

### III. PROCEDURAL SAFEGUARDS REGARDING DUE PROCESS HEARINGS

The reauthorized *Individuals with Disabilities Act* (IDEA) was signed into law on Dec. 3, 2004, by President George W. Bush. The provisions of the act will be effective on 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 Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education, that covers a variety of high-interest topics and brings together the statutory language related to those topics to support constituents in preparing to implement the new requirements. This document addresses only the changes to the procedural safeguards regarding due process hearings of IDEA that will take effect on July 1, 2005. It does not address any changes that may be made by the final regulations.

#### **IDEA 2004:**

##### **1. Adopts current regulations regarding who may request a due process hearing.**

Either the parent or the public agency may request a due process hearing with respect to any matter relating to identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child. [34 CFR 300.507(a)(1); 615(b)(6)(A); 615(f)(1)(A)]

##### **2. Specifies the timeline for requesting a due process hearing.**

... Sets forth an alleged violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the state has an explicit time limitation for presenting such a complaint ..., in such time as the state law allows, except that the exceptions to the timeline described in Section 615(f)(3)(D) shall apply... [615(b)(6)(B)]

A parent or agency shall request an impartial due process hearing within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the state has an explicit time limitation for requesting such a hearing under this part, in such time as the state law allows. [615(f)(3)(C)]

The timeline described in Section 615(f)(3)(C) shall not apply to a parent if the parent was prevented from requesting the hearing due to:

- Specific misrepresentations by the local educational agency (LEA) that it had resolved the problem forming the basis of the complaint; or
- The LEA’s withholding of information from the parent that was required under this part to be provided to the parent.

[615(f)(3)(D)]

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<sup>1</sup> Other topics in this series include: Disproportionality and Overidentification; Early Intervening Services; Changes in Initial Evaluations and Reevaluations; Individualized Education Program (IEP); Discipline; Statewide and Districtwide Assessments; Individualized Education Program (IEP) Team Meetings and Changes to the IEP; Part C Option: Age 3 to Kindergarten Age; Procedural Safeguards: Surrogates, Notice, Consent; Procedural Safeguards: Mediation and Resolution Sessions; Procedural Safeguards: Due Process Hearings; Alignment With the *No Child Left Behind Act*; Highly Qualified Teachers; Children Enrolled by Their Parents in Private Schools; State Funding; and Local Funding. Documents are available on the OSERS Web site at: [www.ed.gov/about/offices/list/osers/index.html](http://www.ed.gov/about/offices/list/osers/index.html).

### **3. Requires either party requesting a due process hearing to provide notice to the other party.**

Procedures that require either party, or the attorney representing a party, to provide a request for a due process hearing notice in accordance with Section 615(c)(2) (which shall remain confidential)<sup>2</sup> to the other party ... and forward a copy of such notice to the state educational agency (SEA) that shall include:

- The name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;
- In the case of a homeless child or youth (within the meaning of Section 725(2) of the *McKinney-Vento Homeless Assistance Act* (42 U.S.C. 11434a(2)), available contact information for the child and the name of the school the child is attending;
- A description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and
- A proposed resolution of the problem to the extent known and available to the party at the time.

[615(b)(7)(A)]

... 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 of Section 615(b)(7)(A)(ii). [615(b)(7)(B)]

The due process ... notice required under Section 615(b)(7)(A) shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party, in writing, that the receiving party believes the notice has not met the requirements of section 615(b)(7)(A). [615(c)(2)(A)]

### **4. Specifies timelines for actions related to a request for a due process hearing.**

If the LEA has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process request, the LEA shall, within 10 days of receiving the request for a due process hearing, send to the parent a response that shall 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 individualized education program (IEP) team considered and the reasons why 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.

[615(c)(2)(B)(i)(I)]

A response filed by an LEA pursuant to Section 615(c)(2)(B)(i)(I) shall not be construed to preclude such LEA from asserting that the parent's due process request was insufficient where appropriate. [615(c)(2)(B)(i)(II)]

Except as provided in Section 615(c)(2)(B)(i), the noncomplaining party shall, within 10 days of receiving the notice of request for a due process hearing, send to the other party a response that specifically addresses the issues raised in the request. [615(c)(2)(B)(ii)]

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<sup>2</sup> The statute uses the term "complaint" to indicate a request for a due process hearing. The term "request for a due process hearing" will be used in this document in lieu of "complaint."

The party providing a hearing officer notification under Section 615(c)(2)(A) shall provide the notification within 15 days of receiving the request for a due process hearing. [615(c)(2)(C)]

Within five days of receipt of the notification provided under Section 615(c)(2)(C), the hearing officer shall make a determination on the face of the notice of whether it meets the requirements of Section 615(b)(7)(A), and shall immediately notify the parties in writing of such determination. [615(c)(2)(D)]

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

- The other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to Section 615(f)(1)(B); or
- The hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than five days before a due process hearing occurs.

The applicable timeline for a due process hearing under this part shall recommence at the time the party files an amended notice, including the timeline under Section 615(f)(1)(B).

[615(c)(2)(E)(i)(ii)]

### **5. Adds provisions regarding hearing officers.**

A hearing officer conducting a hearing pursuant to Section 615(f)(1)(A) shall, at a minimum:

- Not be an employee of the SEA or the LEA involved in the education or care of the child, or a person having a personal or professional interest that conflicts with his or her objectivity in the hearing;
- Possess knowledge of, and the ability to understand, the provisions of this title, federal and state regulations pertaining to this title, and legal interpretations of this title by federal and state courts;
- Possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and
- Possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

[615(f)(3)(A)]

### **6. Sets guidelines for issues raised at a due process hearing.**

The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under Section 615(b)(7), unless the other party agrees otherwise. [615(f)(3)(B)]

### **7. Specifies parameters for hearing officer decisions.**

Subject to Section 615(f)(3)(E)(ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education. [615(f)(3)(E)(i)]

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies:

- Impeded the child's right to a free appropriate public education;
- Significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or
- Caused a deprivation of educational benefits.

[615(f)(3)(E)(ii)(I-III)]

Rule of construction--Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under Section 615. [615(f)(3)(E)(iii)]

Rule of construction--Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the SEA. [615(f)(3)(F)]

**8. Specifies a timeline for bringing a civil action.**

The party bringing the [civil] action shall have 90 days from the date of the decision of the hearing officer to bring such an action or, if the state has an explicit time limitation for bringing such action under Part B, in such time as the state law allows. [615(i)(2)(B)]

**9. Adds provisions regarding the awarding of attorneys' fees.**

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs:

- To a prevailing party who is an SEA or an LEA against the attorney of a parent who files a request for a due process hearing 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
- To a prevailing SEA or LEA against the attorney of a parent, or against the parent, if the parent's complaint 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.

[615(i)(3)(B)(i)(II), (III)]

**10. Clarifies that parents may file separate due process requests on additional issues.**

Nothing in this section shall be construed to preclude a parent from filing a separate request for a due process hearing on an issue separate from a request already filed. [615(o)]