



# **PROCEDURAL SAFEGUARDS**

*Available to Parents and Students  
With Exceptionalities*

Revised July 2017



**West Virginia Board of Education  
2017-2018**

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*Procedural Safeguards*

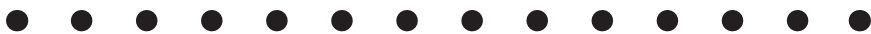




## **FOREWORD**

The West Virginia Department of Education is dedicated to ensuring students become engaged, productive citizens of our state, nation and world. We believe that all young people can and will learn and that every young person in West Virginia must be provided with a world-class education. When a student's individual needs require changes to his or her educational services, the parent and student have special protections, or procedural safeguards, under state and federal law to ensure they are informed participants in the decision-making process.

To facilitate informed parent involvement, this document explains the rights of parents, and students to whom rights have transferred, in the special education process. For situations in which the parent and school district disagree on important matters related to the student's education, it describes the processes available for resolving disputes.



## PROCEDURAL SAFEGUARDS AT A GLANCE

The following is a summary of the procedural safeguards, that is, parent and student rights under the special education laws and regulations, which are discussed in full in this document. The full explanation includes all procedural safeguards available under the Individuals with Disabilities Education Act implementing regulations, 34 Code of Federal Regulations (CFR) §300.148 (unilateral placement in private school at public expense), §§300.151 through 300.153 (state complaint procedures), §300.300 (consent), §§300.502 through 300.503, §§300.505 through 300.518, and §§300.500 through 300.537 (procedural safeguards in Subpart E of Part B regulations) and §§300.610 through 300.625 (confidentiality of information provisions in Subpart F). Please refer to the section indicated for complete information.

### Parent Notice and Consent – Page 4

A parent or adult student (student age 18 or older to whom rights have transferred) has the right to be informed of actions, and for some actions, to give consent before the school district considers or makes changes to the student's education based on special needs. The school district must give the parent **prior written notice**, information in writing, before it takes any action to identify, test or place the student in special education for the first time and before it makes any changes to the student's special education and related services or placement. When the parent has requested a change, and the district refuses, the parent also must be informed in writing of the basis for the action. Parents have certain **consent** rights. The school district must get written parental consent before first evaluating a student and before providing special education services for the first time to a student. After the student is placed in special education, consent will be requested before reevaluations. Parents also have the right to revoke (withdraw) consent.

### Independent Educational Evaluations – Page 9

A parent who disagrees with an evaluation completed by the school district has the right to have the student evaluated by someone who does not work for the school district. If the evaluation meets certain conditions, the school district must pay for it, unless the district proves in a due process hearing its evaluation was appropriate.



## **Confidentiality (Privacy) of Education Records – Page 10**

Parents (and adult students) have **access rights** to review education records about the student kept by the school district and the right to expect that those records will not be open to anyone except certain people who need the information for reasons related to the student’s education. Parents must give written **consent** before records may be released, except in certain circumstances. If a parent believes the student’s records are incorrect or violate privacy, an **amendment of the record** may be requested. When the records are no longer needed for the student’s education, the parent (or adult student) has the right to request **destruction of the records**.

## **Dispute Resolution – Page 16**

When a concern arises about a student’s education, parents are encouraged to discuss it with teachers, the principal and the district special education director. Many issues may be resolved through informal conferences or IEP team meetings. When these steps do not resolve the issue, a parent may consider a Facilitated Individualized Education Program (FIEP) Team Meeting, mediation, state complaint or a due process hearing.

## **Disciplinary Actions for Students with Disabilities – Page 32**

School personnel may remove a student with a disability from class or school for a violation of the student code of conduct used for all students for ten days in a school year. When the removal is for more than ten days in a school year, special rules for functional behavior assessment, behavior plans and continued services apply. If the removal is for more than ten days in a row or otherwise is a change of placement, an Individualized Education Program (IEP) team must decide whether the behavior was caused by the student’s disability (manifestation determination). A parent may file an appeal if he or she disagrees with the district’s manifestation determination or change of placement decision.

## **Unilateral Parental Placement of Students with Disabilities in Private Schools – Page 39**

Special conditions apply when a due process hearing is filed to resolve a dispute between a parent and the school district regarding payment for private school services.



## **PROCEDURAL SAFEGUARDS AVAILABLE TO PARENTS AND STUDENTS**

The Individuals with Disabilities Education Act (IDEA), the federal law concerning the education of students with disabilities, and West Virginia Board of Education Policy 2419: Regulations for the Education of Students with Exceptionalities provide procedural safeguards to ensure parent participation in the special education process and to ensure the student's right to a free appropriate public education (FAPE). In addition, Policy 4350: Regulations for the Collection, Maintenance and Disclosure of Student Data protects confidentiality of student information. At age eighteen, all the following rights given to parents transfer to the student. The student will receive any notices sent to parents and may exercise these rights unless a court has appointed a legal guardian to represent the educational interests of the student. Parents also continue to receive all required notices. Procedural safeguards in IDEA may be found in Part B at 34 Code of Federal Regulations (CFR) §§300.500 through 300.536.

### **Parent Notice and Consent**

#### ***Prior Written Notice (PWN)***

The school district must give the parent written notice (provide certain information in writing), whenever it:

1. Proposes to initiate or to change the identification, evaluation or educational placement of a student, or the provision of a free appropriate public education (FAPE), or
2. Refuses to initiate or to change the identification, evaluation or educational placement of a student, or the provision of FAPE.

The written notice must:

1. Describe the action the school district proposes or refuses to take;
2. Explain why the school district is proposing or refusing to take the action;
3. Describe each evaluation procedure, assessment, record or report the school district used in deciding to propose or refuse the action;
4. Include a statement that parents have protections under the procedural safeguards provisions of the IDEA;
5. Tell how to obtain a description of the procedural safeguards if the action the school district is proposing or refusing is not an initial referral for evaluation;





6. Include resources for parents to contact for help in understanding the IDEA;
7. Describe any other choices the student's Individualized Education Program (IEP) Team considered and the reasons why those choices were rejected; and
8. Provide a description of other reasons why the school district proposed or refused the action.

### **Notice in understandable language**

The notice must be:

1. Written in language understandable to the general public; and
2. Provided in the parent's native language or other mode of communication, unless it is clearly not feasible to do so.

If the native language or other mode of communication is not a written language, the school district must take steps to ensure that:

1. The notice is translated orally or by other means to the parent in the native language or other mode of communication;
2. The parent understands the content of the notice; and
3. Written evidence that 1 and 2 have been met is maintained.

**Native language**, when used with an individual who has limited English proficiency, means the following:

1. The language normally used by that person, or, in the case of a student, the language normally used by the student's parents;
2. In all direct contact with a student (including evaluation of the student), the language normally used by the student in the home or learning environment.

For a person with deafness or blindness, or for a person with no written language, the method of communication is what the person normally uses (such as sign language, Braille or oral communication).

If the school district offers parents the choice of receiving documents by electronic mail (e-mail), parents may choose to receive the following by e-mail:

1. Prior written notice;
2. Procedural safeguards notice; and
3. Notices related to a due process complaint.



### **Definition of consent**

Consent means the parent:

1. Has been fully informed in his or her native language or other method of communication (such as sign language, Braille or oral communication) of all information about the action for which consent is given;
2. Understands and agrees in writing to that action, and the consent describes that action and lists the records (if any) that will be released and to whom; and
3. Understands the consent is voluntary and may be withdrawn at any time.

