

# South Dakota Parental Rights and Procedural Safeguards



Special Education Programs  
Revised July 2009



## Table of Contents

Prior Written Notice	<a href="#">1</a>
Definition of Parental Consent	<a href="#">2</a>
Definition of Parent	<a href="#">3</a>
Parental Consent: Initial Evaluation	<a href="#">4</a>
Parental Consent: Services	<a href="#">5</a>
Parental Consent: Reevaluations	<a href="#">6</a>
Parental Consent: Reasonable Efforts	<a href="#">7</a>
Parental Consent: Other	<a href="#">7</a>
Independent Educational Evaluations	<a href="#">8</a>
Confidentiality and Access to Educational Records	<a href="#">10</a>
Amendment of Records at Parent's Request	<a href="#">14</a>
Children Placed in Private Schools by Their Parents if FAPE is at Issue	<a href="#">16</a>
Procedures on Disciplining Students with Disabilities: Authority of School Personnel	<a href="#">18</a>
Procedures on Disciplining Students with Disabilities: Manifestation determination	<a href="#">19</a>
Procedures on Disciplining Students with Disabilities: Special Circumstances	<a href="#">20</a>
Procedures on Disciplining Students with Disabilities: Notification	<a href="#">20</a>
Procedures on Disciplining Students with Disabilities: Change of Placement Because of Disciplinary Removals	<a href="#">21</a>
Procedures on Disciplining Students with Disabilities: Determination of Settings	<a href="#">21</a>
Procedures on Disciplining Students with Disabilities: Appeal	<a href="#">21</a>
Procedures on Disciplining Students with Disabilities: Authority of Hearing Officer	<a href="#">22</a>
Procedures on Disciplining Students with Disabilities: Placement during Appeals	<a href="#">22</a>
Protections for Children Not Determined Eligible for Special Education	<a href="#">22</a>
Expedited Due Process Hearings	<a href="#">24</a>
Rule of Construction: Referral to and Action by Law Enforcement and Judicial	<a href="#">25</a>
Transmittal of Records	<a href="#">25</a>
State Complaint Procedures: Difference between a Due Process Hearing Complaint and State Complaint Procedures	<a href="#">25</a>
State Complaints	<a href="#">26</a>
State Complaint: Filing a Complaint	<a href="#">27</a>
State Complaint: State Complaint Procedures	<a href="#">27</a>
Mediation	<a href="#">29</a>
Filing a Due Process Complaint	<a href="#">31</a>
Due Process Complaint	<a href="#">31</a>

Resolution Process	<a href="#">33</a>
Impartial Due Process Hearing	<a href="#">35</a>
Civil Actions	<a href="#">38</a>
Attorneys' Fees	<a href="#">39</a>
Child's Status During Proceedings	<a href="#">40</a>
Transfer of Parental Rights at Age of Majority	<a href="#">41</a>
Sources for You to Contact for Additional Assistance in Understanding Your Rights:	<a href="#">42</a>
Appendix A	<a href="#">43</a>
• Education records	
• Special Circumstances Definitions	<a href="#">44</a>

## **Parental Rights Procedural Safeguards Notice**

The primary purpose of this document is to provide you with important information regarding your rights as a parent under special education in South Dakota. Please review them carefully and if you have questions or need assistance in understanding the provisions of the state's special education rules, contact any of the organizations listed at the end of this document or contact your local school district's superintendent or designee.

---

### **Prior Written Notice**

The district must provide you with prior written notice five days before proposing to initiate or change or refusing to initiate or change the identification, evaluation or educational placement of your child or the provision of a free appropriate public education to your child. The five day notice may be waived by you.

The written notice must:

1. Describe the action that your school district proposes or refuses to take;
2. Explain why your school district is proposing or refusing to take the action;
3. Describe each evaluation procedure, assessment, record, or report your school district used in deciding to propose or refuse the action;
4. Include a statement that you have protections under the procedural safeguards provisions in Part B of the IDEA;
5. Tell you how you can obtain a description of the procedural safeguards if the action that your school district is proposing or refusing is not an initial referral for evaluation;
6. Include sources for you to contact for help in understanding Part B of the IDEA;
7. Describe any other options that your child's individualized education program (IEP) Team considered and the reasons why those options were rejected; **and**
8. Provide a description of other factors relevant to why your school district proposed or refused the action.

The notice must be:

1. Written in language understandable to the general public; **and**
2. Provided in your native language or other mode of communication you use, unless it is clearly not feasible to do so.

If your native language or other mode of communication is not a written language, your school district must take steps to ensure that:

1. The notice is translated for you orally or by other means in your native language or other mode of communication;
2. You understand the content of the notice; **and**
3. There is written evidence that 1 and 2 have been met.

You may elect to receive notices required in this document regarding prior written notice, procedural safeguards notice, and notices related to a due process complaint by an electronic mail communication if the district makes that option available. The district will document your request to receive these notices by electronic mail.

***What this means.....***

- Notices to parents must be in writing. It must be given to you whenever the school proposes or refuses an action that deals with identifying, evaluating, placing or providing services to your child.
- The notice must include all required information.
- Schools must make sure parents understand the contents of the prior written notice.

---

**Definition of Parental Consent**

"Consent" means that the parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication. The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and the parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked). If the parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the district is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent.

***What this means.....***

- The parent understands and agrees in writing to the carrying out of the activity for which consent is sought.
- Granting your consent is voluntary and may be revoked at any time.
- If you revoke consent for special education services, the district is not required to amend your child's record regarding previous special education services received.

---

**Definition of a Parent**

A parent means:

1. A biological or adoptive parent of a child;
2. A foster parent unless state law, regulations, or contractual obligations with the state or local entity prohibit a foster parent from acting as a parent;
3. A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);
4. An individual acting in the place of a biological 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
5. A surrogate parent who has been appointed in accordance with §24:05:30:15.

*Except:*

1. If a judicial decree or order identifies a specific person or persons to act as the "parent" of a child or to make educational decisions on behalf of a child, under items 1-4 above, then such person or persons shall be determined to be the "parent"
  2. The biological or adoptive parent, when attempting to act as the parent and when more than one party is qualified to act a parent, must be presumed to be the parent unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.
-

<b>Parental Consent</b>
<b>Initial Evaluation</b>

### **Consent for initial evaluation**

Your school district cannot conduct an initial evaluation of your child to determine whether your child is eligible under Part B of the IDEA to receive special education and related services without first providing you with prior written notice of the proposed action and without obtaining your consent as described in this document.

