

PARENT'S RIGHTS
AND THE
SPECIAL EDUCATION
PROCESS

Law Office of Charles Weiner
179 N. Broad Street
Doylestown, PA 18901
215-348-4283
215-340-2412 (FAX)
weinlaw@verizon.net

PROCEDURAL SAFEGUARDS
SURROGATES, NOTICE AND CONSENT

Law Office of Charles Weiner
Doylestown, Pennsylvania
weinlaw@verizon.net
215-348-4283

IDEA–Reauthorized Statute

PROCEDURAL SAFEGUARDS: SURROGATES, NOTICE AND CONSENT

(See also Changes in Initial Evaluation and Reevaluation)

The reauthorized *Individuals with Disabilities Education Act* (IDEA) was signed into law on Dec. 3, 2004, by President George W. Bush. The provisions of the act became effective on July 1, 2005, with the exception of some of the elements pertaining to the definition of a “highly qualified teacher” that took effect upon the signing of the act. This is one in a series of documents, prepared by the Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education, that covers a variety of high-interest topics and brings together the statutory language related to those topics to support constituents in preparing to implement the new requirements.¹ This document addresses only the changes to the provisions of IDEA regarding the alignment between IDEA and *No Child Left Behind*, referred to in this document as the *Elementary and Secondary Education Act* (ESEA) of 1965, that took effect on July 1, 2005. It does not address any changes that may be made by the final regulations.

IDEA 2004:

1. Adds to the procedures for the appointment of a surrogate parent.

In the case of a child who is a ward of the state, a surrogate parent may alternatively be appointed by the judge overseeing the child's care, provided that the surrogate meets the requirements of Section 615(b)(2). [615(b)(2)(A)(i)]

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 local education agency (LEA) shall appoint a surrogate in accordance with Section 615(b)(2). [615(b)(2)(A)(ii)]

The state shall make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate. [615(b)(2)(B)]

2. Revises requirements regarding the provision of procedural safeguards notices to parents.

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only one time a year, except that a copy also shall be given to the parents:

- Upon initial referral or parental request for evaluation;
- Upon the first occurrence of the filing of a complaint under Section 615(b)(6); and
- Upon request by a parent.

An LEA may place a current copy of the procedural safeguards notice on its Internet Web site if such Web site exists. [615(d)(1)]

3. Adds to required notice content, requirements for due process hearing requests and civil actions.

The procedural safeguards notice shall include a full explanation of the procedural safeguards...relating to...

- The opportunity to present and resolve complaints, including:
 - The time period in which to make a complaint;
 - The opportunity for the agency to resolve the complaint;
 - The availability of mediation; and
- Civil actions, including the time period in which to file such actions.

[615(d)(2)(E), (K)]

4. Allows a new method of providing notices required under Section 615.

A parent of a child with a disability may elect to receive notices required under Section 615 by an electronic mail (e-mail) communication, if the agency makes such option available. [615(n)]

5. Specifies that LEAs may not use Section 615 remedies to obtain consent for services.

If the parent of a child for whom an agency is seeking consent to provide special education and related services refuses to consent to services under Section 614(a)(1)(D)(i)(II), the LEA shall not provide special education and related services to the child by utilizing the procedures described in Section 615. [614(a)(1)(D)(ii)(II)]

If the parent of such child refuses to consent to the receipt of special education and related services, or if the parent fails to respond to a request to provide such consent:

- The LEA shall not be considered to be in violation of the requirement to make available a free appropriate public education (FAPE) to the child for the failure to provide such child with the special education and related services for which the LEA requests such consent; and
- The LEA shall not be required to convene an individualized education program (IEP) meeting or develop an IEP under this section for the child for the special education and related services for which the LEA requests such consent.

[614(a)(1)(D)(ii)(III)]

6. Mandates consent for wards of the state.

If the child is a ward of the state (See Section 602(36)) and is not residing with the child's parent, the agency shall make reasonable efforts to obtain the informed consent from the parent (as defined in Section 602) of the child for an initial evaluation to determine whether the child is a child with a disability. The agency shall not be required to obtain informed consent from the parent of a child for an initial evaluation to determine whether the child is a child with a disability if:

- Despite reasonable efforts to do so, the 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.

[614(a)(1)(D)(iii)]

¹ Topics in this series include: Alignment With the *No Child Left Behind Act*, Changes in Initial Evaluation and Reevaluation; Children Enrolled by Their Parents in Private Schools; Discipline; Disproportionality and Overidentification; Early Intervening Services; Highly Qualified Teachers; Individualized Education Program (IEP) Team Meetings and Changes to the IEP; Individualized Education Program (IEP); Local Funding; National Instructional Materials Accessibility Standard (NIMAS); Part C Amendments in *IDEA 2004*; Part C Option: Age 3 to Kindergarten Age; Procedural Safeguards: Surrogates, Notice and Consent; Procedural Safeguards: Mediation and Resolution Sessions; Procedural Safeguards: Due Process Hearings; Secondary Transition; State Funding; and Statewide and Districtwide Assessments. Documents are available on the OSERS Web site at: www.ed.gov/about/offices/list/osers/index.html.

