

Bureau of Indian Education (BIE)

Albuquerque Service Center (ASC)

Resolution Session and Due Process Hearing Procedures in
Special Education

DUE PROCESS HEARING OFFICER MANUAL



Individuals with Disabilities Education Act, IDEA of 2004

Revised 2007

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Introduction

Due process is a set of procedures that seeks to ensure fairness of education decisions and accountability, for both parents and educational professionals. The due process hearing provides a forum where disagreements about the identification, evaluation, educational placement, and provision of a free appropriate public education for students with disabilities may be adjudicated.

Usually parents and school personnel assume their responsibilities in regard to the education of children with disabilities. They usually have little or no difficulty in reaching mutual agreement about the initiation, continuation, or termination of special education services. *When disagreements arise, due process is available to bring in an impartial special education due process hearing officer to make a ruling. Ultimately, the intent of federal special education due process requirements is to protect the rights of students from inappropriate actions by schools or by parents.*

Due process rights begin when educational professionals or the parents request an evaluation to determine whether a student is eligible and needs special education and related services. Examples are providing Prior Written Notice to parents; obtaining informed parent consent when required; and conducting meetings for initial evaluation, reevaluation when needed, IEP development, and educational placement. Ideally, educators and parents will work together and agree on what is appropriate for the student. All parent-school contacts can be used to communicate openly about the student's situation. Parents and education professionals should be willing to consider various services or approaches to benefit the student.

However, if differences of opinion occur, *both the educators and the parents should try to resolve those differences through mediation and/or a resolution session. Only as a last resort should the legal method of a special education due process hearing and appeal procedure be used.*

Due Process Overview and Flow Chart

SECTION 1 – PURPOSE

The purpose of this document is to review procedures by which the Bureau of Indian Education (BIE) Albuquerque Service Center (ASC) will appoint contract hearing officers and operate the administrative hearing mandated by the requirements of Part B of the Individuals with Disabilities Education Act (IDEA) or its implementing regulations.

SECTION 2 – SCOPE

This document applies to the conduct of any Impartial Due Process Hearing thereof conducted by hearing officers appointed by the BIE pursuant to Part B of the IDEA regulations.

SECTION 3 – PARENT INITIATION OF HEARING

A parent of a child with a disability or the parent of a child who the parent believes to have a disability may initiate a hearing as described in the document if

- A. the parent disagrees with a proposal by a special education unit or a proposal by another public agency operating an education program to initiate of change the *identification, evaluation, or educational placement* of the child or the provision of a free appropriate public education to the student; or
- B. a special education unit or another public agency operating an education program refuses to initiate of change the *identification, evaluation, or educational placement* of the student or the provision of a free appropriate public education to the student.

SECTION 4 – TIMELINES

- A. The BIE shall ensure that no later than **45 calendar days** after the receipt of an Application of Request for Due Process Hearing, a final decision is reached in the hearing and a copy of the decision is mailed to each of the parties in the dispute.
- B. A hearing officer may grant specific extensions of time beyond the period set out in (A) of this section at the reasonable request of either party.

SECTION 5 – INITIATION OF HEARING BY OTHERS

A school or other public agency operating an education program may initiate a hearing as described in this document if the parent of a child with a disability refuses consent before evaluation. Public agencies as well as parents are also

permitted to initiate a hearing on “any of the matters” that include the proposal of refusal to initiate or change the identification, evaluation or placement of the student, or the provision of a free appropriate public education for the student.

SECTION 6 – FILING AND PROCEDURE FOR A DUE PROCESS HEARING

Either party, the parent or the school, seeking to initiate a hearing pursuant to the procedures of the BIE, as the administrative agency conducting the hearing, shall follow the rules of procedure and notice of hearing as set forth in this document.

SECTION 7 – APPOINTMENT OF HEARING OFFICERS

- A. The BIE shall maintain a register of contract due process hearing officers that contains the names of persons who are impartial, not employed by an agency involved with the care or education of a student, or a school board official, and who is knowledgeable about the legal and educational issues that may arise under Part B of the IDEA in connection with the matters in dispute at a hearing initiated pursuant to this document.
- B. The BIE shall ensure that each person on the list prepared by the BIE shall have successfully completed a training program for hearing officers approved by the BIE.
- C. The register shall include a summary of the qualifications of each person.

SECTION 8 – SCHEDULING OF RESOLUTION SESSION AND HEARING

- A. During the period of time between the date of filing of the Application for Request for Due Process Hearing and the commencement of the hearing, *the BIE shall offer a resolution session within 15 days of the filing to mediate the dispute between the parents and the school.* If a resolution session is accepted, the BIE will appoint a mediator. The resolution session is voluntary, and the costs of a resolution session are the responsibility of the BIE. The participation of the parties in a resolution session or the refusal of the parties to meet will not delay or replace the due process procedures or timelines. In all cases, the BIE shall be available to provide any technical assistance to the mediator, parents, and school necessary to assist the mediator in bringing about a voluntary resolution of the matters in the dispute.
- B. In the event that resolution session efforts fail to result in a voluntary resolution by the parties of all of the matters in dispute, the mediator appointed by the BIE shall prepare and file a written report with the BIE and the parties involved setting forth concisely the matters in actual controversy between the parties and the efforts undertaken to mediate the dispute.

SECTION 9 – SCOPE OF HEARING

A hearing shall be conducted for the purpose of deciding whether or not a student with a disability (or student suspected of having a disability) has been denied one or more aspects of a free appropriate public education guaranteed under Part B of the IDEA – 2004.

SECTION 10 – ACCESS TO RECORDS AND INFORMATION

The school shall provide parents who are parties to a hearing with full access to all school records pertaining to the student for whom the hearing is held, including the written record of any individual evaluation of the student connected by the special education unit and any other school files and papers relevant to the matters in dispute.

SECTION 11 – CONDUCTING THE HEARING

- A. Preceding the commencement of the hearing, the hearing officer shall meet with the parties in order to attempt to arrive at a voluntary resolution of the matters in dispute.
- B. In the event that a voluntary resolution of the dispute cannot be achieved as a result of the resolution session, a hearing shall be conducted in accordance with established procedures. If the primary language of the parents is other than English or if a parent is either blind or deaf, an interpreter or reader shall be provided. All hearings shall be conducted in locations fully accessible to persons in wheelchairs.
- C. Any party to the hearing shall have the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the area of the student's needs.
- D. Any party to the hearing has the right to present evidence; confront, cross-examine, and compel witnesses; and prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing.
- E. If requested by the parents, the hearing conducted pursuant to this document shall be open to the public. At the request of parents, the student with a disability for whom the hearing is being held shall be permitted to attend the hearing.
- F. The burden of proof as to the adequacy or appropriateness of a decision made by a school regarding the identification, evaluation, and placement or provision of services to a student with a disability or to a student suspected of having a disability shall be on the school.
- G. A tape recording or other verbatim record of the hearing shall be made. The record shall remain under the control of the BIE. Upon request, the

parent and the school shall have a right to obtain a copy of the record of the proceedings. Thereafter, additional copies may be obtained at a uniform charge set by the BIE.