1. Your school district must make reasonable efforts to obtain your informed consent for an initial evaluation to decide whether your child is a child with a disability.
2. Your consent for initial evaluation does not mean that you have also given your consent for the school district to start providing special education and related services to your child.
3. If your child is enrolled in public school or you are seeking to enroll your child in a public school and you have refused to provide consent or failed to respond to a request to provide consent for an initial evaluation, your school district may, but is not required to, seek to conduct an initial evaluation of your child by utilizing the Act's mediation or due process complaint, resolution meeting, and impartial due process hearing procedures (unless required to do so or prohibited from doing so under State law).
4. Your school district will not violate its obligations under child find to locate, identify and evaluate your child and the requirements regarding parental consent, evaluation, and reevaluation, if it does not pursue an evaluation of your child in these circumstances, unless State law requires it to pursue the evaluation.

***What this means.....***

- The school must get your consent to do an initial evaluation of your child to see if your child is eligible to receive services.
- Your consent for the evaluation does not mean you have given consent for your child to receive special education services.

### **Special rules for initial evaluation of wards of the State**

If a child is a ward of the State and is not residing with his/her parent —

The school district does not need consent from the parent for an initial evaluation to determine if the child is a child with a disability if:

1. Despite reasonable efforts to do so, the school district cannot discover the whereabouts of the child's parent;
2. The rights of the parents have been terminated in accordance with State law; **or**
3. A judge has assigned the right to make educational decisions and to consent for an initial evaluation to an individual other than the parent.

*Ward of the State*, as used in the IDEA, means a child who, as determined by the State where the child lives, is:

1. A foster child;
2. Considered a ward of the State under State law; **or**
3. In the custody of a public child welfare agency.

*Exception:*

*Ward of the State* does not include a foster child who has a foster parent who meets the definition of a parent.

---

<b>Parental Consent</b>
-------------------------

<ul style="list-style-type: none"><li>• <b>Services</b></li></ul>
---

### **Parental consent for services**

Your school district must obtain your informed consent before providing special education and related services to your child for the first time.

1. The school district must make reasonable efforts to obtain your informed consent before providing special education and related services to your child for the first time.
2. If you do not respond to a request to provide your consent for your child to receive special education and related services for the first time, or if you refuse to give such consent, or later revoke (cancel) your consent in writing your school district **may not** use the procedural safeguards (i.e., mediation, due process complaint, resolution meeting, or an impartial due process hearing) in order to obtain agreement or a ruling that the special education and related services (recommended by your child's IEP Team) may be provided to your child without your consent.
3. If you refuse to give your consent for your child to receive special education and related services for the first time, or if you do not respond to a request to provide such consent, or later revoke (cancel) your consent in writing, and the school district does not provide your child with the special education and related services for which it sought your consent, your school district:

- Is not in violation of the requirement to make a free appropriate public education (FAPE) available to your child for its failure to provide those services to your child; **and**
- Is not required to have an individualized education program (IEP) meeting or develop an IEP for your child for the special education and related services for which your consent was requested.

If you revoke (cancel) your consent in writing at any point after your child is first provided special education and related services, then the school district may not continue to provide such services, but must provide you with prior written notice, as described under the heading [Prior Written Notice](#), before discontinuing those services.

***What this means.....***

- The school must get your consent before providing special education and related services to your child for the first time.
- The school must try very hard to get your permission to provide special education and related services to your child.
- If you revoke (cancel) your consent for services in writing after your child first receives special education and related services, the school may not continue to provide your child with services and will notify you in writing.
- The school is not in violation of FAPE if you do not give your consent for services or if you do not respond to their request, or if you revoke (cancel) your consent in writing.

**Parental Consent**

**Reevaluations**

**Parental consent for reevaluations**

Your school district must obtain your informed consent before it reevaluates your child, unless your school district can demonstrate and document its efforts that:

1. It took reasonable steps to obtain your consent for your child's reevaluation; **and**
2. You did not respond.

If you refuse to consent to your child's reevaluation, the school district may, but is not required to, pursue your child's reevaluation by using the mediation, due process complaint, resolution meeting, and impartial due process hearing procedures to seek to override your refusal to consent to your child's reevaluation. As with initial evaluations,

your school district does not violate its obligations under Part B of the IDEA if it declines to pursue the reevaluation in this manner.

***What this means.....***

- The school must get your consent in order to reevaluate your child for services unless the school can show it has made attempts to contact you to get consent and you have failed to respond, the school may go ahead and conduct the reevaluations without your consent.

---

**Parental Consent**

- **Reasonable Efforts**

**Documentation of reasonable efforts to obtain parental consent**

Your school must maintain documentation of reasonable efforts to obtain parental consent for initial evaluations, to provide special education and related services for the first time, to reevaluation and to locate parents of wards of the State for initial evaluations. The documentation must include a record of the school district's attempts in these areas, such as:

1. Detailed records and dates of telephone calls made or attempted and the results of those calls;
2. Detailed copies of dated correspondence sent to the parents and any responses received; **and**
3. Detailed records and dates of visits made to the parent's home or place of employment and the results of those visits.

---

**Parental Consent**

- **Other**

**Other consent requirements**

Your consent is **not** required before your school district may:

1. Review existing data as part of your child's evaluation or a reevaluation; **or**
2. Give your child a test or other evaluation that is given to all children unless, before that test or evaluation, consent is required from all parents of all children.

Your school district may not use your refusal to consent to one service or activity to deny you or your child any other service, benefit, or activity.

If you have enrolled your child in a private school at your own expense or if you are home schooling your child, and you do not provide your consent for your child's initial evaluation or your child's reevaluation, or you fail to respond to a request to provide your consent, the school district may not use its consent override procedures (i.e., mediation, due process complaint, resolution meeting, or an impartial due process hearing) and is not required to consider your child as eligible to receive equitable services (services made available to parentally-placed private school children with disabilities).

---

### **Independent Educational Evaluation (IEE)**

- You have the right to an independent educational evaluation of your child at public expense if you disagree with an evaluation obtained by the district subject to the conditions in this section.
  1. An independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the district responsible for the education of your child.
  2. Public expense means that the district either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to you (consistent with the provisions of Part B of the IDEA, which allow each State to use whatever State, local, Federal and private sources of support are available in the State to meet the requirements of Part B of the Act).
- If you request an independent educational evaluation, the district may ask you for the reason why you object to the public evaluation. However, the explanation by you may not be required and the district may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.
- At your request for an IEE, the district will provide you with information about where an IEE may be obtained, and the district criteria applicable for independent educational evaluations.
- If you request an independent educational evaluation at public expense, the district must, without unnecessary delay either file a due process complaint to request a hearing to show that its evaluation is appropriate or ensure an independent educational evaluation is provided at public expense unless, through the hearing

process, the district demonstrates that the evaluation obtained by the parent did not meet district criteria.

