

# Procedural Safeguards



**Mississippi Department of  
Education  
Office of Special Education  
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## **Procedural Safeguards for Parents of Students with Disabilities**

### **Introduction**

The information in this document provides parents of children with disabilities an overview of their educational rights, sometimes called procedural safeguards. This information is your Notice of Procedural Safeguards as required under the Individuals with Disabilities Education Act, as amended (IDEA '04). A copy of the procedural safeguards available to parents of children with a disability must be given to the parents only one (1) time a year, except that a copy also must be given to the parents upon initial referral or parent request for evaluation; the first occurrence of the filing of a complaint under §§ 300.151 through 300.153; or a due process complaint under §300.507 during the school year; and, upon request by a parent. A local educational agency may place a current copy of the procedural safeguards notice on its Internet website if such a website exists.

### **Independent Educational Evaluation**

An independent educational evaluation is an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

The public agency will provide to parents, upon request for an independent evaluation, information about where an independent educational evaluation may be obtained and the agency criteria applicable for independent educational evaluation. The agency criteria shall include information regarding the location of the evaluation and the qualifications required of the examiners that the agency uses when it initiates an evaluation.

A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to certain conditions. "Public expense" means that the public agency either pays the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.

If a parent requests an independent educational evaluation at public expense, the public agency must without unnecessary delay, either **a)** file a due process complaint to request a hearing to show that its evaluation is appropriate; or **b)** ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing that the evaluation obtained by the parent did not meet agency criteria.

If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the explanation by the parent may not be required and the public agency may not unreasonably delay either providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.

If a parent obtains an independent evaluation at private expense, the results of the evaluation must be considered by the public agency if it meets agency criteria, in any decision made with respect to the provision of a free appropriate public education (FAPE) to the child and may be presented as evidence at a hearing on a due process complaint regarding the child.

If a hearing officer requests an independent educational evaluation as part of the hearing on a due process complaint, the cost of this evaluation must be at the expense of the public agency.

Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiners, must be the same criteria the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

### **Written Prior Notice**

Parents will be given written notice within a reasonable time before the public agency proposes or refuses to initiate or change the identification, evaluation, or educational placement of their child or the provision of a FAPE to the child. A parent of a child with a disability may elect to receive notices by an electronic mail communication, if the public agency makes that option available. If the notice relates to an action proposed by the public agency that also requires parental consent, the agency may give notice at the same time it requests parental consent. The notice will include:

- (1) A description of the action proposed or refused by the agency;
- (2) An explanation of why the agency proposes or refuses to take the action;
- (3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;
- (4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;
- (5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;
- (6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and
- (7) A description of other factors that is relevant to the agency's proposal or refusal.

The notice will be written in language understandable to the general public and provided in the native language of the parent or other mode of communication used by the parent unless it is clearly not feasible to do so.

If the native language or other mode of communication is not a written language, the public agency must take steps to ensure **a)** the notice is translated orally or by other means to the parent in his or her native language or other mode of communication, **b)** the parent understands the content of the notice, and **c)** there is written evidence that the these requirements have been met.

### **Parental Consent**

A parent must be fully informed of all information relevant to the activity for which consent is sought and understand the activity for which consent is requested. Written parental consent must be obtained (with the understanding that the granting of consent is voluntary and may be revoked at any time) before the public agency conducts a preplacement (initial) evaluation or prior to the initial provision of special education and related services to a child with a disability.

“Evaluation” is defined as procedures used to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and do not include basic tests administered to or procedures used with all children in a school, grade or class.

Before the public agency conducts an initial evaluation, the public agency must obtain informed consent from the parent of the child before conducting the initial evaluation. Parental consent for initial evaluation may not be construed as consent for initial placement. Parental consent must also be obtained before conducting any new test as a part of a reevaluation.

Written parental consent is not required before reviewing existing data as part of an evaluation or a reevaluation, or when administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.

Consent will not be required for the screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation, as this is not considered to be an evaluation for eligibility for special education and related services.

Consent will also not be required for teacher and related service provider observations, ongoing classroom evaluations, or the administration or review of the results of adapted or modified assessments that are administered to all children in a class, grade or school.

In determining whether parent permission is necessary whenever an individual assessment is conducted with an individual child, agency personnel will follow the policies of their local school board regarding assessments, observations or procedures that may be conducted for any student experiencing educational difficulties.

Informed parental consent will not be required for reevaluation if the public agency can demonstrate it has taken reasonable measures to obtain that consent and the child's parents have failed to respond.

