

XIII. Procedural Safeguards

Procedural Safeguards Opportunity to Examine Records

What the Federal Regs. Say ...

The parents of a child with a disability must be afforded ... an opportunity to inspect and review all education records with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. Sec. 300.501(a).

Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to Sec. 300.507 or Secs. 300.530 through 300.532, or resolution session pursuant to Sec. 300.510, and in no case more than 45 days after the request has been made. Sec. 300.613(a).

The right to inspect and review education records under this section includes (1) the right to a response from the participating agency to reasonable requests for explanations and interpretations of the records; (2) the right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and (3) the right to have a representative of the parent inspect and review the records. Sec. 300.613(b).

An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not

have the authority under applicable State law governing such matters as guardianship, separation, and divorce. Sec. 300.613(c).

What the Regulations Mean ...

Parents may see all of their child's educational records relating to identification, evaluation, placement, and provision of FAPE. This right would broadly encompass most everything, including behavior reports and notes that were kept and shared with others.

Teachers do not need to show classroom notes to parents so long as the teacher never shares the record with anyone else, including other teachers. If the teacher shares the record with others, then parents also have the right to read it. When requested, the school must tell parents where all of their child's records are located.

Schools do not have to provide immediate access. They have up to 45 days, unless the request is made prior to an IEP Team meeting or due process hearing.

What Parents Should Know ...

The right to "inspect and review" does not necessarily mean the right to "receive a copy." The school may charge a reasonable fee for copies. Parents may ask the school to waive the fees for copies if the parent cannot afford the pay for them. Schools should keep the child's confidential records in a locked file. A child's records may be located in more than one location. Parents should look at their child's records to see if everything is in order. Parents can ask to have records explained and have the right to ask the school to remove information from the file if the parent thinks it is wrong.

Procedural Safeguards Parent Participation in Meetings

What the Federal Regs. Say ...

The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. Sec. 300.501(b)(1).

Each public agency must provide notice consistent with Sec. 300.322(a)(1) and (b)(1) to ensure that parents of children with disabilities have the opportunity to participate in meetings described in paragraph (b)(1)... Sec. 300.501(b)(2).

A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting. Sec. 300.501(b)(3).

What the Regulations Mean ...

Parents do not have the right to attend informal meetings and IEP preparatory meetings conducted by school personnel. Such meetings are not considered "official" meetings under IDEA. Parents DO have the right to participate in all meetings related to the identification, evaluation, placement, and provision of a free appropriate public education of their child.

What Parents Should Know ...

Formal decisions regarding a child's special education program cannot be made during an informal meeting amongst school personnel. School personnel may meet prior to an IEP Team meeting to discuss the services or placement to be proposed. School personnel may also meet without the parent present to develop a draft IEP, so long as it is clear that the document is only a draft — a starting point for IEP discussions.

If schools do develop a draft IEP prior to the meeting, it is best practice for the school to send it to the parents to review before the meeting. Parents should be informed that what they have been sent is a "draft" open to discussion and changes at the IEP Team meeting.



TIP - If school personnel meet to develop a draft IEP with the intent of presenting it to parents as a finished document to approve, the district has essentially held the IEP Team meeting without parent participation in violation of IDEA. No changes can legally be made to the IEP unless they are made at an IEP Team meeting where the parent is invited to participate or with parent participation through amendment (See Section VI).

Procedural Safeguards Parent Participation in Placement Decisions

What the Federal Regs. Say ...

Each public agency shall ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child. Sec. 300.501(c)(1).

If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency shall use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing. Sec. 300.501(c)(3).

A placement decision may be made by a group without the involvement of a parent, if the public agency is unable to obtain the parents' participation in the decision. In this case, the public agency must have a record of its attempt to ensure their involvement. Sec. 300.501(c)(4).

The public agency must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English. Sec. 300.322(e).

What the Regulations Mean ...

Schools must ensure that parents attend meetings where decisions will be made regarding placement of their child. If parents cannot attend, schools must take

other steps to ensure parental participation. The only times a school may make placement decisions without parental participation are when parents refuse to participate or when parents cannot be located.



What Parents Should Know ...

Schools must notify parents of IEP Team meetings early enough to ensure that they have an opportunity to attend. Schools must schedule meetings at a mutually agreed on time and place. If parents refuse to attend or otherwise participate in meetings, schools can make placement and other decisions without parental involvement.

If parents will need an interpreter at an IEP Team meeting, they should inform the school in advance to allow the school time to make arrangements.

If parents disagree with the placement proposed by the school (or the school refuses to place the child in the setting the parents propose), they can contest the placement through a due process hearing.

Procedural Safeguards Independent Educational Evaluation (IEE)

What the Federal Regs. Say ...

The parents of a child with a disability have the right under this part to obtain an independent educational evaluation (IEE) of the child.... Each public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations.... "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and "public expense" means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent. Sec. 300.502(a).

Parent right to evaluation at public expense

- A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.... If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either file for a due process hearing to show that its evaluation is appropriate; or ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing ... that the evaluation obtained by the parent did not meet agency criteria. If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educa-

tional evaluation, but not at public expense. If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation. A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees. Sec. 300.502(b).

Parent-initiated evaluations - If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and may be presented by any party as evidence at a hearing on a due process complaint ... regarding that child. Sec. 300.502(c).

Requests for evaluation by hearing officers

- If a hearing officer requests an independent educational evaluation as part of a hearing on a due process complaint, the cost of the evaluation must be at public expense. Sec. 300.502(d).

Agency Criteria - If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation to the extent those criteria are consistent with the parent's right to an independent educational evaluation. Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or

Procedural Safeguards Independent Educational Evaluation (IEE) (cont.)

timelines related to obtaining an independent educational evaluation at public expense. Sec. 300.502(e).

What the Regulations Mean ...

While the regulation refers to a parental "*request*" for an Independent Educational Evaluation (IEE), the IEE is a *right*, not a request that can be denied by the school. The right to an IEE can be invoked only if parents disagree with one or more evaluations completed by or on behalf of the school. If parents inform a school of their intent to have an IEE completed, or if parents have an IEE conducted without informing the school ahead of time, at that point the school's only options are to pay for the evaluation(s) or initiate a due process hearing to attempt to show that the school's evaluation was appropriate (and to do one or the other without "unnecessary delay"). A school can also initiate a hearing to demonstrate the IEE the parents obtained did not meet school criteria.

Parents are entitled to only **one** independent evaluation in the area(s) in which they disagree with a school's evaluation. For example, if a school conducted intelligence, achievement, physical therapy, and speech therapy evaluations, the parent could have one independent evaluation completed at school expense in each area if the parent disagreed with each evaluation conducted by the school. If the parent then disagrees with the results of the IEE, the parent cannot have further IEEs done at school expense. The right to an IEE comes back into play whenever the school has a new evaluation conducted (so long as the parent disagrees with that evaluation).

What Parents Should Know ...

The school can set criteria for an IEE, such as location and examiner qualifications. However, the criteria must be flexible enough to allow for individual circumstances. Otherwise, schools could set the criteria to be so restrictive as to effectively eliminate a parent's right to an IEE.

Parents may disagree with an evaluation conducted by the school for any of several reasons:

- Disagreement with the results or findings of the evaluation;
- Disagreement with the evaluation instrument used;
- Disagreement with the qualifications of the evaluator; or
- The school's refusal to evaluate in an area of concern.

Parents always have the right to have independent evaluations conducted at their own expense. Any such evaluations shared with the IEP Team must be considered in developing the child's IEP, so long as the evaluation meets the school's criteria.

Parents do not have to inform the school ahead of time that they are having an IEE conducted. They can simply submit the bill to the school for payment. However, because parents will want to make sure the independent evaluation meets school criteria, in most situations it is best practice for parents to inform the school they are exercising their right to the IEE. When parents inform the school, the school must provide the parents information on where an IEE can be obtained and the school criteria, if any.

While the school may ask parents why they disagree with the school's evaluation, parents do not have to provide their reason(s).

Procedural Safeguards Prior Notice by Public Agency

What the Federal Regs. Say ...

Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency: proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child. Sec. 300.503(a).

What the Regulations Mean ...

Parents must be provided detailed written notice whenever the school proposes to initiate or change the identification (determining eligibility, categorizing) of a child, an evaluation, the child's placement, or the services in the IEP. Similarly, if a school denies a parent's request, it must do so in writing.

What Parents Should Know ...

Parents should insist that schools provide them with prior **written** notice when a school proposes to begin or change, or refuses a parent's request to begin or change, the identification, evaluation, placement, or provision of FAPE, if the school has not already done so. While the provision of written notice is legally required, sometimes schools need prodding to comply.

If a school refuses to provide prior written notice to a parent when legally required to do so, parents may wish to address this violation through the State Complaint process or through a due process hearing.

In
South Dakota ...

Prior notice - Written notice which meets the requirements of §24:05:30:05 must be given to parents five days before the district proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child. The five-day notice requirement may be waived by the parents. ARSD 24:05:30:04.

South Dakota has thus defined a "reasonable time" as five calendar days. This means that at the end of an IEP Team meeting, or shortly thereafter, or following a decision by a district that did not occur at an IEP Team meeting, the district must provide parents with written notice describing what the district proposed or refused. Parents then have five calendar days from receipt of the notice (with the day of receipt counting as the first day) to consider the proposal or refusal. The district will implement the changes on the sixth day. Parents have the right to waive the five-day notice so that changes can begin sooner. (*See p. 180*).

TIP - Remember, parents are supposed to receive a prior written notice for **ANY** action involving their child, not only meetings.

**Procedural Safeguards
Content of Prior Notice**

What the Federal Regs. Say ...

The notice required under paragraph (a) of this section must include: a description of the action proposed or refused by the agency; an explanation of why the agency proposes or refuses to take the action; a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; a statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; sources for parents to contact to obtain assistance in understanding the provisions of this part; a description of other options that the IEP Team considered and the reasons why those options were rejected; and a description of other factors that are relevant to the agency's proposal or refusal. Sec. 300.503(b).

Notice in understandable language - The notice required under paragraph (a) of this section must be: Written in language understandable to the general public; and provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. If the native language or other mode of communication of the parent is not a written language, the public agency must take steps to ensure: that the notice is translated orally or by other means to the parent in his or her native language or other mode of communication; that the parent understands the content of the notice; and that

there is written evidence that the requirements in ... this section have been met. Sec. 300.503(c).

What the Regulations Mean ...

IDEA requires that parents be provided with very detailed written notice whenever a school proposes or refuses an action. For example, if parents requested a specific service and the school refused, the school must provide written notice detailing the basis for its refusal.

