

STATE BOARD OF EDUCATION
STATE DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION SERVICES
ADMINISTRATIVE CODE

CHAPTER 290-8-9
SPECIAL EDUCATION SERVICES

290-8-9-.08 Procedural Safeguards.

(1) Surrogate Parents. Each public agency must ensure that the rights of a child are protected when no parent can be identified.

(a) Determination of the Need for a Surrogate Parent. A surrogate parent is needed when no parent can be identified; the public agency, after reasonable efforts, cannot locate a parent; or the child is a ward of the State. In the case of a child who is a ward of the State, a surrogate may alternatively be appointed by the judge overseeing the child's case, provided that the surrogate meets the criteria. In the case of an unaccompanied homeless youth as defined in section 725(6) of the *McKinney-Vento Homeless Assistance Act* [42 U.S.C. 11434a(6)], the public agency must appoint a surrogate.

(b) Criteria for Selection of a Surrogate Parent.

1. Public agencies must ensure that the person selected as a surrogate parent:

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

(ii) Has no personal or professional interest that conflicts with the interest of the child he/she represents; and

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

2. In the case of a child who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs may be appointed as temporary surrogate parents without regard to any of the above provisions, until a surrogate parent can be appointed that meets the criteria for selection of a surrogate parent. A public agency may select as a temporary surrogate a person who is an employee of a nonpublic agency that only provides non-educational care for the child and who meets the surrogate parent criteria.

(c) Assigning a Surrogate Parent. The following procedures must be utilized to ensure the right of a child with a disability to a surrogate parent:

1. Public agencies must have a method for determining whether a child with a disability needs a surrogate parent and for assigning a surrogate parent.

2. If the public agency determines that a surrogate parent is required, the public agency must make reasonable efforts to ensure the assignment of a surrogate parent not more than thirty days from the date the public agency determines the child's need for a surrogate parent.

(d) A person who otherwise qualifies to be a surrogate parent is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.

(e) Scope of Surrogate Parent Representation. A surrogate parent may represent children with disabilities in all matters related to the identification, evaluation, educational placement, and the provision of FAPE to the child.

(2) **Records.** Personally identifiable data, information, and records collected or maintained must be stored, retrieved, and utilized for the benefit of children with disabilities in a manner that will ensure confidentiality and privacy rights.

(a) Person Responsible for Records of Children with Disabilities. Participating agencies must appoint one person to assume the overall responsibility for ensuring that personally identifiable information will be safeguarded and confidential. The assigned person will ensure that all agency persons involved in collecting, maintaining, or using the information must receive training or instruction regarding confidentiality requirements.

(b) Confidentiality of Personally Identifiable Information. Each participating agency must protect the confidentiality of personally identifiable information at the collection, storage, disclosure, and destruction stages.

(c) Access to Records by Parents and Their Representatives.

1. Parents may inspect and review all educational records relating to identification, evaluation, and educational placement of the child and the provision of FAPE to the child that are collected, maintained, or used by the participating agency.

2. Parents must be given the opportunity to review their child's educational records without unnecessary delay

(not more than 45 days after the request has been made) and before any meeting regarding an IEP or before a due process hearing, or resolution session is conducted.

3. Upon request, parents must be provided copies of their child's records if failure to do so would effectively prevent the parents from exercising their right to inspect and review the records.

4. Upon reasonable request, parents must be given explanations and interpretations of their child's records.

5. Parents may have a representative inspect and review their child's records.

6. The agency may presume that the parents have authority to inspect and review the records of their child unless the agency has been advised that authority has been removed under state laws governing such matters as guardianship, separation, and divorce.

7. With the exception of parents and authorized employees of the participating agency itself, the agency must keep a record of all other persons who are given access to the educational records. Documentation must include the name of the person given access, date of access, and purpose for access.

8. When a record contains information on more than one child, the parents may inspect and review only the information regarding their child. If the information on their child cannot be isolated for review, the participating agency may inform the parent regarding that portion of the information that pertains to their child.

9. Upon request, the parents must be provided with a list of the types and locations of educational records collected, maintained, or used by the participating agency.

10. The participating agency may provide copies of the child's records, upon parent request; and, may charge parents a fee for copies of the educational records, but not in an amount that would effectively prevent them from exercising their right to inspect and review the records. The fee may not include a charge to search or to retrieve information under this section.

(d) Disclosure Procedures Pertaining to Special Education Records.

1. Each participating agency must maintain for public inspection, a current listing of the names and positions of those employees within the agency who have access to personally identifiable information.

2. Parental consent must be obtained before personally identifiable information is disclosed to parties other than officials of participating agencies.

3. Parental consent is not required before personally identifiable information is released to:

(i) Officials of participating agencies for the purposes of meeting a requirement of Part B of the IDEA. However, the child's parents or eligible child who has reached the age of majority (age 19) must be given prior notice of the transfer of records as required by the *Family Educational Rights and Privacy Act* (FERPA).

(ii) Authorized state or federal officials in conjunction with monitoring or enforcement of legal requirements that relate to the special education program.

(iii) Law enforcement and judicial authorities to the extent permitted by FERPA when the child with a disability has committed a crime.

