



State of New Jersey

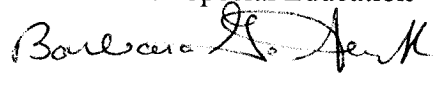
DEPARTMENT OF EDUCATION
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RICHARD J. CODEY
Acting Governor

WILLIAM L. LIBRERA
Commissioner

July 14, 2005

TO: Chief School Administrator
Director of Special Education
Administrator of a State Facility
Administrator of a Charter School
Administrator of an Approved Private School
for the Disabled
Administrator of a College-Operated Program
Statewide Special Education Advisory Council
Agencies or Organizations Concerned with Special Education

FROM: Barbara Gantwerk, Director 
Office of Special Education Programs

SUBJECT: Guidance Regarding Changes to the Due Process System in the Individuals with Disabilities Education Act of 2004

I am writing with respect to the Individuals with Disabilities Education Act of 2004 (IDEA 2004), enacted and signed into law on December 3, 2004. As you are aware, IDEA 2004 contains numerous changes to the Federal law governing the provision of special education and related services to students with disabilities. Almost all of the provisions of IDEA 2004 are effective July 1, 2005, with the exception of the provisions concerning highly qualified teachers, which were effective upon enactment of the law. The purpose of this guidance is to inform school districts and interested parties of the provisions of IDEA 2004 with respect to dispute resolution and how these provisions will be implemented for mediation and due process hearings. The procedures must change wherever the New Jersey Department of Education (NJDOE) has determined that IDEA supersedes state regulation, or where the department has determined there is no concomitant state regulation. The new procedures become effective in New Jersey on July 1, 2005.

The department has determined these procedures to meet the requirements of IDEA 2004 governing dispute resolution as of July 1, 2005. **These procedures are subject to change by further guidance from the United States Department of Education, amendment to State or Federal statute or regulation, or orders of courts of appropriate jurisdiction.**

Enclosed are a summary of the mediation and due process requirement and a quick reference guide. In addition, a revised copy of the procedural safeguards statement is enclosed. This

version of *Parental Rights in Special Education* (PRISE) contains all the essential information to provide notice to parents of their rights under IDEA 2004. Beginning in July and continuing until the booklet form of **PRISE** is reprinted, this version of PRISE must be given when the full explanation of the parents' rights is required.

A new model form has been developed and is included as part of PRISE. The model form is now for use by parents only as the procedures are different if a district requests a due process hearing. Copies of the due process model forms are attached to the PRISE document. The forms will also be available on the department's website at www.nj.gov/education.

It is very important that you carefully read all the information in this packet to assure that the new procedures are followed. We recognize that the transition to the new requirements may initially cause some confusion. We ask for your cooperation and patience as we proceed with implementing the new requirements.

BG/CK/KF

Enclosures

c: Members, State Board of Education
Commissioner William L. Librera
Richard Rosenberg
Senior Staff
Kathryn Forsyth
Rochelle Hendricks
Erika Leak
County Superintendent
County Supervisor of Child Study
Members, NJ LEE Group
Garden State Coalition of Schools

IDEA 2004: SUMMARY OF MEDIATION AND DUE PROCESS REQUIREMENTS

SUFFICIENT NOTICE

Due Process or Expedited Due Process Complaint

The request for a due process hearing, or expedited due process hearing (for disciplinary issues) must be sent to the receiving party (respondent) and to the Office of Special Education Programs (OSEP). The request serves as notice to the respondent of the issues in the due process complaint. The respondent may claim that the notice does not meet the requirements of IDEA 2004 and therefore, the notice is not sufficient. The notice for a hearing will be considered sufficient unless the respondent notifies the OSEP and the complaining party (petitioner), in writing, within 15 days of receipt of the request for due process. The sufficiency challenge will be forwarded to the Office of Administrative Law (OAL) and within five (5) days of receipt of the written objection, an administrative law judge (ALJ) will determine whether the notice meets the requirements of IDEA 2004 and will immediately notify the parties in writing of the determination. If sufficient, the timelines for resolution activities and for conducting a due process hearing will continue. If the notice is deemed insufficient, the ALJ may dismiss the case and the petitioner may re-file with OSEP or the ALJ may grant permission to amend the request at any time not later than five (5) days before the due process hearing occurs. Additionally, the petitioner may amend the due process request if the respondent consents to an amendment in writing and is given the opportunity to resolve the issues through a resolution session. The timelines for resolution activities and for conducting a due process hearing will begin again at the time the party files an amended request.