- If the district files a due process complaint notice to request a hearing and the final decision is that the district's evaluation is appropriate, you still have the right to an independent educational evaluation, but not at public expense.
- You are entitled to only one independent educational evaluation of your child at public expense each time your school district conducts an evaluation of your child with which you disagree.
- If you obtain an independent educational evaluation at public expense or share with the district an evaluation obtained at private expense, the results of the evaluation must be considered by the district, if it meets district criteria, in any decision made with respect to the provision of a free appropriate public education to your child.
- The results of the evaluation may be presented by any party as evidence at a hearing on a due process complaint under this state rule regarding your child.
- If a hearing officer requests an independent educational evaluation as part of a hearing on a due process complaint, the cost of the evaluation must be at public expense.
- If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner must be the same as the criteria that the district uses when it initiates an evaluation to the extent those criteria are consistent with the parent's right to an independent educational evaluation. Except for the criteria described above, the district may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

***What this means.....***

- You have the right to an independent educational evaluation if you disagree with the evaluation conducted by the public school.
- Parents always have the right to have an independent evaluation conducted at your own expense which must be considered in developing your child's IEP, so long as your evaluation meets the school's criteria for evaluations.
- If you have an IEE completed or if you inform the school of your intent to have an IEE completed, the school's options are to pay for the evaluation or initiate a due process hearing to attempt to show that the school's evaluation was appropriate.
- A school can also initiate a hearing to demonstrate an IEE the parent had conducted did not meet school criteria.
- Parents are entitled to only one IEE in the area(s) in which they disagree with a school's evaluation each time the school district evaluates their child.

---

## Confidentiality of Information & Access to Educational Records

Definitions as used under confidentiality of information include -

**"Destruction"** means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

**"Education records"** means the type of records covered under the definition of "education records" in 34 CFR part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (FERPA)). (See Appendix A for full definition)

**"Participating agency"** means any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under Part B of the IDEA.

**"Personally identifiable"** means that information includes-

1. The name of the child, the child's parent, or other family member;
2. The address of the child or child's family;
3. A personal identifier, such as the child's social security number or student number; and
4. A list of personal characteristics or other information that would make the identity of the child easily traceable.

Special Education Programs shall give notice that is adequate to fully inform parents about the requirements of the confidentiality of personally identifiable information, including:

1. A description of the extent that the notice is given in the native languages of the various population groups in the state;
2. A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the state intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;
3. A summary of the policies and procedures that participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and
4. A description of all rights of parents and children regarding this information, including the rights under the Family Educational Rights and Privacy Act of 1974, and implementing regulations in 34 CFR part 99.

Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media or both, with circulation adequate to notify parents throughout the state of the activity.

The school district:

1. Must permit you to inspect and review any education records relating to your child which are collected, maintained or used by the district under Part B of IDEA.
2. Must comply with your request without unnecessary delay and before any meeting regarding an individualized education program (IEP), a resolution session described in this document, hearing relating to discipline or hearing relating to the identification, evaluation, or education placement of your child or the provision of a free appropriate public education to your child.
3. May not take more than 45 calendar days to comply after the request has been made.

Your right to inspect and review education records under this section includes:

1. The right to a response from the district to reasonable requests for explanations and interpretations of the records;
  2. The right to request that the district provide copies of the records containing the information if failure to provide these copies would effectively prevent you from exercising your right to inspect and review the records;
  3. The right to have your representative inspect and review the records.
- The school district may presume that you have authority to inspect and review records relating to your child unless the district has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.
  - The district must keep a record of parties obtaining access to the education record collected, maintained or used under Part B of IDEA (except access by you or authorized school employees of the district) including the name of the party, the date access was given and the purpose for which the party is authorized to use the records. A parent or an eligible student may inspect the record on request.
  - If any education records include information on more than one child, the parents of those children have the right to inspect and review only the information relating to their child or to be informed of that specific information.
  - The district shall provide parents, upon request, a list of the types of education records and the locations of those records collected, maintained, or used by the district.
  - A fee may be charged by the district for copies of records that are made for parents under Part B of IDEA, if the fee does not effectively prevent the parents from

exercising their right to inspect and review those records. The district may not charge a fee to search for or retrieve information under Part B of IDEA.

- Unless the information is contained in education records, and the disclosure is authorized without parental consent under the Family Educational Rights and Privacy Act (FERPA), your consent must be obtained before personally identifiable information is disclosed to parties other than officials of participating agencies collecting or using the information under Part B of IDEA.
- Except under the circumstances specified below, your consent is not required before personally identifiable information is released to officials of participating agencies for purposes of meeting a requirement of Part B of the IDEA:

(1) An educational agency or institution may disclose personally identifiable information from the education records of a student without the written consent of the parent of the student or the eligible student if the disclosure is to other school officials, including teachers, within the educational institution or local educational agency who have been determined by the agency or institution to have legitimate educational interests or to officials of another school or school system in which the student seeks or intends to enroll, subject to the requirements set forth in subdivision (2) of this section; and

(2) An educational agency or institution that discloses the education records of a student pursuant to subdivision (1) of this section shall make a reasonable attempt to notify the parent of the student or the eligible student at the last known address of the parent or eligible student, unless the disclosure is initiated by the parent or eligible student.

- If the agency or institution includes in its annual notice of parent's rights that it is the policy of the public agency to forward education records on request to a school in which a student seeks or intends to enroll, then the public agency does not have to provide any further notice of the transfer of records.
- An educational agency receiving personally identifiable information from another educational agency or institution may make further disclosures of the information on behalf of the educational agency without the prior written consent of the parent or eligible student if the conditions of subdivisions (1) and (2) of this section are met and if the educational agency informs the party to whom disclosure is made of these requirements.
- Your consent, or consent of an eligible child who has reached the age of majority under State law, must be obtained before personally identifiable information is released to officials of participating agencies providing or paying for transition services.

- If your child is in, or is going to go to, a private school that is not located in the same school district you reside in, your consent must be obtained before any personally identifiable information about your child is released between officials in the school district where the private school is located and officials in the school district where you reside.
- The district shall protect the confidentiality of personally identifiable information at collection, storage, disclosure and destruction stages.
  1. One official at the district shall assume responsibility for ensuring the confidentiality of any personally identifiable information.
  2. All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures regarding confidentiality of personally identifiable information under Part B of IDEA and FERPA.
  3. The district shall maintain, for public inspection, a current listing of the names and positions of those employees within the district who may have access to personally identifiable information.
  4. The district shall inform you when personally identifiable information collected, maintained or used for special education and related services is no longer needed to provide educational services to your child.
  5. The information no longer needed must be destroyed at your request, however, a permanent record of your child's name, address, phone number, his or her own grades, attendance record, classes attended and grade level completed may be maintained without time limitation.

Special Education Programs shall have in effect 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 of the child and type or severity of disability.

Under the regulations for the Family Educational Rights and Privacy Act of 1974 (34 CFR 99.5(a)), the rights of parents regarding education records are transferred to the student at age 18.

If the rights accorded to parents under Part B of the IDEA are transferred to a student who reaches the age of majority, the rights regarding educational records must also be transferred to the student. However, the district must provide any notice required under section 615 of the IDEA to the student and the parents.