4. Parental consent, or the consent of an eligible child who has reached the age of majority (age 19), must be obtained before personally identifiable information is released to officials of participating agencies providing or paying for transition services.

5. 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 located and officials in the LEA of the parent's residence.

(e) Transfer of Records.

1. To facilitate the transition for a child who has transferred from one public agency to another in the same state or from another state, the new public agency in which the child enrolls must take reasonable steps to promptly obtain the child's records, including the IEP and supporting documents and any other records relating to the provision of special education or related services to the child, from the previous public agency in which

the child was enrolled, pursuant to FERPA; and the previous public agency in which the child was enrolled must take reasonable steps to promptly respond to such request from the new public agency.

2. Parental consent is not required as a condition for a transfer of special education records from one public agency to another. However, FERPA requires notice to be provided to the child's parents or the student who has reached age 18.

(f) Amendment of Records at Parent's Request.

1. A parent who believes that the information in the education records collected, maintained, or used are inaccurate or misleading or violate the privacy or other rights of the child may request that the participating agency amend the information. The agency must decide on the matter within a reasonable period of time from receipt of request.

2. If the participating agency decides not to amend the information in accordance with the request, written notice must be provided to the parent. The notice must advise the parent of the right to a local hearing before the agency.

(g) Hearing to Request Amendment of Child's Educational Record.

1. The participating 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.

2. If, as a result of the hearing, the participating 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 inform the parent in writing.

3. If, as a result of the hearing, the participating agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, the agency must inform the parent of the right to place in the records a statement commenting on the information or setting forth reasons for disagreeing with the decision of the agency. Any explanation placed in the records must be maintained as part of the records as long as the records or contested portion of the records is maintained by the agency.

4. If the records of the child or the contested portion are disclosed by the participating agency to any party, the explanation must also be disclosed to the party.

5. The hearing must be conducted according to the procedures set forth in FERPA.

(h) Retention and Destruction of the Records of Special Education Children.

1. The public agency must retain a copy of the education records containing personally identifiable information for a period of five (5) years after the termination of the special education program for which they were used.

2. The information must be destroyed at the request of the parents. However, a permanent education record that contains the child's name, address, telephone number, his or her grades, record of attendance for special education services, classes attended, grade level completed, and year completed may be maintained without time limitation.

3. At the end of the five-year retention period, the public agency must inform the parents when personally identifiable information collected, maintained, or used is no longer needed.

4. Information must be destroyed in a manner whereby confidentiality of the information is maintained.

(i) Disciplinary Information.

1. The public agency may include in the records of a child with a disability a statement of any current or previous disciplinary action that has been taken against the child and transmit the statement to the same extent that the disciplinary information is included in, and transmitted with, the student records of nondisabled children.

2. The statement may include a description of any behavior engaged in by the child that required disciplinary action, a description of the disciplinary action taken, and any other information that is relevant to the safety of the child and other individuals involved with the child.

3. If the child transfers from one school to another, the transmission of any of the child's records must include both the child's current IEP and any statement of current or previous disciplinary action that has been taken against the child to the same extent that disciplinary

information is transmitted with the records of nondisabled children.

(3) **Rights for Children**. Public agencies must afford to the child, rights of privacy similar to those afforded to parents regarding records taking into consideration the age of the child and type and severity of the disability. Although the rights of parents under the IDEA transfer to the student at the age of majority (age 19), the rights of parents regarding educational records under FERPA transfer to the student at age 18.

(4) **Parental Notice and Consent**. A public agency must provide notice to parents and obtain consent prior to specific actions.

(a) Parental Consent.

1. Informed written consent must be obtained prior to an initial evaluation; prior to the initial provision of special education and related services; and prior to any reevaluation that requires additional data to be obtained. Consent for initial evaluation must not be construed as consent for the initial provision of services. If the parent of the child with a disability refuses or fails to respond to a request to provide consent for initial evaluation or a reevaluation that requires evaluation of the child, the public agency may, but is not required to pursue consent by using mediation and/or due process procedures. The public agency does not violate its obligation under Child Find requirements if it declines to pursue an initial evaluation or reevaluation.

2. 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. 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:

(i) May not use the mediation process or the due process hearing procedures in order to obtain agreement or a ruling that the services may be provided to the child.

(ii) 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

(iii) Is not required to convene an IEP Team meeting or develop an IEP for the child.

3. 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:

- (i) May not continue to provide special education and related services to the child, but must provide prior written notice before ceasing the provision of special education and related services;

- (ii) May not use the mediation procedures or the due process procedures in order to obtain agreement or a ruling that the services may be provided to the child;

- (iii) 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.

4. If a parent revokes consent in writing for their child's receipt of special education and related 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.

5. A public agency may not use a parent's refusal of informed written consent to deny the parent or child any other service, benefit, or activity of the public agency, except as described in paragraphs 1. and 2. above.

6. Informed written consent is not required:

- (i) For reevaluation, if the public agency can demonstrate that it has made reasonable efforts, (at least two attempts) to obtain that consent and the child's parent has failed to respond.

- (ii) Before reviewing existing evaluation data as part of an evaluation or reevaluation or administering a test or other evaluation that is administered to all children, unless, before administration of that test or evaluation, consent is required of parents of all children.

- (iii) For the type of evaluations listed on the IEP to evaluate the mastery of annual goal(s).