A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. To meet the reasonable measures requirement above, the public agency must have a record of its attempts to arrange a mutually agreed on time and place.

If parents refuse to give written consent to an initial evaluation or reevaluation, the public agency may initiate the due process procedures under §§ 300.507 - 300.509 or the mediation procedures under §300.506 if appropriate, except to the extent inconsistent with State law relating to parental consent. If the hearing officer upholds the public agency, the public agency may conduct the evaluation without parental permission, unless the parent brings civil action. If the appeal is not successful, the public agency may complete the evaluation.

The local educational agency (LEA) will not be considered to be in violation of the requirement to make available FAPE to the child for the failure to provide the child with the special education and related services for which the public agency requests consent. The LEA will not be required to convene an IEP meeting or develop an IEP under §§ 300.320 and 300.324 for the child for the special education and related services for which the public agency requests such consent.

A public agency may not use a parent's refusal to consent to one service or activity under paragraphs above to deny the parent or child any other service, benefit, or activity of the public agency, except as required by this part.

### **Surrogate Parents**

An agency will ensure that the rights of a child are protected when:

1. No parent can be identified;
2. The public agency, after reasonable efforts, cannot locate a parent;
3. The child is a ward of the State under the laws of that State; or
4. The child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act.

The surrogate must meet the following criteria:

1. Must not be an employee of the State Educational Agency (SEA), the LEA or any other agency that is involved in the education or care of the child;

2. Have no personal or professional interest that conflicts with the interest of the child he or she represents; and
3. Have knowledge and skills that ensure adequate representation of the child.

A person who otherwise qualifies to be a surrogate parent will not be an employee of the agency because he or she is paid by the agency to serve as a surrogate parent.

Surrogate parents will be formally trained to advocate for the child in the special education process in including the procedures concerning the identification, evaluation, placement, and the provision of a FAPE.

### **Access to Examine Education Records**

The parents of a child with a disability must be afforded an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the child and the provision of a FAPE to the child. "Education records" mean (1) those records that are directly related to a student and (2) maintained by an educational agency, institution or a party acting for the agency or institution. "Participating agency" means any agency or institution that collects, maintains or uses personally identifiable information, or from which information is obtained.

Each participating agency must permit parents to inspect and review any education records related to their children that are collected, maintained, or used by the agency. The agency must comply with a parent's request without unnecessary delay and before any meeting regarding an Individualized Educational Program (IEP), or any hearing or resolution session and in no case more than forty-five (45) days after the request has been made.

Parents or their representatives have the right to inspect, review, and request copies of any personally identifiable data relating to their children unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

The right to inspect and review education records includes:

- 1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;
- 2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and
- 3) The right to have a representative of the parent inspect and review the records.

Parental consent must be obtained before personally identifiable information is disclosed to anyone other than officials of participating agencies collecting or using the information under this part, or used for any purpose other than meeting a requirement of this part.

An educational agency or institution may not release information from education records to participating agencies without parental consent unless authorized to do so. The consent must describe the activity to be carried out and must list the records (if any) which will be released and to whom they will be released. Consent will not be required as a condition of any other benefit to the parent or student. The Mississippi Department of Education (MDE) shall provide policies and procedures that are used in the event that a parent refuses to provide consent under this section.

The term “personally identifiable” means information that includes (1) the name of the child, the child’s parent, or other family member; (2) the address of the child; (3) a personal identifier, such as the child’s social security number or student number; or (4) a list of personal characteristics or other information which would make it possible to identify the student with relative certainty.

The agency may charge a fee for copies of education records that are made for parents if the fee does not effectively prevent the parents from exercising their right to inspect and review those records. The agency may not charge a fee to search for or retrieve information.

Parents should address requests to review education records to their school principal or other appropriate official. This person or his appointee will arrange for the parent to review the child’s records without unnecessary delay prior to any meeting regarding an individualized education program or hearing relating to the identification, evaluation, or placement of the child or the provision of a FAPE to the child, and in no case, more than forty-five (45) days after the request was made. An agency official will provide parents with explanations or interpretations of the education records being reviewed.

Each agency must maintain a current listing for public inspection, of the names and positions of those employees within the agency who are authorized to have access to personally identifiable information within the education records. This list of current employees must be available for public inspection.

The agency must also keep a record of the name of each individual granted access to the education records collected, maintained or used, date(s) access was given, and the purpose for which the individual is authorized to use the records. This rule does not apply to parents or authorized employees of the agency.

Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages. One official at each participating agency shall assume responsibility for ensuring the confidentiality of any personally identifiable information. All persons collecting or using personally identifiable information must receive training or instruction regarding the State’s policies and procedures under the Family Educational Rights and Privacy Act (FERPA).