PROCEDURAL SAFEGUARDS
MEDIATION AND RESOLUTION SESSIONS

Law Office of Charles Weiner
Doylestown, Pennsylvania
weinlaw@verizon.net
215-348-4283

IDEA–Reauthorized Statute

PROCEDURAL SAFEGUARDS: MEDIATION AND RESOLUTION SESSIONS

The reauthorized *Individuals with Disabilities Education Act* (IDEA) was signed into law on Dec. 3, 2004, by President George W. Bush. The provisions of the act became effective on July 1, 2005, with the exception of some of the elements pertaining to the definition of a “highly qualified teacher” that took effect upon the signing of the act. This is one in a series of documents, prepared by the Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education, that covers a variety of high-interest topics and brings together the statutory language related to those topics to support constituents in preparing to implement the new requirements.¹ This document addresses only the changes to the provisions of IDEA regarding the alignment between IDEA and *No Child Left Behind*, referred to in this document as the *Elementary and Secondary Education Act* (ESEA) of 1965, that took effect on July 1, 2005. It does not address any changes that may be made by the final regulations.

IDEA 2004:

1. Requires that mediation² is available whether or not there is a request for a due process hearing.³

Any state education agency (SEA) or local education agency (LEA) that receives assistance under Part B shall ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a due process hearing request pursuant to Section 615(b)(6), to resolve such disputes through a mediation process. [615(e)(1)]

2. Provides parents and schools the opportunity to meet with a disinterested party.

An LEA or SEA may establish procedures to offer to parents and schools that choose not to use the mediation process an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with:

- A parent training and information center or community parent resource center in the state, established under Section 671 or 672; or
- An appropriate alternative dispute resolution entity to encourage the use, and explain the benefits, of the mediation process to the parents.

[615(e)(2)(B)]

3. Adds mediation requirements.

In the case that a resolution is reached to resolve the issues in the request for a due process hearing through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that:

- States that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;
- Is signed by both the parent and a representative of the agency who has the authority to bind such agency; and
- Is enforceable in any state court of competent jurisdiction or in a district court of the United States.

[615(e)(2)(F)]

4. Adds “resolution sessions.”

Prior to the opportunity for an impartial due process hearing under Section 615(f)(1)(A), the LEA shall convene a meeting with the parents and the relevant member or members of the individualized education program (IEP) team who have specific knowledge of the facts identified in the request for a due process hearing:

- Within 15 days of receiving notice of the parents' request for a due process hearing;
- Which shall include a representative of the agency who has decision-making authority on behalf of such agency;
- Which may not include an attorney of the LEA unless the parent is accompanied by an attorney; and

- Where the parents of the child discuss their request for a due process hearing, and the facts that form the basis of the request for a due process hearing, and the LEA is provided the opportunity to resolve the request for a due process hearing, unless the parents and the LEA agree in writing to waive such meeting, or agree to use the mediation process described in Section 615(e).

[615(f)(1)(B)(i)]

If the LEA has not resolved the issues that are the subject of the request for the due process hearing to the satisfaction of the parents within 30 days of the receipt of the request for a due process hearing, the due process hearing may occur, and all of the applicable timelines for a due process hearing under Part B shall commence.

[615(f)(1)(B)(ii)]

In the case that a resolution is reached to resolve the issues that are the subject of the request for a due process hearing at a meeting described in Section 615(f)(1)(B)(i), the parties shall execute a legally binding agreement that is:

- Signed by both the parent and a representative of the agency who has the authority to bind such agency; and
- Enforceable in any state court of competent jurisdiction or in a district court of the United States.

[615(f)(1)(B)(iii)]

If the parties execute an agreement pursuant to Section 615(f)(1)(B)(iii), a party may void such agreement within three business days of the agreement's execution. [615(f)(1)(B)(iv)]

5. Provides that attorneys' fees are not available for the resolution session meetings required by Section 615(f)(1)(B)(I).

A meeting conducted pursuant to Section 615(f)(1)(B)(i) (a resolution session's preliminary meeting) 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 Section 615(i).

[615(i)(3)(D)(iii)]

¹ Topics in this series include: Alignment With the *No Child Left Behind Act*, Changes in Initial Evaluation and Reevaluation; Children Enrolled by Their Parents in Private Schools; Discipline; Disproportionality and Overidentification; Early Intervening Services; Highly Qualified Teachers; Individualized Education Program (IEP) Team Meetings and Changes to the IEP; Individualized Education Program (IEP); Local Funding; National Instructional Materials Accessibility Standard (NIMAS); Part C Amendments in *IDEA 2004*; Part C Option: Age 3 to Kindergarten Age; Procedural Safeguards: Surrogates, Notice and Consent; Procedural Safeguards: Mediation and Resolution Sessions; Procedural Safeguards: Due Process Hearings; Secondary Transition; State Funding; and Statewide and Districtwide Assessments. Documents are available on the OSERS Web site at: www.ed.gov/about/offices/list/osers/index.html. ²The mediation provision in Part C, Procedural Safeguards, Section 639(a)(8), provides parents with the right to use mediation in accordance with Section 615(e), except that: any reference to a state education agency (SEA) shall be considered to be a reference to the state lead agency established or designated under Section 635(a)(10); any reference in Section 639 to an LEA shall be considered a reference to a local service provider or the state's lead agency under Part C, as the case may be; and any reference in Section 639 to the provision of a free appropriate public education (FAPE) to children with disabilities shall be considered to be a reference to the provision of appropriate early intervention services to infants or toddlers with disabilities.

