

Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities

Revised June 2009

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. Additional 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 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* due process procedures. This Q&A document represents the Department's current thinking on this topic. 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.

This Q&A document supersedes 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.

As a result of the 2004 amendments to the *IDEA*, the Department has made several changes in the Part B regulations regarding the procedures States must adopt for resolving written complaints filed with the SEA. These changes include 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 period for filing complaints. The regulations expand the availability of mediation to resolve disputes and include a new provision for the enforcement of 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 whenever a parent files such a complaint; specify the time period for requesting a due process hearing and bringing a civil action; and include new guidelines on the substantive or procedural basis of the hearing officer's decision concerning the provision of a free appropriate public education (FAPE).

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. The Q&As in this document are not intended to be a replacement for careful study of the *IDEA* and its implementing regulations. The *IDEA*, its implementing regulations, and other important documents related to the *IDEA* and the regulations are found at <http://IDEA.ed.gov>.

If you are interested in commenting on this guidance, please e-mail your comments to OSERSguidancecomments@ed.gov and include Procedural Safeguards in the subject of your email or write us at the following address: Patricia Guard, U.S. Department of Education, Potomac Center Plaza, 550 12th Street, SW, room 4108, Washington, DC 20202.

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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 in 34 CFR §300.151(b), be used to address the problems of a group of children, i.e., a complaint alleging systemic noncompliance? 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 complaint alleging that a public agency failed to provide 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 *IDEA* by LEAs in the State. These responsibilities extend to both systemic and child-specific issues.

An example of a complaint alleging systemic noncompliance 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 the *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. Under that section, a complaint must include a statement that a public agency has violated a requirement of Part B of the *Act* or the regulations; the facts on which the statement is based; and the signature and contact information for the complainant. If the complaint alleges a violation with respect to a specific child the complaint also must include the name and address of the residence of the child; the name of the school the child is attending; in the case of a homeless child or youth, available contact information for the child and the name of the school the child is attending; a description of the problem of the child, including facts relating to the problem; and a proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed. However, in the *Analysis of Comments and Changes* accompanying the

regulations, the Department indicated 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. 71 FR 46540, 46606 (August 14, 2006). 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 an SEA dismiss a complaint alleging systemic noncompliance because the complainant did not include a proposed resolution to the problem?

Answer: No. The requirement, in 34 CFR §300.153(b)(4)(v), that the complaint must include "...a proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed" only applies to complaints alleging violations with respect to a specific child.

Question A-5: 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 services?

Answer: No, unless the State chooses to accept and resolve complaints regarding alleged violations that occurred outside the one-year timeline as described

in Question A-6. The regulations in 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 and Changes* 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. 71 FR 46606. The references to these circumstances were removed from the current regulations to expedite the resolution of complaints. It is the Department's position 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.

Question A-6: May an SEA choose to accept written complaints alleging violations of the *IDEA* that occurred longer than one year prior to the SEA's receipt of the written complaint? If such a procedure is permitted, must the SEA widely disseminate the procedure pursuant to 34 CFR §300.151(a)(2)?

Answer: As with other procedural protections, a State may elect to provide more protections for children with disabilities and their parents than those specifically required by the *IDEA*. Therefore, an SEA may adopt a policy or procedure to accept and resolve complaints regarding alleged violations that occurred outside the one-year timeline set out in 34 CFR §300.153(c), because this would constitute greater protection for children with disabilities. Stakeholders, including parents, parent training and information centers, protection and advocacy agencies, independent living centers, and other appropriate entities, must be informed of the State's complaint resolution procedures pursuant to 34 CFR §300.151(a)(2). Therefore, if an SEA adopts a policy or procedure to accept complaints alleging violations that occurred outside of the one-year timeline, stakeholders must be informed of the policy or procedure so that they will be able to make informed decisions about how and when they may access the State complaint procedures. Additionally, pursuant to 34 CFR §300.504(c)(5), an SEA must ensure that the procedural safeguards notice provided to parents includes a full explanation of the procedural safeguards, including the time period in which a parent may file a State complaint and relevant procedures.

Question A-7: What are 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 may 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-8: 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 in 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 and Changes* accompanying the regulations:

[T]he 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.

71 FR 46604.

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 automatically 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(b)(8) are automatically 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 the *IDEA* regardless of whether the parties resolve a dispute. If the parties resolve a dispute through the mediation process, the parties must execute a legally binding agreement that includes a statement that all discussions that occurred during the mediation process will remain confidential, as stated in 34 CFR §300.506(b)(6)(i).

Question B-2: Must a written mediation agreement be kept confidential?

Answer: Neither the *IDEA* nor the regulations specifically address whether the mediation agreement, itself, must remain confidential. However, the confidentiality provisions in the Part B regulations in 34 CFR §300.610 and the *Family Educational Rights and Privacy Act (FERPA)* and its regulations apply. Further, there is nothing in the *IDEA* or the regulations that would prohibit the parties from agreeing voluntarily to include in their mediation agreement a provision that limits disclosure of the mediation agreement, in whole or in part, to third parties.

Question B-3: Do the regulations allow discussions that occur during the mediation process to be disclosed during the investigation of a State complaint?

Answer: No. As noted above, the regulations require that discussions that occur during the mediation process must remain confidential. 34 CFR §300.506(b)(8). Neither the *IDEA* nor the regulations specifically address exceptions to the confidentiality requirement for mediation discussions when the State conducts a complaint investigation.

C. Due Process Complaints

Authority: The requirements for due process complaints are found in the regulations at 34 CFR §§300.507 through 300.509.

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 the *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 in 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: Yes. The regulations in 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: What steps are available to the complaining party if a hearing officer rules that the due process complaint is insufficient?