The LEA shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to

the child. The information must be destroyed at the request of the parents. However, a permanent record of a student'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.

The MDE shall provide policies and procedures regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age and type of severity of disability. Under the regulations for FERPA, the rights of parents regarding education records are transferred to the student at age eighteen (18). If the rights accorded to parents under Part B of the Act are transferred to a student who reaches the age of majority, the rights regarding education records must also be transferred to the student. However, the LEA must provide any notice required to the student and the parents.

The MDE shall provide the policies and procedures, including sanctions that the State uses to ensure that its policies and procedures are followed and that the requirements of the Act and the regulations in this part are met.

If any record includes information on more than one child, the parents have the right to inspect and review only the information relating to the portion of the record that applies to their child or to be informed of that specific information. Upon parent request, the agency must provide, within the timeline specified above, a list of the types and locations of education records collected, maintained or used by the agency.

A parent who believes that any portion of his child's records is inaccurate, misleading, or violates the privacy or other rights of his child may request the agency to make appropriate amendments to the records. Within a reasonable time of receipt of such a request, the agency must decide whether to amend the information in accordance with the request.

If the agency decides not to amend the information as requested, it must inform the parent of this decision and advise the parent of the right to a hearing under § 300.619. The agency must, on request, provide an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child. If the parent requests a hearing, the agency shall schedule a hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student. The educational agency or institution shall give the parent or eligible student notice of the date, time, and place reasonably in advance of the hearing.

The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing. The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision.



If the agency determines that evidence presented in the hearing substantiates the parent's charge, the student's record will be amended to correct the error, and the parent shall be informed in writing that this amendment has been made. If the agency determines that the records are not inaccurate, misleading or otherwise in violation of the privacy or other rights of the student, the parents shall be informed of this decision and the right to place in their child's record a statement commenting on the information and any reasons for disagreeing with the decision of the agency. The parent's statement must be maintained in the file so long as the information that it contests is there. If the records of the child or the contested portion are disclosed by the agency to any party, the explanation must also be disclosed to the party.

### **Request for Investigation of a Complaint**

An organization or individual may file a signed written complaint (including a complaint filed by an organization or individual from another state) with the MDE, Office of Special Education (OSE).

The complaint must include:

- 1) A statement that a public agency has violated a requirement of Part B of IDEA;
- 2) The facts on which the statement is based;
- 3) The signature and contact information for the complainant; and
- 4) If alleging violations against a specific child
  - a. the name and address of the residence of the child; and
  - b. the name of the school the child is attending.
  - c. In the case of a homeless child or youth (within the meaning of section 725(2) of 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 of the child, including the facts relating to the problem; and
- 6) A proposed resolution of the problem to the extent known and available to the individual or organization at the time the complaint is filed.

The complaint must allege a violation occurred not more than one (1) year prior to the date that the complaint is received by the MDE, unless a longer period is reasonable because the violation is continuing or the complainant is requesting compensatory services for a violation that occurred not more than two (2) years to the date the complaint is received.

Within sixty (60) calendar days after a complaint is filed, the MDE must carry out an independent onsite investigation, if the MDE determines that such an investigation is necessary. The complainant must be given the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint. The agency should be given the opportunity to respond to the complaint, including, a proposal to resolve the complaint; and with the consent of the parent, an opportunity for the public agency to engage the parent in mediation, or alternative means of dispute resolution.

Following a review of all relevant information, an independent determination is made by the MDE as to whether the public agency is violating a requirement of Part B of IDEA. The MDE must 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 MDE's final decision. If the MDE notes deficiencies in its final decision, procedures for effective implementation must be included along with technical assistance activities, negotiations, and corrective actions necessary to achieve compliance.

The time limit may be extended only if exceptional circumstances exist. In resolving a complaint in which it was found a failure to provide appropriate services, the MDE, pursuant to its general supervisory authority under Part B of the Act, must address:

1. The failure to provide appropriate services, including corrective action appropriate to address the needs of the child; and
2. Appropriate future provision of services for all children with disabilities.

If a written complaint is received that is also the subject of a due process hearing, the MDE must set aside the complaint until the conclusion of the due process hearing. Any issue in the complaint that is not a part of the due process action must be resolved using the time limit and procedures described in the paragraphs above.

If an issue raised in a complaint has previously been decided in a due process hearing involving the same parties, the hearing decision is binding and the MDE must inform the complainant to that effect. A complainant alleging a public agency's failure to implement a due process decision must be resolved by the MDE.