(iv) For initial evaluations only, if the child is a ward of the State and is not residing with the child's parent, the public agency is not required to obtain informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability if despite reasonable efforts to do so, the public agency cannot discover the whereabouts of the parent of the child; the rights of the parents of the child have been terminated in accordance with State law; or the rights of the parent to make educational decisions have been subrogated by a judge in accordance with State law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.

7. If a parent of a child who is home schooled or placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or the reevaluation, or the parent fails to respond to a request to provide consent, the public agency may not use the consent override procedures of mediation or due process and the public agency is not required to consider the child as eligible for services under these rules.

8. To meet the reasonable efforts requirement regarding consent for initial evaluation, reevaluation and initial provision of services, the public agency must document its attempts to obtain parental consent using the procedures under these rules.

(b) Parental Notice.

1. Written notice must be given to parents a reasonable time before the public agency proposes or refuses to initiate or change the identification, evaluation, educational placement, or the provision of FAPE to a child. Written notice is required when a child graduates from high school with a regular diploma or exits because the child has exceeded the age of eligibility for FAPE.

2. The parental notice must include a description of the action proposed or refused by the agency, the reason for the proposed or refused action, a description of other options the public agency considered and why those options were rejected, a description of each evaluation procedure, assessment, record, or report the public agency used as a basis for the proposal or refusal and a description of any other factors that are relevant to the proposal or refusal. The notice must also include a statement that the parents of the child have protection under the Special Education Rights and if this notice is not an initial referral for evaluation, the means by

which a copy of the rights can be obtained, and sources for parents to contact to obtain assistance in understanding the provisions of the notice. To ensure that parents understand the content of each notice, the public agency must provide written notice in language understandable to the general public, provide notice 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, and take the necessary steps to ensure, that when the native language or other mode of communication of the parent is not a written language, that the notice is translated orally or by other means to the parent in his or her native language or other mode of communication. Public agencies must ensure that parents understand the content of the notice and maintain written evidence that the notice requirements have been met. Parents may request to receive notices by electronic mail if the public agency provides notices by electronic mail.

(5) **Meetings.** Parents must be provided written notice and an opportunity to participate in meetings regarding identification, evaluation, educational placement, and the provision of FAPE to their child.

(a) 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 that will be discussed at a later meeting.

(b) When conducting IEP Team meetings regarding evaluation, eligibility, IEP development, mediation, due process hearing resolution, and when carrying out administrative matters (such as scheduling, exchange of witness lists, and status conferences), the parent of a child with a disability and a public agency may agree to use alternative means of meeting participation, such as video conferences and conference calls.

(c) An educational placement decision may be made by a group without the involvement of the parents, 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 attempts to ensure their involvement, including information that is consistent with the requirements of these rules.

(d) The public agency must take whatever action is necessary to ensure that the parents understand and are able to participate in, any group discussions relating to the identification, evaluation, educational placement or provision of FAPE for their child, including arranging for an

interpreter for parents with deafness, or whose native language is other than English.

(6) **Special Education Rights**. A current copy of the Special Education Rights is on the SDE's Web site at www.alsde.edu. In addition, a public agency may place the Special Education Rights on its Internet Web site if a Web site exists but still must provide a physical copy to the parent once per school year as required below. In addition, parents may elect to receive notices required under these rules by an electronic mail communication, if the public agency makes that option available. A copy of the Special Education Rights under IDEA must be given to the parents only one time per school year, except that a copy must also be given to the parents:

(a) Upon initial referral or parental request for an initial evaluation,

(b) Upon receipt of the first State complaint under these rules and upon receipt of the first due process hearing request in a school year,

(c) In accordance with the discipline procedures in these rules, and

(d) Upon request by the parent.

(7) **Content of Special Education Rights**. The Special Education Rights notice must meet the requirements of these rules and include a full explanation of all rights relating to:

(a) Independent educational evaluations;

(b) Prior written notice;

(c) Parental consent;

(d) Access to educational records;

(e) Opportunity to request and resolve due process hearings, including the time period in which to request a due process hearing, the opportunity for the agency to resolve the due process hearing, 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;

(f) The availability of mediation;

(g) The child's placement during the pendency of any due process proceedings;

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

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

(j) Due process hearings, including requirements for disclosure of evaluation results and recommendations; Civil actions, including the time period in which to file those actions; and

(l) Attorneys' fees.

(8) **Transfer of Parental Rights at Age of Majority (Age 19)**. When a child with a disability reaches the age of majority (except for a child with a disability who has been determined to be incompetent under Alabama law), the public agency shall provide all notices to both the adult student and the parents. All other rights accorded to parents transfer to the student. The public agency shall notify the student and the parents of the transfer of rights. All rights accorded to parents transfer to students who are incarcerated in an adult or juvenile federal, state, or local correctional institution. If, under Alabama law, a child with a disability who has reached the age of 19, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of their child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child.

(9) **State Complaints/Mediation/Due Process Hearings**. Parents of children with disabilities must be provided with the opportunity to utilize appropriate administrative remedies when they believe that their rights or the rights of their children have been violated or when they disagree with their child's special education services.

