

Chapter 10

FORMAL PROBLEM SOLVING

What This Chapter Is About

When a school violates the law or fails to do something the law requires, you may file a complaint. Sometimes, you may be able to resolve the complaint informally; other times you may have to file a formal complaint.

A formal state complaint must be written, signed, and sent to the Michigan Department of Education (MDE) and your school district. You can file a complaint up to one year after the problem occurs. The complaint must contain information about the problem you are having and the laws you think have been broken. MDE is responsible for investigating your complaint, though in most cases they will involve your local Intermediate School District (ISD) compliance investigator. If the MDE finds your complaint is true, they will order the school to correct its actions. If the MDE does not find your complaint is true, you can request a reconsideration.

You also may file a federal complaint under Section 504 of the Rehabilitation Act with the U.S. Department of Education Office for Civil Rights. This kind of complaint is useful when a school violates the law against a student who is not eligible for special education but nevertheless has a disability. You can file a complaint up to 180 days after the problem occurs.

Addresses and sample complaint letters are at the end of the chapter. The U.S. Department of Education has also prepared a guide to dispute resolution. See Appendix 10-4.

Due process hearings are different from complaints and also from other civil rights actions. You may request a due process hearing by disagreeing with your child's IEP and by filing a due process hearing notice within two years of the date of the IEP. Changes in federal and state law have made hearings more complex, and MPAS recommends that parents seek legal representation in due process hearings.

Both parties have procedural rights to call and question witnesses, present documentary evidence, make arguments, receive a written decision, and others. Parents have the right to have the student present and to open the hearing to the public. During the hearing process, the student must remain in his or her present educational setting. The hearings must be conducted under strict timelines, with the option of postponement upon order of the hearing officer. The hearing officer must issue a written decision, which may be appealed to court within 90 days.

Mediation is an option encouraged by federal law and made available through public and private providers. Mediation allows the parties to settle disagreements without resort to a formal hearing.

Advocacy Hints in Chapter 10

- ◆ Use the complaint process to address problems with both the content of your child's program and problems with the process or implementation of the program (Page 3).
- ◆ Use the complaint process to address systemic issues affecting lots of children instead of handling the problems one at a time (Page 4).
- ◆ Try to focus on a few important problems that have a real effect on your child's education, keeping in mind you do not have to know everything about the situation to ask the state to look into it (Page 4).
- ◆ If your child has been denied services and lost ground as a result, ask for remediation to make up for services not provided in the past (Page 6).
- ◆ You must file a due process hearing request within two years of the date of the IEP you are challenging (Page 10).
- ◆ You must file a notice before the hearing process will start; it is not enough simply to disagree with an IEP and request a hearing (Page 11).
- ◆ Make sure to include all possible issues, as specifically as you can, in the due process notice (Page 12).
- ◆ The law is still evolving around what alternative ways are available to write and enforce agreements reached in resolution sessions and mediation (Page 13).
- ◆ Disclose your documents five days before a hearing, and check your child's file to make sure you have everything you need (Page 14).
- ◆ Think carefully before opening a hearing to the public (Page 14).
- ◆ Get a written decision and transcript to understand what happened (Page 14).
- ◆ You may have to use the complaint process, rather than requesting a hearing, to address process problems (Page 16).
- ◆ Parents may get attorneys' fees only if they win at hearing or court (Page 16).
- ◆ Schools may be able to get attorneys' fees from parents in rare situations available for many years in federal law (Page 17).
- ◆ Mediation is available any time (Page 17).
- ◆ Mediation agreements are contracts; they bind schools and parents (Page 18).

In this chapter we will identify appropriate formal action to take when you disagree with a school's decision or believe that a school has violated the law and when informal means of dispute resolution do not work. The two types of actions are **formal complaints** and **due process hearings**.

Federal regulations do not allow the state to investigate a complaint and convene a due process hearing on the same issue. If a written complaint is received that is also the subject of a due process hearing, the state 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 part of the due process action must be resolved using the time limit and procedures. **34 CFR 300.152(c)**.

Formal State Complaints

A complaint is a written and signed allegation by an individual or organization that there is a violation of any of the following:

- 1) federal and state laws and regulations;
- 2) provisions of an ISD special education plan;
- 3) provisions of MDE's application for federal funds (state plan); or,
- 4) provisions of an IEP, a hearing officer decision, or a court decision regarding special education programs or services. **R 340.1701a(c)**.

A complaint must be made within **one year** of the school's legal violation. **34 CFR 300.153(c)**.

State law sets forth procedures for filing and investigating special education complaints. See **R 340.1851 through 1855**. MDE's complaint procedures are called "**Special Education Problem Solving Process**," and are available on the Center for Educational Networking website at http://www.michigan.gov/mde/0,4615,7-140-6530_6598_7363---,00.html. The state procedures also include a form that may be used on page 17.

► **Advocacy Hint: The complaint process reaches broadly.** In the comments to the 2006 IDEA regulations, the Office of Special Education Programs made clear that "the broad scope of the complaint process is critical to each state's exercise of its general supervision responsibilities... the state complaint procedures can be used to resolve any complaint ... including matters concerning the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child." **71 Fed.Reg. 46601 (8/14/06)**.

The complaint must include a statement that the school has violated the law, facts showing how the school violated the law, and the contact information for the person filing the complaint. If the complaint relates to a specific child, it must also include the child's name and address, name of the school the child is attending, contact information if the child is homeless, a description of the nature of the problem the child is having, and a proposed resolution if known. **34 CFR 300.153(b).**

► **Advocacy Hint: Complaints can be systemic.** A complaint need not relate to a specific child, but may relate to **patterns and practices** of violations that affect many students. For example, a person could file a complaint about a school's failure to make a related service available without having to refer to specific children who need that service. In resolving a complaint, MDE has a responsibility under its general supervisory authority to address "appropriate future provision of services for all children with disabilities." **34 CFR 300.151(b)(2); 71 Fed.Reg. 46601 (8/14/06).**

When filing a complaint about a specific child, make sure to include proof that you have authority to file the complaint on behalf of that child and may receive information about the investigation and the outcome. See **R 340.1851(4).**

The complaint letter should be addressed and mailed to:

Michigan Department of Education
Office of Special Education
P.O. Box 30008
Lansing, MI 48909
(517) 373-8414 (fax) (separate number for Program Accountability)

MDE will not accept electronically-filed complaints. If your complaint is not complete when you file it, MDE will let you know and let you fix it. **MDE, Special Education Problem Solving Process, page 11.**

You must also send a copy to your local school district. **34 CFR 300.153(d).** You should send the letter by fax or certified mail, return receipt requested. Keep a receipt with the date and confirmation of receipt.