Emergency Relief

The notice for emergency relief will be considered sufficient unless the respondent notifies the petitioner and the **ALJ** in writing, prior to the emergency relief hearing, that the notice does not meet the requirements of IDEA 2004. The ALJ will hear the sufficiency challenge first. If the notice is sufficient, the ALJ will decide the emergent issue.

RESPONSE TO A REQUEST FOR DUE PROCESS

When a parent requests a due process hearing, or an expedited due process hearing (for disciplinary issues) and the district has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process request, the district must send a written response to the parent within 10 days of receiving the petition. The response must include:

- an explanation of why the agency proposed or refused to take the action raised in the complaint;
- a description of other options that the IEP team considered and the reasons those options were rejected;
- a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and
- a description of the factors that are relevant to the agency's proposal or refusal.

When a district requests a due process hearing, the parent must send a response that specifically addresses the issues raised in the request for due process. The response must be

sent to the district superintendent or board attorney within 10 days of receipt of the request for a due process hearing.

RESOLUTION SESSION

When a parent requests a due process hearing or expedited due process hearing, the district is given an opportunity to resolve the matter before going to a hearing. The district must conduct a resolution session with the parents and the relevant member(s) of the IEP team who have specific knowledge of the facts identified in the request. The resolution session must include a representative of the district who has authority to make decisions on behalf of the district. The school district may not include its attorney unless the parent is accompanied by an attorney. For a due process hearing, this resolution session must be held within 15 days of receiving the parents' request. For an expedited due process hearing, the resolution session must be held within seven (7) days of receiving the request. If the matter is not resolved to the satisfaction of the parents within 30 days of the receipt of the petition, OSEP will forward the case to the OAL for a due process hearing. If an expedited disciplinary matter is not resolved to the satisfaction of the parents within 15 days of receipt of the request, OSEP will forward the case to the OAL for an expedited due process hearing.

If an agreement is reached at the resolution session, the terms of the agreement will be incorporated into a written document and signed by the parties. Either party may void the agreement within three (3) business days of signing the agreement. If the agreement is not voided within the three (3) days, it is legally binding. If either party fails to implement the written agreement, it is enforceable in any State court of competent jurisdiction or in a District court of the United States.

In place of a resolution session, the parties may agree to participate in mediation conducted by a mediator from the OSEP. Parents can indicate on the request for a hearing that mediation is also requested. If the district agrees to mediation, **a representative of the district must contact OSEP** to facilitate the scheduling of the mediation conference.

The parties may agree to waive the resolution session and proceed directly to a hearing. Parents can indicate on the request for a hearing that they want to waive the resolution session. If the district agrees, the parent and a representative of the district with decision-making authority must agree in writing to waive the resolution session and must submit the signed waiver to the OSEP. Upon receipt of a signed waiver, the case will be transmitted to the OAL for a hearing.

Unless the parties notify the OSEP, in writing, that the matter has been resolved or withdrawn, the matter will be transmitted to the OAL after 30 days from the date the request was received.

When a district requests a due process hearing, the district is not required to conduct a resolution session. A representative of the OSEP will contact the parties to determine whether the parties will agree to mediation and if so, the representative will arrange for the mediation conference.

Emergency Relief - There is no requirement to conduct a resolution session for an emergency relief hearing.

DUE PROCESS HEARING

Sharing Information - Not less than five (5) business days prior to a due hearing and not less than **two (2) business** days for an expedited due process hearing, each party shall disclose to all other parties all evaluations completed by that date, and recommendations that the party intends to use at the hearing. Failure to comply with this requirement may bar use of the evaluations at the hearing.

Administrative Law Judge (ALJ) shall:

- not be an employee of the State education agency or have a personal or professional interest that conflicts with the person's objectivity in the hearing;
- possess knowledge of, and the ability to understand, the provisions of the IDEA 2004, Federal and State regulations pertaining to IDEA and legal interpretations thereof;
- possess knowledge and ability to conduct hearings in accordance with the appropriate, standard legal practice; and
- possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

Subject Matter of the Hearing - The party requesting the due process hearing is not permitted to raise issues at the due process hearing that were not raised in the request for a due process hearing.

