

Questions and Answers On Procedural Safeguards and Due Process Procedures For Parents and Children With Disabilities

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The final regulations for the reauthorized Individuals with Disabilities Education Act (IDEA) were published in the Federal Register on August 14, 2006, and became effective on October 13, 2006. Since publication of the final regulations, the Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education has received requests for clarification of some of these regulations. This is one in a series of question and answer documents prepared by OSERS to address some of the most important issues raised by requests for clarification on a variety of high-interest topics. Generally, the questions, and corresponding answers, presented in this Q&A document required interpretation of IDEA and the regulations and the answers are not simply a restatement of the statutory or regulatory requirements. The responses presented in this document generally are informal guidance representing the interpretation of the Department of the applicable statutory or regulatory requirements in the context of the specific facts presented and are not legally binding. The Q&As are not intended to be a replacement for careful study of IDEA and the regulations. The statute, regulations, and other important documents related to IDEA and the regulations are found at <http://idea.ed.gov>.

The regulations include important changes in the procedures States must adopt for resolving written complaints filed with the State Educational Agency (SEA). This includes a new requirement to forward a copy of the State complaint to the public agency serving the child, new content requirements for complaints, and a revised time limit for filing complaints. The regulations expand the availability of mediation to resolve disputes and include a new provision for enforcing mediation agreements. The regulations also revise due process hearing procedures to: specify a timeline for filing a due process complaint; require either party to provide notice of the due process complaint to the other party; provide the parties with the opportunity to resolve the dispute through a new resolution process with specific timelines; specify the timelines for the commencement of due process hearings and for bringing a civil action; and, include new guidelines for issues raised at a due process hearing and for the parameters of a hearing officer's decision.

A. State Complaint Procedures

Authority: The requirements for State complaint procedures are found in the regulations at 34 CFR §§300.151 through 300.153.

Question A-1: May the State complaint procedures, including the remedies outlined at 34 CFR §300.151(b), address the problems of a group of children? If so, please provide an example of a systemic complaint.

Answer: Yes. An SEA is required to resolve any complaint that meets the requirements of 34 CFR §300.153, including a systemic complaint alleging that a public agency failed to provide a free appropriate public education (FAPE) to a group of children with disabilities. The Department views the State complaint procedures as an important tool for a State to use to fulfill its general supervision responsibilities to monitor implementation of the requirements in Part B of the Act by LEAs in the State. These responsibilities extend to both systemic and child-specific issues.

An example of a systemic complaint could include a complaint alleging that an LEA has a policy, practice, or procedure that results in not providing occupational therapy to children in a specific disability category, which if true, would be inconsistent with the requirements of IDEA.

Question A-2: What is an SEA's responsibility to conduct a complaint investigation if the written complaint submitted to the SEA does not include the content required in 34 CFR §300.153?

Answer: The regulations do not specifically address an SEA's responsibility when it receives a complaint that does not include the content required in 34 CFR §300.153. However, in the *Analysis of Comments* accompanying the regulations, the Department indicates that when an SEA receives a complaint that is not signed or does not include contact information, the SEA may choose to dismiss the complaint. In general, an SEA should adopt proper notice procedures for such situations. For example, an SEA could provide notice indicating that the complaint will be dismissed for not meeting the content requirements or that the complaint will not be investigated and timelines not commence until the missing content is provided.

Question A-3: What is an SEA's responsibility to conduct a complaint investigation if the complainant does not provide a copy of the complaint to the public agency/LEA serving the child at the same time the complaint is filed with the SEA?

Answer: The regulations do not address this specific question. It would be appropriate for an SEA, when establishing its complaint procedures, to include the actions that will be taken under such circumstances and provide proper notice of these procedures. An SEA's complaint procedures may address how the complainant's failure to provide the required copy to the public agency/LEA will affect the initiation of an investigation and/or the timeline for completing the investigation.

For example, an SEA could adopt procedures that include advising the complainant in writing that the investigation will not proceed and the 60-day timeline will not begin until the complainant provides the public agency/LEA with a copy of the complaint as required by the regulations.

Question A-4: May a complaint be filed with an SEA over an alleged violation that occurred more than one year prior to the date of the complaint if the violation is continuing or the complainant is requesting compensatory services for failure to provide appropriate education services?

Answer: No, unless the State chooses to accept and resolve complaints regarding alleged violations that occurred outside the one-year timeline. The regulations at 34 CFR §300.153(c) stipulate that a complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received. The *Analysis of Comments* accompanying the regulations notes that the previous regulations allowed complaints to be filed for continuing violations and for compensatory services claims using a longer time period. The references to these circumstances were removed from the current regulations to expedite resolution of complaints. The Department believes that limiting a complaint to a violation that occurred not more than one year prior to the date that the complaint is received will help ensure that problems are raised and addressed promptly so that children receive FAPE. However, a State may choose to accept and resolve complaints alleging violations that occurred outside the one-year timeline, just as a State is free to add additional protections in other areas that are not inconsistent with the requirements of the Act.

