

## Division of Special Education/Early Intervention Services

### Procedural Safeguards

The reauthorized Individuals with Disabilities Education Act (IDEA) was signed into law on December 3, 2004, by President George W. Bush. The provisions of the Act are effective July 1, 2005, with the exception of some elements of the definition of “highly qualified teacher” that took effect upon the signing of the Act. This is one in a series of documents, prepared by the Division of Special Education/Early Intervention Services, Maryland State Department of Education (MSDE) that cover a variety of high-interest topics to support local school systems, local Infants and Toddlers Programs, and other public agencies in preparing to implement the new requirements. This document only addresses the changes in the provisions regarding procedural safeguards that take effect on July 1, 2005. It does not address any changes that may be made in the final federal regulations or potential changes to State statutes or regulations.

#### 1. How does the statute define “parent” of a child with a disability?

The term “parent” means:

- A natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent);
- A guardian (but not the State if the child is a ward of the State);
- An individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child’s welfare; or
- An individual assigned to be a surrogate parent. [Sec. 602(23)]

Although the statute includes a foster parent in the definition of “parent,” the definition of parent in Education Article §8-412, Annotated Code of Maryland does not include a foster parent, unless the foster parent is a relative or stepparent. Therefore, individuals serving as foster parents who are not relatives or stepparents, must be appointed the student’s parent surrogate in order to represent the child in the educational decision making process.

**2. When must a parent surrogate be appointed to represent a child with a disability in the educational decision making process?**

The statute requires that each public agency have procedures to “protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents...” (also see answer to question 1 above). The surrogate cannot be an employee of the State educational agency, the public agency, or any other agency that is involved in the education or care of the child. [Sec. 615(b)(2)(A)]

In the case of a child who is a ward of the State, the surrogate “may alternatively be appointed by the judge overseeing the child’s care,” provided that individual meets the requirements. [Sec. 615(b)(2)(A)(i)]. In the case of “an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)),” the public agency must appoint a parent surrogate for the child. [Sec. 615(b)(2)(A)(ii)]

Reasonable efforts must be made to ensure the parent surrogate is assigned not more than 30 days after there is a determination that the child needs a surrogate [Sec. 615(b)(2)(B)]

**3. When must parents receive a copy of the procedural safeguards and parental right document?**

A copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents “only 1 time per year, except that a copy also shall be given to the parents (i) upon initial referral or parental request for evaluation; (ii) upon the first occurrence of a filing of a due process request; and (iii) upon request by a parent.” [Sec. 615(d)]

A public agency may place a current copy of the procedural safeguards on its website. [Sec. 615(d)(1)(B)]

The statute does not prohibit a public agency from providing the parents with a copy of the procedural safeguards and parental rights document more frequently.

#### **4. When must the public agency provide the parent with “prior written notice”?**

The public agency must provide parents with prior written notice (also referred to as written prior notice in the statute), whenever the public agency proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child. The notice must be written in “the native language of the parents, unless it clearly is not feasible to do so.” The notice must include specific content that is stated in current federal regulations.

[Sec. 615(c)(1)]

The statute states “a parent of a child with a disability may elect to receive notices required under this section by an electronic mail (e-mail) communication, if the [public] agency makes such option available.” [Sec. 615(n)]

#### **5. What is mediation and when is it permitted?**

Mediation is defined as an attempt to bring about a peaceful settlement or compromise between parties to a dispute through the objective intervention of a neutral party. Mediation is an opportunity for parents and school officials to meet with an independent mediator from the Office of Administrative Hearings and discuss a problem, issue, concern, or complaint in order to resolve the problem amicably without the necessity of a hearing. Mediation can be initiated at any time, if both parties agree to expedite the development of a solution for any dispute including matters that arise prior to the filing of a formal due process hearing request. This process is at no cost to the parent and public agency. Each mediation session is to be scheduled in a timely manner and held in a location that is convenient for the parties involved.

[Sec. 615(e) and *IDEA Guide to “Frequently Asked Questions,”* Committee on Education and the Workforce, February 17, 2005, pp.13-14]

#### **6. How did IDEA 2004 change the provisions related to mediation?**

Because Maryland has been implementing a statewide system to promote mediation, procedures have already been established and implemented to ensure parties have the opportunity to use mediation independent of a due process hearing to resolve disputes. IDEA 2004 states that if the parties successfully resolve a dispute through mediation:

- The written agreement executed by the parties must be signed by both the parent and a representative of the agency who has the authority to bind the agency; and
- The mediation agreement is legally binding and is enforceable in any State

court of competent jurisdiction or in a district court of the United States. [Sec. 615(e)(2)(F)].

