

## Special Education Due Process Hearing Rules

### Selected Rules of the Oregon Department of Education and Office of Administrative Hearings

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#### Department of Education Hearing Rules<sup>1</sup>

##### **581-015-2340**

##### **Procedural Rules for Due Process Hearings**

(1) Pursuant to an interagency agreement with the Office of Administrative Hearings, the Office of Administrative Hearings will assign administrative law judges to conduct special education due process hearings.

(2) The Department of Justice's model rules for administrative hearings, OAR 137-003-0501 through 137-003-0700, apply to the extent consistent with federal law and these Division 15 regulations. The Department's interagency agreement with the Office of Administrative Hearings will identify delegations of authority and the application of the rules in this section.

Stat. Auth.: ORS 343.041, ORS 343.045 & ORS 343.055, ORS 343.155

Stats. Implemented: ORS 343.055, ORS 343.155

##### **581-015-2345**

##### **Hearing Request and Response**

(1) Request for Hearing

(a) Parent Requests for a Due Process Hearing

(A) A parent may request a due process hearing in accordance with subsection(3) if the parent does not agree with the identification, evaluation, educational placement of a child, or the provision of a free appropriate education to a child who may be disabled.

(B) The parent, or the attorney representing the child, must provide notice to the school district and to the Department when requesting a hearing. The notice (which remains confidential) must, include:

(i) The child's name and address (or available contact information in the case of a homeless child);

(ii) The name of the school the child is attending;

(iii) A description of the nature of the problem of the child relating to the proposed or **refused** initiation or change, including facts relating to the problem; and

(iv) A proposed resolution of the problem to the extent known and available to the party at the time.

(b) School District Requests for a Due Process Hearing:

(A) A school district may request a due process hearing regarding identification, evaluation or educational placement of a child with a disability, or the provision of a free appropriate public education to the child.

(B) The school district requesting a due process hearing, or the attorney representing the district, must provide notice to the parent and to the Department in as described in subsection (1)(a)(B).

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<sup>1</sup> These rules were adopted by the State Board of Education on April 19, 2007, effective April 25, 2007 (history omitted). For the complete set of Division 15 OARs relating to Special Education adopted by the State Board of Education on April 19, 2007, see: <http://www.ode.state.or.us/stateboard/2007april19specialeducationoars2.doc>. The official version of the Division 15 OARs will be posted on the Secretary of State website on or after May 15, 2007 at: [http://arcweb.sos.state.or.us/rules/OARS\\_500/OAR\\_581/581\\_tofc.html](http://arcweb.sos.state.or.us/rules/OARS_500/OAR_581/581_tofc.html).

(c) A party may not have a hearing until the party, or the attorney representing the party, files a due process hearing request that meets the requirements of subsection (1)(a)(B) or (1)(b)(B).

(2) Response to hearing request:

(a) School district: If the school district has not sent a prior written notice to the parent regarding the subject matter in the parent's due process request, the school district must, within ten days of receiving the request:

(A) Send to the parent a response that includes:

(i) An explanation of why the school district proposed or refused to take the action raised in the hearing request;

(ii) A description of other options that the IEP team considered and the reasons why those options were rejected;

(iii) A description of each evaluation procedure, assessment, record or report the school district used as the basis for the proposed or refused action; and

(iv) A description of the factors relevant to the school district's proposal or refusal.

(B) The school district's response under subsection (2)(a)(A) may not be construed to preclude the school district from asserting that the parent's due process request was insufficient, where appropriate.

(b) Parent and school district:

(A) The party that did not file the hearing request must, within ten days of receiving the request for hearing, send to the other party a response that specifically addresses the issues raised in the hearing request.

(B) A school district providing a response to an issue under subsection (3)(a) is not required to respond to the same issue under (3)(b).

(3) Time limitation and exception:

(a) A special education due process hearing must be requested within two years after the date of the act or omission that gives rise to the right to request the hearing.

(b) This timeline does not apply to a parent if the parent was prevented from requesting the hearing due to specific misrepresentations by the school district that it had resolved the problem forming the basis of the complaint, or the school district's withholding of information from the parent that the district was required to provide under Chapter 343.

(4) Information: The Department will inform a parent of any free or low-cost legal services and other relevant services available in the area if a parent requests the information.

Stat. Auth.: ORS 343.045, ORS 343.055 & ORS 343.155;

Stats. Implemented: ORS 343.165, 34 CFR 300.507, 300.508, 300.511(e)

### **581-015-2350**

#### **Sufficiency of Hearing Request**

(1) A written request for hearing will be deemed sufficient unless the party receiving the request notifies the administrative law judge and the other party in writing, within 15 days of receipt of the hearing request, that the receiving party believes the notice does not meet the requirements of OAR 581-015-2345.

(2) Within five days of receiving notice that a party is objecting to the sufficiency of the other party's hearing notice, the administrative law judge must make a determination on the face of the hearing request of whether the hearing request meets the requirements of OAR 581-015-2345, and must immediately notify the parties in writing of that determination.

(3) A party may amend its hearing request only if:

(A) The other party consents in writing to the amendment and is given the opportunity to resolve the hearing request through a resolution meeting; or

(B) The administrative law judge grants permission, except that this permission may only be granted at any time not later than five days before a due process hearing occurs.

(4) If a party files an amended hearing request, the applicable timelines for the resolution session and resolution period begin again with the filing of the amended hearing request.

Stat. Auth.: ORS 343.045, ORS 343.055 & ORS 343.155;

Stats. Implemented: ORS 343.165, 34 CFR 300.508(d)

**OAR 581-015-2355**

**Resolution Process**

(1) Resolution meeting:

(a) Within 15 days of receiving a parent's due process hearing request, the school district must hold a resolution 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.

(b) The meeting:

(A) Must include a representative of the school district who has decision-making authority on behalf of the school district; and

(B) May not include an attorney for the school district unless the parent is accompanied by an attorney.

(c) The purpose of the meeting is for the parent of the child to discuss the hearing request, and the facts that form the basis of that request, so that the school district has the opportunity to resolve the dispute that is the basis for the due process hearing request.

(d) This resolution meeting need not be held if:

(A) The parent and school district agree in writing to waive the meeting; or

(B) The parent and school district agree to use the mediation process.

(e) The parent and the school district determine the relevant members of the IEP team to attend the meeting.

(2) Resolution period:

(a) If the school district has not resolved the dispute to the satisfaction of the parents within 30 days of the receipt of the due process hearing request, the due process hearing may occur.

(b) The 45 day hearing timeline begins at the end of the 30 day resolution period except as provided in subsection (2)(c).

(c) The 45 day hearing timeline begins the next business day after any of the following circumstances.

(A) The parties agree in writing to waive the resolution session.

(B) After the mediation or resolution meeting starts but before the end of the 30 day resolution period, the parties agree in writing that no agreement is possible.

(C) Both parties agree in writing to continue the mediation at the end of the 30 day resolution period, but later, the parent or school district withdraws from the mediation process.

(d) The failure of a parent requesting a due process hearing to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held, unless:

(A) The parties have agreed to waive the resolution session; or

(B) The parties have agreed to use mediation instead of the resolution meeting.

(e) If the school district is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and documented (as in OAR 581-015-2195), the school district may, at the conclusion of the 30 day resolution period, request that a hearing officer or administrative law judge dismiss the parent's due process hearing request.

(f) If the school district fails to hold the resolution meeting within 15 days of receiving the parent's due process hearing request or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer or administrative law judge to begin the 45 day hearing timeline.

(3) Resolution agreement:

(a) If a resolution to the dispute is reached at the resolution meeting, the parties must execute a legally binding written agreement that is:

(A) Signed by both the parent and a representative of the school district who has the authority to bind the district; and

(B) Enforceable in any state court of competent jurisdiction or in a district court of the United States.  
(b) If the parties execute a resolution agreement, either party may void the agreement within three business days of the agreement's execution.

Stat. Auth.: ORS 343.045, ORS 343.055 & ORS 343.155; ORS 343.165

Stats. Implemented: ORS 343.045, ORS 343.155 & ORS 343.165, 34 CFR 300.510

### **581-015-2360**

#### **Pre-Hearing Conference, Notice of Hearing and Hearing Rights**

(1) Upon receipt of a written request by a parent or the school district for a hearing regarding the identification, evaluation, individualized education program, educational placement of the child or the provision of a free appropriate public education to a child, the Superintendent will:

- (a) Appoint an administrative law judge, in accordance with OAR 581-015-2365, to conduct the hearing.
- (b) Provide the parent with a copy of the Notice of Procedural Safeguards;
- (c) Inform the parties that mediation is available at no cost to the parents or school district; and
- (d) Inform the parent of any free or low-cost legal services and other relevant services.

(2) Subject matter of hearing: The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the hearing request unless the other party agrees otherwise.

(3) Pre-Hearing Conference: The administrative law judge will require the parties to appear in person or by telephone for a pre-hearing conference for the purpose of:

- (a) Identifying the issues to be resolved;
- (b) Establishing the length and scheduling of the hearing;
- (c) Deciding whether the hearing record will be a written or electronic verbatim record;
- (d) Reviewing the parties' hearing rights and procedures; and
- (e) Notifying the parties of the availability of mediation at no cost through the Department.

(4) Notice of Hearing:

(a) The administrative law judge will provide a notice to the parties of the hearing. The notice will be served by registered or certified mail.

(b) The hearing notice will include:

- (A) A statement of the time and place of the hearing, the scheduling of pre-hearing exchange of documents and any other filing deadlines, and the date for issuance of the final order;
- (B) A statement of the authority and jurisdiction under which the hearing is to be held;
- (C) A reference to the particular sections of the statutes and rules involved;
- (D) A short and plain statement of the matters asserted or charged;
- (E) A statement that mediation is available to the parties at no cost from the Department;
- (F) A statement of hearing rights as described in subsection (3).

(5) Due Process Hearing Rights: Parties to a due process hearing conducted under OAR 581-015-2360 (Notice of Hearing, Hearing Rights, and Pre-Hearing Conference) or OAR 581-015-2400 through 581-015-2445 (Discipline for Students with Disabilities) have the following rights:

(a) During the pendency of any due process hearing or judicial appeal, the child must, remain in the present educational placement unless:

- (A) The school district and the parent agree otherwise;
- (B) If applying for initial admission to a public school, the parent consents to the child's placement in a program provided or selected by the district at the district's expense until all proceedings are completed;
- (C) The school district orders a change in placement to an appropriate interim alternative educational setting for up to 45 school days due to a weapon, illegal drug, or controlled substance incident or for serious bodily injury;
- (D) The administrative law judge orders a change in placement to an appropriate interim alternative educational setting for up to 45 school days due to the substantial likelihood of injurious behavior; or

(E) The school district implements a disciplinary removal to an interim alternative educational setting for a student when the student's behavior is determined not to be a manifestation of the student's disability.

(b) Any party to a hearing has the right to:

(A) Be accompanied and advised by counsel and by individuals who have special knowledge or training with respect to the problems of children with disabilities;

(B) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(C) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least 5 business days before the hearing;

(D) Obtain a written or, at the option of the parents, electronic verbatim record of the hearing at no cost to the parents; and

(E) Obtain a written or, at the option of the parents, electronic findings of fact and hearing decision at no cost to the parents.

(c) The parent involved in a hearing has the right to:

(A) Have the child present who is the subject of the hearing; and

(B) Open the hearing to the public.

Stat. Auth.: ORS 343.041, ORS 343.045 & ORS 343.055; ORS 343.155, ORS 343.165

Stats. Implemented: ORS 343.155, ORS 343.165, ORS 343.177, 34 CFR 300.504; 34 CFR

300.507(b)(2); 34 CFR 300.511; 34 CFR 300.512; 34 CFR 300.518, 34 CFR 300.530; 34 CFR 300.533

**581-015-2365**

#### **Criteria for Administrative Law Judge**

(1) An administrative law judge appointed to conduct a hearing regarding the identification, evaluation, educational placement of a child, or the provision of a free appropriate public education to a child who may have a disability must:

(a) Not be employed by the Department or a school district; and

(b) Not have a professional or personal interest that would conflict with the person's objectivity in the hearing.

(2) An administrative law judge must:

(a) Possess knowledge of, and the ability to understand, the provisions of state and federal special education laws, regulations, and legal interpretations by federal and state courts;

(b) Possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(c) Possess the knowledge and ability to render and write decisions in accordance with standard legal practice.

(3) For purposes of section (1)(a) of this rule, a person who otherwise qualifies to conduct a hearing is not an employee of the Department or school district solely because the person is paid by the Department or school district to serve as a hearings officer.

(4) The Department keeps a list of the persons serving as administrative law judges, which includes a statement of the qualifications of each person.

Stat. Auth.: ORS 343.041, ORS 343.045 & ORS 343.055; ORS 343.155, ORS 343.165

Stats. Implemented: ORS 343.165, 34 CFR 300.511(c)

**581-015-2370**

#### **Conduct of Hearing**

(1) The hearing will be conducted by and under the control of the administrative law judge appointed under 581-015-2360.

(2) At the discretion of the administrative law judge, the hearing will be conducted in the following manner:

(a) Statement and evidence of the school district in support of its action;

(b) Statement and evidence of the parents disputing the school district action;

(c) Rebuttal testimony.

(3) The administrative law judge, counsel or other representatives of the parties, and the parents if the parents are not represented, have the right to question or cross-examine any witnesses.

(4) The hearing may be continued with recesses as determined by the administrative law judge.

(5) The administrative law judge may set reasonable time limits for oral presentation and may exclude or limit cumulative, repetitious or immaterial matter.

(6) Exhibits must be marked, and the markings must identify the person offering the exhibits. The exhibits will be preserved by the Superintendent as part of the record of the proceedings.

(7) Each hearing must be conducted at a time and place that is reasonably convenient to the parents and child involved.

Stat. Auth.: ORS 343.041, ORS 343.045, ORS 343.055, ORS 343.155, ORS 343.165

Stats. Implemented: ORS 343.155 & ORS 343.165, 34 CFR 300.512; 34 CFR 300.515(d)

### **581-015-2375**

#### **Decision of Administrative Law Judge**

(1) The decision of the hearing officer in a contested case will comply with ORS 343.167.