Question A-5: Please clarify the requirements related to extension of the timeline for resolving a State complaint when the parties are engaged in mediation.

Answer: As provided in 34 CFR §300.152(b)(1)(ii), the parent (or individual or organization, if mediation or other alternative means of dispute resolution is available to the individual or organization under State procedures) and the public agency involved can agree to extend the time limit to engage in mediation to resolve a complaint.

If the parties involved voluntarily agree to engage in mediation once the State complaint is filed, and the mediation is not successful in resolving the dispute, the entity responsible for resolving the complaint at the State level must ensure that the complaint is resolved within the applicable timeline in 34 CFR §300.152.

Question A-6: If the complainant is a party other than a parent, may the parties use the mediation process to attempt to resolve the issues in the State complaint?

Answer: The regulations at 34 CFR §300.152(a)(3)(ii) require an SEA to offer the parent and the public agency the opportunity to voluntarily engage in mediation (or other alternative methods of dispute resolution if available in the State to resolve the issues in a State complaint) to resolve the issues in a State complaint. The regulations do not require an SEA to provide mediation when an organization or individual other than the child's parent files a State complaint.

As set out in the *Analysis of Comments* accompanying the regulations:

The statute does not require that mediation be available to other parties, and we believe it would be burdensome to expand, through regulation, new 34 CFR §300.152(a)(3)(ii) (proposed 34 CFR §300.152(a)(3)(B)) to require that States offer mediation to non-parents. Although we do not believe we should regulate to require that mediation be offered to non-parents, there is nothing in the Act or these regulations that would preclude an SEA from permitting the use of mediation, or other alternative dispute resolution mechanisms, if available in the State, to resolve a State complaint filed by an organization or individual other than a parent, and we will add language to 34 CFR §300.152(b)(1)(ii) to permit extensions of the timeline if the parties are voluntarily engaged in any of these dispute resolution procedures. In fact, we encourage SEAs and their public agencies to consider alternative means of resolving disputes between the public agency and organizations or

other individuals, at the local level, consistent with State law and administrative procedures. It is up to each State, however, to determine whether non-parents can use mediation or other alternative means of dispute resolution.

B. Mediation

Authority: The requirements for mediation are found in the regulations at 34 CFR §300.506.

Question B-1: Are discussions that occur in mediation confidential or is the confidentiality of the mediation session something that must be mediated and documented as a part of the mediation agreement?

Answer: Discussions that occur during the mediation process pursuant to 34 CFR §300.506 must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any Federal court or State court of a State receiving assistance under Part B of IDEA. 34 CFR §300.506(b)(7). Whether the mediation agreement should include a statement setting out this confidentiality requirement is not specifically addressed by the regulations. States may allow parties to sign a confidentiality pledge to ensure that discussions during the mediation process remain confidential, irrespective of whether the mediation results in a resolution.

C. Due Process Complaints

Authority: The requirements for due process complaints are found in the regulations at 34 CFR §§300.507 through 300.518.

Question C-1: What happens if a parent files a due process complaint with the public agency but does not forward a copy of the due process complaint to the SEA? When does the timeline for convening a resolution meeting begin?

Answer: The regulations do not address this specific question. When establishing its procedures for administering the due process complaint system, a State may address how the failure to provide the required copy to the public agency/LEA and SEA will affect the resolution process and impartial hearing timeline. However, such procedures must be consistent with the due process requirements of Part B of IDEA.

For example, a State could adopt procedures that include a requirement that an LEA or SEA, as appropriate, advise the parent in writing that the timeline for starting the resolution process will not begin until the complainant provides the LEA and SEA with a copy of the due process complaint as required by the regulations.

Question C-2: May a parent file a due process complaint because their child's teacher is not highly qualified?

Answer: No. The regulations at 34 CFR §300.18(f) state that there is no right of action on behalf of an individual student, or class of students for the failure of a particular SEA or LEA employee to be highly qualified. However, a parent may file a State complaint about staff qualifications with the SEA.

Question C-3: May an LEA file a due process complaint when a parent notifies the LEA that the parent intends to unilaterally place his or her child in a private school because FAPE is at issue?

Answer: The Act and the regulations at 34 CFR §300.507 provide that a public agency may file a due process complaint on matters relating to the identification, evaluation, or educational placement of a child with a disability or the provision of FAPE to the child. This question was addressed in at least one Federal court case, Yates v. Charles County, 212 F. Supp. 2d 470 (D. Md. 2002). In that case, the court determined that the public agency had the right to initiate a hearing to demonstrate that the

public agency's proposed program offered the child FAPE.

Question C-4: If a due process complaint is amended and the 15-day timeline to conduct a resolution meeting starts over, must the LEA conduct another resolution meeting?