Timeline for Requesting a Due Process Hearing - A parent or district must request a due process hearing within two (2) years of the date the parent or district knew or should have known about the alleged action that forms the basis of the complaint. The timeline does not apply if the parent was prevented from requesting the due process hearing due to:

- specific misrepresentations by the district that it had resolved the problem forming the basis of the complaint; or
- the district's withholding of information from the parent that was required under this part to be provided to the parent.

Timelines for Issuing a Decision - The timelines for conducting a due process hearing start when the case is transmitted to the OAL. The ALJ has 45 days to issue a written decision. At the request of either party, an ALJ can grant extensions to the 45-day timeline through an adjournment. If an adjournment is granted the time is not counted until the adjournment expires.

An expedited hearing is conducted within **20 school days** of receipt of the request. A decision is issued within **10 school days** after the hearing.

A copy of the decision will be mailed to both parties. Parents may request an electronic decision.

Decision of the Administrative Law Judge (ALJ) - In general, a decision made by an ALJ

must be made on substantive grounds based on a determination of whether the child received a free, appropriate public education (FAPE). In matters, alleging a procedural violation, an ALJ may decide that a child did not receive a FAPE only if the procedural inadequacies:

- impeded the child's right to a FAPE;
- significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or
- caused a deprivation of educational benefits.

Right to Bring a Civil Action (Appeal) - The decision of the ALJ is final except that any party may appeal the decision in any State court of competent jurisdiction or in a District court of the United States. The party bringing the action has 90 days from the date of the decision of the ALJ to file an appeal.

EMERGENCY RELIEF

A request for emergency relief must:

- be supported by an affidavit or notarized statement specifying the basis for the request; and
- be accompanied by a request for a due process hearing.

The petitioner must send an original request for the emergency relief and two copies of the entire due process petition to the OSEP. The petitioner must also provide a copy of the request for emergency relief and due process petition to the other party (district or education agency).

The ALJ assigned to hear the emergent issue will either grant or deny the requested emergency relief through a temporary order pending resolution of the underlying due process issue. After this interim decision, the parties must participate in a resolution session, agree to mediation in place of the resolution session, or agree in writing to waive the resolution session and proceed directly to a hearing on the underlying due process issue. The district will arrange the resolution session. The OSEP will schedule mediation, if requested by the parties. (See the sections on Resolution Session above and Mediation below for more information.)

MEDIATION

When a request for mediation is received by the OSEP and both parties have agreed to mediation, a representative of the OSEP will schedule a mediation conference within 15 calendar days of receipt of the request. The mediation activities will be concluded within 30 days of receipt of the request.

When a request for a due process hearing is received by the OSEP and the parties have agreed to mediation in place of the resolution session, a mediation conference will be scheduled within 15 calendar days of receipt of the request. The mediation activities will be concluded within 30 days of receipt of the request. For an expedited due process hearing, a mediation conference will be scheduled within seven (7) days of the request and the mediation activities

will be concluded within 15 days.

The purpose of mediation is to discuss the issues and explore the options in an attempt to resolve the underlying dispute. The chief school administrator of the district or his or her designee attends the mediation. The district may bring its attorney. The parent(s) may bring an attorney and/or advocate to the mediation.

The mediator from the OSEP does not represent either party. The role of the mediator is to help parties communicate and reach a mutually agreed upon settlement. Mediators do not make decisions regarding the facts in dispute nor do they determine the terms of any agreement. However, mediators do review the terms of the agreement to ensure compliance with the regulations for special education, New Jersey Administrative Code (N.J.A.C.) 6A:14.

Mediation Agreement - If agreement regarding the disputed issues is achieved, the terms of the agreement are written into the Notice of Agreement and signed by both parties (the parent and the representative of the district who has decision-making authority). The signed Notice of Agreement is legally binding on the parties. If a parent believes the mediation agreement is not being implemented as written, the parent may request enforcement of the agreement by writing to the State Director of the OSEP. Districts may seek enforcement in any State court of competent jurisdiction or in a District court of the United States.

Withdrawal of Mediation - As mediation is voluntary, it can end at any time. The petitioner may withdraw his or her request for mediation and the mediator will close the case.

