the

school district or charter school withheld information it was required to provide to the parent.

The Department provides a Due Process Complaint Form and Request for Due Process Hearing and instructions for parties to use when filing a due process complaint. This form can be found online at <http://www.doe.k12.de.us/rightsandresolution>. The complainant may also contact (302) 735-4210 to request the form be mailed.

The due process complaint must be signed by the person filing it, and hand-delivered, mailed, or faxed to:

Secretary of Education
Delaware Department of Education
John G. Townsend Building
401 Federal Street, Suite 2
Dover, DE 19901
Fax: (302) 739-4654

Electronic signatures are acceptable. The Department does not accept due process complaints by E-mail.

The party filing the due process complaint is responsible for serving a copy of the complaint on the opposing party at the same time it is sent to the Secretary of Education.

The timeline for the opposing party to file a response to the complaint and give notice of insufficiency begins upon receipt of the complaint by the opposing party. Therefore, it is recommended the party filing the due process complaint serve the opposing party by hand delivery, or certified U.S. mail, return receipt requested, so that a record of receipt is made.

As a general rule, the complainant may not raise issues at the due process hearing that are not stated in the complaint, unless the other party agrees.

APPOINTMENT OF A HEARING PANEL

When a due process complaint is received by the Department, the Office of the Secretary of Education shall forward the due process complaint to the Exceptional Children Resources Work Group (ECR Work Group).

ECR Work Group staff shall review panel appointment criteria and contact prospective panel members to confirm the members are eligible and available to serve on the hearing panel being appointed.

Each prospective panel member shall verify that, if appointed to serve on the panel, the member's schedule will permit completion of the member's hearing duties within the hearing timeline.

The Secretary of Education, or the Secretary's designee, shall appoint an attorney, an educator; and a layperson, on a rotating basis, to hear the case from the panel members eligible and available to serve.

In most circumstances, the Secretary of Education will appoint the panel members within three (3) business days of receipt of the due process complaint. Additional time may be warranted in exceptional circumstances.

The Department shall send written notification of the appointment to the panel members and to the parties and their attorneys, if represented. The notification to the parties shall include information regarding free and low cost legal services, information on mediation, and the Delaware Procedural Safeguards Parent and Child Rights in Special Education.

PANEL APPOINTMENT CRITERIA

Prospective panel members are appointed to a hearing panel on a rotating basis from the list of certified panel members, based on the member's availability to serve, and ability to participate in the hearing in compliance with IDEA timelines.

A panel member may not be an employee of the Department, school district, charter school, or other public agency involved in the education or care of the child. A person otherwise qualified to be a panel member does not become an employee of the Department solely because the member is paid by the Department to serve on the panel.

A panel member may not have a personal or professional interest that would conflict with his or her objectivity.

A panel member must possess the knowledge of, and the ability to understand, the provisions of the IDEA, federal and state regulations pertaining to the IDEA, and legal interpretations of the IDEA by federal and state courts.

A panel member must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice, in cooperation and consultation with other hearing officers appointed to the hearing panel.

A panel member must possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice, in cooperation and consultation with other hearing officers appointed to the hearing panel.

ADMISSION PRO HAC VICE OF COUNSEL

Attorneys who are not members of the Delaware Bar may apply to be admitted *pro hac vice* before the Department to represent a parent, school district, charter school, or other public agency in a due process hearing. An attorney seeking admission must submit a written motion to the Department through Delaware counsel in accordance with the requirements of Delaware Supreme Court Rule 72, and serve the opposing party with a copy of the motion. The attorney seeking admission must also attach to the motion a check made payable to the Delaware Supreme Court based on the current fee schedule to be deposited in the registration fund of the Delaware Supreme Court. Upon receipt, the Department will forward the check to the Delaware Supreme Court.

The Department will promptly rule on the motion and enter a written decision notifying the parties and the Department of the *pro hac vice* admission. If the *pro hac vice* admission is granted, the Department will forward the written decision to the Delaware Supreme Court. Attorneys seeking admission must comply with the requirements of Delaware Supreme Court Rule 72.