³IDEA 2004 uses the term "complaint" to indicate a request for a due process hearing. The term "request for a due process hearing" will be used in this document in lieu of "complaint." [615(c)(2)]

PROCEDURAL SAFEGUARDS DUE PROCESS HEARINGS

Law Office of Charles Weiner
Doylestown, Pennsylvania
weinlaw@verizon.net
215-348-4283

IDEA–Reauthorized Statute

PROCEDURAL SAFEGUARDS: DUE PROCESS HEARINGS

The reauthorized *Individuals with Disabilities Education Act* (IDEA) was signed into law on Dec. 3, 2004, by President George W. Bush. The provisions of the act became effective on July 1, 2005, with the exception of some of the elements pertaining to the definition of a “highly qualified teacher” that took effect upon the signing of the act. This is one in a series of documents, prepared by the Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education, that covers a variety of high-interest topics and brings together the statutory language related to those topics to support constituents in preparing to implement the new requirements.¹ This document addresses only the changes to the provisions of IDEA regarding the alignment between IDEA and *No Child Left Behind*, referred to in this document as the *Elementary and Secondary Education Act* (ESEA) of 1965, that took effect on July 1, 2005. It does not address any changes that may be made by the final regulations.

IDEA 2004:

1. Replicates current regulations regarding who may request a due process hearing.²

Either the parent or the public agency may request an impartial due process hearing conducted by the state education agency (SEA) or local education agency (LEA), as determined by state law or the SEA, with respect to any matter relating to the identification, evaluation or educational placement of the child, or the provision of a free appropriate public education (FAPE) to such child. [615(b)(6)(A), (f)(1)(A); 34 CFR 300.507(a)(1)]

2. Specifies the timeline for requesting a due process hearing.

The procedures required by Section 615 shall include ... an opportunity for any party to request a due process hearing regarding 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 due process hearing, or, if the state has an explicit time limitation for presenting such a request under Part B, in such time as the state law allows, except that the exceptions to the timeline described in Section 615(f)(3)(D) shall apply.... [615(b)(6)(B)]

A parent or agency shall request an impartial due process hearing 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 request for a due process hearing, or, if the state has an explicit time limitation for requesting such a hearing under Part B, in such time as the state law allows. [615(f)(3)(C)]

The timeline described in Section 615(f)(3)(C) shall not apply to a parent if the parent was prevented from requesting the hearing due to:

- Specific misrepresentations by the local education agency (LEA) that it had resolved the problem forming the basis of the request for a due process hearing; or
- The LEA’s withholding of information from the parent that was required under Part B to be provided to the parent.

[615(f)(3)(D)]

3. Requires either party to provide notice to the other party.

The procedures required by Section 615 shall include ... procedures that require either party, or the attorney representing a party, to provide a request for a due process hearing notice in accordance with Section 615(c)(2) (which shall remain confidential) to the other party in the request for a due process hearing filed under Section 615(b)(6), and forward a copy of such notice to the state education agency (SEA); and that shall include:

- The name of the child, the address of the residence of the child (or available contact information in the case of a homeless child) and the name of the school the child is attending;
- 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;

- A description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and
- A proposed resolution of the problem to the extent known and available to the party at the time.

[615(b)(7)(A)]

The procedures required by Section 615 must include ... a requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of Section 615(b)(7)(A)(ii). [615(b)(7)(B)]

The request for a due process hearing notice required under Section 615(b)(7)(A) shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party, in writing, that the receiving party believes the notice has not met the requirements of Section 615(b)(7)(A). [615(c)(2)(A)]

4. Specifies timelines for actions related to a request for a due process hearing.

If the LEA has not sent a prior written notice to the parent regarding the subject matter contained in the parent's request for a due process hearing, such LEA shall, within 10 days of receiving the request for a due process hearing, send to the parent a response that shall include:

- An explanation of why the agency proposed or refused to take the action raised in the request for a due process hearing;
- A description of other options that the individualized education program (IEP) team considered and the reasons why those options were rejected;

A description of each evaluation procedure, assessment, record or report the agency used as the basis for the proposed or refused action; and

- A description of the factors that are relevant to the agency's proposal or refusal.