(2) The decision will be entered and mailed to the parties not later than 45 days after the expiration of the resolution period under OAR 581-015-2375 unless a specific extension has been granted by the administrative law judge at the request of a party.

(3) A copy of the hearing decision will be sent to the parent and school district accompanied by a statement describing the method of appealing the decision.

(4) The Department will submit a copy of the findings and hearing decision to the State Advisory Council for Special Education or a subcommittee of the Council, and make the findings and decisions available to the public, in such a manner so that personally identifiable information will not be disclosed.

Stat. Auth.: ORS 343.041, ORS 343.045 & ORS 343.055; ORS 343.155, ORS 343.165

Stats. Implemented: ORS 343.167, 34 CFR 300.513, 34 CFR 300.515

### **581-015-2380**

#### **Informal Disposition**

Nothing contained herein shall be construed to preclude any system of consultations or conferences with parents that is used by school districts with regard to identification, evaluation or educational placement of a child with a disability. Such conferences or consultations, however, shall not be held in lieu of a hearing requested under OAR 581-015-0081 if one is requested. A request for a hearing shall not preclude informal disposition of the matter by stipulation, agreed settlement or consent order.

Stat. Auth.: ORS 343.041, ORS 343.045 & ORS 343.055, ORS 343.155

Stats. Implemented: ORS 343.155

### **581-015-2383**

#### **Failure to Appear at a Hearing**

(1) When a parent, having requested a hearing, fails to appear at the specified time and place, the administrative law judge must enter a decision which supports the school district action.

(2) The decision supporting the school district's action must set forth the material on which the action is based, or the material must be attached to and made a part of the decision.

Stat. Auth.: ORS 343.041, ORS 343.045 & ORS 343.055, ORS 343.155, ORS 343.165

Stats. Implemented: ORS 343.155 & ORS 343.165

### **581-015-2385**

#### **Hearing Costs**

(1) Costs of the Proceedings:

(a) The school district must reimburse the Department for the costs related to conducting the hearing, including pre-hearing conferences, scheduling arrangements, and other related matters.

(b) The school district must provide the parent with a written, or at the option of the parent, an electronic verbatim recording of the hearing, within a reasonable time of the close of the hearing.

(2) Attorney Fees: Funds under Part B of the Individuals with Disabilities Education Act may not be used to pay attorney fees or costs of a party related to an action or proceeding under this rule.  
Stat. Auth.: ORS 343.041, ORS 343.045, ORS 343.055, ORS 343.167;  
Stats. Implemented: ORS 343.165, ORS 343.167, 34 CFR 300.512; 34 CFR 300.517(b)

## **HEARINGS UNDER SECTION 504**

### **581-015-2390**

#### **Definitions for Hearings Under Section 504 of the Rehabilitation Act**

The following definitions apply to OAR 581-015-2395:

(1) "Student with a disability under Section 504" means any student who has a physical or mental impairment that substantially limits one or more major life activities.

(2) As used in section (1) of this rule:

(a) "Physical or mental impairment" means any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; endocrine; any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities;

(b) "Major life activities" means functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working;

(3) "Qualified student with a disability under Section 504" means a student with a disability under Section 504 who is:

(a) Of an age during which non-disabled persons are provided educational services;

(b) Of any age during which it is mandatory under state law to provide such services to students with disabilities; or

(c) To whom a state is required to provide a free appropriate public education under the Individuals with Disabilities Education Act.

(4) "School District" means a school district as defined in ORS 343.153.

Stat. Auth.: ORS 326 & ORS 323.055

Stats. Implemented: ORS 343.041

### **581-015-2395**

#### **Procedures for a Hearing under Section 504 of the Rehabilitation Act of 1973**

(1) The parent or guardian of a qualified student with a disability under section 504 may file a written request for a hearing with the State Superintendent of Public Instruction with respect to actions regarding the identification, evaluation, provision of a free appropriate education, or education placement of the student with the disability under Section 504, which the parent or guardian alleges to be in violation of Section 504 of the Rehabilitation Act of 1973, Public Law 93-112, or any amendment thereof. In such event, the Superintendent will conduct a hearing.

(2) The school district involved in the hearing is responsible for the costs of the hearing.

(3) The prehearing and hearing procedures in OAR 581-015-2340 through 581-015-2383 apply to hearings conducted under Section 504 of the Rehabilitation Act.

(4) The parties are entitled to the procedural rights under OAR 581-015-2360 with the exceptions of the stay-put provision and the right to obtain at no cost a written or electronic verbatim record of the hearing, both of which do not apply to a hearing under this rule.

(5) Nothing in this rule is meant to prevent the parties from also seeking due process remedies under the Individuals with Disabilities Education Act as set forth in OAR 581-015-2340 through 581-015-2385.

Stat. Auth.: ORS 326 & ORS 343.055

Stats. Implemented: ORS 343.041

## Selected Office of Administrative Hearings Rules

### 137-003-0501

#### Rules for Office of Administrative Hearings

(1) OAR 137-003-0501 to 137-003-0700 apply to the conduct of all contested case hearings conducted for an agency by an administrative law judge assigned from the Office of Administrative Hearings unless:

(a) The case is not subject to the procedural requirements for contested cases; or

(b) The Attorney General, by order, has exempted the agency or a category of the agency's cases from the application of these rules in whole or in part.

(2) Any procedural rules adopted by the agency related to the conduct of hearings shall not apply to contested case hearings conducted for the agency by an administrative law judge assigned from the Office of Administrative Hearings unless required by state or federal law or specifically authorized by these rules or by order of the Attorney General. An agency may have rules specifying the time for requesting a contested case hearing, the content of a hearing request, any requirement for and content of a response to the contested case notice, the permissible scope of the hearing and timelines for issuance of a proposed or final order. The agency's substantive rules, including those allocating the burden of proof, shall apply to all of its hearings.

(3) If permitted by law, the agency may delegate to an administrative law judge any of the agency's functions under these rules, including the authority to issue a final order. This delegation must be in writing and may be for a category of cases or on a case-by-case basis.

Stat. Auth.: ORS 183.341

Stats. Implemented: OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

*Note:* In the Interagency Agreement with the Office of Administrative Hearings, ODE delegates to the administrative law judge the authority to issue a final order.

### 137-003-0505

#### Contested Case Notice

(1) When the agency is required to issue a contested case notice pursuant to ORS 183.415, the notice shall include:

(a) A caption with the name of the agency and the name of the person or agency to whom the notice is issued;

(b) A short and plain statement of the matters asserted or charged and a reference to the particular sections of the statute and rules involved;

(c) A statement of the party's right to be represented by counsel;

(d) A statement of the party's right to a hearing;

(e) A statement of the authority and jurisdiction under which a hearing is to be held on the matters asserted or charged;

(f) Either (i) a statement of the specific time within which a person may request a hearing, the agency address to which a hearing request should be sent, and a statement that if a request for hearing is not received by the agency within the time stated in the notice the person will have waived the right to a contested case hearing, or (ii) a statement of the time and place of the hearing; and

(g) Any other information required by law.

(2) A contested case notice may include either or both of the following:

(a) A statement that the record of the proceeding to date, including information in the agency file or files on the subject of the contested case automatically become part of the contested case record upon default for the purpose of proving a prima facie case;

(b) A statement that a collaborative dispute resolution process is available as an alternative to a contested case hearing, if requested within the time period stated in the notice, and that choosing such a process will not affect the right to a contested case hearing if a hearing request is received by the agency within the time period stated in the notice and the matter is not resolved through the collaborative process.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, ORS 183.413, ORS 183.415 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00

*Note:* In the Interagency Agreement, ODE delegates the authority to issue this notice to the administrative law judge.



### 137-003-0510

#### Rights of Parties in Contested Cases

- (1) In addition to the information required to be given under ORS 183.413(2), before commencement of a contested case hearing, the agency shall inform a party, if the party is an agency, corporation, partnership, limited liability company, trust, government body or an unincorporated association, that such party must be represented by an attorney licensed in Oregon, unless statutes applicable to the contested case proceeding specifically provide otherwise.
- (2) The agency may request the administrative law judge to provide any or all of the information required to be given under ORS 183.413(2) or section (1) of this rule to each party in writing or orally before the commencement of the hearing.
- (3) Unless otherwise precluded by law, the party(ies) and the agency, if participating in the contested case hearing, may agree to use alternative methods of dispute resolution in contested case matters. Such alternative methods of resolution may include arbitration or any collaborative method designed to encourage the agency and the parties to work together to develop a mutually agreeable solution, such as negotiation, mediation, use of a facilitator or a neutral fact-finder or settlement conferences, but may not include arbitration that is binding on the agency.
- (4) Final disposition of contested cases may be by a final order following hearing or, unless precluded by law, by stipulation, agreed settlement, consent order or final order by default. A stipulation, agreed settlement or consent order disposing of a contested case must be in writing and signed by the party or parties. By signing such an agreement, the party or parties waive the right to a contested case hearing and to judicial review. The agency or administrative law judge shall incorporate the disposition into a final order.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.413, 183.415 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

*See:* OAR 581-015-2360 Pre-Hearing Conference, Notice of Hearing, Hearing Rights

### 137-003-0515

#### Agency Referral to Office of Administrative Hearings

- (1) When referring a contested case to the Office of Administrative Hearings, the agency shall provide written notice of the referral to the Office of Administrative Hearings that includes the name of the agency and the name and address of each party and its counsel. The notice may also include the agency case number, the name and address of the agency staff person or the assigned assistant attorney general, if any, upon whom pleadings and other papers should be served, and any other information requested by the Office of Administrative Hearings.
- (2) The agency referral notice must be accompanied by a copy of the agency's contested case notice in the case, a copy of any request for hearing and copies of motions or petitions filed with the agency and orders issued by the agency in the contested case.
- (3) The agency shall provide a copy of the referral notice to each party or their counsel, if any. The agency may include additional copies of documents already sent to or received from the parties or their counsel with the copy of the referral notice.
- (4) After a case has been referred by the agency to the Office of Administrative Hearings, the agency may withdraw the case from the Office of Administrative Hearings if the agency notifies the parties in writing that:
  - (a) The agency is withdrawing its contested case notice;
  - (b) All of the issues in the case have been resolved without the need to hold a hearing; or
  - (c) The agency has determined that it is not appropriate for the case to proceed to a hearing at that time and the reason therefor.**

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 9-2001, f. & cert. ef. 10-3-01; DOJ 7-2003, f. 7-11-03, cert. ef. 7-21-03; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04; DOJ 11-2005, f. 10-31-05, cert. ef. 1-1-06

**137-003-0520**

**Filing and Service of Pleadings and Other Documents in Contested Case**

- (1) Notwithstanding any other provision of these rules, a hearing request is considered filed when actually received by the agency.
- (2) Unless otherwise provided by these rules, any documents, correspondence, motions including motions for a discovery order, pleadings, rulings and orders filed for the record in the contested case shall be filed:
  - (a) With the agency before the case is referred by the agency to the Office of Administrative Hearings;
  - (b) With the Office of Administrative Hearings or assigned administrative law judge after the agency has referred the case to the Office of Administrative Hearings and before the assigned administrative law judge issues a proposed order;
  - (c) With the agency after the assigned administrative law judge issues a proposed order, or with the administrative law judge if the administrative law judge has authority to issue the final order.
- (3) The agency shall refer to the Office of Administrative Hearings or the assigned administrative law judge any motion or other matter filed with the agency that is not within the agency's jurisdiction.
- (4) The Chief Administrative Law Judge or assigned administrative law judge shall refer to the agency any motion or other matter filed with the Office of Administrative Hearings or assigned administrative law judge that is not within the jurisdiction of the Office of Administrative Hearings.
- (5) The person or agency filing any pleading, motion, correspondence or other document with the agency, the Office of Administrative Hearings or administrative law judge assigned to the case shall simultaneously provide copies of the documents to the agency and the parties, or their counsel if the agency or parties are represented.
  - (a) Copies shall be provided to the agency and the parties, or their counsel if the agency or parties are represented, by hand delivery, by facsimile, by mail or as otherwise permitted by the agency by rule or in writing, or as otherwise directed by the administrative law judge with the agreement of the agency and the parties.
  - (b) The agency may by rule or in writing waive the right to receive copies of documents filed under this rule if the administrative law judge is authorized to issue the final order or if the agency is not a participant in the contested case hearing.
- (6) Each party shall notify all other parties, the agency and the administrative law judge of any change in the party's address or withdrawal or change of the party's representatives, including legal counsel. If an attorney withdraws from representing a party, the attorney shall provide written notice of the withdrawal to the administrative law judge, all other parties and the agency, unless the agency has waived the right to receive notice.
- (7) The agency shall notify all parties and the administrative law judge of any change in the agency's address or withdrawal or change of the agency's representatives, including legal counsel.
- (8) Motions, pleadings and other documents sent through the U.S. Postal Service to the agency, Office of Administrative Hearings or assigned administrative law judge shall be considered filed on the date postmarked. Documents sent by facsimile or hand-delivered are considered filed when received by the agency, Office of Administrative Hearings or assigned administrative law judge. If the agency permits or the administrative law judge directs alternative means of filing, the agency or the administrative law judge should determine when filing is effective for each alternative method permitted or directed.
- (9) Documents sent through the U.S. Postal Service by regular mail are presumed to have been received by the addressee, subject to evidence to the contrary.
- (10) In computing any period of time prescribed or allowed by these rules, the day of the act or event from which the designated period of time begins to run shall not be included. The last day of the time period shall be included, unless it is a Saturday or a legal holiday, including Sunday, in which event the time period runs until the end of the next day that is not a Saturday or a legal holiday. Legal holidays are those identified in ORS 187.010 and 187.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 7-2003, f. 7-11-03, cert. ef. 7-21-03; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04; DOJ 11-2005, f. 10-31-05, cert. ef. 1-1-06

### **137-003-0525**

#### **Scheduling Hearings**

- (1) Subject to the approval of the agency, the Office of Administrative Hearings or assigned administrative law judge shall:
  - (a) Set the date and time of the hearing, including a postponed or continued hearing;
  - (b) Determine the location of the hearing; and
  - (c) Determine whether cases shall be consolidated or bifurcated.
- (2) Unless otherwise provided by law, the Office of Administrative Hearings or assigned administrative law judge may postpone a hearing:
  - (a) For good cause; or
  - (b) By agreement of the parties and the agency, if the agency is participating in the hearing.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 2-2000, f. & cert. ef. 3-27-00; DOJ 9-2001, f. & cert. ef. 10-3-01; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

*Note:* ODE delegates to the administrative law judge the scheduling of the date, time and location of the hearing, consistent with the Interagency Agreement . *See:* 581-015-2360 Pre-Hearing Conference, Notice of Hearing and Hearing Rights.