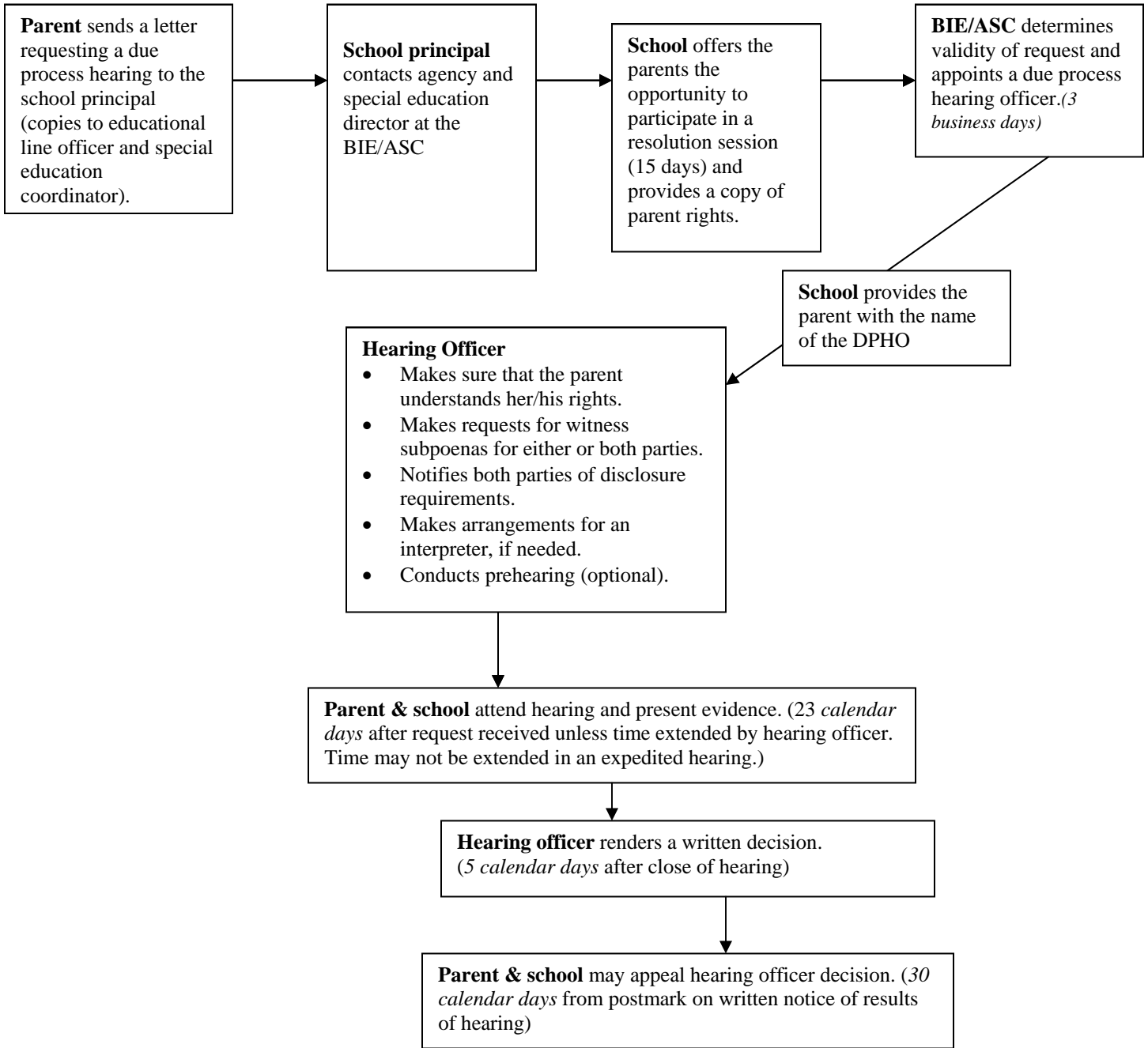
SECTION 12 – ISSUANCE OF HEARING DECISION

- A. Following the close of the hearing, a decision that states concisely and explicitly the findings of fact and conclusions of law will be sent by certified mail to the parties involved in the hearing. The decision of the hearing office is final unless either party appeals the decision. As appropriate, the hearing decision will be written in English and in the primary language of the child's home if other than English and where appropriate, will be transcribed in Braille or tape-recorded for parents who are visually impaired or blind.
- B. Both parties will be notified in writing that any party who is aggrieved by the hearing decision may seek relief through the civil court system.
- C. The hearing officer shall send the written findings of fact and decision to the BIE.
- D. The BIE shall transmit the findings of fact and decision, after deleting any personally identifiable information, to the BIE/ ASC IDEA Advisory Board and will make the findings and decision available to the general public.

SECTION 13 – STATUS OF STUDENT DURING PROCEDURES

- A. During the pendency of any administrative or judicial proceeding pursuant to this document, unless the parties agree otherwise, the student for whom the due process hearing is held shall remain in his/her present placement. While the placement may not be changes, this does not preclude the special education unit from using its normal procedures for dealing with a student who is endangering himself/herself or others.
- B. If the complaint involves an application for initial admission of a student to school, the student, with consent of the parents, shall be placed in the school program until the completion of all due process proceedings.

DUE PROCESS FLOW CHART



Due Process Activities

FILING FOR DUE PROCESS

Either educational professionals or parents may initiate a special education due process hearing to resolve differences about a student's

- Identification,
- Evaluation,
- Educational placement, or
- Provision of a free appropriate public education.

If the student is age 18, the student has the right to file for a due process hearing. To make their request, educational professionals, parents, or students filing for due process are required to complete the Request for Due Process Hearing form, which includes all needed components. Federal regulations specify the required content of the notice that parents give to the school:

- Name of the child
- Address of the child's residence
- Name of the school the child is attending
- Description of the nature of the child's problem related to the proposed or refused initiation or change including facts relating to the problems
- Proposed resolution of the problem

When the school receives this request, school personnel are required to do the following:

- Inform parents about mediation and the resolution session.
- Inform parents of free or low-cost legal services.
- Provide a copy of the Parent Rights document.

CONDUCTING A DUE PROCESS HEARING

The special education due process hearing officer must conduct the due process hearings as required by federal law. Both parties have the right to come with legal counsel and people who have special knowledge about students with disabilities. Special education due process hearing officers may administer oaths before hearing testimony. Subpoenas may be issued to bring in the appropriate witnesses. If witnesses are available, they must appear in person and not be deposed. The record of the hearing and the findings of fact and decisions must be provided at no cost to the parents.

REACHING A DECISION

After the special education due process hearing officer reaches a decision, they must (1) render a decision within 10 calendar days, (2) prepare a written decision, and (3) give it to school personnel and send it by certified mail to the parents or the student if the student is of the age of majority. In addition, the special education due process hearing officer must delete identifiable information from the report and send a copy to the special education advisory council.

TIMELINES AND STAY-PUT

The special education due process hearing officer has 45 calendar days in which to conduct the due process hearing and send a copy of the written decision to both parties. A special education due process hearing officer may grant extensions of time upon request of either party, unless the due process hearing is an expedited hearing.

While the due process hearing is pending, the student involved in the complaint must remain (“stay-put”) in the current educational placement unless

- The parents and school agree to a different placement or
- The student is in an interim alternative educational setting for disciplinary reasons.

CIVIL ACTIONS

After the outcome of a due process hearing and/or an appeal to that hearing, either the parents or the school may pursue a civil action through a State or federal court. Federal regulations allow the civil action by either party.