The MDE shall adopt written procedures for widely disseminating to parents and other interested individuals, including parent training and information centers, protection and advocacy agencies, independent living centers, and other appropriate entities, the State's complaint procedures.

### **Resolution Process**

Once a parent has filed for a due process hearing, the LEA is to conduct a resolution session. Within fifteen (15) days of receiving notice of the parent's due process complaint and prior to the initiation of a hearing, the LEA must convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process complaint that includes a representative of the public agency who has decision-making authority on behalf of that agency; and may not include an attorney of the LEA unless the parent is accompanied by an attorney.

The purpose of the meeting is for the parents of the child to discuss their due process complaint. The meeting need not be held if the parents and the LEA agree to use the mediation process. Parents and the LEA must determine relevant members of the IEP

Team to attend the resolution session. The timeline for issuing a final hearing decision **begins** at the end of the 30-day resolution period. If the parent filing a due process complaint fails to participate in the resolution meeting, this will delay the timelines for the resolution process and due process hearing until the resolution meeting is held, unless both parties have jointly agreed to waive the resolution process or to use mediation.

Timelines for due process commence at the end of a resolution period, so the 45-day timeline for a final due process decision begins at the expiration of a 30-day resolution period. If a resolution to the dispute is reached at the meeting, the parties must execute a legally binding agreement that is signed by both the parent and a representative of the agency who has the authority to bind the agency; and enforceable in any State court of competent jurisdiction or in a district court of the United States. If the parties execute an agreement, a party may void the agreement within 3 business days of the agreement's execution.

### **Mediation**

Mediation services may be accessed when a parent and a public agency disagree on matters pertaining to the identification, evaluation, educational placement and/or the provision of a FAPE. Mediation will be provided, at a minimum, when the parent and public agency disagree on such matters and either party requests a due process hearing. Mediation services will be provided either before or after a request for a due process hearing.

Mediation must:

1. Be voluntary on the part of both parties;
2. Not be used to deny or delay a parent's right to a due process hearing or to deny any other rights afforded under IDEA, Part B; and
3. Be conducted by a qualified and impartial mediator who is trained in effective mediation techniques and who is knowledgeable in laws and regulations relating to the provision of special education and related services.

A mediator is a neutral third party working to resolve a disagreement between parents of children with disabilities and public agencies. The mediator will approach the session objectively and will:

1. Explain the benefits of and encourage the use of the mediation process to the parents;
2. Explain his role as a facilitator;
3. Listen to each party's description of the disagreement;
4. Clarify the issues to be mediated;
5. Seek agreement of the parties to limit discussion to the identified mediation issues;
6. Recess mediation if additional information is needed to reach an agreement and reconvene at an agreed upon date;
7. Write a clear, concise statement of the agreement to be signed by both parties;

8. Discontinue mediation when it becomes evident that an agreement cannot be reached and write a clear, concise statement of why mediation is discontinued; and
9. Explain due process options to both parties.

The MDE will maintain a list of individuals who are qualified mediators. Mediators will be selected for mediation on a rotation basis from a list of qualified mediators. The MDE will bear the cost of the mediators and the mediation process, including the cost of the meetings.

An individual who serves as a mediator:

1. May not be an employee of the MDE or the LEA involved in the education or care of the child; and
2. Must not have a personal or professional interest that conflicts with the person's objectivity in the mediation.

A person who otherwise qualifies as a mediator is not an employee of the LEA or State agency, solely because he or she is paid by the MDE to serve as a mediator.

Mediation sessions will be conducted in the following manner:

1. Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties in the dispute;
2. If the parties resolve a dispute through the mediation process, the parties must execute a legally binding agreement that sets forth that resolution;
  - (i) The legally binding agreement states that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding arising from that dispute
  - (ii) The legally binding agreement is signed by the parent and a representative of the agency who has the authority to bind such agency.
3. A written, signed mediation agreement is enforceable in any State court of competent jurisdiction or in a district court of the United States.
4. Discussions that occur during the mediation process must be confidential and will not be used as evidence in any subsequent due process hearings or civil proceedings. The parties to the mediation process may be required to sign a confidentiality pledge prior to the commencement of the mediation to ensure that all decisions that occur during mediation remain confidential; and
5. Parents and public agencies have the right to bring an attorney or other representative to the mediation, but are not required to do so. If either party elects to have an attorney present, their role will be only to advise the party they represent. Attorneys will not be allowed to participate in the discussions to resolve issues between the parent and the public agency personnel.