***What this means.....***

- Parents have the right to see all educational records. Schools must comply with a parent's request "without unnecessary delay," but within no more than 45 days.
- The only time a school may forbid a parent from reviewing records is if the school has a legal document stating that a particular parent does not have that right.
- Schools must keep a record of any person, excluding parents and authorized school personnel, who view your child's records.
- Schools must keep a list, and inform you if you request, of the location of all educational records for your child.
- Schools must get your consent before disclosing personally identifiable information about your child to any person other than school officials allowed such access or entities where consent is not required.
- Schools must inform you when your child's records become outdated and then destroy them upon your request.
- The rights regarding confidentiality of records discussed above apply equally to students with disabilities once their rights have been transferred at age 18.

---

**Amendment of Records at Parent's Request**

- If you believe the information in the education records regarding your child collected, maintained or used under Part B of IDEA is inaccurate or misleading or violates the privacy or other rights of your child, you may request the district that maintains the information to amend the information.
- The district shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request. If the district decides to refuse to amend the information in accordance with the request, it shall inform you of the refusal, and advise you of your rights to a hearing as described below.
- The district shall, on request, provide you 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 your child.

- A hearing to challenge information in education records must be conducted according to the procedures for such hearings under the Family Educational Rights and Privacy Act (FERPA).

- At a minimum, a district's hearing procedures must include the following elements:

(1) The hearing must be held within 30 days after the district received the request, and the parent of the student or eligible student shall be given notice of the date, place, and time 5 days in advance of the hearing;

(2) The hearing may be conducted by any party, including an official of the district, who does not have a direct interest in the outcome of the hearing;

(3) The parent of the student or eligible student shall be afforded a full and fair opportunity to present evidence relevant to the issues raised and may be assisted or be represented by individuals of the parent's choice at the parent's own expense, including an attorney;

(4) The district shall make its decision in writing within 30 days after the conclusion of the hearing; and

(5) The decision of the district shall be based solely upon the evidence presented at the hearing and shall include a summary of the evidence and the reasons for the decision.

- If, as a result of the hearing, the district decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of your child, it shall amend the information accordingly and so inform you in writing.
- If as a result of the hearing, the district decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of your child, it shall inform you of your right to place in the records the district maintains on your child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.
- Any explanation placed in your child's records must be maintained by the district as part of the records of your child as long as the record or contested portion is maintained by the district; and if the records of your child or the contested portion is disclosed by the district to any party, the explanation must also be disclosed to the party.

***What this means.....***

- If you find something in your child's file that you believe to be incorrect, false, or go against your child's rights, you have the right to request that such information be changed or deleted from the file.
- If the school disagrees with your request, you have the right to a hearing on the matter.

---

## Children Placed in Private Schools by Their Parents if FAPE is at Issue

- A school district is not required to pay the cost of education, including special education and related services, of a child with a disability at a private school or facility if the district made a free appropriate public education (FAPE) available to the child and you still elected to place your child at the private school or facility. However, the district shall include your child in the population whose needs are addressed through private school enrollment where FAPE is not at issue.
- Disagreements between you and the district regarding the availability of an appropriate program for your child and the question of financial reimbursement are subject to the due process procedures found within this document.
- If you enroll your child, who previously received special education and related services through your school district, in a private preschool, elementary or secondary school without the consent of or referral by the district:
  1. A court or hearing officer may require the district to reimburse you for the cost of that enrollment if the court or hearing officer finds that the district had not made FAPE available to your child in a timely manner prior to that enrollment, and that the private placement is appropriate.
  2. 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 State Special Education Programs and school districts.
- The cost of reimbursement described in the above paragraph may be reduced or denied if-
  1. At the most recent IEP team meeting you attended prior to the removal of your child from the public school, you did not inform the IEP team that you were rejecting the placement proposed by the district to provide FAPE to your child, including stating your concerns and intent to enroll your child at a private school at public expense; or at least ten (10) business days (including any holidays that occur on a business day) prior to the removal of your child from the public school, you did not give written notice to the district of your rejection of the placement proposed by the district, including stating your concerns and intent to enroll your child in a private school at public expense.
  2. If, prior to your removal of your child from the public school, the district informed you through notice of its intent to evaluate your child (including a statement of the purpose of the evaluation that was appropriate and reasonable) but you did not make the child available for the evaluation; or

3. Upon a judicial finding of unreasonableness with respect to actions taken by you.
- However, the cost of reimbursement:
    1. May not be reduced or denied for failure to provide the notice if: (a) The school prevented you from providing the notice; (b) You had not received notice of your responsibility to provide the notice described above; or (c) Compliance with the requirements above would likely result in physical harm to your child; **and**
    2. May, in the discretion of the court or a hearing officer, not be reduced or denied for the parents' failure to provide the required notice if: (a) The parent is not literate or cannot write in English; or (b) Compliance with the above requirement would likely result in serious emotional harm to the child.

***What this means.....***

- If you believe the public school is not providing a free appropriate public education (FAPE) to your child and you place your child privately for services, a court or hearing officer can order the public school to reimburse you for the cost of the private program if the court or the hearing officer finds: 1) the public school failed to offer or provide your child with a FAPE in a timely manner; and 2) the private placement is determined to be appropriate.
- Parents must give the public school notice, either at an IEP meeting or in writing at least 10 business days prior to removing your child, of your dissatisfaction with the proposed placement, concerns, and intent to place your child privately. Reimbursement may be reduced or denied if this notice is not given.
- Reimbursement may also be reduced or denied if, after you've told the public school of your intent to place your child in a private school and the public school provides you written notice of its intent to evaluate your child, you fail to make your child available for evaluation.
- The law also provides that parents who act unreasonably may have reimbursement reduced or denied.
- Parents do not need to give notice prior before placing their child privately if 1) if the parent is illiterate and cannot write in English; 2) if giving notice would likely result in physical or serious emotional harm to your child; 3) if the public school prevented you from providing notice (such as refusing to hold an IEP meeting or refusing to accept your written notice); or 4) if the public school failed to provide you with notice that you were required to give the district notice.

## **Procedures on Disciplining Students with Disabilities**

### **Authority of School Personnel**

#### **Case-by-Case Determination**

School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

#### **General**

School personnel under this section may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement.)

After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the district must provide services to the extent required under this section.

#### **Additional Authority**

For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in this section.

#### **Services**

A child with a disability who is removed from the child's current placement pursuant to the additional authority above or special circumstances in this section must:

1. Continue to receive educational services under FAPE, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and
2. Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications that are designed to address the behavior violation so that it does not recur.

The services required by this section may be provided in an interim alternative educational setting.

A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly removed.

After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed, under FAPE, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.

If the removal is a change of placement, the child's IEP Team determines appropriate services under this section.