ATTORNEY FEES

If the parents prevail in the due process hearing or upon appeal, the court may award some or all of the attorney fees they have paid in conjunction with the due process hearing. Only a court can award attorney fees to the parents. The special education due process hearing officer has no authority to do so. However, there may be limitations on the amount paid. For example, if it is found that the parents prolonged the process or if the fees charged are more than the hourly rate usually charged, the judge has the right to reduce the award paid to the parents. In determining the amount of the reimbursement of attorney fees, the judge must follow federal regulations. Under certain circumstances, the school can be awarded attorney fees from the parent or their attorney

Hearing Officer Qualifications

GENERAL QUALIFICATIONS

1. Be licensed and in good standing with the Bar to practice law and/or have extensive special education experience.
2. Be engaged in the active practice of law for at least five years. Preference will be given to individuals who have been actively involved in cases and/or practice in the areas of special education, disability law, administrative law, or civil rights. Alternatively, have a background in special education and legal issues.
3. Possess good legal research skills and familiarity with special education law and administrative law.
4. Demonstrate clarity of expression in writing.

MINIMUM JOB REQUIREMENTS

1. Be fair, disinterested, and independent with no external commitments that would infringe on the ability to be impartial. Outside practice is not barred so long as the practice is compatible with the duties of a Hearing Officer.
2. Travel to a neutral location to conduct the hearing.
3. Possess the necessary support and equipment to perform the duties as a Hearing Officer, including but not limited to a telephone monitored during normal business hours (by a secretary, answering machine, or service), a fax machine, e-mail address, and access to a law library, including access to the Individuals with Disabilities Education Law Report (IDELR).
4. Comply with the standards of neutrality, confidentiality, and conduct required by Individuals with Disabilities Education Act (IDEA) and the Family Educational Rights and Privacy Act (FERPA). Maintain individual case files along with detailed records of activity on each case, such as travel, phone calls, research, drafting of orders, decisions, and correspondence.

5. Comply with all legal and contractual timelines, including but not limited to (1) rendering final decision not later than the forty-fifth day following the date of the request, (2) delivering final written decision to the BIE no later than 10 days following the hearing, (3) immediately notifying the BIE/ASC of any order granting an extension of the 45-calendar-day timeline for issuing a final decision, and (4) returning individual case files to the BIE/ASC immediately upon rendering a final decision.
6. Attend training sessions, as assigned.
7. Maintain the ability to respond to request for hearings and pre-hearing motions within 24 hours and issue a final decision within the 45-day federal requirement.
8. Comply with the decision format requirements set by the BIE/ASC.
9. Provide updates and docket information on case activity for each case file on a continuing basis, as specified by the BIE/ASC.
10. Maintain scheduling flexibility as there is no guarantee to the number of cases that the BIE/ASC will assign to each Hearing Officer.

Prehearing Checklist

The following summary identifies the potential items that can be covered in a prehearing conference:

1. Review whether either party has a concern or objection to the assignment of the Hearing Officer.

If the event that a Hearing Officer has what might appear to be a conflict of interest that the Hearing Officer determines will not interfere with the ability to remain impartial, it is strongly suggested that the Hearing Officer disclose such facts to the parties on the record. By doing so, the Hearing Officer affords both parties the opportunity to ask clarifying questions and ultimately gives the parties the right to challenge the Hearing Officer's impartiality.

2. If either party is unrepresented, clarify their intent to proceed with or without representation.

The law gives both the parent and the school system the right to be accompanied and advised by counsel or an advocate. The Hearing Officer should ensure that the school has carried out its legal requirement of informing the parent of any no or low-cost legal or other relevant services available.

3. Set expectations for the parties and their representatives for their conduct throughout the proceedings.

Special education hearings often become very emotional. It is extremely important for the Hearing Officer to clearly set out the expectations of conduct for the parties. Parties/representatives should be warned that rude discourteous behavior will not be tolerated.

4. Encourage parties to explore mediation or other settlement options.

Mediation is an available option for parties to resolve their differences. It must be voluntary and cannot be used to delay/deny the right to go to a hearing. Hearing Officers should raise the mediation option and encourage parties to pursue mediation if they have not already done so. Hearing Officers, however, should not turn the prehearing conference into a mediation session.

5. Clarify the issue(s) identified by the moving party and the relief they are seeking through the hearing process.

It is critical that the Hearing Officer and the parties have a clear understanding of the specific issue(s) and the relief sought from the hearing process.

6. Review the procedural safeguards applicable to the hearing process. Do the parents want (1) the hearing open or closed, (2) to have their student present at the hearing, and (3) a written or electronic record of the hearing and decision?

The law specifically gives the parents the sole right to decide whether the hearing will be open or closed to the public, whether the child will be present at the hearing, and the form of the hearing record.

7. Review the hearing procedures such as estimating the length of time needed for each party to present their case and confirm the hearing date, time, and place.

The place of the hearing must be reasonably convenient to the parents and the child involved.

8. Review disclosure issues between the parties and consider ordering the parties to submit a list of joint exhibits and encourage voluntary disclosure. Identify the last day for exchange of exhibits and list of witnesses.

IDEA allows a Hearing Officer to bar a party from introducing as evidence any documents to be introduced as exhibits and witnesses to be that have not been disclosed at least five business days prior to the hearing (commonly referred to as the "five-day rule"). The Hearing Officer should encourage a complete and free exchange of documents and other evidence between the parties, thereby facilitating a thorough airing and exploration of the issues. In the event a party does not cooperate in that effort, the party requesting the documents from the other party may move for their production.

9. Discuss witnesses desired to attend and the production of documents. Address any request to compel the attendance of witnesses. Address any request to compel the production of documents from non-parties.

Either party has the right to compel the attendance of witnesses. Although federal regulations give the Hearing Officer the authority to compel the attendance of witnesses who will not voluntarily give testimony at a due process hearing, the Hearing Officer does not have the authority to enforce the subpoena of witnesses, but he/she has considerable discretion regarding the conduct of the hearing.

10. Discuss other evidentiary issues. Discuss the fact that rules of evidence will not be strictly applied although there is an exception that the parties will avoid redundant and irrelevant testimony.
11. Entertain other motions/requests such as an extension of the 45-day time frame, motions to dismiss, motion for recusal, clarification of “stay put” rules, and access to records.

Regulations permit the Hearing Officer to extend the 45-day timeline at the request of either or both parties. Hearing Officers are also authorized to determine whether the issues raised are within the jurisdiction of an IDEA hearing. Although the guidelines for the potential need for a Hearing Officer to recuse himself or herself have been previously addressed, a party may move for recusal.

The student who is the subject of the hearing must remain in his/her preset educational placement during the pendency of the hearing process unless the school and parents agree otherwise. Parents are also given the right to inspect and review the education records of their child prior to the hearing.

12. Determine if the individual who will participate in the hearing is in need of an accommodation such as an interpreter.
13. Determine whether any briefing will be required and when such briefs are due.