If the parent wishes to revoke (cancel) consent after the student has begun receiving special education and related services, the parent must do so in writing. Withdrawal of consent does not negate (undo) an action that occurred after the parent gave consent and before it was withdrawn. In addition, the school district is not required to amend (change) the student's education records to remove any references that the student received special education and related services after withdrawal of consent.

### **Consent for initial evaluation**

Before the school district conducts an initial evaluation of a student to determine eligibility under IDEA to receive special education and related services, it must provide the parent PWN of the proposed action and obtain parent consent.

The school district must make reasonable efforts to obtain informed consent for an initial evaluation to decide whether a student has an exceptionality. Parent consent for initial evaluation does not mean the parent has given consent for the school district to start providing special education and related services to the student.

Refusal to consent to one service or activity related to the initial evaluation may not be used as a basis for denying the parent or the student any other service, benefit or activity, unless IDEA, Part B requires the school district to do so.

If the student is enrolled in public school, or parents are seeking to enroll the student in a public school, and consent has been refused or the parents have not responded to a request for consent for an initial evaluation, the school district

may, but is not required to, seek to conduct an initial evaluation through the special education mediation or due process hearing procedures. The school district will not violate its obligations to locate, identify and evaluate the student if it does not pursue an evaluation in these circumstances.

### ***Special rules for initial evaluation of wards of the state***

If a student is a ward of the state and is not living with the parent, the school district does not need consent from the parent for an initial evaluation to determine if the student is a student with an exceptionality if:

1. Despite reasonable efforts to do so, the school district cannot find the student's parent;
2. The rights of the parents have been terminated in accordance with state law; or
3. A judge has assigned the right to make educational decisions and to consent for an initial evaluation to an individual other than the parent.

Ward of the State, as used in the IDEA, means a child who, as determined by the state where the child lives, is:

1. A foster child;
2. Considered a ward of the state under state law; or
3. In the custody of a public child welfare agency.

Ward of the State does not include a foster child who has a foster parent who meets the definition of a parent as used in IDEA.

### ***Parental consent for services***

The school district must obtain the parent's informed consent before providing special education and related services to the student for the first time. The school district must make reasonable efforts to obtain this informed consent.

If the parent does not respond to a request to provide such consent, if consent is refused or if the parent later revokes (cancels) consent in writing, the school district cannot use the procedural safeguards (i.e., mediation, due process complaint, resolution meeting or an impartial due process hearing) to obtain agreement or a ruling that the special education and related services may be provided without consent.

When the school district does not provide special education and related services because the parent refused to give consent for the student to receive special education and related services for the first time, did not respond to a request to provide such consent or revoked (cancelled) consent in writing, the district:

1. Is not in violation of the requirement to make a free, appropriate public education (FAPE) available to the student for its failure to provide those services; and
2. Is not required to have an IEP Team meeting or develop an IEP for the student.

If the parent revokes (cancels) consent in writing at any point after the student is first provided special education and related services, then the school district may not continue to provide such services, but must provide the parent prior written notice, as described under the heading PWN, before discontinuing the services.

### ***Parental consent for reevaluations***

The school district must obtain informed parental consent before it reevaluates a student, unless the school district can demonstrate that:

1. It took reasonable steps to obtain consent for reevaluation; and
2. The parent did not respond.

If the parent refuses consent for the reevaluation, the school district may, but is not required to, pursue the reevaluation by using the mediation or due process hearing procedures to seek to override the parent's refusal to consent to the reevaluation. As with initial evaluations, the school district does not violate its obligations under the IDEA if it does not pursue the reevaluation in this manner.

### ***Documentation of reasonable efforts to obtain parental consent***

The school district must keep records of reasonable efforts to obtain parental consent for initial evaluations, to provide special education and related services for the first time, to reevaluate and to locate parents of wards of the state for initial evaluations. The documentation must include a record of the school district's attempts in these areas, such as:

1. Detailed records of telephone calls made or attempted and the results of those calls;
2. Copies of correspondence sent to the parents and any responses received;
3. Detailed records of visits made to the parent's home or place of employment and the results of those visits.



### **Other consent requirements**

Parental consent is not required before the school district may:

1. Review existing data as part of a student's evaluation or a reevaluation;
2. Give a test or other evaluation that is given to all students unless, before that test or evaluation, consent is required from parents of all students;
3. Conduct evaluations, tests, procedures or instruments that are identified on an IEP as a measure for determining progress toward IEP goals; or
4. Conduct a screening of a student by a teacher or specialist to determine appropriate instructional strategies for curriculum implementation.

If the student is enrolled in a private school at parent expense, or if the student is home schooled, and the parent does not consent to the student's initial evaluation, or to reevaluation, or does not respond to a request for consent, the school district cannot use its consent override procedures (i.e., mediation, state complaint, resolution meeting or an impartial due process hearing) and is not required to consider the student eligible to receive equitable services (services made available to parentally-placed private school students with disabilities).

### **Independent Educational Evaluations**

A parent has the right to obtain an independent educational evaluation (IEE) of the student if he or she disagrees with the evaluation conducted by the school district. If a parent requests an independent educational evaluation, the school district must provide information about where to obtain an IEE and about the school district's criteria that apply to independent educational evaluations.

### **Definitions**

**Independent educational evaluation** means an evaluation conducted by a qualified examiner who is not employed by the school district responsible for the student's education.

**Public expense** means the school district either pays for the full cost of the evaluation or ensures the evaluation is otherwise provided at no cost to parents, consistent with the provisions of the IDEA, which allow each state to use whatever state, local, federal and private sources of support are available in the state to meet the requirements of the IDEA.



### **Parent right to evaluation at public expense**

The parent who disagrees with a school district's evaluation has the right to an independent educational evaluation (IEE) of the student at public expense, subject to the following conditions:

1. If the parent requests an IEE of the student at public expense, the school district must, without unnecessary delay, either: (a) Request a due process hearing to show its evaluation is appropriate; or (b) Provide an IEE at public expense unless the district demonstrates in a hearing that the evaluation of the student obtained by the parent did not meet the school district's criteria.
2. If the school district requests a hearing and the final decision is that the school district's evaluation is appropriate, the parent still has the right to an IEE, but not at public expense.
3. If a parent requests an IEE of the student, the school district may ask why the parent objects to the school district's evaluation. However, the school district may not require an explanation and may not unreasonably delay either providing the IEE at public expense or filing a due process complaint to defend the school district's evaluation.

The parent is entitled to only one IEE at public expense each time the school district conducts an evaluation of the student with which the parent disagrees.

### **Parent-initiated Evaluations**

If a parent obtains an IEE at public expense or shares with the school district an evaluation obtained at private expense:

1. The school district must consider the results of the evaluation, if it meets the school district's criteria for an IEE, in any decision made with respect to the provision of a free appropriate public education (FAPE) to the student; and
2. The parent or the school district may present the evaluation as evidence at a due process hearing regarding the student.

If a parent/adult student asks the district to pay for an IEE that has already been obtained, the district must:

1. Pay for the IEE; or
2. Request WVDE mediation when parent agrees to mediate; and/or



3. Request a due process hearing within ten school days of the receipt of the evaluation report to show that the evaluation obtained by the parent/adult student did not meet the criteria for a publicly funded IEE; or
4. Request a due process hearing within ten school days to demonstrate that the district's evaluation was appropriate. The district does not have to pay for an IEE if the hearing officer finds for the district.

### ***Requests for evaluations by a due process hearing officer***

If a due process hearing officer requests an IEE of the student as part of a due process hearing, the cost of the evaluation must be at public expense.