### **137-003-0530**

#### **Late Filing and Amendment of Documents**

- (1) Unless otherwise provided by law, when a party or agency fails to file any document for the contested case proceeding, except a hearing request, within the time specified by agency rules or these rules of procedure, the late filing may be accepted if the agency or administrative law judge determines that there was good cause for failure to file the document within the required time.
- (2) The decision whether a late filing will be accepted shall be made:
  - (a) By the agency if OAR 137-003-0520 requires the document to be filed with the agency, or
  - (b) By the administrative law judge if OAR 137-003-0520 requires the document to be filed with the Office of Administrative Hearings or the assigned administrative law judge.
- (3) The agency or administrative law judge may require a statement explaining the reasons for the late filing.
- (4) Notwithstanding any other provision of these rules, at any time after the issuance of the notice required by ORS 183.415, an agency may issue an amended notice. If an agency issues an amended notice, any party may obtain, upon request, a continuance determined to be reasonably necessary to enable the party to file an amended response, if required by agency rules, or to respond to any new material contained in the amended notice. If the agency files an amended notice after the evidentiary record has been closed, the agency shall inform the administrative law judge, who will reopen the record and conduct any further hearing or listen to additional argument required by new matters in the amended notice. If the administrative law judge has issued a proposed order, the administrative law judge shall prepare an amended proposed order after completion of any further hearing.
- (5) Unless otherwise provided by law, when a party or agency files any document for the contested case proceeding, the agency or the administrative law judge may permit the party or agency to file an amended document if the agency or administrative law judge determines that permitting the amendment will not unduly delay the proceeding or unfairly prejudice the parties or the agency.
- (6) The decision whether an amended document will be accepted shall be made:
  - (a) By the agency if OAR 137-003-0520(2) requires the document to be filed with the agency, or
  - (b) By the administrative law judge if OAR 137-003-0520(2) requires the document to be filed with the Office of Administrative Hearings or the assigned administrative law judge.
- (7) The agency or administrative law judge may require a statement explaining the reasons for the amendment.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 9-2001, f. & cert. ef. 10-3-01; DOJ 7-2003, f. 7-11-03, cert. ef. 7-21-03; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

*Note:* ODE delegates to the administrative law judge the authority to determine the timeliness of the hearing request and any other filings.

### 137-003-0535

#### Participation as Party or Limited Party

- (1) The agency may by rule or in writing identify persons or entities who shall be parties or limited parties.
- (2) Persons who have an interest in the outcome of the agency's contested case proceeding or who represent a public interest in such result may request to participate as parties or limited parties. Unless otherwise provided by law, a person requesting to participate as a party or limited party shall file a petition with the agency and shall include a sufficient number of copies of the petition for service on all parties.
- (3) The petition shall be filed at least 21 calendar days before the date set for the hearing, unless the agency by rule has set a different deadline or unless the agency and the parties agree to a different deadline. Petitions untimely filed shall not be considered unless the agency determines that good cause has been shown for failure to file within the required time.
- (4) The petition shall include the following:
  - (a) Names and addresses of the petitioner and of any organization the petitioner represents;
  - (b) Name and address of the petitioner's attorney, if any;
  - (c) A statement of whether the request is for participation as a party or a limited party, and, if as a limited party, the precise area or areas in which participation is sought;
  - (d) If the petitioner seeks to protect a personal interest in the outcome of the agency's proceeding, a detailed statement of the petitioner's interest, economic or otherwise, and how such interest may be affected by the results of the proceeding;
  - (e) If the petitioner seeks to represent a public interest in the results of the proceeding, a detailed statement of such public interest, the manner in which such public interest will be affected by the results of the proceeding, and the petitioner's qualifications to represent such public interest;
  - (f) A statement of the reasons why existing parties to the proceeding cannot adequately represent the interest identified in subsection (4)(d) or (e) of this rule.
- (5) The agency shall serve a copy of the petition on each party personally or by mail. Each party shall have seven calendar days from the date of personal service or agency mailing to file a response to the petition.
- (6) If the agency determines under OAR 137-003-0530 that good cause has been shown for failure to file a timely petition, the agency at its discretion may:
  - (a) Shorten the time within which responses to the petition shall be filed; or
  - (b) Postpone the hearing until disposition is made of the petition.
- (7) If a person is granted participation as a party or a limited party, the hearing may be postponed or continued to a later date if necessary to avoid an undue burden to one or more of the parties in the case.
- (8) In ruling on petitions to participate as a party or a limited party, the agency shall consider:
  - (a) Whether the petitioner has demonstrated a personal or public interest that could reasonably be affected by the outcome of the proceeding;
  - (b) Whether any such affected interest is within the scope of the agency's jurisdiction and within the scope of the notice of contested case hearing;
  - (c) When a public interest is alleged, the qualifications of the petitioner to represent that interest;
  - (d) The extent to which the petitioner's interest will be represented by existing parties.
- (9) The agency may treat a petition to participate as a party as if it were a petition to participate as a limited party.
- (10) If the agency grants a petition, the agency shall specify areas of participation and procedural limitations as it deems appropriate.
- (11) An agency ruling on a petition to participate as a party or as a limited party shall be by written order and served promptly on the petitioner, all parties and the Office of Administrative Hearings or assigned administrative law judge. If the petition is allowed, the agency shall also provide petitioner with the notice of rights required by ORS 183.413(2) or request the administrative law judge to do so.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.415(4), 183.450(3) & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 7-2003, f. 7-11-03, cert. ef. 7-21-03; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

*Note:* Although ODE may initially name the parties to the hearing, ODE delegates the authority for ultimate determination of parties to the administrative law judge.

### 137-003-0540

#### Agency Participation as Interested Agency or Party

- (1) At any time after an agency refers a contested case to the Office of Administrative Hearings, the agency may also notify the parties that it intends to name any other agency that has an interest in the outcome of that proceeding as a party or as an interested agency, either on its own initiative or upon request by that other agency.
- (2) Each party shall have seven calendar days from the date of service of the notice to file objections. The agency may establish a shorter or longer period of time for filing objections.
- (3) The agency decision to name an agency as a party or as an interested agency shall be by written order and served promptly on the parties, the named agency and the Office of Administrative Hearings or assigned administrative law judge.
- (4) An agency named as a party or as an interested agency has the same procedural rights and shall be given the same notices as any party in the proceeding. An interested agency, unlike a party, has no right to judicial review.
- (5) An agency may not be named as a party under this rule without written authorization of the Attorney General.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 180.060, 180.220, 183.341, 183.415(4) & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

### 137-003-0545

#### Representation of Agency by Attorney General or Agency Representative

- (1) An agency may be represented at a contested case hearing by the Attorney General.
- (2) An agency may be represented at a contested case hearing by an officer or employee of the agency if the Attorney General has consented to that representation in a particular hearing or class of hearings and the agency, by rule, has authorized an agency representative to appear on its behalf in the particular type of contested case hearing involved.
- (3) The administrative law judge shall not allow an agency representative appearing under section (2) of this rule to present legal argument as defined in this rule.
  - (a) "Legal Argument" includes arguments on:
    - (A) The jurisdiction of the agency to hear the contested case;
    - (B) The constitutionality of a statute or rule or the application of a constitutional requirement to an agency;
    - (C) The application of court precedent to the facts of the particular contested case proceeding.
  - (b) "Legal Argument" does not include presentation of motions, evidence, examination and cross-examination of witnesses or presentation of factual arguments or arguments on:
    - (A) The application of the statutes or rules to the facts in the contested case;
    - (B) Comparison of prior actions of the agency in handling similar situations;
    - (C) The literal meaning of the statutes or rules directly applicable to the issues in the contested case;
    - (D) The admissibility of evidence; and
    - (E) The correctness of procedures being followed in the contested case hearing.
- (4) If the administrative law judge determines that statements or objections made by an agency representative appearing under section (2) involve legal argument as defined in this rule, the administrative law judge shall provide reasonable opportunity for the agency representative to consult the Attorney General and permit the Attorney General to present argument at the hearing or to file written legal argument within a reasonable time after conclusion of the hearing.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.413, 183.415 & OL 1999, Ch. 448, 599 & 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

### 137-003-0550

#### Representation of Parties; Out-of-state Attorneys

- (1) Natural persons who are parties in a contested case may represent themselves or may be represented by an attorney or other representative as authorized by federal or state law, including ORS 183.458.
- (2) Corporations, partnerships, limited liability companies, unincorporated associations, trusts and government bodies must be represented by an attorney except as provided in OAR 137-003-0555 or as otherwise authorized by law.
- (3) Unless otherwise provided by law, an out-of-state attorney may not represent a party to a contested case unless the out-of-state attorney is granted permission to appear in the matter pursuant to Oregon Uniform Trial Court Rule 3.170. Local counsel who obtained the order on behalf of the out-of-state attorney must participate meaningfully in the contested case in which the out-of-state attorney appears.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 9.320, 183.341 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 9-2001, f. & cert. ef. 10-3-01; DOJ 11-2005, f. 10-31-05, cert. ef. 1-1-06

### **137-003-0565**

#### **Use of Collaborative Dispute Resolution in Contested Case Hearing**

- (1) When an agency issues a contested case notice, the party(ies) and the agency, if participating in the contested case hearing, may agree to participate in a collaborative dispute resolution (DR) process to resolve any issues relevant to the notice. Neither a party's request, nor any agreement by the agency, to participate in such a process tolls the period for filing a timely request for a contested case hearing.
- (2) The agency, if participating in the contested case hearing, or the administrative law judge, if the agency is not participating in the contested case hearing, may establish a deadline for the conclusion of the collaborative DR process,
- (3) The participants in the collaborative DR process may sign an agreement containing any of the provisions listed in OAR 137-005-0030 or such other terms as may be useful to further the collaborative DR process.
- (4) If the party(ies), and the agency if participating in the contested case hearing, have agreed to participate in a collaborative DR process and a party makes a timely request for a contested case hearing, the hearing shall be suspended until the collaborative DR process is completed, the agency or the party opts out of the collaborative DR process, or the deadline, if any, for the conclusion of the collaborative process is reached.
- (5) Collaborative dispute resolution may occur at any time before issuance of a final order. Any informal disposition of the contested case shall be consistent with ORS 183.415(5) and OAR 137-003-0510(4).

Stat. Auth.: ORS 183.341 & 183.502

Stats. Implemented: ORS 183.341, 183.415(5) & 183.502

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

*Note:* ODE and the Office of Administrative Hearings cannot automatically delay a parent's right to a due process hearing. Extensions may only be made at the request of a party as provided in the Interagency Agreement.

### **137-003-0570**

#### **Discovery in Contested Case Hearing**

- (1) Discovery by the agency or any party may be permitted in appropriate contested cases. Any party or the agency may file a motion pursuant to the requirements in this rule for an order requiring discovery. Before requesting a discovery order, a party or the agency must seek the discovery through an informal exchange of information.
- (2) A motion for an order requiring discovery should be filed with and decided by the agency or the administrative law judge, as required by OAR 137-003-0520(2).
- (3) Any party seeking an order from the administrative law judge requiring discovery shall send a copy of the motion to the agency, unless the agency has waived notice, and to all other parties. If the agency seeks an order requiring discovery, the agency shall send a copy of the motion to all parties. A request for an order requiring discovery must include a description of the attempts to obtain the requested discovery informally.
- (4) After receiving a written request for an order requiring discovery, the agency or the administrative law judge shall issue a written order to require or deny discovery, or the agency may issue an order to require discovery on the agency's own motion.
- (5) Discovery may include but is not limited to one or more of the following methods:
  - (a) Disclosure of names and addresses of witnesses expected to testify at the hearing;
  - (b) Production of documents, which may but need not be limited to documents that the party producing the documents plans to offer as evidence;
  - (c) Production of objects for inspection;
  - (d) Permission to enter upon land to inspect land or other property;
  - (e) Up to 20 requests for admission, including subparts, unless otherwise authorized by the administrative law judge or the agency;
  - (f) Up to 20 written interrogatories, including subparts, unless otherwise authorized by the administrative law judge or the agency;
  - (g) Prehearing conferences, as provided in OAR 137-003-0575.
- (6) Any discovery request must be reasonably likely to produce information that is generally relevant and necessary to the case, or is likely to facilitate resolution of the case. If the relevance or necessity of the requested discovery is not apparent, the agency or the administrative law judge may require the party or agency requesting discovery to explain how the request is likely to produce information that is relevant and necessary, or likely to facilitate resolution of the case.
- (7) The agency or the administrative law judge may authorize the requested discovery if the agency or the administrative law judge determines that the requested discovery is reasonably likely to produce information that is generally relevant to the case and necessary, or likely to facilitate resolution of the case. Upon request of a party, a witness, or the agency, the agency or the administrative law judge may deny, limit, or condition discovery to protect any party, any witness, or the agency from annoyance, embarrassment, oppression, undue burden or expense, or to limit the public disclosure of information that is confidential or privileged by statute or rule. In making a decision, the agency or administrative law judge shall consider any objections by the party, the witness or the agency from whom the discovery is sought.

(8) If the agency or the administrative law judge authorizes discovery, the agency or the administrative law judge shall control the methods, timing and extent of discovery. The agency or the administrative law judge may limit discovery to a list of witnesses and the documents upon which the agency and parties will rely. The agency may adopt rules governing discovery in the agency's contested cases as long as those rules are not in conflict with the requirements of this rule. Upon request of a party or the agency, the administrative law judge or the agency may issue a protective order limiting the public disclosure of information that is confidential or privileged by law.