CHALLENGES TO SUFFICIENCY OF A DUE PROCESS COMPLAINT

The due process complaint must be deemed sufficient unless the party receiving the due process complaint notifies the hearing panel and the opposing party in writing, within fifteen (15) calendar days of receipt of the due process complaint, that the receiving party believes the due process complaint does not include the required content.

Within five (5) calendar days of receiving the notice of insufficiency, the hearing panel must make a determination, on the face of the due process complaint, whether it contains the required content.

There is no right of a party to file a response to the notice of insufficiency, nor can a party supplement the due process complaint to prevent the hearing panel from ruling on the sufficiency of the complaint. The hearing panel must make a ruling on the face of the due process complaint and issue a ruling.

If the hearing panel determines the due process complaint is not sufficient, the panel should identify how the complaint is insufficient. The hearing panel may direct the filing party to amend the due process complaint within a reasonable time period.

AMENDMENT TO THE DUE PROCESS COMPLAINT

A party may amend the due process complaint, but only if the opposing party consents in writing to the amendment and is given the opportunity to resolve the amended due process complaint through a resolution meeting, or the hearing panel grants permission to amend at any time not later than five (5) calendar days before the hearing begins.

If the due process complaint is amended, the timelines begin again for the resolution meeting, the resolution process, and the due process hearing.

RESPONSE TO THE DUE PROCESS COMPLAINT

If the school district or charter school has not previously sent prior written notice as defined in 34 C.F.R. § 300.503 and 14 DE Admin Code § 926.3.0, the school district or charter school must, within ten (10) calendar days of receiving notice of the due process complaint, send a written response to the parent that includes:

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

See, 34 C.F.R. § 300.508(e)(1); 14 DE Admin Code § 926.8.8.

By responding to the complaint, the school district or charter school is not precluded from challenging the sufficiency of the complaint.

If the school district or charter school filed the due process complaint, the parent must, within ten (10) calendar days of receiving notice of the complaint, send a written response to the school district or charter school that addresses the issues raised in the due process complaint.

FORTY-FIVE CALENDAR DAY HEARING TIMELINE

The hearing panel must conduct the hearing and issue a final written decision within forty-five (45) calendar days of the end of the resolution period.

The hearing panel, for good cause, may also grant specific extensions of time at the request of either party. When granting a specific extension of time, the hearing panel must document the record and notify the parties in writing of:

- (1) a motion for extension by one (1) or both parties;
- (2) good cause to extend the hearing timeline based on specific facts; and
- (3) the period of the extension must be carefully limited so that it does not exceed a reasonable time.

RESOLUTION PROCESS

Before the due process hearing occurs, the parties have an opportunity to resolve the complaint through a resolution meeting. The purpose of the resolution meeting is for the parent to discuss the due process complaint and the facts that form the basis of the complaint so the school district or charter school has the opportunity to resolve the dispute. The resolution process involves various steps and timelines.

The school district or charter school must convene a resolution meeting within fifteen (15) calendar days of receiving the parent's due process complaint.

"Day" means calendar day. Therefore, school districts and charter schools may not suspend the timeline for convening a resolution meeting while schools are closed for breaks or holidays.

The resolution meeting participants include the parent and relevant members of the child's IEP team who have specific knowledge of the facts identified in the due process complaint. The parent and the school district and charter school determine the relevant members of the IEP team to attend the meeting. The meeting must also include a representative of the school district or charter school who has decision making authority. The meeting may include legal counsel for the school district or charter school attorney, but only if the parent is accompanied by an attorney.

When the school district or charter school files the due process complaint, a resolution meeting is not required. The forty-five (45) calendar day timeline for issuing a final decision begins the day after the parent receives the complaint.

The resolution meeting is mandatory, and there are no regulatory provisions that allow a parent, school district, or charter school to unilaterally waive the resolution meeting. The parent and school district or charter school may bypass the resolution meeting only if:

- (1) Both parties agree in writing to waive the resolution meeting; or
- (2) Both parties agree to use the mediation process instead.

