

NEVADA DEPARTMENT OF EDUCATION

IMPLEMENTATION OF IDEA-2004¹

DUE PROCESS HEARINGS

September, 2005

I. MANDATORY FILING - REQUEST FOR A HEARING

The party requesting the hearing, either the parent or the local educational agency (LEA), must now provide a due process hearing notice to the other party and forward a copy of the notice to the NVDOE. Under IDEA-2004, the party may not have a due process hearing until the required notice is filed:² The request must include:

- Name of the child, child's address (or contact information in the case of a homeless child or youth) and name of school child attends;
- A description of the nature of the problem of the child relating to a proposal or refusal to initiate or change the child's identification, evaluation, or educational placement, or the provision of a free appropriate public education to the child, including facts relating to such problem; and
- A proposed resolution of the problem to the extent known and available to the party at the time.³

The LEA provides parent with Procedural Safeguards Notice, if this is the first request for a hearing⁴, and informs the parent of any free or low- cost legal and other relevant services available in the area.

The party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements.⁵

Important To Know

1. The importance of meeting the content requirements of this notice cannot be over emphasized:

- If the notice does not meet the above requirements, the notice may be determined by a Hearing Officer to be insufficient, and the requesting party would not be

¹ The IDEA-2004 regulations are scheduled to be released in December 2005. The Nevada Administrative Code (NAC), Chapter 388 has been revised to comply with the IDEA –2004 and, according to the NVDOE are in effect at the date of this memorandum.

² IDEA Sec. 615(b)(7)(B)

³ IDEA Sec. 615(b)(7)(A)(ii).

⁴ Until the NAC is revised Section 388.300 would require the statement of parental rights to be provided to the parents whenever the LEA receives a request for a hearing.

⁵ IDEA Sec. 615(b)(7)(B)

allowed to proceed to hearing. That is, if the requesting party still wants a due process hearing, they must begin the process all over again.

- If the request is determined to be sufficient, the party requesting the due process hearing will not be allowed to raise issues at the due process hearing that were not raised in the hearing notice, unless the other party agrees otherwise or the Hearing Officer grants a request to amend not later than 5 days before the hearing.⁶

2. The copy of the due process hearing notice to the NVDOE does not start the hearing process. The LEA's receipt of the due process hearing notice initiates the hearing process, including the timelines.⁷

II. REQUIRED PROCEDURES-DAYS 1-10

From Receipt of the Request for a Hearing

A. LEA RESPONSE TO PARENT NOTICE

Within 10 Days of Receipt: If the LEA did not already send a prior written notice to the parent regarding the subject matter of the hearing request, the LEA shall send parent a response that includes:

- Explanation of why LEA proposed or refused action raised in the hearing request;
- Description of other options IEP team considered and why rejected;
- Description of each evaluation procedure, etc., used as basis for proposed or refused action;
- Description of factors relevant to the LEA's proposal or refusal.⁸

Within 10 Days of Receipt: If the LEA is the nonfiling party and **did** already send prior written notice to the parent regarding the subject matter of the hearing request, the LEA shall:

- Send the party requesting a hearing a response that specifically addresses the issues raised in the request for a hearing.⁹

⁶ IDEA Sec. 615 (f)(3)(B) If there were an amendment to the notice, then all of the timelines would begin again, including the resolution session timeline.(See Part V (C))

⁷ Upon receipt of a parent's due process hearing notice, the district must provide the parent with the Procedural Safeguards Notice, if this is the first request for a hearing, and inform the parent of any free or low- cost legal and other relevant services available in the area.

⁸ IDEA Sec. 615(c)(2)(B)(i)

⁹ IDEA Sec. 615(c)(2); ImObersteg Interpretation

- **B. PARENT RESPONSE TO DISTRICT NOTICE - Within 10 Days of Receipt:**

If the district is the party filing the due process hearing notice (request), the parent must:

Send the district a response that specifically addresses the issue(s) raised in the hearing notice within 10 days of receiving the request for a hearing.¹⁰

III. OPTIONAL PROCEDURE – DAYS 1-15 From Receipt of the Request for a Hearing

SUFFICIENCY CHALLENGE

Within 15 days of Receipt:

The required due process hearing notice will be deemed to be sufficient unless the nonfiling party notifies the Hearing Officer and the filing party in writing that the receiving party believes the notice has not met the statutory notice requirements.¹¹ ☒

Within 5 days of receipt of the notification of insufficiency: The Hearing Officer shall make a determination **on the face of the notice** of whether the notification meets the statutory requirements and shall immediately notify the parties in writing of such determination.¹²

The required response from a LEA if a prior written notice had not already been sent to the parent regarding the subject matter of the hearing request, shall not be construed to preclude the LEA from asserting that the parent's due process request notice was insufficient where appropriate.¹³

What happens if insufficient: Filing party must re-file and the request is treated like a new request. All required processes, including notices, and timelines begin again. To expedite the processing of a due process hearing notice that is re-filed, the same Hearing Officer who was randomly appointed for the first request will be re-appointed to a proximate re-filed request for a hearing.¹⁴

What happens if sufficient? The hearing process continues.

