



**Special Education**

. . . a service, not a place.

**Interim Notice of  
Procedural Safeguards**

**for Special Education  
Students and Their Families**

**July 2005**

# ***Interim Notice of Procedural Safeguards for Special Education Students and Their Families***

Dr. Terry Bergeson  
State Superintendent of Public Instruction

Dr. Mary Alice Heuschel  
Deputy Superintendent  
Learning and Teaching

Bob Harmon  
Assistant Superintendent  
Special Populations

Douglas H. Gill, Ed.D.  
Director of Special Education Operations

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July 2005

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## Introduction

On December 3, 2004, Congress reauthorized the Individuals with Disabilities Education Act (IDEA) and renamed it the Individuals with Disabilities Education Improvement Act. The law continues to be referred to as IDEA and will be used as this throughout this document. Changes to the IDEA went into effect July 1, 2005. The Office of Superintendent of Public Instruction (OSPI) has provided this Interim Notice of Procedural Safeguards to inform you of your rights given changes to the federal law. Some of the information in this notice will change when the United States Department of Education, Office of Special Education Programs (OSEP) finalizes regulations based upon the changes made by the IDEA, and when Washington State changes its regulations to implement final federal regulations.

Chapter 392-172 of the Washington Administrative Code (WAC) contains Washington State's special education regulations. These WACs contain the policies and procedures designed to ensure that the requirements of the IDEA 2004 are met in Washington. Therefore, the recent changes to your procedural safeguards are in this notice but are not yet in the WACs. OSPI will update the WACs as soon as possible after OSEP has issued its final regulations. Until changed, the WACs remain in effect unless they are inconsistent with the current federal IDEA 2004 law. To check for updated information contact your local school district or OSPI's webpage at <http://www.k12.wa.us/specialed>.

This interim notice of procedural safeguards provides parents, surrogate parents, and adult students a full explanation of their educational rights, including changes made under IDEA 2004. References to "you" and "your child" also apply to surrogate parents and adult students. References in this notice to the "district" include other public agencies, including educational service districts, if they are providing special educational services to your child. Your district in the State of Washington that provides your child with special education services is required by IDEA to provide you a copy of procedural safeguards, and make sure that you understand them.

A notice of procedural safeguards must be given to you at least one time every year and:

- The first time you or others refer your child for a special education evaluation.
- The first time you or the district files a due process hearing request during the year.
- Anytime you ask for a copy.

The IDEA is a federal special education law that requires districts to provide a free appropriate public education (FAPE) to students eligible for special education. FAPE means special education and related services necessary for your child to benefit from his or her education. Students are eligible for special education between the ages of three and twenty-one. Incarcerated youth in a state adult correctional facility and who are eligible for special education are entitled to a FAPE until age 18. These services will be provided to your child in the least restrictive environment as described in an Individualized Education Program (IEP).

**For more information:** Your local district is the first stop for more information. There are a number of people in the district who can answer questions about your child's education. You may contact your child's general or special education teacher, the school principal, or the district's special education director. Your district may have information about its special education programs including notice of your procedural safeguards on its webpage. Your district may allow you the option of receiving special education notices by e-mail. OSPI has program supervisors to assist you with questions about your child's special education program. You may reach OSPI, Special Education Operations at (360) 725-6075, TTY (360) 586-0126, or [speced@ospi.wednet.edu](mailto:speced@ospi.wednet.edu).

## Parent Participation

Your participation in making decisions about your child's special education program is valuable. You will be given opportunities to participate in any meetings about the identification, evaluation, educational placement of your child, and the provision of special education and related services (FAPE) to your child. This includes the right to participate in meetings to discuss the eligibility of your child, the need for evaluations, development or revision of your child's IEP, and to make placement decisions.

Districts may discuss issues affecting your child's program without including you. These discussions include preparation for an upcoming IEP meeting, lesson plans, methodology, and coordination of service delivery. However you must be invited to participate in any meetings where decisions will be made involving the identification, evaluation, placement and provision of a FAPE to your child.

## Agreements Between You and Your School District

You and your district may agree to waive some procedural requirements. You and the district can agree, in writing, to:

1. Make changes to your child's IEP without a meeting after you and the district have developed the annual IEP. Upon request, the district must incorporate those changes and provide you with a revised copy of the IEP.
2. Excuse a member of the IEP team from attending an IEP meeting, in whole or part if:
  - (a) You and the district agree that the attendance of such member is not necessary because the member's area of curriculum or related services is not being modified or discussed in the meeting; or
  - (b) You and the district mutually **consent** in writing to the **excusal** of an IEP team member when the meeting involves a modification to or discussion of the member's area of the curriculum or related services. Under this circumstance, the excused IEP team member must submit, in writing to you and the IEP team, input into the development of the IEP in prior to the meeting.
3. Waive the requirement that the district conduct a reevaluation at least once every three years. You and the district can also agree to reevaluate your child more than once a year.
4. Alternate means for IEP meetings ....

You may withdraw from the agreements, however, your withdrawal from an agreement does not negate an action that occurred when the agreement was in place. A request to withdraw from an agreement should also be in writing.

### **Definition of “Parent” and Assignment of a Surrogate Parent**

The definition of a “parent” is a natural or adoptive parent, and includes:

- a foster parent (except when you voluntarily place your child with the foster parent);
- a guardian of the student (but not the state, if a child is a ward of the state); or
- an individual acting in the place of a parent, with whom the student lives, or an individual who is legally responsible for the student’s welfare.

A district must assign a person to act as a surrogate parent for a student when:

- no parent can be identified;
- after reasonable efforts, the parent cannot be located;
- the child is a ward of the state; or
- a child is homeless and not in the physical custody of his or her parent or guardian.