► **Advocacy Hint: Not too hot, not too cold, but just right.** In a dispute between a parent and school district, it can be tempting to complain about every possible area of violation. It can also be tempting to not complain about something when you don't have all the information. Try to focus on a few important problems that have a real effect on your child's education, but remember that you do not have to know everything about the situation to ask the state to look into it.

When a State Complaint is Made

MDE has 60 calendar days to investigate a complaint and issue a written decision. **34 CFR 300.152(a); R 340.1853(5)**. The timeline starts when a complaint is filed – that is, when MDE and the school district have received a complaint with all of the basic information required by law. MDE may extend the 60-day timeline if:

- a) There is also a due process hearing request on the same issue for the same student;
- b) The parties have agreed to mediation; or,
- c) “Exceptional circumstances” (such as unexpected school closures, unusually complicated questions of law, large numbers of students affected, etc.) exist. **34 CFR 300.152(b), (c); R 340.1853(6)**.

During MDE’s 60 day complaint process:

- 1.) The MDE and ISD investigator interview the person filing the complaint, talk with school officials and other individuals, review records, and write a “final” report. When investigating a complaint challenging the appropriateness of a child’s educational services or the denial of FAPE, MDE should not only look at whether or not the school followed the proper procedures but also should look at whether or not the school reached an appropriate decision in light of the child’s individual abilities and needs. This may include looking at evaluation data, interviewing individuals, and making an independent determination as to whether or not the school is violating the law. **71 Fed.Reg. 46601 (8/14/06); Special Education Problem Solving Process, page 14.**
- 2.) The complainant and the school district may try and resolve all or part of the allegation through an informal meeting or mediation.
- 3.) The school district can admit noncompliance in writing to one or all of the allegations. MDE will then order corrective action and require proof of compliance.
- 4.) The complainant can withdraw the complaint at anytime for any reason. A withdrawal allows the complainant to re-file the same allegation with the one year timeline.

When a State Complaint is Valid

When the complaint is found to be valid, the report will include corrective actions. **34 CFR 300.151(b).**

Proof of compliance must be filed by the school district within the timeline specified by the corrective action. **R 340.1854.** If a school district refuses to comply, MDE may order the district to provide services, withdraw the district's authority to operate special education programs, withhold federal or state funds, withhold licenses or accreditation, or take court action. **R 340.1855.**

Complaints are very useful when some particular service on a student's IEP has not been provided. A finding of a valid complaint usually leads to a change. The school will be instructed to begin providing the IEP service, complete an evaluation, or make some other change in how services and supports are provided.

In some cases, however, some harm or loss has accrued to the student during the time in which the school was out of compliance with the law. For example, an IEP could identify that the student needs speech therapy in two half-hour sessions each week. The service is to begin in September and continue until June. The school, however, does not have a speech therapist until the beginning of January. The student has lost four months of speech services. While a complaint may start the service, the issue of the student's loss must also be considered.

In resolving a complaint in which it has found a failure to provide appropriate services, MDE must address: (1) How to remedy the denial of those services, including as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the student; and, (2) Appropriate future provision of services for all students with disabilities. **34 CFR 300.151(b).**

► **Advocacy Hint: Remediation required.** Federal and state rules now explicitly recognize that compensatory education, sometimes referred to as "remediation," is one of the remedies to be used when necessary in resolving complaints. Further, an order requiring a school to convene a new process to determine the extent of remediation does not comport with IDEA; MDE has the power and responsibility to order remediation directly when necessary to restore a child to where she or he would have been had the services specified in his or her IEP been received. **Fayette Co. BOE v. L.M., 478 F.3d 307 (6th Cir. 2007) Cert den. 128 S. Ct. 693 (2007).**

When a State Complaint is Not Valid

If MDE does not substantiate the complaint, it must still send a written copy of its investigation report to all involved parties. The report must also inform the person making the complaint of his or her right to appeal the decision.

The process for challenging a state complaint finding is not clear. In some circumstances, one might have to request a due process hearing. In other circumstances, it may be possible to appeal the finding by filing state or federal court action.

Tips on Filing an Effective State Complaint

When writing a complaint letter:

- ◆ lay out facts as concisely and as clearly as possible, focusing on events that happened within the last year (events older than that cannot be addressed through a complaint);
- ◆ cite violations of all the relevant statutes and regulations, plans, IEPs, hearing decisions, or court orders;
- ◆ tell how the violation occurred and what effect it had on the child or children involved;
- ◆ request that the complaint be investigated without delay and that you be informed of the resolution of the complaint;
- ◆ ask for compensatory education if a child or children have missed out on services or lost other educational benefits;
- ◆ ask for changes in policies and procedures if a violation affects many children;
- ◆ ALWAYS sign and date your complaint;
- ◆ ALWAYS make a copy of your complaint;
- ◆ include a release of information if the complaint relates to a specific child and you are not the parent;
- ◆ send copies to MDE and the local district; and,
- ◆ keep a copy of the investigation report and any actions the local district and ISD propose to take to rectify the situation.

Federal Complaints

The United States Department of Education investigates complaints of noncompliance with Section 504 within educational programs. The U.S. Department of Education's Office of Civil Rights (OCR) is responsible for enforcing Section 504.