¹⁰ IDEA Sec. 615(c)(2)

¹¹ IDEA Sec. 615(c)(2)(A) and (C)

¹² IDEA Sec. 615(c)(2)(D)

¹³ IDEA Sec. 615(c)(2)(B)(ii)

¹⁴ ImObersteg Interpretations

However, it should be noted that the determination that a notice meets the statutorily mandated content requirements and is, therefore, sufficient to proceed does not necessarily mean that the Hearing Officer has the jurisdiction to hear the issues and/or the issues do not need to be further clarified prior to the hearing. The Hearing Officer would address any such problems with the parties in a pre-hearing conference.

IV. REQUIRED PROCEDURE- DAYS 1-15, May Continue Through Day 30, From Receipt of the Request for a Hearing

RESOLUTION

Within 15 days of receiving notice of the parents' request for a hearing: The LEA must convene a resolution session:

- The parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the request for a hearing--
 - Which shall include a representative of the LEA who has decisionmaking authority on behalf of the LEA;
 - Which may not include an attorney of the LEA unless the parent is accompanied by an attorney; and
 - Where the parents of the child discuss their request for a hearing, and the facts that form the basis of the complaint, and the LEA is provided the opportunity to resolve the hearing request.

The resolution process must proceed unless the parents **and** the LEA agree in writing to waive the session, or agree to use the mediation process.¹⁵

Day 30: If the LEA has not resolved the issues in the request for a hearing to the satisfaction of the parents within 30 days, the due process hearing 45-day time period begins on day 31.¹⁶

Note: Citing the House Rep. No. 108-77, proposed regulations are taking a strict interpretation: “(If) the parent and the LEA mutually agree that the meeting does not need to occur, the resolution session does not need to take place. However, unless such an agreement is reached, the failure of the party bringing the complaint to participate in the meeting will delay the timeline for convening a due process hearing until the meeting is held.”

What happens if?

- LEA and parent opt for mediation- 45-day timelines run.

¹⁵ IDEA Sec. 615(f)(B)(i)

¹⁶ IDEA Sec. 615(f)(1)(B)(ii).

- LEA and parent meet and cannot resolve and agree to waive continued resolution and proceed to hearing – 45-day timeline begins when Hearing Officer receives notification.¹⁷

V. LIMITATIONS ON HEARING

A. STATUTE OF LIMITATIONS

A parent or LEA shall request an impartial due process hearing within **2 years** of the date the parent or LEA knew or should have known about the alleged action that forms the basis of the due process hearing request.¹⁸

The 2-year timeline shall not apply to a parent if the parent was prevented from requesting the hearing due to--

- (i) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the complaint; or
- (ii) The LEA withholding of information from the parent that was required under IDEA Part B to be provided to the parent.

B. SUBJECT MATTER OF THE HEARING

The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the due process hearing notice, unless the other party agrees otherwise.¹⁹

C. AMENDED REQUEST

A party may amend its due process hearing request only if--

- The other party consents in writing to the amendment and is given the opportunity to resolve the due process hearing request through the resolution session; or
- The Hearing Officer grants permission, except that the Hearing Officer may only grant such permission at any time **not later** than 5 days before a due process hearing occurs.

¹⁷ ImObersteg Interpretations

¹⁸ IDEA Sec. 615(f)(1)(C)

¹⁹ IDEA Sec. 615 (f)(3)(B)

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

D. HEARING OFFICERS' QUALIFICATIONS

A Hearing Officer shall, at a minimum--

(i) Not be--

(I) An employee of the State educational agency or the LEA involved in the education or care of the child; or

(II) A person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) Possess knowledge of, and the ability to understand, the provisions of the IDEA, Federal and State regulations pertaining to the IDEA, and legal interpretations of the IDEA by Federal and State courts;

(iii) Possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) Possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.²⁰

E. HEARING DECISION

A decision made by a Hearing Officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education, except that:

In matters alleging a procedural violation, a Hearing Officer **may** find that a child did not receive a free appropriate public education **only if** the procedural inadequacies--

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

Rule of Construction- This shall not be construed to preclude a Hearing Officer from ordering a LEA to comply with procedural requirements under Section 615 of the IDEA.

Rule of Construction- - This shall be construed to affect the right of a parent to file a complaint with the State educational agency. (Proposed IDEA regulations indicate Congressional intent that this refers to appeals in two-tier states.)

²⁰ IDEA Sec. 615(f)(3)

VI. CIVIL ACTION

The party bringing the action shall have 90 days from the date of the decision of the Hearing Officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this part, in such time as the State law allows.

VII. ATTORNEYS' FEES

The court, in its discretion, may award reasonable attorneys' fees as part of the costs--
(I) to a prevailing party who is the **parent** of a child with a disability;
(II) to a prevailing party who is a **LEA** against the **attorney of a parent** who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or
(III) to a prevailing LEA against **the attorney of a parent, OR against the parent**, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.²¹

VIII. SUBSEQUENT HEARING

Nothing in the procedural safeguards section of the IDEA shall be construed to preclude a parent from filing a separate due process hearing request on **an issue separate from a due process** hearing request already filed.²²

IX. EXPEDITED HEARING

The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.²³

An expedited hearing shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing.²⁴

Resolution Session

Expedited hearings include the resolution session.²⁵

²¹ IDEA Sec. 615(i)

²² IDEA Sec. 615(o)

²³ IDEA Sec. 615(k)(3)

²⁴ IDEA Sec. 615(k)(4)

²⁵ IDEA Sec. 615(f)(1)(B)(i)

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Note: The proposed IDEA regulations require the resolution session must occur within 7 days of the date the hearing was requested.