(a) Complaint Procedure. When it is believed that the public agency is violating a requirement of Part B of IDEA and 34 CFR Part 300, the special education complaint procedure may be utilized as the appropriate administrative remedy.

1. Procedures for Filing a Complaint with the State Department of Education.

(i) A parent (or organization or individual, including an organization or individual from another State) may file a signed written complaint and send it to the State Superintendent of Education, Attention: Special Education Services, Post Office Box 302101, Montgomery, Alabama 36130-2101. A sample

form for filing a State Complaint can be found on the Department of Education's Web site at www.alsde.edu. The use of the form is not required as long as another form or document used meets the State Complaint content requirements set forth herein.

(ii) A signed written complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received.

(iii) The complaint must include, at a minimum:

(I) A statement that a public agency has violated a requirement of Part B of the IDEA,

(II) The facts on which the statement is based,

(III) The signature and contact information for the complainant, and

(IV) 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 the *McKinney-Vento Homeless Assistance Act* (42 USC 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

IV. A proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed.

(iv) The party filing the complaint must forward a copy of the complaint to the public agency serving the child at the same time the party files the complaint with the Alabama Department of Education. The public agency must provide a copy of the Special Education Rights if this is the first State Complaint filed by the parent in a school year.

2. Procedures for Acting on Complaints.

(i) The State Superintendent of Education will assign a staff member to review and investigate each complaint to determine its validity. If it is determined that the complaint is a possible violation of the IDEA or 34 CFR Part 300, the complaint will be processed.

(ii) The public agency involved must be notified by telephone or fax with a follow-up letter providing the identity of the complainant and the nature of the complaint.

(iii) The public agency **must** submit a written resolution statement, plan of action, or statement of position that addresses the complaint allegations to the State Superintendent of Education, Attention: Special Education Services.

(iv) A parent who has filed a complaint and the public agency may voluntarily agree to engage in mediation pursuant to this rule.

(v) Special Education Services will review all relevant information and make independent determination as to whether the public agency is violating the IDEA or 34 CFR Part 300.

(vi) If an on-site investigation is determined to be necessary, the public agency will be notified prior to the investigation regarding the nature of the review. The investigation will be conducted by a person(s) selected by the State Superintendent of Education and will not be anyone who is employed by the agency under investigation. The person(s) conducting the investigation must have complete access to all records of the agency that pertain to the special education program.

(vii) The complainant must be given the opportunity to submit additional information, either orally or in writing, regarding the allegations of the complaint.

(viii) A written decision that addresses each allegation and contains findings of fact and conclusions and the reasons for the Department of Education's final decision (subject to confidentiality requirements) will be sent to the complainant.

(ix) The written decision will include procedures such as technical assistance activities, negotiations, and corrective actions to achieve

compliance, if needed, for the effective implementation of the final decision.

(x) The entire complaint process, including the letter of findings, must be completed within 60 calendar days from receipt of the complaint. An extension of time may be granted only when it can be established that exceptional circumstances warrant a delay or the parent and the public agency involved agree to extend the time to engage in mediation pursuant to this rule.

(xi) In resolving a complaint in which it has found a failure to provide appropriate services, the Department of Education must address how to remediate the denial of those services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement) and appropriate future provision of services for all children with disabilities.

(xii) If a written complaint is received that is also the subject of a due process hearing or contains multiple issues, of which one or more are part of the hearing, the Department of Education 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.

(xiii) If an issue is raised in a complaint that has previously been decided in a due process hearing involving the same parties, the hearing decision is binding and the Department of Education must inform the complainant to that effect.

(xiv) A complaint alleging a public agency's failure to implement a due process decision must be resolved by the Department of Education.

(xv) Once the written decision for a complaint is issued, the decision is final. There is no appeal process.

(b) State Education Agency Mediation Procedures. Any time the public agency and the parents disagree on special education matters, either party may request a mediation.

1. The State Superintendent of Education provides mediation where the parties may resolve their differences involving matters under the IDEA and 34 CFR Part 300.

2. The procedures for mediation 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 due process hearing or any other rights afforded under the IDEA, and is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

3. The Department of Education will 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. Mediators will be selected on a rotational basis from the list.

4. The Department of Education will bear the cost of the mediation process.

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 written agreement that sets forth the resolution. A written signed mediation agreement is signed by both the parent and a representative of the agency who has the authority to bind the agency. The signed mediation agreement is enforceable in any State court of competent jurisdiction or in a district court of the United States.

7. 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 or State court.

8. An individual who serves as a mediator may not be an employee of any LEA or the Department of Education that is involved in the education or care of the child who is the subject of the mediation process 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 Department of Education solely because he or she is paid by the agency to serve as a mediator.

9. A public agency may establish procedures to offer to parents and schools who elect not to use the Department of Education's mediation process the opportunity to meet, at a time and location convenient to the parents and school, with a disinterested party who is under contract with a parent training and information center or established under Section 671 or 672 of the IDEA, or an

appropriate alternative dispute resolution entity, and who would explain the benefits of the mediation process and encourage the parents to use the process. The Department of Education will not establish such procedures.

10. A public agency may not deny or delay a parent's right to a due process hearing if the parent fails to participate in the meeting to discuss the benefits of mediation.