Section 504 prohibits discrimination based on disability in any program or activity that receives federal funds. Public education programs receive federal funds and must comply with the nondiscrimination provisions of Section 504. For instance, if a student in a wheelchair is denied access to art class because it is held in an inaccessible building, the school is in violation of Section 504 whether or not the student receives special education. Another example is the school's failure to justify the placement of a student in a separate school for students with disabilities. This is in violation of both Section 504 and IDEA unless it can be clearly shown that the placement is based on the student's unique needs.

Section 504 complaints are made in the same way as are state complaints but can be made only if the discrimination occurred within the past 180 days, unless there are special circumstances that would justify a waiver of that timeline. In order to file a complaint, write a complaint letter detailing all of the facts, all of the involved schools and persons, and all of the statutes and regulations you believe to have been violated. Attach medical documentation of the student's disability, along with any important reports, letters, or other written material. Make sure to include your recommendation on what should be done to correct the violation. Letters of complaint should be sent to:

Office for Civil Rights, Cleveland Office
U.S. Department of Education
1350 Euclid Ave, Suite 325
Cleveland, Ohio 44115-1812
Telephone: (216) 522-4970 (Voice), (800) 877-8339 (TDD)

Unlike a state complaint, a federal complaint may be filed electronically. Go to: <http://www2.ed.gov/about/offices/list/ocr/complaintprocess.html>.

You may also wish to copy the Washington, DC, office:

U.S. Department of Education
Office for Civil Rights
400 Maryland Ave., S.W.
Washington, DC 20202-1100

Due Process Hearings and Appeals

A due process hearing is an appeal from the recommendation of the IEPT. A due process hearing may be requested over the issue of a student's identification, evaluation, eligibility, individualized education program or the proposed educational placement, or any matter relating to an appropriate education for the student. **34 CFR 300.507(a); R 340.1724f(5).**

A due process hearing is the legal forum for resolving disputes between parties, usually the school district and the parent, about some matter related to the child's education that has not been able to be resolved through informal means. It is also the only way a parent may assert "stay put" rights, under which a student stays in his or her current placement pending the outcome of the hearing. For that reason, it is sometimes necessary to request a due process hearing.

The changes made to the due process provisions by the 2004 IDEA Amendments have made the due process hearing system even more difficult for parents to navigate without the assistance of legal counsel. Parents have to, from the outset, review their claims against the school district to ensure that the claims have a basis in law and have merit. Experts will need to be retained in most cases to support the claims of the parent. The due process complaint notice is a very important first step since it sets the basis for attempting to resolve the issues be it through the resolution process, mediation, or the hearing process. Parents should seek assistance of counsel from the outset so that the issues outlined in the due process notice are thorough and comprehensive.

The State Bar of Michigan Lawyer Referral and Information Service, (800) 968-0738, is a good resource for finding an attorney. Several counties also have local attorney referral services, and most Legal Services organizations maintain panels of private attorneys who take on selected cases at reduced cost. MPAS maintains a small referral network, including attorneys who represent parents in due process hearings. MPAS also provides representation in selected cases that fit agency priorities.

When to Request a Hearing

A due process hearing may be requested by the student's parents or legal guardian, the district of residence, the operating district or the Michigan Department of Education. (If the student is 18 years of age or older, the student or his/her attorney must request the hearing.) When any party requests a hearing, that party must notify the other parties of the intent to seek a hearing. **R 340.1724f(3).**

► **Advocacy Hint: Don't sit on your rights.** Federal law sets a time limit (two years) on how far back you can go in challenging IEPs. **34 CFR 300.507(a)(2)**. This time limit is most important in situations where a school district has not met a student's needs over a long period of time and, as a result, there is a need for compensatory education or remediation. In other cases, if there is a problem with an IEP, the simplest way to resolve it is to call a new IEPT meeting and, if you still disagree, challenge the finding from that meeting.

Other Civil Rights Laws. IDEA regulations say that asking for a hearing or review or bringing a lawsuit under special education law does NOT limit rights to seek action under the Constitution or other federal laws protecting the rights of students or youths with disabilities. There is one restriction. Before filing a lawsuit under other laws for a matter that is also covered by the special education law, a person must first go through the special education hearing process. This is called exhausting administrative remedies. **34 CFR 300.516(e)**.

Complaints and Hearings Together. Federal regulations do not allow the state to investigate a complaint and convene a hearing on the same issue. 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 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 part of the due process action must be resolved using the time limit and procedures. **34 CFR 300.152(c)**.

How to Request a Hearing

Step 1: Prepare and send a "due process complaint notice." The parent, or the attorney representing the parent, must provide a "due process complaint notice" to the other party and forward a copy of the notice to the MDE. MDE has developed a model form to assist parents in filing a due process complaint notice. The model form is available at the MDE website in the **Special Education Due Process Complaint Procedures, Appendix B** or at http://www.michigan.gov/documents/mde/DueProcess_Complaint_Procedures_340126_7.pdf.

The notice must specify:

- ◆ Name of the child;
- ◆ Address where the child resides;
- ◆ Name of the school the child attends;
- ◆ A description of the nature of the problem relating to the initiation or change with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education, including the facts relating to such problem;

- ◆ A proposed resolution to the problem to the extent known and available to the party at the time; and,
- ◆ If the child is homeless, the notice must provide contact information for the child and the name of the school the child is currently attending. **34 CFR 300.508(b).**

► **Advocacy Hint: No notice, no hearing.** A party cannot have a due process hearing until the notice has been provided which meets the requirements discussed above. **34 CFR 300.508(c).** It is no longer enough to merely disagree and request a due process hearing.

Nor is it sufficient (or even possible in many cases) to request a hearing by signing an IEP in disagreement. The most recent changes in the Michigan IEP form do not include a signature page, reflecting the law that requires no signature on an IEP (except for consent to an initial IEP) in order to make it effective.

Step 2: Receive a response. The non-complaining party must respond to the due process complaint notice within *10 days* of receiving the notice, and specifically address the issues raised in the complaint.