If a school refuses or fails to provide parents with prior written notice that contains all the detail required in the regulation, the school is in violation of IDEA and parents may wish to address such procedural violations through the State Complaint process.

What Parents Should Know ...

When parents receive written notice, it must be in language understandable to the general public. If parents communicate in other than English or not in written language, schools must take steps to translate and make sure parents understand the content.

In
South Dakota ...

The three sources listed on the State Special Education Programs office website for parents to contact to obtain assistance in understanding their rights are:

Special Education Programs (SEA)
(773-3678);

South Dakota Parent Connection
(361-3171 or 1-800-640-4553); and

Disability Rights South Dakota
(224-8294 or 1-800-658-4782).

Procedural Safeguards When Procedural Safeguards Notice is Given

What the Federal Regs. Say ...

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only one time a school year, except that a copy shall also be given to the parents: upon initial referral or parent request for evaluation; upon receipt of the first State complaint under Secs. 300.151 through 300.153 and upon receipt of the first due process complaint under Sec. 300.507 in a school year; in accordance with the discipline procedures in Sec. 300.530(h); and upon request by a parent. Sec. 300.504(a).

Internet Web site - A public agency may place a current copy of the procedural safeguards notice on its Web site if a Web site exists. Sec. 300.504(b).

Notice in Understandable language - The notice required under paragraph (a) of this section must meet the requirements of Sec. 503(c). Sec. 300.504(d).



What the Regulations Mean ...

Schools must provide parents a copy of their procedural safeguards at least once a year. It is the school's responsibility to ensure the parents understand the contents of the procedural safeguards if written English is not their native language or mode of communication.



What Parents Should Know ...

Parents must be provided a copy of the school's procedural safeguards whenever they request a copy. Parents should carefully study the procedural safeguards document so that they become familiar with their procedural rights under IDEA. If they have questions about their rights, parents should contact their school, South Dakota Parent Connection, Disability Rights South Dakota, or the State Special Education Programs office for answers.

The procedural safeguards must be provided in the parents' native language or other mode of communication. If parents' native language or mode of communication is not a written language, the school must make sure the procedural safeguards are translated, which may require reading them to the parents, and make sure the parents understand the content.

**Procedural Safeguards
Contents of Procedural
Safeguards Notice**

What the Federal Regs. Say ...

The procedural safeguards notice must include a full explanation of all of the procedural safeguards available under Sec. 300.148, Secs. 300.151 through 300.153, Sec. 300.300, Secs. 300.502 through 300.503, Secs. 300.505 through 300.518, Sec. 300.520, Secs. 300.530 through 300.536, and Secs. 300.610 through 300.625 relating to:

- Independent educational evaluations;
- Prior written notice;
- Parental consent;
- Access to education records;
- Opportunity to present and resolve complaints through the due process complaint and State complaint procedures, including the time period in which to file a complaint; the opportunity for the agency to resolve the complaint; and the difference between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures;
- The availability of mediation;
- The child's placement during the pendency of any due process complaint;
- Procedures for students who are subject to placement in an interim alternative educational setting;

- Requirements for unilateral placement by parents of children in private schools at public expense;
 - Hearings on due process complaints, including requirements for disclosure of evaluation results and recommendations;
 - State-level appeals (if applicable in the State);
 - Civil actions, including the time period in which to file those actions; and
 - Attorneys' fees.
- Sec. 300.504(c).

What the Regulations Mean ...

The notice (listing) of procedural safeguards parents receive must thoroughly describe all the items listed in the regulation. It must be in language understandable to the general public.



What Parents Should Know ...

Parents should carefully read the listing of procedural safeguards provided by the school, and re-read it as needed until reaching the point of understanding. If parents have questions, in addition to asking school personnel, parents may contact South Dakota Parent Connection, Disability Rights South Dakota, or the State Special Education Programs office.

Procedural Safeguards Definitions of Consent / Personally Identifiable

What the Federal Regs. Say ...

"Consent" means that: the parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication; the parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and the parent understands that the granting of consent is voluntary on the part of the parent, and may be revoked at any time. If a parent revokes consent, that revocation is not retroactive (*i.e.*, it does not negate an action that has occurred after the consent was given and before the consent was revoked.) Sec. 300.9.

"Personally identifiable" means information that contains: 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 student number; or a list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty. Sec. 300.32.

What the Regulations Mean ...

Parental consent must be in writing and can be given only after being fully informed about why consent is sought and what will occur as a result of providing consent. Parents have the right to change their mind regarding their consent at any time, but revoking consent does

not change any decisions or actions already made between signing and revoking consent.

Personally identifiable information cannot be released without a parent's consent. Personally identifiable information is that where one could identify the child based on the content of the records.

What Parents Should Know ...

Parents should fully understand what it is they are agreeing to before giving their consent. If parents do not understand something, they should ask questions.

Parental consent is granted in writing so a record of it is created. Consent can be granted through a letter signed by the parents, or through signing a consent form provided by the school. Information regarding the consent should be provided in the parents' native language or other form of communication.

Consent to release records must include the names of the parties who may receive the records.

The timeline for completing evaluations does not begin until parents provide consent.



TIP - Parents should always keep a copy of consent documents in case they need to prove consent was provided.

Procedural Safeguards

Parental Consent/ Refusal to Consent

What the Federal Regs. Say ...

The public agency proposing to conduct an **initial evaluation** to determine if a child qualifies as a child with a disability ... must, after providing notice..., obtain informed consent ... from the parent of the child before conducting the evaluation. Parental consent for initial evaluation must not be construed as consent for initial provision of special education and related services. Sec. 300.300(a)(1).

Refusal - If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for **initial evaluation**..., or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards ... [mediation and due process procedures], if appropriate, except to the extent inconsistent with State law relating to parental consent. Sec. 300.300(a)(3)(i).

Each public agency must obtain informed parental consent ... prior to conducting any **reevaluation** of a child with a disability. If the parent refuses to consent to the reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures.... Sec. 300.300(c)(1)(i), (ii).

The informed parental consent ... need not be obtained if the public agency can demonstrate that it made reasonable efforts to obtain such consent; and the child's parent has failed to respond. Sec. 300.300(c)(2).

A public agency may not use a parent's refusal to consent to one service or activity under paragraphs (a), (b), (c), or (d)(2) of this section to deny the parent or child any other service, benefit, or activity of the public agency, except as provided in this part. Sec. 300.300(d)(3).

To meet the reasonable efforts requirement ... the public agency must document its attempts to obtain parental consent using the procedures in Sec. 300.322(d). Sec. 300.300(d)(5).

Parental consent for services - A public agency that is responsible for making FAPE available to a child with a disability must obtain informed consent from the parent of the child before the **initial provision** of special education and related services to the child. Sec. 300.300(b)(1).

The public agency must make reasonable efforts to obtain informed consent from the parent for the initial provision of special education and related services to the child. Sec. 300.300(b)(2).

Refusal - If the parent of a child fails to respond to a request for, or refuses to consent to, the **initial provision of special education and related services**, the public agency: 1) May not use the procedures in subpart E of this part (including the mediation procedures under Sec. 300.506 or the due process procedures under Secs. 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child; 2) will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with the special education and related services for which the parent refuses to or fails to provide consent; and 3) is not required to convene an IEP Team meeting or develop an IEP under Secs. 300.320 and 300.324 for the child. Sec. 300.300(b)(3).

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Parental Consent / Refusal to Consent (cont.)

If, at any time **subsequent to the initial provision of special education and related services**, the parent of a child revokes consent in writing for the continued provision of special education and related services, the public agency: 1) May not continue to provide special education and related services to the child, but must provide prior written notice in accordance with Sec. 300.503 before ceasing the provision of special education and related services; 2) may not use the procedures in subpart E of this part (including the mediation procedures under Sec. 300.506 or the due process procedures under Secs. 300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child; 3) will not be considered to be in violation of the requirement to make FAPE available to the child because of the failure to provide the child with further special education and related services; and 4) is not required to convene an IEP Team meeting or develop an IEP under Secs. 300.320 and 300.324 for the child for further provision of special education and related services. Sec. 300.300(b)(4).



If the parent revokes consent in writing for their child's receipt of special education services after the child is initially provided special education and related services, the public agency is not required to amend the child's education records to remove any references to the child's receipt of special education and related services because of the revocation of consent. Sec. 300.9(c)(3).

What the Regulations Mean ...

Parental consent must be in writing and is required:

- Before an initial evaluation;
- Before any reevaluation; and
- Before a child begins receiving special education services for the first time.

Parental consent is also required to authorize release of records.

Consent means that the parent understands and agrees in writing to the carrying out of the activity for which consent is sought. Granting parental consent is voluntary and may be revoked at any time.

If a parent refuses to have his or her child evaluated, and the school believes the child should receive an initial evaluation or reevaluation, the school can file for a due process hearing to attempt to get a hearing officer to issue an order that the child be evaluated.

With reevaluations only, if a school has made attempts to contact a parent to get consent and the parent has failed to respond (*e.g.*, failed to call the school back, failed to respond to mail, etc.), the school may go ahead and conduct the reevaluations without the parent's consent.

If a parent refuses to consent to one service, the school cannot use that refusal to deny all services. For example, a school cannot condition continued services upon parents consenting to a reevaluation.

Once a child has received an initial evaluation and been determined eligible for services, par-

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Parental Consent / Refusal to Consent (cont.)

ents must provide written consent before the initial provision of special education services. If parents refuse consent for services, the process stops and the school has no further responsibility for offering an IEP and cannot take parents to a hearing to get a hearing officer to order services be provided.

Similarly, if a parent of a child who is already receiving special education services revokes consent for services, the school must provide prior written notice, cease providing services, and cannot use the due process procedures to attempt to get an agreement or ruling ordering services. The school's responsibility ends and it will not be in violation of IDEA for failing to serve the child. Parents must revoke consent in writing. When parents revoke consent for services, the school is not required to remove references in the child's records to the child's past receipt of special education services.

What Parents Should Know ...

The timeline for conducting evaluations does not begin until the school receives written consent, so it is important for parents to provide written consent to the school as soon as possible.

Schools typically may seek to have parents sign consent on a specific school form. Legally, signing on a school form is not required. A letter signed by the parents giving permission to conduct an evaluation or begin services should suffice.

If parents refuse to consent to an evaluation, the school may initiate a due process hearing to attempt to get a hearing officer to order that the child be evaluated.