[615(c)(2)(B)(i)(I)]

A response filed by an LEA pursuant to Section 615(c)(2)(B)(i)(I) shall not be construed to preclude such LEA from asserting that the parent's request for a due process hearing notice was insufficient when appropriate. [615(c)(2)(B)(i)(II)]

Except as provided in Section 615(c)(2)(B)(i), the non-complaining party shall, within 10 days of receiving the notice of request for a due process hearing, send to the other party a response that specifically addresses the issues raised in the request for a due process hearing. [615(c)(2)(B)(ii)]

The party providing a hearing officer notification under Section 615(c)(2)(A) shall provide the notification within 15 days of receiving the request for a due process hearing. [615(c)(2)(C)]

Within five days of receipt of the notification provided under Section 615(c)(2)(C), the hearing officer shall make a determination on the face of the notice of whether it meets the requirements of Section 615(b)(7)(A), and shall immediately notify the parties in writing of such determination. [615(c)(2)(D)]

A party may amend its request for a due process hearing notice only if:

- The other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to Section 615(f)(1)(B) (resolution session); or
- The hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than five days before a due process hearing occurs.

The applicable timeline for a due process hearing under this part shall recommence at the time the party files an amended notice, including the timeline under Section 615(f)(1)(B). [615(c)(2)(E)]

5. Adds provisions regarding hearing officers.

A hearing officer conducting a hearing pursuant to Section 615(f)(1)(A) shall, at a minimum:

- Not be an employee of the SEA or the LEA involved in the education or care of the child, or a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;
- Possess knowledge of, and the ability to understand, the provisions of IDEA; federal and state regulations pertaining to IDEA; and legal interpretations of IDEA by federal and state courts;
- Possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and
- Possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

[615(f)(3)(A)]

6. Sets guidelines for issues raised at a due process hearing.

The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under Section 615(b)(7), unless the other party agrees otherwise. [615(f)(3)(B)]

7. Specifies parameters for hearing officer decisions.

Subject to Section 615(f)(3)(E)(ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE). [615(f)(3)(E)(i)]

In matters alleging a procedural violation, a 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 parents' opportunity to participate in the decision-making process regarding the provision of FAPE to the parents' child; or
- Caused a deprivation of educational benefits.

[615(f)(3)(E)(ii)]

Rule of construction—Nothing in Section 615(f)(3)(E) shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under Section 615. [615(f)(3)(E)(iii)]

Rule of construction—Nothing in Section 615(f)(3)(E) shall be construed to affect the right of a parent to file a complaint with the SEA. [615(f)(3)(F)]

8. Specifies a timeline for bringing a civil action.

The party bringing the civil action shall have 90 days from the date of the decision of the hearing officer to bring such an action or, if the state has an explicit time limitation for bringing such action under Part B, in such time as the state law allows. [615(i)(2)(B)]

9. Adds provisions regarding the awarding of attorneys' fees.

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

- To a prevailing party who is an SEA or an LEA against the attorney of a parent who files a request for a 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.

[615(i)(3)(B)(i)(II)-(III)]

10. Clarifies that parents may file separate due process requests on additional issues.

Nothing in Section 615 shall be construed to preclude a parent from filing a separate request for a due process hearing on an issue separate from a request for a due process hearing already filed. [615(o)]

¹ Topics in this series include: Alignment With the *No Child Left Behind Act*, Changes in Initial Evaluation and Reevaluation; Children Enrolled by Their Parents in Private Schools; Discipline; Disproportionality and Overidentification; Early Intervening Services; Highly Qualified Teachers; Individualized Education Program (IEP) Team Meetings and Changes to the IEP; Individualized Education Program (IEP); Local Funding; National Instructional Materials Accessibility Standard (NIMAS); Part C Amendments in *IDEA 2004*; Part C Option: Age 3 to Kindergarten Age; Procedural Safeguards: Surrogates, Notice and Consent; Procedural Safeguards: Mediation and Resolution Sessions; Procedural Safeguards: Due Process Hearings; Secondary Transition; State Funding; and Statewide and Districtwide Assessments. Documents are available on the OSERS Web site at: www.ed.gov/about/offices/list/osers/index.html. ² IDEA 2004 uses the term "complaint" to indicate a request for a due process hearing. The term "request for a due process hearing" will be used in this document in lieu of "complaint." [615(c)(2)]

PROCEDURAL SAFEGUARDS DISCIPLINE

Law Office of Charles Weiner
Doylestown, Pennsylvania
weinlaw@verizon.net
215-348-4283

IDEA–Reauthorized Statute
DISCIPLINE

The reauthorized *Individuals with Disabilities Education Act* (IDEA) was signed into law on Dec. 3, 2004, by President George W. Bush. The provisions of the act became effective on July 1, 2005, with the exception of some of the elements pertaining to the definition of a “highly qualified teacher” that took effect upon the signing of the act. This is one in a series of documents, prepared by the Office of Special Education and Rehabilitative Services (OSERS) in the U.S. Department of Education, that covers a variety of high-interest topics and brings together the statutory language related to those topics to support constituents in preparing to implement the new requirements.¹ This document addresses only the changes to the provisions of IDEA regarding the alignment between IDEA and *No Child Left Behind*, referred to in this document as the *Elementary and Secondary Education Act* (ESEA) of 1965, that took effect on July 1, 2005. It does not address any changes that may be made by the final regulations.

IDEA 2004:
1. Adds new authority for school personnel.