A public agency may establish procedures to offer to parents and schools that choose not to use the mediation process an opportunity to try to meet, at a time and location convenient to the parents, with a representative from a parent training center, a community parent resource center or an appropriate alternative dispute resolution entity to explain the benefits of mediation and encourage the use of the mediation process. The representative must be from a center in the State established under Section 671 or 672 of IDEA. The representative must not have a personal or professional interest, which could conflict with his objectivity in a mediation session. The meeting must be held at a time and location convenient to the parents.

A public agency may not deny or delay a parent's rights to a due process hearing if the parent fails to participate in this meeting.

### **Impartial Due Process Hearings**

The agency shall, on request, provide an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child. A hearing held must be conducted according to the procedures in the FERPA.

A parent or public agency may file a due process complaint regarding the agency's proposal or refusal to initiate or change the identification, evaluation, or educational placement of a child or the provision of a FAPE. When a hearing is requested, a State level hearing will be conducted.

The public agency must have procedures that require either party, or the attorney representing a party, to provide to the other party a due process complaint (which must remain confidential).

The notice for a hearing must include:

1. The name of the child;
2. The address of the residence of the child;
3. The name of the school the child is attending;
4. In the case of a homeless child or youth (within the meaning of section 725(2) of 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 of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and
6. A proposed resolution of the problem to the extent known and available to the party at the time.

The MDE, OSE, will develop model forms to assist parents in filing a request for a due process complaint. A parent's right to a due process may not be delayed; however, the parent must provide information related to the problem. The parent must provide the notice for a due process to the Superintendent of the local school district or the Director of the State agency in which the child is enrolled. If an attorney or other individual

representing the parent provides such notice on behalf of the parent, an authorization for representation signed by the parent must accompany this notice.

A hearing officer will be appointed by the MDE. A hearing may not be conducted by a person who is an employee of the State agency or the LEA involved in the education or care of the child or a person having a personal or professional interest that conflicts with the person's objectivity in the hearing. A person who otherwise qualifies to conduct a hearing is not considered as an employee of the agency solely because he is paid by the LEA to serve as a hearing officer. Each public agency must keep a list of hearing officers and their qualifications. The following procedures will be utilized when a due process hearing is held:

1. The hearing officer appointed by MDE will conduct the hearing;
2. The public agency must inform the parent of any free or low-cost legal and other relevant services available in the area if the parent requests the information or when the parent or agency requests a hearing. The agency will also provide the parent a Procedural Safeguards document and the procedures regarding mediation services;
3. Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
4. Present evidence and confront, cross-examine and compel the attendance of witnesses;
5. At least five (5) business days prior to a hearing, each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing;
6. A hearing officer may bar any party that fails to comply with the timeline from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party;
7. Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five (5) business days before the hearing;
8. Obtain a written or, at the option of the parents, electronic verbatim record of the hearing. The record of the hearing will be provided to the parents at no cost; and
9. Obtain a written or, at the option of the parents, electronic finding of facts and decisions. The finding of facts and decisions will be provided to the parents at no cost.

Parents involved in hearings may have the child who is the subject of the hearing present and may open the hearing to the public.

The actual hearing will be completed and a copy of the decision will be mailed to each of the parties no later than forty-five (45) days after the thirty (30) day period for resolution session. A hearing officer may grant specific extensions of time beyond this period at the request of either party. Each hearing must be conducted at a time and place that is reasonably convenient to the parents and the child involved.

The MDE will, after deleting personally identifiable information, transmit the decisions of the hearing officers to the State Advisory Committee and make the decisions available to the public.

### **Expedited Due Process Hearings**

Any party to an expedited due process hearing or appeal has the same rights as are described in “*Impartial Due Process Hearings*” on page 12 with the exception of:

1. Within fifteen (15) days the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint;
2. The timeline for issuing a final hearing decision begins at the end of the thirty (30) day resolution period. The hearing would be delayed until the meeting (resolution session meeting) is held, if the parent filing a complaint fails to participate in the resolution session.
3. If the local education agency has not resolved the complaint to the satisfaction of the parents within thirty (30) days of the receipt of the complaint, the due process hearing may occur, and all timelines under due process commence. The forty-five (45) day timeline for a final Due Process decision begins at the end of a thirty (30) day resolution period.

The timelines established above are the same for the hearing requested by parents or public agencies.

Procedural rules for an expedited hearing are the same as those described in “*Impartial Due Process Hearings*” on page 12.

Parents involved in the hearing must be given the right to have the child who is the subject of the hearing present, and open the hearing to the public. The record of the hearing and the findings of fact and decisions described in the paragraph above must be provided at no cost to the parents.