If the school is seeking to conduct a re-evaluation and the parent does not want to consent to a reevaluation, the parent must affirmatively refuse. When a parent ignores mail or phone calls from the school regarding a reevaluation, the school is allowed to proceed with the reevaluation without consent.

If a parent signs his/her consent to the initial evaluation, another consent must be signed before a child may begin to receive services. Thus, following initial evaluations, if parents do not consent to services beginning, no services will be provided and schools cannot force such services to occur through the due process procedures.

Once a child is receiving special education services, parents may later revoke consent (withdraw from special education services), but must do so in writing. The school's responsibility ends unless or until the parents later seek special education services and the child is found to still have a qualifying disability (and provided the child is not over age 21 or has not graduated). The initial evaluation process would begin again.

When parents revoke consent for services for a child receiving special education services, they may request that the school remove records from the file referencing the child's past receipt of special education services, but the school is not required to remove such records.



Procedural Safeguards
Placement of Children by
Parents When FAPE IS at
Issue

What the Federal Regs. Say ...

This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. However, the public agency must include that child in the population whose needs are addressed consistent with Secs. 300.131 through 300.144. Sec. 300.148(a).

Disagreements about FAPE - Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures of Secs. 300.504 through 300.520. Sec. 300.148(b).

Reimbursement for private school placement - If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enroll-

ment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs. Sec. 300.148(c).

Limitation on reimbursement - The cost of reimbursement described in this section may be reduced or denied if:

1) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or at least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section; (Sec. 300.148(d)(1))

2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in Sec. 300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; (Sec. 300.148(d)(2)) or

Procedural Safeguards

Placement of Children by Parents When FAPE IS at Issue (cont.)

3) upon a judicial finding of unreasonableness with respect to actions taken by the parents. Sec. 300.148(d)(3).

Exception - Notwithstanding the notice requirements in paragraph (d)(1) of this section, the cost of reimbursement must not be reduced or denied for failure to provide the notice if:

1. The school prevented the parents from providing the notice;
2. The parents had not received notice, pursuant to Sec. 300.504, of the notice requirement in paragraph (d)(1) of this section; or
3. Compliance with paragraph (d)(1) of this section would likely result in physical harm to the child; and

may, in the discretion of the court or hearing officer, not be reduced or denied for failure to provide this notice if:

1. The parents are not literate or cannot write in English; or
2. Compliance with paragraph (d)(1) of this section would likely result in serious emotional harm to the child.

Sec. 300.300.148(e).

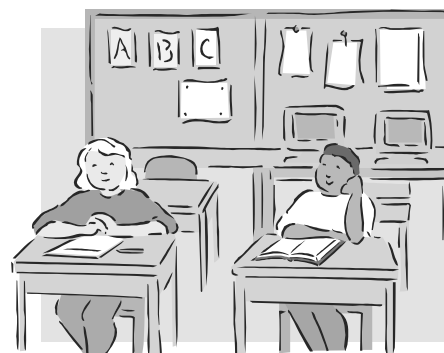
What the Regulations Mean ...

IDEA '97 codified previous United States Supreme Court and other federal court decisions to create these provisions. IDEA 2004 separated the exceptions into mandatory and discretionary exceptions.

If parents believe the public school is not providing FAPE to their child and place the child privately for services, a court or hearing officer can order the public school to reimburse the parents for the cost of the private program if the court or hearing officer: 1) finds the public school failed to offer or provide the child with a FAPE in a timely manner; and 2) determines the private placement to be appropriate.

In order to succeed in a claim for reimbursement, the law sets forth specific requirements parents must meet *prior* to placing their child privately. **The parent must give the public school notice, either at an IEP Team meeting or in writing at least 10 business days prior to removing the child, of their dissatisfaction with the proposed placement, their concerns, and their intent to place the child privately. Reimbursement may be reduced or denied if this notice is not given, unless a specific exception applies.**

Reimbursement may also be reduced or denied if, after receiving notice from the parents of their dissatisfaction with the school's proposed or the child's current placement and their intent to place their child privately, the public school provides the parents written notice of its intent to



Procedural Safeguards
Placement of Children by
Parents When FAPE IS at
Issue (cont.)

evaluate the child and the parents fail to make their child available for evaluation.

The law also provides that parents who are found to have acted unreasonably may have reimbursement reduced or denied.

There are exceptions to the notice requirement. Parents need not have given the public school notice prior to placing their child privately if: 1) the school somehow prevented the parents from giving notice (such as refusing to hold an IEP Team meeting or refusing to accept the parents' written notice); 2) the parents had not received notice of the notice requirement (such as if the school failed to give parents a copy of their procedural safeguards); or 3) continued placement would likely result in physical harm to the child ("likely" is not defined, but clearly a child who is suicidal or otherwise a threat to harm him/herself would qualify, as would a situation where the child is in danger from other students). Further, at a court's discretion, reimbursement may not be reduced or denied if: 1) the parent is illiterate and cannot write in English; or 2) continued placement would likely result in serious emotional harm to the child (again, "likely" is not defined, nor is "serious emotional harm").

What Parents Should Know ...

The notice requirement should be contained within the procedural safe-

guards parents routinely receive. Therefore, parents are expected to know the process they must follow if they intend to place their child privately and attempt to seek reimbursement from the public school for that placement. In order to be reimbursed, unless a public school simply agrees to reimburse the parents, parents must file a Due Process Complaint and prevail at a due process hearing or on appeal into State or federal court.

At the due process hearing, the parents will need to present evidence that the school's placement failed to provide FAPE to the child. Parents must also present evidence proving that the private placement was appropriate for the child.

If parents successfully prove their case, a court or hearing officer may require the public school to reimburse the parents for the entire cost of the private placement, as well as reasonable travel expenses to and from that placement.



Procedural Safeguards Mediation

What the Federal Regs. Say ...

Each public agency must ensure that procedures are established and implemented to allow parties to disputes involving any matter under this part, including matters arising prior to the filing of a due process complaint, to resolve disputes through a mediation process. Sec. 300.506(a).

Requirements - The procedures must meet the following requirements: (1) The procedures must ensure that the mediation process is voluntary on the part of the parties; is not used to deny or delay a parent's right to a hearing on the parent's due process complaint, or to deny any other rights afforded under Part B of the Act; and is conducted by a qualified and impartial mediator who is trained in effective mediation techniques. (2) A public agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with an appropriate alternative dispute resolution entity, or a parent training and information center or community parent resource center in the State...; and who would explain the benefits of, and encourage the use of, the mediation process to the parents. (3) The State must maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services. The SEA must select mediators on a random, rotational, or other

impartial basis. (4) The State must bear the cost of the mediation process, including the costs of meetings described in paragraph (b)(2) of this section. (5) Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute. (6) If the parties resolve a dispute through the mediation process, the parties must execute a legally binding agreement that sets forth that resolution and that states that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding; and is signed by both the parent and a representative of the agency who has the authority to bind such agency. (7) A written, signed mediation agreement under this paragraph is enforceable in any State court of competent jurisdiction or in a district court of the United States.

Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any Federal court or State court of a State receiving assistance under this part. Sec. 300.506(b).

Impartiality of Mediator - An individual who serves as a mediator under this part may not be an employee of the SEA or the LEA that is involved in the education or care of the child; and must not have a personal or professional interest that conflicts with the person's objectivity. A person who otherwise qualifies as a mediator is not an employee of an LEA or State agency ... solely because he or she is paid by the agency to serve as a mediator. Sec. 300.506(c).

Procedural Safeguards Mediation (cont.)

What the Regulations Mean ...

When a parent (or school) files for a due process hearing, the State will offer mediation to the parties as a way of attempting to settle an issue prior to going to the hearing. Mediation is voluntary. It cannot be used to delay timelines for due process hearings. The mediator is an impartial individual who will attempt to facilitate a settlement of the area(s) of disagreement. The mediator makes no decision, but will work with the parties to try to get them to reach an agreement. If a settlement is reached on some or all issues, a written agreement is created and signed by the parties. Any issues not resolved will go on to the hearing. Mediation is different from a Resolution Meeting (discussed later in this section) for two reasons: First, with mediation there is an impartial facilitator; and second, all discussions and offers by either party are confidential and cannot be used as evidence at the due process hearing or in a court appeal.

Mediation is also available to parents and schools prior to a party filing a Due Process Complaint.



What Parents Should Know ...

Mediation is an excellent opportunity for parties to come together with an impartial facilitator to attempt to resolve their differences short of going to a due process hearing. It can be requested even in situations where a hearing has not been requested. Any conversations at the mediation are confidential and cannot be used as evidence should the matter proceed to a due process hearing.

Mediation is voluntary for both the parents and the school. Thus, either party can refuse mediation. The law has always stated that mediation cannot delay a parent's right to a due process hearing, but the 2006 federal regulations do exactly that by including mediation within the 30-day time period for Resolution Meetings (addressed later in this section). In other words, if parties agree to waive a Resolution Meeting and agree to mediation, the federal Department of Education has interpreted the 30-day period to apply to mediations; thus, the 45-day time period for completion of the due process hearing proceeding would be delayed for up to 30 days when the parties agree to mediate.

If mediation is successful, the process is well worth it. If mediation is not successful, the right to a due process hearing is delayed for 30 days (unless an exception would apply that would begin the process sooner, such as where the parties mediate and agree that settlement is not possible prior to completion of the 30-day period).

Procedural Safeguards
Filing a Due Process Complaint

What the Federal Regs. Say ...

A parent or a public agency may file a due process complaint on any of the matters described in Sec. 300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child). Sec. 300.507(a)(1).

The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in Sec. 300.511 (f) apply to the timeline in this section. Sec. 300.507(a)(2).

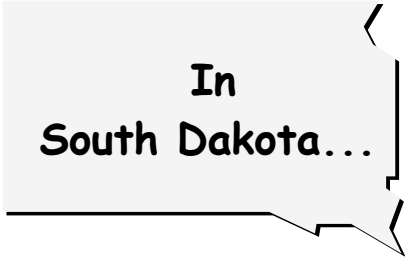
Information for parents - The public agency must inform the parent of any free or low-cost legal and other relevant services available in the area if the parent requests the information; or the parent or the agency files a due process complaint under this section. Sec. 300.507(b).

What the Regulations Mean ...

When parents and schools cannot come to an agreement on issues related to the

identification, evaluation, placement, or the provision of FAPE, either party has the right to file for a due process hearing. A "Due Process Complaint" must be filed within two years of the date a party knew or should have known of a violation.

