

**DELAWARE DEPARTMENT OF EDUCATION
Exceptional Children & Early Childhood Group**

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**DUE PROCESS HEARING
PROCEDURES**

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

I. HOW TO FILE A DUE PROCESS COMPLAINT

- A. ***Who May File a Complaint.*** A due process complaint may be filed by a parent or local educational agency (“LEA”)¹ relating 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. The complainant may use the Due Process Complaint Form available on the Department’s website at: <http://www.doe.k12.de.us>. Or, contact (302) 735-4210 to request the form be mailed. Use of the Department’s form is not required. The complainant may use another document as long as the necessary information is provided.

See, 14 DE Admin Code § 926.7.1; 14 Del. Code § 3135.

- B. ***Required Content of the Complaint.*** A due process complaint must be in writing, signed by the complainant, and include the following:
- (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, the child’s contact information;
 - (5) A description of the nature of the problem, including the facts relating to the problem; and
 - (6) A proposed resolution to the problem to the extent known and available to the complainant.

¹ “LEA” refers to a school district, charter school, and/or any other public agency responsible for providing education to children with disabilities.

See, 14 DE Admin Code § 926.8.2.

- C. **Limitations Period.** The due process complaint must be filed within 2 years of the date the parent 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: (1) the LEA specifically misrepresented it had resolved the problem forming the basis of the complaint; or (2) the LEA withheld information it was required to provide to the parent.

See, 14 DE Admin Code §§ 926.7.2 and 11.9.

- D. **Presenting New Issues.** 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.

See, 14 DE Admin Code § 926.11.7.

- E. **Where to Send the Complaint.** The due process complaint must be sent to:

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

The complainant must also send a copy of the due process complaint to the opposing party at the same time it is sent to the Secretary of Education.

See, 14 DE Admin Code §§ 926.7.1 and 8.1.

II. DEPARTMENT RESPONSE

- A. **Hearing Panel Appointment.** When a due process complaint is received by the Department, the Secretary of Education will appoint a three member hearing panel (or a single hearing officer in the case of an expedited hearing), and inform the parties who has been appointed. The Secretary will also provide the complainant with information on low cost legal assistance, the availability of mediation, and a copy of the Notice of Procedural Safeguards. The panel chairperson will then contact the parties to discuss scheduling the hearing and other pre-hearing matters.

See, 14 DE Admin Code §§ 926.7.3 and 11.2; 14 Del. Code § 3135.

- B. ***Hearing Panel Qualifications.*** Each hearing panel must consist of three members, appointed by the Secretary, on a rotating basis, and include: (1) a Delaware attorney licensed to practice in the State; (2) an educator knowledgeable in the field of special education; and (3) a lay person with a demonstrated interest in the education of children with disabilities and approved by the Governor’s Advisory Council for Exceptional Citizens. Each hearing officer must: (1) have knowledge of, and the ability to understand, the provisions of the IDEA, and state and federal regulations pertaining to the education of children with disabilities, and the legal interpretations of the IDEA by federal and state courts; (2) have the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice, in cooperation and consultation with the other hearing officers appointed to a given hearing panel; and (3) complete training as required by the Secretary to ensure adequate knowledge and competent performance.

See, 14 DE Admin Code §§ 926.11.2 and 11.4; 14 *Del. C.* § 3137.

- C. A hearing officer may not be a person who is an employee of the Department, school district, or other public agency involved in the education or care of the child. In addition, a hearing officer may not have a personal or professional interest which would conflict with the person’s own objectivity in the hearing.

See, 14 DE Admin Code § 926.11.3.

III. ADMISSION PRO HAC VICE FOR OUT OF STATE COUNSEL

- A. ***Application and Approval Process.*** Attorneys who are not members of the Delaware Bar may apply to be admitted pro hac vice before the Department of Education to represent an LEA or parent in a due process hearing. An attorney seeking admission must submit a written motion to the Department of Education 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 for the sum of \$300 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 admission. If the pro hac 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.