A due process hearing officer who has been appointed by the MDE, and who meets all requirements described in “*Impartial Due Process Hearings*” on page 12, must conduct expedited due process hearings. The procedures described in this section may be repeated as necessary.

### **Civil Action**

The decisions on expedited due process hearings are appealable, except that any party aggrieved by the findings and decision shall have the right to bring civil action with respect to the issues of the due process hearing. Such action may be brought in any State court of competent jurisdiction or in a district court of the United States. The party bringing the action shall have forty-five (45) days from the date of the decision of the due process hearing officer. If any civil action, the court:

1. Shall receive the records of the administrative proceedings;

2. Shall hear additional evidence at the request of the party; and
3. Basing its decision on the preponderance of evidence shall grant the relief that the court determines to be appropriate.

The district courts of the United States have jurisdiction of action brought under Procedural Safeguards without regard to the amount of controversy.

Nothing in this section restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1973, or other federal laws protecting the rights of children with disabilities. Before the filing of civil action under these laws seeking relief that is also available under Procedural Safeguards of the Act, the procedures of a due process hearing under IDEA, Part B must be exhausted to the same extent as would be required had the action been brought under Procedural Safeguards of the Act.

### **Child's Status during Proceedings**

During a due process hearing or subsequent court action, the child involved must remain in the current educational placement or a placement agreed upon by the parents and the public agency, except as required in the *Procedures for Students Who Are Subject to Placement in an Interim Alternative Educational Setting* section of this document. If the hearing involves initial admission to a public school, the child, with the consent of the parents, must be placed in the public school program until completion of all the proceedings. If the decision of the hearing officer agrees with the child's parents that a change of placement is appropriate, the child will be placed in accordance with the hearing officer's decision during subsequent appeals.

### **Attorneys' Fees**

In any action or proceeding under Section 615 of IDEA, the court, in its discretion, may award reasonable fees as part of the costs to:

1. The prevailing party who is a parent of a child with a disability;
2. To a prevailing party who is an SEA or LEA against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation;
3. To a prevailing SEA or LEA against the attorney of a parent, or against the parent, if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

Fees awarded shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used. Part B funds may not be used for due process. Attorneys' fees may not be awarded and related costs may not be reimbursed for services preformed:



1. Subsequent to the time of a written offer of settlement to a parent if: The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or in the case of an administrative proceeding, if the offer is made at any time more than ten (10) calendar days before the proceeding began;
2. The offer is not accepted within ten (10) calendar days; and
3. The court or administrative hearing finds that the relief finally obtained by the parents is not more favorable than the offer of settlement.

Attorneys' fees may not be awarded relating to any meeting of the IEP committee unless such meeting is convened as a result of an administrative proceeding or judicial action. An award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer. Attorneys' fees may be awarded for mediation that is conducted prior to the request for due process.

The court shall reduce, accordingly, the amount of the attorneys' fees awarded whenever the court finds that:

1. The parent or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;
2. The amount of the attorneys' fees, otherwise authorized to be awarded, unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation and experience;
3. The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or
4. The attorney representing the parent did not provide to the school the notice required before a hearing on a due process complaint. A party may not have a hearing on a due process complaint or engage in a resolution session until the party, or the attorney representing the party, files a due process complaint that includes the following:
  - (1) The name of the child;
  - (2) The address of the residence of the child;
  - (3) The name of the school the child is attending;
  - (4) 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;
  - (5) A description of the nature of the problem of the child relating to the proposed or refused initiation change, including facts relating to the problem; and
  - (6) A proposed resolution of the problem to the extent known and available to the party at the time.

The reduction of attorneys' fees will not apply in any action or proceeding if the court finds that the State or LEA unreasonably protracted the final resolution of the action or proceeding or there was a violation of the procedural safeguards.

### **Procedures for Students Who Are Subject To Placement in an Interim Alternative Educational Setting**

School personnel may order the removal of a child with a disability (to the extent such a removal would be applied to children without disabilities for the same offense) from the

child's current educational placement for not more than ten (10) consecutive school days if behavior constitutes a physical danger to self or others or constitutes a clear emergency in the school. School personnel may order a change in placement of a child with a disability to an appropriate interim alternative setting for not more than forty-five (45) school days if

1. the child carries a weapon to school or a school function, or
2. the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function,
3. the child who has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an state or local agency

For purposes of removals of a child with a disability from the child's current educational placement, a change of placement occurs if a child is removed for more than ten (10) consecutive school days, or if the child is subjected to a series of removals that constitute a pattern because they cumulate to more than ten (10) school days in a school year. A change of placement could also occur because of factors such as the length of each removal, the total amount of time the child is removed, and the proximity in time of the removals to one another. If a child with a disability has been removed from his or her current placement for more than ten (10) consecutive school days in the same school year, during any subsequent days of removal the public agency must provide services as required under FAPE. Either before or not later than ten (10) business days after either first removing the child for more than ten (10) school days in a school year or commencing a removal that constitutes a change in placement under 34 CFR §300.519, including a change in placement to an appropriate interim alternative educational setting, an IEP committee meeting must be held.

