

RESOLVING DISPUTES UNDER IDEA

IDEA SPECIAL EDUCATION MEDIATOR TRAINING
NEW YORK STATE EDUCATION DEPARTMENT

VIRTUAL PROGRAM

TUESDAY, SEPTEMBER 8, 2020 – WEDNESDAY, SEPTEMBER 9, 2020
WEDNESDAY, SEPTEMBER 23, 2020 – THURSDAY, SEPTEMBER 24, 2020 (REPEAT)

DEUSDEDI MERCED, ESQ.

SPECIAL EDUCATION SOLUTIONS, LLC
(203) 557-6050
DMERCED@SPEDSOLUTIONS.COM
WWW.SPEDSOLUTIONS.COM

I. INTRODUCTION

- A. IDEA and **New York State law** provide for three distinct dispute resolution mechanisms, each with its own set of procedures.
- B. A local educational agency (LEA) or the parent can file a due process complaint or state complaint or pursue mediation to attempt to resolve a special education dispute. Following a due process hearing, an aggrieved party can file a civil action in any federal or state court of competent jurisdiction. 34 C.F.R. § 300.516. However, generally speaking, prior to filing a civil action, IDEA requires the complainant to first exhaust the administrative remedies. *Id.*
- C. This outline provides a summary review of the three dispute resolution options available to LEAs and parents.

II. DUE PROCESS COMPLAINTS

- A. Non-Discipline Hearings
 - 1. Subject Matter – A parent or the LEA 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 a free appropriate public education (“FAPE”) to the child. 20 U.S.C. § 1415(b)(6)(A); 34 C.F.R. § 300.507(a).
 - 2. Statute of Limitations. The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the

alleged action that forms the basis of the complaint. 20 U.S.C. § 1415(b)(6)(B); 34 C.F.R. § 300.507(a)(2).

A parent or agency shall request an impartial due process hearing within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint. 20 U.S.C. § 1415(f)(3)(C); 34 C.F.R. § 300.511(e).

A State may adopt a different timeline but the exceptions to the timeline described below shall also apply. 20 U.S.C. §§ (b)(6)(B) and 1415(f)(3)(C); 34 C.F.R. §§ 300.507(a)(2) and 300.511(e). **New York State has the two-year timeline consistent with IDEA. See 8 NYCRR § 200.5(j)(1)(i).**

The timeline shall not apply to a parent if the LEA made specific misrepresentations to the parent that it had resolved the problem forming the basis of the complaint or it withheld information from the parent that it was required to provide to the parent. 20 U.S.C. § 1415(f)(3)(D); 34 C.F.R. § 300.511(f).

3. Resolution Process

- a. Resolution Meeting. Prior to the opportunity for an impartial due process hearing, the LEA shall convene a meeting with the parents and the relevant member(s) of the IEP team who have specific knowledge of the facts identified in the due process complaint –
 1. within 15 calendar days of receiving notice of the due process complaint;
 2. which shall include a representative of the LEA who has decision-making authority on behalf of the LEA;
 3. which may not include an attorney of the LEA unless the parent is accompanied by an attorney; and
 4. where the parents discuss their due process complaint, and the facts that form the basis of the complaint, and the LEA is provided the opportunity to resolve the complaint.¹

¹ Discussions held during the resolution meeting are not confidential. *Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Act*, 61 IDELR 232, Question D-17 (OSEP 2013); *Analysis and Comments to the Regulations*, Federal

- b. Exceptions to Meeting. The resolution meeting is not required when the parents and the LEA agree in writing to waive the meeting, or agree to use the mediation process in lieu of the resolution process. 20 U.S.C. § 1415(f)(1)(B)(i); 34 C.F.R. § 300.510(a).

- c. Agreement. When the parents and the LEA resolve the complaint at the resolution meeting, the parties shall execute a legally binding, written agreement that is –
 - 1. signed by both the parents and a representative of the LEA who has the authority to bind the LEA; and
 - 2. enforceable in any State court of competent jurisdiction or in a district court of the United States. 20 U.S.C. § 1415(f)(1)(B)(iii); 34 C.F.R. § 300.510(d).

- d. Review Period. Either party may void the signed, written settlement agreement within three (3) business days of the agreement’s execution. 20 U.S.C. § 1415(f)(1)(B)(iv); 34 C.F.R. § 300.510(e).