(9) Only the agency may issue subpoenas in support of a discovery order. The agency or the party requesting the discovery may apply to the circuit court to compel obedience to a subpoena. (Subpoenas for attendance of witnesses or production of documents at the hearing are controlled by OAR 137-003-0585.)

(10) Unless otherwise prohibited by law, the agency may delegate to an administrative law judge its authority to issue subpoenas in support of a discovery order and control discovery. The delegation must be by rule or in writing, and it may be limited.

(11) The administrative law judge may refuse to admit evidence that was not disclosed in response to a discovery order or discovery request, unless the party or agency that failed to provide discovery offers a satisfactory reason for having failed to do so, or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10). If the administrative law judge admits evidence that was not disclosed as ordered or requested, the administrative law judge may grant a continuance to allow an opportunity for the agency or other party to respond.

(12) Failure to respond to a request for admissions required by a discovery order shall be deemed an admission of matters that are the subject of the request for admissions, unless the party or agency failing to respond offers a satisfactory reason for having failed to do so, or unless excluding additional evidence on the subject of the request for admissions would violate the duty to conduct a full and fair inquiry under ORS 183.415(10). If the administrative law judge does not treat failure to respond to the request for admissions as admissions, the administrative law judge may grant a continuance to enable the parties and the agency to develop the record as needed.

(13) Nothing in this rule shall be construed to require the agency or any party to provide information that is confidential or privileged under state or federal law, except that upon request the agency or any party must disclose all documents that the agency or party intends to introduce at the hearing.

(14) A party or agency dissatisfied with an administrative law judge's discovery order may ask the Chief Administrative Law Judge for immediate review of the order. A request for review by the Chief Administrative Law Judge must be made in writing within 10 days of the date of the discovery order. The Chief Administrative Law Judge shall review the order and independently apply the criteria set out above in subsection seven of this rule. The Chief Administrative Law Judge's order shall be in writing and shall explain any significant changes to the discovery order.

(15) If a party is dissatisfied with the Chief Administrative Law Judge's discovery order, the party may request that the agency review the order. A request for review must be made in writing within 10 days of the filing of the Chief Administrative Law Judge's discovery order. The agency shall review the order and independently apply the criteria set out above in subsection seven of this rule. The agency order shall be in writing and shall explain any significant changes to the Chief Administrative Law Judge's discovery order.

(16) If the agency is dissatisfied with the Chief Administrative Law Judge's discovery order, the agency may review the order on its own motion. Any decision to review the order must be stated in writing within 10 days of the filing of the Chief Administrative Law Judge's discovery order. The agency shall review the order and independently apply the criteria set out above in subsection seven of this rule. The agency order shall be in writing and shall explain any significant changes to the Chief Administrative Law Judge's discovery order.

(17) The Chief Administrative Law Judge or the agency may designate in writing a person to exercise their respective responsibilities under this rule.

(18) In addition to or in lieu of any other discovery method, a party may ask an agency for records under the Public Records Law. The party making a public records request of the agency before which the contested case is pending should serve a copy of the public records request upon the agency representative or the attorney representing the agency.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.425 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 7-2003, f. 7-11-03, cert. ef. 7-21-03; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04; DOJ 11-2005, f. 10-31-05, cert. ef. 1-1-06

*Note:* ODE delegates all discovery decisions to the administrative law judge consistent with OAR 581-015-2360 Pre-Hearing Conference, Notice of Hearing and Hearing Rights., and with the five-day disclosure rule in the Interagency Agreement.

### **137-003-0572**

#### **Depositions in Contested Cases**

- (1) Depositions may not be taken in contested cases without agency authorization.
- (2) A party or an attorney representing the agency may petition the agency for an order to take a deposition of a witness. A copy of the petition shall be sent to all other parties and the administrative law judge. The petition shall include the name and address of the witness, explain why the witness's testimony is material to the proceedings and explain why no other means of obtaining the witness's testimony for the hearing is adequate. As used in this rule, materiality means the testimony sought tends to make the existence of any fact that is of consequence to the determination of the issues more or less probable.
- (3) The agency shall consider the petition and issue a written order either granting or denying the deposition. If the agency grants the deposition, the deposition shall be taken on such terms as the agency may order including, but not limited to, location, manner of recording, time of day, persons permitted to be present and duration.
- (4) Examination and cross-examination of deponents may proceed as permitted at hearing.
- (5) The testimony of the deponent shall be recorded.
- (6) All objections made at the time of the examination shall be noted on the record.
- (7) At any time during the taking of a deposition, upon motion and a showing by a party, the agency or a deponent that the deposition is being conducted or hindered in bad faith or in a manner not consistent with these rules or in such manner as unreasonably to annoy, embarrass or oppress the deponent, the agency or any party, the agency may order the examination to cease or may limit the scope or manner of the taking of the deposition. The taking of the deposition shall be suspended for the time necessary to make a motion under this subsection.
- (8) Documents and things produced for inspection during the examination of the witness shall, upon the request of a party or the agency, be marked for identification and annexed to and returned with the deposition, and may be inspected and copied by any party or the agency.
- (9) Deposition of a non-party may be compelled by a subpoena issued by the agency. The agency or the party requesting the deposition may apply to circuit court to compel obedience to a subpoena issued to compel a deposition.
- (10) Unless otherwise prohibited by law, the agency may delegate to the administrative law judge its authority to authorize or limit depositions. Unless expressly required by law or expressly stated in the delegation by the agency, an administrative law judge may not require the agency to pay for any deposition taken by a party.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.425 & OL 1999, Ch. 849

Hist.: DOJ 7-2003, f. 7-11-03, cert. ef. 7-21-03; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

*Note:* ODE delegates all deposition decisions to the administrative law judge, consistent with OAR 581-015-2360 Pre-Hearing Conference, Notice of Hearing and Hearing Rights..

### **137-003-0575**

#### **Prehearing Conferences**

- (1) Prior to hearing, the administrative law judge may conduct one or more prehearing conferences to facilitate the conduct and resolution of the case. The administrative law judge may convene the conference on the initiative of the administrative law judge or at the agency's or a party's request.
- (2) Prior to the conference, the administrative law judge shall notify the party(ies) and the agency, if participating, of the purposes of the conference and the matters to be considered. The agency may add additional matters to be considered at the conference by providing notice in writing to the administrative law judge and the parties.
- (3) The party(ies) and the agency, if participating in the contested case hearing, shall appear at a prehearing conference through legal counsel or through persons authorized to represent the party or the agency in the contested case hearing.
- (4) The purposes of a prehearing conference may include, but are not limited to the following:
  - (a) To facilitate discovery and to resolve disagreements about discovery;
  - (b) To identify, simplify and clarify issues;
  - (c) To eliminate irrelevant or immaterial issues;
  - (d) To obtain stipulations of fact and to admit documents into evidence;
  - (e) To provide to the administrative law judge, agency and parties, in advance of the hearing, copies of all documents intended to be offered as evidence at the hearing and the names of all witnesses expected to testify;
  - (f) To authenticate documents;
  - (g) To decide the order of proof and other procedural matters pertaining to the conduct of the hearing;
  - (h) To assist in identifying whether the case might be appropriate for settlement or for a collaborative dispute resolution process and, if the agency agrees that the case is appropriate, to refer the case to the agency for settlement discussions or for exploration or initiation of a collaborative dispute resolution process;
  - (i) To schedule the date, time and location of the hearing or for any other matters connected with the hearing, including dates for pre-filed testimony and exhibits; and



- (j) To consider any other matters that may expedite the orderly conduct of the proceeding.
- (5) The prehearing conference may be conducted in person or by telephone.
- (6) The failure of a party or the agency to appear at a prehearing conference convened by the administrative law judge shall not preclude the administrative law judge from making rulings on any matters identified by the administrative law judge in the notice issued under section (2) of this rule, and discussion of any of these matters at the conference in the absence of the agency or a party notified of the conference does not constitute an ex parte communication with the administrative law judge.
- (7) The administrative law judge conducting the prehearing conference must make a record of any stipulations, rulings and agreements. The administrative law judge shall either make an audio or stenographic record of the pertinent portions of the conference or shall place the substance of stipulations, rulings and agreements in the record by written summary. Stipulations to facts and to the authenticity of documents and agreements to narrow issues shall be binding upon the agency and the parties to the stipulation unless good cause is shown for rescinding a stipulation or agreement.
- (8) After the hearing begins, the administrative law judge may at any time recess the hearing to discuss any of the matters listed in section (4) of this rule.
- (9) Nothing in this rule precludes the agency and parties from engaging in informal discussions of any of the matters listed in section (4) of this rule without the participation of the administrative law judge. Any agreement reached in an informal discussion shall be submitted to the administrative law judge in writing or presented orally on the record at the hearing.
- (10) An agency may adopt rules regarding the exchange of exhibits and a list of witnesses before the hearing. In the absence of an agency rule to the contrary, an administrative law judge may establish deadlines for the exchange of exhibits and a list of witnesses before the hearing.

Stat. Auth.: ORS 183.341 & 183.502

Stats. Implemented: ORS 183.341, 183.430, 183.502 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 7-2003, f. 7-11-03, cert. ef. 7-21-03; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

*Note:* The Interagency Agreement requires a pre-hearing conference consistent with OAR 581-015-2360 Pre-Hearing Conference, Notice of Hearing and Hearing Rights.

### **137-003-0580**

#### **Motion for Summary Determination**

- (1) Not less than 28 calendar days before the date set for hearing, the agency or a party may file a motion requesting a ruling in favor of the agency or party on any or all legal issues (including claims and defenses) in the contested case. The motion, accompanied by any affidavits or other supporting documents, shall be served on the agency and parties in the manner required by OAR 137-003-0520.
- (2) Within 14 calendar days after service of the motion, the agency or a party may file a response to the motion. The response may be accompanied by affidavits or other supporting documents and shall be served on the agency and parties in the manner required by OAR 137-003-0520.
- (3) The administrative law judge may establish longer or shorter periods than those under section (1) and (2) of this rule for the filing of motions and responses.
- (4) The agency by rule may elect not to make available this process for summary determination.
- (5) The party and the agency may stipulate to a record upon which the requested summary determination shall be made.
- (6) The administrative law judge shall grant the motion for a summary determination if:
- (a) The pleadings, affidavits, supporting documents (including any interrogatories and admissions) and the record in the contested case show that there is no genuine issue as to any material fact that is relevant to resolution of the legal issue as to which a decision is sought; and
- (b) The agency or party filing the motion is entitled to a favorable ruling as a matter of law.
- (7) The administrative law judge shall consider all evidence in a manner most favorable to the non-moving party or non-moving agency.
- (8) Each party or the agency has the burden of producing evidence on any issue relevant to the motion as to which that party or the agency would have the burden of persuasion at the contested case hearing.
- (9) A party or the agency may satisfy the burden of producing evidence through affidavits. Affidavits shall be made on personal knowledge, establish that the affiant is competent to testify to the matters stated therein and contain facts that would be admissible at the hearing.
- (10) When a motion for summary determination is made and supported as provided in this rule, a non-moving party or non-moving agency may not rest upon the mere allegations or denials contained in that party's or agency's pleading. When a motion for summary determination is made and supported as provided in this rule, the administrative law judge or the agency must explain the requirements for filing a response to any unrepresented party or parties.
- (11) The administrative law judge's ruling may be rendered on a single issue and need not resolve all issues in the contested case.
- (12) If the administrative law judge's ruling on the motion resolves all issues in the contested case, the administrative law judge shall issue a proposed order in accordance with OAR 137-003-0645 incorporating that ruling or a final order in

accordance with OAR 137-003-0665 if the administrative law judge has authority to issue a final order without first issuing a proposed order.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 44.415, 183.341, 183.440, 183.445 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 9-2001, f. & cert. ef. 10-3-01; DOJ 7-2003, f. 7-11-03, cert. ef. 7-21-03; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04; DOJ 11-2005, f. 10-31-05, cert. ef. 1-1-06

*Note:* ODE delegates all discovery decisions to the administrative law judge, including the decision whether to rule on legal issues in advance of a hearing.

### **137-003-0585**

#### **Subpoenas**

- (1) Subpoenas for the attendance of witnesses or the production of documents at the hearing may be issued as follows:
  - (a) By an agency on its own motion or by an Assistant Attorney General on behalf of the agency;
  - (b) By the agency or administrative law judge upon the request of a party to a contested case upon a showing of general relevance and reasonable scope of the evidence sought; and
  - (c) By an attorney representing a party on behalf of that party.
- (2) A motion to quash a subpoena must be presented in writing to the administrative law judge, with service on the agency and any other party in the manner required by OAR 137-003-0520.
  - (a) The agency and any party may respond to the motion to quash within seven calendar days of receiving the motion. Any response must be in writing and served on the agency and any other party in the manner required by OAR 137-003-0520.
  - (b) The administrative law judge shall rule on the motion to quash within 14 calendar days of receiving the motion.
- (3) If a person fails to comply with a properly issued subpoena, the agency, administrative law judge or party may apply to any circuit court judge to compel obedience with the requirements of the subpoena.
- (4) The administrative law judge may establish longer or shorter periods than those under section (2) of this rule for the filing of motions and responses.
- (5) The agency shall be responsible for paying any mileage or fees required by ORS 44.415 for witnesses subpoenaed to a hearing under subsection (1)(a) of this rule. The party shall be responsible for paying any mileage or fees required by ORS 44.415 for witnesses subpoenaed to a hearing under subsections (1)(b) or (c) of this rule.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 44.415, 183.341, 183.440, 183.445 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

### **137-003-0590**

#### **Qualified Interpreters**

- (1) For purposes of this rule:
  - (a) An "assistive communication device" means any equipment designed to facilitate communication by an individual with a disability;
  - (b) An "individual with a disability" means a person who cannot readily understand the proceedings because of deafness or a physical hearing impairment, or cannot communicate in the proceedings because of a physical speaking impairment;
  - (c) A "non-English speaking" person means a person who, by reason of place of birth or culture, speaks a language other than English and does not speak English with adequate ability to communicate effectively in the proceedings;
  - (d) A "qualified interpreter" means:
    - (A) For an individual with a disability, a person readily able to communicate with the individual with a disability, interpret the proceedings and accurately repeat and interpret the statements of the individual with a disability;
    - (B) For a non-English speaking person, a person readily able to communicate with the non-English speaking person and who can orally transfer the meaning of statements to and from English and the language spoken by the non-English speaking person. A qualified interpreter must be able to interpret in a manner that conserves the meaning, tone, level, style and register of the original statement, without additions or omissions. "Qualified interpreter" does not include a person who is unable to interpret the dialect, slang or specialized vocabulary used by the party or witness.
- (2) If an individual with a disability is a party or witness in a contested case hearing:
  - (a) The administrative law judge shall appoint a qualified interpreter and make available appropriate assistive communication devices whenever it is necessary to interpret the proceedings to, or to interpret the testimony of, the individual with a disability.