RECORD OF PREHEARING CONFERENCE LETTER

[Hearing Officer's Letterhead]

Memorandum via Facsimile (or Regular Mail)

To: [Parent's representative]
[School's legal counsel]

From: [Hearing Officer]

Date:

Subject: **[Student's name] and [School]**

1. On [day, date, and time], a [telephone] prehearing conference for the above reference matter was conducted. Present were (1) *parent(s)*, (2) *parent's representative*, (3) *school's representatives*, and (4) *school's legal counsel* (as applicable).
2. The matters addressed and determined during the prehearing conference were as follows:
 - a. *Legal Issues on which Due Process is Requested:* [Specify all issues that are identified after confirming the working of issues. If the parties agree that certain issues are not in dispute, note this fact as well.]
 - b. *Access to the Student's Educational Records:*
 - c. *Estimated Number of Witnesses and Topic Summary of Testimony:*
 - i. Petitioner: [Parent's representative] identified ____ individuals as witnesses:
 1. [Name; area of testimony]
 2. [Name; area of testimony]
 - ii. Respondent: [LEA] identified ____ individuals as witnesses:
 1. [Name; area of testimony]
 2. [Name; area of testimony]
 - d. *Estimated Length of Hearing:*
 - e. *Hearing Date and Location:*
 - f. *Procedural Issues:*
 - i. Order of presentation of evidence
 - ii. Burden of proof
 - iii. Representation of parent(s)

- iv. Open/closed hearing: Parent has requested that the hearing be [open/close].
 - v. Presence of child: Parent has requested that the child [will/will not] be present during the hearing.
 - vi. Record of proceedings: The special education hearing officer is responsible for preparing a verbatim record of the proceedings (if desired). Parent prefers [written/electronic] transcript.
 - vii. Prehearing motions/memorandum (as applicable)
 - g. *List of Witnesses and Exhibit Folder*: The list of witnesses and exhibits that are to be used in the hearing must be exchanged between the parties no later than five *business* days before the start of the due process hearing. The deadline is [day, date] at 5:00 p.m.
3. If either party has any questions concerning any of the foregoing points, please call me immediately so that any uncertainty, confusion, or ambiguity that might exist can be properly addressed. You will both be given the opportunity to state any objection, correction, or supplementation of this letter at the outset of the due process hearing.

Conducting the Hearing

1. Call to order.

2. Introductory statements

The Due Process Hearing Officer (DPHO) should begin the hearing with an opening statement that substantially covers the following information:

- Introduction of participants
- Opened/closed hearing – If a closed hearing is desired, all persons should be requested to leave the room except
 - The representatives of all parties, counsels, and other persons entitled to be present pursuant to law and
 - Witnesses.
- Known or potential witnesses may be sequestered at the discretion of the hearing officer and instructed to remain nearby and be ready to be called to give their testimony.
- A brief statement of the issues to be decided
- Burden of proof – The burden of proof, as well as the burden of going forward with the evidence, is always on the school. It may be more convenient for the parent to present evidence first, regardless of the burden, provided neither party objects. As an accommodation to the parent, an offer to let them proceed first may be made.

3. Opening statements

The DPHO shall ask each party to make an opening statement.

4. Swearing in witnesses

The court reporter should administer the oath. If the witness is a student under 10 years of age, the oath may be waived.

5. Opening of formal testimony

This is the evidence and testimony phase of the hearing. The DPHO should organize this phase of the hearing consistent with the asterisked (*) headers:

- Opening statements
- Presentation of evidence and testimony
- Written evidence
- Witnesses
 - *examination
 - *cross-examination
 - *reexamination
 - *examination by DPHO

6. Closing statements

Each party should have an opportunity to present a closing statement. Closings are brief statements given by each party that summarize their position and the evidence given in support of that position. Parties may wish to submit closing statements in writing. Such written closings may be permitted at the discretion of the DPHO. However, a time limit for receipt of written material should be set so as not to unnecessarily delay a decision in the case.

7. Closing statement by the DPHO

The DPHO should end the hearing with a closing statement that substantially covers the following information

- Estimated completion date for written decision
- Mailing date of the decision to the school and the parents or their representatives
- Right to appeal

. Post Hearing

1. Before leaving the hearing site, the DPHO should make sure that they have the correct address of the parents or adult student and any legal or other advisor in order to provide them with a copy of the hearing decision. The DPHO should also be sure they have exhibits offered or admitted into evidence.
2. In making the decision, the DPHO shall consider only the evidence as presented at the hearing and reflected in the official transcript and the exhibits. Any information obtained from other sources, either before or following the hearing, shall not be used in arriving at the decision. Notwithstanding the foregoing, with the consent of the DPHO, a party may offer in evidence the written deposition of a witness regardless of whether such deposition is taken before or after the hearing.
3. The DPHO should keep in mind that the burden of proof is on the school to establish its position by a preponderance of the evidence. Where appropriate, the DPHO may order an independent educational evaluation of the student to be provided at public expense. In cases involving issues of placement, the school must show that it can and will provide the services to which the child is entitled. If the issue involved identification or evaluation, the school must have followed the requirements specified in the Individuals with Disabilities Education Act – Amendments of 2004.
4. The written decision shall contain, at a minimum, the following sections:
 - A summary of the dispute that was resolved at the hearing, including enough detail for general understanding
 - A statement of the position of the school, including the major points of their presentation
 - A statement of the position of the parents, including major points of the presentation

- Findings of fact as determined by an examination of the evidence presented at the hearing with references to pages of the record and exhibits – A finding of fact may be based up undisputed testimony of documents. A finding of fact may also be based on a fact that is disputed between the parties but upon which the DPHO determines that one party has prevailed by proof.
- Major points of law as they relate to the case in question
- A clear and concise statement of the decision of the DPHO
- A discussion of the DPHO's rationale for the decision (if not provided previously) – A written decision shall address the issues stated as the subject of the hearing.
- The DPHO has the authority to reconvene the parties to elicit information they require to come to a decision.

Questions and Answers

1. MAY THE PARENTS STRIKE THE NAME OF THE SPECIAL EDUCATION DUE PROCESS HEARING OFFICER PROVIDED BY THE SCHOOL?

Yes. The school must then request the BIE to appoint another special education due process hearing officer.

2. DO THE PARENTS HAVE THE RIGHT TO AN ATTORNEY AT THE DUE PROCESS HEARING AT PUBLIC EXPENSE?

No. However, if the parents are the prevailing party, they may request from the court that attorney fees be reimbursed by the school. The law provides for exceptions and limitations as appropriate.

3. MAY THE PARENTS OR THE SCHOOL ASK THAT THEIR REQUEST FOR A SPECIAL EDUCATION DUE PROCESS HEARING BE WITHDRAWN OR DISMISSED?

Yes. A party that has filed for a special education due process hearing may, subsequently, request the action be dismissed.

4. MAY THE SPECIAL EDUCATION DUE PROCESS HEARING OFFICER AWARD ATTORNEY FEES?

No. Only a court has the authority to award attorney fees.

5. WHAT IF EITHER PARTY DISAGREES WITH THE DECISION OF THE SPECIAL EDUCATION DUE PROCESS HEARING OFFICER?

Following the due process hearing, if either party wishes to appeal a decision of the special education due process hearing officer, school personnel or the parents may pursue further action through a civil proceeding in State or federal district court.

6. WHAT ARE SOME ALTERNATIVES TO DUE PROCESS HEARINGS?

Parents and school personnel should always try to resolve differences at the school level. Parents and school staff may wish to use the informal process of mediation. An impartial third party is assigned to serve as a facilitator in reaching an agreement at no cost to either party. If the parents or an

organization wishes to file a formal complaint alleging the school has violated a special education law or regulation, they may do so. The parent will also have the opportunity to participate in a resolution session that can occur 15 days after filing for due process.

7. WHEN WOULD A FORMAL COMPLAINT BE FILED INSTEAD OF REQUESTING A DUE PROCESS HEARING?

First of all, the school may file for a due process hearing but would usually not file a formal complaint. Parents may file either or both. However, the BIE may not address any issue in a formal complaint that is also an issue in a due process hearing until the conclusion of the due process hearing.