School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct. [615(k)(1)(A)]

2. Establishes a new standard for manifestation determinations.

Except for children with disabilities who have been suspended for not more than 10 days, within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local education agency (LEA), the parent, and relevant members of the individualized education program (IEP) team (as determined by the parent and LEA) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine if the conduct in question was:

- Caused by, or had a direct and substantial relationship to, the child's disability; or
- The direct result of the LEA's failure to implement the IEP.

[615(k)(1)(E)(i)]

3. Adds a new provision when there is a determination that a behavior was a manifestation of the disability.

If the LEA, the parent, and relevant members of the IEP team make the determination that the conduct was a manifestation of the child's disability, the IEP team shall:

- Conduct a functional behavioral assessment and implement a behavioral intervention plan for such child, provided that the LEA had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in Section 616(k)(1)(C) or (G);
- In the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and
- Except as provided in Section 616(k)(1)(G), return the child to the placement from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavior intervention plan.

[615(k)(1)(F)]

4. Establishes a new standard for special circumstances.

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child ... has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or LEA. [615(k)(1)(G)]

5. Adds a definition for “serious bodily injury.”

The term “serious bodily injury” is defined in Section 1365(h)(3) of Title 18, U.S. Code, to mean a bodily injury that involves a substantial risk of death, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty. [615(k)(7)(D)]

6. Establishes the authority of the hearing officer.

In making the determination under Section 615(k)(3)(B)(i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may: (1) return a child with a disability to the placement from which the child was removed; or (2) order a change in placement of a child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of such child is substantially likely to result in injury to the child or to others. [615(k)(3)(B)(ii)]

7. Adds timelines for an expedited hearing regarding appeals under Section 615(k)(3).

When an appeal under Section 615(k)(3) has been requested, the SEA or LEA shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested, and shall result in a determination within 10 school days after the hearing. [615(k)(4)(B)]

8. Revises the standard for a basis of knowledge for children not yet eligible for special education and related services.

An LEA shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred:

- The parent of the child expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;
- The parent of the child has requested an evaluation of the child pursuant to Section 614(a)(1)(B); or
- The teacher of the child, or other personnel of the LEA, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

[615(k)(5)(B)]

9. Establishes an exception to the “basis of knowledge” standard.

An LEA shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to Section 614 or has refused services under Part B or the child has been evaluated and it was determined that the child was not a child with a disability under Part B. [615(k)(5)(C)]

¹ Topics in this series include: Alignment With the *No Child Left Behind Act*, Changes in Initial Evaluation and Reevaluation; Children Enrolled by Their Parents in Private Schools; Discipline; Disproportionality and Overidentification; Early Intervening Services; Highly Qualified Teachers; Individualized Education Program (IEP) Team Meetings and Changes to the IEP; Individualized Education Program (IEP); Local Funding; National Instructional Materials Accessibility Standard (NIMAS); Part C Amendments in *IDEA 2004*; Part C Option: Age 3 to Kindergarten Age; Procedural Safeguards: Surrogates, Notice and Consent; Procedural Safeguards: Mediation and Resolution Sessions; Procedural Safeguards: Due Process Hearings; Secondary Transition; State Funding; and Statewide and Districtwide Assessments. Documents are available on the OSERS Web site at: www.ed.gov/about/offices/list/osers/index.html.

PROCEDURAL SAFEGUARDS
DELAWARE CODE
TITLE 14, CHAPTER 31
SUBCHAPTER V.

Law Office of Charles Weiner
Doylestown, Pennsylvania
weinlaw@verizon.net
215-348-4283



[§ 3130.](#) | [§ 3131.](#) | [§ 3132.](#) | [§ 3133.](#) | [§ 3134.](#) | [§ 3135.](#) | [§ 3136.](#) | [§ 3137.](#) | [§ 3138.](#) | [§ 3139.](#) | [§ 3140.](#) | [§ 3141.](#) | [§ 3142.](#) | [§ 3143.](#)

TITLE 14

Education

PART I

Free Public Schools

CHAPTER 31. EXCEPTIONAL PERSONS

Subchapter V. Procedural Safeguards

§ 3130. Opportunity to examine records and educational program.

(a) The parents of a handicapped child, either personally or through a representative, shall be afforded an opportunity to inspect and review all relevant records with respect to:

(1) The identification, evaluation and educational program and placement of the child;
and

(2) The provision of a free, appropriate, public education to the child.

(b) The parents shall have the right to obtain copies of all records, except the actual evaluation or examination instrument, described in subsection (a) of this section either without charge, or, at the discretion of the district or state agency, at a fee not to exceed actual cost. Under no circumstances shall a fee be assessed which effectively prevents parents from exercising their right to inspect, review and copy records.

(c) The parents of a handicapped child shall have the right to visit and observe, either personally or through a representative, their child's current or proposed public educational program. (64 Del. Laws, c. 63, § 1.)

§ 3131. Minutes of meetings.