---

### **Manifestation Determination**

Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the district, the parent, and relevant members of the child's IEP Team (as determined by the parent and the district) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine:

1. If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
2. If the conduct in question was the direct result of the district's failure to implement the IEP.

The conduct must be determined to be a manifestation of the child's disability if the district, the parent, and relevant members of the child's IEP Team determine that a condition in either (1) or (2) above was met.

If the district, the parent, and relevant members of the child's IEP Team determine the condition described above was met, the district must take immediate steps to remedy those deficiencies.

If the district, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must:

1. Either:

- a. Conduct a functional behavioral assessment, unless the district had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or
  - b. If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and
2. Except as provided in cases of “special circumstances” (i.e. weapons, drugs, serious bodily injury) return the child to the placement from which the child was removed, unless the parent and the district agree to a change of placement as part of the modification of the behavioral intervention plan.

---

### **Special Circumstances**

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child:

1. Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of the state or district;
2. Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of the state or a district; or
3. Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the state or a district.

For purposes of this section, please see the definitions in Appendix A.

---

### **Notification**

On the date on which the decision to take disciplinary action is made, the district must notify the parents of that decision, and provide the parents the procedural safeguards notice described in this document.

---

## **Change of Placement Because of Disciplinary Removals**

A removal of a child with a disability from the child's current educational placement is a **change of placement** if:

1. The removal is for more than 10 school days in a row; **or**
2. The child has been subjected to a series of removals that constitute a pattern because:
  - a. The series of removals total more than 10 school days in a school year;
  - b. The child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
  - c. Of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

The district determines on a case-by-case basis whether a pattern of removals constitutes a change of placement.

This determination is subject to review through due process and judicial proceedings.

---

## **Determination of Setting**

The individualized education program (IEP) Team must determine the interim alternative educational setting for removals that are changes of placement, and removals under the headings Additional authority and Special circumstances, above.

---

## **Appeal**

The parent of a child with a disability who disagrees with any decision regarding:

- placement under these procedures, or
- the manifestation determination

may request a hearing by filing a due process complaint consistent with this document.

A district that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others may request a hearing by filing a due process complaint consistent with this document.

---

### **Authority of Hearing Officer**

A hearing officer hears, and makes a determination regarding, an appeal requested under this section.

In making the determination under this section, the hearing officer may:

1. Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of these procedures or that the child's behavior was a manifestation of the child's disability; or
2. Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

The procedures under this section may be repeated, if the district believes the child is substantially likely to injure him or herself or other children if returned to the original placement.

---

### **Placement During Appeals**

When an appeal under these procedures has been requested by either the parent or the district, the child must remain in the interim alternative educational setting, pending the decision of the hearing officer or until the expiration of the time period provided for regarding a change in placement including under special circumstances, whichever occurs first, unless the parent and the district agree otherwise.

---

### **Protections for Children Not Determined Eligible for Special Education and Related Services**

A child who has not been determined to be eligible for special education and related services, and who has engaged in behavior that violate a code of conduct of the school district, may assert any of the protections provided for under this part if the district had knowledge (as determined in accordance with the following information) that the child

was a child with a disability before the behavior that precipitated the disciplinary action occurred.

A school district must be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred:

1. The parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
2. The parent of the child has requested an evaluation of the child; or
3. The teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the district or to other supervisory personnel of the district.

A district would not be deemed to have knowledge under this section if:

1. The parent of the child:
  - a. Has not allowed an evaluation of the child consistent with state rule; or
  - b. Has refused services under Part B of IDEA; or
2. The child has been evaluated and determined to not be a child with a disability under Part B of IDEA.

If a district does not have knowledge that the child is a child with a disability prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measure as the measures applied to children without disabilities who engaged in comparable behaviors.

If a request is made for an evaluation of a child during the time period in which a child is subjected to disciplinary measures, the evaluation must be conducted in an expedited manner.

1. 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.
2. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the district and information provided by the parents, the district shall provide special education and related services to the child in accordance with all the provisions of Part B of the IDEA including the disciplinary provisions And FAPE requirements.

***What this means.....***

- A student may claim the protections of the discipline section of IDEA if the school “had knowledge” he or she was a student with a disability prior to the behavior in question.
- If a school does not “have knowledge” that a student has a disability, the student may be subjected to the regular discipline policies of the school.
- If an evaluation is requested during the discipline period, it must be done as soon as possible.
- Until the evaluation is completed, a student remains in the placement determined by the school authorities, which may mean suspension or expulsion without services.

---

**Expedited Due Process Hearings**

Whenever a hearing is requested under this section, the parents or the district involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements in this document, except as provided below.

The State Special Education Programs is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed. The hearing officer must make a determination within 10 school days after the hearing.

Unless the parents and the district agree in writing to waive the resolution meeting described in this section, or agree to use the mediation process described in this document:

1. A resolution meeting must occur within seven days of receiving notice of the due process complaint; and
2. The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint.

A party may appeal the decision in an expedited due process hearing in the same way as they may for decisions in other due process hearings

---

## **Rule of Construction**

### **Referral to and Action by Law Enforcement & Judicial**

Nothing in Part B of IDEA prohibits a school district from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

A district reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom it reports the crime.

#### ***What this means.....***

- Being on an IEP does not make a child protected from criminal prosecution.

---

## **Transmittal of Records**

A school district reporting a crime under this section may transmit copies of the student's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.

---

## **State Complaint Procedures**

### **Difference Between Due Process Hearing Complaint and State Complaint Procedures**

The regulations for Part B of IDEA set forth separate procedures for State complaints and for due process complaints and hearings.

1. As explained below, any individual or organization may file a State complaint alleging a violation of any Part B requirement by a school district, the State Educational Agency, or any other public agency.

2. Only you or a school district may file a due process complaint on any matter relating to:
    - a. a proposal or a refusal to initiate or change the identification, evaluation or educational placement of a child with a disability, or
    - b. the provision of a free appropriate public education (FAPE) to the child.
  3. While staff of the State Educational Agency generally must resolve a State complaint within a 60-calendar-day timeline, unless the timeline is properly extended, an impartial due process hearing officer must hear a due process complaint (if not resolved through a resolution meeting or through mediation) and issue a written decision within 45-calendar-days after the end of the resolution period, as described in this document under the heading Resolution Process, unless the hearing officer grants a specific extension of the timeline at your request or the school district's request.
  4. The State complaint and due process complaint, resolution and hearing procedures are described more fully below.
- 

## **State Complaints**

A complaint is a written signed statement by an individual or organization, including a complaint filed by an individual or organization from another state containing a statement that the department of education or a school district has violated a requirement of federal or state statutes, rules, or regulations that apply to a program and a statement of the facts on which the complaint is based.