What does this mean? Usually the parent is the person requesting the hearing. If the *parent* has requested a hearing, the school district has to respond to the due process notice, within 10 days, if they have not already sent to the parent a prior written notice regarding the subject matter contained in the parent's due process complaint notice. The district's response to the parent must include:

- ◆ An explanation of why the district proposed or refused to take the action at issue in the notice;
- ◆ A description of the options that the IEP team considered and the reasons why those options were rejected;
- ◆ A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; and,
- ◆ The description of the factors that are relevant to the district's proposal or refusal. **34 CFR 300.508(e).**

Step 3: Address any objection to the notice. The district's response also may include an objection that the parent's notice was insufficient. This objection must be filed within 15 days of receiving the hearing notice. **34 CFR 300.508(d)(1).**

► **Advocacy Hint: Be thorough up front.** It is imperative that the due process notice clearly describe all the issues you are attempting to resolve. You will not be allowed to raise issues that are not described in the notice. Although there are procedures for amending the notice, there is no guarantee that you will be allowed to do so.

For guidance on writing due process hearing notices, see Wrightslaw's "Letter to a Stranger" at: http://www.wrightslaw.com/advoc/articles/Letter_to_Stranger.html.

Step 4: Arguing about/amending the notice. If the non-complaining party objects that the due process complaint notice is not complete, the hearing officer has to, within 5 days of such notice, make a ruling regarding the adequacy of the due process complaint notice. **34 CFR 300.508(d)(2).**

If the hearing officer determines that the due process complaint notice is inadequate or the party seeking the hearing wants to amend the notice, there are procedures outlined for doing so. A complaint notice can only be amended if:

- ◆ the other party, in writing, consents to the amendment of the notice and is given the opportunity to resolve the dispute through the "resolution session" (discussed below); or,
- ◆ the hearing officer grants permission to amend the notice. The hearing officer may allow amendment right up to five days before the hearing. **34 CFR 300.508(d)(3).**

Once the notice is amended, the applicable timeline for the due process hearing recommences, including the timeline for the "resolution session."

Step 5: Mandatory resolution session. Prior to the opportunity to proceed with the 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 complaint. This meeting is known as a "resolution session". **34 CFR 300.510.**

The meeting has to be convened within 15 days of receiving the parent's due process hearing notice. The meeting must include a representative of the agency or district who has decision-making authority. The school district's attorney may not be present unless the parent brings an attorney. The purpose of the meeting is to have the parent(s) of the child discuss their complaint and the facts upon which it is based and allow the district the opportunity to resolve the complaint.

The meeting can be waived if both parties, in writing, agree to waive the resolution session meeting or use the mediation process.

If the parent(s) and district are able to resolve the problem at the resolution session, the parties must execute a legally binding settlement agreement. The agreement must be signed by the parent(s) and a representative of the agency or district who has the authority to bind the agency or district. This agreement is enforceable in court. A settlement agreement reached as a result of the resolution session can be voided by any party within three business days of the agreement's execution. **34 CFR 300.510(e).**

► **Advocacy Hint: Know your contracts.** A federal court in Michigan held in an unreported decision that an attorney may assist in drafting settlement agreements without violating the bar on attorney involvement at the resolution session. **Mr. S. v. Rochester Community Schools, 2006 WL 2830042 (W.D.Mich. 2006).**

MDE may, but has not yet, elected to make other forms of dispute resolution available to resolve conflicts over agreements reached in resolution sessions. **34 CFR 300.537.** Until MDE does so, the federal law appears to permit enforcement of resolution session agreements only by going to court.

If the district does not resolve the problem within 30 days of the receipt of the complaint, the due process hearing may occur. It is only then that the applicable timelines for the due process hearing commence. **34 CFR 300.510(b).**

Due Process Hearing Rights

If neither mediation nor the resolution session resolves the issues raised in the due process complaint notice, then the parties can proceed to hearing.

Subject matter of hearing. The subject matter of hearing is restricted to the issues raised in the due process complaint notice. Only if the other party consents, can any additional issues be raised. **34 CFR 300.511(d).**

The hearing officer. Hearings are conducted by administrative law judges (ALJs) employed by the State Department of Licensing and Regulatory Affairs. The administrative law judge must possess:

- ◆ Knowledge of, and the ability to understand, the IDEA, its regulations, state regulations, and interpretation of IDEA rendered by state and federal courts;
- ◆ Knowledge and ability to conduct the hearing in accordance with appropriate, standard legal practice; and,
- ◆ Knowledge and ability to render and write decisions in accordance with appropriate legal practice. **34 CFR 300.511(c).**

Every due process hearing must be conducted according to rules, regulations, and procedures of both federal and state law.

- ◆ Any party has a right to be accompanied and represented by counsel, to present evidence, and to obtain a written or electronic copy of the decision and record. **34 CFR 300.512(a)**.
- ◆ Any party has the right to prohibit the introduction of any evidence at the hearing that has not been disclosed AT LEAST FIVE DAYS before the hearing. **34 CFR 300.512(a)(3), (b)**.

► **Advocacy Hint: Disclose evaluations and recommendations.** It is never a good idea to withhold evaluations/documents you want to use at the hearing from the five day exchange, since failure to disclose such evaluations could result in the ALJ barring the introduction of evaluations unless the other party consents. **34 CFR 300.512(b)**. Also, remember that this rule does not require school districts to provide the entire file to the ALJ unless you request it. It's always a good idea to review your child's file before a hearing and make sure all important documents are included in the documents given to the ALJ.

- ◆ The student who is the subject of the hearing has the right to be present at the hearing and may open the hearing to the public. **34 CFR 300.512(c)**.

► **Advocacy Hint: Private or public?** Because of a desire for privacy, the parent may wish to have a hearing closed to the public. The parent, however, should realize that this will restrict the number of people the parent may have present. In a closed hearing, only parents, the student, school officials, and advocates may be present. Others may attend only if both parties agree.