- If the IEP committee did not conduct a functional behavioral assessment and implement a behavioral intervention plan for the child before the behavior that resulted in removal, an IEP meeting will be convened to develop an assessment plan.
- As soon as practicable after developing the plan and completing the assessments required by the plan, the IEP committee will convene a meeting to develop appropriate behavioral interventions to address that behavior and shall implement those interventions.
- If the child already has a behavioral intervention plan, the IEP committee shall meet to review the plan and its implementation and modify the plan and its implementation as necessary, to address the behavior.
- If subsequently, a child with a disability who has a behavioral intervention plan and who has been removed from the child's current educational placement for more than ten (10) school days in a school year is subjected to a removal that does not constitute a change of placement under 34 CFR §300.519, the IEP committee shall review the behavioral intervention plan and its implementation to determine if modifications are necessary.

- If one or more of the IEP committee members believe that modifications are needed, the team shall meet to modify the plan and its implementation to the extent the team determines necessary.

The educational setting must be determined by the IEP committee when a child is removed from his or her current placement for more than ten (10) consecutive school days and must be selected so as to enable the child to continue to participate in the general curriculum, although in another setting, and to continue to receive those services and modifications, including those described in the child's current IEP, that will enable the child to meet the goals set out in that IEP. This standard for services must be met when a child is placed in an interim alternative educational setting due to a weapon or drug offense as indicated above or when a hearing officer as described below determines whether the setting is appropriate. An interim alternative setting will also include services and modifications designed to address the behavior so that it does not recur.

A hearing officer may order a change in the placement of a child with a disability to an appropriate interim alternative educational setting for not more than forty-five (45) calendar days if the hearing officer, in an expedited due process hearing, determines that the public agency has demonstrated by substantial evidence that maintaining the current placement of the child is substantially likely to result in injury to the child or to others. The hearing officer must consider:

1. the appropriateness of the child's current placement; and
2. whether the public agency has made reasonable efforts to minimize the risk of harm in the child's current placement, including the use of supplementary aids and services.

The hearing officer must determine that the interim alternative educational setting meets the requirements of such a setting as described above.

Not later than the date that the school authorities make a decision to change a child's current educational placement for more than ten (10) school days in a given school year, the parent must be notified of that decision and of all procedural safeguards accorded under this section. Immediately, if possible, but in no case later than ten (10) school days after the date on which the decision to take that action is made, a review must be conducted by the IEP committee and other qualified personnel of the relationship between the child's disability and the behavior subject to the disciplinary action.

The IEP committee may determine that the behavior of the child was not a manifestation of the child's disability if:

1. The IEP committee first considers, in terms of the behavior subject to disciplinary action, all relevant information, including evaluation and diagnostic results, including such results or other relevant information supplied by the parents, observations of the child, and the child's IEP and placement; and
2. Then determines that in relationship to the behavior subject to the disciplinary action:

- a. The child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the child's IEP and placement;
- b. The child's disability did not impair the ability of the child to understand the impact and consequences of the behavior subject to the disciplinary action; and
- c. The child's disability did not impair the ability of the child to control the behavior subject to disciplinary action.

If the IEP committee and other qualified personnel determine that any of the standards above were not met, the behavior must be considered a manifestation of the child's disability. This review may be conducted at the same IEP meeting at which the alternative interim placement is determined. If in the review of a child's IEP, placement, or implementation, a public agency identifies deficiencies, it must take immediate steps to remedy those deficiencies.

If the result of the review is a determination that the behavior of the child with a disability was not a manifestation of the child's disability, the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner in which they would be applied to children without disabilities, except that educational services must be provided as determined by an IEP committee and meet the standard addressed above.

The agency must ensure that the special education and disciplinary records of the child with a disability are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action.

Placements into an interim alternative setting for forty-five (45) days due to a weapon or drug offense or due to the order of a hearing officer will apply whether the behavior is or is not a manifestation of a child's disability.