### ***School District 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 the school district uses when it initiates an evaluation (to the extent those criteria are consistent with the parent's right to an IEE).

Except for the criteria described above, a school district may not impose conditions or timelines related to obtaining an IEE at public expense.

## **Confidentiality of Information**

### ***Definitions***

As used under the heading **Confidentiality of Information**:

- **Destruction** means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.
- **Education records** means those records that are directly related to a student and are collected, maintained or disclosed by an educational agency or institution or by a party acting for the educational agency or institution. This term is further defined in 34 CFR Part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (FERPA) and Policy 4350: Procedures for the Collection, Maintenance and Disclosure of Student Information.
- **Personally identifiable** means information that has:
  - (a) The student's name, the name of the student's parent, or the name of another family member;
  - (b) The student's address;



- (c) A personal identifier, such as the student’s Social Security number or student number; or
- (d) A list of personal characteristics or other information that would make it possible to identify the student.

The rules for confidentiality apply to any “participating agency”, that is, any school district, agency or institution that collects, maintains or uses personally identifiable information, or from which information is obtained, under IDEA, Part B. This includes the West Virginia Department of Education (WVDE), school districts and other agencies under the general supervision of the West Virginia Board of Education. Because this document focuses on the parent’s involvement with the local school district, “school district” is used rather than the broader term, “participating agency”.

### **Notice to Parents**

The WVDE must give notice that is adequate to fully inform parents about confidentiality of personally identifiable information, including:

1. A description of the extent to which the notice is given in the native languages of the various population groups in the state;
2. A description of the students on whom personally identifiable information is maintained, the types of information sought, the methods the state intends to use in gathering the information (including the sources from whom information is gathered) and the uses to be made of the information;
3. A summary of the policies and procedures participating agencies must follow regarding storage, disclosure to third parties, retention and destruction of personally identifiable information; and
4. A description of all of the rights of parents and students regarding this information, including the rights under the Family Educational Rights and Privacy Act (FERPA) and its implementing regulations in 34 CFR Part 99.

Before any major activity to identify, locate and evaluate students in need of special education and related services, (also known as “child find”) the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the state of the activities.





## **Access Rights**

The school district must permit the parent (or adult student to whom rights have transferred) to inspect and review any education records relating to the student that are collected, maintained or used by the school district under the IDEA. The school district must comply with a parent's request to inspect and review a student's education records without unnecessary delay and before any meeting regarding an IEP or any impartial due process hearing (including a resolution meeting or a hearing regarding discipline), and in no case more than 45 calendar days after the parent made the request.

The right to inspect and review education records includes:

1. The right to a response from the school district to reasonable requests for explanations and interpretations of the records;
2. The right to request the school district provide copies of the records if parents cannot effectively inspect and review the records unless they receive those copies; and
3. The right to have a representative inspect and review the records.

The school district may presume a parent has authority to inspect and review records relating to his or her child unless advised the parent does not have the authority under applicable state law governing such matters as guardianship, separation and divorce.

## **Record of Access**

Each school district must keep a record of parties obtaining access to education records collected, maintained or used under the IDEA (except access by parents and authorized employees of the district ), including the name of the party, the date access was given and the purpose for which the party is authorized to use the records.

## **Records on more than one student**

If any education record includes information on more than one student, the parent has the right to inspect and review only the information relating to his or her child or to be informed of that specific information.

## **List of types and locations of information**

On request, the school district must provide parents with a list of the types and locations of education records collected, maintained or used by the agency.



### **Fees**

The school district may charge a fee for copies of records made for a parent, if the fee does not effectively prevent the parent from exercising the right to inspect and review those records. A school district may not charge a fee to search for or to retrieve information from education records under Part B of IDEA.

### **Amendment of records at parent's request**

If a parent believes that information in the education records regarding his or her child collected, maintained or used under the IDEA is inaccurate, misleading or violates the privacy or other rights of the student, the parent may request the school district to change the information. The school district must decide whether to change the information in accordance with the request within a reasonable period of time of receipt of the request. If the school district refuses to change the information as requested, it must inform the parent of the refusal and of the right to a hearing.

### **Opportunity for a hearing and results of a hearing**

The school district must, on request, provide the parent an opportunity for a hearing to challenge information in a student's education records to ensure it is not inaccurate, misleading or otherwise in violation of the privacy or other rights of the student. A hearing to challenge information in education records must be conducted according to the procedures for such hearings under the Family Educational Rights and Privacy Act (FERPA) and Policy 4350.

If, as a result of the hearing, the school district decides the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the student, it must change the information and inform the parent in writing. If, as a result of the hearing, the school district decides the information is not inaccurate, misleading or otherwise in violation of the privacy or other rights of the student, it must inform the parent of the right to place in the records it maintains on the student a statement commenting on the information or providing any reasons the parent disagrees with the decision of the school district.

The parent's explanation must:

1. Be maintained by the school district as part of the student's records as long as the record or contested portion is maintained by the school district, and
2. If the school district discloses the student's records or the challenged portion to any party, the explanation must also be disclosed to that party.



### **Consent for disclosure of personally identifiable information**

Unless the information is contained in education records and the disclosure is authorized without parental consent under the Family Educational Rights and Privacy Act (FERPA), parent consent must be obtained before personally identifiable information is disclosed to parties other than officials of the student's school district who have a legitimate educational interest in the student's education, or to a school or district in which the student seeks to enroll. WVDE officials responsible for monitoring the requirements of IDEA also have access.

Parent consent, or the consent of an eligible student 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.

If the parent has enrolled the student in a private school that is not located in the same school district in which the parent resides, parent consent must be obtained before any personally identifiable information about the student is released between officials in the school district where the private school is located and officials in the school district where the parent resides.

### **Safeguards**

Each school district must protect the confidentiality of personally identifiable information at collection, storage, disclosure and destruction stages. One official at each participating agency must assume responsibility for ensuring the confidentiality of any personally identifiable information. All persons collecting or using personally identifiable information must be trained in Policy 4350, which includes policies and procedures for confidentiality under the IDEA and the Family Educational Rights and Privacy Act (FERPA). Each school district 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.

### **Destruction of Information**

Parents (or adult students) must be informed when personally identifiable information collected, maintained or used is no longer needed to provide educational services to the student. The information must be destroyed at parent (or adult student) request. However, a permanent record of the student's name, address, phone number, grades, attendance record, classes attended, grade level completed and year completed may be maintained without time limitation.



## Dispute Resolution

The West Virginia Department of Education (WVDE) provides four dispute resolution options to parents and school districts for resolving concerns: 1) Facilitated Individualized Education Program (IEP) Team meeting, 2) Mediation, 3) State Complaint, and 4) Impartial Due Process Complaint and Hearing, including a Resolution Session. WVDE provides additional information on all four processes on its website (<http://wvde.state.wv.us/osp/compliance>) and upon request.

A **Facilitated IEP Team meeting** is a voluntary early dispute prevention option utilizing an impartial facilitator to guide the IEP process during the meeting and to assist members of the IEP Team to communicate effectively. A student's IEP is developed by a collaborative team whose required members share responsibilities for the process, content and results. An IEP Facilitator provides assistance to the IEP Team before a potential conflict develops into a more serious dispute. The IEP Facilitator is an impartial third party, not a member of the IEP Team, and has no stake in decisions made by the team. A district, parent or adult student may request a Facilitated IEP Team meeting.