- (b) No fee shall be charged to the individual with a disability for the appointment of an interpreter or use of an assistive communication device. No fee shall be charged to any person for the appointment of an interpreter or the use of an assistive communication device if appointment or use is made to determine whether the person is disabled for purposes of this rule.
- (3) If a non-English speaking person is a party or witness in a contested case hearing:
- (a) The administrative law judge shall appoint a qualified interpreter whenever it is necessary to interpret the proceedings to a non-English speaking party, to interpret the testimony of a non-English speaking party or witness, or to assist the administrative law judge in performing the duties of the administrative law judge.
  - (b) No fee shall be charged to any person for the appointment of an interpreter to interpret the testimony of a non-English speaking party or witness, or to assist the administrative law judge in performing the duties of the administrative law judge. No fee shall be charged to a non-English-speaking party who is unable to pay for the appointment of an interpreter to interpret the proceedings to the non-English speaking party. No fee shall be charged to any person for the appointment of an interpreter if an appointment is made to determine whether the person is unable to pay or non-English speaking for the purposes of this rule.
  - (c) A non-English speaking party shall be considered unable to pay for an interpreter for purposes of this rule if:
    - (A) The party makes a verified statement and provides other information in writing under oath showing financial inability to pay for a qualified interpreter and provides any other information required by the agency concerning the inability to pay for such an interpreter; and
    - (B) It appears to the agency that the party is in fact unable to pay for a qualified interpreter.
  - (d) The agency may delegate to the administrative law judge the authority to determine whether the party is unable to pay for a qualified interpreter.
- (4) When an interpreter for an individual with a disability or a non-English speaking person is appointed or an assistive communication device is made available under this rule:
- (a) The administrative law judge shall appoint a qualified interpreter who is certified under ORS 45.291 if one is available unless, upon request of a party or witness, the administrative law judge deems it appropriate to appoint a qualified interpreter who is not so certified.
  - (b) The administrative law judge may not appoint any person as an interpreter if the person has a conflict of interest with any of the parties or witnesses, is unable to understand or cannot be understood by the administrative law judge, party or witness, or is unable to work cooperatively with the administrative law judge, the person in need of an interpreter or the representative for that person. If a party or witness is dissatisfied with the interpreter selected by the administrative law judge, a substitute interpreter may be used as provided in ORS 45.275(5).
  - (c) If a party or witness is dissatisfied with the interpreter selected by the administrative law judge, the party or witness may use any certified interpreter except that good cause must be shown for a substitution if the substitution will delay the proceeding.
  - (d) Fair compensation for the services of an interpreter or the cost of an assistive communication device shall be paid by the agency except, when a substitute interpreter is used for reasons other than cause, the party requesting the substitute shall bear any additional costs beyond the amount required to pay the original interpreter.
- (5) The administrative law judge shall require any interpreter for a person with a disability or a non-English speaking person to state the interpreter's name on the record and whether he or she is certified under ORS 45.291. If the interpreter is not certified under ORS 45.291, the interpreter must state or submit his or her qualifications on the record and must swear or affirm to make a true and impartial interpretation of the proceedings in an understandable manner using the interpreter's best skills and judgment in accordance with the standards and ethics of the interpreter profession.
- (6) A person requesting an interpreter for a person with a disability or a non-English speaking person, or assistive communication device for an individual with a disability, must notify the administrative law judge as soon as possible, but no later than 14 calendar days before the proceeding, including the hearing or pre-hearing conference, for which the interpreter or device is requested.
- (a) For good cause, the administrative law judge may waive the 14-day advance notice.
  - (b) The notice to the administrative law judge must include:
    - (A) The name of the person needing a qualified interpreter or assistive communication device;
    - (B) The person's status as a party or a witness in the proceeding; and
    - (C) If the request is in behalf of;
      - (i) An individual with a disability, the nature and extent of the individual's physical hearing or speaking impairment, and the type of aural interpreter, or assistive communication device needed or preferred; or
      - (ii) A non-English speaking person, the language spoken by the non-English speaking person.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.418, 183.421 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 9-2001, f. & cert. ef. 10-3-01; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

*Note:* Under the Interagency Agreement, the Office of Administrative Hearings will arrange for qualified interpreters when necessary.

### **137-003-0595**

#### **Public Attendance; Exclusion of Witnesses; Removal of Disruptive Individuals**

- (1) Unless otherwise required by law, contested case hearings are open to the public unless the agency by rule or in writing determines that the hearing will be closed to non-participants in the hearing.
- (2) The administrative law judge may exclude witnesses from the hearing, except for a party, a party's authorized representative, expert witnesses, the agency representative, one agency officer or employee and any persons authorized by statute to attend.
- (3) An administrative law judge may expel any person from the contested case hearing if that person engages in conduct that disrupts the hearing.
- (4) Any party, party's representative, agency or agency's representative, having knowledge or reasonable belief that any person participating in the hearing may present a danger or may be a threat to anyone involved in the hearing, should immediately notify the assigned administrative law judge, the agency and the parties or their representatives of the potential danger.
- (5) An administrative law judge may take any other measures reasonably required to ensure the safety and security of the participants in the hearing.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 2-2000, f. & cert. ef. 3-27-00; DOJ 7-2003, f. 7-11-03, cert. ef. 7-21-03; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

*Note:* Under state and federal law, the parent has the right to elect whether the hearing is open to the public or closed to the public. Otherwise, the administrative law judge has the authority to decide whether to exclude witnesses or expel disruptive individuals.

*See:* OAR 581-015-2360 Pre-Hearing Conference, Notice of Hearing and Hearing Rights.

### **137-003-0600**

#### **Conducting the Contested Case Hearing**

- (1) The contested case hearing shall be conducted by and under the control of the administrative law judge assigned from the Office of Administrative Hearings.
- (2) If the administrative law judge has an actual or potential conflict of interest as defined in ORS 244.020(1) or (7), that administrative law judge shall comply with the requirements of ORS Chapter 244 (e.g., ORS 244.120 and 244.130).
- (3) At the commencement of the hearing, the administrative law judge shall explain the issues involved in the hearing and the matters that the parties must either prove or disprove.
- (4) The hearing shall be conducted so as to include the following:
  - (a) The statement and evidence of the proponent in support of its action;
  - (b) The statement and evidence of opponents, interested agencies, and other parties; except that limited parties may address only subjects within the area to which they have been limited;
  - (c) Any rebuttal evidence; and
  - (d) Any closing arguments.
- (5) The administrative law judge, the agency through an agency representative or assistant attorney general, interested agencies through an assistant attorney general, and parties or their attorneys or authorized representatives shall have the right to question witnesses. However, limited parties may question only those witnesses whose testimony may relate to the area or areas of participation granted by the agency.
- (6) The hearing may be continued with recesses as determined by the administrative law judge.
- (7) The administrative law judge may set reasonable time limits for oral presentation and may exclude or limit cumulative, repetitious, irrelevant or immaterial matter.
- (8) Exhibits shall be marked and maintained by the administrative law judge as part of the record of the proceedings.
- (9) If the administrative law judge receives any written or oral ex parte communication during the contested case proceeding, the administrative law judge shall notify all parties and otherwise comply with the requirements of OAR 137-003-0625.
- (10) The administrative law judge may request that any closing arguments be submitted in writing or orally.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.415(9) & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 7-2003, f. 7-11-03, cert. ef. 7-21-03; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04; DOJ 11-2005, f. 10-31-05, cert. ef. 1-1-06

*See also:* OAR 581-015-2370 Conduct of Hearing

### **137-003-0605**

#### **Telephone Hearings**

- (1) Unless precluded by law, the administrative law judge may hold a hearing or portion of a hearing by telephone and may permit a party or witness to appear at a hearing by telephone.
- (2) If a hearing is to be held by telephone, each party and the agency, if participating in the contested case hearing, shall provide, before the commencement of the hearing, to all other parties, to the agency and to the administrative law judge copies of the exhibits it intends to offer into evidence at the hearing.
- (3) If a witness is to testify by telephone, the party or agency that intends to call the witness shall provide, before commencement of the hearing, to the witness, to the other parties, to the agency, if participating in the contested case hearing, and to the administrative law judge a copy of each document about which the witness will be questioned.
- (4) Nothing in this rule precludes any party or the agency from seeking to introduce documentary evidence in addition to evidence described in section (2) during the telephone hearing. The administrative law judge shall receive such evidence, subject to the applicable rules of evidence, if inclusion of the evidence in the record is necessary to conduct a full and fair hearing. If any evidence introduced during the hearing has not previously been provided to the agency and to the other parties, the hearing may be continued upon the request of any party or the agency for sufficient time to allow the party or the agency to obtain and review the evidence.
- (5) The administrative law judge shall make an audio or stenographic record of any telephone hearing.
- (6) As used in this rule, "telephone" means any two-way or multi-party electronic communication device, including video conferencing.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 9-2001, f. & cert. ef. 10-3-01; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

### **137-003-0610**

#### **Evidentiary Rules**

- (1) Evidence of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs shall be admissible.
- (2) Irrelevant, immaterial, or unduly repetitious evidence shall be excluded, and privileges afforded by Oregon law shall be recognized by the administrative law judge.
- (3) All offered evidence, not objected to, will be received by the administrative law judge subject to the administrative law judge's power to exclude irrelevant, immaterial, or unduly repetitious matter.
- (4) Evidence objected to may be received by the administrative law judge. If the administrative law judge does not rule on its admissibility at the hearing, the administrative law judge shall do so either on the record before a proposed order is issued or in the proposed order. If the administrative law judge has authority to issue a final order without first issuing a proposed order, the administrative law judge may rule on the admissibility of the evidence in the final order.
- (5) The administrative law judge shall accept an offer of proof made for excluded evidence. The offer of proof shall contain sufficient detail to allow the reviewing agency or court to determine whether the evidence was properly excluded. The administrative law judge shall have discretion to decide whether the offer of proof is to be oral or written and at what stage in the proceeding it will be made. The administrative law judge may place reasonable limits on the offer of proof, including the time to be devoted to an oral offer or the number of pages in a written offer.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.450 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

### 137-003-0615

#### Judicial Notice and Official Notice of Facts

(1) The administrative law judge may take notice of judicially cognizable facts on the record before issuance of the proposed order or in the proposed order or, if the administrative law judge has authority to issue a final order without first issuing a proposed order, before the final order is issued. The agency or party(ies) may present rebuttal evidence.

(2) The administrative law judge may take official notice of general, technical or scientific facts within the specialized knowledge of the administrative law judge.

(a) If the administrative law judge takes official notice of general, technical or scientific facts, the administrative law judge shall provide such notice to the parties and the agency, if the agency is participating in the contested case hearing, before the issuance of the proposed order or, if the administrative law judge has authority to issue a final order without first issuing a proposed order, before the final order is issued.

(b) The agency or a party may object or may present rebuttal evidence in response to the administrative law judge's official notice of general, technical or scientific facts.

(c) If an objection is made or if rebuttal evidence is presented, the administrative law judge shall rule before the issuance of the proposed order or in the proposed order or, if the administrative law judge has authority to issue a final order, in the final order on whether the noticed facts will be considered as evidence in the proceeding.

(3) Before the issuance of the proposed order or a final order issued by an administrative law judge, the agency may take notice of judicially cognizable facts and may take official notice of general, technical or scientific facts within the specialized knowledge of the agency as follows:

(a) The agency shall provide notice of judicially cognizable facts or official notice of general, technical or scientific facts in writing to the administrative law judge and parties to the hearing.

(b) A party may present rebuttal evidence in response to agency notice of judicially cognizable facts or official notice of general, technical or scientific facts.

(c) If a party presents rebuttal evidence, the administrative law judge shall rule on whether the noticed facts will be considered as evidence in the proceeding.

(4) After the issuance of a proposed order, the agency may take notice of judicially cognizable facts and may take official notice of general, technical or scientific facts within the specialized knowledge of the agency as follows:

(a) The agency shall provide notice of judicially cognizable facts or official notice of general, technical or scientific facts in writing to the parties to the hearing and, if authorized to issue a final order, to the administrative law judge.

(b) A party may object in writing to agency notice of judicially cognizable facts or official notice of general, technical or scientific facts with service on any other parties, the agency and, if authorized to issue a final order, on the administrative law judge in the manner required by OAR 137-003-0520. A party may request that the agency or, if authorized to issue a final order, the administrative law judge provide an opportunity for the party to present written or non-written rebuttal evidence.

(c) The agency may request the administrative law judge to conduct further hearing proceedings under OAR 137-003-0655 as necessary to permit a party to present rebuttal evidence.

(d) If a party presents rebuttal evidence, the agency or, if authorized to issue a final order, the administrative law judge shall rule in the final order on whether the noticed facts were considered as evidence.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.450(4) & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04; DOJ 11-2005, f. 10-31-05, cert. ef. 1-1-06

### 137-003-0625

#### Ex Parte Communications with Administrative Law Judge

(1) For purposes of this rule, an ex parte communication is:

(a) An oral or written communication,

(b) By a party, a party's representative or legal adviser, any other person who has a direct or indirect interest in the outcome of the proceeding, any other person with personal knowledge of the facts relevant to the proceeding, or any officer, employee or agent of the agency,

(c) That relates to a legal or factual issue in the contested case proceeding,

(d) Made directly or indirectly to the administrative law judge,

(e) While the contested case proceeding is pending,

(f) That is made without notice and opportunity for the agency and all parties to participate in the communication.