What Parents Should Know ...
A due process hearing before an impartial hearing officer is similar in many ways to going to trial before a judge. The due process hearing is the trial level for special education cases. While not required, it is advisable that parents have legal counsel represent them at the hearing.
Congress created a two-year statute of limitations for bringing IDEA actions in the 2004 Amendments. The two years begins when the party bringing the action knew or should have known of the violations.



South Dakota uses a one-tier hearing system. This means that the hearing officer's decision is not open to State-level review. It is a "final decision" upon which either party can appeal into court. ARSD 24:05:30:11.

**Procedural Safeguards
Due Process Complaint
Requirements - Filing /
Content**

What the Federal Regs. Say ...

The public agency must have procedures that require either party, or the attorney representing a party, to provide to the other party a due process complaint (which must remain confidential). The party filing a due process complaint must forward a copy of the due process complaint to the SEA. Sec. 300.508(a).

Content of complaint - The due process complaint required in paragraph (a)(1) of this section must include:

- (1) The name of the child;
- (2) The address of the residence of the child;
- (3) The name of the school the child is attending;
- (4) In the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child, and the name of the school the child is attending;
- (5) A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and
- (6) A proposed resolution of the problem to the extent known and available to the party at the time. Sec. 300.508(b).

Notice required before a hearing on a due process complaint - A party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint

that meets the requirements of paragraph (b) of this section. Sec. 300.508(c).

What the Regulations Mean ...

The 1997 Amendments to Part B of IDEA added the requirement that parents or their attorney submit a "Due Process Complaint" containing certain information when filing for a due process hearing. The 2004 Amendments clarified that this requirement applies to schools as well, and that the hearing will not occur if the moving party failed to file a sufficient complaint. The Due Process Complaint provides "notice" of the child's name, address, school, issue(s)/problem(s) (with supporting facts), and proposed resolution, if known.

What Parents Should Know ...

The State Special Education Programs office has developed a model Due Process Complaint form, which can be accessed at: <http://doe.sd.gov/oess/sped-complaints.aspx>. A party filing for a due process hearing does not have to use the State form, so long as the Due Process Complaint otherwise contains the required items. If the party bringing the hearing fails to provide a sufficient Due Process Complaint, the hearing will not occur.



Procedural Safeguards
Due Process Complaint
Requirements - Sufficiency of
Due Process Complaint

What the Federal Regs. Say ...

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

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

A party may amend its due process complaint only if the other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting held pursuant to Sec. 300.510; or the hearing officer grants permission, except that the hearing officer may only grant permission to amend at any time not later than five days before the due process hearing begins.

If a party files an amended due process complaint, the timelines for the resolution meeting in Sec. 300.510(a) and the time period to resolve in Sec. 300.510(b) begin again with the filing of the amended due process complaint. Sec. 300.508(d).

What the Regulations Mean ...

The party receiving the Due Process Complaint can contest the sufficiency of the content by notifying the hearing officer in writing within 15 days of receiving the complaint. The hearing officer will review the complaint and make a determination within five days as to whether it complies with the content requirements.

The moving party can amend the Due Process Complaint if the other party consents and is allowed to resolve the amended Due Process Complaint at a Resolution Meeting, or if the hearing officer grants permission. However, amending the Due Process Complaint starts timelines over again.

What Parents Should Know ...

Filing for a due process hearing requires filing a Due Process Complaint. It is important that the complaint meets the requirements of the law, as all timelines start over if it becomes necessary to later amend the complaint. If a school contests the sufficiency of a due process complaint and the hearing officer agrees it is insufficient, the parents will need to amend the complaint before the matter will be allowed to proceed through the hearing process.

**Procedural Safeguards
Due Process Complaint
Requirements - Response to
Due Process Complaint**

What the Federal Regs. Say ...

LEA response to a due process complaint

- If the LEA has not sent a prior written notice under Sec. 300.503 to the parent regarding the subject matter contained in the parent's due process complaint, the LEA must, within 10 days of receiving the due process complaint, send to the parent a response that includes an explanation of why the agency proposed or refused to take the action raised in the due process complaint; 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 agency used as the basis for the proposed or refused action; and a description of the other factors that are relevant to the agency's proposed or refused action.

A response by an LEA under paragraph (e) (1) of this section shall not be construed to preclude the LEA from asserting that the parent's due process complaint was insufficient, where appropriate. Sec. 300.508(e).

Other party response to a due process complaint - Except as provided in paragraph (e) of this section, the party receiving a due process complaint must, within 10 days of receiving the due process complaint, send to the other party a response that specifically addresses the issues raised in the due process complaint. Sec. 300.508(f).

What the Regulations Mean ...

A parent's filing of a Due Process Complaint does not relieve the school of providing written notice (discussed previously) as to the basis for its proposal or refusal regarding the issue(s) addressed in the parent's Due Process Complaint. Therefore, if the school had not already done so, the school must provide written notice within 10 days of receipt of the Due Process Complaint. Providing the prior written notice does not prevent the school from asserting that the parent's Due Process Complaint is insufficient.

Regardless of which party filed the Due Process Complaint, the party receiving the complaint must send a response to the allegations within 10 days of receipt of the Due Process Complaint.

What Parents Should Know ...

Parents are always entitled to prior written notice when a school proposes or refuses a change in the identification, evaluation, placement, or provision of FAPE.

If a school files a Due Process Complaint, parents must submit a written response to the school within 10 days of their receipt of the complaint.



Procedural Safeguards Resolution Process

What the Federal Regs. Say ...

Resolution meeting - Within 15 days of receiving notice of the parent's due process complaint, and prior to the initiation of a due process hearing under Sec. 300.511, the LEA must convene a meeting with the parent and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process complaint that includes a representative of the public agency who has decision-making authority on behalf of that agency; and may not include an attorney of the LEA unless the parent is accompanied by an attorney. Sec. 300.510(a)(1).

The purpose of the meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint. Sec. 300.510(a)(2).

The meeting described in paragraph (a)(1) and (2) of this section need not be held if: The parent and the LEA agree in writing to waive the meeting; or the parent and the LEA agree to use the mediation process described in Sec. 300.506. Sec. 300.510(a)(3).

The parent and the LEA determine the relevant members of the IEP Team to attend the meeting. Sec. 300.510(a)(4).

Resolution period - If the LEA has not resolved the due process complaint to the satisfaction of the parent within 30 days of the receipt of the due process complaint, the due process hearing may occur. Except as provided in paragraph (c) of this section, the timeline for issuing a final decision under Sec. 300.515 begins at the expiration of this 30-day period. Sec. 300.510(b)(1), (2).

Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding paragraphs (b)(1) and (2) of this section, the failure of the parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held. Sec. 300.510(b)(3).

If the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented using the procedures in Sec. 300.322(d)), the LEA may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint. Sec. 300.510(b)(4).

If the LEA fails to hold the resolution meeting specified in paragraph (a) of this section within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the

Procedural Safeguards Resolution Process (cont.)

intervention of a hearing officer to begin the due process hearing timeline. Sec. 300.510(b)(5).

Adjustments to 30-day resolution period - The 45-day timeline for the due process hearing in Sec. 300.515(a) starts the day after one of the following events: (1) Both parties agree in writing to waive the resolution meeting; (2) After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible; (3) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process. Sec. 300.510(c).

Written settlement agreement - If a resolution to the dispute is reached at the meeting described in paragraphs (a) (1) and (2) of this section, the parties must execute a legally binding agreement that is: Signed by both the parent and a representative of the agency who has the authority to bind the agency; and enforceable in any State court of competent jurisdiction or in a district court of the United States, or, by the SEA, if the State has other mechanisms or procedures that permit parties to seek enforcement of resolution agreements, pursuant to Sec. 300.537. Sec. 300.510(d).

Agreement review period - If the parties execute an agreement pursuant to paragraph (c) of this section, a party may void the agreement within 3 business days of the agreement's execution. Sec. 300.510(e).



What the Regulations Mean ...

The requirement of a Resolution Meeting was added in the 2004 Amendments. When a parent files a Due Process Complaint, the school must convene a Resolution Meeting within 15 days of receipt of the parent's complaint. The purpose of this meeting is to allow the school the opportunity to hear the parent's concerns and resolve them short of going to hearing. The school then has until the end of 30 days from receipt of the complaint to resolve the issue(s).

The Resolution Meeting does not need to take place if both the parent and the school agree to waive the meeting, or if they agree to utilize mediation. However, if parents refuse to attend a Resolution

**Procedural Safeguards
Resolution Process (cont.)**

Meeting, the school can seek to have the parent's Due Process Complaint dismissed following the end of the 30-day period. If the school fails to schedule or participate in a Resolution Meeting within the 15 days, parents can contact the hearing officer and request the time period for the due process hearing to begin.

The 30-day time period can be reduced or extended. The 45-day period for the due process hearing can begin prior to the end of 30 days if the parties agree to waive the Resolution Meeting or they agree after the Resolution Meeting or mediation that agreement cannot be reached. It can begin later than the 30 days if the parties agree to continue the mediation process beyond the 30-day period.

If the Resolution Meeting results in a settlement, it must be put in writing and signed by both parties. It is voidable for three business days. It is enforceable in State or federal court.

period for a due process hearing for up to 30 calendar days. The regulations also applied this 30-day time period to mediation. Either process provides the opportunity for a quick resolution of the parent's issue(s). However, if parents believe the chance for settlement through either process is slim, they may want to consider seeking to waive the Resolution Meeting and going straight to hearing. However, if the school does not agree to waive the Resolution Meeting, the parents must attend or face dismissal of their complaint. If settlement is reached through the Resolution Meeting, but the school fails to follow the agreement, parents can enforce it in court. Unlike the mediation process, there is no requirement with Resolution Meetings that the conversations be kept confidential, and thus they may be used as evidence at a subsequent due process hearing or in court.

What Parents Should Know ...
The Resolution Meeting is essentially a meeting of the IEP Team. The school cannot have its attorney attend unless the parents have their attorney attend.
The Resolution Meeting generally delays the beginning of the 45-day time



Procedural Safeguards
Impartial Due Process
Hearing - Right to Hearing /
Hearing Officer Requirements

What the Federal Regs. Say ...

Whenever a due process complaint is received under Sec. 300.507 or Sec. 300.532, the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing, consistent with the procedures in Secs. 300.507, 300.508, and 300.510. Sec. 300.511(a).

Agency responsible for conducting the due process hearing - The hearing described in paragraph (a) of this section must be conducted by the SEA or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the SEA. Sec. 300.511(b).