11. Either party may request mediation by writing to the State Superintendent of Education, Attention: Special Education Services, Post Office Box 302101, Montgomery, Alabama 36130-2101, or by calling Special Education Services at (334) 242-8114 or (334) 242-8406 (TDD). A Special Education Services' staff member will contact the other parties to determine if mediation is desired.

12. If a due process hearing has been requested, or a State complaint has been filed, the parties may agree to use mediation to resolve the need for a due process hearing or to resolve the State complaint.

13. The SEA will allow other state enforcement mechanisms (a State complaint, mediation, or a due process hearing) to seek enforcement of mediation agreements. The use of those mechanisms is not mandatory and must not delay or deny a party the right to seek enforcement of the written agreement in a State court of competent jurisdiction or in a district court of the United States.

(c) Impartial Due Process Hearing Procedures. An impartial due process hearing is available when a parent or the public agency disagrees with any matter relating to a proposal or refusal to initiate or change the identification, evaluation, educational placement of a child or the provision of FAPE to a child. An impartial due process hearing may be requested if the disagreement on which the request for a due process hearing arises out of or relates to an alleged 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 request for a hearing. However, the timelines may be extended if the parent was prevented from requesting a hearing due to specific misrepresentations by the public agency that it had resolved the problem forming the basis of the hearing request or the public agency's withholding of information from the parent that was required to be provided to the parent. The public agency must inform the parent of any free or low-cost legal and other relevant services in the area any time the parent requests the information, or if the parent or public agency initiates a due process hearing. Nothing in this part shall be

construed to create a right of action on behalf of an individual student or class of students for the failure of a particular public agency employee to be highly qualified, or to prevent a parent from filing a State complaint about staff qualifications. There is no right to due process solely based upon the failure of a public agency employee to be highly qualified. The party filing the hearing request has the burden of proof with respect to any claimed violation or request for relief.

1. Procedures for Requesting an Impartial Due Process Hearing.

(i) The parent, the attorney or a designated person representing the parent, or an official from the public agency may request an impartial due process hearing by sending a **signed** written request to the State Superintendent of Education, Attention: Special Education Services, Post Office Box 302101, Montgomery, Alabama 36130-2101. A copy of the written request for a due process hearing must also be sent to the other party and must remain confidential. The timelines referred to in this section begin when the Department of Education receives the written request. The Department of Education must forward a copy of the due process hearing request to the other party involved in the hearing.

(ii) When the parent, the attorney representing the parent, or an official from the public agency, files a written request, the request must include the name of the child, the address of the residence of the child, the name of the school the child is attending, 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 a proposed resolution of the problem to the extent known and available to the party at the time. 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 must be provided in the request. A party may not have a hearing until the party, or the attorney representing the party, files a written request for a hearing that meets the requirements of this rule. A sample form for filing a Request for Due Process Hearing can be found on the Department of Education's Web site at www.alsde.edu. The use of the form is not required, as long as another form or document used meets, as appropriate, the due process request content requirements.

(iii) The written request for a hearing must be deemed to be sufficient unless the party receiving the written request for the hearing notifies the hearing officer and the other party in writing within 15 calendar days of receipt of the due process hearing request that the receiving party believes the request is insufficient. Within five calendar days of receipt of the notification, the hearing officer must make a determination on the face of the written request for a hearing as to whether it meets the requirements for sufficiency and immediately notify the parties in writing of that determination.

(iv) A party may amend its due process request only if the other party consents in writing to such an amendment and is given the opportunity to resolve the issue(s) through a resolution meeting, or the hearing officer grants permission, except that the hearing officer may only grant such permission to amend at any time not later than five calendar days before a hearing begins. If a party files an amended request, the timelines for a resolution meeting and the thirty-day resolution period begin again with the filing of the amended request.

2. Response to a Request for a Due Process Hearing. If the public agency has not sent prior written notice to the parent regarding the issues contained in the parent's hearing request, the public agency must, within ten calendar days of receiving the request, send to the parent a response that includes an explanation of why it proposed or refused to take the action raised in the hearing request; a description of other options that the IEP Team considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report used as the basis for the proposed or refused action; and a description of the other factors that are relevant to the proposed or refused action. Except as provided, the party receiving a hearing request must, within ten calendar days of receiving the request, send to the other party a response that specifically addresses the issues raised in the hearing request. A response filed by a public agency shall not be construed to preclude the public agency from asserting that the parent's hearing request was insufficient, where appropriate.

3. Resolution Process.

(i) Within 15 calendar days of receiving the parent's hearing request and prior to the opportunity for a hearing, 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 hearing request. The meeting must include a representative of the public agency who has decision-making authority on behalf of the agency and may not include an attorney of the LEA unless the parent is accompanied by an attorney. The purpose of the meeting is for the parents of the child to discuss the due process hearing request and the facts that form the basis of the request so that the LEA has the opportunity to resolve the issues. The resolution meeting need not be held if the parent and the LEA agree in writing to waive the meeting or they agree to use the State mediation process. The parent and the LEA determine the relevant members of the IEP Team to attend the resolution meeting.

(ii) If the LEA has not resolved the issues to the satisfaction of the parents within 30 calendar days of the receipt of the due process hearing request, the due process hearing may occur and the timeline for issuing a final decision on the hearing request begins at the expiration of this 30-day resolution period.