**Mediation** is a voluntary process for both parties in which WVDE assigns a trained third party to meet with the parent and school officials to resolve the issue(s) in dispute. If the issues are resolved, a written and legally binding agreement is signed by both parties. Only the parent, the school district or an attorney representing a party may request a mediation on any matter relating to a proposal or a refusal to initiate or change the identification, evaluation or educational placement of a student with an exceptionality or the provision of a free appropriate public education.

A **State Complaint** can be filed by a parent or any individual alleging a violation of any IDEA, Part B requirement by the school district, the WVDE or any other public agency. The WVDE staff must resolve a state complaint in writing within 60 calendar days of receipt unless the timeline is properly extended or the parent and district use the early resolution process to resolve the issues.

A **Due Process Complaint** is a written complaint which meets specific legal requirements and is filed with the WVDE to request a due process hearing. This is a one- tier process in which a hearing is conducted at the state level and appeals of the decision are made in state or federal court. An impartial due process hearing officer assigned by the WVDE conducts a formal hearing with



witnesses' testimony, presentation of evidence and cross examination. Parents and the district have a resolution period in which to have a meeting to attempt to resolve the issues. In addition, parties may agree to a mediation to resolve the issues prior to the hearing. An impartial due process hearing officer must hear a due process complaint (if not resolved through a resolution meeting or through mediation) and issue a written decision within 45 calendar days after the end of the resolution period, unless the due process hearing officer grants a specific extension of the timeline at the request of the parent or the school district. Both the district and parents are bound by the decision.

### **Facilitated IEP Team Meeting**

The WVDE makes Facilitated IEP Team meetings available to parents and the school districts to assist in solving problems and developing an IEP to meet the student's needs to the mutual satisfaction of the participants.

A Facilitated IEP Team Meeting:

1. Is free, voluntary and must be agreed to by both parties;
2. May not be used to deny or delay a parent/adult student's right to a hearing or to deny any other rights afforded under IDEA, Part B;
3. Is assigned to a qualified facilitator on a rotational basis;
4. Is conducted by a qualified and impartial facilitator who is trained in facilitation techniques; and
5. Is scheduled in a timely manner and adheres to all required timelines.

The IEP Facilitator must not:

1. Be an employee of the WVDE or an employee of the district who is involved in the care and education of the student;
2. Have a personal or professional interest that conflicts with the facilitator's objectivity; or
3. Have a student enrolled in the district involved in the Facilitated IEP Team meeting.

### **Mediation**

The WVDE makes mediation available to allow parents and the school district to resolve disagreements involving any matter under the IDEA, Part B, including matters arising before the filing of a due process complaint. Mediation is available whether or not a due process hearing complaint has been filed. A parent or school district may submit a written request for mediation to the WVDE, which maintains



a list of qualified mediators who know the laws and regulations relating to the provision of special education and related services. The WVDE selects mediators on a rotational basis. The WVDE is responsible for the cost of the mediation process, including meetings to encourage mediation.

Mediation:

1. Is voluntary for parents and the school district;
2. May not be used to deny or delay the parent's right to a due process hearing, or to deny any other rights under the IDEA; and
3. Is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

The school district may develop procedures to offer parents and school districts 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:

1. 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
2. Who would explain the benefits and encourage the use of the mediation process to the parent.

Each meeting in the mediation process must be scheduled in a timely manner and held at a place that is convenient for the parent and the school district.

If the parent and the school district resolve a dispute through mediation, both parties must enter into a legally binding agreement that states the resolution and:

1. States all discussions that happened during the mediation process will remain confidential and may not be used as evidence in any later due process hearing or court proceeding, and
2. Is signed by both the parent and a representative of the school district who has the authority to bind the school district to the agreement.

A written, signed mediation agreement is enforceable in any state court that has the authority under state law to hear this type of case or in a federal district court.

Discussions that happened during the mediation process must be confidential. They cannot be used as evidence in any future due process hearing or civil proceeding in any federal or state court.



### **Impartiality of the mediator**

The mediator:

1. May not be an employee of the WVDE or the school district involved in the education or care of the student, and
2. Must not have a personal or professional interest which conflicts with the mediator's objectivity.

A person who otherwise qualifies as a mediator is not an employee of the WVDE solely because the person is paid by the WVDE to serve as a mediator.

### **State Complaint**

The WVDE has written procedures for:

1. Filing a complaint with the WVDE;
2. Resolving any special education complaint, including a complaint filed by an organization or individual from another state;
3. Disseminating the state complaint procedures to parents and other interested individuals, including parent training and information centers, protection and advocacy agencies, independent living centers and other appropriate entities.

### **Filing a State Complaint**

An organization or individual, including one from another state, may file a signed, written state complaint by sending a request to:

West Virginia Department of Education, Office of Federal Programs  
1900 Kanawha Boulevard, East, Building 6  
Charleston, WV 25305

The complaint must include:

1. A statement that a school district or other public agency has violated a requirement of Part B of IDEA or its regulations;
2. The facts on which the statement is based;
3. The signature and contact information for the complainant; and
4. If alleging violations regarding a specific student:
  - (a) The name of the student and address of the residence of the student;
  - (b) The name of the school the student is attending;
  - (c) In the case of a homeless student, available contact information for the child and the name of the school the student is attending;



- (d) A description of the nature of the problem, including facts relating to the problem; and
- (e) A proposed resolution of the problem to the extent known and available to the party filing the complaint at the time the complaint is filed.

The complaint must allege a violation that occurred not more than one year before the date the complaint is received. The party filing the complaint must forward a copy of the complaint to the school district or other public agency serving the student at the same time the party files the complaint with the WVDE.

### **Timelines**

The WVDE's complaint procedures include a timeline of 60 calendar days from the date the WVDE receives a complaint that it determines to be sufficient. The WVDE will:

1. Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;
2. Provide the school district (or other public agency involved) the opportunity to respond to the complaint, including, at a minimum: (a) at the option of the agency, a proposal to resolve the complaint, and (b) an opportunity for a parent who has filed a complaint and the agency to agree voluntarily to try early resolution and / or mediation;
3. Carry out an independent investigation, on-site if necessary;
4. Review all relevant information and make an independent determination as to whether the school district or other public agency is violating a requirement of Part B of the IDEA; and
5. Issue a written decision that addresses each allegation in the complaint with (a) findings of fact and conclusions, and (b) the reasons for the WVDE's final decision.

The WVDE's complaint process:

1. Permits an extension of the 60-calendar-day timeline only if: (a) exceptional circumstances exist with respect to a particular state complaint, or (b) the parent and the school district or other public agency involved voluntarily agree to extend the time to engage in mediation or alternative means of dispute resolution.
2. Includes procedures for effective implementation of the WVDE's final decision, if needed, including: (a) technical assistance activities; (b) negotiations, and (c) corrective actions to achieve compliance.





### ***Early resolution of state complaints***

Either the parent or the school district may request early resolution of a state complaint by contacting the other party and participating in a local conference, which is voluntary for both parties. If early resolution is reached on any or all allegations in the complaint within fifteen days of being notified of the receipt of the state complaint, the school district submits the signed Verification of Early Resolution form and the complaint is considered resolved. Allegations not resolved will be investigated using the procedures described above.

### ***State complaints and due process hearings***

If a state complaint is received that is also the subject of a due process complaint, or the complaint has multiple issues of which one or more are part of a due process complaint, the WVDE must set aside the state complaint, or any part of the complaint that is being addressed in the due process hearing, until the hearing is over. Any issue in the complaint that is not a part of the due process hearing must be resolved using the time limit and procedures described above. If an issue raised in a complaint has previously been decided in a due process hearing involving the same parties (the parent and the school district), then the due process hearing decision is binding on that issue and the WVDE must inform the complainant that the decision is binding. A complaint alleging a school district's or other public agency's failure to implement a due process hearing decision must be resolved through the state complaint procedures by the WVDE.