Subject to confidentiality requirements of applicable state or federal law, minutes may be taken, by disclosed recording device or stenographer, of any meeting, review or conference concerning a handicapped child's free, appropriate, public education, at the option of the parents of the handicapped child, their authorized representative or the agency conducting the meeting, review or conference. Costs of the recording shall be borne by the person or agency exercising the option under this section. (64 Del. Laws, c. 63, § 1; 70 Del. Laws, c. 186, § 1.)

§ 3132. Surrogate parents.

The Department with the approval of the State Board of Education shall establish and maintain procedures to protect the rights of a handicapped child whenever the parents of the child are not known, unavailable or the child is a ward of the State, including the assignment of an individual, who shall not be an employee of any public agency involved in the education or care of the child,

to act as a surrogate parent for the child. The surrogate parent shall exercise and be accorded all rights of a parent to assure the provision of a free, appropriate, public education to the child. (64 Del. Laws, c. 63, § 1; 71 Del. Laws, c. 180, § 154.)

§ 3133. Notice required.

Written notice which meets the requirements under § 3134 of this title must be given to the parents of a handicapped child a reasonable time before any school district or state agency:

(1) Proposes to initiate or change the identification, evaluation or educational placement of the child or the provision of a free and appropriate public education to the child; or

(2) Refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of a free, appropriate, public education to the child. (64 Del. Laws, c. 63, § 1.)

§ 3134. Contents of notice.

The notice under § 3133 of this title must include:

(1) A full explanation of all of the procedural safeguards available to the parents under this subchapter;

(2) A description of the action proposed or refused by the district or agency, an explanation of why the district or agency proposes or refuses to take the action, and a description of any options the district or agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record or report the district or agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors which are relevant to the district or agency's proposal or refusal. (64 Del. Laws, c. 63, § 1.)

§ 3135. Administrative hearing.

(a) A parent, district or state agency may initiate a hearing concerning any right or entitlement conferred by this chapter.

(b) A hearing is initiated by submission of a written request to the Secretary of Education.

(c) The Secretary of Education, upon receipt of a request for hearing, shall appoint a hearing panel whose membership shall meet the requirements of § 3137 of this title.

(d) The district or state agency shall inform the parent of any free or low-cost legal and other relevant services available in the area whenever:

(1) The parent requests the information; or

(2) A hearing is initiated pursuant to this section. (64 Del. Laws, c. 63, § 1; 71 Del. Laws, c. 180, § 155.)

§ 3136. Timeliness of administrative hearings.

(a) The Secretary of Education shall ensure that, not later than 45 days after receipt of a request for a hearing:

- (1) A hearing is conducted;
- (2) A final decision is reached in the hearing; and
- (3) A copy of the decision is mailed to each of the parties.

(b) The hearing panel, for good cause, may grant specific extensions of time beyond the 45 day limit at the request of either party; provided, however, that a final decision shall be reached and a copy of the decision mailed to each of the parties within 15 days of the date of the hearing, or, where applicable, within 15 days of the completion of post-hearing argument. (64 Del. Laws, c. 63, § 1; 71 Del. Laws, c. 180, § 155.)

§ 3137. Hearing panel.

(a) A hearing panelist may not be:

(1) A person who is an employee of a district or agency which is involved in the education or care of the child; or

(2) A person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

(b) The Secretary of Education shall maintain a list of the persons who serve as hearing panelists. The list must include a statement of the qualifications of each of those persons.

(c) All hearing panelists shall have successfully completed such training as may be required by the Secretary of Education to ensure the adequate knowledge and competent performance of panelists.

(d) Each panel shall consist of 3 panelists, appointed by the Secretary of Education on a rotating basis, as follows:

(1) One attorney admitted to practice in the State;

(2) One educator knowledgeable in the field of special education and special educational programming;

(3) One lay person with demonstrated interest in the education of the handicapped included on an approved list compiled by the Advisory Council for Exceptional Citizens and submitted to the Secretary of Education.

(e) The Department with approval of the State Board of Education shall promulgate regulations which, consistent with this subchapter, further define hearing procedures and the conduct of hearing panelists which shall include standards of competency, expertise and training for hearing panelists. (64 Del. Laws, c. 63, § 1; 71 Del. Laws, c. 180, §§ 155, 156.)

§ 3138. Hearing rights; procedure.

(a) Any party to a hearing 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 handicapped children;

(2) Present evidence and confront and cross-examine adverse witnesses;

(3) Compel the attendance of witnesses as authorized by § 3139 of this title;

(4) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least 5 business days before the hearing;

(5) Obtain a written or, at the option of the parents, electronic verbatim record of the hearing, at public expense;

(6) Obtain a written or, at the option of the parents, electronic decision which includes findings of fact and law.

(b) Parents involved in hearings must be given the right to:

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

(2) Open the hearing to the public.

(c) The hearing panel shall ensure that parents who have requested a hearing have been advised of the procedural safeguards provided by this subchapter.

(d) Any hearing must be conducted at a time and place which is reasonably convenient to the parents and child involved.

(e) Any testimony presented at a hearing authorized by this section shall be under oath or affirmation.