(iii) Except where the parties have jointly agreed to waive the resolution meeting or to use mediation, the failure of the parent filing a due process request to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held. 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 procedures consistent to those regarding parent participation in IEP meetings), the public agency may, at the conclusion of the thirty-day resolution period, request that the hearing officer dismiss the parent's hearing request.

(iv) If the LEA fails to hold the resolution meeting within 15 calendar days of receiving notice of the hearing request or fails to participate in the resolution meeting, the parent may seek the intervention of the hearing officer to begin the due process hearing timeline.

(v) The 45-day timeline for the due process hearing starts the day after one of the following events:

(I) Both parties agree in writing to waive the resolution meeting,

(II) 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, or

(III) 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.

(vi) If an agreement is reached as to the issues in the due process hearing request at a resolution meeting, the parties must execute a legally binding agreement that is signed by both the parent and a representative of the public agency who has the authority to bind the agency. The agreement is enforceable in any state court of competent jurisdiction or in a district court of the United States.

(vii) If the parties execute an agreement, a party may void such agreement within three business days of the agreement's execution.

(viii) The SEA will allow other state enforcement mechanisms (a State complaint, mediation, or a due process hearing) to seek enforcement of resolution agreements. The use of those mechanisms is not mandatory and must not delay or deny a party the right to seek enforcement of the written agreement in a State court of competent jurisdiction or in a district court of the United States.

4. The Appointment of a Due Process Hearing Officer. The appointment of the hearing officer must be made by the State Superintendent of Education on a rotational basis.

5. Qualifications of Due Process Hearing Officers. A hearing officer must not be a person who is 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 would conflict with his or her objectivity in a hearing. The hearing officer must possess knowledge of, and the ability to 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; the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and 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 is not an employee of the education agency solely because he or she

is paid by the education agency to serve as a hearing officer.

6. Subject Matter of Due Process Hearings. The party requesting the impartial due process hearing may not raise issues at the due process hearing that were not raised in the written request for hearing, unless the other party agrees otherwise.

7. Due Process Hearing Rights. Any party to a hearing has the right to:

- (i) 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 non-attorneys at due process hearings is determined under State law.
- (ii) Present evidence and confront, cross-examine, and compel the attendance of witnesses.
- (iii) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days prior to the hearing.
- (iv) Obtain a written or, at the option of the parents, electronic, verbatim record of the hearing.
- (v) Obtain written, or, at the option of the parents, electronic findings of fact and decisions at no cost.
- (vi) 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 provided at no cost.
- (vii) Have, no less than five business days prior to a hearing, 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 from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

8. Disclosure of Information. At least five business days prior to the hearing, each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering parties evaluations. A hearing officer may bar any party that fails to comply with this requirement from introducing

the relevant evaluation or recommendation at the hearing without the consent of the other party.

9. Parents' Responsibility in Due Process Hearing Procedures.

(i) Prehearing Activities.

(I) Request a due process hearing that pertains to the proposal or refusal to initiate or change the identification, evaluation, educational placement and/or the provision of FAPE to the child; and

(II) Provide, at least five business days before the hearing a list of potential witnesses to the designated hearing officer. Each party is responsible for the attendance of witnesses.

(III) Disclose evidence to the other party at least five business days prior to the hearing. Do not send a copy of the evidence to the designated hearing officer.

(IV) Cooperate with the hearing officer in any business or communication and the planning for a location, date, and time for the hearing.

(V) Inform the hearing officer regarding their decision pertaining to the child's presence at the hearing and to opening the hearing to the public.

(ii) Hearing Activities. Present their case at the hearing.

10. LEA's Responsibility in Due Process Hearing Procedures.

(i) Prehearing Activities.

(I) Inform the parents of any free or low-cost legal and other relevant services available in the area.

(II) Provide a copy of the Special Education Rights to the parent upon receipt of the first occurrence of a filing of a due process hearing request in a school year.

(III) Provide, at least five business days before the hearing a list of potential witnesses to the

designated hearing officer. Each party is responsible for the attendance of witnesses.

(IV) Disclose evidence to the other party at least five business days prior to the hearing. Do not send a copy of the evidence to the designated hearing officer.

(V) Provide parents and/or their representative the opportunity to inspect and review their child's educational records without unnecessary delay (not more than 45 calendar days after the request has been made) and before a due process hearing, or resolution meeting is conducted.

(VI) Cooperate with the hearing officer in any business or communication and the planning for a location, date, and time for the hearing.

(VII) Provide prior written notice as required by the notice provisions under the IDEA.

(VIII) Within 15 calendar days of receiving notice of the parent's due process hearing request, and prior to the initiation of a due process hearing, 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 hearing request.

(ii) Hearing Activities. Present the case at the hearing.

11. Department of Education's Responsibility in Due Process Hearing Procedures.

(i) Prehearing Activities.

(I) Appoint a qualified Due Process Hearing Officer.

(II) Provide for a qualified court reporter to make an official transcript of the hearing.

(III) Arrange for an interpreter, as needed.

(IV) Keep a list of persons who serve as hearing officers, which must include a statement of the qualifications of each person.

(ii) Hearing Activities.