Impartial hearing officer - At a minimum, a hearing officer must not be an employee of the SEA or the LEA that is involved in the education or care of the child; or a person having a personal or professional interest that conflicts with the person's objectivity in the hearing; must possess knowledge of, and the ability to understand, the provisions of the Act, Federal and State regulations pertaining to the Act, and legal interpretations of the Act by Federal and State courts; must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and must possess the knowledge and ability to render and write decisions in accordance with appropriate,

standard legal practice. A person who otherwise qualifies to conduct a hearing under paragraph (c)(1) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer. Each public agency must keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons. Sec. 300.511(c).

What the Regulations Mean ...

When a parent or school files a Due Process Complaint, the State agency will appoint a hearing officer. The hearing officer must be impartial, meaning not an employee of the SEA or LEA, and one who has no personal or professional conflict of interest. The hearing officer also must have the ability to conduct the hearing and make decisions in conformance with IDEA.

What Parents Should Know ...

South Dakota currently uses hearing officers from the State Office of Hearing Examiners to hear special education cases. Parents or their attorneys can contact the State Special Education Programs office to inquire into who that office uses for hearing officers and their qualifications.



Procedural Safeguards
Impartial Due Process
Hearing - Subject Matter /
Time Limitations for Filing
Due Process Complaint

What the Federal Regs. Say ...

Subject matter of due process hearings - The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under Sec. 300.508(b), unless the other party agrees otherwise. Sec. 300.511(d).

Timeline for requesting a hearing - A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law. Sec. 300.511(e).

Exceptions to the timeline - The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to (1) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or (2) The LEA's withholding of information from the parent that was required under this part to be provided to the parent. Sec. 300.511(f).

What the Regulations Mean ...

The purpose of the Due Process Complaint is to inform the other party of the issues being brought to hearing. Therefore, the moving

party cannot bring up new issues at the hearing without permission from the other side.

IDEA now has a two-year statute of limitations for bringing a Due Process Complaint, which begins when the moving party **knew or should have known** of the action forming the basis for the complaint. For example, if a school ceased providing PT services contained in the IEP at the beginning of the 2006-07 school year, but the parents did not find out (and had no way of knowing) until February 1, 2007, they would have until February 1, 2009, to file a Due Process Complaint.

The two-year limitation can be extended under limited circumstances, such as when the school misrepresented that it had resolved an issue or withheld relevant information.

What Parents Should Know ...

Parents must make sure they include all issues in their Due Process Complaint to prevent delays or having to file separate complaints/have separate hearings. Due Process Complaints typically fall under two types: Alleged ongoing (immediate) issues; and past alleged violations wherein parents are seeking reimbursement or compensatory services (or both). While parents have two years to file a Due Process Complaint from the time they found out, or should have found out, about their concern, often they will want to file their complaint without undue delay (such as for ongoing violations).

It is highly recommended that parents have legal representation. An attorney can assist with drafting the complaint and, after fully discussing the case and reviewing the file, may find additional violations to include in the complaint and have ideas of what to seek from the school to remedy the violations.

**Procedural Safeguards
Impartial Due Process
Hearing - Hearing Rights**

What the Federal Regs. Say ...

Any party to a hearing conducted pursuant to Secs. 300.507 through 300.513 or Secs. 300.530 through 300.534, ... has the right to -

- Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities, except that whether parties have the right to be represented by nonattorneys at due process hearings is determined under State law ;
- Present evidence and confront, cross-examine, and compel the attendance of witnesses;
- Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least 5 business days before the hearing;
- Obtain a written, or, at the option of the parents, electronic, verbatim record of the hearing; and
- Obtain written, or, at the option of the parents, electronic findings of fact and decisions.

Sec. 300.512(a).

Additional disclosure of information - At least five business days prior to a hearing conducted pursuant to Sec. 300.511(a), each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing. A hearing officer may bar any

party that fails to comply with paragraph (b)(1) of this section from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party. Sec. 300.512(b).

What the Regulations Mean ...

Both parties to a due process hearing have certain rights set out in IDEA. One is the right to refuse to allow evidence to be included in the hearing record that was not shared by the other party at least 5 business days prior to the hearing.

What Parents Should Know ...

A due process hearing is similar to a civil trial before a judge in many respects. While less formal, there are specific timelines for disclosing to the school who will be witnesses and what documentary evidence parents want the hearing officer to consider. Schools will almost always be represented at hearing by an attorney. While parents do not have to be represented by an attorney, it is highly recommended.

The Federal Rules of Evidence generally apply to these hearings, although not as strictly as in court proceedings. It is very helpful to have legal representation when presenting testimony, cross-examining witnesses, and admitting documentary evidence into the official record. Frequently, hearing officers will ask the parties to submit legal briefs (written statements supported by applicable law arguing in favor of a party's position). Parents have the right to receive a copy of the transcript of the testimony and a copy of the hearing officer's decision.

Procedural Safeguards
Impartial Due Process
Hearing - Parental Rights /
Hearing Decisions / Timelines

What the Federal Regs. Say ...

Parental rights at hearings - Parents involved in hearings must be given the right to: have the child who is the subject of the hearing present; open the hearing to the public; and have the record of the hearing and the findings of fact and decisions described in paragraphs (a)(4) and (a)(5) of this section provided at no cost to parents. Sec. 300.512(c).

Decision of hearing officer on the provision of FAPE - Subject to paragraph (a)(2) of this section, a hearing officer's determination of whether a child received FAPE must be based on substantive grounds. Sec. 300.513(a)(1).

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE; significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or caused a deprivation of educational benefit. Sec. 300.513(a)(2).

Nothing in paragraph (a) of this section shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under Secs. 300.500 through 300.536. Sec. 300.513(a)(3).

Separate request for a due process hearing - Nothing in Secs. 300.500 through 300.536 shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed. Sec. 300.513(c).

Finality of hearing decision - A decision made in a hearing conducted pursuant to Secs. 300.507 through 300.513 or Secs. 300.530 through 300.534 is final, except that any party involved in the hearing may appeal the decision under the provisions of ... Sec. 300.516. Sec. 300.514(a).

Timelines and convenience of hearings and reviews - The public agency must ensure that not later than 45 days after the expiration of the 30 day period under Sec. 300.510(b), or the adjusted time periods described in Sec. 300.510(c): A final decision is reached in the hearing; and a copy of the decision is mailed to each of the parties. Sec. 300.515(a).

A hearing ... officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party. Sec. 300.515(c).

Each hearing ... involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved. Sec. 300.515(d).

What the Regulations Mean ...

Parents may have their child with a disability who is the subject of the hearing attend the hearing. In certain circum-

Procedural Safeguards
Impartial Due Process
Hearing - Parental Rights /
Hearing Decisions / Timelines
(cont.)

stances, it may also be appropriate for the child to be a witness at the hearing. Parents may either have the hearing open to the public to view or may have the proceedings closed to the public. If parents wish to have a written transcript of the hearing, it must be provided to the parents free of charge.

The 2004 Amendments set out the requirement that a hearing officer cannot make a finding of a denial of FAPE on purely procedural grounds. For example, a hearing officer may not typically find a denial of FAPE if the school failed to provide written notice or committed some other procedural violation. Exceptions to this requirement apply if parents prove the procedural violations impeded the right to FAPE, significantly impeded the parent's right to participate in decisions, or caused a deprivation of educational benefit. For example, the failure to follow an IEP is a procedural violation, yet it directly impacts the right to FAPE.

What Parents Should Know ...

The entire hearing process is supposed to take no more than 45 days, beginning at the end of the 30-day Resolution Process (or adjusted time

period). Based on the timeline in the regulation, the hearing officer's decision must be sent out by the 45th day. From a realistic standpoint, however, rarely is the hearing process completed in 45 days. A number of factors can contribute to delays, such as: The schedules of the parties, their attorneys, the hearing officer, and witnesses; the length of the hearing (if scheduling additional days is required); whether post-hearing briefs are submitted (which is almost always the case) and scheduling for those; and the time the hearing officer requires to write and issue the decision.

Often, hearings will be held at school buildings. However, if parents object to the hearing being held at a school building, the parents/parent attorney should notify the hearing officer and request it be held at a neutral site. The hearing officer should accommodate any reasonable request.

If parents discover additional issues following the filing of their Due Process Complaint, they can either seek to amend their initial complaint or file a separate complaint.



Procedural Safeguards Civil Action (Appeals to Court)

What the Federal Regs. Say ...

Any party aggrieved by the findings and decision made under Secs. 300.507 through 300.513 or Secs. 300.530 through 300.534 ... has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under Sec. 300.507 or Secs. 300.530 through 300.532. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. Sec. 300.516(a).

Time limitation - The party bringing the action shall have 90 days from the date of the decision of the hearing officer ... to file a civil action, or, if the State has an explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by that State law. Sec. 300.516(b).

Additional Requirements - In any action brought under paragraph (a) of this section, the court receives the records of the administrative proceedings; hears additional evidence at the request of a party; and basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate. Sec. 300.516(c).

Jurisdiction of District courts - The district courts of the United States have jurisdiction of actions brought under section 615 of the Act without regard to the amount in controversy. Sec. 300.516(d).

What the Regulations Mean ...

If either party disagrees with the hearing officer's decision, that party has 90 days to ap-

peal the case into either State or federal court.

State circuit courts and federal district courts act as appellate courts in most instances, meaning no new (or very limited) evidence is presented at that level and the court will base its decision on the administrative record, written briefs, and usually oral argument. In limited circumstances, a party will be allowed to submit additional documentary or testimonial evidence at the State or federal court level.

Courts use the "preponderance of the evidence" standard (also used by hearing officers), which means "more than half," to decide special education appeals. Courts have broad authority to grant different types of relief, depending on the issues in the case. Parties can continue to appeal the case through the State or federal systems.

What Parents Should Know ...

The type of relief a parent can receive from a court (or hearing officer) is very broad. A court can award compensatory educational services, reimbursement for costs of services/placement paid for by parents, order a school to comply with an IEP, order specific services, and otherwise correct deficiencies. The 8th Circuit Court of Appeals (applicable to SD) has ruled that punitive damages are not available under IDEA.



Procedural Safeguards

Bringing Court Action Under
Other Laws / Exhaustion of
Administrative Remedies /
States' Sovereign Immunity



What the Federal Regs. Say ...

Nothing in this part restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the Act, the procedures under Secs. 300.507 and 300.514 must be exhausted to the same extent as would be required had the action been brought under Sec. 615 of the Act. Sec. 300.516(e).