Termination of Mediation - If the mediator determines that the mediation is not productive, the mediator is authorized to terminate the mediation.

Transmittal to the OAL - At the conclusion of an unsuccessful mediation direct transmittal to the OAL is no longer an option under the IDEA 2004. Rather, the petitioner must submit a new written request for a due process hearing as the request is subject to the new procedural requirements for a due process hearing.

Confidentiality - In accordance with N.J.A.C. 6A:14-2.6(d)7, **all discussions that occur during the mediation process are confidential** and may not be used as evidence in any subsequent due process hearing or civil proceeding.

Transfer of Rights - At age 18, all rights under N.J.A.C. 6A:14 transfer to the student. The parent(s) cannot initiate a hearing unless guardianship has been established or the adult student authorizes the parent(s) in writing to act on his or her behalf.

QUICK REFERENCE FOR MEDIATION – DUE PROCESS

SUFFICIENT NOTICE

Request must be sent to other party (respondent) and OSEP. The request serves as notice to the respondent of the issues in the due process complaint.

The respondent may challenge the sufficiency of the notice within 15 days of receipt of the request.

THE ALJ has 5 days to decide the challenge and notify the parties.

The request may be determined sufficient or insufficient. If insufficient, permission may be granted to amend the request.

RESPONSE TO A REQUEST FOR A DUE PROCESS HEARING

If the district has not sent written notice to the parents regarding the subject matter in their due process request, the district must send written notice within 10 days of receiving the request.

When the district requests a due process hearing the parent must send a written response to the district that specifically address the issues raised in the due process request. The response must be sent to the superintendent or board attorney within 10 days of receipt of the request for a due process hearing.

RESOLUTION SESSION

Within 15 days of a parental request for a due process hearing, the district must conduct a resolution session. Within seven (7) days of a parental request for an expedited due process hearing, the district must conduct a resolution session.

Within 30 days of a parental request for a due process hearing, the resolution activities must be concluded.

Within 15 days of a parental request for an expedited due process hearing, the resolution activities must be concluded.

The parent, relevant members of the IEP team and a representative of the district with decision-making authority attend. The board attorney may attend only if the parent brings an attorney.

A signed, written agreement may be voided within three (3) days of the date it was signed. An executed agreement may be enforced in a State court or a district court of the United States.

No resolution session for district initiated due process. No resolution session for emergency relief.

MEDIATION IN PLACE OF RESOLUTION

Parents can indicate on the request for a due process hearing that they would like mediation instead of a resolution session. If the district agrees to mediation in place of the resolution

session, the district must contact the OSEP to facilitate the scheduling of the mediation conference.

Mediation, including mediation as part of a due process hearing, is scheduled within 15 days of the request for mediation and mediation activities are concluded within 30 days.

Mediation as part of an expedited due process hearing is scheduled within seven (7) days and mediation activities are concluded within 15 days.

WAIVING THE RESOLUTION SESSION

Parents can indicate on the request for a due process hearing that they want to waive the resolution session. The parent and a representative of the district who has decision-making authority may agree in writing to waive the resolution session. Upon receiving the signed waiver, the OSEP will transmit the case to the OAL for a hearing.

TIMELINE FOR REQUESTING A DUE PROCESS HEARING

A parent or district must request a due process hearing within two (2) years of the date the parent or district knew or should have known about the alleged action that forms the basis of the complaint. The timeline does not apply if the parent was prevented from requesting the due process hearing due to:

- specific misrepresentations by the district that it had resolved the problem forming the basis of the complaint; or
- the district's withholding of information from the parent that was required under this part to be provided to the parent.

TIMELINES FOR ISSUING A DECISION

The timelines for conducting a due process hearing start when the case is transmitted to the OAL. The ALJ has 45 days to issue a written decision. If an adjournment is granted at the request of a party, the time is not counted until the adjournment expires.

An expedited hearing is conducted within **20 school days** of receipt of the request. A decision is issued within **10 school days** after the hearing.

RIGHT TO BRING A CIVIL ACTION (APPEAL)

The decision of the ALJ is final except that any party may appeal the decision in any State court of competent jurisdiction or in a District court of the United States. The party bringing the action has 90 days from the date of the decision of the ALJ to file an appeal.