Children who are wards of the state may also have a surrogate parent appointed by the judge overseeing the student’s care, provided that the surrogate parent meets the requirements in IDEA as addressed below. Each district has procedures for determining whether a child needs a surrogate parent and for assigning a surrogate parent to the student. A surrogate parent must be assigned within 30 days after the district determines one is needed.

The person selected as a surrogate parent (1) may not have any interest that conflicts with the interests of the student and (2) must have knowledge and skills that ensure adequate representation of the student.

A person assigned as a surrogate parent may not be an employee of the OSPI, the district, or any other public agency that is involved in the education or care of the student. This includes a child’s state Department of Social and Health Services (DSHS) caseworker. A person who otherwise qualifies as a surrogate parent is not considered an employee of the district solely because he or she is paid by the district to serve as a surrogate parent.

A person selected as a surrogate parent may be an employee of a nonpublic agency if the agency only provides non-educational care for the student. This individual must meet the requirements stated above.

The surrogate parent represents the student in all educational matters relating to the identification, evaluation, and educational placement of the child and the provision of a FAPE to the student.

## Prior Written Notice

In addition to being a participant in decision making, you have the right to have the district provide you written notice about important decisions that affect your child's special education. Prior written notice is a document reflecting **decisions** that were made at a meeting or by the district in response to a request by you. The district sends this written notice after a decision has been made, but before implementing the decision. These decisions include those related to any proposal or refusal to initiate or change the identification, evaluation, placement, or provision of a FAPE.

Some examples of when you will receive prior written notice are:

- Your child is referred because of a suspected disability and potential need for special education.
- Your child is evaluated for the first time or when the district is refusing to evaluate your child.
- The district is considering or refusing to change your child's eligibility for special education from one disability category to another.
- It is time for your child to be reevaluated or when the district is refusing your request for a reevaluation.
- After developing or changing an IEP for your child, but before the services or changes to services to your child begin.

Prior written notice must include:

- what the district is proposing or refusing to do;
- why the district is proposing or refusing to take action;
- a description of any other options considered by the IEP team and the reasons why those options were rejected;
- a description of each evaluation procedure, assessment, record, or report used as a basis for the action;
- a description of any other factors relevant to the action;
- a description of any evaluation procedure the district proposes to conduct for the initial evaluation and any reevaluations;
- a statement that parents are protected by the procedural safeguards described in this booklet;
- a copy of this notice of procedural safeguards booklet or information about how you can get a copy; and
- sources for you to contact to get help in understanding these procedural safeguards.

Prior written notice must be provided in your native language or other mode of communication that you use, such as sign language, unless it is clearly not feasible to do so. The notice given to you must be written so that it is understandable to the general public.

If your native language or other mode of communication is not a written language, the district must take steps to ensure that (1) the notice is translated orally or by other means in your native language or other mode of communication, (2) you understand the content of the notice, and (3) there is written evidence that these requirements have been met.

## Parent Consent

Consent means that you have been given and you understand all information relevant to the activity for which consent is requested. This information must be provided in your native language or other mode of communication, if needed. You must agree in writing when your consent is needed, and acknowledge that you understand what you are being asked to sign. The consent form should describe why the district needs your consent and what it is planning to do. If the request for consent involves a request to obtain or release records, the form should specify the records, if any, that will be obtained or released and who will receive the records.

Your consent is voluntary and may be withdrawn at any time. However, your withdrawal does not negate an action that occurred after the consent was given and before consent was withdrawn. Should you provide consent to allow a district to conduct a test, and later withdraw your consent, the district may use the results from that test if it was conducted before you withdrew your consent.

Parental consent is **not** required before (1) reviewing existing information as part of an initial evaluation or reevaluation; (2) giving a test or evaluation that is administered to all children unless consent is required of all children's parents before administering the test; or (3) screening a student who has not yet been considered for special education to determine appropriate general education interventions.

Written, informed consent **is** required before a district:

- releases or obtains educational or medical records;
- initially evaluates your child to determine whether he or she is eligible for special education services;
- conducts additional assessments as part of a reevaluation. However, the district may reassess your child without your written consent if the district can demonstrate that it has taken reasonable measures to obtain your consent and you have not responded. If, during a reevaluation, the district determines that reassessment is not necessary, it must notify you of the reasons it has made this determination and that you have the right to request additional assessments; and
- initiates special education services for your child for the first time. If you do not give consent to initial services, the district cannot be considered in violation of its obligation to make a FAPE available to your child for failing to provide special education services. In addition, the district is not required to develop an IEP for your child.

There may be additional times that a district may need your consent, including but not limited to permission to verify current Medicaid eligibility in order to bill Medicaid for

school services and permission to communicate with your insurance company. If you refuse consent to permit the district to access your private insurance, this does not relieve the district of its responsibility to ensure that all services are provided to your child at no cost to you.

**Refusal.** You can refuse to provide the district with the consent they are requesting, such as for an evaluation or for a reevaluation. However, if you refuse consent, the district may ask an administrative law judge (ALJ) to overrule your refusal if it believes consent is needed to provide the necessary services to your child. You and the district may agree to first try mediation to resolve your disagreements.

The school district may **not** ask an ALJ to override your refusal to grant consent for **initial** special education services. And, a district may not use your refusal to consent to a service or activity to deny your child any other service, benefit, or activity of the district.

**Wards of the State.** If your child is a ward of the state, and is not residing with you or another person meeting the definition of a parent, the district must make reasonable efforts to obtain consent from you before conducting an initial evaluation. However, the district is not required to obtain consent from you if the district cannot locate you, your parental rights have been limited through a court order such as a disposition order or an order of dependency, or terminated, or if a judge has appointed someone in a dependency proceeding to make educational decisions for your child.