(2) If an administrative law judge receives an ex parte communication during the pendency of the contested case proceeding, the administrative law judge shall place in the record:

(a) The name of each individual from whom the administrative law judge received an ex parte communication;

(b) A copy of any ex parte written communication received by the administrative law judge;

(c) A memorandum reflecting the substance of any ex parte oral communication made to the administrative law judge;

- (d) A copy of any written response made by the administrative law judge to any ex parte oral or written communication; and
  - (e) A memorandum reflecting the substance of any oral response made by the administrative law judge to any ex parte oral or written communication.
- (3) The administrative law judge shall advise the agency and all parties in the proceeding that an ex parte communication has been made a part of the record. The administrative law judge shall allow the agency and parties an opportunity to respond to the ex parte communication. Any responses shall be made part of the record.
- (4) The provisions of this rule do not apply to:
- (a) Communications made to an administrative law judge by other administrative law judges;
  - (b) Communications made to an administrative law judge by any person employed by the Office of Administrative Hearings to assist the administrative law judge; or
  - (c) Communications made to the administrative law judge by an assistant attorney general if the communications are made in response to a request from the administrative law judge and the assistant attorney general is not advising the agency about the matters at issue in the contested case proceeding.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

### **137-003-0630**

#### **Pre-hearing Motions**

- (1) A request for any order or other relief may be made by filing a motion in writing. The motion need not be in any particular form.
- (2) Unless otherwise provided by statute or rule, all motions shall be filed in writing at least seven calendar days before the date set for the hearing and a copy provided to the parties and to the agency in the manner required by OAR 137-003-0520 except:
- (a) Motions seeking to intervene or to be granted party status under OAR 137-003-0535,
  - (b) Motions made in a pre-hearing conference,
  - (c) Motions for a ruling on legal issues under OAR 137-003-0580; and
  - (d) Motions to continue a scheduled conference or hearing,
  - (e) Motions to quash a subpoena under OAR 137-003-0585 when the subpoena is served less than 14 days before the date set for the hearing.
- (3) The agency or a party may file a response to a motion. Responses to motions made seven calendar days before the date of the hearing shall be in writing with service to the parties and to the agency in the manner required by OAR 137-003-0520 and shall be filed on the earlier of:
- (a) Five calendar days after receipt of the motion, or
  - (b) The date and time of the hearing.
- (4) Responses to late-filed motions may be presented orally or in writing at the contested case hearing.
- (5) At the request of a party or the agency, or on the administrative law judge's own motion, the administrative law judge may establish longer or shorter periods than those under sections (2) and (3) of this rule for the filing of motions and responses. The administrative law judge may also consider motions presented orally at the contested case hearing. In exercising discretion under this subsection, the administrative law judge shall consider the duty to ensure a full and fair inquiry into the facts and the likelihood of undue delay or unfair prejudice.
- (6) The mere filing or pendency of a motion, even if uncontested, does not alter or extend any time limit or deadline established by statute, rule or order.
- (7) The administrative law judge shall rule on all motions on the record before issuance of a proposed order or in the proposed order or, if the administrative law judge has authority to issue a final order without first issuing a proposed order, in the final order.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 9-2001, f. & cert. ef. 10-3-01; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04

### **137-003-0635**

#### **Transmittal of Questions to the Agency**

- (1) Questions regarding the following issues may be transmitted to the agency:
  - (a) The agency's interpretation of its rules and applicable statutes; or
  - (b) Which rules or statutes apply to a proceeding.
- (2) At the request of a party, the agency, or their representatives, or on the administrative law judge's own motion, the administrative law judge may transmit a question to the agency unless the agency by rule or in writing elects not to make available this process for transmittal of questions to the agency.
- (3) The administrative law judge shall submit any transmitted question in writing to the agency. The submission shall include a summary of the matter in which the question arises and shall be served on the agency representative and parties in the manner required OAR 137-003-0520(3).
- (4) The agency may request additional submissions by a party or the administrative law judge in order to respond to the transmitted question.
- (5) Unless prohibited by statute or administrative rules governing the timing of hearings, the administrative law judge may stay the proceeding and shall not issue the proposed order or the final order, if the administrative law judge has authority to issue the final order, until the agency responds to the transmitted question.
- (6) The agency shall respond in writing to the transmitted question within a reasonable time and the response shall be made a part of the record of the contested case hearing. The agency's response may be to decline to answer the transmitted question. The agency shall provide its response to the administrative law judge and to each party. The parties may reply to the agency's response within a reasonable time.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 9-2001, f. & cert. ef. 10-3-01; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04; DOJ 11-2005, f. 10-31-05, cert. ef. 1-1-06

*See also: OAR 581-015-2375 Decision of Administrative Law Judge*

### **137-003-0665**

#### **Final Orders in Contested Cases**

- (1) Final orders in contested cases shall be in writing.
- (2) Except as provided in section (5) of this rule, all final orders in contested cases shall include the following:
  - (a) Each of the elements identified in OAR 137-003-0645(3)(a)-(h),
  - (b) An Order stating the action taken by the agency as a result of the facts found and the legal conclusions arising therefrom; and
  - (c) A citation of the statutes under which the order may be appealed.
- (3) If the agency modifies the proposed order issued by the administrative law judge in any substantial manner, the agency must identify the modifications and provide an explanation to the parties as to why the agency made the modification. For purposes of this provision, an agency modifies a proposed order in a "substantial manner" when the effect of the modifications is to change the outcome or the basis for the order or to change a finding of fact.
- (4) The agency may modify a finding of historical fact made by the administrative law judge only if the agency determines that the finding made by the administrative law judge is not supported by a preponderance of the evidence in the record. For purposes of this provision, an administrative law judge makes a finding of historical fact if the administrative law judge determines that an event did or did not occur in the past or that a circumstance or status did or did not exist either before the hearing or at the time of the hearing.
- (5) When informal disposition of a contested case is made by stipulation, agreed settlement or consent order as provided in OAR 137-003-0510(4), the final order need not comply with section (2) of this rule. However, the order must state the agency action and:
  - (a) Incorporate by reference a stipulation or agreed settlement signed by the party or parties agreeing to that action; or
  - (b) Be signed by the party or parties.
- (6) The final order shall be served on each party.
- (7) The date of service of the final order on the parties shall be specified in writing and be part of or be attached to the order on file with the agency, unless service of the final order is not required by statute.

Stat. Auth.: ORS 183.341

Stats. Implemented: ORS 183.341, 183.415(5), 183.470 & OL 1999, Ch. 849

Hist.: DOJ 10-1999, f. 12-23-99, cert. ef. 1-1-00; DOJ 19-2003, f. 12-12-03, cert. ef. 1-1-04



**Inapplicable regulations:**

OAR 137-003-0528	Late Hearing Requests	
OAR 137-003-0555	Authorized Representatives of Parties before Designated Agencies	
OAR 137-003-0560	Emergency License Suspension, Refusal to Renew	
OAR 137-003-0573	Individually Identifiable Health Information	
OAR 137-003-0635	Transmittal of Questions to the Agency	
OAR 137-003-0640	Immediate Review by Agency	The IDEA does not permit proposed orders.
OAR 137-003-0645	Proposed Orders in Contested Cases	
OAR 137-003-0650	Exceptions to Proposed Order	
OAR 137-003-0655	Further Hearing and Issuance of Final Order	
OAR 137-003-0660	Ex Parte Communications to Agency during Review of Contested Cases	No administrative review of due process hearings – Oregon has a “one tier” system; review is by court.
OAR 137-003-0675	Reconsideration and Rehearing	20 USC § 1415(j), 34 CFR 300.514, and ORS 343.177 govern child’s status pending appeal.
OAR 137-003-0690	Stay Request	
OAR 137-003-0695	Intervention in Stay Proceeding	
OAR 137-003-0700	Stay Proceeding and Order	
OAR 137-003-0670	Default in Cases Involving a Notice of Proposed Action that Does Not Become Final Without a Hearing or Default	
OAR 137-003-0672	Default in Cases Involving an Agency Order that May Become Final Without a Request for Hearing	

#### **471-060-0005**

##### **Request for Change of Administrative Law Judge**

- (1) The purpose of this rule is to establish uniform procedures for the change of assignment of administrative law judges.
- (2) The words and terms used in OAR 471-060-0005 have the following meanings:
  - (a) An administrative law judge is "assigned" when a written notice is sent to a party or agency naming the administrative law judge to preside over a contested case, or the date a party or agency has actual notice of the assignment, whichever is earlier.
  - (b) "Good cause" is any reason why an administrative law judge's impartiality might reasonably be questioned. It includes, but is not limited to, personal bias or prejudice, personal knowledge of disputed facts, conflict of interest, or any other interest that could be substantially affected by the outcome of the proceeding.
- (3) Every party and agency in a contested case is entitled to request a change of administrative law judge. The first request of that party or agency shall be automatically granted. If that party or agency makes a subsequent request, it must show good cause why the administrative law judge should not preside over the hearing. The Chief administrative law judge or designee shall decide all requests.
- (4) Notwithstanding section (3), no request shall be granted if a party or agency had a reasonable opportunity to request a change of administrative law judge but did not do so. "Reasonable opportunity" is determined under the totality of circumstances. All requests must be in writing and sent or delivered to the Chief Administrative Law Judge or designee at the mailing address, telephone number, or electronic mail address indicated in the notice of assignment of administrative law judge. Requests may be sent by mail, facsimile transmission, or electronic mail.
- (5) The Chief Administrative Law Judge may exempt an agency or a class of cases from this section. All requests must be in writing.
- (6) For all contested cases pending on January 1, 2000, the Chief Administrative Law Judge shall not assign or change assignments of administrative law judges unless the agency on whose behalf the hearing is conducted requests assignment of a administrative law judge from the Office of Administrative Hearings to continue the conduct and conclude the proceedings of a pending case.

Stat. Auth.: ORS 657.610 & Ch. 849, Sec. 11, OL 1999 (HB 2525)

Stats. Implemented: Ch. 849, Sec. 11, OL 1999 (HB 2525)

Hist.: ED 8-1999(Temp), f. 12-29-99, cert. ef. 1-1-00 thru 6-28-00; ED 3-2000, f. 6-23-00, cert. ef. 6-25-00; ED 2-2001, f. 1-26-01, cert. ef. 1-28-01; ED 18-2003, f. 12-31-03, cert. ef. 1-4-04

**§ 300.501 Opportunity to examine records; parent participation in meetings.**

(a) *Opportunity to examine records.* The parents of a child with a disability must be afforded, in accordance with the procedures of §§ 300.613 through 300.621, an opportunity to inspect and review all education records with respect to—

(1) The identification, evaluation, and educational placement of the child; and

(2) The provision of FAPE to the child.

(b) *Parent participation in meetings.*

(1) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to—

(i) The identification, evaluation, and educational placement of the child; and

(ii) The provision of FAPE to the child.

(2) Each public agency must provide notice consistent with § 300.322(a)(1) and (b)(1) to ensure that parents of children with disabilities have the opportunity to participate in meetings described in paragraph (b)(1) of this section.

(3) A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

(c) *Parent involvement in placement decisions.* (1) Each public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.

(2) In implementing the requirements of paragraph (c)(1) of this section, the public agency must use procedures consistent with the procedures described in § 300.322(a) through (b)(1).

(3) If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency must use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.

(4) A placement decision may be made by a group without the involvement of a parent, if the public agency is unable to obtain the parent's participation in the decision. In this case, the public agency must have a record of its attempt to ensure their involvement.

(Authority: 20 U.S.C. 1414(e), 1415(b)(1))

**§ 300.502 Independent educational evaluation.**

(a) *General.* (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.

(3) For the purposes of this subpart—

(i) *Independent educational evaluation* means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and

(ii) *Public expense* means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with § 300.103.

(b) *Parent right to evaluation at public expense.*

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either—

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at

**Subpart E—Procedural Safeguards Due Process Procedures for Parents and Children****§ 300.500 Responsibility of SEA and other public agencies.**

Each SEA must ensure that each public agency establishes, maintains, and implements procedural safeguards that meet the requirements of §§ 300.500 through 300.536.

(Authority: 20 U.S.C. 1415(a))

public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

(5) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

(c) *Parent-initiated evaluations.* If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation—

(1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and

(2) May be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding that child.

(d) *Requests for evaluations by hearing officers.* If a hearing officer requests an independent educational evaluation as part of a hearing on a due process complaint, the cost of the evaluation must be at public expense.

(e) *Agency criteria.* (1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

(2) Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

(Authority: 20 U.S.C. 1415(b)(1) and (d)(2)(A))

**§ 300.503 Prior notice by the public agency; content of notice.**

(a) *Notice.* Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency—

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.

(b) *Content of notice.* The notice required under paragraph (a) of this section must include—

(1) A description of the action proposed or refused by the agency;

(2) An explanation of why the agency proposes or refuses to take the action;

(3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;

(6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and

(7) A description of other factors that are relevant to the agency's proposal or refusal.

(c) *Notice in understandable language.* (1) The notice required under paragraph (a) of this section must be—

(i) Written in language understandable to the general public; and

(ii) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(2) If the native language or other mode of communication of the parent is not a written language, the public agency must take steps to ensure—

(i) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(ii) That the parent understands the content of the notice; and

(iii) That there is written evidence that the requirements in paragraphs (c)(2)(i) and (ii) of this section have been met.

(Authority: 20 U.S.C. 1415(b)(3) and (4), 1415(c)(1), 1414(b)(1))

**§ 300.504 Procedural safeguards notice.**

(a) *General.* A copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents only one time a school year, except that a copy also must be given to the parents—

(1) Upon initial referral or parent request for evaluation;

(2) Upon receipt of the first State complaint under §§ 300.151 through 300.153 and upon receipt of the first due process complaint under § 300.507 in a school year;

(3) In accordance with the discipline procedures in § 300.530(h); and

(4) Upon request by a parent.

(b) *Internet Web site.* A public agency may place a current copy of the

procedural safeguards notice on its Internet Web site if a Web site exists.