### ***Remedies for denial of appropriate services***

In resolving a state special education complaint in which the WVDE has found a failure to provide appropriate services, the WVDE must address:

1. The district's failure to provide appropriate services, including corrective action appropriate to address the needs of the student, and
2. Appropriate future provision of services for all students with disabilities.



## **Due Process Hearing Complaint**

### **Filing a due process complaint**

A parent or the school district may file a due process complaint on any matter relating to the identification, evaluation or educational placement of a student or the provision of a FAPE. The due process complaint must allege a violation that happened not more than two years before the parent or the school district knew or should have known about the alleged action that forms the basis of the due process complaint.

This timeline does not apply if the parent could not file a due process complaint within the timeline because:

1. The school district specifically misrepresented it had resolved the issues identified in the complaint, or
2. The school district withheld information from the parent it was required to provide under the IDEA, Part B.

The WVDE will inform parents of any free or low-cost legal and other relevant services available in the area when a due process complaint is filed. The complaint must contain all of the content listed below and must be kept confidential. The party filing the complaint, or the attorney representing the party, must forward a copy of the complaint to the other party and to the WVDE.

The burden of proof will be on the party seeking relief in accordance with the decision in *Shaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528, 163L. Ed.2d 387 (2005).

### **Content of the due process complaint**

The due process complaint must include:

1. The name of the student;
2. The address of the student's residence;
3. The name of the student's school;
4. If the student is a homeless child or youth, the student's contact information and the name of the student's school;
5. A description of the nature of the problem of the student relating to the proposed or refused action, including facts relating to the problem; and
6. A proposed resolution of the problem to the extent known and available to the parent or the school district at the time.



The parent or the school district may not have a due process hearing until the party requesting the hearing (or the parent's or the school district's attorney) files a due process complaint that includes this information.

### **Sufficiency of the due process complaint**

For a due process complaint to go forward, it must be sufficient. The due process complaint request will be considered sufficient (to have met the content requirements above) unless the party receiving it (the parent or the school district) notifies the due process hearing officer and the other party in writing, within 15 calendar days of receiving the complaint, that the receiving party believes the hearing request does not meet the requirements listed above. Within 5 calendar days of receiving this notice, the hearing officer must decide if the complaint meets the requirements listed above and notify the parent and the school district in writing immediately.

### **Amendment of the due process complaint**

The parent or the school district may make changes to the due process complaint request only if:

1. The other party consents to the amendment in writing and is given the chance to resolve the due process complaint through a resolution meeting, or
2. By no later than 5 days before the due process hearing begins, the due process hearing officer grants permission for the amendment.

If a party amends the due process complaint, the 15 day timeline for the resolution meeting and the 30 day timeline for the resolution period start again on the date the amended complaint is filed.

### **School district response to a due process complaint**

If the school district has not given the parent a PWN regarding the subject matter in the parent's due process complaint, the school district must, within 10 calendar days of receiving the due process complaint, send the parent a response that includes:

1. An explanation of why the school district proposed or refused to take the action raised in the due process complaint;
2. A description of other options the student's IEP Team considered and the reasons why those options were rejected;
3. A description of each evaluation procedure, assessment, record or report the school district used as the basis for the proposed or refused action; and
4. A description of the other factors that are relevant to the school district's proposed or refused action.



Providing the information in items 1-4 above does not prevent the school district from stating a due process complaint was insufficient.

### **Other party response to a due process complaint**

Except as stated immediately above, the party receiving a due process complaint must, within 10 days of receiving the complaint, send the other party a response that specifically addresses the issues in the complaint.

### **WVDE forms**

The WVDE has forms for accessing all of the dispute resolution processes. These forms are not required, but any other form or letter used must include the required information.

### **Placement while the due process hearing is pending**

Except as provided below under the heading **Procedures When Disciplining Students with Disabilities**, once a due process complaint is sent to the other party, during the resolution period and while waiting for the decision of any impartial due process hearing or court proceeding, unless the parent and the state or the school district agree otherwise, the student must remain in his or her current educational placement.

If the due process complaint involves an application for initial admission to public school, the student, with parent consent, must be placed in the regular public school program until the completion of all such proceedings. If the due process complaint involves an application for initial services under IDEA, Part B for a child who is transitioning from being served under Part C of the IDEA to Part B of the IDEA and who is no longer eligible for Part C services because the child has turned three, the school district is not required to provide the Part C services the child has been receiving. If the child is found eligible under IDEA, Part B and the parent consents for the child to receive special education and related services for the first time, then, pending the outcome of the proceedings, the school district must provide those special education and related services that are not in dispute (those to which the parent and the school district both agree).

If the hearing officer in a due process hearing conducted by WVDE agrees with the parent that a change of placement is appropriate, that placement must be treated as the student's current educational placement where the student will remain while waiting for the decision of the impartial due process hearing officer or court proceeding.



## **Resolution Process**

### **Resolution Meeting**

Within 15 days of receiving a parent's due process complaint, and before the due process hearing begins, the school district must hold a resolution meeting with the parent and the relevant members of the IEP Team who have specific knowledge of the facts identified in the due process complaint. The parent and the school district determine the relevant members of the IEP Team to attend the meeting.

The meeting:

1. Must include a representative of the school district who has decision-making authority on behalf of the school district; and
2. May not include an attorney of the school district unless the parent brings an attorney.

The purpose of the meeting is for the parent to discuss the due process complaint and the facts that form the basis of the request, so the school district has the opportunity to resolve the dispute. The resolution meeting is not necessary if:

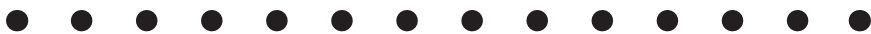
1. The parent and the school district agree in writing to waive the meeting, or
2. The parent and the school district agree to try mediation, as described under the heading Mediation.

Note: A resolution meeting is not necessary when the district submits a due process complaint.

### **Resolution period**

If the school district has not resolved the due process complaint to the parent's satisfaction within 30 days of receiving the request (the resolution period), the due process hearing may occur. Except as provided below, the 45 day timeline for issuing a final decision begins at the end of the 30 day resolution period.

Unless the parent and the school district have both agreed to waive the resolution process or to use mediation, a parent's failure to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held. If, after making reasonable efforts and documenting such efforts, the school district is not able to obtain parent participation in the resolution meeting, the school district may, at the end of the 30-day resolution period, request the due process hearing officer dismiss the due



process complaint. Documentation of the district's efforts must include a record of attempts to arrange a mutually agreed upon time and place, such as:

1. Detailed records of telephone calls made or attempted and the results of those calls;
2. Copies of correspondence sent to the parent and any responses received; and
3. Detailed records of visits made to the home or parent's place of employment and the results of those visits.

If the school district does not hold the resolution meeting within 15 days of receiving notice of the due process complaint or does not participate in the resolution meeting, the parent may ask the due process hearing officer to begin the 45-day due process hearing timeline. If the parent and the school district agree in writing to waive the resolution meeting, then the 45-day timeline for the due process hearing starts the next day.