- ◆ The parent or parent representative has the right to obtain a copy of the record and decision at no charge. **34 CFR 300.512(c)**.

► **Advocacy Hint: Get it in writing.** Obtaining a written hearing decision is crucial in order to understand the basis of the ALJ's decision and identify any possible issues for appeal to court.

Placement During the Hearing Process

The school may not change the placement of a student during the pendency of any administrative or judicial proceeding unless the parents and the school agree. **34 CFR 300.518(a)**. If the hearing involves an application for initial admission to a public school and parental consent is obtained, the student must be placed into the public school until the completion of all administrative and judicial proceedings. **34 CFR 300.518(b)**.

See the chapter on “Discipline” for special rules governing alternative placements in specific disciplinary actions.

Termination of the Hearing Process

Sometimes, through mediation or negotiation, an agreeable solution may be reached before the hearing process is exhausted. State regulations provide that the hearing or appeal procedure may be suspended, delayed, or terminated at any point upon written stipulation (statement) by the parent and school, prior to the appointment of the ALJ. After appointment of the ALJ, the hearing may be terminated by stipulation between the district and the parent; however, delays, suspensions, or adjournments require ALJ approval.

The Hearing Decision

The administrative law judge must render a decision not later than 45 days after the timeline for the resolution session ends. **34 CFR 300.515(a)**. The ALJ may grant specific time extensions at the request of either party. **34 CFR 300.515(c)**.

Discipline disputes are addressed through “expedited hearings.” An expedited hearing must be held within 20 school days of the date the hearing is requested and must result in a determination within 10 school days after the hearing. **34 CFR 300.532(c)**.

The ALJ’s decision must be made on *substantive grounds* on a determination of whether the child received a free appropriate public education. If procedural violations are alleged, the hearing officer may find that a child did not receive a free appropriate public education *only if* the procedural inadequacies:

- ◆ impeded the student’s right to a free appropriate public education;
- ◆ significantly impeded the parent’s opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the student; or,
- ◆ caused a deprivation of educational benefits. **34 CFR 300.513(a)**.

► **Advocacy Hint: But they broke the law!** Many parents' complaints focus on a school's compliance with procedural rules. The 2004 IDEA Amendments preserved the right of parents to file a compliance complaint with MDE, or to ask a hearing officer to order compliance with procedural rules. The 2004 Amendments state clearly, however, that procedural violations by themselves do not automatically mean a school district is not providing a free appropriate public education. In general, it is always a good idea to ask, when you think a school district has violated an IDEA procedural rule, what impact the violation has on your child's education.

Appealing the Administrative Law Judge's Decision

State-level review was abolished in Michigan in June 2006. All hearings are now "one-tier" hearings, so if you disagree with an ALJ's decision, you must appeal to court by filing a civil lawsuit. The suit may be filed in state or federal court. **34 CFR 300.516(a)**.

The 2004 IDEA Amendments added a statute of limitations for filing appeals to court. Appeal to a federal district court or a court of competent jurisdiction must be filed within **90 days** of the hearing officer's decision. **34 CFR 300.516(b)**.

Attorneys' Fees

Attorneys' fees and related costs may be awarded to students' attorneys in cases where students prevail in due process hearings or in court actions to enforce rights under IDEA. **34 CFR 300.517(a)**. There are a number of limitations on the collection of fees. For example, attorneys' fees may not be awarded if a student's attorney fails to respond promptly to a reasonable settlement offer and may not be awarded for representation in most IEPT meetings or mediation conferences. **34 CFR 300.517(c)(2)**. Attorneys' fees may be reduced if the student's attorney fails to give proper notice in the due process hearing request, if the attorney unreasonably delays resolving the conflict, or if the time spent or hourly rate billed are excessive. **34 CFR 300.517(c)(4)**. Despite these limitations, making attorneys' fees and costs available to students' attorneys may help encourage private attorneys to represent students with disabilities in due process hearings.

► **Advocacy Hint: Prevailing in court action or hearing only.** Parents are not entitled to receive attorneys' fees for reaching favorable settlements or agreements. Fees are only available in actions where there is a favorable finding by a court or hearing officer. **See T.D. v. LaGrange School District No. 102, 349 F.3d 469 (7th Cir. 2003); Buckhannon v. West Virginia DHHR, 121 S.Ct. 1835 (2001)**. This does not mean, of course, that attorneys' fees cannot be negotiated as part of a settlement agreement.

A court, at its discretion, may award attorneys' fees to a state or local educational agency against the *attorney of a parent* who files a complaint or subsequent cause of action which is (or becomes) frivolous, unreasonable or without foundation. A court, at its discretion, may award reasonable attorneys' fees to a SEA or 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, or cause unnecessary delay, or to needlessly increase the cost of litigation. **34 CFR 300.517(a)**

► **Advocacy Hint: This is yesterday's news.** Under Rule 11 of the Federal Rules of Civil Procedure, anyone (including parents or school districts) can collect fees from a party when the party's claims are frivolous, unreasonable, without foundation, or presented for an improper purpose. **See *Christianburg v. EEOC*, 98 S.Ct. 694 (1978).** Parents should evaluate their claims continuously to make sure that their claims are not frivolous, unreasonable, or without foundation. MPAS urges parents to review their retainer agreements carefully to see if the retainer agreement contains any fee shifting arrangement. Parents should also be wary of school districts who suggest that they have an automatic right to attorneys' fees as a way of dissuading parents from asserting their due process rights. Such threats would chill the right of parents to participate in educational decisions and might give rise to civil rights claims.

Mediation

Mediation is different from hearings. In a hearing, the hearing officer makes a decision that is imposed on the two disputing parties. The role of the mediator is to facilitate the two parties in reaching their own decision.

Professional mediation of conflicts between parents and special educators can preclude the need for many special education due process hearings. Mediation is also more informal and easier than hearings.