- e. Timelines
 - 1. 30-day Resolution Period. If the LEA has not resolved the due process complaint to the satisfaction of the parents within 30 calendar days of the receipt of the complaint, the due process hearing may occur. 20 U.S.C. § 1415(f)(1)(B)(ii); 34 C.F.R. § 300.510(b)(1).
 - 2. Adjustments to 30-day Resolution Period. The 45-day timeline for the due process hearing starts the day after –
 - i. both parties agree in writing to waive the resolution meeting;
 - ii. 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
 - iii. both parties agree in writing to continue the mediation at the end of the 30-day resolution

Register, Vol. 71, No. 156, Page 46704 (August 14, 2006); *Letter to Baglin*, 53 IDELR 164 (OSEP 2008); *Letter to Cohen*, 67 IDELR 217 (OSEP 2015).

period, but later, the parent or the LEA withdraws from the mediation process. 34 C.F.R. § 300.510(c).

3. LEA Complainant. There is no provision requiring a resolution meeting when an LEA is the complaining party. *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46700 (August 14, 2006). Since the resolution process is not required when the LEA files a complaint, the 45-day timeline for issuing a written decision (*see* Decision Timeline, *infra*) begins the day after the parent and the SEA receive the LEA's complaint. *Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Act*, 61 IDELR 232, Question D-2 (OSEP 2013).

4. Decision Timeline

- a. Within 45 calendar days after the expiration of the 30-day resolution period, or the adjusted time periods described in 34 C.F.R. § 300.510(c), a final decision must be reached in the hearing and mailed to each of the parties. 34 C.F.R. § 300.515(a).
- b. A hearing officer may grant specific extensions of time beyond the 45-day period but only at the request of either party and for good cause. 34 C.F.R. § 300.515(c); 8 NYCRR § 200.5(j)(5)(i).

B. Discipline Hearings

1. Subject Matter. A parent of a child with a disability may challenge the placement decision resulting from a disciplinary removal or the manifestation determination. 34 C.F.R. § 300.532(a). An LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may seek to have the child placed in an interim alternative educational setting ("IAES"). 34 C.F.R. § 300.532(a). *See* 34 C.F.R. § 300.532(b)(2)(ii).
2. Expedited Hearing. In matters involving a challenge to the placement decision resulting from a disciplinary removal, the manifestation determination, or placement in an IAES, the parent or LEA must be given an opportunity for an expedited due process hearing, which must occur within 20 school days of the date the complaint is filed. 34 C.F.R. § 300.532(c)(1) and (2). A decision

must be made and provided to the parties within 10 school days after the hearing. 34 C.F.R. § 300.532(c)(2); *but see* 8 NYCRR § 201.11(b)(3) (“The school district shall arrange the expedited due process hearing according to the following time period, *unless the parent and school district agree* in writing to waive the resolution meeting or agree to use mediation[.]”).

3. Resolution Period. A resolution meeting must occur, unless waived in writing by both parties, within seven calendar days of receiving notice of the due process complaint and the due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 calendar days of the receipt of the due process complaint. 34 C.F.R. § 300.532(c)(3). The resolution period runs concurrent with the hearing period. *Letter to Gerl*, 51 IDELR 166 (OSEP 2008).

C. Burden of Persuasion

1. IDEA is silent on which party has the burden of persuasion and/or production.
2. Generally, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief. *Shaffer v. Weast*, 546 U.S. 49, 44 IDELR 150 (2005).² However, in New York, the LEA has the burden of proof, including the burden of persuasion and burden of production, in the impartial hearing, except that a parent seeking tuition reimbursement for a unilateral parental placement has the burden of persuasion and burden of production on the appropriateness of the unilateral placement. N.Y. EDUC. LAW Art. 89 § 4404(c).

D. Procedural Issues

1. Hearing Decisions – Generally. A decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a FAPE. 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. § 300.513(a)(1).
2. Procedural Issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies –

² The *Weast* Court did not address the burden of production. Nor does the decision address whether States can have laws shifting the burden of persuasion to their LEAs.

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

20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2).

3. Judicial Interpretations

- a. A procedural violation alone without a showing that the child’s education was substantively affected, does not establish a failure to provide a FAPE. *See, e.g., A.C. v. Bd. of Educ.*, 553 F.3d 165 (2d Cir. 2009) (the failure to conduct an FBA in accordance with State regulation did not deprive the student of a FAPE); *Lesesne v. Dist. of Columbia*, 447 F.3d 828 (D.C. Cir. 2006) (the failure to complete an evaluation in a timely manner did not result in substantive harm to the child); *Grim v. Rhinebeck Cent. Sch. Dist.*, 346 F.3d 377, 381 (2d Cir. 2003) (the failure of the LEA to develop and review the student’s IEP in a timely manner did not result in a denial of a FAPE where the parents had removed the student from the LEA and placed her in a private school months before they challenged the IEP).
- b. Only material failures to provide the services in an IEP are compensable under the IDEA. *See, e.g., Banks v. District of Columbia*, 720 F. Supp. 2d 83, 54 IDELR 282 (D.D.C. 2010); *S.S. v. Howard Rd. Acad.*, 585 F. Supp. 2d 56, 51 IDELR 151 (D.D.C. 2008); *Catalan v. District of Columbia*, 478 F. Supp. 2d 73, 47 IDELR 223 (D.D.C. 2007). Minor discrepancies between the services recommended in the IEP and the services actually provided to the student are not a violation of the IDEA. A court and/or hearing officer must first ascertain whether the aspects of the IEP that were not followed were “substantial or significant,” or, in other words, whether the deviations from the IEP’s stated requirements were “material.” *A.P. v. Woodstock Bd. of Educ.*, 370 F. Appx. 202, 55 IDELR 61 (2d Cir. 2010); *Van Duyn v. Baker Sch. Dist.*, 481 F.3d 770, 47 IDELR 182 (9th Cir. 2007); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, n.3, 38 IDELR 61 (8th Cir. 2003); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 31 IDELR 185 (5th Cir. 2000).