IV. STEPS THAT OCCUR BEFORE THE HEARING

- A. ***Challenges to the Sufficiency of the Complaint.*** For the hearing to proceed, the complaint must contain all the required information listed above. The complaint will be considered sufficient unless the party receiving the complaint notifies the hearing panel and the complainant in writing, within 15 days of receiving the complaint, that the receiving party believes the complaint does not contain all the required information. Within 5 days of receiving this notice, the hearing panel must decide if the due process complaint contains all the required information, and must notify the parties immediately of the panel's decision.

See, 14 DE Admin Code § 926.8.4.

- B. ***Amendments to the Complaint.*** A party may amend the due process complaint, but only if: (1) the other party consents to the changes in writing and is given the chance to resolve the due process complaint through a resolution meeting (described below); or (2) the hearing panel grants permission to amend, at any time not later than 5 days before the hearing begins.

If changes are made to the due process complaint, the timelines for the resolution meeting and resolution period (discussed below) start again on the date the amended complaint is filed.

See, 14 DE Admin Code § 926.8.6 to 8.7.

- C. ***LEA Response to Complaint.*** If the LEA has not already sent the parent prior written notice² concerning the subject matter in the complaint, the LEA must, within 10 days of receiving the complaint, send a response to the parent that includes:

- (1) An explanation of why the LEA 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 LEA used as the basis for the proposed or refused action; and
- (4) A description of the other factors that are relevant to the LEA's proposed or refused action.

² The requirements for prior written notice are found in 14 DE Admin Code § 926.3.0 and 14 Del. C. §§ 3133 and 3134.

See, 14 DE Admin Code § 926.8.8.

- D. ***Other Party Response to Complaint.*** Any other party receiving a due process complaint must, within 10 days of receiving it, send to the other party a response that specifically addresses the issues raised in the complaint.

See, 14 DE Admin Code § 926.8.10.

- E. ***The 45 Day Hearing Timeline.*** The hearing panel must conduct the hearing and issue a final decision within 45 days of the end of the resolution period (discussed below).

The hearing panel, for good cause, may also grant specific extensions of time at the request of either party. The hearing panel must, however, reach a final decision and send it to the parties within 15 days of the date of the hearing, or within 15 days of any post-hearing argument.

When granting a specific extension of time, the hearing panel must document the record and notify the parties in writing of:

- (1) the specific extension of time granted;
- (2) the party who requested the extension; and
- (3) the reason(s) the extension was granted.

See, 14 DE Admin Code § 926.15.0; 14 *Del. C.* § 3136.

- F. ***The Resolution Process.*** Before the due process hearing occurs, the parties have an opportunity to resolve the complaint through a resolution process. According to the U.S. Office of Special Education, the resolution process offers the parties a valuable chance to resolve the dispute before expending what can be considerable time and money in the due process hearing.³ The resolution process involves the following steps and timelines:

Within 15 days of receiving notice of a parent's due process complaint, the LEA must convene a "resolution meeting". A resolution meeting is a meeting between the parents and the LEA concerning the due process complaint. It provides the parents an opportunity to discuss the complaint with the LEA, and it gives the LEA a chance to resolve the dispute.⁴

³ See, OSEP's *Analysis of Comments and Changes*, 71 Fed Reg. 46701 (August 14, 2006).

⁴ Note, there is no requirement to convene a resolution meeting when the due process complaint is filed by the school district, charter school, or other public agency. See, OSEP's *Analysis of Comments and Changes*, 71 Fed. Reg. 46700 (August 14, 2006).

The resolution meeting must include the parents 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 LEA determine the relevant members of the IEP team to attend the meeting. However, the meeting must include an LEA representative who has decision-making authority on behalf of the LEA. The meeting may include the LEA's attorney, but only if the parent is accompanied by an attorney.

The resolution meeting is mandatory, and there are no regulatory provisions that allow a parent or school district to unilaterally waive the resolution meeting. The parent and LEA 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 mediation instead.