### **Transfer of Parental Rights at Age of Majority**

When your child reaches the age of 18, he or she is considered to have reached the age of majority. This means that all rights under IDEA transfer from you as the parent, to your child. There are some instances under state law when your child will be treated as if he or she has reached the age of majority before age 18. Examples of this include court ordered emancipation and marriage.

Students who are determined incapacitated under Washington State law will not have rights transferred to them. If there is a guardianship limiting the student's right to make personal decisions, the legal guardian will exercise the rights on the student's behalf.

Beginning at least one year before your child turns 18, the IEP will include a statement that your child has been told about the transfer of rights. When your child reaches the age of majority, notification of the transfer of rights will be provided to both you and your child, provided that the student does not have a legal guardianship.

### **Independent Educational Evaluations**

You have the right to obtain an independent educational evaluation (IEE) for your child. An IEE is an evaluation by a qualified examiner who is not an employee of the district responsible for your child's special education program. You may request an IEE at public expense if you disagree with an evaluation completed by the district. Public

expense means that the district either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to you.

It is helpful if your request is in writing and is made before the IEE is obtained. The district may ask for the reason why you object to its evaluation. However, you are not required to provide an explanation and the district may not unreasonably delay either providing the IEE at public expense or initiating a due process hearing to defend its evaluation.

Upon your request for an IEE, the district must inform you about where an IEE may be obtained and its IEE criteria. If the IEE is at public expense, the district or other public agency must use the same criteria it uses when it initiates an evaluation, to the extent those criteria are consistent with your right to an IEE. In addition, the district may not impose conditions or timelines related to obtaining the IEE except to the extent they are consistent with its own criteria. You are not required to use an evaluator on the district's list. However, the individual chosen must meet the district's criteria.

Within 15 calendar days of your request, the district must either notify you that it will provide the evaluation or request a due process hearing to challenge your request. If a due process hearing occurs, the ALJ will issue a decision that either orders the district to pay for the IEE or the district does not have to pay for an IEE. If the ALJ finds that the district's evaluation is appropriate or that your IEE does not meet agency criteria, the district will not have to pay for the IEE you requested. However, you may still obtain an IEE at your own expense.

The results of IEEs that meet agency criteria must be considered by the district and your child's IEP team when making decisions regarding your child. Any IEEs you obtain, whether or not they meet agency criteria, may be used as evidence in a due process hearing.

If an ALJ requests an IEE as part of a hearing, the cost of the evaluation must be at public expense.

### **Children Enrolled in Private Schools by Their Parents**

Parents may choose to enroll their child in private schools. Sometimes parents enroll their children in private schools even when a district has offered a FAPE to the student. This is called a unilateral enrollment in a private school. Other times, parents may feel that the district has not offered a FAPE to their child and believes a private school can offer these services. In this situation, the district may be required to reimburse the cost of the private school. This section addresses both situations.

***Unilateral Enrollment In A Private School.*** Eligible students who are enrolled by their parents in private schools may participate in publicly funded special education and related services. However, federal law limits the amount that districts have to spend for these services.

If your child is enrolled in a private school, the district where the private school is located, is responsible for making decisions about who is eligible for special education services, who will be served, what services will be provided, and the location of services. This **might not** be the same district in which you or your child reside.

Federal law permits special education and related services to be provided at the private school to the extent consistent with state law. Washington law prohibits the provision of services, materials, or equipment of any nature to or on the site of any private school or agency subject to religious control.

You may file a citizen complaint if you believe the district violated any procedures under these provisions. You may request a due process hearing only when there are disagreements about whether a district followed child find requirements (activities to locate, evaluate and identify students with a suspected disability), including evaluation and reevaluation procedures.

***Enrollment In A Private School When FAPE Is At Issue.*** A court or ALJ may require a district to reimburse you for the cost of private school placement made without the consent of or referral by the district only if:

- your child received special education and related services under the authority of a district before enrolling in the private school;
- at that time, the district did not make a FAPE available to your child in a timely manner; and
- the private placement is appropriate.

A parental placement may be found to be appropriate by a court or ALJ even if it does not meet the state standards that apply to education provided by the districts.

The court or ALJ may reduce or deny reimbursement if you did not inform the district that you were rejecting the district's proposed placement to provide a FAPE, including stating your concerns and your intent to enroll your child in a private school at public expense. You must give notice either:

- at the most recent IEP meeting that you attended before removing your child from public school; or
- in writing to the district at least ten business days, including any holidays that occur on a business day, before removing the child from public school.

The court or ALJ may not reduce or deny reimbursement if a parent does not give this notice because:

- You are illiterate and/or cannot write in English.
- Giving notice would likely result in physical or serious emotional harm to your child.
- The school prevented you from giving notice.
- You did not receive a copy of a notice of procedural safeguards or were not informed that you were required to notify the district of the intent to enroll in a private school at public expense.

The court or ALJ may also reduce or deny reimbursement if you do not make your child available for an evaluation by the district, provided:

- The district gave you prior written notice of its intent to evaluate or reevaluate your child.
- The purpose of the evaluation as described in the prior written notice was appropriate and reasonable.
- The prior written notice was given before your child was removed from the public school.

Reimbursement may also be reduced or denied if the court or ALJ finds that you were unreasonable in your actions.

***Part Time Enrollment:*** Even if your child is a private school student, Washington state laws allow you to enroll your child on a part time basis in the child's resident district. In these instances, the unilateral provisions do not apply.