III. STATE COMPLAINTS

- A. The IDEA regulations require that each State establish a procedure for the filing of complaints (i.e., alleged violations of the IDEA). 34 C.F.R. §§ 300.151 through 300.153.
- B. A complaint must be filed within one year of the alleged event, and must be decided within 60 days of the complaint having been filed. 34 C.F.R. §§ 300.152(a) and 300.153(c); 8 NYCRR §§ 200.5(l)(1)(iii)(a) and 200.5(l)(2)(vi). Monetary reimbursement, compensatory services and other corrective action can be provided if it is determined that FAPE was denied. 34 C.F.R. § 300.151(b); 8 NYCRR §§ 200.5(l)(2)(v)(e)(1).
- C. A parent may utilize either or both of the complaint or hearing processes. *Memorandum to Chief State School Officers*, 34 IDELR 264 (OSEP 2000). If an issue has already been decided in a due process hearing, then that decision should prevail over a complaint investigation of the same issue. 34 C.F.R. § 300.152(c)(2)(i); 8 NYCRR § 200.5(l)(2)(viii). If the parents have commenced both processes, any part of the complaint that is being addressed in the due process hearing may be held in abeyance pending conclusion of the hearing. 34 C.F.R. § 300.152(c)(1); 8 NYCRR § 200.5(l)(2)(vii). However, any issue in the complaint that is not part of the due process hearing, must be resolved within 60 days. *Id.*
- D. An SEA in its procedures regarding complaints must provide that an LEA has the opportunity to respond to a complaint, including a proposal to resolve it and, if the parents consent, the opportunity to resolve the complaint through mediation or some other means, with the 60-day time limitation being extended upon agreement of the parties. 34 C.F.R. §§ 300.152(a)(3), 300.152(b)(1)(ii); 8 NYCRR §§ 200.5(l)(2)(i) and (ii).

IV. MEDIATION

- A. Each State must have procedures in place for parents and LEAs to voluntarily resolve their disputes through a mediation process at no cost. *See* 34 C.F.R. § 300.506; 8 NYCRR § 200.5(h). Mediation cannot deny or delay the parents' right to a hearing. 34 C.F.R. § 300.506(b)(1)(ii); 8 NYCRR § 200.5(h)(1)(ii).
- B. Mediation must be available to the parties even if a request for a due process hearing has not been filed. 34 C.F.R. § 300.506(a); 8 NYCRR 200.5(h)(1).
- C. Special education mediators must be trained in effective mediation techniques to resolve special education disputes consistent with IDEA and state law. 34 C.F.R. § 300.506(b)(1)(iii); 8 NYCRR §§ 200.1(dd), 200.5(h)(1)(iii). More importantly, special education mediators are

required to be trained and be knowledgeable in the laws and regulations regarding special education services. 34 C.F.R. § 300.506(b)(3)(i); 8 NYCRR § 200.5(h)(1)(iii).

- D. An individual who serves as a special education mediator may not have a personal or professional interest which would conflict with his or her objectivity in the mediation process and may not be an employee of the state education agency (SEA) or LEA. 34 C.F.R. § 300.506(c); 8 NYCRR § 200.1(dd).
- E. LEAs and/or parents choosing not to utilize the mediation process can be required by a State or school district policy to meet with a disinterested third party who would encourage and explain the benefits of mediation. 34 C.F.R. § 300.506(b)(2); 8 NYCRR § 200.5(h)(2). Meeting participation can be through video conferences, conference calls, or other alternatives, by agreement of the parties. 8 NYCRR § 200.5(h)(5).
- F. Mediation must be scheduled in a timely manner and held in a location that is convenient to the parties to the dispute. 34 C.F.R. § 300.506(b)(5); 8 NYCRR § 200.5(h)(1)(iv).
- G. Mediation discussions are confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. 34 C.F.R. § 300.506(b)(7); 8 NYCRR § 200.5(h)(1)(v). This said, an LEA may not compel parents to sign a confidentiality agreement as a prerequisite to the school district participating in the mediation process. *Letter to Anonymous*, 120 LRP 23294 (OSEP 2020).