If the school district or charter school has not resolved the due process complaint to the satisfaction of the parent within thirty (30) calendar days of the receipt of the complaint, the forty-five (45) calendar day hearing timeline begins.

The forty-five (45) calendar day hearing timeline also starts the day after one (1) of the following events:

- (1) Both parties agree in writing to waive the resolution meeting;
- (2) After either the mediation or resolution meeting starts, but before the end of the thirty (30) calendar day resolution period, the parties agree in writing that no agreement is possible; or
- (3) If both parties agree in writing to continue the mediation at the end of the thirty (30) calendar day resolution period, but later, the parent, school district, or charter school withdraws from the mediation process.

If the school district or charter school fails to hold the resolution meeting within fifteen (15) calendar days of receiving notice of the parent's due process complaint, or fails to participate in the resolution meeting, the parent may seek intervention from the hearing panel to begin the forty-five (45) day hearing timeline.

If the parent refuses to participate in the resolution meeting, it will delay the timelines for the resolution process and due process hearing until the meeting is held. If the school district or charter school is unable to obtain the participation of the parent in the resolution meeting, the school district or charter school must continue to make and document reasonable efforts throughout the remainder of the thirty (30) calendar day resolution period to convince the parent to participate in the meeting. If at the end of the thirty (30) calendar day resolution period, the school district or charter school is still unable to convince the parent to participate, the school district or charter school may request the hearing panel dismiss the parent's due process complaint.

School districts and charter schools must document the attempts to ensure parent participation in resolution meetings in the same manner as required to document the attempts to involve parents in IEP team meetings. Specifically, school districts and charter schools must keep a record of the attempts, including:

- (1) Detailed records of telephone calls made or attempted and the results of those calls;
- (2) Copies of correspondence sent to the parent and any responses received; and
- (3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

The school district or charter school shall send to the chairperson a copy of all written correspondence sent to the parent offering the parent the resolution meeting.

If a resolution to the dispute is reached at the resolution meeting, the parties must sign a legally binding agreement that is signed by the parent and a school district or charter school representative with authority to bind the school district or charter school. The agreement must also be enforceable in any Delaware court of competent jurisdiction or in a District Court of the United States. The parent, school district, and charter school are afforded a review period and may void the agreement within three (3) business days of signing it.

HEARING RIGHTS

The parties are afforded certain rights throughout the hearing process. The parent, school district, and charter school have the rights to:

- (1) Be accompanied and advised by legal counsel and by individuals who have special knowledge or training about children with disabilities;
- (3) Present evidence, cross examine witnesses, and compel the attendance of witnesses through subpoena;
- (4) Have all testimony received at the hearing provided under oath or affirmation;
- (5) Sequester and separate witnesses;
- (6) Prohibit the introduction of any evidence that is not disclosed at least five (5) business days prior to the hearing;
- (7) Obtain a written or electronic verbatim transcript of the hearing at no cost;
- (8) Be provided with an interpreter, if any party to the hearing has a hearing impairment or other difficulty communicating, or whose native language is not English;

- (9) Obtain a written or electronic decision from the hearing panel, which includes findings of fact and conclusions of law, at no cost.

The parent involved in the hearing has the further right to:

- (1) Have the child, who is the subject of the hearing, present;
- (2) A hearing that is open or closed to the public;
- (3) A hearing conducted at a time and place which is reasonably convenient to the parent and the child;
- (4) Inspect and review any educational records pertaining to the child which are maintained by the school district or charter school, including all evaluations and reports, prior to the hearing.

WHAT HAPPENS AT THE DUE PROCESS HEARING

Depending on the issues involved, the hearing may take one (1) or several days to conclude. The Department will provide the hearing location and facility, as well as a reporter to transcribe testimony. The Department will arrange the location of the hearing with the panel chairperson. The hearing panel will receive testimony from witnesses, documents, and any other relevant evidence. During the hearing, any testimony must be presented under oath or affirmation.