## **Mediation**

Mediation services are available to help resolve problems involving the identification, evaluation, educational placement, and provision of a FAPE to your child at no cost to you or the district. Mediation is available to help resolve disagreements between you and the district over any matter relating to the identification, evaluation, placement of or the provision of a FAPE to your child and whenever a due process hearing is requested. Mediation is voluntary and cannot be used to deny or delay your right to a due process hearing or to deny any other rights afforded under Part B of the IDEA.

Mediation is conducted by an individual who is qualified, impartial, and trained in effective mediation techniques. That individual must also be knowledgeable in the laws and regulations relating to the provision of special education and related services. OSPI contracts with an outside agency to conduct mediations. That agency maintains the list of mediators. The mediator (1) may not be an employee of OSPI, a school district or other state agency that is providing direct services to a child who is the subject of the mediation process, and (2) may not have a personal or professional conflict of interest. The mediation sessions are scheduled in a timely manner at a location that is convenient to you and the district.

When an agreement is reached, it must be documented in a written mediation agreement that is signed by you and an authorized representative of the district. Discussions during the mediation sessions are confidential and may not be used as evidence in any due process hearings or civil proceedings that may follow. This must be stated in the written agreement. However, the mediation agreement itself may be used as evidence. Mediation agreements are legally binding and enforceable in any state court of competent jurisdiction or in a district court of the United States.

The district might have a procedure that allows you to meet with a disinterested party to encourage the use and explain the benefits of the mediation process to you. Not all

districts have this process. If they do, OSPI will pay for the cost of the meeting. You may refuse to participate in this meeting.

### **Impartial Due Process Hearing**

You or the district may request a hearing conducted by an Administrative Law Judge (ALJ) regarding any matter related to the identification, evaluation, and educational placement of your child or the provision of a FAPE to your child. When the hearing involves discipline, the hearing process is “expedited”. To the extent that there are timelines or other procedural differences, in discipline hearings, those differences will be addressed in the section entitled *Appeals Regarding Discipline and Behavior*.

**Two Year Time Limit.** Under the new IDEA statute, the party requesting the hearing must set forth alleged violations that occurred not more than two years before the date the party knew or should have known about the alleged action that forms the basis of the hearing request. This time limit will not apply to you if you were prevented from requesting the hearing because:

- the district made a specific misrepresentation that it had resolved the problems raised in the hearing request; or
- the district withheld information from you that it was required to provide under the IDEA.

**Due Process Hearing Request Requirements.** A request (which remains confidential) for a due process hearing must be in writing and include:

- the name of the child;
- the address of the residence of the child (or available contact information in the case of a homeless child);
- the name of the school the child is attending;
- a description of the nature of the problem and the facts related to the problem; and
- a proposed resolution of the problem to the extent known and available to the party at the time.

If you ask for the hearing, the request must be mailed or provided directly to the district superintendent. If the district is requesting the hearing, it must send a copy of its request directly to you.

The party requesting the hearing must also send a copy of the request to:

Office of Superintendent of Public Instruction  
Administrative Resource Services  
Old Capitol Building  
PO Box 47200  
Olympia, WA 98504-7200  
FAX: 360-753-4201

The party requesting the hearing should send a copy of the hearing request to OSPI Administrative Resource Services at the same time it provides the original request to

the other party so that OSPI can assign a cause number and refer it to the Office of Administrative Hearings (OAH) for appointment of an independent ALJ.

OSPI has developed a model due process hearing request form to assist you in filing a request for a due process hearing. OSPI has also developed written instructions entitled *Procedures and Timelines for Due Process Hearings Under IDEA 2004* that addresses the required procedures for providing the request to the other party, including timelines before the due process hearing can begin. These forms are available from OSPI at the following websites:

<http://www.k12.wa.us/ProfPractices/adminresources/forms.aspx> or  
<http://www.k12.wa.us/SpecialEd/mediation.aspx>.

You may also obtain a copy of the forms from your district's special education department. Your right to a due process hearing can be denied or delayed if the due process hearing request does not include all of the required information.

It is up to the party requesting the hearing to provide proof that the due process hearing request was provided to the other party. Issues concerning receipt of the due process hearing request will be determined by the ALJ.

***Response to a Due Process Hearing Request Within 10 Days.*** If you received a prior written notice from the district that addresses the issues in your due process hearing request, the district must send you a response that specifically addresses the issues raised in your due process hearing request within 10 days of its receipt of the request. If the district has not provided you prior written notice, its response must include:

- an explanation of why the district proposed or refused to take the action raised in your due process hearing request;
- a description of other options that the IEP team considered and the reasons why those options were rejected;
- a description of each evaluation procedure, assessment, record or report the district used as the basis for the proposed or refused action; and
- a description of the factors relevant to the district's proposal or refusal.

If the district is the one filing a due process hearing request, you must file a response that specifically addresses the issues raised within 10 days of receiving the district's due process hearing request.

You or the district may still object to the sufficiency of the due process hearing request.

When a party sends its response to the party who requested the hearing, the responding party should also provide a copy of this response to OAH.

***Sufficiency of Hearing Request Within 15 Days.*** Within the first 15 days of receiving a due process hearing request, the party must notify the other party and the ALJ if it believes the request does not meet requirements. An ALJ must rule upon a sufficiency objection within 5 days of receipt and make a determination on the face of the request whether it meets the requirements. The ALJ must immediately notify both you and the

district in writing of the determination. If a due process hearing request is not objected to within the 15 days, the request is deemed sufficient.