Formal complaint is one of the grievance procedures to consider if the parents or any other persons or organization wishes to have their complaint against the school investigated. Formal complaints are filed with the BIE. The complaint must allege a violation of special education law or regulation. Thus, the BIE does not have authority to consider complaints regarding differences of opinion or judgment that do not allege a violation of special education law or regulation.

Due process is usually the last resort. Hopefully, the parties have attempted a resolution session or mediation in an attempt to resolve their differences. If all these methods fail, either the parents or the school may file for due process.

Due Process Hearing Sample Forms

1. Request for Mediation/Resolution Session/Due Process Hearing
2. Receipt of Request for Due Process Hearing
3. Approval of Request for Due Process Hearing (Parents)
4. Approval of Request for Due Process Hearing (School)
5. Due Process Hearing Officer Notification
6. Letter of Motion for Continuance
7. Interim Hearing Officer's Decision
8. List of Witnesses
9. Hearing Agenda
10. Notice to Appear
11. Interpreter Request Form
12. Hearing Officer's Determination Cover Page
13. Index of Names
14. Due Process Decision
15. How to Write Findings of Fact and Conclusions of Law
16. Certification of Record
17. Index of Exhibits
18. Record of Proceeding

REQUEST FOR MEDIATION/RESOLUTION SESSION/DUE PROCESS HEARING

I request: **Mediation Only** **Resolution Session** **Hearing Only**

Student for whom mediation/resolution session/due process hearing is requested

Name _____

Birthdate _____

School of Attendance _____

Person requesting mediation/resolution session/due process hearing

Name _____

Address _____

Phone (W) _____ (H) _____ Fax _____

Relationship to student Parent Legal Guardian Public Agency
 Self Parent Surrogate

(If a school board is the applicant, please designate a contact person and telephone number.)

Attorney/Representative (if applicable)

Name _____

Address _____

Phone _____ Fax _____

* * * * *

Please indicate three dates when you and your representative (if you have one) are available within the next 20 days for mediation (if requested) and three dates within the next 30 days when you are available for the due process hearing (if requested). If the public agency initiates the hearing or mediation, the public agency shall promptly notify the parent(s) and their representative, if known, and shall consult with the parent(s) or their representative to determine mutually agreeable dates for the mediation or hearing.

Mediation	Resolution Session	Hearing
_____	_____	_____
_____	_____	_____
_____	_____	_____

How many days are needed for the hearing? _____

RECEIPT OF REQUEST FOR DUE PROCESS HEARING

Date

Name

Address

Dear [name]:

On *date*, our office received a request for an "Application for Due Process and Review" regarding *student name*, an identified student of *school*. Once the application is received and approved by our office, a hearing officer is appointed to conduct the hearing between the disputing parties within 45 days of our receipt of the application.

You will be notified when a completed application is received and a hearing officer has been appointed. If you have any questions, please contact me at 505-563-5255.

Sincerely,

BIE Procedural Safeguards Specialist

APPROVAL OF REQUEST FOR DUE PROCESS HEARING (PARENTS)

[Date]

[Parent Names
Address
Address]

Dear [parent names]:

On [date], our office received and approved a request for a due process hearing regarding the special education and related services provided to your [daughter/son], [student name], an identified student of the [name] school. The 45-day timeline for completion of the due process hearing proceedings will conclude on [date].

When a request for a due process hearing is received by this office, a due process hearing officer (DPHO) is appointed to hold the hearing between the disputing parties within 45 days of our receipt of the request. The DPHO appointed for this case is [name].

In accordance with BIE procedures, when a due process hearing has been requested, we are offering you the services of a mediator prior to the due process hearing. If you are willing to have the conflict in question mediated by an impartial third party, please indicate so in a letter to our office. In the case that you and that other party agree to mediation, a mediator will appointed at our expense.

Since there is an educational dispute between you, as the parent, and the [name] School, the present Individual Education Program (IEP) must remain in place. The Individuals with Disabilities Education Act (IDEA) indicates that “during the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present education placement.” This regulation does not permit a child’s placement to be changed during a due process proceeding unless it is agreed to by both parties. All provisions of the IEP must be continued until a determination is made otherwise by the DPHO.

If you have any questions regarding the due process procedures, please contact me at _____.

Sincerely,

BIE/ASC

APPROVAL OF REQUEST FOR DUE PROCESS HEARING (SCHOOL)

[Date]

[name]

Principal

[school name]

[address]

Dear [principal name]:

On [date], our office received and approved a request for a due process hearing regarding the special education and related services provided to you [student name], an identified student of the [name] school. The 45-day timeline for completion of the due process hearing proceedings will conclude on [date].

When a request for a due process hearing is received by this office, a due process hearing officer (DPHO) is appointed to hold the hearing between the disputing parties within 45 days of our receipt of the request. The DPHO appointed for this case is [name].

In accordance with BIE procedures, when a due process hearing has been requested, we are offering you the services of a mediator prior to the due process hearing. If you are willing to have the conflict in question mediated by an impartial third party, please indicate so in a letter to our office. In the case that you and that other party agree to mediation, a mediator will appointed at our expense.

Since there is an educational dispute between you the school, and the parent, the present Individual Education Program (IEP) must remain in place. The Individuals with Disabilities Education Act (IDEA) indicates that "during the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present education placement." This regulation does not permit a child's placement to be changed during a due process proceeding unless it is agreed to by both parties. All provisions of the IEP must be continued until a determination is made otherwise by the DPHO.

If you have any questions regarding the due process procedures, please contact me at _____.

Sincerely,

BIE/ASC

DUE PROCESS HEARING OFFICER NOTIFICATION

[date]

[name of DPHO]

[address]

Dear [name of DPHO]:

We have received notice that you have been assigned as the hearing officer for the due process filed by [name of party filing due process] regarding the special education and related services for their [daughter/son], [students name]. We forwarded copies of the information that we had in our file concerning this student when we sent the [party's name] Application for Due Process and Review to your office on [date].

[Principal name], school principal of [school name], would be able to provide you with current information regarding [student name]. The student attended [school name].

If I can be of further assistance, please contact me at _____.

Sincerely,

BIE/ASC

LETTER OF MOTION FOR CONTINUANCE

Re: [Student's Name] AND [School]

Dear Hearing Officer:

I am writing this letter to request a continuance of my due process hearing currently scheduled to take place on [date]. I am unable to appear of this date for the following reasons: _____

I am available to appear for the hearing on the following dates (please indicate a.m./p.m.):

1. _____ 2. _____ 3. _____

I [attempted/did not attempt] to contact the school's legal counsel to discuss scheduling before proposing these dates. I spoke to _____ at the school's legal offices (if applicable). I understand that these dates may not be available and that the Hearing Officer may reschedule my hearing for another date. I also understand that if my request for a continuance is granted, the 45-day time limit will be extended for the duration of the continuance.

I also understand that the hearing may go forward as scheduled unless I receive a written decision from the Hearing Officer granting a continuance. If I do not receive a written decision granting a continuance and I fail to appear for a scheduled hearing, I understand that the Hearing Officer may dismiss my request.