### **Adjustments to the 30 day resolution period**

After the start of mediation or the resolution meeting and before the end of the 30-day resolution period, if the parent and the school district agree in writing that no agreement is possible, then the 45 day timeline for the due process hearing starts the next day. If the parent and the school district agree to try mediation, at the end of the 30 day resolution period, both parties can agree in writing to continue the mediation process until an agreement is reached. However, if either the parent or the school district withdraws from the mediation process, then the 45 day timeline for the due process hearing starts the next day.

### **Written Settlement Agreement**

If a resolution to the dispute is reached at the resolution meeting, the parent and the school district must enter into a legally binding agreement that is:

1. Signed by the parent and a representative of the school district who has the authority to bind the school district, and
2. Enforceable in any state court of competent jurisdiction (a state court that has authority to hear this type of case) or in a federal district court.

### **Agreement Review Period**

If the parent and the school district enter into an agreement as a result of a resolution meeting, either party may void the agreement within 3 business days of the time both parties signed the agreement.



### **Impartial Due Process Hearing Officer**

Whenever a due process complaint is filed, the parent or the school district involved in the dispute must have an opportunity for an impartial due process hearing, as described above and in this section, conducted by an impartial due process hearing officer. At a minimum, a due process hearing officer:

1. Must not be an employee of the WVDE or the school district that is involved in the education or care of the student. A person is not an employee of the WVDE solely because the person is paid by the WVDE to serve as a due process hearing officer;
2. Must not have a personal or professional interest that conflicts with the due process hearing officer's objectivity in the hearing;
3. Must be knowledgeable and understand the provisions of the IDEA, federal and state regulations pertaining to the IDEA and legal interpretations of the IDEA by federal and state courts; and
4. Must have the knowledge and ability to conduct hearings and to make and write decisions, consistent with appropriate, standard legal practice.

The WVDE keeps a list of those persons who serve as due process hearing officers and a statement of the qualifications for each one.

### **Subject matter of due process hearing**

The party (parent or the school district) that requests the due process hearing may not raise issues at the due process hearing that were not addressed in the due process complaint, unless the other party agrees.

### **Hearing Rights**

Any party to a due process hearing (including a hearing relating to IDEA disciplinary procedures) has the right to:

1. Be accompanied and advised by a lawyer and/or persons with special knowledge or training regarding the problems of students with exceptionalities;
2. Present evidence and confront, cross-examine and require the attendance of witnesses;
3. Object to the introduction of any evidence at the hearing that has not been disclosed to that party at least 5 business days before the hearing;
4. Obtain a written, or, at the parent's option, electronic, word-for-word record of the hearing; and
5. Obtain written, or, at the parent's option, electronic findings of fact and decisions.



At least 5 business days before a due process hearing, the parent and the school district must disclose to each other all evaluations completed by that date and recommendations based on those evaluations they intend to use at the hearing. A due process hearing officer may bar any party that does not comply with this requirement from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

### **Parental rights at hearings**

The parent must be given the right to:

1. Have the student present at the hearing;
2. Open the hearing to the public; and
3. Have the record of the hearing, the findings of fact and decisions provided at no cost.

### **Timelines and convenience of hearings**

The WVDE ensures not later than 45 days after the end of the 30 day period for resolution meetings or, as described under the subheading Adjustments to the 30 day resolution period, not later than 45 days after the end of the adjusted time period:

1. A final decision is reached in the hearing, and
2. A copy of the decision is mailed to each of the parties.

A due process hearing officer may grant specific extensions of time beyond the 45 day time period at the request of either party. Each hearing must be conducted at a time and place that is reasonably convenient to the parent and student.

### **Separate request for a due process hearing**

Nothing in the procedural safeguards section of the federal regulations under IDEA, Part B (34 CFR §§300.500 through 300.536) prevents a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

### **Hearing Decision**

A due process hearing officer's decision on whether a student received a free appropriate public education (FAPE) must be based on evidence and arguments directly relating to FAPE. In matters alleging a procedural violation, a due process hearing officer may find that the student did not receive FAPE only if the procedural inadequacies:





1. Impeded the student's right to FAPE;
2. Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the student; or
3. Caused a deprivation of an educational benefit.

These provisions do not prevent a due process hearing officer from ordering a school district to comply with the requirements in the procedural safeguards section of the IDEA regulations (34 CFR §§300.500 through 300.537).

### **Findings and decision to the advisory panel and general public**

The WVDE, after deleting any personally identifiable information:

1. Provides the findings and decisions in the due process hearing to the West Virginia Advisory Council for the Education of Exceptional Children; and
2. Makes those findings and decisions available to the public.

### **Finality of the hearing decision**

A decision made in a due process hearing (including a hearing relating to IDEA disciplinary procedures for students with disabilities) is final, except that any party involved in the hearing may appeal the decision by bringing a civil action in court, as described below.

### **Civil actions, including the time period to file**

A party (the parent or the school district) who does not agree with the findings and decision in the due process hearing (including a hearing relating to IDEA disciplinary procedures for students with disabilities) has the right to bring a civil action with respect to the matter that was the subject of the due process hearing. The action may be brought in a state court of competent jurisdiction (a state court that has authority to hear this type of case) or in a federal district court without regard to the amount in dispute.

### **Time limitation**

The party bringing the action has 90 calendar days from the date of the decision of the due process hearing officer to file a civil action.



### **Additional procedures**

In any civil action, the court:

1. Receives the records of the administrative proceedings;
2. Hears additional evidence at the request of either party; and
3. Bases its decision on the preponderance of the evidence and grants the relief the court determines to be appropriate.

### **Jurisdiction of district courts**

The district courts of the United States have authority to rule on actions brought under Part B of the IDEA without regard to the amount in dispute.

### **Rule of Construction**

Nothing in IDEA, Part B restricts or limits the rights, procedures and remedies available under the U.S. Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973 (Section 504) or other federal laws protecting the rights of students with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under IDEA, Part B, the due process procedures described above must be exhausted to the same extent as would be required if the party filed the action under IDEA, Part B.

This means the party may have remedies available under other laws that overlap with those available under IDEA, but in general, to obtain relief under those other laws, the available administrative remedies under IDEA (i.e., the state complaint process; resolution process, including the resolution meeting; and impartial due process hearing procedures) must be used first, before going directly into court.

### **Attorneys' Fees**

In any action or proceeding brought under IDEA, Part B, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to:

1. The parent who is the prevailing party;
2. To the WVDE or a school district as a prevailing party, to be paid by the parent's attorney, if the attorney: (a) filed a due process complaint or court case the court finds is frivolous, unreasonable, or without foundation, or (b) continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or
3. To the WVDE or a school district as a prevailing party, to be paid by the parent or the parent's attorney, if the request for a due process hearing or later court case was presented for any improper purpose, such as to harass, to cause unnecessary delay or to unnecessarily increase the cost of the action or proceeding.

A court awards reasonable attorneys' fees as follows:

1. Fees must be based on rates prevailing in the community in which the action or hearing arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded.
2. Fees may not be awarded and related costs may not be reimbursed in any action or proceeding under IDEA, Part B for services performed after a written offer of settlement to the parent if:
  - (a) The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of a due process hearing, at any time more than 10 calendar days before the proceeding begins;
  - (b) The offer is not accepted within 10 calendar days; and
  - (c) The court finds the relief finally obtained by the parent is not more favorable than the offer of settlement. Despite these restrictions, an award of attorneys' fees and related costs may be made to the parent who prevails and was substantially justified in rejecting the settlement offer.
3. Fees may not be awarded relating to any meeting of the IEP Team, including resolution meetings, unless the meeting is held as a result of a due process decision or judicial action.
4. A resolution meeting is not considered a meeting convened as a result of an administrative hearing or court action and also is not considered an administrative hearing or court action for purposes of these attorneys' fees provisions.