Any party to a hearing may request mediation at any time. Participation in mediation is voluntary. The mediator must be acceptable to both the parent and the school. Mediation may not be used to delay a hearing, except by mutual agreement of the parties and approval of the hearing officer. Parties to mediation retain the right to take other action if mediation fails to achieve a settlement.

► **Advocacy Hint: Mediation is available any time.** Although mediation occurs most frequently in the midst of due process hearings, it is available at any time to address any dispute in the provision of special education services, including complaint issues. Remember, though, that either party may decline mediation.

Mediation is free of charge to parents. **34 CFR 300.506(b)(4)**. Michigan has a series of Community Dispute Resolution Centers throughout the state with trained mediators to handle many kinds of disputes, including special education issues. A number of private mediators also accept assignments in such cases.

If the parent(s) and district are able to resolve the complaint as a result of mediation, the parties must execute a legally binding settlement agreement. The agreement must be signed by the parent(s) and a representative at the agency or district who has the authority to bind the agency or district. This agreement is enforceable in court. (See prior comments about resolution sessions.)

► **Advocacy Hint: It's a contract.** The agreement that is signed by the parties is, in essence, a contract. If either party fails to follow the terms of the agreement, the agreement can be enforced through legal action. This is a boon in getting the district to do its part, but it can also lead to trouble if the parent has responsibilities under the agreement and fails to follow the terms specified. It also can act to waive certain special education rights. Please review the agreement carefully and understand its implications before you sign the document. MPAS strongly advises parents to contact legal counsel prior to signing the agreement.

Appendix 10-1

Sample Complaint Letter

Via fax and U.S. Mail: (517) 373-8414 and (000) 555-0000

October 19, 2016

Michigan Department of Education
Office of Special Education
608 West Allegan Street
Lansing, Michigan 48909

Gene Simmons, Superintendent
Hades School District
123 Lucifer Street
Hades, MI 48000

This is a formal complaint under 34 CFR 300.151-153 and R 340.1851-55. Please see the following pages showing how the school district did not follow the law and the facts showing how that happened.

Complainant:

Mark McWilliams
Michigan Protection & Advocacy Service, Inc
4095 Legacy Parkway, Suite 500
Lansing, MI 48911
(517) 487-1755, mmcwill@mpas.org

Student Information:

Name: Sherry Smith
Age: 7 years
Date of birth: 02/26/2003
Grade: 1
School of attendance: Gates Elementary School, 12 Lucifer St., Hades, MI 48000
Resident district/operating district: Hades Public Schools
Parent name: Jerry Smith
Address: 781 Mephistophiles Road, Hades, MI 48000
Phone number: (517) 555-4321

I have enclosed a Release of Information signed by the student's parent.

Complaint Allegations and Supporting Facts

Allegation	Supporting Facts
1. The district has failed to identify, locate, and evaluate children with disabilities, in violation of 34 CFR 300.111.	See fact statements 3, 4, 5, and 6 below.
2. The district has failed to base decisions on data by not basing IEP goals on student needs, in violation of 34 CFR 300.320(a)(2).	See fact statement 7 below.
3. The district has failed to apply standards by not offering services and supports reasonably calculated to confer educational benefit, in violation of 34 CFR 300.101(a) and <u>Board of Ed. of Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690.</u>	See fact statement 8 below.
4. The district has failed to follow procedures by denying access to copies of records, in violation of 34 CFR 300.613.	See fact statement 9 below.

Supporting Facts

1. Sherry Smith is a 7 year old girl with autism. She lives at home with her father, Jerry Smith. She loves to paint, and some of her paintings have been displayed at school.
2. Sherry was diagnosed with autism at the University of Michigan Clinic at age 4. Her diagnosis was confirmed by the Mayo Clinic at age 5.
3. Despite her artistic success, Sherry has struggled in school since she began kindergarten. From September 2009 to May 2011, Sherry received all “unsatisfactory” ratings from her teachers, who noted that she did not play well with other children and would not participate in group activities.
4. One teacher wrote on Sherry’s November 2010 progress report, “Your daughter needs medical help – please get it!”

5. From September 2009 to May 2011, the district received at least four letters from Sherry's father asking for help. Each letter included copies of the University of Michigan and Mayo Clinic evaluations. Although none of the letters specifically asked for a special education evaluation, each letter put the district on notice that Sherry had a disability and needed help.
6. Despite having this information, the district did not initiate an evaluation until May 5, 2011, one day after receiving MPAS' initial request for records.
7. Once the district finally initiated an evaluation, they convened an IEPT meeting within a week. In the IEP drafted by the district, there was a statement of present level of academic achievement and functional performance that concluded: "Sherry is developmentally delayed, but she is able to perform first grade work with appropriate supports and services." However, her goals were drawn from the district's day care center and included such goals as recognizing colors and shapes.
8. In the services section of Sherry's IEP, the district listed "the same services everyone gets, without exception." These services were not individually designed to help Sherry access the general curriculum or make progress toward her IEP goals.
9. MPAS submitted a detailed records request on May 1, 2011, attached. The district at first did not respond to the request for records. After a call to the district's counsel, the district responded by sending a single page – page 4 of Sherry's most recent IEP, describing "secondary transition services." All other documents were received from Sherry's father and CMH case manager.

Impact on the Student

Sherry was denied special education services for at least a year. As a result, she is a year behind in school. Her loss comes at a key age and creates a disproportionately high risk of future educational struggles and delays.

Systemic Violations

The school district violations shown in this complaint may include patterns and practices of violations that affect many students. In resolving a complaint, MDE has a responsibility to assure through its general supervisory authority to address 'appropriate future provision of services for all children with disabilities.' 34 CFR 300.151(b)(2); 71 Fed.Reg. 46601 (8/14/06).

A review of the district's State Performance Plan data from 2008-9 indicates that they have no special education students identified. Since the district's child find practices are at issue in this complaint, the absence of any students with disabilities suggests the district is not meeting its child find responsibilities.