Signed: _____ Date: _____
(Parent or Advocate)

INTERIM HEARING OFFICER'S DETERMINATION

Office of Compliance

In the Matter RE: [Name of child] ("student") and [Name of School] ("school"),

Case Information: Hearing Dates: [insert dates]
Held at: [insert location, with address]
Case Number:
Student's Date of Birth:
Attending School:
Hearing Request Date(s):

Upon consideration of [student's/school's] Motion for Continuance, any opposition thereto, it is hereby

ORDERED that [student's/school's] Motion is [GRANTED/DENIED]; it is [FURTHER ORDERED] that the parties shall convene on [date] at [time] [a.m./p.m.], and that a Hearing Officer Determination be issued no later than [date]. Either party may, upon a showing of good cause why they are unable to accommodate the newly scheduled date, file a new Motion for Continuance using the Due Process Officer Letter Motion Form. Unless and until the parties receive a written Order granting any such Motion, the parties are obligated to appear for the hearing. Failure to appear may result in dismissal of the case or a default decision against the non-appearing party.

[This space is reserved for any additional comments responding to the Motion TO INCLUDE THE REASON FOR GRANTING CONTINUANCE – **INSERT THE LANGUAGE.**]

SO ORDERED.

Due Process Hearing Officer

Date _____

LIST OF WITNESSES

The following information must be provided concerning the witnesses you intend to call at the due process hearing. Only witnesses who are listed (and disclosed to the other party no fewer than five *business* days prior to the hearing) will be allowed to testify at the hearing unless the other party consents.

Re: *[Student's Name] AND [School]*

Name/Address/Affiliation

1.

2.

3.

4.

5.

HEARING AGENDA

RE: [Student's Name] AND [School]

[time, day, and date of hearing]

- A. Formal call to order
- B. Introductory statement by Hearing Officer (Maintain a written listing of all participants, title, and relationship to the hearing as well as stated for the record.)
 - 1. Introduction of Hearing Officer
 - 2. Statement of open or closed hearing
 - 3. Introduction of participants for the record
 - 4. Purpose of hearing
 - 5. Explanation of hearing procedures and role of the Hearing Officer
- C. Opening of formal testimony
 - 1. Opening statement (if desired)
 - a. Respondent
 - b. Petitioner
 - 2. Presentation or written evidence and testimony. Maintain a complete record of documents entered into evidence and any documents that were not admitted.
 - a. Written evidence
 - 1. Respondent
 - 2. Petitioner
 - b. Testimony of witnesses
 - 1. Respondent
 - 2. Petitioner
 - 3. Respondent (rebuttal)
 - 3. Closing arguments
 - a. Respondent
 - b. Petitioner
 - c. Respondent (rebuttal)
- D. Closing statement by Hearing Officer
 - 1. Overview of due process and procedural safeguards. *[During this hearing, each party had the opportunity to examine its witness(es) identified in the disclosure statement and to cross-examine the other party's witness(es). Each party had the right to offer into evidence all documents that were included in the five-day disclosure to the other party prior to the hearing and the right to object to the introduction of documents. Each party was allowed to make both a brief opening and closing statement.]*
 - 2. Availability of record of the hearing
 - 3. Schedule for filing post-hearing documents
 - 4. Decision date
 - 5. Procedures for appeal
 - 6. Adjourn the hearing.

NOTICE TO APPEAR

MEMORANDUM

TO: [Name of Requested Party] in care of [School's Legal Counsel or Parent/Parent's Representative]

FROM: BIE Special Education Procedural Safeguards Coordinator

DATE:

SUBJECT: **NOTICE TO APPEAR AS A WITNESS IN THE MATTER RE:
[STUDENT'S NAME] AND [SCHOOL]**

This is to notify you that you are required to appear as a witness at the Special Education Due Process Hearing for the above-referenced student. The hearing is scheduled for

Date: [Date]
Time: [Time]
Place: [Place]

The authority to compel your attendance is found in the Individuals with Disabilities Education Act (IDEA).

If you have any questions, please call the BIE Office at _____.

INTERPRETER REQUEST FORM

DATE: _____

NAME OF REQUESTER: _____

TITLE: _____

SCHOOL: _____ NAME OF PRINCIPAL: _____

NAME OF STUDENT: _____

NAME OF PARENT/GUARDIAN: _____

Language/Dialect Support Requested

___ Spanish ___ Other _____

Area of Service Requested

___ Parent/Teacher/Administrator Meeting
___ Special Education Meeting
___ DPH/Mediation
___ Other _____

Funding Sources

___ From School
___ ASC

Name of Preferred Interpreter (if any):

When/Date/Time: _____

Where: _____

Name of Contact: _____ Phone: _____

Name of Administrator: _____ Phone: _____

For more information, please call _____.

Approved: ___ Yes ___ No By: _____ Date: _____

HEARING OFFICER'S DETERMINATION COVER PAGE

Office of Compliance

In the Matter RE: [Name of student] ("student") and [Name of school] ("school"),

Case Information: Hearing dates: [insert dates]
Held at: [insert location, with address]
Case number:
Student's date of birth:
Attending school:
Hearing request date(s):

DUE PROCESS HEARING OFFICER'S DETERMINATION

Parent(s): [Insert name and address of parent(s)]

Counsel for Parents: [Insert name and address of parent's counsel]

Counsel for School: [Insert name and address of School's counsel]

An index of names is attached hereto for the benefit of the parties. The index will permit the parties to identify specific witnesses and other relevant persons. The index is designed to be detached before release of this Determination as a public record.

DUE PROCESS DECISION

Purpose of the Decision. The purpose of the decision is to summarize the pertinent evidence presented at the hearing and to make a conclusion based upon the evidence to decide the issue. The hearing officer's responsibility is to decide what is *legally appropriate for the student*, not whether the parent's or the school system's position is correct. It is possible that based on the record, the Hearing Officer will issue a decision that is different from either party's decision.

Form and Content of the Final Decision. The Hearing Officer prepares the final decision based solely on the evidence and testimony presented at the hearing and any briefs submitted pursuant to a Hearing Officer's Order. The form and content of the final determination must include the following:

- a. **Cover Page**— The cover page is a separate page for listing personally identifiable information from the due process hearing. The Hearing Officer should then refer to the parties in the body of the decision in generic terms (e.g., mother, father, school). Using the generic terms in the body of the decision will allow reader to have the full decision without blackened portions. Also include the child's Student Identification Number, Social Security Number, and/or Case Number on the cover page and use this number on subsequent pages of the record.
- b. **Decision**—
 - i. **Introduction**— This section should describe the process leading up to the issuance of a decision including the party requesting the hearing, date of request, representation, etc. This section should also clearly state the issue(s), that were the subject of the hearing.
 - ii. **Summary of Evidence**— This section sets out the evidence relied upon by the Hearing Officer to address the issues that were proven by a preponderance of the evidence (documents and testimony).
 - iii. **Findings of Fact, Decisions, and Conclusions of Law**— In this section, the Hearing Officer analyzes and applies the facts to the applicable legal standard.
 - iv. **Order**— The Hearing Officer must decide the issues presented to him/her. The Order should be concise, address any violations, and mandate definite action to remedy any violations. The Hearing Officer will not retain jurisdiction over the parties to the hearing after the hearing decision has been issued.
 - v. **Appeal Process Statement**— The decision should refer to the applicable appeal process. The aggrieved party shall have 30 calendar days from the date of the issue of the Hearing Officer's Determination to file a notice of appeal and/or request for transcripts of recordings.
 - vi. **Sign and date the decision**— Submit to the BIE Office for distribution to the parties. Maintain a file copy.