(I) Ensure that not later than 45 days after the expiration of the 30-day resolution period or the adjusted time periods, a final decision is reached and a copy of the decision is mailed to each of the parties.

(II) Maintain comprehensive tracking and filing regarding each impartial due process hearing to include, but not be limited to, all written correspondence, evidence, decisions, and transcripts.

(III) Transmit the hearing findings and decisions, after deleting any personally identifiable information, to the Special Education Advisory Panel and make the findings and decisions available to the public.

(IV) Provide for payment of the hearing officer, court reporter, and interpreter.

12. Due Process Hearing Officer's Responsibility in Hearings.

(i) Prehearing Activities.

(I) Ensure that the issues raised in the hearing request pertain to the proposal or refusal to initiate or change the identification, evaluation, educational placement, and/or the provision of FAPE. Identify and dismiss claims and issues that are not justiciable or otherwise properly raised in a due process hearing.

(II) Ensure that the parties to the proceedings have been properly identified, named and served, and have been notified of the hearing and of the claims and issues to be addressed at the hearing.

(III) Notify the Department of Education, Special Education Services, of all interim or final rulings or orders affecting the hearing. This includes, but is not limited to, resolution meeting results, continuances, settlements, or specific extensions of timelines.

(IV) Inform the parties of his or her appointment as the hearing officer.

(V) Inform the parties of the availability of mediation.

(VI) Establish a date, time, and location for the hearing that is reasonably convenient to the parent(s) and child involved.

(VII) Establish a date, at least five business days prior to the hearing, for a prehearing telephone conference to identify the specific issues to be addressed in the hearing.

(VIII) Ensure that the parties understand their rights pertaining to the hearing.

(IX) Utilize written correspondence to notify the parties of hearing procedures and schedules. All telephone calls must be followed by written notification.

(X) Obtain a list of representatives and witnesses from the parties at least five business days prior to the hearing.

(XI) Ensure that the parties have disclosed evidence to each other at least five business days prior to the hearing.

(XII) Inform the parties regarding the format of the hearing.

(XIII) Advise the parties of the confidential nature of the proceedings.

(XIV) Determine if witnesses should be excluded from the hearing room. This may be requested by either party.

(XV) Make sure that the physical arrangement of the hearing room is appropriate.

(XVI) Provide the parties written notice of any specific extensions to the 30 calendar day resolution timeline or the 45 calendar day hearing timeline.

(XVII) Make such rulings as necessary to conduct the hearings.

(ii) Hearing Activities. The hearing officer will conduct the hearing as outlined below:

(I) Call to order.

(II) Opening statement by the hearing officer.

(III) Introductions of himself/herself and principal parties.

(IV) Statement of opened or closed hearing.

(V) Explanation of procedural matters.

(VI) Statement of issue(s) and purpose.

(VII) Swearing in witnesses.

(VIII) Exclusion of witnesses, if requested by either party.

(iii) Presentation of formal testimony.

(I) Explanation of format for presentation of evidence.

(II) Opportunity for opening statements by all of the principal parties. This is not part of the evidence and will not be considered in the decision.

(III) Presentation of written evidence by petitioner followed by the respondent. The written evidence may be presented all together or as needed during the oral testimony. The impartial due process hearing officer will mark each document for identification purposes and must return all exhibits entered into evidence to the State Department of Education, Special Education Services.

(IV) Presentation of oral testimony by petitioner followed by the respondent. Each witness must identify himself/herself by stating the name, address, position, and relationship to the child. Oral testimony will be taken in the following order:

I. Petitioner's Witnesses.

A. Examination by petitioner.

B. Cross-examination by respondent.

C. Reexamination by petitioner.

D. Recross-examination by respondent.

E. Further examination allowed at the hearing officer's discretion.

F. Questions by the hearing officer.

II. Respondent's Witnesses.

A. Examination by respondent.

B. Cross-examination by petitioner.

C. Reexamination by respondent.

D. Recross-examination by petitioner.

E. Further examination allowed at the impartial due process hearing officer's discretion.

F. Questions by the hearing officer.

(V) General Procedures Pertaining to the Hearing.

I. Only a principal party or their attorney may question witnesses.

II. The hearing officer may dismiss witnesses when it has been determined that neither party has further need for them.

III. The hearing officer may stop unnecessarily hostile or irrelevant pursuits in questioning.

IV. If a principal party fails to appear, the hearing officer may hold the hearing after noting in the record that proper notice was provided, or the hearing may be adjourned or postponed.

V. If a witness fails to appear, the hearing can proceed with a notation in the record. If the evidence from the witness is required, it may be taken at a later date. The hearing may be reconvened at a later time to obtain the testimony.

VI. Written evidence provided by a witness who does not appear may be accepted as fact if the other party agrees.

VII. Summary statements by the petitioner will be followed by the respondent. This is not part of the evidence and will not be considered in the decision.

(VI) Closing statements by the hearing officer.

I. When decision can be expected.

II. Availability of the record of the hearing.

III. Appeal procedures.

(iv) Posthearing activities.

(I) Include in the decision.

