NOTICE OF PROCEDURAL SAFEGUARDS

SPECIAL EDUCATION RIGHTS
OF
PARENTS AND CHILDREN

Under the Individuals with Disabilities Education Act, Part B

October 15, 2002

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WHAT ARE PROCEDURAL SAFEGUARDS?[1]

This information provides you as parents, legal guardians, and surrogate parents of children with disabilities from 3 years of age through age 20 with an overview of your educational rights, sometimes called procedural safeguards. This information is your Notice of Procedural Safeguards as required under the Individuals with Disabilities Education Act (IDEA). This notice is also provided for students who are entitled to these rights at age 18.

This Notice of Procedural Safeguards must be given to you at least:

- The first time your child is referred for a special education evaluation;
- Each time you receive a written notice of an individualized education program (IEP) meeting for your child (including IEP meetings held regarding disciplinary actions);
- Each time your child is reevaluated; and
- Any time you request a due process hearing.

WHAT IS THE IDEA?

The IDEA is a federal law that requires school districts to provide a free appropriate public education to eligible children with disabilities. A "free appropriate public education" is often called "FAPE." It means that special education and related services are to be provided as described in an individualized education program and under public supervision to your child at no cost to you.

CAN I PARTICIPATE IN DECISIONS ABOUT MY CHILD'S EDUCATION?

You have the right to refer your child for special education services. You must be given the opportunity to participate in any decision-making meeting regarding your child's special education program. You are a member of your child's IEP team and have the right to participate in team meetings about the identification, evaluation, and educational placement of your child and other matters relating to your child's

1 The term school district is used throughout this document to describe any public education agency responsible for providing your child's special education program.

free appropriate public education. The school district must make sure you have adequate notice of such meetings. It must also make sure that you are able to participate in the meetings, including methods like telephone and conference calls when parents can not be physically present, and arranging for an interpreter for parents with deafness, or whose native language is not English.

A "meeting" does *not* include informal conversations among school district staff, conversations about teaching methodology or lesson plans if those issues are not addressed in your child's IEP, or preparation to develop a proposal or respond to a parent's proposal that will be discussed at a later meeting.

A placement decision may be made without your involvement if the school district is unable to obtain your participation. In this case, the school district must have a record of its attempts to obtain your involvement.

WHERE CAN I GET MORE HELP?

When you have a concern about your child's education, it is important that you call or contact your child's teacher or administrators to talk about your child and any problems you see. Staff in your school district can answer questions about your child's education, your rights, and procedural safeguards. When you have a concern, this informal conversation often solves the problem and helps to maintain open communication. Additional resources are listed at the end of this document to help you understand the procedural safeguards.

NOTICE, CONSENT, EVALUATION, AND ACCESS

PRIOR WRITTEN NOTICE

WHEN IS NOTICE NEEDED?

The school district must inform you about proposed evaluations of your child in a Prior Written Notice that is understandable and in your native language or other mode of communication, unless it is clearly not feasible to do so. This notice must be given a reasonable time before the school district proposes to (or refuses to) initiate or change the identification, evaluation, or educational placement of your child with special needs or the provision of a free appropriate public education.

WHAT WILL THE NOTICE TELL ME?

The Prior Written Notice must include the following:

1. A description of the actions proposed or refused by the school district;
2. An explanation of why the action was proposed or refused;
3. A description of any other options considered and the reasons those options were rejected;
4. A description of each evaluation procedure, test, record or report the school district used as a basis for the proposed action or refused action;
5. A description of any other factor relevant to the action proposed or refused;
6. A statement that parents of a child with a disability are protected by the Procedural Safeguards. If the Prior Written Notice is not sent because of an initial referral for evaluation, it must also tell you how you can obtain a copy of the Procedural Safeguards; and
7. Sources for you to contact to obtain help in understanding the IDEA and its regulations.

PARENT CONSENT

WHEN IS MY APPROVAL REQUIRED?

You must give informed, written consent before your child's first special education evaluation can proceed and before the school district can provide your child's special education program. Your consent is *not* required to review existing information as part of the evaluation process, or to administer tests that are given to all children (unless consent is required for all children).