IDEA 2004 also includes the requirement stated in current federal regulation [34 CFR 300.506] that mediation agreements be set forth in writing and that discussions that occur during the mediation session are confidential and may not be used in any subsequent due process hearing or civil proceedings. [Sec. 615(e)(2)(G)]

**7. Does IDEA place a statute of limitations on when a due process hearing can be requested?**

Yes. Effective July 1, 2005, a request for due process hearing must be filed no later than two (2) years after the violation is alleged to have occurred. IDEA provides an exception to this limit if the parent “was prevented from requesting the hearing due to specific misrepresentations by the [public agency] that it had resolved the problem forming the basis of the complaint; or the [public agency’s] withholding of information from the parent that was required under [IDEA] to be provided to the parent.” [Sec. 614(f)(3)(D)]

**8. What disputes can be resolved through a due process hearing?**

Either the parent or the public agency may request a due process hearing with respect to “any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” [Sec. 615(b)(6)(A), 615(f)(1)(A)].

However, the statute states that a public agency may not request a due process hearing OR mediation concerning a parent’s refusal to provide consent for the initial provision of special education services. [Sec. 614(a)(1)(D)(ii)(II)]

**9. What information must be included in a due process hearing request?**

The due process hearing request must include the name and home address of the student; the name of the school the student attends; a description of the nature of the problem, including the facts relating to the problem; and a proposed resolution to the problem. A party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements. [Sec. 615(b)(7)(B)]

**10. Where is a due process hearing request sent?**

The written request for a due process hearing must be sent to the *non-complaining party* and a copy forwarded to the Office of Administrative Hearings at the following address:

Office of Administrative Hearings  
Administrative Law Building  
11101 Gilroy Road, Unit E/Clerk's Office  
Hunt Valley, MD 21031  
Fax: 410-229-4277

**11. What procedures must be followed when a due process hearing is requested to resolve issues unrelated to the disciplinary removal of a student, or a student who is not enrolled and attending school?**

- Within 10 days of receipt of a parent's request for a due process hearing, the public agency must provide the parents with prior written notice regarding the issues in the hearing request unless the public agency has already done so.
- Within 10 days of receipt of a hearing request, the non-complaining party must send a response to the complaining party that specifically addresses the issues raised in the due process request. [Sec. 615(c)(2)(B)]
- If the non-complaining party believes the due process hearing request does not meet the requirements, that party may notify the Office of Administrative Hearings within 15 days of receiving the request.
- Within 5 days of receiving the notice challenging the sufficiency of the request, the administrative law judge must, on the face of the due process request, determine whether the notice meets the requirements and immediately notify the parties in writing of the determination. If the due process notice is determined to be insufficient, the complaining party may submit a new request and the timeline starts over. The due process request is deemed to be sufficient unless the party receiving the notice notifies the Office of Administrative Hearings and the complaining party in writing.

[Sec. 615(c)(2)(A), (C) and (D)] and *IDEA Guide to "Frequently Asked Questions,"* Committee on Education and the Workforce, February 17, 2005, pg. 13].

- The public agency must convene a resolution session (see description of resolution session below) with the parents within 15 days of receipt of the due process request, unless both parties agree in writing not to conduct the session

**OR** agree to use mediation through the Office of Administrative Hearings. If, through the resolution session, the public agency is not able to resolve the issues to the parents' satisfaction within 30 days of the receipt of the due process hearing request, a hearing may then be held and the timeline for issuing a decision commences (within 45 days).  
[Sec. 615(f)(1)(A) and (B); and Education Article §8-413(f)]

- If the parties agree, in writing, to waive the use of a resolution session and go directly to a due process hearing without attempting mediation, the hearing must be held and a decision issued within 45 days of the date of the agreement.  
[Sec. 615(f)(1)(A) and (B); and Education Article §8-413(f)]
- If the parties agree to attempt to resolve the issues subject to the hearing request through mediation and waive the resolution session, but are unsuccessful, a hearing may be held and a decision issued within 45 days of the date the parties agreed to waive the resolution session.  
[Sec. 615(f)(1)(A) and (B); and Education Article §8-413(f)]

## **12. What is a resolution session?**

A resolution session is a new requirement that is intended to provide an opportunity to resolve issues in the due process request in an efficient and effective manner so that parents and public agencies can avoid due process. The resolution session must include a representative of the public agency who has decision-making authority on behalf of the agency, but may not include an attorney for the public agency unless an attorney accompanies the parent.

If the parties reach agreement through this process, they must execute a legally binding agreement that is signed by both the parent and representative of the public agency who has the authority to bind the agency. This agreement is enforceable in any State court of competent jurisdiction or in a district court of the United States. Either party may void the agreement up to three business days of the agreement's execution.

If the public agency has not resolved the issues to the parents' satisfaction within 30 days of receipt of the complaint, the parties may proceed to a due process hearing and all applicable timelines for a hearing commence.

The parties may agree NOT to conduct the resolution session if both agree in writing **OR** decide to use mediation through the Office of Administrative Hearings.