The burden of proof is on the school district or charter school.

THE HEARING DECISION AND APPEAL RIGHTS

After the hearing concludes, the panel must issue a written decision containing findings of fact and conclusions of law. The written decision must be issued within forty-five (45) calendar days after the expiration of the thirty (30) calendar day resolution period or the adjusted time periods. The hearing panel decision on whether the child received a free, appropriate public education must be based on substantive grounds. If the parent alleged the school district or charter school violated the procedural requirements of the IDEA, the hearing panel may find the child did not receive a free, appropriate public education, but only if the procedural violations:

- (1) Impeded the child's right to a free, appropriate public education;
- (2) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the providing of a free, appropriate public education to your child; or

(3) Caused a deprivation of educational benefit.

Delaware is considered a “one tier” state. In other words, it offers one (1) 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 the filing of a civil action in the United States District Court or in the Family Court of the State of Delaware. An appeal must be filed with the court within ninety (90) calendar days from the date of the final decision. The courts can provide additional information about how to file a civil action.

When a civil action is filed seeking judicial review of a hearing decision, the Secretary of Education, or the Secretary’s designee, will (upon order from the court) certify and file with the court the record of the administrative hearing, which shall include all documents submitted, a transcript of all testimony, and the written decision of the hearing panel.

THE CHILD’S PLACEMENT DURING THE PROCEEDINGS

During the pendency of any administrative or judicial proceedings regarding a due process complaint, unless the school district or charter school and parent agree otherwise, the child involved in the complaint must remain in the current educational placement. If the due process complaint involves the initial admission to a public school, the child, with the consent of the parent, must be placed in the public school program until the completion of all proceedings.

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 or charter school 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 the parent consents for the child to receive special education and related services for the first time, then pending the outcome of the proceedings, the LEA must provide those special education and related services that are not in dispute (i.e., those which the parent and the school district or charter school agree upon).

Finally, if the hearing panel agrees with the parent that a change of placement is appropriate, the new placement will be treated as if it were the placement the parent and the school district or charter school agreed to for purposes deciding the child’s educational placement during any related judicial proceedings involving the due process complaint.

EXPEDITED APPEALS

In some circumstances, a parent may file a due process complaint and receive an expedited hearing. If, for example, a parent disagrees with a manifestation determination, or the parent believes the school district or charter school has not complied with certain disciplinary placement procedures, an expedited due process hearing may be requested.

A school district or charter school may also request an expedited hearing if the school district or charter school believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others.

Expedited due process hearings are very similar to regular due process hearings and initiated by the filing of a due process complaint. Expedited hearings are, however, heard by a single hearing officer appointed by the Department, instead of a three (3) member panel. In addition, the hearing must occur within twenty (20) school days of the Department's receipt of the due process complaint. No extensions may be granted. The hearing officer must then render a decision within ten (10) school days after the hearing concludes.

In an expedited hearing, the parties are afforded a resolution period to resolve the complaint. However, the timelines are shorter. The school district or charter school must convene a resolution meeting within seven (7) calendar days of receiving notice of the due process complaint, unless the parent and school district or charter school agree, in writing, to waive the resolution meeting or use mediation instead. The expedited due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within fifteen (15) calendar days of the school district or charter school receipt of the due process complaint.

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

- (1) 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 certain disciplinary placement rules; or
- (2) 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 manner as decisions in regular due process hearings.

When a parent, school district, or charter school has 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 or charter school have agreed to another arrangement).

PUBLIC AWARENESS

The Department disseminates this due process hearing procedures document to the Governor's Advisory Council for Exceptional Citizens, the Parent Information Center, parents, school districts, charter schools, and other public agencies responsible for the education of children with disabilities, as requested. The Department collaborates with the Parent Information Center of Delaware, Inc., and the University of Delaware's Special Education Partnership for the Amicable Resolution of Conflict (SPARC), at the Conflict Resolution Program (CRP) to ensure awareness of these procedures. The Department also ensures these procedures are posted on the Department's website, in addition to redacted due process hearing decisions.