In the case of reevaluations, the school district must document reasonable attempts to obtain your consent. If you as the parent do not respond to these attempts, the school district may proceed with the evaluation without your consent.

If you refuse consent for initial evaluation or reevaluation, the school district may continue to seek these evaluations by using mediation or the due process hearing procedure. Your consent to any activity is voluntary and may be revoked at any time, but revoking your consent does not negate any action taken while the school district had your consent.

SURROGATE PARENT APPOINTMENT

WHAT IF THE PARENT CANNOT BE IDENTIFIED OR LOCATED?

School districts must ensure that an individual is assigned to act as a surrogate parent for the parents of a child with a disability when a parent cannot be identified and the school district cannot discover the whereabouts of a parent. A surrogate parent may also be appointed if a child has been determined to be a ward of the state.

INDEPENDENT EDUCATIONAL EVALUATIONS

CAN MY CHILD BE TESTED INDEPENDENTLY AT THE DISTRICT'S EXPENSE?

If you disagree with the results of the evaluation conducted by the school district, you have the right to ask for and obtain an independent educational evaluation for your child from a person qualified to conduct the evaluation at public expense. Independent evaluation means an evaluation conducted by a qualified examiner who is not employed by the school district.

The school district must respond to your request for an independent educational evaluation and provide you information upon request about where to obtain the independent evaluation. The school district may ask why you object to its evaluation, but you are not required to provide an explanation. The IEP team must consider independent evaluations when making decisions about the child's free appropriate public education.

If the school district disagrees that an independent educational evaluation is necessary, the school district must request a due process hearing to prove that its evaluation was appropriate. The school district may not unreasonably delay providing the independent educational evaluation or initiating a hearing to defend the public evaluation. If the district requests a hearing and prevails, you still have the right to an

independent educational evaluation, but not at public expense.

ACCESS TO EDUCATIONAL RECORDS

CAN I EXAMINE MY CHILD'S EDUCATIONAL RECORDS?

You have the right to inspect and review all of your child's education records without unnecessary delay, including prior to a meeting about your child's IEP or before a due process hearing. The school will let either parent see the records unless an appropriate court order directing otherwise is given to the school.

You have these rights concerning your child's education records:

1. On request, the school must tell you what kinds of records are collected, maintained or used concerning your child, and where the records are kept.

2. You must be allowed to review these records before the IEP or any other meeting where identification, evaluation or educational placement of your child is an issue, or before a hearing.

3. The school must allow you to review the records promptly, and in no case longer than 45 days after you request to see them.

4. When you request information from the records, the school may not charge a fee to search for the records.

5. The school must give an explanation of the information in the records, if requested.

6. When copies of the records are requested, they must be provided at reasonable cost.

7. The school may not refuse to provide copies of a student's records if refusing would prevent you from accessing the records.

8. The school may not allow you to see information on any other student except your child.

9. You may allow another person to review your child's records.

10. If you find an error in your child's records, you may ask the school to change the information and add a statement to the records describing the disagreement. The school

must make a decision on your request within a reasonable time. If the school decides to refuse to change the records as you requested, it must tell you so and advise you that you have the right to a hearing to challenge the records.

Additional information about how school districts maintain student records and about the rights of students and parents under the Family Educational Rights and Privacy Act of 1974 (FERPA) is available in the Regulations of the Department of Education.

HOW DISPUTES ARE RESOLVED

DUE PROCESS HEARING

WHEN IS A DUE PROCESS HEARING AVAILABLE?

You have the right to request an impartial due process hearing regarding the identification, evaluation and educational placement of your child or the provision of a free appropriate education. School districts may also request hearings.

HOW DO I REQUEST A DUE PROCESS HEARING?

You need to file a written request for a due process hearing. The request must include:

- Your child's name;
- The address of your child's residence;
- The name of the school your child is attending;
- A description of the nature of the problem, including facts relating to the problem; and
- A proposed resolution to the problem.

The request must be signed by you, by the child's guardian, or by legal counsel. The written request should be sent to:

Secretary of Education
Department of Education
P.O. Box 1402
Dover, Delaware 19903

The Department of Education has developed a form to assist parents in filing a request for a due process hearing. A copy of that form is attached to the back of this Notice.