(f) Copies of all written decisions shall be provided to the Advisory Council for Exceptional Citizens after deleting any personally identifiable information. (64 Del. Laws, c. 63, § 1; 71 Del. Laws, c. 180, § 157; 74 Del. Laws, c. 98, §§ 2-4.)

§ 3139. Subpoenas.

(a) Authority to issue subpoenas is conferred upon the Secretary of Education, or the Secretary's designee, in order to implement § 3138(a)(3) of this title.

(b) Upon the application of any party at least 12 days prior to hearing, a subpoena shall be issued requiring the attendance of the person or persons listed in the application.

(c) If a person subpoenaed to attend a hearing fails to obey without reasonable cause, or if such a person in attendance refuses, without lawful excuse, to be examined or to answer pertinent questions, an application may be filed with the Family Court for an order directing such person to show cause why he or she should not appear or testify. Upon return of the rule, the Court shall examine such person under oath, and if the Court shall determine, after giving such person an opportunity to be heard, that he or she refused without legal excuse to attend or testify at the hearing, despite the subpoena, the Court may order such person to comply therewith. Any failure to obey the order may be punished as a contempt of the Family Court, pursuant to the Rules of the Family Court. (64 Del. Laws, c. 63, § 1; 70 Del. Laws, c. 186, § 1; 71 Del. Laws, c. 180, § 157.)

§ 3140. Burden of proof.

The burden of proof and persuasion in any proceeding convened pursuant to § 3135 of this title shall be on the district or state agency which is a party to the proceeding. (64 Del. Laws, c. 63, § 1.)

§ 3141. Finality of decision.

A decision made by a hearing panel under this subchapter is final, unless a party to the hearing brings a civil action under § 3142 of this title. (64 Del. Laws, c. 63, § 1.)

§ 3142. Judicial review.

(a) Any party aggrieved by the decision of the hearing panel may file a civil action in the Family Court. Such proceeding shall be initiated by the filing of a complaint within 90 days of the date of the decision.

(b) In any action brought under this section, the Court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party and, basing its decision on the preponderance of the evidence, shall grant such relief as the Court determines is appropriate.

(c) The Secretary of Education, or the Secretary's designee, shall certify and file with the Court the record of the administrative hearing, which shall include all documents submitted, a transcript of all testimony, and the decision of the hearing panel. (64 Del. Laws, c. 63, § 1; 70 Del. Laws, c. 186, § 1; 71 Del. Laws, c. 180, § 157; 74 Del. Laws, c. 98, § 5.)

§ 3143. Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceedings regarding a complaint, unless the district or state agency and parents of the child agree otherwise, the child involved in the complaint shall remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, shall be placed in the public school program until the completion of all proceedings. (64 Del. Laws, c. 63, § 1.)

NOTICE: The Delaware Code appearing on this site was prepared by the Division of Research of Legislative Council of the General Assembly with the assistance of the Government Information Center, under the supervision of the Delaware Code Revisors and the editorial staff of LexisNexis, includes all acts up to and including 75 Del. Laws, c. 222, effective September 6, 2005.

DISCLAIMER: Please Note: With respect to the Delaware Code documents available from this site or server, neither the State of Delaware nor any of its employees, makes any warranty, express or implied, including the warranties of merchantability and fitness for a particular purpose, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any information, apparatus, product, or process disclosed, or represents that its use would not infringe privately-owned rights. This information is provided for informational purposes only. Please seek legal counsel for help on interpretation of individual statutes.

SAMPLE
DUE PROCESS COMPLAINTS

Law Office of Charles Weiner
Doylestown, Pennsylvania
weinlaw@verizon.net
215-348-4283

LAW OFFICE OF CHARLES WEINER

Attorney at Law

179 North Broad Street
Doylestown, Pennsylvania 18901
215-348-4283
215-340-2412 (Fax)
weinlaw@verizon.net

September 2, 2005

VIA FACSIMILE/

Office of Dispute Resolution
Street
City, State Zip

Re: N.X.
Street
City, State Zip
D.O.B.

Dear Sir/Madame:

Please be advised that I represent the above student and his mother, Ms. B in connection with his educational programming. Attached please find our request/complaint for a Due Process Hearing that was previously sent to the school district.

The following is the additional information relative to our due process request.

School District (SD): School District, Street, City, State Zip
215-555-5000 (voice) 215-555-5500 (Fax)

LEA Contact: Ms. A, Director of Secondary Education/Special Services
Superintendent: Dr. Y

Attorney for SD: Name
Street
City, State Zip
Phone and FAX

Thank you for your attention to this matter.

Very truly yours,

Charles Weiner

LAW OFFICE OF CHARLES WEINER

Attorney at Law

179 North Broad Street
Doylestown, Pennsylvania 18901
215-348-4283
215-340-2412 (Fax)
weinlaw@verizon.net

September #, 2005

VIA FACSIMILE (555-555-5000) AND FIRST CLASS MAIL

Ms. A
Director of Secondary Education/Special Services
School District

RE: X.