***Amendment of Hearing Request:*** A due process hearing request may be amended only if the other party consents in writing and is given the opportunity to resolve the dispute through a resolution meeting, or if the ALJ grants permission to amend the request. An ALJ may not grant permission to amend a hearing request within 5 days before a due process hearing occurs. The filing of an amended hearing request restarts the due process hearing request timelines. The party requesting the hearing may not raise any issue in the hearing that was not stated in the hearing request, unless the other party agrees otherwise.

***Resolution Meeting.*** If you or the district files a due process hearing request, the district must arrange a meeting with you, the relevant members of the IEP team who have specific knowledge of the facts involved in your hearing request, and a representative of the district who has decision-making authority. If you filed the due process hearing request, this meeting must occur within 15 days of the District's receipt of this request. The resolution period for either party must be completed within 30 days from when the due process hearing request was provided. The district may not have its attorney at this meeting unless you bring an attorney. The meeting is for you to discuss the hearing request so that the district may have an opportunity to resolve the issue. The district does not have to convene this meeting if you and the district agree in writing to waive the resolution meeting or if both parties agree to go to mediation. If the parties agree to waive the resolution meeting or agree to mediation, the parties must notify the ALJ.

If you and the district resolve the issues raised in the due process hearing request, you and the district must execute a legally binding agreement that is signed by you and an authorized representative of the district, and is enforceable in any state court of competent jurisdiction or in a district court of the United States. Either you or the district may cancel this agreement within three days. If some or all the issues have been resolved, the ALJ should be notified.

If all the issues have not been resolved within 30 days from when the due process hearing request was provided to the other party, the due process hearing may occur and all timelines for conducting the hearing begin.

***Administrative Law Judge (ALJ).*** The hearing itself will be conducted by a qualified independent ALJ, who is employed by the Office of Administrative Hearings (OAH). The hearing cannot be conducted (1) by a person who is an employee of a state agency or district that is involved in the education or care of the child or (2) by any person having a personal or professional interest that would conflict with his or her objectivity in the hearing. ALJs must have the knowledge and ability to:

- understand the federal and state special education laws;
- conduct hearings according to appropriate, standard legal practice; and
- make and write decisions according to appropriate, standard legal practice.

An ALJ who is otherwise qualified to conduct a hearing is not considered an employee of OSPI solely because OSPI contracts with OAH. Each district has a list of the ALJs, including a statement of their qualifications which can be provided to you, upon request.

In general, an ALJ's decision must be made on substantive grounds based on a determination of whether or not your child received a FAPE. In order to determine that procedural violations resulted in the denial of a FAPE to your child, an ALJ must find that the violations:

- impeded your child's right to a FAPE;
- significantly impeded your opportunity to participate in the decision making process regarding the provision of a FAPE to your child; or
- caused a deprivation of educational benefits.

Even if an ALJ does not find a violation of a FAPE, the ALJ may still order a district to comply with procedural requirements.

### **Due Process Hearing Rights**

Any party to a due process hearing, including an expedited discipline hearing, has the following rights:

- Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of special education students.
- Present evidence and confront, cross-examine, and compel the attendance of witnesses.
- Prohibit the introduction at the hearing of any evidence that was not disclosed to that party at least five business days before the hearing (or two business days if the hearing is expedited because the request involves a discipline issue). Obtain a written, or at the parents' option, electronic verbatim record of the hearing.
- Obtain a written, or at the parents' option, electronic findings of fact and decisions.
- You have the right to have your child present at the hearing and to open the hearing to the public.

Parties 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 at least five business days before the hearing (or for an expedited discipline hearing, two business days) or be barred by the ALJ.

The record of the hearing, the findings of fact, and the decision are provided at no cost to either party.

OAH will inform you of any free or low-cost legal and other relevant services available in your area and a copy of this notice of procedural safeguards booklet. OAH will also inform you of the availability of mediation.

Each hearing will be conducted at a time and place that is reasonably convenient to you and your child. A final hearing decision must be reached and mailed to the parties not

later than 45 days after receiving a request for a hearing unless the ALJ grants an extension at the request of either party.

After deleting any personally identifiable information, OSPI is required to transmit the findings and decisions to the Washington State Special Education Advisory Council (SEAC) and make them available to the public.

### **Child's Status During Proceeding**

Except as explained in the discipline section, during the pendency of any administrative or judicial proceeding regarding a complaint, unless you and the district agree otherwise, your child must remain in his or her present educational placement. If the hearing involves an application for initial admission to public school, and if you consent, your child must be placed in the public school program until the completion of all the proceedings. If the ALJ agrees with you that a change of placement is appropriate, that placement must be treated as an agreement between the parties for where your child will be placed during any subsequent appeals.

The decision made in a due process hearing is final, unless a party to the hearing appeals the decision under the procedures described below under "Civil Action."

### **Civil Action**

Any party aggrieved by the findings and conclusions made in a due process hearing decision has the right to bring a civil action in state or federal court without regard to the amount in controversy within 90 days of the date the final decision is mailed to the parties. In any appeal, the court will have the records of the hearing, will hear additional evidence, if requested, and based on a preponderance of the evidence, will order what it considers to be appropriate relief.

Nothing in the IDEA limits the rights, procedures, and remedies available under the United States Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973, or other federal laws protecting the rights of students with disabilities. Before filing a civil action under these laws that also seek relief available under section 615 of the IDEA, the due process hearing procedures described earlier must be exhausted to the same extent as would be required had the action been brought under section 615 of the IDEA.

### **Award of Attorneys' Fees**

In any action or proceeding brought under the IDEA, a federal or state court, in its discretion, may award reasonable attorneys' fees to a parent who is a prevailing party. Attorney fees may be awarded to a state educational agency or a district 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. Attorney fees may be awarded against the attorney of a parent or the parent themselves if the parent's complaint 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.