When a request for a due process hearing is received, the Secretary of Education will appoint a hearing panel (or single hearing officer in the case of expedited hearings) and tell you who has been appointed. The Secretary will also provide information on low cost legal assistance, the availability of mediation and a copy of this Notice of Procedural Safeguards.

The due process hearing must be completed, and a written decision mailed to you, within 45 days of your request for a hearing, unless the hearing panel grants an extension of time.

CAN I REQUEST MEDIATION TO RESOLVE THE DISPUTE?

When you request a due process hearing, the Department of Education will provide you information about mediation services. Mediation is a voluntary way to resolve disputes and is conducted by an impartial person trained in strategies that help people come to agreement over difficult issues. Mediation gives parents and school districts the opportunity to resolve disagreements and work out acceptable solutions in an informed, non-adversarial context. Mediation is provided at no cost, but both parents and the school district must agree to try mediation before it can be attempted. Mediation may *not* be used to delay your right to a due process hearing.

The Department has established a voluntary mediation system through the Conflict Resolution Program at the University of Delaware. The Department may also offer mediation in circumstances other than when a due process hearing has been requested.

For further information on mediation, contact the Special Education Partnership for the Amicable Resolution of Conflict (SPARC), at the Conflict Resolution Program, 177 Graham Hall, Institute for Public Administration, University of Delaware, Newark, Delaware 19716, (302) 831-8128.

WHAT ARE MY DUE PROCESS RIGHTS?

When you request a due process hearing, you have the right to:

1. Have a fair and impartial hearing before a three-member hearing panel (or a single hearing officer in the case of expedited hearings) appointed from a Registry of Impartial Hearing Officers maintained by the Department of Education.

2. Be represented by an attorney or accompanied and advised by individuals who have knowledge about children with disabilities.

3. Present evidence of your own and confront and cross-examine witnesses testifying against you.

4. Require witnesses to be present.

5. Prohibit evidence (including witness testimony) from being presented at the hearing unless it was disclosed to you at least five business days before the hearing (two business days if the hearing is expedited).

6. Be told about evaluations and resulting recommendations that have been completed at least five business days before the hearing (two business days if the hearing is expedited).

7. Receive a written or an electronic verbatim record of the hearing at public expense.

8. Receive a written or an electronic decision from the hearing panel or officer.

9. Have your child present at the hearing.

10. Have the hearing open or closed to the public.

DOES MY CHILD'S PLACEMENT CHANGE DURING THE PROCEEDINGS?

A child involved in any due process hearing or judicial proceeding must remain in his/her current educational placement unless you and the school district agree on another arrangement. This is often called the "stay put" rule. If the proceedings involve initial admission to a public school, your child will be placed in a public school program with your consent until all proceedings are complete.

If the due process hearing panel agrees with you that a change of placement is appropriate, the new placement will be treated as if it were one you and the district agreed to for purposes of deciding your child's educational placement during any related court proceedings.

CAN THE DECISION BE APPEALED?

Delaware is a "one tier" state--it offers one level of administrative review, conducted by the due process hearing panel or hearing officer. The hearing decision is final and binding on all parties unless it is appealed. Any party can appeal the hearing decision (either a regular or expedited one) by filing a civil action in Federal District Court or in the Family Court for the State of Delaware. You must file any appeal with the Court within 30 days of the final decision. The Courts can provide you additional information about how to file an appeal.

WHO PAYS FOR MY ATTORNEYS' FEES?

In any action or proceeding regarding the due process hearing, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to you as a parent of a child with a disability, if you are the prevailing party in the hearing. Fees may be reduced if:

1. The court finds that you unreasonably delayed the final resolution of the controversy;

2. Your attorney's hourly fee exceeds the prevailing rate in the community for similar work;

3. The time spent and legal services were excessive; or

4. Your attorney did not provide appropriate information in the request for the hearing.

Fees will *not* be reduced, however, if the court finds that the state or the school district unreasonably delayed the resolution of the action or there was a violation of the procedural safeguards section of the IDEA.

Attorneys' fees may *not* be awarded for any meeting of the IEP team unless the meeting is convened because of a due process hearing or judicial action. Attorney fees may also be denied if you reject a reasonable settlement offer made by the school district ten days before the hearing begins and the hearing decision is not more favorable than the settlement offer.