If the child's parent disagrees with a determination that the child's behavior was not a manifestation of the child's disability or with any decision regarding placement, the parent may request a hearing. If a parent requests a hearing to challenge a decision that the child's behavior was not a manifestation of his or her disability, the child must remain in his or her current setting until a ruling has been made. If a parent requests a hearing due to disagreement with manifestation determination(s) or change of placement decision(s) due to a disciplinary action, the MDE will arrange for an expedited hearing by a State level hearing officer. If such a request is made while a child is in an interim alternative placement, the child will remain in the interim setting pending the decision of the hearing officer or until the expiration of the forty-five (45) day placement, whichever occurs first, unless the parent and the agency agree otherwise. When reviewing a manifestation determination decision, the due process hearing officer must determine whether the public agency demonstrated that the child's behavior was not a manifestation of the child's disability using the standards described above.

If a child is placed in an interim alternative educational setting and the agency proposes to change the child's placement after expiration of that placement, during the pendency of any proceeding to challenge the proposed change in placement, the child shall remain in the placement where he or she was placed prior to the interim alternative educational setting. In this instance, the agency may request an expedited hearing if it believes it would be dangerous for the child to be in that placement.

An agency will not be prohibited from seeking judicial relief through measures such as a temporary restraining order when necessary.

If a child has not yet been determined eligible for special education under the IDEA and has engaged in behavior that violated the school's disciplinary rules, the parent may assert IDEA procedural protections if school personnel had knowledge that the child has a disability under IDEA procedural protections, if school personnel had knowledge that the child has a disability under IDEA before the behavior that precipitated the disciplinary action occurred. The school is considered to have knowledge if:

1. The parent has expressed concern in writing to agency personnel that their child is in need of special education and related services;
2. The child's behavior or performance shows a need for special education;
3. The parent has requested an evaluation under IDEA; or
4. The teacher of the child or other personnel of the agency have expressed specific concern about the pattern of behavior or performance of the child directly to the Supervisor of Special Education or to other personnel in accordance with the agency's established Child Find procedures.

If school personnel had been informed of a suspected disability but determined that an evaluation was not necessary, or conducted an evaluation and determined the child was not eligible for special education services and provided written prior notice to the parent of its determination, then the agency would be considered to have no knowledge of a disability.

If the agency did not have knowledge that the child was suspected to have a disability before disciplining the child, the agency may initiate the same disciplinary measures applied to children without disabilities who engaged in comparable behaviors.

If the parent requests an evaluation for a suspected disability under IDEA during the period of discipline, the agency must conduct the evaluation in an expedited manner. Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services. If the child is determined not to have a disability and be in need of special education, the parent will be given notice of the determination. If the child is determined to have a disability, taking into consideration information from the evaluation and the parents, the agency will provide special education and related services in accordance with an IEP and the disciplinary procedures outlined above.

A school may report a crime committed by a child with a disability to the appropriate authorities. When a crime has been committed by a child with a disability, the agency will ensure that copies of the special education and disciplinary records are transmitted for consideration by the appropriate authorities to which it reports the crime in accordance with the requirements under the FERPA.

### **Requirements for Unilateral Placement by Parents of Children in Private Schools When FAPE is an Issue**

An LEA is not required to pay for the cost of education including special education and related services, if a child with a disability is at a private school or facility if that LEA has made a free appropriate public education available to the child and the parents made a unilateral decision to place the child in the private school or facility. However, the public agency shall include that child in the population whose needs are addressed consistent with 34 CFR §300.540-§300.546.

If the parents of a child with a disability who previously received special education and related services under the authority of a public agency enroll the child in a private preschool, elementary or secondary school without the consent of or referral by the public agency, a hearing officer or court may require the agency to reimburse the parents for the cost of that enrollment if the hearing officer or court finds that the agency has not made a free appropriate public education available to the child in a timely manner prior to that enrollment, and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the LEA.

The cost of reimbursement may be reduced or denied:

1. If the parents did not inform the IEP committee at the most recent IEP meeting, or give written notice ten (10) business days (including holidays that occur on a business day) prior to the removal of the child from the public school, that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense;
2. If prior to the parents' removal of the child from the public school, the public agency informed the parents through written prior notice requirements of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluations; or
3. Upon judicial finding of unreasonableness with respect to actions taken by the parents.

Reimbursement to parents may not be reduced or if denied for failure to provide notice to the school if:

1. The parent is illiterate and cannot write in English;
2. Continued placement in public school would be likely to result in physical or serious emotional harm to the child;

3. The school prevented the parent from providing notice; or
4. The parents had not received written notice of their responsibility to provide notice to the school district.

Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child and the question of financial responsibility are subject to due process procedures.