***Determination of the amount of attorneys' fees.*** Attorneys' fees awarded 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 fees awarded.

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under the IDEA for services performed after the time of a written offer of settlement to a parent if:

- 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 ten calendar days before the proceeding begins;
- the offer is not accepted within ten calendar days; and
- 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.

However, 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.

Attorneys' fees may not be awarded relating to any IEP team meeting unless the meeting resulted from an administrative proceeding or judicial action. A resolution meeting is not a meeting convened as a result of an administrative hearing or judicial action or an administrative hearing or judicial action.

Unless it finds that the district unreasonably delayed final resolution, the court may reduce the parent's attorneys' fees award if it finds that:

- The parent, or the parent's attorney during the course of the action or proceeding unreasonably protracted the final resolution of the controversy.
- The amount of the attorneys' fees unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience.
- The time spent and legal services furnished are considered excessive.
- The attorney representing the parent did not provide to the district the appropriate information in the hearing request notice.

## **Suspension and Expulsion Rules For All Students**

When a district suspends or expels your child, it must make sure that the removal is consistent with Washington state laws and regulations governing discipline for all students. Washington State discipline regulations are located at chapter 180-40 WAC. The regulations address discipline, suspension, and expulsion for all public education students. Districts must have policies and procedures that describe various types of misconduct and address penalties imposed for the misconduct. The district's procedures must also describe how you may challenge its determination to discipline your child under these provisions. Discipline must be consistent with the district policies

and procedures. Except for emergencies, districts generally may not suspend or expel any student unless they have tried other forms of corrective action that would modify the student's behavior.

A *suspension* is a removal from a single subject, class period, or full schedule of classes for a **definite** period of time. **Removal for more than a single class period or subject area is a suspension.** An *expulsion* is a removal from any single subject, class period, or full schedule of classes for an **indefinite** period of time.

If the district initiates disciplinary procedures applicable to all children, the district shall ensure that the special education and disciplinary records of your child are transmitted for consideration by the person or persons making the final determination regarding the disciplinary action.

Be sure you are aware of any timelines for contesting a district's determination regarding discipline under general education procedures as well as any timelines you may have for a due process hearing addressing discipline procedures under special education regulations.

### **General Information About Disciplinary Removals Under IDEA**

**Case-by-case determination.** School personnel may consider any unique circumstances on a case-by-case basis when deciding to order a change in placement because your child has violated a student code of conduct.

**No change in placement.** School authorities may remove your child from his or her current educational placement up to ten school days without changing the placement of your child.

**Change in placement.** A change in placement occurs any time the removal exceeds ten school days.

**Special education services during a disciplinary removal.** After your child has been removed for ten school days in a school year, the school must provide services that will allow your child to appropriately progress in the general curriculum and appropriately advance toward achieving the goals in your child's IEP. School personnel need to consult with the special education teacher to make the decision regarding the level of services needed.

### **Removals for Drug, Weapon, or Serious Bodily Injury Violations**

**Removal for up to 45 school days.** School personnel may remove your child from his or her current educational placement and place him or her in an interim alternative educational setting for the same amount of time that a student who is not eligible for special education services would be subject to discipline, but not for more than 45 school days, without regard to whether the behavior is determined to be a manifestation of your child's disability, if your child:

- possesses or carries a weapon to school, on school premises, or to a school function;
- 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; or
- has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function.

A weapon means a weapon, device, instrument, material, or substance, animate or inanimate, that is used for, or is readily capable of, causing death or serious bodily injury, except that such term does not include a pocket knife with a blade of less than two and one-half inches in length.

Illegal drugs means a controlled substance but does not include a 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.

Serious bodily injury means a bodily injury that involves: a substantial risk of death; extreme physical pain; protracted and obvious disfigurement; or protracted loss or impairment of the function of a bodily member, organ or faculty.

***Interim alternative educational settings.*** The IEP team, which includes the parent, determines the interim alternative educational setting when a student's placement is changed through discipline, including removals because of drug, weapon, or substantial bodily injury violations.

Any interim alternative educational setting must allow your child to continue to progress in the general curriculum and receive services and modifications, including those in the current IEP, that will allow your child to meet the goals set out in that IEP. In addition, your child must receive a functional behavioral assessment, behavioral intervention services and modifications designed to address his or her behavior.

***Court intervention.*** In addition to the administrative hearing process for removing your child, school personnel may request an injunction from the courts.

***When the student is incarcerated.*** An IEP team of a special education student convicted as an adult and receiving services under chapter 28A.193 RCW may modify the student's IEP if there is a demonstrated bona fide security or compelling penological interest that cannot otherwise be accommodated.

## **Manifestation Determination Process**

***Parent notice.*** Any time a school considers a discipline removal that constitutes a change of placement, the district must notify you not later than the date on which the decision to take the action is made and provide you with your procedural safeguards.

**Manifestation determination review.** Within ten school days of any decision to change your child's placement through a disciplinary removal, the district must meet with you and relevant members of the IEP team that you and the district determine are relevant. At this meeting the group must review all relevant information in your child's file, including your child's IEP, teacher observations, and relevant information that you provide.

The review team must answer the following questions:

1. Was the behavior in question caused by or did it have a direct and substantial relationship to your child's disability?
2. Was the behavior in question the direct result of the district's failure to implement your child's IEP?

If you, the district, and relevant members of the IEP team determine that the answer to either of these 2 questions is yes, then the behavior in question shall be determined to be a manifestation of your child's disability.