STATE COMPLAINT PROCEDURE

ARE THERE OTHER WAYS TO RESOLVE DISPUTES OVER MY CHILD'S EDUCATION?

In addition to due process hearings and mediation, the Department of Education will investigate and resolve complaints alleging violations of the IDEA (Part B). Complaints may be filed by any person or organization. They must be in writing and signed, and must include: (1) a statement that the school district (or any other public agency) has violated the IDEA or the federal regulations; and (2) a description of the facts believed to constitute the violation. The Department also must resolve complaints charging that a school district has failed to follow a decision previously rendered by a due process hearing panel or officer.

Complaints must be filed within one year of the alleged violation (unless the violation is a continuing one or the complaining party is seeking compensatory services). Complaints should be sent to:

Martha Brooks, Ed.D., Director
Exceptional Children & Early Childhood Group
Department of Education
P.O. Box 1402
Dover, DE 19903

When the Department receives a complaint, it will:

- Conduct an independent investigation, including an on-site investigation, if it determines that one is necessary.
- Give the complainant the opportunity to submit additional information about the allegations in the complaint.
- Review all relevant information and make an independent determination as to whether the school district or other public agency is violating the IDEA or the federal regulations.
- Issue a written decision to the complainant that addresses each allegation in the complaint and includes findings of fact and conclusions, and the reasons for its final decision.

The Department must complete its investigation and issue its written decision within sixty days (unless exceptional circumstances justify a longer time). If the Department determines that the school district or other public agency failed to provide appropriate services, the Department must address how to remediate the denial of services (including, for example, monetary reimbursement or other corrective action) and how to assure appropriate future provision of services for all children with disabilities.

The due process hearing system and the state complaint procedures are *not* mutually exclusive. You may use *either* the state complaint procedure or the due process hearing system to resolve disputes over your child's education. If the Department receives a complaint that is already the subject of a due process hearing, the Department must set aside the parts of the complaint that are being addressed in the due process hearing until that hearing is over. In this case, the hearing decision will be binding on the Department's investigation. If a complaint contains some issues that are being addressed in the due process hearing and some that are not, the Department must continue its investigation of the ones that are not being considered in the due process proceedings.

SCHOOL DISCIPLINE AND PLACEMENT PROCEDURES

SCHOOL DISCIPLINE

CAN MY CHILD BE SUSPENDED OR EXPELLED?

Children with disabilities may be suspended or placed in other alternative interim settings or other settings to the same extent these options would be used for children without disabilities.

The school district may remove a child with a disability from their current educational placement for ten school days in a school year without providing educational services. In addition, children may be removed for up to ten consecutive school days per offense, so long as the additional removals do not create a pattern of removal. ***If a child with a disability is removed from their educational placement for more than ten school days during the school year, the district must provide services that will allow the student to appropriately progress in the general curriculum and meet the goals of the child's IEP.***

If a school removes a child for more than ten consecutive school days, or in some cases, if there has been a pattern of removals that cumulate to more than ten school days in the school year, the school district must notify the child's parents of their procedural rights and conduct an IEP team meeting to determine whether the child's misconduct is caused by their disability. This IEP meeting must take place immediately, if possible, or within ten school days of the district's decision to take this type of disciplinary action. If the IEP team concludes that the misconduct was *not* a manifestation of your child's disability, the school district may take disciplinary action, such as expulsion, in the same manner as it would for a child without disabilities (as long as the person making the final disciplinary decision has received and considered the child's special education and disciplinary records).

In any event, the school district must hold an IEP meeting when the student has been removed for a total of ten schools days in a school year. This meeting must be held within ten business days (counted from the tenth day of removal). The purpose of the meeting is to either (1) develop a plan to conduct a functional behavior assessment and develop a behavior intervention plan, or (2) review and modify an existing behavior intervention plan and, as soon as practical, convene an IEP meeting to develop appropriate behavior interventions to address the student's behavior.

As a parent, you are a member of your child's IEP team and will be invited to participate in any IEP team meeting(s). If you disagree with the IEP team's decision, or believe that the school district has not complied with these disciplinary procedures, you may request an expedited due process hearing from the Secretary of Education. Expedited due process hearings are very similar to the regular due process hearings described above, but they are heard by a single hearing officer (instead of a three-person panel) and *must*

be concluded within 45 days *without* delays or extensions. The time frames for identifying evidence and evaluations are also shorter in an expedited hearing, i.e., two days instead of five.