I. Procedural history.

II. Statement of the facts.

III. Issues presented.

IV. Discussion of issues.

V. Conclusions.

VI. List of all documents introduced as exhibits.

VII. Order.

VIII. Appeal rights, including time limits on the filing of an appeal.

IX. Such matters deemed necessary by the hearing officer to implement the decision.

X. A hearing officer's determination of whether a child received FAPE must be based on substantive grounds. Due process hearing officers shall have no authority to resolve or determine claims or issues or matters arising under State law (other than laws or regulations adopted for the purpose of implementing the requirements of the IDEA), or arising under federal laws other than the IDEA and its implementing regulations. In matters alleging a procedural violation, the hearing officer may find that a child did not receive FAPE only if the procedural inadequacies impeded the child's right to FAPE; significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to the child; or caused a deprivation of educational benefit. Nothing here shall be

construed to preclude the hearing officer from ordering an LEA to comply with the procedural safeguards requirements. Nothing in this shall be construed to affect the right of a parent to file a State complaint with the Department of Education.

(II) Send copies of the written decision to all parties and to the State Superintendent of Education, Attention: Special Education Services.

(III) Submit all correspondence, evidence, or any other information collected during the hearing to the State Superintendent of Education, Attention: Special Education Services, for filing and safeguarding.

(v) Extension of Timelines. At the request of either party, the hearing officer may grant extensions for specific amounts of time beyond the periods set for impartial due process hearings. Documentation of extensions must be submitted to the State Department of Education, Special Education Services.

13. Additional Impartial Due Process Hearing Requests. Nothing in this part shall be construed to preclude a parent from filing a separate hearing request on an issue separate from the request already filed. ***All claims that are or that should be known to the party filing the request for due process hearing at the time the initial due process hearing request is filed should be asserted in the same hearing request.***

14. Child's Status During Hearing Proceedings. Subsequent to a request and during the pendency of any administrative or judicial proceeding, the child involved must remain in his or her current educational placement unless the State or the LEA and parents agree otherwise. If the request for hearing 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. If the hearing request involves an application for initial services under Part B of the IDEA for a child who is transitioning from Part C 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 has 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, then the public agency must provide those special education and related services that are not in

dispute between the parent and the agency. If the hearing officer agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents pending any subsequent proceedings.

15. Civil Action. The decision made by the hearing office is final except that, any party agreed by the findings and decision has the right to bring a civil action with respect with the due process hearing. In any civil action brought, the court shall receive the records of the administrative proceedings; hear additional evidence at the request of a party; and basing its decision on the preponderance of the evidence, grant the relief that the court determines to be appropriate. The district courts of the United States have jurisdiction of actions brought under section 615 of the IDEA without regard to the amount in controversy. Nothing here shall be construed to restrict or limit 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 such laws seeking relief that is also available under this part, the procedures under Ala. Admin Code r. 290-8-9-.08(9) must be exhausted.

16. Timeline for Filing Civil Action. The party bringing the civil action must file a notice of intent to file a civil action within 30 days after receipt of the hearing decision. The party must file the civil action within 30 days of the filing of the notice of intent.

17. Attorneys' Fees. In any action or proceeding brought under the procedural safeguards requirements of IDEA, the court in its discretion may award reasonable attorneys' fees to a prevailing party who is the parent of a child with a disability; to a prevailing party who is a SEA or LEA against the attorney of a parent who files a request for due process hearing 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 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.

(i) Part B funds may not be used to pay attorneys' fees or costs of a party related to any action or proceeding under the procedural safeguards requirements of the IDEA. However, this does not preclude a public agency from using Part B funds for conducting an action or proceeding. Fees 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.

(ii) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under the IDEA 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 a due process hearing, at any time more than ten calendar days before the proceeding begins, the offer is not accepted within ten calendar days; and the court or hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(iii) 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. A resolution meeting conducted pursuant to these rules 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.

(iv) 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.

(v) The court reduces, accordingly, the amount of attorneys' fees awarded if the court finds that:

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

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

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

(IV) The attorney representing the parent did not provide to the LEA the appropriate information in the request for the due process hearing in accordance with these rules.

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

Author: Joseph B. Morton

Statutory Authority: Code of Ala. 1975, Title 16, Chapter 39; 20 U.S.C. 1400 et seq.; 34 CFR §300.

History: **Amended:** August 12, 1980. **Repealed:** April 10, 1986; New: April 10, 1986; effective May 30, 1986; July 11, 1989.

Amended: 290-080-090-.09(4)(c)16. Due Process and 290-80-090-.09(5) Suspension/Expulsion effective August 16, 1989. December 13, 1990 added 290-080-090-.09(2)(c)17. through (iii) effective January 21, 1991. August 8, 1991 adopted 290-080-090-.09.52ER effective August 8, 1991. **Repealed:** June 10, 1993, New: June 10, 1993; effective August 1, 1993. **Repealed and New Rule:** Filed September 9, 1999; effective October 14, 1999 (Ed. Note: This was rule was previously 290-080-090-.10). **Amended:** Filed December 14, 2000; effective January 18, 2001. **Amended:** Filed August 9, 2001; effective September 13, 2001. **Repealed and New Rule:** Filed August 11, 2005; effective September 15, 2005. **Repealed and New Rule:** Filed June 14, 2007; effective July 19, 2007. **Amended:** Filed April 9, 2009; effective May 14, 2009. **Amended:** Filed April 14, 2011; effective May 19, 2011.