**Manifestation determination.** If the behavior in question was a manifestation of your child's disability, the IEP team must:

- conduct a functional behavioral assessment and implement a behavioral intervention plan for your child; or
- if a behavioral intervention plan has been developed, review the existing plan and modify it as necessary to address the behavior; and
- your child is returned to the placement from which he or she was removed unless you and the district agree otherwise.

**No manifestation of a disability.** If your child is removed from his or her placement for behavior that is not a manifestation of your child's disability, educational services must be provided to the extent necessary to enable your child to appropriately progress in the general education curriculum and advance toward achieving the goals in the IEP although in a different setting. The IEP team determines what educational services are necessary while your child is subject to the removal for discipline.

## Appeals Regarding Discipline and Behavior

**In General.** You have the right to ask for a hearing if you disagree with any disciplinary placement decisions or if you disagree with a determination that your child's behavior was not a manifestation of your child's disability. The district may also request a hearing if it believes that maintaining the current placement is substantially likely to result in injury to your child or to others. When a hearing is requested your child will remain in the interim alternative educational setting pending the ALJ decision, or until the expiration of the disciplinary time period, whichever comes first, unless you and the district agree otherwise.

**ALJ authority.** An ALJ shall hear and make a determination regarding disciplinary placement decisions and manifestation determinations. The ALJ may order a change in your child's placement. The ALJ may return your child to the placement from which he

or she was removed or order a change in placement to an appropriate interim alternative educational setting (IAES) for not more that 45 school days. When the district requests a hearing because it believes that maintaining the current placement is substantially likely to result in injury to your child or to others, the ALJ can remove your child to an IAES, but not for more than 45 school days.

***Expedited Discipline Hearing.*** When a due process hearing request involves disciplinary matters, the due process hearing is expedited. The hearing must occur within 20 school days from the date the due process hearing request is provided to the other party and a copy of the notice is sent to OSPI, Administrative Resource Services. The ALJ must issue a final decision within 10 school days after the hearing. You may refer to the *Procedures and Timelines for Due Process Hearings Under IDEA 2004* instructions for more information about these timelines.

### **Protections for Students Not Yet Eligible for Special Education Services**

Parents may also challenge disciplinary actions for any violation of a rule or code of conduct of the district, including drugs, weapons, or seriously bodily injury, on behalf of their children who are not yet determined eligible for special education if the district had knowledge that the child had a disability. A district is deemed to have had knowledge that a child is a child with a disability and the discipline procedures apply if, before the behavior that precipitated the disciplinary action occurred:

- the parent has expressed concern in writing to supervisory or administrative personnel or a teacher that the child is in need of special education and related services;
- the parent of the child has requested an evaluation of the child; or
- the teacher of the child, or other district personnel expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of the district or to other supervisory personnel of the district.

The district will not be deemed to have knowledge the child is a child with a disability if: the parent has not allowed an evaluation or has refused services; a district has already evaluated the child and determined that the child is not in need of special education services; or the district determined that it does not need to evaluate the student and the district has given written notice to the parents.

If the district does not have knowledge that a child is a child with a disability (as described above) prior to taking disciplinary measures against the child, the child may be subjected to the same disciplinary measures as applied to children without disabilities who engaged in comparable behaviors. If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures, the evaluation must be conducted in an expedited manner. If the child is determined to be eligible, the district shall provide special education and related services. However, pending the completion of the evaluation, the child will remain in the educational placement determined by school authorities.

## Educational Records

Educational records are those records that are directly related to your child. The definition of “educational records” may be found under 34 CFR Part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974 [FERPA]).

Districts shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages. The district must designate a person who is responsible for ensuring the confidentiality of any personally identifiable information. All persons collecting or using personally identifiable information must receive training or instruction regarding confidentiality procedures in state law and 34 CFR Part 99 (FERPA).

**Access to Your Child’s Records:** Both FERPA and IDEA permit access to your child’s educational records. Your district has written policies about school records. This policy is published and available to parents upon request.

You have the right to inspect and review all of your child’s education records:

- Without unnecessary delay.
- Before any meeting about your child's IEP.
- Before any due process hearing related to your child; and,
- In any other situation, within 45 calendar days of your request.

Your right to inspect and review education records under this section includes the right to:

- A response from the district to reasonable requests for explanation and interpretation of the records.
- Have your representative inspect and review the records.
- Request copies of the records containing the information if failure to provide those copies would effectively prevent you from exercising your right to inspect and review the records.

The district will presume that you have authority to inspect and review records relating to your child unless it has been advised that you do not have the authority under applicable state law governing such matters as guardianship, dependency, and divorce.

If any education record includes information on more than one child, you have the right to inspect and review only the information relating to your child or to be informed of that specific information.

When you request it, the district must provide you a list of the types and locations of education records collected, maintained, or used by the district.

**Fees:** The district may not charge a fee to search for or to retrieve information for parents. However, it may charge a fee for copies of records that are made for parents if

the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

**Record of Access:** The district must keep a record of the people accessing education records collected, maintained, or used (except access by parents and authorized employees of the district), including the name of the person accessing the records, the date access was given, and the purpose for which the person is authorized to use the records.

**Amendment of Records at Parent Request:** If you believe that information collected in your child's education record is inaccurate, misleading, or violates the privacy or other rights of your child, you may ask the district to amend the information.

Within a reasonable period of time after receiving your request, the district must decide whether to amend the information. If the district decides to refuse to amend the information as you requested, it must inform you of its refusal and of your right to a hearing.

If you request a hearing, the district must provide you with an opportunity for a hearing to challenge information in your child's educational record. The hearing is conducted according to district procedures.

If, as a result of the hearing, the district decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of your child, it must amend the information accordingly and inform you of that action in writing.