Finally, if your child has committed a crime, the school district may report it to the appropriate law enforcement agency. The district must give the law enforcement agency your child's special education and disciplinary records when it reports the crime, to the extent the district is permitted to do so under the Family Educational Rights and Privacy Act (FERPA). You can find more information about FERPA in this document in the section called "Access to Educational Records."

DOES MY CHILD HAVE ANY PROTECTIONS IF HE/SHE WERE NOT PREVIOUSLY IDENTIFIED AS NEEDING SPECIAL EDUCATION AND RELATED SERVICES?

Maybe. If your child has not been determined eligible for special education and related services and has violated the school district's disciplinary rules (or is removed for being dangerous), the procedural safeguards apply *if* the district knew or should have known that your child was a child with a disability before the misconduct or behavior occurred. The federal regulations explain in detail when a school district is considered to have known that a child has a disability. If the school district did not know or have reason to know about your child's disability, it may discipline your child under the same measures and procedures applied to children without disabilities.

If you request an evaluation for special education services while your child is subject to disciplinary action, the school district must conduct an expedited evaluation. Until the evaluation is done, your child remains in the placement decided by the school district. This may include suspension or expulsion without educational services. If the evaluation results in your child qualifying for special education and related services, an appropriate special educational program must be provided your child, including the procedural protections relating to disciplinary and other removals.

INTERIM ALTERNATIVE EDUCATIONAL SETTINGS

CAN MY CHILD BE PLACED IN AN INTERIM ALTERNATIVE EDUCATIONAL SETTING FOR DISCIPLINARY REASONS?

A school district may remove a child to an appropriate interim alternative educational placement when: (1) the child carries a weapon to school or a school function; or (2) the child knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function. In this situation, the school may place the child in an interim alternative educational setting for up to forty-five calendar days. The child's IEP team determines the setting. The child must return to their regular placement at the end of the removal.

The alternative setting must enable the student to continue to progress in the general curriculum and to continue to receive services and modifications that will enable the child to meet his/her IEP goals. It must also include services that address the behavior that led to the interim removal and are designed to prevent the behavior from recurring.

The procedures and protections explained in the section called "*Can My Child be Suspended or Expelled?*", including the right to an expedited Due Process Hearing, also apply to removals to interim alternative educational settings because of drugs and weapons.

ARE THERE OTHER REASONS MY CHILD MAY BE PLACED IN AN INTERIM ALTERNATIVE EDUCATIONAL SETTING?

When the school district believes that a child is dangerous, it may request that a due process hearing officer place the child in an interim alternative educational setting for up to forty-five days. In this case, the school district must show by substantial evidence in an expedited hearing that maintaining the child's current placement is substantially likely to result in injury to the child or others. The hearing officer must also consider the appropriateness of the child's current placement and whether the school district has made reasonable efforts to minimize the risk of harm in the child's current placement. More information about expedited hearings is in the section called *"Can My Child be Suspended or Expelled?"*.

The interim alternative educational setting proposed by the school district (in consultation with the child's special education teacher) must be selected so as to enable the child to continue to progress in the general curriculum and to continue to receive services and modifications that will enable to child to meet their IEP goals. It must also include services that address the child's dangerous behavior and are designed to prevent it from recurring.

The school district can ask for additional expedited hearings and alternative placements at the end of the first such placement if it believes that continued removal is necessary.

CHILDREN ATTENDING PRIVATE SCHOOLS

WHEN IS REIMBURSEMENT REQUIRED FOR PRIVATE SCHOOL TUITION?

Children who are enrolled by their parents in private schools may participate in publicly funded special education programs. However, while school districts must offer a free appropriate public education to children with disabilities, changes to federal law have significantly limited the school district's responsibility to provide services to students whose parents have chosen for them to attend private schools. Federal law now requires that districts spend only a proportionate share of federal IDEA funds in such circumstances.