Answer: Yes. As set out in the *Analysis of Comments* accompanying the regulations:

Section 300.508(d)(3) of the regulations and section 615(c)(2)(E) of the Act allow the party filing the due process complaint an opportunity to amend the complaint to ensure that the complaint accurately sets out their differences with the other party. The complaint can be amended only if the parties mutually agree in writing to the amendment and **are given the opportunity for a resolution meeting** (emphasis added), or the hearing officer grants permission to amend the complaint at any time not later than five days before the due process hearing begins. This process ensures that the parties involved understand and agree on the nature of the complaint before the hearing begins. Section 300.508(d)(4) of the regulations and section 615(c)(2)(E)(ii) of the Act provide that when a due process complaint is amended, the timelines for the resolution meeting and the time period for resolving the complaint begin again with the filing of the amended due process complaint.

Question C-5: May a school district proceed directly to court for a temporary injunction to remove a student from his or her current educational placement for disciplinary reasons or must the school district exhaust administrative remedies by first filing a due process complaint?

Answer: This situation is not addressed specifically by the regulations. However, the Department's position, in the context of discipline, continues to be that a school district may seek judicial relief, through measures such as a temporary restraining order when necessary and legally appropriate. In addition, there is extensive case law addressing circumstances where exhaustion of administrative remedies is not required or where the failure to exhaust administrative remedies may be excused.

D. Resolution Process

Authority: The requirements for the resolution process are found in the regulations at 34 CFR §300.510.

Question D-1: Does the resolution process under 34 CFR §300.510 apply when a public agency files a due process complaint? If not, what is the timeline for issuing a hearing decision on the matter?

Answer: The regulations do not require a public agency to convene a resolution meeting when the public agency files a due process complaint. However, the public agency and parent may choose to voluntarily engage in mediation to resolve the issue. Since the resolution process is not required under the regulations when a public agency files a complaint, the 45-day timeline for issuing a written decision begins the day after the public agency's due process complaint is received by the other party and the SEA. If the complaint is determined to be insufficient under 34 CFR §300.508(d)(2) and is not amended, the complaint could be dismissed.

Question D-2: Why is a resolution meeting not required when an LEA files a due process complaint?

Answer: The Act does not require a resolution meeting in this situation. Also, the Department's experience has been that LEAs rarely initiate due process proceedings. It is expected that LEAs will attempt to resolve disputes with parents prior to filing a due process request. This includes communicating with a parent about the disagreement and convening an IEP Team meeting, as appropriate, to discuss the matter and attempt to reach a solution.

Question D-3: Does the 30-day resolution period apply if the parties elect to use mediation under 34 CFR §300.506 rather than convene a resolution meeting?

Answer: Yes. If the parties choose to use mediation rather than participate in a resolution meeting, the 30-day resolution period is still applicable. Under 34 CFR §300.510(c), the resolution period applies to the use of mediation after the filing of a complaint requesting a due process hearing.

Question D-4: In the event an agreement is not reached during the resolution meeting, must mediation continue to be available?

Answer: Yes. The regulations at 34 CFR §300.506 require that the public agency ensure mediation is available “to allow parties to disputes involving any matter under this part, including matters arising prior to the filing of a due process complaint, to resolve disputes through a mediation process.” It is important to note that mediation is voluntary and must be agreed to by both parties.

Question D-5: Are there any provisions in IDEA that require discussions that occur in resolution meetings to remain confidential?

Answer: Unlike mediation, the Act and the regulations do not prohibit or require discussions that occur during a resolution meeting to remain confidential. However, the confidentiality provisions in the Part B regulations and the Family Educational Rights and Privacy Act (FERPA), and its regulations continue to apply.

Question D-6: Must the LEA continue its attempts to convince a parent to participate in a resolution meeting throughout the 30-day resolution period?

Answer: Yes. If a parent fails to participate in a resolution meeting, an LEA must continue to make reasonable efforts throughout the remainder of the 30-day resolution period to convince the parent to participate in a resolution meeting. The regulations permit an LEA, at the conclusion of the 30-day resolution period, to request that a hearing officer dismiss the complaint when an LEA is unable to obtain the participation of a parent in a resolution meeting despite making reasonable efforts to do so and has documented its efforts using the procedures in 34 CFR §300.322(d).

Question D-7: If a party fails to participate in the resolution meeting, must the other party seek the hearing officer’s intervention?

Answer: The regulations at 34 CFR §300.510(b)(4) provide that an LEA may request a hearing officer to dismiss a complaint when the LEA has been unable to obtain the participation of the parent in a resolution meeting despite making reasonable efforts to do so. Under 34 CFR §300.510(b)(5), if an LEA fails to hold a resolution meeting within the required timelines or fails to participate in a resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline.

The hearing officer's intervention will be necessary to either dismiss the complaint or to commence the hearing, depending on the circumstances.