The court reduces, as appropriate, the amount of the attorneys' fees awarded under IDEA, Part B, if the court finds that:

1. The parent or parent's attorney, during the course of the action or proceeding, unreasonably delayed the final resolution of the dispute;
2. 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 similar skill, reputation and experience;
3. The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or
4. The attorney representing the parent did not provide to the school district the appropriate information in the due process complaint.



However, the court may not reduce fees if the court finds the state or school district unreasonably delayed the final resolution of the action or proceeding or there was a violation under the procedural safeguards provisions of IDEA, Part B.

## **Procedures When Disciplining Students with Disabilities**

### ***Authority of School Personnel***

School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change of placement, made in accordance with the following requirements related to discipline, is appropriate for a student with a disability who violates the student code of conduct. To the extent they also take disciplinary action for students without disabilities, school personnel may, for not more than 10 consecutive school days, remove a student with a disability who violates the student code of conduct from the current placement to an appropriate interim alternative educational setting, another setting or suspension. School personnel also may impose additional removals of the student of not more than 10 consecutive school days in that same school year for separate incidents of misconduct, as long as those removals do not constitute a change of placement. (See Change of Placement, below)

Once a student with a disability has been removed from his or her current placement for a total of 10 school days in the same school year, the school district must, during any later days of removal in that school year, provide services to the extent required below under Services.

If the behavior that violated the student code of conduct was not a manifestation of the student's disability (see Manifestation Determination, below) and the disciplinary change of placement would exceed 10 consecutive school days, school personnel may apply the disciplinary procedures to that student with a disability in the same manner and for the same duration as it would to students without disabilities, except that the school must provide services to that student. The student's IEP Team determines appropriate services to be provided as set forth in the student's IEP.

### ***Services***

The services that must be provided to a student with a disability who has been removed from the student's current placement may be provided in an Interim Alternative Educational Setting (IAES). A school district is only required to provide

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services to a student with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if it provides services to a student without disabilities who has been similarly removed. Districts typically do not provide such services.

A student with a disability who is removed from the student's current placement for more than 10 school days must:

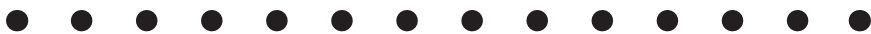
1. Continue to receive educational services to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals in the student's IEP, and
2. Receive, as appropriate, a functional behavioral assessment and behavioral intervention services and modifications that are designed to address the behavior violation so it does not happen again.

After a student with a disability has been removed from his or her current placement for 10 school days in that same school year, and if the current removal is for 10 consecutive school days or less and if the removal is not a change of placement (see Change in Placement, below), then school personnel, in consultation with at least one of the student's teachers, determine the extent to which services are needed to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP. Decisions made must be documented on the Disciplinary Action Review Form (DARF). If the removal is a change of placement, the student's IEP Team determines the appropriate services to meet the above requirements.

### ***Manifestation Determination***

Within 10 school days of any decision to change the placement of a student with a disability because of a violation of the student code of conduct (see Change of Placement, below), the school district, the parent and relevant members of the IEP Team (as determined by the parent and the school district) must review all relevant information in the student's file, including the student's IEP, any teacher observations and any relevant information provided by the parent to determine:

1. If the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability, or
2. If the conduct in question was the direct result of the school district's failure to implement the student's IEP.



If the school district, the parent and relevant members of the student's IEP Team determine either of those conditions was met, the conduct must be found to be a manifestation of the student's disability. If they determine the conduct in question was the direct result of the school district's failure to implement the IEP, the school district must take immediate action to remedy those deficiencies.

If the conduct was a manifestation of the student's disability, the IEP Team must either:

1. Conduct a functional behavioral assessment, unless the school district had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the student, or
2. If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior.

Except as described below under special circumstances, the school district must return the student to the placement from which the student was removed, unless the parent and the district agree to a change of placement as part of the modification of the behavioral intervention plan.

### ***Special Circumstances***

Whether or not the behavior was a manifestation of the student's disability, school personnel may remove a student to an IAES (determined by the student's IEP Team) for up to 45 school days, if the student:

1. Carries a weapon to school or has a weapon at school, on school premises or at a school function under the jurisdiction of the WVDE or a school district;
2. Knowingly has or uses illegal drugs or sells or solicits the sale of a controlled substance while at school, on school premises or at a school function under the jurisdiction of the WVDE or a school district; or
3. Has inflicted serious bodily injury upon another person while at school, on school premises or at a school function under the jurisdiction of the WVDE or a school district.

**Controlled substance** means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).



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

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

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

### ***Parent Notice***

On the date the school district makes the decision to make a removal that is a change of placement of the student because of a violation of the student code of conduct, the school district must notify the parents of that decision and provide the parents with this notice of procedural safeguards.

### ***Change of placement because of disciplinary removals***

A removal of a student with a disability from the student’s current educational placement is a change of placement if:

1. The removal is for more than 10 consecutive school days; or
2. The student has had a series of removals that constitute a pattern because:
  - (a) The series of removals totals more than 10 school days in a school year;
  - (b) The student’s behavior is substantially (for the most part) similar to the student’s behavior in previous incidents that resulted in the series of removals; and
  - (c) Of such additional factors as the length of each removal, the total amount of time the student has been removed and the proximity of the removals to one another.

Whether a pattern of removals constitutes a change of placement is determined on a case- by-case basis by the school district and, if challenged, is subject to review through due process and judicial proceedings. The IEP Team determines the IAES for removals that are changes of placement, and removals under the subheadings authority of school personnel and special circumstances.



## **Appeal**

The parent of a student with a disability may file a due process complaint to request a due process hearing if he or she disagrees with:

1. Any decision regarding placement made under these discipline provisions, or
2. The manifestation determination described above.

The school district may file a due process complaint if it believes maintaining the current placement of the student is substantially likely to result in injury to the student or to others.

### ***Expedited due process hearing for disciplinary removal or manifestation determination***

Whenever a parent or a school district files a due process complaint to request a due process hearing, a hearing must be held that meets the requirements described under the heading Due Process Hearing Complaint, except as follows:

1. The WVDE must arrange for an expedited due process hearing, which must occur within 20 school days of the date the hearing is requested and must result in a determination within 10 school days after the hearing.
2. Unless the parents and the school district agree in writing to waive the meeting, or agree to use mediation, a resolution meeting must occur within 7 calendar days of receiving notice of the due process complaint. The hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 calendar days of receipt of the due process complaint.

A party may appeal the decision in an expedited due process hearing by bringing civil action in a state court of competent jurisdiction or a U.S. district court.

### ***Authority of an impartial due process hearing officer***

An impartial due process hearing officer who meets the requirements above under the subheading impartial due process hearing officer, must conduct the due process hearing and make a decision. The due process hearing officer may:

1. Return the student with a disability to the placement from which the student was removed if the due process hearing officer determines the removal was a violation of the discipline requirements or that the student's behavior was a manifestation of the student's disability; or





2. Order a change of placement of the student with a disability to an appropriate IAES for not more than 45 school days if the due process hearing officer determines that maintaining the current placement of the student is substantially likely to result in injury to the student or to others.

These hearing procedures may be repeated if the school district believes returning the student to the original placement is substantially likely to result in injury to the student or to others.