Dear Ms. A:

I have been retained by B, the mother of X., a student entering 10th grade at High School, in regard to X's educational programming. X has been identified as a student with a disability and provided with a §504 Plan (Chapter 15 Service Plan), but has not been identified as eligible for special education. For the reasons summarized below, a due process hearing is being requested on behalf of X and his mother.

X entered the School District in 8th grade on December 8, 2003. Ms. B executed a permission to evaluate on January #, 2004. An initial evaluation ensued and an evaluation report was issued on March #, 2004. The report concluded that X is a student with ADHD, Central Auditory Processing deficiencies, as well as academic weaknesses in reading comprehension and listening comprehension. However, the evaluation report concluded that X is a child with a disability but does not need specially designed instruction.

This report and the evaluation were defective in several respects. The evaluation did not include a sufficient observation of the student. Moreover, the conclusions were not consistent with the data available to the district. The report should have concluded that X required specially designed instruction and that an IEP should have been provided.

X was issued a §504 Plan on November # 2004. The Plan provided for preferential seating and extra time for class work, tests and exams. The §504 Plan was not properly implemented and was not appropriate in several respect. The §504 Plan was not issue in a timely manner and it was not consistent with the evaluation report or X's needs. As a result of the district's failure to provide proper support, X's academic performance and progress seriously deteriorated and X received low and failing grades.

On or about February #, 2005, Ms. B made a written request to Mr.T for an educational evaluation of X (see attached e-mail). Mr. T did not timely respond but used several delay tactics. After several communications to Mr. T about the status of the evaluation, Ms. B restated her request for an evaluation in a letter dated March 11, 2005 to Assistant Principal (see attached letter). Mr. T continued to delay responding to this request. On April #, 2005, Mr. T improperly denied the request for a “re-evaluation” on the basis that X was “evaluated on March #, 2004 and received a 504 Plan.”

Because of the district’s refusal to conduct an evaluation as mandated by federal and state law, Ms. B pursued an independent evaluation with Dr. Psy.D. Dr. Psy.D concluded (report attached) that X requires special education services under the classifications of a specific learning disability in the areas of reading comprehension and written expression and other health impairment for ADHD. Dr. Psy.D also made numerous recommendations for modifications and accommodations to X’s educational program which included specially designed instruction to improve reading comprehension and writing, an Occupational Therapy evaluation, and tutoring outside school to aid with reading and writing.

Based on the foregoing, we are requesting a due process hearing at which Ms. B will assert that X was denied a free appropriate public education (“FAPE”) for eighth grade (2004) and ninth grade (2004-2005 school year). Ms. B will assert the following bases for relief at the hearing; (1) the district failed to conduct an appropriate evaluation in March 2004; (2) the district failed to address X’s disability through an appropriate and timely IEP or §504 Plan and failed to implement the §504 Plan; (3) the district refused to conduct an educational evaluation contrary to federal and state regulations; (4) the district denied various procedural and substantive rights that collectively resulted in a denial of FAPE.

We will request that the Hearing Officer award compensatory education for the time that X was denied a FAPE; direct the district to pay/reimburse for Dr. Psy.D’s evaluation; direct the district to accept Dr. Psy.D’s evaluation; direct the district to convene an IEP meeting and devise an appropriate IEP or §504 Plan; direct the district to pay/reimburse for an Occupational Therapy evaluation; direct the district to pay/reimburse for tutoring outside the school to aid with reading and writing. Ms. B is willing to resolve this matter by an agreement to provide the relief described herein and to reimburse her for her reasonable attorney’s fees and costs.

Please do not hesitate to contact me should you or counsel for the district wish to discuss this matter.

Very truly yours,

Charles Weiner

LAW OFFICE OF CHARLES WEINER

Attorney at Law

179 North Broad Street
Doylestown, Pennsylvania 18901
215-348-4283
215-340-2412 (Fax)
weinlaw@verizon.net

September #, 2005

By Facsimile And Mail

Ms. A
Supervisor of Special Education
High School
Street
City, State Zip

Re: X

Dear Ms. A

I have been retained by XX in regard to the educational program for their daughter, X. X is an 11th grade student who resides within the District and is currently attending the Friends School ("FS"). The parents provided the District with notice of their intent to enroll X in FS at the July 25, 2003 IEP meeting, as confirmed by their September #, 2003 letter to the District.

I am writing at this time to request a due process hearing on behalf of X and her parents. At the hearing, the parents will ask for reimbursement for the tuition for X's attendance at FS, for compensatory education for a period of two years prior to the request for due process, and, finally, they will ask for compensation for the evaluation that was performed by Dr. Phy.D on June # & # 2003.

The parents ask for due process because the district has failed to provide X with an appropriate education over the past two years. Specifically, the district has failed to provide X with appropriate academic supports including appropriate instruction to address or deficits in reading, written expression and math, has failed to address X's emotional needs.

The parents are willing to resolve this due process hearing request by an agreement that the District pay for her tuition at FS, and for 360 hours of compensatory education to address the failure to provide her with an appropriate education.

Please do not hesitate to contact me should you or your counsel wish to discuss this matter.

Very truly yours,

Charles Weiner