If the district decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it must inform you that you have the right to place a statement in your child's educational record. The statement may comment on the information or give the reasons for disagreeing with the district's decision not to amend the record.

Any explanation placed in your child's educational record under this section must (1) be maintained by the district as part of the records of your child as long as the record or contested portion is maintained by the district and (2) if the record of the child or the contested portion is disclosed by the district to any party, the explanation must also be disclosed to that party.

**Consent to Disclose Records:** Written consent is required by you before releasing educational records, unless the release is allowed under the rules implementing FERPA and IDEA.

Some examples of when parental consent is not required include:

- When the disclosure is to other school officials, including teachers, within the district, whom the district has determined have legitimate educational interests.
- To officials of another school district or institution of postsecondary education where your child plans to enroll.

- When a court order or a subpoena requires that the district provide the information.
- When OSPI or the US Department of Education needs to review the information as part of monitoring or as part of a complaint.

Personally identifiable information is the following: the name of the child, the child's parent, or other family member; the address of the child; a personal identifier, such as the child's social security number; or a list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

***Destruction of Information:*** Destruction means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

Each district must inform parents (and adult students) when personally identifiable information collected and maintained is no longer needed to provide educational services to the student. The information will be destroyed at the request of the parent.

However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed and year completed may be maintained without time limitation.

***Transmittal of Disciplinary Records:*** Washington law (RCW 28A.225.330) permits a district where a student enrolls to ask the parent about whether the student has (1) any history of placement in special educational programs; (2) any past, current, or pending disciplinary action; or (3) any history of violent behavior or behavior listed in RCW 13.04.155. In addition, the law allows the school enrolling the student to request the school the student previously attended to send the student's permanent record, including records of disciplinary action and academic performance which would include the student's IEP.

## **Special Education Citizen Complaints**

If you (or any individual or organization) believe the district, OSPI, or any other educational entity governed by the IDEA has violated Part B of IDEA, its implementing regulations, or corresponding state law or regulation, you may file a written complaint with the Office of Superintendent of Public Instruction, Special Education Operations, PO Box 47200, Olympia, WA 98504-7200.

The complaint must be signed and include the following information:

- a statement that a public agency has violated a requirement of Part B of IDEA, its implementing regulations, or corresponding state law or regulation;
- the name of the district you believe has violated the law (if the complaint is about an agency other than the district, include the name and address);
- A description of the problem with specific facts; and
- Your name, address, and telephone number.

OSPI has developed an optional form that you may use to file a complaint. This form is available on OSPI's webpage at:

[http://www.k12.wa.us/SpecialEd/pubdocs/Citizen\\_Complaint\\_Request\\_Form.pdf](http://www.k12.wa.us/SpecialEd/pubdocs/Citizen_Complaint_Request_Form.pdf).

The violation must not have occurred more than one year prior to the date that the complaint is received unless a longer period is reasonable because the violation is continuing, or you are asking for compensatory services for a violation that occurred not more than three years prior to the date the complaint is received.

If you file a signed, written complaint of this type, OSPI must investigate and send a written decision within 60 calendar days unless an extension of time is warranted. During the 60 days, OSPI (1) may carry out an independent on-site investigation, if OSPI determines it is necessary; (2) requires the district or other agency to provide a response to your complaint; (3) gives the complainant the opportunity to submit additional information, about the allegations in the complaint; and (4) reviews all relevant information and makes an independent determination as to whether the district or other agency is violating a requirement of Part B of IDEA, its implementing regulations, or corresponding state law.

A written decision is sent to the person filing the complaint. The written decision will address each allegation. For each allegation the written decision will state findings of fact, conclusions, and any reasonable corrective measures deemed necessary to resolve the complaint (see section 392-172-329 WAC).

If a written complaint is received that is also the subject of a due process hearing or contains multiple issues, of which one or more are part of the hearing, OSPI must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action must be resolved using the time limit and procedures described above. If an issue raised in a complaint has been previously decided in (not dismissed from) a due process hearing involving the same parties, (1) the hearing decision is binding and (2) OSPI must inform the complainant to that effect. A complaint alleging a district's failure to implement a due process decision must be resolved by OSPI.

Other sources of information about the complaint investigation process is available in written format in the Washington State special education regulations (chapter 392-172 WAC) from OSPI Special Education Operations or in the OSPI Special Education publication *Family/Educator Guide*. You may access the Family/Educator Guide by linking to:

[http://www.k12.wa.us/SpecialEd/pubdocs/family\\_educator\\_guide/family\\_educator\\_guide\\_2002.doc](http://www.k12.wa.us/SpecialEd/pubdocs/family_educator_guide/family_educator_guide_2002.doc).

Additional information about the complaint investigation process may be obtained in training sessions on legal issues and through direct inquiries to OSPI Special Education Operations.

## Resources

These publicly funded organizations may provide additional information about special education services in Washington State:

### **Washington PAVE**

6316 So. 12th St.

Tacoma, WA 98465

(253) 565-2266 (v/tty)

1-800-5-PARENT (v/tty)

Fax: (253) 566-8052

E-mail: [wapave9@washingtonpave.com](mailto:wapave9@washingtonpave.com)

### **Washington Protection and Advocacy System**

315 5<sup>th</sup> Ave. S. #850

Seattle, WA 98104

(206) 324-1521 or (800) 562-2702

TDD: (800) 905-0209

[wpas@wpas-rights.org](mailto:wpas@wpas-rights.org)

### **Washington State Parent to Parent Support Programs**

(800) 821-5927

2600 Martin Way E. Suite D

Olympia, WA 98506

[Statep2p@earthlink.net](mailto:Statep2p@earthlink.net)