States' sovereign immunity - A State that accepts funds under this part waives its immunity under the 11th amendment to the Constitution of the United States from suit in Federal court for a violation of this part. In a suit against a State for a violation of this part, remedies (including remedies both at law and in equity) are available for such a violation in the suit against a public entity other than a State. Paragraphs (a) and (b) of this section apply with respect to violations that occur in whole or part after the date of enactment of the Education of the Handicapped Act Amendments of 1990. Sec. 300.177.



What the Regulations Mean ...

IDEA prohibits a parent or school from bringing an action based on IDEA into court without first going through the due process hearing procedure. This requirement is referred to as "exhausting administrative remedies." Parents cannot circumvent the IDEA due process hearing exhaustion requirement by bringing a court action against a school under other laws, such as the Americans with Disabilities Act (ADA) or Section 504 of the Rehabilitation Act, if the parents are seeking relief from the court that would be available under IDEA. Schools and the SEA cannot assert sovereign immunity under the 11th Amendment in an IDEA action.

What Parents Should Know ...

Many cases get dismissed by courts each year because parents fail to bring the matter to a due process hearing first.

Parents may also use other laws (besides IDEA) in court to protect their child's rights, such as the Americans With Disabilities Act (ADA) or Section 504 of the Rehabilitation Act. However, in most instances, because relief requested under these laws will be the same as that available under IDEA, cases may well be dismissed if a parent has not gone through the administrative hearing process under IDEA before bringing an action in court.

Procedural Safeguards Attorneys' Fees

What the Federal Regs. Say ...

In general - In any action or proceeding brought under section 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to:

- (1) The prevailing party who is the parent of a child with a disability;
- (2) To a prevailing party who is an SEA or LEA against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or
- (3) To a prevailing SEA or LEA against the attorney of a parent, or against the parent, if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

Sec. 300.517(a).

Prohibition on use of funds - Funds under Part B of the Act may not be used to pay attorneys' fees or costs of a party related to any action or proceeding under section 615 of the Act

and subpart E of this part. Paragraph (b)(1) of this section does not preclude a public agency from using funds under Part B of the Act for conducting an action or proceeding under section 615 of the Act. Sec. 300.517(b)(1), (2).

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

Fees awarded under section 615(i)(3) of the Act must be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this paragraph. Sec. 300.517(c)(1).

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



Procedural Safeguards Attorneys' Fees (cont.)

time more than 10 days before the proceeding begins; the offer is not accepted within 10 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. Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless the meeting is convened as a result of an administrative proceeding or judicial action, or at the discretion of the State, for a mediation described in Sec. 300.506. A meeting conducted pursuant to Sec. 300.510 shall not be considered a meeting convened as a result of an administrative hearing or judicial action; or an administrative hearing or judicial action for purposes of this section. Sec. 300.517(c)(2).

Notwithstanding paragraph (c)(2) of this section, an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer. Sec. 300.517(c)(3).

Except as provided in paragraph (c)(5) of this section, the court reduces, accordingly, the amount of the attorneys' fees awarded under section 615 of the Act, if the court finds that: 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 otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience; the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or the attorney representing the parent did not provide to the LEA the appropriate information in the due process request notice in accordance with Sec. 300.508. Sec. 300.517(c)(4).

The provisions of paragraph (c)(4) of this section do not apply in any action or proceeding if the court finds that the State or local agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of the Act. Sec. 300.517(c)(5).



What the Regulations Mean ...

If parents prevail on any significant issue at a due process hearing or in court, a court may award the parents reasonable attorneys' fees based on the number of hours their attorney spent on the case, the attorney's level of experience

Procedural Safeguards Attorneys' Fees (cont.)

and expertise, and hourly rates paid to attorneys in the community where the school is located. The 2004 Amendments added provisions where schools can receive attorneys' fees from parents or their attorney for bringing a frivolous action or bringing an action for an improper purpose.

If parents reject a settlement offer made at least 10 days prior to hearing and then do not receive any more relief from the hearing officer than was offered, fees would not be awarded for the time spent after the date of the settlement offer. Such fees may not be reduced if parents can demonstrate they were substantially justified in rejecting the offer.

Fees may also be reduced if parents unnecessarily prolonged the proceedings, if the attorney's hourly rate is too high or his/her hours spent are unreasonable, or if the attorney failed to provide the school the required written notice when filing the Due Process Complaint. On the other hand, fees may not be reduced if the school unnecessarily prolonged the proceedings or was found to have violated procedural safeguards.

Fees will not be awarded for attending an IEP Team meeting unless the meeting was ordered by the hearing officer or court. If a mediation is held prior to the filing of a due process hearing, fees typically would not be allowed for time spent attending that mediation.



What Parents Should Know ...

Typically, the parents and attorney sign a representation agreement. If it is agreed the attorney will get paid on a contingency fee basis, he or she would get paid only if the parents prevail. If the agreement is on an hourly basis, the attorney would be paid based on the number of hours worked regardless of the outcome.

If parents prevail at a due process hearing or on an appeal, fees can be awarded for the time spent on the case, as well as for costs incurred in the litigation, but not costs for an expert witness. Only a court can award attorneys' fees and costs.

If parents prevail at a due process hearing and there is no appeal, typically the parents' attorney would submit a bill to the school for fees and costs. If the school refuses to pay or a settlement on fees cannot be reached, parents must file a separate action in federal court for fees.

Procedural Safeguards Child's Status During Proceedings ("Stay Put")

What the Federal Regs. Say ...

General Rule - Except as provided in section 300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under Sec. 300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement. Sec. 300.518(a).

Initial Admission to Public School - If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings. Sec. 300.518(b).

Transition from Part C - If the complaint involves an application for initial services under this part from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned three, the public agency is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services under Sec. 300.300(b), then the public agency must provide those special education and related services that are not in dispute between the parent and the public agency. Sec. 300.518(c).

Hearing Officer Decision in Parents' Favor - If the hearing officer in a due process

hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section. Sec. 300.518(d).

What the Regulations Mean ...

IDEA protects children from a school's unilateral change in the child's placement. If a school proposes to change a child's placement and the parent disagrees and files for a due process hearing on the issue, the child will remain in his or her current placement (unless the parties agree otherwise) until the administrative or judicial proceedings are completed. This part of the law is commonly known as the "stay put" provision, meaning the child "stays put" in the current placement when a parent files for a hearing to dispute a proposed change in placement.

An exception to this rule occurs where a parent prevails at a due process hearing on a placement issue. In that situation, the placement ordered by the hearing officer becomes the new "stay put" placement during any further appeals. Separate rules apply in the area of discipline. (See Section XIV).

What Parents Should Know ...

"Stay put" has been interpreted broadly to apply to other situations besides strictly placement issues. For example, "stay put" could apply where a school wants to reduce or discontinue a related service and a parent disagrees with such reduction and files for a due process hearing. For "stay put" to apply, parents would need to file a Due Process Complaint before the district implements its proposal/refusal following parents' receipt of prior written notice. (See p. 150).

Procedural Safeguards Surrogate Parents

What the Federal Regs. Say ...

Each public agency must ensure that the rights of a child are protected when: No parent (as defined in Sec. 300.30) can be identified; the public agency, after reasonable efforts, cannot locate a parent; the child is a ward of the State under the laws of that State; or the child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)). Sec. 300.519(a).

Duties of public agency - The duties of a public agency under paragraph (a) of this section include the assignment of an individual to act as a surrogate for the parents. This must include a method for determining whether a child needs a surrogate parent; and for assigning a surrogate parent to the child. Sec. 300.519(b).

Wards of the State - In the case of a child who is a ward of the State, the surrogate parent alternatively may be appointed by the judge overseeing the child's case, provided that the surrogate meets the requirements in paragraphs (d)(2)(i) and (e) of this section. Sec. 300.519(c).

Criteria for selection of surrogate parents - The public agency may select a surrogate parent in any way permitted under State law. Public agencies must ensure that a person selected as a surrogate is not an employee of the SEA, the LEA, or any other agency that is involved in the education or care of the child; has no personal or professional interest that conflicts with the interest of the child the surrogate parent represents; and has knowledge and skills that ensure ade-

quate representation of the child. Sec. 300.519(d).

Non-employee requirement; compensation - A person otherwise qualified to be a surrogate parent under paragraph (d) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent. Sec. 300.519(e).

Surrogate parent responsibilities - The surrogate parent may represent the child in all matters relating to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child. Sec. 300.519(g).

SEA responsibility - The SEA must make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after a public agency determines that the child needs a surrogate parent. Sec. 300.519(h).

What the Regulations Mean ...

Surrogate parents are individuals appointed to act as the child's "parent" in situations where no parent can be found, no parent exists, or the child is a ward of the state or homeless youth. The superintendent or designee shall assign a surrogate parent in these circumstances. A surrogate parent must have no conflict of interest that would interfere with acting in the child's best interests, and must have "knowledge and skills" to adequately act as the parent.

What Parents Should Know ...

Surrogate parents must be appointed only when a "parent" as defined in IDEA cannot be identified or located. If one has questions regarding surrogate parents, contact the State Special Education Programs office at 773-3678.

Procedural Safeguards
Transfer of Parental Rights
at Age of Majority / One-
Year Notice Requirement

What the Federal Regs. Say ...

A State may provide that, when a child with a disability reaches the age of majority under State law that applies to all students (except for a child with a disability who has been determined to be incompetent under State law): The public agency must provide any notice required by this part to both the child and the parents; and all rights accorded to parents under Part B of the Act transfer to the child; all rights accorded to parents under Part B of the Act transfer to children who are incarcerated in an adult or juvenile, State or local correctional institution; and whenever a State provides for the transfer of rights under this part pursuant to paragraph (a)(1) or (a)(2) of this section, the agency must notify the child and the parents of the transfer of rights. Sec. 300.520(a).

Special Rule - A State must establish procedures for appointing the parent of a child with a disability, or, if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of the child's eligibility under Part B of the Act if, under State law, a child who has reached the age of majority, but has not been determined to be in-

competent, can be determined not to have the ability to provide informed consent with respect to the child's educational program. Sec. 300.520(b).

Transfer of Rights - Beginning not later than one year before the child reaches the age of majority under State law, the IEP must include a statement that the child has been informed of the child's rights under Part B of the Act, if any, that will transfer to the child on reaching the age of majority under Sec. 300.520. Sec. 300.320(c).

What the Regulations Mean ...

The rights of parents under IDEA transfer to the child with a disability when the child reaches the age of majority. Two exceptions exist in the law: First, if the child has been found by a court to be incompetent prior to reaching age of majority, or thereafter when it occurs; and second, if the State has a law that allows for a determination that the child does not have the capacity to provide informed consent, despite not being determined incompetent by a court.