The mediation agreement itself is not subject to the same confidentiality requirement, though an LEA would need to abide by the confidentiality requirements in IDEA (34 C.F.R. §§ 300.611 – 300.626) and the Family Educational Rights and Privacy Act (FERPA) and its regulations (34 C.F.R. part 99). The parties, however, may voluntarily agree to include in their mediation agreement a provision that limits disclosure of the mediation agreement, in whole or in part, to third parties or to disclose it to the public. *See Questions and Answers on Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act (Part B)*, 61 IDELR 232, Question A-24 (OSEP 2013).

- H. Should the parties reach resolution through the mediation process, the parties must execute a legally binding agreement. 34 C.F.R. § 300.506(b)(6)(i); 8 NYCRR § 200.5(h)(1)(vi). The mediation agreement must be in writing, signed by the parents and a district representative with the authority to bind the school district, and provide that all discussions that occur during the mediation process will remain “confidential” (i.e., cannot be used later as evidence in any subsequent IDEA proceeding). 34 C.F.R. § 300.506(b)(6)(i); 8 NYCRR § 200.5(h)(1)(vi). The agreement is

enforceable in any court of competent jurisdiction. 34 C.F.R. § 300.506(b)(7); 8 NYCRR § 200.5(h)(1)(vi).

- I. If the parties reach an agreement to change the student's IEP, the student's IEP must be immediately amended to be consistent with the mediation agreement. 8 NYCRR § 200.5(h)(5). The IEP may be amended using the process outlined in 34 C.F.R. § 300.324(a)(4) and 8 NYCRR § 200.4(g) (i.e., a written document amending or modifying the student's current IEP).
- J. Generally, under IDEA, mediation can be used to address disputes relating to any of the matters relating to the identification, evaluation or educational placement of a child with a disability or the provision of a FAPE to the child. Mediation can also be used to address any other matters arising under federal and State special education law and regulations that are not subject to a due process hearing complaint.

New York State places some limitations on what can be mediated. These are:

1. Decisions made at the subcommittee on special education resulting in disagreement. The committee on special education (CSE) must first be given an opportunity to resolve the disagreement. The subcommittee must refer in writing the disagreement to the CSE.
2. Attorneys' fees, even if other issues are resolved through mediation.
3. The failure of the parent to respond to a request for, or refusal to consent to, the initial provision of special education programs and services.³
4. Parental revocation of consent for receipt of special education services;⁴ and
5. Parental refusal to consent, or failure to respond to a request to provide consent, to an initial evaluation or reevaluation of a student

³ This is consistent with IDEA. See 34 C.F.R. § 300.300(b)(3); *Analysis and Comments to the Regulations*, Federal Register, Vol. 71, No. 156, Page 46633 (August 14, 2006); *Questions and Answers on Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act (Part B)*, 61 IDELR 232, Question A-8, fn 9 (OSEP 2013).

⁴ See 34 C.F.R. § 300.300(b)(4)(ii); see also *Analysis and Comments to the Regulations*, Federal Register, Vol. 73, No. 231, Page 73016 (Dec. 1, 2008).

who is home-schooled or parentally placed in a private school at the parents' expense.⁵

See Helping Parents and School Districts Become More Effective Partners, Special Education Mediation Questions and Answers Guidance, updated September 27, 2016, <http://www.p12.nysed.gov/specialed/dueprocess/documents/documents/nysdra-q-and-a.pdf>. Accessed Aug. 14, 2020.

- K. The mediation process is available to parents and LEAs to resolve tuition reimbursement claims. *Id.*

NOTE: REDISTRIBUTION OF THIS OUTLINE WITHOUT EXPRESSED, PRIOR WRITTEN PERMISSION FROM ITS AUTHOR IS PROHIBITED.

THIS OUTLINE IS INTENDED TO PROVIDE WORKSHOP PARTICIPANTS WITH A SUMMARY OF SELECTED STATUTORY PROVISIONS AND SELECTED JUDICIAL INTERPRETATIONS OF THE LAW. IN USING THIS OUTLINE, THE PRESENTER IS NOT RENDERING LEGAL ADVICE TO THE PARTICIPANTS.

⁵ This is consistent with IDEA. *See* 34 C.F.R. § 300.300(d)(4)(i). Mediation is available to parents of parentally-placed private school children with disabilities regarding the child find requirements in 34 C.F.R. § 300.131. *See Questions and Answers on Dispute Resolution Procedures Under Part B of the Individuals with Disabilities Education Act (Part B)*, 61 IDELR 232, Question A-7 (OSEP 2013).