[Sec. 615(f)(1)(B)]

**13. May a party requesting the due process hearing raise issues that were not raised in the due process hearing request?**

The party requesting the due process hearing cannot raise issues at the hearing that were not raised in the due process request unless the other party agrees otherwise. [Sec. 615(f)(3)(B)]

A separate due process request may be made on an issue separate from a due process hearing already filed.

[Sec. 615(o)]

**14. May the hearing request be amended?**

A party may amend its request for a due process hearing notice only if:

- (i) the other party consents in writing to the amendment and is given the opportunity to resolve the issue through a resolution session under Sec. 615(f)(1)(B); or
- (ii) the administrative law judge grants permission, but not later than 5 days before the due process hearing occurs.

[Sec. 615(c)(2)(E)]

**15. What are the requirements for hearings requested to resolve disagreements with decisions regarding placement in an interim alternative educational setting or the manifestation determination?**

The parent of a child with a disability who disagrees with any decision regarding placement under 615(k) (removal to an interim alternative educational setting), or the manifestation determination may request a hearing. [Sec. 615(k)(3)(A)]. The parent is entitled to an expedited hearing that must be conducted within 20 school days of the date the hearing is requested and a written decision must be issued within 10 school days after the hearing.

If a public agency believes that maintaining the current placement of the student is substantially likely to result in injury to the students or to others, the public agency may request a hearing that must be completed and a written decision issued within the same timelines as stated above.

During the pendency of the hearing, the student remains in the interim alternative education setting or until the expiration of the disciplinary removal, whichever occurs first, unless the parent and the public agency agree otherwise.

[Sec. 615(k)(4)]

**16. What is the timeline for hearings requested to resolve disputes regarding a student who is not currently enrolled and attending school?**

The IDEA statute does not address timelines for hearings requested on behalf of a student not currently enrolled and attending school. Under Maryland law the hearing must be held within 20 calendar days of receipt of the request and a decision issued no later than 15 calendar days after the hearing.

[Education Article §8-413(g)]

**17. What direction does IDEA 2004 provide to administrative law judges in reaching decisions regarding the provision of FAPE?**

In general, the administrative law judge's (ALJ) decision must "be made on substantive grounds based on a determination of whether the child received a free appropriate public education... In matters alleging a procedural violation, the ALJ may find that a child did not receive a free appropriate public education only if the procedural inadequacies—

- (I) Impeded the child's right to a free appropriate public education;
- (II) Significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free appropriate public education to the parents' child; or
- (III) Caused a deprivation of educational benefits."

[Sec. 615(f)(3)(E)]

**18. What are the new provisions in IDEA 2004 related to the awarding of attorneys' fees?**

A district court of the United States, may "in its discretion, award reasonable attorneys' fees as part of the costs:

- (I) To a prevailing party who is the parent of a child with a disability;
- (II) To a prevailing party who is a State educational agency or local [public] agency against the attorney of a parent who files a due process request 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; or

- (III) To a prevailing State educational agency or local [public] agency against the attorney of a parent, or against the parent, if the parent's due process request 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."

[Sec. 615(i)(3)(B)(i)(II) and (III)]

Attorneys' fees may not be awarded for attorneys attending a resolution session or an IEP team meeting unless the IEP meeting is convened as a result of an administrative proceeding or judicial action. [Sec. 615(i)(3)(D)] Maryland law does not provide for attorney's fees for mediation [COMAR 13A.05.01.15B]

**19. What is the time period to bring a civil action in court by the party aggrieved by a due process hearing decision?**

IDEA 2004 states that an aggrieved party has the right to bring a civil action in court with respect to the due process complaint within 90 days of the date of that decision unless the State has an explicit time limitation for appeals. Education Article §8-413(h) provides either party up to 180 days from the date of the decision to file an appeal to the federal District Court for Maryland or to the circuit court for the county in which the student resides.

**20. What data must be collected and reported by MSDE to the U.S. Department of Education related to mediation and due process hearing requests?**

MSDE must report, annually, the following data to the Secretary of Education and the public:

- Number of due process hearing requests;
- Number of due process hearings conducted;
- Number of hearings requested under 615(k) (i.e., hearings requested to resolve disagreements regarding the interim alternative educational setting or the manifestation determination, or when the public agency believes maintaining the current placement of the student is substantially likely to result in injury to the student or others);
- Number of changes in placement ordered as a result of the hearings requested under 615(k);
- Number of mediations held; and
- Number of mediation agreements reached. [Sec. 618(a)(1)(F) – (H)]

Additionally, as part of the State's general supervisory responsibilities, MSDE must collect and analyze data related to the use of resolution sessions as described in Sec. 615(f)(1)(B). [Sec. 616(a)(3)(B)]

For more information, call 410-767-0858

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