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# SPECIAL REVIEW

A NEWSLETTER ABOUT SPECIAL  
EDUCATION LAW ISSUES

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Exceptional Student Services Unit  
Colorado Department of Education

## Let's Talk Due Process

### WHO CAN REQUEST DUE PROCESS?

**Parents** A parent of a student with a disability, as defined in 34 CFR 300.20, may request a due process hearing. There is also the question of divorced parents with joint custody. Administrative rulings may vary from one state to the next, depending on interpretations of family law provisions, on who may file the request.

**School Districts** While less common than parent-initiated due process, a hearing initiated by school districts also is permitted in certain situations (34

CFR 300.507). For example, a school district may initiate due process when the parents refuse to give consent for an evaluation as required under 34 CFR 300.505(b) or if a school district does not agree to a parent's request for a publicly funded independent educational evaluation (34 CFR 300.502(b)(2)).

**Children Who Have Reached the Age of Majority** According to 34 CFR 300.517(a)(1) a state may provide that when a student with a disability

reaches the age of majority under State law that applies to all students (except for a student with a disability who has been determined to be incompetent under State law)... all other rights accorded to parents under Part B of the Act transfer to the student.

**Other Parties** IDEA has no provision that allows any party other than parents, school districts, or students who have reached the age of majority to request a due process hearing.

### REQUIREMENTS OF FILING FOR DUE PROCESS

**Model Form to Assist Parents** Every state must have a form that will assist parents in filing a request for due process. 34 CFR 300.507(c)(3). To obtain a copy of Colorado's Due Process/Mediation request form please visit our website at: <http://www.cde.state.co.us/spedlaw/info.htm>

**Request for Hearing by Parent** Hearings are initiated by a parent submitting a written request to the Special Education Director of an Administrative Unit. This request must include a description of the nature of the problem and, if known to the parent, a proposed resolution. 34 CFR 300.507(c)(2) and ECEA 6.03(3)(a)

**Right to a Hearing** A school district cannot deny or delay a parent's right to a due process hearing for failing to file such a form/request. 34 CFR 300.507(c)(4) and ECEA 6.03(3)(a)(iv)

**Request for Hearing by An Administrative Unit** Hearings are initiated when an Administrative Unit submits a written request to the Colorado Department of Education.



### GRANTING AND DENYING DUE PROCESS REQUESTS

Only an impartial hearing officer can decide if a parent's request for a hearing is based on issues that already have been decided. A state educational agency has no authority to deny a parent's request for a due process hearing on this or any other grounds. Letter to Howey, 213 IDELR 147 (OSEP 1988) and Drinker v. Colonial School District, 22 IDELR 847 (E.D. PA. 1995), aff'd, 23 IDELR 1112 (3rd Cir. 1996).

## PROCEDURAL RIGHTS

### Procedural Rights Applying to Parents and School Districts

The procedural rights granted to both parents and school districts include the following: 1) The right to be accompanied and advised by counsel and by individuals with special knowledge or training in the problems of children with disabilities. 2) The right to present evidence and confront, cross-examine, and compel the attendance of witnesses. 3) The right to prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing. 4) The right to obtain a written or (at the option of the parents) electronic verbatim record of the hearing. 5) The right to obtain written or (at the option of the parents) electronic findings of fact and decisions. 34 CFR 300.509(a)

Procedural Rights Applying Only to Parents In addition, parents have the following additional hearing rights: 1) The right to have the child attend or not attend the hearing. 2) The right to open the hearing to the public. 3) The right to receive a free record of the hearing including the findings of fact and the decision (either written or electronic, at the option of the parents). 34 CFR 300.509(c)

Non-Attorney Advocates at Due Process Hearings A non-attorney advocate may accompany and advise a parent at a due process hearing. 34 CFR 300.509(a)(1). However, under the current IDEA, there is no specific provision authorizing the advocate to function as an attorney for the parent.

Pre-Hearing Discovery The IDEA does not contain general discovery rules and, except for the five-day rule, there is nothing in the statute to either prohibit or require the use of discovery proceedings (i.e., compelling the other party to produce documents or be deposed). Whether discovery is used in a due process hearing and the nature and extent of the of the discovery methods used are matters left to the discretion of the hearing officer subject to any relevant state or local rules of procedures. *Letter to Stadler*, 24 IDELR 973 (OSEP 1996).

Presentation of Case State law may give hearing officers the authority to control the presentation of evidence, including determining which party presents its case first in a due process hearing.

Burden of Proof in Due Process Hearings The IDEA is silent with respect to the burden of proof in special education cases. Accordingly, various jurisdictions have assigned the burden dif-

ferently. In a Colorado case the ruling states that “the Court must look to the nature of the challenge to the IEP. Where a change in a child’s IEP is sought, regardless of whether the party seeking the change is the school district or the parents, the burden of showing that the placement is “appropriate” rests with the school district. *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1035 (3d Cir. 1993), cert. denied, 114 S.Ct. 2104 (1994) (citation omitted). This burden of proof is contrasted with the allocation where the issue is whether the IEP is appropriate. In this situation, the student or his parents bear the burden of proving by a preponderance of the evidence that the IEP devised by the school authorities is inappropriate. *Doe v. Board of Education of Tullahoma City Schools*, 9 F.3d 455, 458 (6th Cir. 1993), citing *Cordrey v. Euckert*, 917 F.2d 1460, 1469 (6th Cir. 1990). The burden is also on the Plaintiff here as he is challenging the outcome of the administrative procedures. *Board of Education v. Illinois State Board of Education*, 938 F.2d 712, 716 (7th Cir. 1991), cert. denied, 112 S.Ct. 957 (1992).” 21 IDELR 985 (D. Colo. 1994)

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### VISIT THE SPECIAL EDUCATION LAW WEBSITE

- For Parents Rights and other special education informational brochures: <http://www.cde.state.co.us/spedlaw/index.htm>
- To view the Rules for the Administration of the Exceptional Children’s Educational Act: <http://www.cde.state.co.us/spedlaw/rules.htm>
- To view recent Due Process Hearing Decisions: <http://www.cde.state.co.us/spedlaw/dueprocess.htm>