HOW TO WRITE FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Administrative decisions should be written so that they are understandable to everyone who is likely to read them. The goal assumes added importance when you consider that of the people who will read your decision, the least sophisticated may be most significantly affected by it. This consideration notwithstanding, you can and should meet the standard of writing a comprehensible decision without any compromise of scholarship.
2. SUGGESTIONS PERTINENT TO THE WRITING OF FACTS AND CONCLUSIONS
 - a. Strive to be concise, as opposed to simply brief.
 - b. Short sentences are preferable. They demonstrate willingness and ability of the writer to
 1. Make a straightforward statement;
 2. Elicit sufficient evidence to support a clear finding of fact; and
 3. Conduct a thorough analysis so that a clear conclusion may be drawn.
 - c. Construct an outline, especially in complex case. In the long run, preparing an outline probably saves time. An outline is a good organizational tool, and its effective use will produce a concise and coherent decision. After outlining your proposed findings and conclusions, you can review your findings in light of your proposed conclusions. You will be able to more tightly connect both.
 - d. It is very easy to inadvertently write a conclusion of law, or conclusionary language, into your findings of fact. The reverse is also true. Careful proofreading is usually the best remedy for this and other errors.
 - e. If you address procedural problems in your decision in addition to dealing with the merits, set forth findings to the procedural issues first, followed by the finding on the merits. This format should also be followed in writing conclusion.
3. WRITING FINDINGS OF FACT. The most comprehensible way to set forth findings of fact is in chronological order.
 - a. Adherence to the record is imperative. As a decision-maker, your reputation is based on your record since it is the basis for your

findings, which support your conclusions, which in turn, dictate your order.

- b. Each finding of fact should be supported by competent evidence of record. In those instances when your findings thus supported do not support a conclusion, you will have to lay a foundation for a conclusion by resorting to related evidence on the record and by drawing logical inferences there from. When you “fill gaps” in this manner, consider the following procedure:
 1. State that you are without evidence that would, by itself, support a finding of fact.
 2. Set forth the evidence in the record that will use as a basis for drawing the inference.
 3. Reach a conclusion as a result of your analysis of the associated facts or your inferences. This last step would appear in the “conclusions” portion of you decision.
 4. Avoid relying on statements that merely summarize the testimony adduced at the hearing; instead, the writer should set forth concrete factual findings.

Incorrect: The psychologist testified that the student’s high degree of inattentiveness and hyperactivity were interfering with his ability to concentrate on his schoolwork. The teacher’s aide testified that the student had no difficulty concentrating on his school work.

Correct: Having weighed the conflicting evidence, the Hearing Officer finds as a matter of fact that the student’s high degree of inattentiveness and hyperactivity interfered with his ability to concentrate on his school work (testimony of the school psychologist).

- c. Occasionally, an effective use of the record will consist of setting forth verbatim excerpts from the testimony or other evidence.
4. **EVALUATING CONFLICTING EVIDENCE.** When testimony or other evidence is contradictory on a critical point of a factual nature, you must resolve the conflict. Sometimes, the most coherent method of introducing the problem is to set forth the contentions of the parties. When this is done, care should be taken to state the contentions precisely as the parties have. If you

can resolve the conflict by reference to findings you have already made that are consistent with one party's contention, your resolution of the problem should be set forth as a finding. This is preferable to merely stating that "the evidence was in conflict on this point" or breaking off your treatment of the issue after having set forth the parties' contentions, necessitating you return to the problem later in your conclusions.

5. WRITING CONCLUSIONS OF LAW

- a. First, identify the pertinent statutes and regulations. In succeeding paragraphs, show the proper application of the rules to the facts of the case at hand. If your decision will turn on a legal principle or concept, you should trace the principle's definition and development through administrative and judicial decisions and then show its application to the present facts.
- b. Relationship to Findings of Fact. If, in your findings, you have dealt with multiple issues, address the issues in your conclusion in the same sequence as you did in your findings.
- c. Evaluating conflicting evidence
 1. Generally, if brief reference to their findings cannot be made that would enable you to resolve conflicting evidence in your findings, and it will be necessary to explain at some length why you accord credibility to one party's testimony rather than the other's, the explanation can be set forth as a conclusion. Your rationale in these instances may be the result of your observation of the witnesses, the logical persuasiveness of their testimony, or the extent to which each witness's testimony coincides with other competent evidence.
 2. When a witness has made inconsistent statements, explain why you find one statement more worthy of belief than the other. Your rationale may be that you choose to believe the statement made at the time most proximate to the events germane to the issue, or the statement made when the witness was unaware of any adverse consequences the statements might have.
- d. Special consideration. In cases involving hearsay evidence, official notice, burden of proof, or any legal principle requiring unique treatment, first define the principle or concept, explain its application, and show how it affects the case at hand.

- e. Style
 - 1. Use a numbered format for your findings and conclusions. For the sake of clarity or emphasis, it is useful to refer to a previous paragraph as opposed to reiterating the entire finding or conclusion.
 - 2. Minimize use of terms “clearly,” “it seems that,” or words of similar import. If you find yourself about to write in that manner, ask yourself, “Why is it clear?” or “Why does it seem that way?” and write the answers to those questions in your decision.
 - 3. Minimize the use of the subjective mood, such as “We would note the following” or “the undersigned would conclude.” Direct statements, such as “the undersigned concludes,” make a stronger impression.
- 6. WRITING THE ORDER. The order is a simple, clear statement of the disposition of the case. It is here that you order the parties to take the action you have determined is appropriate. The importance of writing a *specific* order cannot be overemphasized. If the case is appealed, you do not want to run the risk that your order will be misinterpreted or rendered unenforceable. It is not necessary or desirable to reiterate your conclusions in the Order; however, if, for example, you have imposed a timeline for the parties to act upon, be sure to identify that timeline in the Order. Avoid leaving the time frame open-ended (e.g., within a reasonable time).

CERTIFICATION OF RECORD

INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)

Office of Compliance

In the Matter RE: [Name of student] (“student”) and [Name of School] (“school”),

Case Information: Hearing dates: [insert dates]
Held at: [insert location, with address]
Case number:
Student’s date of birth:
Attending school:
Hearing request date(s):

CERTIFICATION OF RECORD

I, _____, impartial Due Process Hearing Officer in this matter, DO HEREBY CERTIFY that the attached Record of Proceeding and attached Index of Exhibits itemizes the entire record in the above entitled matter as of this date, consisting of all letters, pleadings, orders, exhibits, depositions, and tapes.

I FURTHER CERTIFY that the materials forwarded herewith are either the original or true copy of the original documents submitted in this matter.

EXECUTED this _____ day of _____, 20_____.

DUE PROCESS HEARING OFFICER

Regulations

Sec. 300.511 Impartial due process hearing.

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

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

(c) Impartial hearing officer. (1) At a minimum, a hearing officer--

(i) Must not be--

(A) An employee of the SEA or the LEA that is involved in the education or care of the child; or

(B) A person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) Must possess knowledge of, and the ability to understand, the provisions of the Act, Federal and State regulations pertaining to the Act, and legal interpretations of the Act by Federal and State courts;

(iii) Must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) Must possess the knowledge and ability to render

and write decisions in accordance with appropriate, standard legal practice.

(2) A person who otherwise qualifies to conduct a hearing under paragraph (c)(1) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(3) Each public agency must keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

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

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

(f) Exceptions to the timeline. The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to--

(1) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or

(2) The LEA's withholding of information from the parent that was required under this part to be provided to the parent. (Approved by the Office of Management and Budget under control number 1820-0600)

(Authority: 20 U.S.C. 1415(f)(1)(A), 1415(f)(3)(A)-(D))

Sec. 300.512 Hearing rights.