(c) *Contents.* The procedural safeguards notice must include a full explanation of all of the procedural safeguards available under § 300.148, §§ 300.151 through 300.153, § 300.300, §§ 300.502 through 300.503, §§ 300.505 through 300.518, § 300.520, §§ 300.530 through 300.536 and §§ 300.610 through 300.625 relating to—

(1) Independent educational evaluations;

(2) Prior written notice;

(3) Parental consent;

(4) Access to education records;

(5) Opportunity to present and resolve complaints through the due process complaint and State complaint procedures, including—

(i) The time period in which to file a complaint;

(ii) The opportunity for the agency to resolve the complaint; and

(iii) The difference between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures;

(6) The availability of mediation;

(7) The child's placement during the pendency of any due process complaint;

(8) Procedures for students who are subject to placement in an interim alternative educational setting;

(9) Requirements for unilateral placement by parents of children in private schools at public expense;

(10) Hearings on due process complaints, including requirements for disclosure of evaluation results and recommendations;

(11) State-level appeals (if applicable in the State);

(12) Civil actions, including the time period in which to file those actions; and

(13) Attorneys' fees.

(d) *Notice in understandable language.* The notice required under paragraph (a) of this section must meet the requirements of § 300.503(c).

(Approved by the Office of Management and Budget under control number 1820-0600)

(Authority: 20 U.S.C. 1415(d))

**§ 300.505 Electronic mail.**

A parent of a child with a disability may elect to receive notices required by §§ 300.503, 300.504, and 300.508 by an electronic mail communication, if the public agency makes that option available.

(Authority: 20 U.S.C. 1415(n))

**§ 300.506 Mediation.**

(a) *General.* Each public agency must ensure that procedures are established and implemented 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.

(b) *Requirements.* The procedures must meet the following requirements:

(1) The procedures must ensure that the mediation process—

(i) Is voluntary on the part of the parties;

(ii) Is not used to deny or delay a parent's right to a hearing on the parent's due process complaint, or to deny any other rights afforded under Part B of the Act; and

(iii) Is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(2) A public agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party—

(i) Who is under contract with an appropriate alternative dispute resolution entity, or a parent training and information center or community parent resource center in the State established under section 671 or 672 of the Act; and

(ii) Who would explain the benefits of, and encourage the use of, the mediation process to the parents.

(3)(i) The State must maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(ii) The SEA must select mediators on a random, rotational, or other impartial basis.

(4) The State must bear the cost of the mediation process, including the costs of meetings described in paragraph (b)(2) of this section.

(5) Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.

(6) If the parties resolve a dispute through the mediation process, the parties must execute a legally binding agreement that sets forth that resolution and that—

(i) States that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding; and

(ii) Is signed by both the parent and a representative of the agency who has the authority to bind such agency.

(7) A written, signed mediation agreement under this paragraph is enforceable in any State court of competent jurisdiction or in a district court of the United States.

Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any Federal court or State court of a State receiving assistance under this part.

(c) *Impartiality of mediator.* (1) An individual who serves as a mediator under this part—

(i) May not be an employee of the SEA or the LEA that is involved in the education or care of the child; and

(ii) Must not have a personal or professional interest that conflicts with the person's objectivity.

(2) A person who otherwise qualifies as a mediator is not an employee of an LEA or State agency described under § 300.228 solely because he or she is paid by the agency to serve as a mediator.

(Approved by the Office of Management and Budget under control number 1820-0600)

(Authority: 20 U.S.C. 1415(e))

**§ 300.507 Filing a due process complaint.**

(a) *General.* (1) A parent or a public agency may file a due process complaint on any of the matters described in § 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).

(2) The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in § 300.511(f) apply to the timeline in this section.

(b) *Information for parents.* The public agency must inform the parent of any free or low-cost legal and other relevant services available in the area if—

(1) The parent requests the information; or

(2) The parent or the agency files a due process complaint under this section.

(Approved by the Office of Management and Budget under control number 1820-0600)

(Authority: 20 U.S.C. 1415(b)(6))

**§ 300.508 Due process complaint.**

(a) *General.* (1) The public agency must have procedures that require either party, or the attorney representing a party, to provide to the other party a due process complaint (which must remain confidential).

(2) The party filing a due process complaint must forward a copy of the due process complaint to the SEA.

(b) *Content of complaint.* The due process complaint required in paragraph (a)(1) of this section must include—

(1) The name of the child;

(2) The address of the residence of the child;

(3) The name of the school the child is attending;

(4) In the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child, and the name of the school the child is attending;

(5) A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and

(6) A proposed resolution of the problem to the extent known and available to the party at the time.

(c) *Notice required before a hearing on a due process complaint.* A party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements of paragraph (b) of this section.

(d) *Sufficiency of complaint.* (1) The due process complaint required by this section must be deemed sufficient unless the party receiving the due process complaint notifies the hearing officer and the other party in writing, within 15 days of receipt of the due process complaint, that the receiving party believes the due process complaint does not meet the requirements in paragraph (b) of this section.

(2) Within five days of receipt of notification under paragraph (d)(1) of this section, the hearing officer must make a determination on the face of the due process complaint of whether the due process complaint meets the requirements of paragraph (b) of this section, and must immediately notify the parties in writing of that determination.

(3) A party may amend its due process complaint only if—

(i) 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 § 300.510; or

(ii) The hearing officer grants permission, except that the hearing officer may only grant permission to amend at any time not later than five days before the due process hearing begins.

(4) If a party files an amended due process complaint, the timelines for the resolution meeting in § 300.510(a) and the time period to resolve in § 300.510(b) begin again with the filing of the amended due process complaint.

(e) *LEA response to a due process complaint.* (1) If the LEA has not sent a prior written notice under § 300.503 to the parent regarding the subject matter contained in the parent's due process complaint, the LEA must, within 10 days of receiving the due process complaint, send to the parent a response that includes—

(i) An explanation of why the agency proposed or refused to take the action raised in the due process complaint;

(ii) A description of other options that the IEP Team considered and the reasons why those options were rejected;

(iii) A description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

(iv) A description of the other factors that are relevant to the agency's proposed or refused action.

(2) A response by an LEA under paragraph (e)(1) of this section shall not be construed to preclude the LEA from asserting that the parent's due process complaint was insufficient, where appropriate.

(f) *Other party response to a due process complaint.* Except as provided in paragraph (e) of this section, the party receiving a due process complaint must, within 10 days of receiving the due process complaint, send to the other party a response that specifically addresses the issues raised in the due process complaint.

(Authority: 20 U.S.C. 1415(b)(7), 1415(c)(2))

#### § 300.509 Model forms.

(a) Each SEA must develop model forms to assist parents and public agencies in filing a due process complaint in accordance with §§ 300.507(a) and 300.508(a) through (c) and to assist parents and other parties in filing a State complaint under §§ 300.151 through 300.153. However, the SEA or LEA may not require the use of the model forms.

(b) Parents, public agencies, and other parties may use the appropriate model form described in paragraph (a) of this section, or another form or other

document, so long as the form or document that is used meets, as appropriate, the content requirements in § 300.508(b) for filing a due process complaint, or the requirements in § 300.153(b) for filing a State complaint.

(Authority: 20 U.S.C. 1415(b)(8))

#### § 300.510 Resolution process.

(a) *Resolution meeting.* (1) Within 15 days of receiving notice of the parent's due process complaint, and prior to the initiation of a due process hearing under § 300.511, the LEA must convene a meeting with the parent and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process complaint that—

(i) Includes a representative of the public agency who has decision-making authority on behalf of that agency; and

(ii) May not include an attorney of the LEA unless the parent is accompanied by an attorney.

(2) The purpose of the meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint.

(3) The meeting described in paragraph (a)(1) and (2) of this section need not be held if—

(i) The parent and the LEA agree in writing to waive the meeting; or

(ii) The parent and the LEA agree to use the mediation process described in § 300.506.

(4) The parent and the LEA determine the relevant members of the IEP Team to attend the meeting.

(b) *Resolution period.* (1) If the LEA has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur.

(2) Except as provided in paragraph (c) of this section, the timeline for issuing a final decision under § 300.515 begins at the expiration of this 30-day period.

(3) Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding paragraphs (b)(1) and (2) of this section, the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.

(4) If the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and

documented using the procedures in § 300.322(d)), the LEA may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint.

(5) If the LEA fails to hold the resolution meeting specified in paragraph (a) of this section within 15 days of receiving notice of a 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.

(c) *Adjustments to 30-day resolution period.* The 45-day timeline for the due process hearing in § 300.515(a) starts the day after one of the following events:

(1) Both parties agree in writing to waive the resolution meeting;

(2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible;

(3) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

(d) *Written settlement agreement.* If a resolution to the dispute is reached at the meeting described in paragraphs (a)(1) and (2) of this section, the parties must execute a legally binding agreement that is—

(1) Signed by both the parent and a representative of the agency who has the authority to bind the agency; and

(2) Enforceable in any State court of competent jurisdiction or in a district court of the United States, or, by the SEA, if the State has other mechanisms or procedures that permit parties to seek enforcement of resolution agreements, pursuant to § 300.537.

(e) *Agreement review period.* If the parties execute an agreement pursuant to paragraph (c) of this section, a party may void the agreement within 3 business days of the agreement's execution.

(Authority: 20 U.S.C. 1415(f)(1)(B))

#### § 300.511 Impartial due process hearing.

(a) *General.* Whenever a due process complaint is received under § 300.507 or § 300.532, the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing, consistent with the procedures in §§ 300.507, 300.508, and 300.510.

(b) *Agency responsible for conducting the due process hearing.* The hearing described in paragraph (a) of this section must be conducted by the SEA or the public agency directly responsible for the education of the child, as determined under State statute,



State regulation, or a written policy of the SEA.

(c) *Impartial hearing officer.* (1) At a minimum, a hearing officer—

(i) Must not be—

(A) An employee of the SEA or the LEA that is involved in the education or care of the child; or

(B) A person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) Must possess knowledge of, and the ability to understand, the provisions of the Act, Federal and State regulations pertaining to the Act, and legal interpretations of the Act by Federal and State courts;

(iii) Must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) Must possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(2) A person who otherwise qualifies to conduct a hearing under paragraph (c)(1) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(3) Each public agency must keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(d) *Subject matter of due process hearings.* The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under § 300.508(b), unless the other party agrees otherwise.

(e) *Timeline for requesting a hearing.* A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law.

(f) *Exceptions to the timeline.* The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to—

(1) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or

(2) The LEA's withholding of information from the parent that was required under this part to be provided to the parent.

(Approved by the Office of Management and Budget under control number 1820-0600)

(Authority: 20 U.S.C. 1415(f)(1)(A), 1415(f)(3)(A)–(D))

### § 300.512 Hearing rights.

(a) *General.* Any party to a hearing conducted pursuant to §§ 300.507 through 300.513 or §§ 300.530 through 300.534, or an appeal conducted pursuant to § 300.514, has the right to—

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;

(4) Obtain a written, or, at the option of the parents, electronic, verbatim record of the hearing; and

(5) Obtain written, or, at the option of the parents, electronic findings of fact and decisions.

(b) *Additional disclosure of information.* (1) At least five business days prior to a hearing conducted pursuant to § 300.511(a), each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(2) A hearing officer may bar any party that fails to comply with paragraph (b)(1) of this section from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(c) *Parental rights at hearings.* Parents involved in hearings must be given the right to—

(1) Have the child who is the subject of the hearing present;

(2) Open the hearing to the public; and

(3) Have the record of the hearing and the findings of fact and decisions described in paragraphs (a)(4) and (a)(5) of this section provided at no cost to parents.

(Authority: 20 U.S.C. 1415(f)(2), 1415(h))

### § 300.513 Hearing decisions.

(a) *Decision of hearing officer on the provision of FAPE.* (1) Subject to paragraph (a)(2) of this section, a hearing officer's determination of whether a child received FAPE must be based on substantive grounds.

(2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies—

(i) Impeded the child's right to a FAPE;

(ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or

(iii) Caused a deprivation of educational benefit.

(3) Nothing in paragraph (a) of this section shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under §§ 300.500 through 300.536.

(b) *Construction clause.* Nothing in §§ 300.507 through 300.513 shall be construed to affect the right of a parent to file an appeal of the due process hearing decision with the SEA under § 300.514(b), if a State level appeal is available.

(c) *Separate request for a due process hearing.* Nothing in §§ 300.500 through 300.536 shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

(d) *Findings and decision to advisory panel and general public.* The public agency, after deleting any personally identifiable information, must—

(1) Transmit the findings and decisions referred to in § 300.512(a)(5) to the State advisory panel established under § 300.167; and

(2) Make those findings and decisions available to the public.

(Authority: 20 U.S.C. 1415(f)(3)(E) and (F), 1415(h)(4), 1415(o))

### § 300.514 Finality of decision; appeal; impartial review.

(a) *Finality of hearing decision.* A decision made in a hearing conducted pursuant to §§ 300.507 through 300.513 or §§ 300.530 through 300.534 is final, except that any party involved in the hearing may appeal the decision under the provisions of paragraph (b) of this section and § 300.516.

(b) *Appeal of decisions; impartial review.* (1) If the hearing required by § 300.511 is conducted by a public agency other than the SEA, any party aggrieved by the findings and decision in the hearing may appeal to the SEA.

(2) If there is an appeal, the SEA must conduct an impartial review of the findings and decision appealed. The official conducting the review must—

(i) Examine the entire hearing record;

(ii) Ensure that the procedures at the hearing were consistent with the requirements of due process;

(iii) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in § 300.512 apply;

(iv) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(v) Make an independent decision on completion of the review; and

(vi) Give a copy of the written, or, at the option of the parents, electronic findings of fact and decisions to the parties.

(c) *Findings and decision to advisory panel and general public.* The SEA, after deleting any personally identifiable information, must—

(1) Transmit the findings and decisions referred to in paragraph (b)(2)(vi) of this section to the State advisory panel established under § 300.167; and

(2) Make those findings and decisions available to the public.

(d) *Finality of review decision.* The decision made by the reviewing official is final unless a party brings a civil action under § 300.516.

(Authority: 20 U.S.C. 1415(g) and (h)(4), 1415(i)(1)(A), 1415(i)(2))

#### § 300.515 Timelines and convenience of hearings and reviews.

(a) The public agency must ensure that not later than 45 days after the expiration of the 30 day period under § 300.510(b), or the adjusted time periods described in § 300.510(c)—

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The SEA must ensure that not later than 30 days after the receipt of a request for a review—

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved.