See, 14 DE Admin Code §§ 926.10.1 to 10.3.

- G. ***The 30 Day Resolution Period.*** If the LEA has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the complaint, the due process hearing may occur and the 45 day timeline for issuing a final decision begins.

See, 14 DE Admin Code §§ 926.10.4.1 to 10.4.2.

- H. ***Specific Adjustments to the 30 Day Resolution Period.*** The 45 day timeline for issuing a final decision also starts the day after one 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 30 day 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 30 day resolution period, but later, the parent or LEA withdraws from the mediation process.

See, 14 DE Admin Code § 926.10.5.

- I. ***LEA's Failure to Hold Resolution Meeting.*** If the LEA fails to hold the resolution meeting within 15 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 45 day hearing timeline.

See, 14 DE Admin Code § 926.10.4.5.

- J. ***Parent's Failure to Participate in Resolution Meeting.*** 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 LEA is unable to obtain the participation of the parent in the resolution meeting, the LEA must continue to make and document reasonable efforts throughout the remainder of the 30 day resolution period to convince the parent to participate in the meeting.⁵ ("Reasonable efforts" are defined in K. below.) If at the end of the 30 day resolution period, the LEA is still unable to convince the parent to participate, the LEA may request the hearing panel dismiss the parent's due process complaint.

See, 14 DE Admin Code §§ 926.10.4.3 to 10.4.4.

- K. ***Reasonable Efforts to Obtain Parent's Participation in the Resolution Meeting.*** LEAs must document their attempts to ensure parent participation in resolution meetings, in the same manner they are required to document their attempts to involve parents in IEP team meetings.⁶ Specifically, the LEA must keep a record of its attempts, including:

- (1) Detailed records of telephone calls made or attempted and the results of those calls;
- (2) Copies of correspondence sent to the parents 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.

See, 14 DE Admin Code § 925.22.4; § 926.10.4.4.

- L. ***Written Settlement Agreement.*** 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 an LEA representative with authority to bind the LEA. The agreement must also be enforceable in any Delaware court of competent jurisdiction or in a district court of the United States. The parent or LEA are afforded a review period and may void the agreement within 3 business days of signing it.

See, 14 DE Admin Code § 926.10.6 to 10.7.

⁵ *See*, OSEP's *Analysis of Comments and Changes*, 71 Fed. Reg. 46702 (August 14, 2006).

⁶ *See*, OSEP's *Analysis of Comments and Changes*, 71 Fed. Reg. 46703 (August 14, 2006).

V. HEARING RIGHTS

A. ***Rights Afforded to the LEA and Parent.*** The parties are afforded certain rights throughout the hearing process. The LEA and parent have the right to:

- (1) Have a fair and impartial hearing before a three 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 accompanied and advised by counsel and by individuals who have special knowledge or training about children with disabilities (except whether parties have the right to be represented by non-attorneys at due process hearings is determined by State law)⁷;
- (3) Present evidence and confront and cross examine adverse witnesses;
- (4) Prohibit evidence (including witness testimony) from being presented at the hearing unless it was disclosed to the other party at least 5 business days before the hearing;
- (5) Be told about evaluations and resulting recommendations that have been completed at least 5 business days before the hearing;
- (6) Receive a written or an electronic verbatim record of the hearing at public expense;
- (7) Receive a written or electronic decision from the hearing panel or officer, including findings of fact and law; and
- (8) Compel the attendance of witnesses.

See, 14 DE Admin Code § 926.12.0.; 14 *Del. C.* §§ 3138; 3139.

B. ***Rights Afforded to the Parent.*** The parent involved in a hearing has the further right to:

- (1) Have the child present at the hearing;
- (2) Have the hearing open or closed to the public; and

⁷ In 2000, the Delaware Supreme Court addressed the issue of lay representation by non-attorneys at due process hearings in the case of *In re Arons*, 756 A.2d 867 (Del. Supr. 2000).

- (3) Have the hearing conducted at a time and place that is reasonably convenient to the parents and child involved.