Procedural Safeguards
Transfer of Parental Rights
at Age of Majority / One-
Year Notice Requirement
(cont.)

In situations where a student has been determined to be incompetent, the rights belong to the legal guardian appointed by the court.

Failure to inform the child of the transfer of rights and document it in the child's IEP at least one year prior to reaching the age of majority is a violation of IDEA. The student must be informed which rights transfer to him or her.

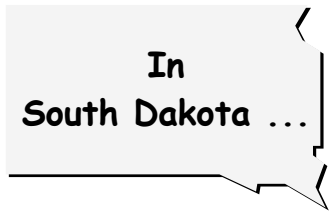
What Parents Should Know ...

If parents have a child with a disability who they believe to be incompetent to make educational decisions upon reaching the age of majority, they should take steps in advance to go to court to become the child's legal guardian when the child reaches the age of majority. Failure to take these steps results in the transfer of parental rights under IDEA to the student, regardless of the child's ability to make decisions on his or her own behalf, unless the State has created a process for making determinations of the child's inability to provide informed consent without court approval.

Once the rights transfer to the student, the student may prohibit his or

her parents from participating at IEP Team meetings, unless invited to the meeting by the school district.

When rights transfer to the child with a disability upon reaching age of majority, that means that parents no longer have those rights. The child becomes the "parent" described in IDEA for purposes of the procedural safeguards and other rights. Thus, parents lose the right to bring a due process hearing on behalf of their child. They lose the right to attend IEP Team meetings, unless specifically invited by the child or the school. Nothing prohibits the child at age of majority from inviting his or her parents to attend and assist with IEP Team meetings, mediation, resolution meetings, or due process hearings. It becomes the student's choice.



In South Dakota, the age of majority is 18. If, consistent with State law, an eligible child is determined not to have the ability to provide informed consent with respect to the educational program of the child, the school district shall appoint the parent, or, if the parent is not available, another appropriate individual to represent the educational interests of the child throughout the child's eligibility under this article. ARSD 24:05:30:16.01.

**Procedural Safeguards
Confidentiality of
Information - Access Rights**

the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce. Sec. 300.613(c).

What the Federal Regs. Say ...

Access rights - Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to Sec. 300.507 or Secs. 300.530 through 300.532, or resolution session pursuant to Sec. 300.510, and in no case more than 45 days after the request has been made. Sec. 300.613(a).

The right to inspect and review education records under this section includes: (1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records; (2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and (3) The right to have a representative of the parent inspect and review the records. Sec. 300.613(b).

An agency may presume that the parent has authority to inspect and review records relating to his or her child unless

What the Regulations Mean ...

Parents have the right to see **ALL** educational records. Schools must comply with a parent's request "without unnecessary delay," but within no more than 45 days. However, if an IEP Team meeting or due process hearing is pending, parents are entitled to such access "without unnecessary delay" prior to the meeting or hearing. For example, if an IEP Team meeting is scheduled in 10 days, schools must allow parents access to review records prior to the meeting if requested.

There is a presumption in the law that any parent has the right to inspect or review his or her child's records. A school may forbid a parent from reviewing records only if the school has been provided with a legal document stating that a particular parent does not have that right.

What Parents Should Know ...

Parents, when reviewing or after having received a copy of records, have the right to have school personnel explain or interpret the contents of such records. Parents can sign a release form to allow a third party (e.g., friend, family member, advocate, attorney, Navigator) to inspect and review the child's records.

Procedural Safeguards
Confidentiality of
Information - Record of
Access / Locations / Fees

What the Federal Regs. Say ...

Record of access - Each participating agency must keep a record of parties obtaining access to education records collected, maintained, or used under Part B of the Act (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records. Sec. 300.614.

Records on more than one child - If any education record includes information on more than one child, the parents of those children have the right to inspect and review only the information relating to their child or to be informed of that specific information. Sec. 300.615.

List of types and locations of information - Each participating agency must provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency. Sec. 300.616.

Fees - Each participating agency may charge a fee for copies of records that are made for parents under this part if the fee does not effectively prevent the parents from exercising their right

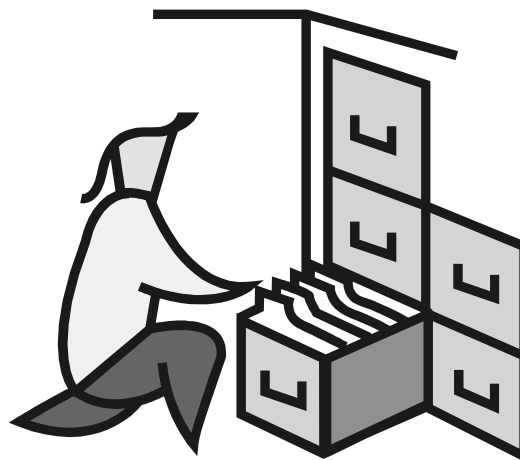
to inspect and review those records. A participating agency may not charge a fee to search for or to retrieve information under this part. Sec. 300.617.

What the Regulations Mean ...

Schools must keep a record of any party, excluding parents and authorized school personnel, who have accessed a child's records. Schools must keep a list, and inform parents if they request, of the location of all educational records for their child.

What Parents Should Know ...

If parents request a copy of educational records, the school may charge the parents a reasonable fee for copies. This fee may be waived if the parent cannot afford to pay. Because parents are entitled to a copy of their child's IEP and evaluation reports, schools may not charge for those documents (unless additional copies are requested).



**Procedural Safeguards
Confidentiality of
Information - Amendment of
Records at Parent's Request**

What the Federal Regs. Say ...

Amendment of records at parent's request - A parent who believes that information in the education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child may request the participating agency that maintains the information to amend the information. Sec. 300.618(a).

The agency must decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request. Sec. 300.618(b).

If the agency decides to refuse to amend the information in accordance with the request, it must inform the parent of the refusal and advise the parent of the right to a hearing under Sec. 300.619. Sec. 300.618(c).



What the Regulations Mean ...

If parents find something in their child's file they believe to be inaccurate, misleading, or to violate the child's rights, the parent has the right to request that such information be amended or deleted from the file. If the school disagrees with the parent's request, the parent has the right to a hearing on the matter.



What Parents Should Know ...

Parents have the right to challenge the contents of their child's educational records, initially by requesting that they be amended. If the school refuses to amend the records, parents can challenge the contents of the records by requesting a hearing, as discussed on the following page. The hearing allowed to contest records, which is borrowed from the Family Educational Rights and Privacy Act (FERPA), is not as formal compared to all the requirements for a due process hearing under IDEA, and does not need to be heard by an impartial hearing officer.

Procedural Safeguards

Confidentiality of Information - Hearings

What the Federal Regs. Say ...

Opportunity for a hearing - The agency must, on request, provide an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child. Sec. 300.619.

Result of hearing - If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it must amend the information accordingly and so inform the parent in writing. Sec. 300.620(a).

If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it must inform the parent of the parent's right to place in the records the agency maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency. Sec. 300.620(b).

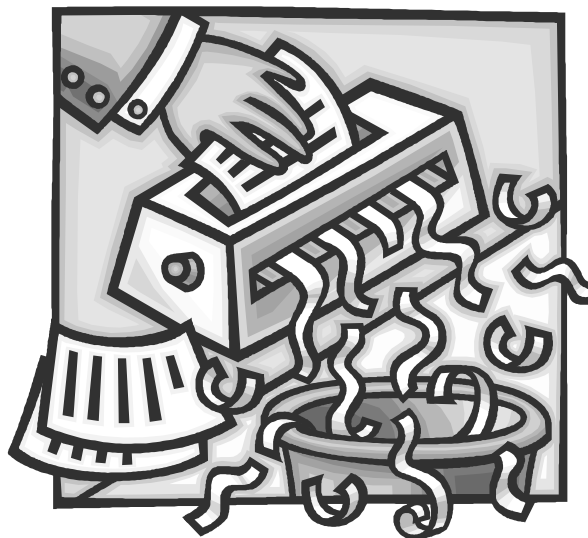
Any explanation placed in the records of the child under this section must: Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained

by the agency; and if the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party. Sec. 300.620(c).

Hearing procedures - A hearing held under Sec. 300.619 must be conducted according to the procedures under 34 C.F.R. 99.22 [FERPA]. Sec. 300.621.

[The FERPA procedures state:]

The hearing required by Sec. 99.21 must meet, at a minimum, the following requirements: (a) The educational agency or institution shall hold the hearing within a reasonable time after it has received the request for the hearing from the parent or eligible student. (b) The educational agency or institution shall give the parent or eligible student notice of the date, time, and place, reasonably in advance of the hearing. (c) The hearing may be conducted by any individual, including an official of the educational agency or insti-



Procedural Safeguards
Confidentiality of
Information - Hearings
(cont.)

tution, who does not have a direct interest in the outcome of the hearing. (d) The educational agency or institution shall give the parent or eligible student a full and fair opportunity to present evidence relevant to the issues raised under Sec. 99.21. The parent or eligible student may, at their own expense, be assisted or represented by one or more individuals of his or her own choice, including an attorney. (e) The educational agency or institution shall make its decision in writing within a reasonable period of time after the hearing. (f) The decision must be based solely on the evidence presented at the hearing, and must include a summary of the evidence and the reasons for the decision. 34 C.F.R. Sec. 99.22.



What the Regulations Mean ...

If a school refuses to remove or amend an educational record, parents may request a hearing. If a hearing results in the finding that the information in the child's records was inaccurate, misleading or violated the child's rights, the record must be amended as necessary. If the hearing officer determines the record should remain in the file, parents have the right to include a statement in the file, stating their reasons for disagreement. The parental statement must remain in the file and accompany the record in which there is disagreement, including if the record is disclosed to another party, as long as that record is maintained by the school.

What Parents Should Know ...

The school can have anyone act as a hearing officer, so long as the person does not have a "direct interest" in the outcome. The law does not provide a process for appeal.

Procedural Safeguards
Confidentiality of
Information - Consent /
Safeguards

What the Federal Regs. Say ...

Consent - Parental consent must be obtained before personally identifiable information is disclosed to parties, other than officials of participating agencies in accordance with paragraph (b)(1) of this section, unless the information is contained in educational records, and the disclosure is authorized without parental consent under 34 C.F.R. part 99. Sec. 300.622(a).

Except as provided in paragraphs (b)(2) and (b)(3) of this section, parental consent is not required before personally identifiable information is released to officials of participating agencies for purposes of meeting a requirement of this part. Sec. 300.622(b)(1).