The school district and the State may agree to the placement of a child with a disability in a private

school or facility in certain situations. Otherwise, parents are entitled to reimbursement for costs associated with a private school placement only if a court or hearing panel determines that the school district did not make a free appropriate public education available to the child in a timely manner.

WHEN MAY REIMBURSEMENT FOR PRIVATE SCHOOL COSTS BE REDUCED OR DENIED?

The court or hearing panel may reduce or deny reimbursement for private school costs if you did not make your child available for an assessment (upon proper notice from the school district) before removing your child from public school. The court may also reduce or deny reimbursement if it finds that you acted unreasonably in removing your child to the private school.

You may also be denied reimbursement if you did not inform the school district that you were rejecting the special education placement proposed by the school district and give notice of your concerns and intent to enroll your child in a private school at public expense. In this case, your notice to the school district must be given either:

- At the most recent IEP meeting you attended before removing your child from the public school; or
- In writing to the school district at least ten business days (including holidays) before removing your child from the public school.

WHEN CAN REIMBURSEMENT NOT BE REDUCED OR DENIED?

A court or hearing panel may not reduce or deny reimbursement to you if you failed to notify the school district of your plans to remove your child for any of the following reasons:

- Illiteracy and inability to write in English;
- Giving notice would likely result in physical or serious emotional harm to the child;
- The school prevented you from giving notice; or
- You had not received a copy of this Notice of Procedural Safeguards or otherwise been informed of your responsibility to notify the school district of your intention to remove your child from public school.

FOR FURTHER INFORMATION

Contact your local Supervisor of Special Education or:

Martha Brooks, Ed.D., Director
Exceptional Children & Early Childhood Group
Department of Education
P.O. Box 1402
Dover, DE 19903

Telephone: (302) 739-5471
Fax: (302) 739-2388
Email: *mbrooks@doe.k12.de.us*
Website: *www.doe.state.de.us/exceptional_child/ececehome.htm*

The Delaware Department of Education has developed the Administrative Manual for Special Education Services (AMSES). The AMSES includes pertinent IDEA regulations and the State's regulations regarding children with disabilities. AMSES is available online at *www.doe.state.de.us/exceptional_child/ececehome.htm*. Paper copies may also be requested from the address above.

ADDITIONAL RESOURCES

Disabilities Law Program:

New Castle County
Community Services Bldg.
100 W. Tenth St, Suite 801
Wilmington, DE 19801
(302) 575-0660 (voice/TDD)
1-800-292-7980 (toll free)

Kent County
840 Walker Road
Dover, DE 19901
(302) 674-8503 (voice/TDD)
1-800-537-8383 (toll free)

Sussex County
144 East Market Street
Georgetown, DE 19947
(302) 856-3742 (voice/TDD)
1-800-462-7070 (toll free)

Parent Information Center of Delaware, Inc.:

New Castle County
700 Barksdale Road
Suite 16
Newark, DE 19711
(302) 366-0152

Kent County
Toll free:
(302) 888-547-4412

Sussex County
109 N. Bedford Street
Georgetown, DE 19947
(302) 856-9880
(302) 856-9881 (fax)

(302) 366-0276 (fax)

Special Education Partnership for the Amicable Resolution of Conflict (SPARC)
The Conflict Resolution Program
177 Graham Hall
Institute for Public Administration
University of Delaware
Newark, DE 19716
(302) 831-8158

Delaware Volunteer Legal Services, Inc.:
P. O. Box 7306, Wilmington, DE 19803
(302)-478-8680
Kent & Sussex Counties: 1-800-494-1913

Request for Due Process Hearing

I understand the due process hearing is appropriate for resolving issues relating to the (1) identification, (2) evaluation, (3) educational placement, or (4) the provision of a free appropriate education to a child receiving special education services.

Please Print

I, _____ _____
(Name of person requesting the hearing) (relationship to the child)

am requesting a due process hearing for _____
(the child's name)

who resides at the following address:

_____

_____

_____

and attends school at _____.
(the name of the school the child attends)

I am a resident of the _____ School District.

The following is a description of the nature of the problem, and the facts upon which this complaint is based.

I propose the following as a possible resolution of the problem, and believe that it would be available to my child at the present time.

Telephone number: _____

Address if different from above: _____

_____

_____
Signature Date