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

If the hearing officer determines the notice [complaint] is not sufficient, the hearing officer's decision will identify how the notice is insufficient, so that the filing party can amend the notice, if appropriate. 71 FR 46698.

A party may amend its due process complaint only if the other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting held pursuant to 34 CFR §300.510 (i.e., resolution meeting or if the parties choose to use mediation); or the hearing officer grants permission to amend the complaint at any time not later than five days before the due process hearing begins. 34 CFR §300.508(d)(3). If a party files an amended due process complaint, the timelines for the resolution meeting and resolution period begin again with the filing of the amended due process complaint. 34 CFR §300.508(d)(4). If the hearing officer determines that the complaint is insufficient and the complaint is not amended, the complaint may be dismissed. 71 FR 46698.

A party may re-file a due process complaint if the complaint remains within the applicable timelines for filing under 34 CFR §§300.507(a)(2) and 300.511(f) -- generally, within two years or an explicit timeline established under State law, unless an exception applies.

Question C-5: 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 and Changes* 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. 71 FR 46698.

Question C-6: 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: While this situation is not addressed specifically by the regulations, 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.

Question C-7: The regulations do not require a resolution meeting when an LEA files a due process complaint. 34 CFR §300.510. How does the absence of a resolution period when an LEA files a due process complaint affect: (1) a parent's right to challenge the sufficiency of the due process complaint; and (2) the parent's responsibility to send to the LEA a response that specifically addresses the issues raised in the LEA's due process complaint?

Answer: A parent's rights and obligations, as outlined above, are not affected by the absence of a resolution meeting time period when an LEA files a due process complaint. In such situations the parent retains the right to challenge the sufficiency of the due process complaint within 15 days of receipt of the complaint, consistent with 34 CFR §300.508(d), and the parent remains obligated to send a response to the LEA that addresses the issues raised in the due process complaint within 10 days of receiving the complaint under 34 CFR §300.508(f).

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 *IDEA* and 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 *IDEA* does not require a resolution meeting in this situation. The resolution meeting provides an opportunity for the parents of the child to discuss their complaint and the facts that form the basis of the complaint, so that the LEA has an opportunity to resolve the complaint. The Department expects that LEAs will attempt to resolve disputes with parents prior to filing a due process complaint. 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: Are there any provisions in the *IDEA* that require discussions that occur in resolution meetings to remain confidential?

Answer: In general, no. Unlike mediation, the *IDEA* 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 at 34 CFR §300.610 and *FERPA* and its regulations apply.

Question D-4: Do the regulations allow information discussed at a resolution meeting to be introduced at a due process hearing?

Answer: In general, yes. Unlike mediation, the *IDEA* and the regulations do not require that discussions in resolution meetings remain confidential. Therefore, absent an agreement by the parties to the contrary, either party may, at a due process hearing, introduce information discussed during the resolution meeting when presenting evidence and confronting or cross-examining witnesses consistent with 34 CFR §300.512(a)(2). Nothing in the *IDEA* or the regulations would prevent the parties from voluntarily agreeing that the resolution meeting discussions will remain confidential, including prohibiting the introduction of those discussions at any subsequent due process hearing. However, neither an SEA nor an LEA can require the parties to enter into such an agreement as a condition of participation in the resolution meeting. 71 FR 46704.

Question D-5: 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-6: 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-7: 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-8: If a party fails to participate in the resolution meeting, must the other party seek the hearing officer's intervention?

Answer: Yes. 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.

Question D-9: If, at the conclusion of the 30-day resolution period, the LEA and parents wish to continue the mediation process, must the hearing officer agree to the extension?

Answer: In general, no. The regulations contemplate that the parties may agree in writing to continue the mediation at the end of the 30-day resolution period pursuant to 34 CFR §300.510(c)(3). Therefore, such agreements would not require hearing officer involvement or approval.

Under 34 CFR §300.515, each hearing and review involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved, and a hearing officer may grant specific extensions of time at the request of either party. Therefore, to the extent that the hearing officer already has established a hearing schedule that is inconsistent with the extension agreed upon by the parties, it would be appropriate to notify the hearing officer of the agreement and any scheduling conflicts in order to revise the hearing schedule.

Question D-10: Must the SEA enforce the requirement that the LEA convene a resolution meeting within 15 days of receiving notice of the parent’s due process complaint? If a resolution meeting is not convened, what action may a parent take?

Answer: Yes. Where the LEA fails to convene resolution meetings as required under 34 CFR §300.510(a)(1), and the failure is not the result of an agreement by the parties to use mediation or a written agreement by the parties to waive the meeting, consistent with §300.510(a)(3), the SEA must enforce the requirement and may use appropriate enforcement actions consistent with its general supervisory responsibilities under 34 CFR §§300.600 and 300.608 to ensure that the LEA complies. Additionally, if the LEA fails to hold the resolution meeting within 15 days of receiving notice of the parent’s due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline.

E. Expedited Due Process Hearings

Authority: The requirements for expedited due process hearings are found in the regulations at 34 CFR §300.532.

Question E-1: May the parties mutually agree to extend the resolution period to resolve an expedited due process complaint?

Answer: No. The regulations for expedited due process hearings, in 34 CFR §300.532(c), do not specifically provide for adjustments to the 15-day resolution period. The purpose of expediting the due process hearing related to a disciplinary decision is to ensure that the matter is resolved promptly and that the child's educational program is not adversely affected by undue delays. Therefore, when the parties have participated in a resolution meeting or mediation and the dispute has not been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint, the due process hearing may proceed. 34 CFR §300.532(c)(3)(ii).