Parental consent, or the consent of an eligible child who has reached the age of majority under State law, must be obtained before personally identifiable information is released to officials of participating agencies providing or paying for transition services in accordance with Sec. 300.321(b)(3). Sec. 300.622(b)(2).

If a child is enrolled, or is going to enroll in a private school that is not located in the LEA of the parent's residence, parental consent must be obtained before any personally identifiable information about the child is released between officials in the LEA where the private school is lo-

cated and officials in the LEA of the parent's residence. Sec. 300.622(b)(3).

Safeguards - Each participating agency must protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages. One official at each participating agency shall assume responsibility for ensuring the confidentiality of any personally identifiable information. All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under Sec. 300.123 and 34 C.F.R. part 99. Each participating agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information. Sec. 300.623.

What the Regulations Mean ...

Schools must get parental consent before disclosing personally identifiable information about a child to any individual or entity other than school officials allowed such access or entities where consent is not required.

What Parents Should Know ...

Generally, schools may not disclose personally identifiable information about a child without parental consent. However, this rule is not absolute, as there are specific exceptions. Parents may ask to see the list of school personnel who have access to their child's records.

Procedural Safeguards
Confidentiality of
Information - Destruction
of Information / Children's
Rights

What the Federal Regs. Say ...

Destruction of Information - The public agency must inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child. Sec. 300.624(a).

The information must be destroyed at the request of the parents. 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. Sec. 300.624(b).

Children's rights - The SEA must have in effect policies and procedures regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability. Sec. 300.625(a).

Under the regulations for FERPA [Family Educational Rights and Privacy Act of 1974] in 34 C.F.R. 99.5(a), the rights of parents regarding education records are transferred to the student at age 18. Sec. 300.625(b).

If the rights accorded to parents under Part B of the Act are transferred to a student who reaches the age of majority, consistent with Sec. 300.520, the rights regarding educational records in Secs. 300.613 through 300.624 must also be transferred to the student. However, the public agency must provide any notice required under Sec. 615 of the Act to the student and the parents. Sec. 300.625(c).

What the Regulations Mean ...

Schools must inform parents when their child's records become outdated and then destroy them upon the parents' request.

The rights regarding confidentiality of records discussed on the previous pages transfer to the child with a disability upon reaching age of majority, just as other IDEA rights transfer to the child at that time.

What Parents Should Know ...

Personally identifiable information is information such as the student's name, the name of the student's parents or other family member, the student's or his or her family's address, a personal identifier such as a Social Security number, student identification number, or any other information that would make the student's identity traceable. Schools are allowed to maintain specific personally identifiable information on a student, even if all other records become outdated and are destroyed.

**Procedural Safeguards
State Complaint Procedures -
Remedies Available**

What the Federal Regs. Say ...

Each SEA must adopt written procedures for: (1) Resolving any complaint, including a complaint filed by an organization or individual from another State, that meets the requirements of Sec. 300.153 by providing for the filing of a complaint with the SEA; and at the SEA's discretion, providing for the filing of a complaint with a public agency and the right to have the SEA review the public agency's decision on the complaint; and (2) Widely disseminating to parents and other interested individuals, including parent training and information centers, protection and advocacy agencies, independent living centers, and other appropriate entities, the State procedures under Secs. 300.151 through 300.153. Sec. 300.151(a).

Remedies for denial of appropriate services - In resolving a complaint in which the SEA has found a failure to provide appropriate services, an SEA, pursuant to its general supervisory authority under Part B of the Act, must address: (1) The failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and (2) Appropriate future provision of services for all children with disabilities. Sec. 300.151(b).

What the Regulations Mean ...

The State Complaint process has been an alternative to a due process hearing, when applicable, since IDEA was created. It was not until the 1997 Amendments, however, that State agencies were given authority to order relief that was actually commensurate with the school's violation, such as compensatory services or reimbursement.

The availability of the State Complaint procedure is not limited to parents. Other individuals and organizations may also avail themselves to the State Complaint if they are aware of what is believed to be a violation of IDEA. Filing a State Complaint on one child has the potential for district-wide application, as the district, if found out of compliance, must typically demonstrate that it is correctly applying IDEA in the specific area of complaint to all children in the district.

What Parents Should Know ...

One of the methods of legal recourse a parent has for resolving disputes with a school is through the State Complaint process (others include mediation and due process hearings). Complaints can address procedural or compliance-type issues (*e.g.*, whether the school violated a procedure, violated the law, or failed to follow an IEP). Substantive issues, such as whether a child requires a specific service and how much, are usually better addressed through mediation or a due process hearing.

Procedural Safeguards
State Complaint Procedures -
Time Limits / Procedures

What the Federal Regs. Say ...

Time limit; minimum procedures - Each SEA must include in its complaint procedures a time limit of 60 days after a complaint is filed under Sec. 300.153 to: (1) Carry out an independent on-site investigation, if the SEA determines that an investigation is necessary; (2) Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint; (3) Provide the public agency with the opportunity to respond to the complaint, including, at a minimum - at the discretion of the public agency, a proposal to resolve the complaint; and an opportunity for a parent who has filed a complaint and the public agency to voluntarily engage in mediation consistent with Sec. 300.506; (4) Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part B of the Act or of this part; and (5) Issue a written decision to the complainant that addresses each allegation in the complaint and contains findings of fact and conclusions; and the reasons for the SEA's final decision. Sec. 300.152(a).

Time extension; final decision; implementation - The SEA's procedures described in paragraph (a) of this section also must (1) Permit an extension of the time limit under paragraph (a) of this section only if (i) Exceptional circumstances exist with respect to a particular complaint; or (ii) The parent (or individual or organization, if mediation

or other alternative means of dispute resolution is available to the individual or organization under State procedures) and the public agency involved agree to extend the time to engage in mediation pursuant to paragraph (a)(3)(ii) of this section, or to engage in other alternative means of dispute resolution, if available in the State; and (2) Include procedures for effective implementation of the SEA's final decision, if needed, including (i) Technical assistance activities; (ii) Negotiations; and (iii) Corrective actions to achieve compliance. Sec. 300.152(b).

What the Regulations Mean ...

The State agency has 60 days to complete its complaint investigation and issue its written findings of fact and conclusions for each complaint allegation. The State can extend this period only for exceptional circumstances.

The State may conduct the complaint investigation on-site, or may conduct the investigation with phone interviews. Both parents and school can submit additional information. State investigators will meet with the complainant and with school personnel separately, whether the investigation is conducted on-site or over the phone. The SEA must offer the parties mediation to resolve the issue(s).

What Parents Should Know ...

If the issues presented by the parents (or other individual or agency) are found to be valid, the State will engage in technical assistance and negotiation, as well as require the school to do "corrective action" and demonstrate it has done so district-wide.

Procedural Safeguards

State Complaint Procedures - State Complaints and Due Process Hearings

What the Federal Regs. Say ...

Complaints filed under this section and due process hearings under Sec. 300.507 and Secs. 300.530 through 300.532 - If a written complaint is received that is also the subject of a due process hearing under Sec. 300.507 or Secs. 300.530 through 300.532, or contains multiple issues of which one or more are part of that hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action must be resolved using the time limit and procedures described in paragraphs (a) and (b) of this section. If an issue raised in a complaint filed under this section has previously been decided in a due process hearing involving the same parties - the due process hearing decision is binding on that issue; and the SEA must inform the complainant to that effect. A complaint alleging a public agency's failure to implement a due process hearing decision must be resolved by the SEA. Sec. 300.152(c).

What the Regulations Mean ...

If parents file a Due Process Complaint and submit a State Complaint on the same issue or issues, the State Complaint will be

set aside and the hearing process will take precedence. If a State Complaint is filed and a due process hearing is requested where some or all of the issues differ, each process proceeds independently and the State agency will conduct its complaint investigation on the issues not addressed in the Due Process Complaint.

There are no appeal rights from the State Complaint process. However, if an issue or issues have been addressed through the State Complaint process, either party may later address the same issue in a due process hearing. Regardless of the State's complaint findings, the hearing officer's decision will take precedence. The results of the State Complaint process may be used as evidence at the due process hearing. The opposite is not allowable, in that if an issue has been addressed at a due process hearing, the same issue cannot later be addressed through the State Complaint process.

What Parents Should Know ...

While the State Complaint process typically would not address substantive issues, such as "how much" or "whether" a child requires a specific service, or eligibility issues, it is now much more attractive for addressing situations where a school has failed to comply with an IEP because IDEA '97 authorized the State to order compensatory education or reimbursement (where a parent has placed a child privately) if a school has been found out of compliance through the State Complaint process.

Procedural Safeguards
State Complaint Procedures -
Content of Complaint

What the Federal Regs. Say ...

Filing a complaint - An organization or individual may file a signed written complaint under the procedures described in Secs. 300.151 through 300.152. Sec. 300.153(a).

The complaint must include:

(1) A statement that a public agency has violated a requirement of Part B of the Act or of this part;

(2) The facts on which the statement is based;

(3) The signature and contact information for the complainant; and

(4) If alleging violations with respect to a specific child - (i) The name and address of the residence of the child; (ii) The name of the school the child is attending; (iii) In the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child, and the name of the school the child is attending; (iv) A description of the nature of the problem of the child, including facts relating to the problem; and (v) A proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed. Sec. 300.153(b).

The complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received in accordance with Sec. 300.151. Sec. 300.153(c).

The party filing the complaint must forward a copy of the complaint to the LEA or public agency serving the child at the same time the party files the complaint with the SEA. Sec. 300.153(d).

What the Regulations Mean ...

IDEA 2004 formalized the State Complaint process by creating a checklist of what must be contained in it, similar to a Due Process Complaint. A State Complaint can be filed by a parent, other individual, or an organization. It can address a particular child or systemic issues. It must be signed by the person or entity filing the complaint. The complaint must state the alleged violations of the IDEA and the facts upon which the alleged violations occurred.

The statute of limitations for filing a State Complaint is one year from the date of the alleged violation. IDEA 2004 eliminated the exceptions extending the time period (to three years) that were contained in the previous version of IDEA (for continuing violations and seeking compensatory education).

What Parents Should Know ...

State Complaints must be in writing, signed, and state both the alleged violation of IDEA and the facts that support the violation. While citing to specific laws or regulations believed to be violated is helpful, it is not required. However, parents are encouraged to consult with someone experienced in IDEA when needed, either in drafting the State Complaint or in answering questions.

IDEA 2004 set a specific one-year time limit following occurrence of the alleged violation for filing State Complaints.