In resolving the complaint in which the State Special Education Programs has found a failure to provide appropriate services, the State Special Education Programs, pursuant to its general supervisory authority under Part B of the IDEA, must address:

1. The failure to provide appropriate services, including corrective actions appropriate to address the needs of the student such as compensatory services or monetary reimbursement; and
  2. Appropriate future provision of services for all children with disabilities.
-

## State Complaints

### Filing a Complaint

#### **An organization or individual may file a signed written complaint under these procedures.**

- **The complaint must include:**
    - (1) A statement that the department of education or a district has violated a requirement of Part B of the Act, state statute, rules, or regulations that apply to the special education program;
    - (2) The facts on which the statement is based;
    - (3) The signature and contact information for the complainant; **and**
    - (4) If alleging violations with respect to a specific child:
      - (a) The name and address of the residence of the child;
      - (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 (42 U.S.C. 11434a(2)), available contact information for the child, and the name of the school the child is attending;
      - (d) A description of the nature of the problem of the child, including facts relating to the problem; **and**
      - (e) A proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed.
  - **The complaint must allege a violation** that occurred not more than one year before the date that the complaint is received by the department in accordance with these procedures.
  - The party filing the complaint must forward a copy of the complaint to the district serving the child at the same time the party files the complaint with the State Special Education Programs.
- 

## State Complaints

### State Complaint Procedures

- The director of the State Special Education Programs appoints a complaint investigation team.

- The team may conduct an independent on-site investigation if it determines that one is necessary.
- The complaint team shall give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint.
- The complaint team provides the district with the opportunity to respond to the complaint, including, at a minimum:
  1. At the discretion of the district, a proposal to resolve the complaint; and
  2. An opportunity for a parent who has filed a complaint and the district to voluntarily engage in mediation.
- The complaint team shall make a recommendation to the state director of special education;
- After reviewing all relevant information, the state director of special education shall make an independent determination as to whether the complaint is valid, what corrective action is necessary to resolve the complaint, and the time limit during which corrective action is to be completed. The state director of special education shall submit a written report of the final decision to all parties involved;
- The written report shall address each allegation in the complaint, contain findings of fact and conclusions, and include reasons for the final decision;
- If the complaint is valid, the state director of special education shall find the school district out of compliance with federal and state statutes and rules;
- If corrective action is not completed within the time limit set, including technical assistance and negotiations, the department shall withhold all federal funds applicable to the program until compliance with applicable federal and state statutes and rules is demonstrated by the school district;
- When the school district demonstrates completion of required correction action, the department's Office of Finance and Management shall be notified by the state director of special education, and all moneys withheld shall be paid to the school district; and
- Documentation supporting the corrective actions taken by a school district shall be maintained by the department's special education programs and incorporated into the state's monitoring process.
- All complaints must be resolved within 60 days after receipt of the complaint by the state director of special education except as stated in this section. The time limit of 60 days may be extended only under exceptional circumstances as determined by the state director of special education, such as the need for additional time to

provide necessary information. Under these circumstances, an extension of time may not exceed 30 days in any one instance.

- In addition, the 60-day time limit may be extended, if the parent, individual, or organization and the school district involved in the complaint agree to engage in mediation in order to attempt to resolve the issues specified in the complaint.
  - If a written complaint is received that is also the subject of a due process hearing, or contains multiple issues, of which one or more are part of that hearing, the State Special Education Programs must set aside any part of the complaint that is being addressed in the due process hearing, until the conclusion of the hearing. However, 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 this section.
  - If an issue is raised in a complaint filed under this section that has previously been decided in a due process hearing involving the same parties:
    1. The hearing decision is binding on that issue; and
    2. The State Special Education Programs must inform the complainant to that effect.
  - A complaint alleging a district's failure to implement a due process hearing decision must be resolved by the State Special Education Programs.
  - The State Special Education Programs has developed a model form to assist parents other parties in filing a state complaint; however, you are not required to use this model form. You may use the appropriate model form or another form or other document, so long as the form or document that is used meets, as appropriate, the content requirements for filing a State complaint.
- 

## **Mediation**

The school district shall ensure that procedures are established and implemented to allow parties to disputes involving any matter under the state's special education rules, including matters that arise before the filing of a due process complaint, to resolve the disputes through a mediation process.

1. The mediation procedures must ensure that participation is voluntary and freely agreed to on the part of the parties.
2. Mediation may not be used to deny or delay the parent's right to a hearing on the parent's due process complaint or to deny any other rights afforded under Part B of the Act.

3. Mediation must be conducted by a qualified and impartial mediator who is trained in effective mediation techniques.
4. Mediators are selected on a random, rotational, or other impartial basis.

The State Special Education Programs shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

1. An individual who serves as a mediator may not be an employee of the school district or State agency involved in the education or care of the child or the department if the department is providing direct services to your child who is the subject of mediation.
2. They must not have a personal or professional interest that conflicts with the person's objectivity.
3. The State will bear the cost of the mediation process, including meetings with a disinterested party.
4. A person who otherwise qualifies as a mediator is not an employee of a district or State agency solely because he or she is paid by the State Special Education Programs to serve as a mediator.

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 to the dispute. The mediation conference is an intervening, informal process, conducted in a nonadversarial atmosphere.

If the parties resolve a dispute through the mediation process, the parties must execute a legally binding agreement that sets forth that resolution and that:

1. 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; **and**
2. Is signed by both the parent and a representative of the district who has the authority to bind such district.

A written, signed mediation agreement under this section is enforceable in any State court of competent jurisdiction or in a district court of the United States.

If you choose not to use the mediation process, the school district or a State agency providing services to the child may establish procedures to offer you and to the district an opportunity to meet, at a time and location convenient to you, with a disinterested party, to encourage the use and explain the benefits of the mediation process to you. This party is under contract with a parent training and information center or a community parent resource center established in the state.

## Filing a Due Process Complaint

A parent or a district may file a due process complaint on any of the matters relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child.

The due process complaint must allege a violation that occurred not more than two years before the date the parent or district knew or should have known about the alleged action that forms the basis of the due process complaint.

- The timeline described above does not apply to a parent if the parent was prevented from filing a due process complaint due to:
  1. Specific misrepresentations by the district that it had resolved the problem forming the basis of the due process complaint; or
  2. The district's withholding of information from the parent that was required under Part B of IDEA to be provided to the parent.

The district must inform the parent of any free or low-cost legal and other relevant services available in the area if:

1. The parent requests the information; or
2. The parent or the district files a due process complaint under this section.

---

## Due Process Complaint

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

The party filing a due process complaint must forward a copy of the due process complaint to the State Special Education Programs.

### **The due process complaint notice 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 (42 U.S.C. 11434a(2)),

- 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.

**Model Forms:**

The State Special Education Programs has developed a model form to assist parents and districts in filing a due process complaint notice; however, you are not required to use these model forms. Parents, districts, and other parties may use the appropriate model form or another form or other document, so long as the form or document that is used meets, as appropriate, the content requirements for filing a due process complaint.

A party, parent or district, may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements of this section.