(Authority: 20 U.S.C. 1415(f)(1)(B)(ii), 1415(g), 1415(i)(1))

#### § 300.516 Civil action.

(a) *General.* Any party aggrieved by the findings and decision made under §§ 300.507 through 300.513 or §§ 300.530 through 300.534 who does not have the right to an appeal under § 300.514(b), and any party aggrieved by the findings and decision under § 300.514(b), has the right to bring a civil action with respect to the due process complaint notice requesting a

due process hearing under § 300.507 or §§ 300.530 through 300.532. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(b) *Time limitation.* The party bringing the action shall have 90 days from the date of the decision of the hearing officer or, if applicable, the decision of the State review official, to file a civil action, or, if the State has an explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by that State law.

(c) *Additional requirements.* In any action brought under paragraph (a) of this section, the court—

(1) Receives the records of the administrative proceedings;

(2) Hears additional evidence at the request of a party; and

(3) Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.

(d) *Jurisdiction of district courts.* The district courts of the United States have jurisdiction of actions brought under section 615 of the Act without regard to the amount in controversy.

(e) *Rule of construction.* Nothing in this part restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the Act, the procedures under §§ 300.507 and 300.514 must be exhausted to the same extent as would be required had the action been brought under section 615 of the Act.

(Authority: 20 U.S.C. 1415(i)(2) and (3)(A), 1415(l))

#### § 300.517 Attorneys' fees.

(a) *In general.* (1) In any action or proceeding brought under section 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to—

(i) The prevailing party who is the parent of a child with a disability;

(ii) To a prevailing party who is an SEA or LEA against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(iii) To a prevailing SEA or LEA against the attorney of a parent, or

against the parent, if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(2) Nothing in this subsection shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(b) *Prohibition on use of funds.* (1) Funds under Part B of the Act may not be used to pay attorneys' fees or costs of a party related to any action or proceeding under section 615 of the Act and subpart E of this part.

(2) Paragraph (b)(1) of this section does not preclude a public agency from using funds under Part B of the Act for conducting an action or proceeding under section 615 of the Act.

(c) *Award of fees.* A court awards reasonable attorneys' fees under section 615(i)(3) of the Act consistent with the following:

(1) Fees awarded under section 615(i)(3) of the Act must be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this paragraph.

(2)(i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under section 615 of the Act for services performed subsequent to the time of a written offer of settlement to a parent if—

(A) The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(B) The offer is not accepted within 10 days; and

(C) The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless the meeting is convened as a result of an administrative proceeding or judicial action, or at the discretion of the State, for a mediation described in § 300.506.

(iii) A meeting conducted pursuant to § 300.510 shall not be considered—

(A) A meeting convened as a result of an administrative hearing or judicial action; or

(B) An administrative hearing or judicial action for purposes of this section.



(3) Notwithstanding paragraph (c)(2) of this section, an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(4) Except as provided in paragraph (c)(5) of this section, the court reduces, accordingly, the amount of the attorneys' fees awarded under section 615 of the Act, if the court finds that—

(i) The parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) The amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) The attorney representing the parent did not provide to the LEA the appropriate information in the due process request notice in accordance with § 300.508.

(5) The provisions of paragraph (c)(4) of this section do not apply in any action or proceeding if the court finds that the State or local agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of the Act.

(Authority: 20 U.S.C. 1415(i)(3)(B)–(G))

**§ 300.518 Child's status during proceedings.**

(a) Except as provided in § 300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under § 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.

(c) If the complaint involves an application for initial services under this part from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned three, the public agency is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and

related services under Part B and the parent consents to the initial provision of special education and related services under § 300.300(b), then the public agency must provide those special education and related services that are not in dispute between the parent and the public agency.

(d) If the hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for purposes of paragraph (a) of this section.

(Authority: 20 U.S.C. 1415(j))

**§ 300.519 Surrogate parents.**

(a) *General.* Each public agency must ensure that the rights of a child are protected when—

(1) No parent (as defined in § 300.30) can be identified;

(2) The public agency, after reasonable efforts, cannot locate a parent;

(3) The child is a ward of the State under the laws of that State; or

(4) The child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)).

(b) *Duties of public agency.* The duties of a public agency under paragraph (a) of this section include the assignment of an individual to act as a surrogate for the parents. This must include a method—

(1) For determining whether a child needs a surrogate parent; and

(2) For assigning a surrogate parent to the child.

(c) *Wards of the State.* In the case of a child who is a ward of the State, the surrogate parent alternatively may be appointed by the judge overseeing the child's case, provided that the surrogate meets the requirements in paragraphs (d)(2)(i) and (e) of this section.

(d) *Criteria for selection of surrogate parents.* (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies must ensure that a person selected as a surrogate parent—

(i) Is not an employee of the SEA, the LEA, or any other agency that is involved in the education or care of the child;

(ii) Has no personal or professional interest that conflicts with the interest of the child the surrogate parent represents; and

(iii) Has knowledge and skills that ensure adequate representation of the child.

(e) *Non-employee requirement; compensation.* A person otherwise qualified to be a surrogate parent under paragraph (d) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(f) *Unaccompanied homeless youth.* In the case of a child who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs may be appointed as temporary surrogate parents without regard to paragraph (d)(2)(i) of this section, until a surrogate parent can be appointed that meets all of the requirements of paragraph (d) of this section.

(g) *Surrogate parent responsibilities.* The surrogate parent may represent the child in all matters relating to—

(1) The identification, evaluation, and educational placement of the child; and

(2) The provision of FAPE to the child.

(h) *SEA responsibility.* The SEA must make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after a public agency determines that the child needs a surrogate parent.

(Authority: 20 U.S.C. 1415(b)(2))

**§ 300.520 Transfer of parental rights at age of majority.**

(a) *General.* A State may provide that, when a child with a disability reaches the age of majority under State law that applies to all children (except for a child with a disability who has been determined to be incompetent under State law)—

(1)(i) The public agency must provide any notice required by this part to both the child and the parents; and

(ii) All rights accorded to parents under Part B of the Act transfer to the child;

(2) All rights accorded to parents under Part B of the Act transfer to children who are incarcerated in an adult or juvenile, State or local correctional institution; and

(3) Whenever a State provides for the transfer of rights under this part pursuant to paragraph (a)(1) or (a)(2) of this section, the agency must notify the child and the parents of the transfer of rights.

(b) *Special rule.* A State must establish procedures for appointing the parent of a child with a disability, or, if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of the child's eligibility under Part B of the Act if, under State law, a child who has

reached the age of majority, but has not been determined to be incompetent, can be determined not to have the ability to provide informed consent with respect to the child's educational program.

(Authority: 20 U.S.C. 1415(m))

**§§ 300.521–300.529 [Reserved]**

**Discipline Procedures**

**§ 300.530 Authority of school personnel.**

(a) *Case-by-case determination.* School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

(b) *General.* (1) School personnel under this section may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than 10 consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under § 300.536).

(2) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, during any subsequent days of removal the public agency must provide services to the extent required under paragraph (d) of this section.

(c) *Additional authority.* For disciplinary changes in placement that would exceed 10 consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to paragraph (e) of this section, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in paragraph (d) of this section.

(d) *Services.* (1) A child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section must—

(i) Continue to receive educational services, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting,

and to progress toward meeting the goals set out in the child's IEP; and

(ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(2) The services required by paragraph (d)(1), (d)(3), (d)(4), and (d)(5) of this section may be provided in an interim alternative educational setting.

(3) A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a child without disabilities who is similarly removed.

(4) After a child with a disability has been removed from his or her current placement for 10 school days in the same school year, if the current removal is for not more than 10 consecutive school days and is not a change of placement under § 300.536, school personnel, in consultation with at least one of the child's teachers, determine the extent to which services are needed, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.

(5) If the removal is a change of placement under § 300.536, the child's IEP Team determines appropriate services under paragraph (d)(1) of this section.

(e) *Manifestation determination.* (1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—

(i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

(2) The conduct must be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either paragraph (e)(1)(i) or (1)(ii) of this section was met.

(3) If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in paragraph (e)(1)(ii) of this section was met, the LEA must take immediate steps to remedy those deficiencies.

(f) *Determination that behavior was a manifestation.* If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must—

(1) Either—

(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or

(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(2) Except as provided in paragraph (g) of this section, return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.

(g) *Special circumstances.* School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child—

(1) Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of an SEA or an LEA;

(2) Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA; or

(3) Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA.

(h) *Notification.* On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA must notify the parents of that decision, and provide the parents the procedural safeguards notice described in § 300.504.

(i) *Definitions.* For purposes of this section, the following definitions apply:

(1) *Controlled substance* means a drug or other substance identified under schedules I, II, III, IV, or V in section

202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(2) *Illegal drug* means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

(3) *Serious bodily injury* has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.

(4) *Weapon* has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

(Authority: 20 U.S.C. 1415(k)(1) and (7))

#### § 300.531 Determination of setting.

The child's IEP Team determines the interim alternative educational setting for services under § 300.530(c), (d)(5), and (g).

(Authority: 20 U.S.C. 1415(k)(2))

#### § 300.532 Appeal.

(a) *General.* The parent of a child with a disability who disagrees with any decision regarding placement under §§ 300.530 and 300.531, or the manifestation determination under § 300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to §§ 300.507 and 300.508(a) and (b).

(b) *Authority of hearing officer.* (1) A hearing officer under § 300.511 hears, and makes a determination regarding an appeal under paragraph (a) of this section.

(2) In making the determination under paragraph (b)(1) of this section, the hearing officer may—

(i) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of § 300.530 or that the child's behavior was a manifestation of the child's disability; or

(ii) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

(3) The procedures under paragraphs (a) and (b)(1) and (2) of this section may

be repeated, if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.

(c) *Expedited due process hearing.* (1) Whenever a hearing is requested under paragraph (a) of this section, the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of §§ 300.507 and 300.508(a) through (c) and §§ 300.510 through 300.514, except as provided in paragraph (c)(2) through (4) of this section.

(2) The SEA or LEA is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed. The hearing officer must make a determination within 10 school days after the hearing.

(3) Unless the parents and LEA agree in writing to waive the resolution meeting described in paragraph (c)(3)(i) of this section, or agree to use the mediation process described in § 300.506—

(i) A resolution meeting must occur within seven days of receiving notice of the due process complaint; and

(ii) The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint.

(4) A State may establish different State-imposed procedural rules for expedited due process hearings conducted under this section than it has established for other due process hearings, but, except for the timelines as modified in paragraph (c)(3) of this section, the State must ensure that the requirements in §§ 300.510 through 300.514 are met.

(5) The decisions on expedited due process hearings are appealable consistent with § 300.514.

(Authority:

20 U.S.C. 1415(k)(3) and (4)(B), 1415(f)(1)(A))

#### § 300.533 Placement during appeals.

When an appeal under § 300.532 has been made by either the parent or the LEA, the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period specified in § 300.530(c) or (g), whichever occurs first, unless the parent and the SEA or LEA agree otherwise.

(Authority: 20 U.S.C. 1415(k)(4)(A))

#### § 300.534 Protections for children not determined eligible for special education and related services.

(a) *General.* A child who has not been determined to be eligible for special education and related services under this part and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in this part if the public agency had knowledge (as determined in accordance with paragraph (b) of this section) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(b) *Basis of knowledge.* A public agency must be deemed to have knowledge that a child is a child with a disability if before the behavior that precipitated the disciplinary action occurred—

(1) The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(2) The parent of the child requested an evaluation of the child pursuant to §§ 300.300 through 300.311; or

(3) The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.

(c) *Exception.* A public agency would not be deemed to have knowledge under paragraph (b) of this section if—

(1) The parent of the child—

(i) Has not allowed an evaluation of the child pursuant to §§ 300.300 through 300.311; or

(ii) Has refused services under this part; or

(2) The child has been evaluated in accordance with §§ 300.300 through 300.311 and determined to not be a child with a disability under this part.

(d) *Conditions that apply if no basis of knowledge.* (1) If a public agency does not have knowledge that a child is a child with a disability (in accordance with paragraphs (b) and (c) of this section) prior to taking disciplinary measures against the child, the child may be subjected to the disciplinary measures applied to children without disabilities who engage in comparable behaviors consistent with paragraph (d)(2) of this section.

(2)(i) If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under

§ 300.530, the evaluation must be conducted in an expedited manner.

(ii) Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services.

(iii) If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency must provide special education and related services in accordance with this part, including the requirements of §§ 300.530 through 300.536 and section 612(a)(1)(A) of the Act.

(Authority: 20 U.S.C. 1415(k)(5))

**§ 300.535 Referral to and action by law enforcement and judicial authorities.**

(a) *Rule of construction.* Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or prevents State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(b) *Transmittal of records.* (1) An agency reporting a crime committed by a child with a disability must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

(2) An agency reporting a crime under this section may transmit copies of the child's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.

(Authority: 20 U.S.C. 1415(k)(6))

**§ 300.536 Change of placement because of disciplinary removals.**

(a) For purposes of removals of a child with a disability from the child's current educational placement under §§ 300.530 through 300.535, a change of placement occurs if—

(1) The removal is for more than 10 consecutive school days; or

(2) The child has been subjected to a series of removals that constitute a pattern—

(i) Because the series of removals total more than 10 school days in a school year;

(ii) Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and

(iii) Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.

(b)(1) The public agency determines on a case-by-case basis whether a pattern of removals constitutes a change of placement.

(2) This determination is subject to review through due process and judicial proceedings.

(Authority: 20 U.S.C. 1415(k))

**§ 300.537 State enforcement mechanisms.**

Notwithstanding §§ 300.506(b)(7) and 300.510(d)(2), which provide for judicial enforcement of a written agreement reached as a result of mediation or a resolution meeting, there is nothing in this part that would prevent the SEA from using other mechanisms to seek enforcement of that agreement, provided that use of those mechanisms is not mandatory and does not delay or deny a party the right to seek enforcement of the written agreement in a State court of competent jurisdiction or in a district court of the United States.

(Authority: 20 U.S.C. 1415(e)(2)(F), 1415(f)(1)(B))