Informal Resolution Attempts

Sherry's father sent four letters and made 78 phone calls to the district asking for help. The district did not respond to any of these overtures.

Proposed Corrective Action

1. Order a complete reevaluation and IEPT meeting to rewrite Sherry's IEP.
2. Order compensatory education based on an independent evaluation by an evaluator of the Smiths' choosing.
3. Order a revision of the district's child find policy.
4. Maintain oversight of the district to ensure compliance and improvement.

Please be advised that, although MPAS will allow the district to communicate directly with the parent regarding the issues in this complaint, as the complainant we reserve the right to accept or decline any proposed resolution the district might suggest.

Sincerely,

Mark McWilliams

Appendix 10-2

Section 504 Letter Of Complaint

(Be sure to keep a copy for your records.)

(Date)

Office for Civil Rights, Cleveland Office
U.S. Department of Education
1350 Euclid Ave., Suite 325
Cleveland, Ohio 44115-1812

RE: Edward Davis

Dear Sir or Madam:

The purpose of this letter is to make a formal complaint to you concerning the actions of the () Intermediate School District and the education of my son, Edward Davis. The main facts of the complaint are as follows:

1. Edward is a 14-year-old boy with mild cognitive impairment who lives with me in the () School District.
2. () School District has excluded Edward from participation in his vocational education and physical education classes and failed to provide him with prescribed speech therapy.
3. On (date), the Individualized Education Program Team (IEPT) met to develop Edward's Individualized Education Program (IEP) for the coming school year when he would be entering Smith Junior High School. The IEPT agreed that Edward was ready to enter the vocational education program. The IEPT also agreed that he should continue to receive speech therapy three times a week for fifty minutes a session.
4. On (date), three weeks after school started, I learned that Edward had been dropped from his vocational education and physical education classes and that he would not be receiving any speech therapy this year. On (date), Ms. Edith Jones, Edward's counselor, called to tell me that Mr. Clark, the principal, and Mr. Smith, the teacher of the vocational program, had met the day before to discuss the problems Edward was having in classes. Ms. Jones told me that Edward had been teased and picked on by the other boys in his P.E. and shop classes. These problems were disrupting the classes.
5. The IEPT did not meet until (date). I said that Edward should be let back into the vocational education and physical education classes. I argued that he should not be punished for the behavior of the other students. Mr. Clark and Mr. Smith insisted that his presence was the source of the problem and they could not stop the other students'

teasing. Mr. Clark also said he was sorry, but the school board had cut back on special education funding and there was no more money available to pay for speech therapy for students in the junior and senior high schools. Edward's IEP was changed to reflect the actions taken by the principal. I indicated my opposition to the school's actions on the IEP. I also insisted that the reasons given for the removal from the classes and denial of speech therapy be included in the IEP.

6. Since (date), Edward has not been going to his vocational education class. Instead, he has been placed in the study hall. He has not received any speech therapy since the school year began.
7. I believe that the school district's actions violate the Section 504 and IDEA regulations and my son's right to an appropriate education.
8. I request that you investigate the actions of () School District and order the district to put Edward back into his vocational education and physical education classes and to give him the prescribed speech therapy. To assist you in your investigation, I will be happy to share with you all relevant documents from my file and put your investigators in touch with other persons who have pertinent information. The following individuals are responsible for the actions complained of:

Mr. Clark Principal; Ms. Edith Jones, Counselor; ISD, 123 Main Street, My City, Michigan (517) 444-3693

9. I expect that the Office for Civil Rights will keep me informed of any actions taken about this complaint, including providing copies of any written findings. I also expect that OCR will promptly acknowledge receipt of my letter and that it will immediately begin an investigation. I intend to keep the Washington Office for Civil Rights informed if there are delays in the investigation of this complaint.

Sincerely,

(Names of Parents)
(Address)
(Telephone Number)

cc: U.S. Department of Education
Office for Civil Rights
400 Maryland Ave., S.W.
Washington, DC 20202-1100

Appendix 10-3

Follow Up Letter To OCR

(Be sure to keep a copy for your records.)

(Date)

Office for Civil Rights, Cleveland Office
U.S. Department of Education
1350 Euclid Ave, Suite 325
Cleveland, Ohio 44115-1812

Dear Sir or Madam:

On (Date), I filed a complaint with your office charging that () School District had discriminated against my child on the basis of his disability in violation of Section 504 and IDEA. However, I have not received a letter acknowledging my complaint and saying when your office will begin an investigation of my complaint.

My child, (), is being denied urgently needed services. Please let me know by (date) when your investigation will begin.

Sincerely,

(Your Name)

(Your Address)

(Your Telephone Number)

cc: U.S. Department of Education
Office for Civil Rights
400 Maryland Ave., S.W.
Washington, DC 20202-1100

Appendix 10-4

U.S. Department of Education Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education

The complete document can be found at

<https://www2.ed.gov/policy/speced/guid/idea/memosdcltrs/acccombinedosersdisputeresolutionqafinalmemo-7-23-13.pdf>

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES

July 23, 2013

Contact Person: Gregg Corr

Telephone: 202-245-7309

OSEP MEMO 13-08

MEMORANDUM

TO: Chief State School Officers
State Directors of Special Education

FROM: Melody Musgrove, Ed.D.
Director
Office of Special Education Programs

SUBJECT: Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education Act
(Part B)

The purpose of this Memorandum is to introduce the updated and combined question and answer (Q&A) document on the dispute resolution procedures that are set out in the Part B regulations, published in the Federal Register on August 14, 2006, including mediation procedures (34 CFR §300.506), State complaint procedures (34 CFR §§300.151-300.153), and due process procedures (34 CFR §§300.507-300.516 and 300.532-300.533). The Office of Special Education Programs (OSEP) encourages parents and local educational agencies (LEAs) to work collaboratively, in the best interests of children, to resolve the disagreements that may occur when working to provide a positive educational experience for all children, including children with disabilities. To this end, the IDEA and its implementing regulations provide specific options for resolving disputes between parents and public agencies, which can be used in a manner consistent with our shared goals of improving results and achieving better outcomes for children with disabilities.