**Sufficiency of Complaint:**

The due process complaint required by this section must be deemed sufficient unless the party, parent or district, receiving the due process complaint notifies the hearing officer and the other party in writing, within 15 days of receipt of the due process complaint, that the receiving party believes the due process complaint does not meet the requirements of this section.

Within five days of receipt of the above notification, the hearing officer must make a determination on the face of the due process complaint of whether the due process complaint meets the requirements of this section, and must immediately notify the parties in writing of that determination.

A party may amend its due process complaint only if:

1. The other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a resolution session; or
2. The hearing officer grants permission, except that the hearing officer may only grant permission to amend at any time not later than five days before the due process hearing begins.

The applicable timeline for a due process hearing under Part B shall recommence at the time the party files an amended notice, including the timeline for a resolution session.

**District Response to a Due Process Complaint:**

If the district has not sent a prior written notice under Part B of IDEA to the parent regarding the subject matter contained in the parent's due process complaint, the district

must, within 10 days of receiving the due process complaint, send to the parent a response that includes:

1. An explanation of why the district proposed or refused to take the action raised in the due process complaint;
2. A description of other options that the IEP Team considered and the reasons why those options were rejected;
3. A description of each evaluation procedure, assessment, record, or report the district used as the basis for the proposed or refused action; and
4. A description of the other factors that are relevant to the district's proposed or refused action.

A response by a district under this section shall not be construed to preclude the district from asserting that the parent's due process complaint was insufficient, where appropriate.

**Other Party Response to a Due Process Complaint:**

Except as provided above, the party receiving a due process complaint must, within 10 days of receiving the due process complaint, send to the other party a response that specifically addresses the issues raised in the due process complaint.

---

**Resolution Process**

**Resolution Meeting**

Within 15 days of receiving notice of the parents' due process complaint, and prior to the initiation of a due process hearing, **the district** 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:

1. Includes a representative of the district who has decision-making authority on behalf of the district; and
2. May not include an attorney of the district 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, and the facts that form the basis of the due process complaint, so that the district has the opportunity to resolve the dispute that is the basis for the due process complaint.

The meeting described above need not be held if:

1. The parents and the district agree in writing to waive the meeting; **or**

2. The parents and the district agree to use the mediation process described in this document.

The parent and the district determine the relevant members of the IEP team to attend the meeting.

### **Resolution Period**

If the district has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur. Except as provided below, the timeline for issuing a final decision under a due process hearing begins at the expiration of this 30 day period.

Except where you and school district have jointly agreed to waive the resolution process or to use mediation, your failure to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.

If the school district has not resolved the due process complaint to your satisfaction within 30 days of the receipt of the due process complaint, the due process hearing may occur.

If the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and documented, the district may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint.

Documentation of such efforts must include a record of the school district's attempts to arrange a mutually agreed upon time and place, such as:

1. Detailed records and dates of telephone calls made or attempted and the results of those calls;
2. Detailed copies of dated correspondence sent to you and any responses received; and
3. Detailed records and dates of visits made to your home or place of employment and the results of those visits.

If the district fails to hold the resolution meeting within 15 days of receiving notice of a parent's due process complaint **or** fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline.

### **Adjustments to the 30-calendar-day resolution period**

The 45-day timeline for the due process hearing starts the day after one of the following events:

1. Both parties agree in writing to waive the resolution meeting;

2. After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible; or
3. If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or district withdraws from the mediation process.

### **Written Settlement Agreement**

If a resolution to the dispute is reached at the meeting described above, the parent and district must execute a legally binding agreement that is:

1. Signed by both the parent and a representative of the agency who has the authority to bind the district; and
2. Enforceable in any State court of competent jurisdiction or in a district court of the United States.

### **Agreement Review Period**

If the parent and district execute an agreement, either may void the agreement within 3 business days of the agreement's execution.

---

### **Impartial Due Process Hearing**

Whenever a due process complaint is received, the parents or the district involved in the dispute must have an opportunity for an impartial due process hearing, consistent with these procedures.

### **Impartial Hearing Officer**

At a minimum, a hearing officer:

1. Must not be:
  - a. An employee of the State Department of Education or the district that is involved in the education or care of the child; or
  - b. A person having a personal or professional interest that conflicts with the person's objectivity in the hearing;
2. Must possess knowledge of, and the ability to understand, the provisions of IDEA, Federal and State regulations pertaining to IDEA, and legal interpretations of IDEA by Federal and State courts;
3. Must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and
4. Must possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

A person who otherwise qualifies to conduct a hearing under this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer. The State Special Education Programs and district shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

### **Subject Matter of Due Process Hearings**

The party, parent or district, requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint unless the other party agrees otherwise.

### **Timeline for Requesting a Hearing**

You or the school district must request an impartial hearing on a due process complaint within two years of the date you or the school district knew or should have known about the issue addressed in the complaint.

### **Exceptions to the timeline**

The above timeline does not apply to you if you could not file a due process complaint because:

1. The school district specifically misrepresented that it had resolved the problem or issue that you are raising in your complaint; **or**
2. The school district withheld information from you that it was required to provide to you under Part B of the IDEA.

### **Hearing Rights**

Any party to a hearing has the right to:

1. Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
2. Present evidence and confront cross-examine, and compel the attendance of witnesses;
3. Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least 5 business days before the hearing;
4. Obtain a written, or, at the option of the parents, electronic, verbatim record of the hearing; and
5. Obtain written, or, at the option of the parents, electronic findings of fact and decisions.

### **Additional Disclosure of Information**

At least 5 business days prior to a hearing, each party shall 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.

A hearing officer may bar any party that fails to comply with the disclosure requirements of this section from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

### **Parental Rights at Hearings**

As a parent involved the hearings, you have the right to:

1. Have the child who is the subject of the hearing present;
2. Open the hearing to the public; and
3. Have the record of the hearing and the findings of fact and decisions provided at no cost to you.

### **Hearing Decisions**

Subject to this section, a hearing officer must make a decision on substantive grounds based on a determination of whether the child received a FAPE.

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

1. Impeded the child's right to a FAPE;
2. Significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child; or
3. Caused a deprivation of educational benefit.

Nothing in this section shall be construed to preclude a hearing officer from ordering a district to comply with procedural requirements in this document.

Nothing in this section shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

### **Findings and Decisions to Advisory Panel and General Public**

The State Special Education Programs, after deleting any personally identifiable information, shall transmit the findings and decisions to the State advisory panel, and make those findings and decisions available to the public.

### **Finality of Decision**

A decision made in a hearing is final, except that any party involved in the hearing may appeal the decision through civil action.

### **Timelines**

The State Special Education Programs shall ensure that not later than 45 days after the expiration of the 30 day period regarding a resolution meeting or adjusted time periods to resolution meetings:

1. A final decision is reached in the hearing; and

2. A copy of the decision is mailed to each of the parties.

A hearing officer may grant specific extensions of time beyond the periods set out above at the request of either party.