### ***Placement during appeals***

When the parent or school district has filed a due process complaint related to disciplinary matters, the student must (unless the parent and school district agree otherwise) remain in the IAES pending the decision of the hearing officer, or until the expiration of the time period of removal as provided for and described under the heading Authority of School Personnel, whichever occurs first.

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

If a student has not been determined eligible for special education and related services and violates the student code of conduct, but the school district had knowledge (as determined below) before the behavior that brought about the disciplinary action occurred that the student was a student with a disability, then the student may assert any of the protections described in this notice.

### ***Basis of knowledge for disciplinary matters***

A school district must be deemed to have knowledge that a student is a student with a disability if, one or more of the following is true:

1. The parent/adult student has expressed concern to district professional personnel that results in written documentation, that the student may need special education and related services.
2. The parent/adult student has requested in writing that the student be evaluated for special education.
3. The student's teacher or other school district personnel expressed specific concerns about a pattern of behavior demonstrated by the student directly to the school district's director of special education or to other supervisory personnel of the school district in accordance with the district's established child find system and referral process.

These protections may apply if a request for evaluation of a student who is not currently eligible for special education is made during the period in which the student is subject to disciplinary measures.

**No basis of knowledge**

These protections are not afforded to students who:

1. Are solely eligible under the category of gifted; and
2. When there is no basis of knowledge that a student has a disability because one or more of the following is true:
  - (a) an evaluation was conducted and a determination was made that the student did not have a disability;
  - (b) the parent/adult student did not give written consent for an evaluation; or
  - (c) the parent/adult student refused special education services.

If before taking disciplinary measures against the student, a school district does not have knowledge that a student is a student with a disability (as described above), the student may be given the disciplinary measures that are applied to students without disabilities who engaged in the same type of behaviors. However, if a request is made for an evaluation of a student during the time period in which the student is given disciplinary measures, the evaluation must be conducted in an expedited manner (more quickly than otherwise).

Until the evaluation is completed, the student remains in the educational placement determined by school authorities, which can include suspension or expulsion. If the student is determined to be a student with a disability, taking into consideration information from the evaluation conducted by the school district and information provided by the parents, the school district must provide special education and related services in accordance with the IDEA, including the disciplinary requirements described above.

**Referral to and action by law enforcement and judicial authorities**

The IDEA does not:

1. Prohibit an agency from reporting a crime committed by a student with a disability to appropriate authorities, or
2. Prevent state law enforcement and judicial authorities from exercising their responsibilities with regard to the application of federal and state law to crimes committed by a student with a disability.



If a school district reports a crime committed by a student with a disability, the school district must ensure copies of the student's special education and disciplinary records are transmitted for consideration by the authorities to whom the agency reports the crime, but only to the extent permitted by the Family Educational Rights and Privacy Act (FERPA).

### **Unilateral Placement by Parents of Students in Private Schools at Public Expense**

The IDEA does not require a school district to pay for the cost of education, including special education and related services, of a student with a disability at a private school or facility if the school district made FAPE available and the parent chose to place the student in a private school or facility. However, the school district where the private school is located must include the student in the population whose needs are addressed under the IDEA provisions regarding students who have been placed by their parents in a private school under 34 CFR §§300.131-300.144.

#### ***Reimbursement for private school placement***

If the student previously received special education and related services under the authority of a school district, and the parent chooses to enroll the student in a private preschool, elementary or secondary school without the consent of or referral by the school district, a court or a due process hearing officer may require the agency to reimburse the parent for the cost of that enrollment if the court or due process hearing officer finds the agency had not made FAPE available in a timely manner before that enrollment and that the private placement is appropriate. A due process hearing officer or court may find the placement to be appropriate, even if the placement does not meet the state standards that apply to education provided by the WVDE and school districts.



### **Limitation on reimbursement**

The cost of reimbursement described in the paragraph above may be reduced or denied:

1. If: (a) at the most recent IEP Team meeting the parent attended prior to removing the student from the public school, the parent did not inform the IEP Team that he or she was rejecting the placement proposed by the school district to provide FAPE to the student, including stating the parent's concerns and intent to enroll the student in a private school at public expense; or (b) At least 10 business days (including any holidays that occur on a business day) before removing the student from the public school, the parent did not give written notice to the school district of that information;
2. If, before removing of the student from the public school, the school district provided the parent prior written notice of its intent to evaluate the student (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parent did not make the student available for the evaluation; or
3. Upon a court's finding that the parent's actions were unreasonable.

However, the cost of reimbursement:

1. Must not be reduced or denied for failure to provide the notice if: (a) the school prevented the parent from providing the notice; (b) the parent had not received notice of the responsibility to provide the notice described above; or (c) compliance with the requirements above would likely result in physical harm to the student; and
2. May, in the discretion of the court or a due process hearing officer, not be reduced or denied for the parent's failure to provide the required notice if: (a) the parent is not literate or cannot write in English; or (b) compliance with the above requirement would likely result in serious emotional harm to the student.



## **NOTICE TO PARENTS PARENTAL CONSENT TO ACCESS PUBLIC BENEFITS OR INSURANCE (E.G, MEDICAID)**

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This notice informs parents of the Individuals with Disabilities Education Act of 2004 (IDEA) regulations at 34 CRF §300.154, effective March 18, 2013, regarding written notification and parent consent to access public benefits or insurance, such as Medicaid. Before the school district accesses the parent's or child's Medicaid or other publicly funded benefits for the first time to seek reimbursement for services provided to an eligible student, and annually thereafter, this written notice is provided to inform parents of the following:

- A prior written parental consent will be requested to release personal information from a child's education records or information about the services that may be provided for the purpose of billing Medicaid or another specific agency for Individualized Education Program (IEP) services.
  - The consent form will state the student's personal education records and information that will be disclosed, the purpose of the disclosure (e.g. Medicaid billing) and the agency to which the records will be released. By consenting, parents state they understand and agree that their or their child's public benefits or insurance will be accessed to reimburse the cost of services.
  - Parents cannot be required to sign up for or enroll in public benefits or insurance programs for their child to receive free appropriate public education, that is, IEP services.
  - Parents are not required to pay out-of-pocket expense such as a deductible or co-pay amount resulting from filing a claim, but may pay the cost that otherwise would be paid by parents.
  - Parents must be informed that their public benefits or insurance (e.g., Medicaid) will not be billed if it would:
    - » result in a decrease in lifetime benefits;
    - » result in the child's parents paying for services that would otherwise be covered and that are needed for the child outside of the time the child is in school;
    - » result in an increase in premiums or discontinuation of public benefits or insurance; or
    - » risk loss of eligibility for home and community-based waivers based on the total (aggregated) health-related expenditures for the child or the child's parents.
  - Parents have the right to withdraw consent to disclose their child's personal information for billing purposes at any time.
  - Parents' withdrawal of consent, or refusal to provide consent, to release their child's personal information for purposes of accessing their public benefits or insurance (e.g., for Medicaid billing) does not relieve the school district of its responsibility to ensure that all required IEP services are provided at no cost to parents.
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**For further information contact:**

County Director of Special Education  
County Board of Education Office  
County Parent/Educator Resource Center

*State complaints, mediations and due process hearing complaints may be filed with:*

**West Virginia Department of Education  
Office of Federal Programs**

Bldg. 6  
1900 Kanawha Blvd. E.  
Charleston, WV 25305

(800) 642-8541 toll free  
(304) 558-7805 or (304) 558-2696 telephone  
(304) 558-3741 fax

**<http://wvde.state.wv.us/osp/>**



**Steven L. Paine, Ed.D.**  
West Virginia Superintendent of Schools