The attached Q&A document provides responses to frequently asked questions to facilitate and enhance States' implementation of the Part B dispute resolution procedures. The Q&A document incorporates prior clarification of the requirements of Part B of the IDEA and the Part B regulations that OSEP has provided on the dispute resolution procedures in policy memoranda, Q&A documents, letters responding to individual requests for policy clarification, and responses to public comments published in regulatory notices in the Federal Register. Three

Michigan Protection and Advocacy Service, Inc.

previous memoranda are being updated and reissued at this time as part of the Q&A document: OSEP Memorandum 94-16 issued on March 22, 1994; OSEP Memorandum 00-20 issued on July 17, 2000; and OSEP Memorandum 01-5 issued on November 30, 2000. Some of the questions and answers in the Q&A document were previously contained in *Questions and Answers on Procedural Safeguards and Due Process Procedures For Parents and Children with Disabilities*, January 2007, updated June 2009. These questions have been revised, amended, and updated, as appropriate.

The Q&A document consists of five sections: mediation; State complaint procedures; due process complaints and due process hearing procedures; resolution process; and expedited due process hearings.

As part of its general supervisory responsibility, a State educational agency (SEA) must ensure implementation of IDEA's dispute resolution procedures in a manner that meets the requirements of the IDEA. OSEP encourages States and their public agencies to work cooperatively with parents to attempt to address their differences through informal means whenever possible. However, when those informal means prove unsuccessful, States should recognize the benefits of encouraging their public agencies to voluntarily engage in mediation with parents, consistent with 34 CFR §300.506. Also, since the inception of the Part B program in 1977, State complaint procedures have provided a very effective and efficient means of resolving disputes between parents and public agencies, without the need to resort to more formal, adversarial, and costly due process proceedings.

Sections A and B of the Q&A document provide guidance on mediation and State complaint procedures, respectively. Section C of the Q&A document describes procedures for due process complaints as well as procedures for due process hearings when the dispute between the parents and the public agency cannot be resolved through informal means, through mediation, or through the resolution process. Even when resorting to IDEA's due process procedures becomes necessary, States and their public agencies should focus on ways to resolve the dispute with parents as early as possible at the local level. Therefore, appropriate use of the resolution procedures, described in Section D of the attached Q&A document, provides an effective and efficient way of resolving disputes at the local level when a parent files a due process complaint. Section E of the Q&A document addresses procedures for expedited due process hearings when a parent or a public agency files a due process complaint regarding a disciplinary matter.

This Memorandum and the attached questions and answers are available at <http://idea.ed.gov> and <http://www2.ed.gov/about/offices/list/osers/osep/policy.html>.

We hope that you find this information helpful. If you or members of your staff have questions, please contact Gregg Corr or your State Contact in OSEP's Monitoring and State Improvement Planning Division.

Thank you for your continued commitment to improving results for children and youth with disabilities and to ensuring that the rights of children and their parents are protected.

Attachment

QUESTIONS AND ANSWERS ON IDEA PART B DISPUTE RESOLUTION PROCEDURES

Revised July 2013

Regulations for Part B of the Individuals with Disabilities Education Act (IDEA) were published in the *Federal Register* on August 14, 2006, and became effective on October 13, 2006. Supplemental IDEA regulations were published on December 1, 2008, and became effective on December 31, 2008. Since publication of the regulations, the Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education (Department) has received requests for clarification of some of these regulations. This is one of a series of question and answer (Q&A) documents prepared by OSERS to address some of the most important issues raised by requests for clarification on a variety of high-interest topics. Each Q&A document will be updated to add new questions and answers as other important issues arise or to amend existing questions and answers as needed.

OSERS issues this Q&A document to provide parents, parent training and information centers, school personnel, State educational agencies (SEAs), local educational agencies (LEAs), advocacy organizations, and other interested parties with information to facilitate appropriate implementation of the IDEA dispute resolution procedures, including mediation, State complaint procedures, and due process complaint and due process hearing procedures. This Q&A document represents the Department's current thinking on these topics. It does not create or confer any rights for or on any person. This guidance does not impose any requirements beyond those required under applicable law and regulations. Further, this document pertains only to IDEA Part B and is not meant to interpret Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act of 1990.¹

This Q&A document updates and revises, as appropriate, the Department's guidance, entitled *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities* issued in January 2007 and revised in June 2009. This Q&A document also updates and revises the information and questions and answers contained in the following Office of Special Education Programs (OSEP) Memoranda: 94-16, *Complaint Management Procedures Under Part B of the Individuals with Disabilities Education Act - Public Law 101-476 (Part B)*, issued March 22, 1994; 00-20, *Complaint Resolution Procedures under Part B of the Individuals with Disabilities Education Act (Part B)*, issued July 17, 2000; and 01-5, *Questions and Answers on Mediation*, issued November 30, 2000. This Q&A document replaces the previously issued OSEP Memoranda and Q&A document.

Generally, the questions and corresponding answers presented in this Q&A document required an interpretation of the IDEA and its implementing 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. However, where controlling case law on these issues exists in your jurisdiction, it generally would be legally binding. The Q&As in this document are not intended to be a replacement for careful study of the IDEA and its implementing regulations or of controlling case law. The IDEA, its implementing regulations, and other important documents related to the IDEA are found at <http://idea.ed.gov>.

If you are interested in commenting on this guidance, please email your comments to OSERSguidancecomments@ed.gov and include Dispute Resolution Procedures in the subject of your email or write us at the following address: Gregg Corr, U.S. Department of Education, Potomac Center Plaza, 550 12th Street, S.W., Room 4108, Washington, D.C. 20202.

¹ For more information about these laws please contact the Office for Civil Rights Enforcement Office that serves your State. Contact information for these offices can be found at: <http://wdcrobcopl01.ed.gov/CFAPPS/OCR/contactus.cfm>.

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