Each hearing involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved.

---

## **Civil Actions**

Any party aggrieved by the findings and decisions made through the hearing process has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount of controversy.

### **Timeline limitation**

The party, parent or district, bringing the action shall have 90 days from the date of the decision of the hearing officer to file a civil action.

### **Additional Requirements**

In any action brought under this section, the court:

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

### **Jurisdiction of District Courts**

The district courts of the United States have jurisdiction of actions brought under section 615 of the IDEA without regard to the amount in controversy.

### **Rule of Construction**

Nothing in Part B of IDEA restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the IDEA, the due process procedures for filing a due process complaint must be exhausted to the same extent as would be required had the action been brought under section 615 of the IDEA.

---

## **Attorneys' Fees**

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

1. The prevailing party who is the parent of a child with a disability;
2. A prevailing party who is the State Department of Education or the district 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; or
3. The prevailing State Department of Education or district 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.

### **Prohibition on Use of Funds**

Funds under Part B of the IDEA may not be used to pay attorneys' fees or costs of a party related to an action or proceeding under section 615 of the IDEA and state rule.

This section does not preclude a district from using funds under Part B of the IDEA for conducting an action or proceeding under section 615 of the IDEA.

### **Award of Fees**

A court awards reasonable attorney's fees under section 615 of the IDEA consistent with the following:

1. Fees awarded under section 615 of the IDEA must 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 in calculating the fees awarded under this section.
2. Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceedings under section 615 of the IDEA for services performed subsequent to the time of a written offer of settlement to a parent if-
  - a. 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 proceedings, at any time more than 10 days before the proceedings begins;
  - b. The offer is not accepted within 10 days; and

- c. The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.
  3. Attorneys' fees may not be awarded relating to any meeting of the IEP team unless the meeting is convened as a result of an administrative proceeding or judicial action. Fees also may not be awarded for a mediation that is conducted in accordance with this document.
  4. A resolution session shall not be considered:
    - a. A meeting convened as a result of an administrative hearing or judicial action; or
    - b. An administrative hearing or judicial action for purposes of this section.
  5. Notwithstanding the above provisions, 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.
  6. Except as provided in this section, the court reduces, accordingly, the amount of the attorney's fees awarded under section 615 of IDEA, if the court finds that:
    - a. The parent, or the parent's attorney, during the course of the action or proceedings, unreasonably protracted the final resolution of the controversy;
    - b. 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;
    - c. The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or
    - d. The attorney representing the parent did not provide to the school district the appropriate information in the due process complaint in accordance with this section.
  7. The above provisions do not apply in any action or proceedings if the court finds that the State or district unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of the IDEA.
- 

### **Child's Status During Proceedings**

- Pending any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing, unless the state or district and parents of

the child agree otherwise, the child involved in the complaint shall remain in their current educational placement.

- Or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.
- If the complaint involves an application for initial services under this part from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned three, the district is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services, then the district must provide those special education and related services that are not in dispute between the parent and the district.
- This section applies to all proceedings with exceptions as provided under placements in alternative educational settings.
- If a hearing officer in a due process hearing agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for the purposes of pendency.

---

### **Transfer of Parental Rights at Age of Majority**

A State may provide that when a child with a disability reaches the age of majority under State law that applies to all children (except for a child with a disability who has been determined to be incompetent under State law) –

1. The district shall provide any notice required under special education to both the child and the parents. All rights accorded to parents under Part B of the IDEA transfer to the child;
2. All rights accorded to parents under Part B of the IDEA transfer to children who are incarcerated in an adult or juvenile, State, or local correctional institution; and
3. Whenever a State provides for the transfer of rights under special education, the district shall notify the child and the parents of the transfer of rights.

A State must establish procedures for appointing the parent of a child with a disability, or, if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of the child's eligibility under Part B of the Act if, under State law, a child who has reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child's educational program.

---

**Sources for You to Contact for Additional Assistance in Understanding Your Rights:**

Department of Education  
Special Education Programs  
700 Governors Drive  
Pierre, SD 57501-2291  
voice - (605) 773-3678  
fax - (605) 773-3782

South Dakota Advocacy Services  
221 South Central  
Pierre, SD 57501  
1-800-658-4782 (voice/TTY) or  
(605) 224-8294

South Dakota Parent Connection  
3701 W. 49th Street, Suite 200B  
Sioux Falls, SD 57106  
1-800-640-4553

Appendix A:

From Page 10:

**"Education records"**

- (a) The term means those records that are:
- (1) Directly related to a student; and
  - (2) Maintained by an educational agency or institution or by a party acting for the agency or institution.
- (b) The term does not include:
1. Records of instructional, supervisory, and administrative personnel and educational personnel ancillary to those persons that are kept in the sole possession of the maker of the record and are not accessible or revealed to any other person except a temporary substitute for the maker of the record;
  2. Records of a law enforcement unit of an educational agency or institution, but only if education records maintained by the agency or institution are not disclosed to the unit and the law enforcement records are maintained separately from education records, maintained solely for law enforcement purposes, and disclosed only to law enforcement officials of the same jurisdiction;
  3. Records related to an individual who is employed by an educational agency or institution that are made and maintained in the normal course of business, are related exclusively to the individual in that individual's capacity as an employee, and are not available for use for any other purpose. Records relating to an individual in attendance at the agency or institution who is employed as a result of the individual's status as a student are educational records and not excepted under this subdivision;
  - (4) Records on a student who is 18 years of age or older, or is attending an institution of postsecondary education, that are:
    - (i) Made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional capacity or assisting in a paraprofessional capacity;
    - (ii) Made, maintained, or used only in connection with treatment of the student; and
    - (iii) Disclosed only to individuals providing the treatment. For the purpose of this definition, "treatment" does not include remedial educational activities or activities that are part of the program of instruction at the agency or institution; and

(5) Records that only contain information about an individual after he or she is no longer a student at that agency or institution.  
(Authority: 20 U.S.C. 1232g(a)(4))

---

From Page 21:

### **Special Circumstances Definitions**

- Controlled substance means a drug or other substance identified under SDCL 34-20B-11 to 34-20B-26, inclusive, or schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).
  - Illegal drug means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under SDCL 34-20B-11 to 34-20B-26, inclusive, or under any other provision of Federal law.
  - Serious bodily injury has the meaning given the term “serious bodily injury” under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.
    - The term serious bodily injury means bodily injury that involves—
      - A substantial risk of death;
      - Extreme physical pain;
      - Protracted and obvious disfigurement; or
      - Protracted loss or impairment of the function of a bodily member, organ, or mental faculty.
  - Weapon has the meaning given the term “dangerous weapon” under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.
    - The term dangerous weapon means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than 2 1/2 inches in length.
-