See, 14 DE Admin Code § 926.12.3 and 15.3; 14 *Del. C.* § 3138.

VI. WHAT HAPPENS AT THE DUE PROCESS HEARING?

- A. ***Some Hearing Issues.*** Depending on the issues involved, the hearing may take one or several days to conclude. The Department will provide the hearing location and facility, as well as a court reporter. 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.

See, 14 DE Admin Code §§ 926.11.10 and 12.3; 14 *Del. C.* §§ 3138(e).

- B. ***Burden of Proof.*** The burden of proof is on the LEA.

See, 14 *Del. C.* § 3140.

VII. THE HEARING DECISION AND APPEAL RIGHTS

- A. ***Content of Hearing Decision.*** After the hearing concludes, the panel must issue a written decision containing findings of fact and conclusions of law. The hearing panel's decision on whether the child received a free, appropriate public education must be based on substantive grounds. If the parent alleged the LEA 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.

See, 14 DE Admin Code § 926.13.0.

- B. **Appeal.** Delaware is considered a “one tier” state. In other words, 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. An appeal must be filed with the court within 90 days from the date of the panel’s final decision. The courts can provide additional information about how to file a civil action.

See, 14 DE Admin Code §§ 926.14.0 and 16.0; 14 *Del. C.* §§ 3141 and 3142; 20 U.S.C. § 1415.

- C. **Department Submission of Administrative Record.** When a civil action is filed seeking judicial review of a hearing decision, the Secretary of the Department 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 decision of the hearing panel.

See, 14 DE Admin Code § 926.16.3; 14 *Del. C.* § 3142.

VIII. THE CHILD’S PLACEMENT DURING THE PROCEEDINGS

- A. **The Stay-Put Rule.** During the pendency of any administrative or judicial proceedings regarding a due process complaint, unless the LEA and parents 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 parents, must be placed in the public school program until the completion of all proceedings.

See, 14 DE Admin Code § 926.18.1 and 2; 14 *Del. C.* § 3143.

- B. **Transition from Part B to C.** 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 3, the LEA 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 LEA agree upon).

See, 14 DE Admin Code § 926.18.3; 14 *Del. C.* § 3143.

- C. ***Change of Placement by Hearing Panel.*** 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 one the parent and the LEA agreed to for purposes deciding the child's educational placement during any related judicial proceedings involving the due process complaint.

See, 14 DE Admin Code § 926.18.4.

VIX. EXPEDITED APPEALS

- A. ***When Available.*** In some circumstances, parents 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 LEA has not complied with certain disciplinary placement procedures, an expedited due process hearing may be requested.

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

See, 14 DE Admin Code § 926.32.0.

- B. ***Shortened Hearing Timelines.*** 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 member panel. In addition, the hearing must occur within 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 10 school days after the hearing concludes.

See, 14 DE Admin Code § 926.32.3.2.

- C. ***Resolution Process.*** In an expedited hearing, the parties are afforded a resolution period to resolve the complaint. But, the timelines are shorter. The LEA must convene a resolution meeting within 7 days of receiving notice of the due process complaint, unless the parent and LEA 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 15 days of the LEA's receipt of the due process complaint.

See, 14 DE Admin Code § 926.32.3.3.

- D. ***Hearing Officer Authority.*** 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 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.

See, 14 DE Admin Code § 926.32.2.

- E. ***Appeal.*** A party may appeal the decision in an expedited due process hearing in the same manner as decisions in regular due process hearings.

See, 14 DE Admin Code § 926.32.3.4.

- F. ***The Child's Placement During An Expedited Hearing.*** When a parent or LEA 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 LEA have agreed to another arrangement).

See, 14 DE Admin Code § 926.33.0.

X. PUBLIC AWARENESS

- A. ***Dissemination.*** The Department disseminates these due process hearing procedures 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 Special Education Partnership for the Amicable Resolution of Conflict to ensure awareness of these procedures. The Department will also ensure these procedures appear on the Department's website, in addition to redacted due process hearing decisions.