(a) General. Any party to a hearing conducted pursuant to Sec. Sec. 300.507 through 300.513 or Sec. Sec. 300.530 through 300.534, or an appeal conducted pursuant to Sec. 300.514, has the right to--

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;

(4) Obtain a written, or, at the option of the parents, electronic, verbatim record of the hearing; and

(5) Obtain written, or, at the option of the parents, electronic findings of fact and decisions.

(b) Additional disclosure of information. (1) At least five business days prior to a hearing conducted pursuant to Sec. 300.511(a), each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(2) A hearing officer may bar any party that fails to comply with paragraph (b)(1) of this section from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(c) Parental rights at hearings. Parents involved in hearings must be given the right to--

(1) Have the child who is the subject of the hearing present;

(2) Open the hearing to the public; and

(3) Have the record of the hearing and the findings of fact and decisions described in paragraphs (a)(4) and (a)(5) of this section provided at no cost to parents.

(Authority: 20 U.S.C. 1415(f)(2), 1415(h))

Sec. 300.513 Hearing decisions.

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

(2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies--

(i) Impeded the child's right to a FAPE;

(ii) Significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or

(iii) Caused a deprivation of educational benefit.

(3) Nothing in paragraph (a) of this section shall be construed to

preclude a hearing officer from ordering an LEA to comply with procedural requirements under Sec. Sec. 300.500 through 300.536.

(b) Construction clause. Nothing in Sec. Sec. 300.507 through 300.513 shall be construed to affect the right of a parent to file an appeal of the due process hearing decision with the SEA under Sec. 300.514(b), if a State level appeal is available.

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

(d) Findings and decision to advisory panel and general public. The public agency, after deleting any personally identifiable information, must--

(1) Transmit the findings and decisions referred to in Sec. 300.512(a)(5) to the State advisory panel established under Sec. 300.167; and

(2) Make those findings and decisions available to the public.

(Authority: 20 U.S.C. 1415(f)(3)(E) and (F), 1415(h)(4), 1415(o))

Sec. 300.514 Finality of decision; appeal; impartial review.

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

(b) Appeal of decisions; impartial review. (1) If the hearing required by Sec. 300.511 is conducted by a public agency other than the SEA, any party aggrieved by the findings and decision in the hearing may appeal to the SEA.

(2) If there is an appeal, the SEA must conduct an impartial review of the findings and decision appealed. The official conducting the review must--

- (i) Examine the entire hearing record;
- (ii) Ensure that the procedures at the hearing were consistent with the requirements of due process;
- (iii) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in Sec. 300.512 apply;
- (iv) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;
- (v) Make an independent decision on completion of the review; and
- (vi) Give a copy of the written, or, at the option of the parents, electronic findings of fact and decisions to the parties.

(c) Findings and decision to advisory panel and general public. The SEA, after deleting any personally identifiable information, must--

- (1) Transmit the findings and decisions referred to in paragraph (b)(2)(vi) of this section to the State advisory panel established under Sec. 300.167; and
- (2) Make those findings and decisions available to the public.

(d) Finality of review decision. The decision made by the reviewing official is final unless a party brings a civil action under Sec. 300.516.

(Authority: 20 U.S.C. 1415(g) and (h)(4), 1415(i)(1)(A), 1415(i)(2))

Sec. 300.515 Timelines and convenience of hearings and reviews.

(a) The public agency must ensure that not later than 45 days after the expiration of the 30 day period under Sec. 300.510(b), or the adjusted time periods described in Sec. 300.510(c)--

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The SEA must ensure that not later than 30 days after the receipt of a request for a review--

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

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

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

(Authority: 20 U.S.C. 1415(f)(1)(B)(ii), 1415(g), 1415(i)(1))

Sec. 300.516 Civil action.

(a) General. Any party aggrieved by the findings and decision made under Sec. Sec. 300.507 through 300.513 or Sec. Sec. 300.530 through 300.534 who does not have the right to an appeal under Sec. 300.514(b), and any party aggrieved by the findings and decision under

Sec. 300.514(b), has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under Sec. 300.507 or Sec. Sec. 300.530 through 300.532. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

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

(c) Additional requirements. In any action brought under paragraph (a) of this section, the court--

(1) Receives the records of the administrative proceedings;

(2) Hears additional evidence at the request of a party; and

(3) Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.

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

(e) Rule of construction. Nothing in this part restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the Act, the procedures under Sec.

Sec. 300.507 and 300.514 must be exhausted to the same extent as would be required had the action been brought under section 615 of the Act.

(Authority: 20 U.S.C. 1415(i)(2) and (3)(A), 1415(l))

Sec. 300.517 Attorneys' fees.

(a) In general. (1) In any action or proceeding brought under section 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to--

(i) The prevailing party who is the parent of a child with a disability;

(ii) To a prevailing party who is an SEA or LEA against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(iii) 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.

(2) Nothing in this subsection shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(b) Prohibition on use of funds. (1) Funds under Part B of the Act may not be used to pay attorneys' fees or costs of a party related to any action or proceeding under section 615 of the Act and subpart E of this part.

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

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

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

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

(A) The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;

(B) The offer is not accepted within 10 days; and

(C) The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless the meeting is convened as a result of an administrative proceeding or judicial action, or at the discretion of the State, for a mediation described in Sec. 300.506.

(iii) A meeting conducted pursuant to Sec.

300.510 shall not be considered –

(A) A meeting convened as a result of an administrative hearing or judicial action; or

(B) An administrative hearing or judicial action for purposes of this section.

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

(4) Except as provided in paragraph (c)(5) of this section, the court reduces, accordingly, the amount of the attorneys' fees awarded under section 615 of the Act, if the court finds that--

(i) The parent, or the 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 due process request notice in accordance with Sec. 300.508.

(5) The provisions of paragraph (c)(4) of this section do not apply in any action or proceeding if the court finds that the State or local

agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of the Act.

(Authority: 20 U.S.C. 1415(i)(3)(B)-(G))

Sec. 300.518 Child's status during proceedings.

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

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

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

(d) If the hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that

placement must be treated as an agreement between the State and the parents for purposes of paragraph (a) of this section.

(Authority: 20 U.S.C. 1415(j))

DUE PROCESS HEARING OFFICERS REIMBURSEMENT RATES



All investigators are entitled to the following reimbursements:

The following figures will be used to reimburse contracted due process hearing officers for their work to prepare, conduct, and issue a decision regarding a due process hearing. Based on a recent survey, these figures reflect comparable rates used by other States.

A. All travel costs to and from the investigation.

The Mountain Plains Regional Resource Center (MPRRC) will make ALL travel arrangements. A MPRRC travel reimbursement form, with original receipts, needs to be sent to the MPRRC after each visit.

- Lodging
- Air travel
- Car travel
- Parking at airport
- Per diem
- Personal car mileage to and from airport
- Other, travel related expenses as appropriate

B. \$125.00 per hour, \$1,000.00 daily (8 hours) – Preparing, conducting, and writing the agreement.

2006 – 2007	\$1,000.00
2007 – 2008	\$1,050.00
2008 – 2009	\$1,100.00
2009 – 2010	\$1,150.00

* An invoice for the daily amount needs to be sent to John Copenhaver at the MPRRC specifying the dates, where the work was performed, and the total amount. The invoice needs to be signed, and please include your social security number.

