

# PARENT AND CHILD RIGHTS IN SPECIAL EDUCATION PROCEDURAL SAFEGUARDS NOTICE



New Mexico Public Education Department, Special Education Bureau  
120 South Federal Place, Room 206, Santa Fe, New Mexico 87501

## About Special Education

Special Education is instruction and services designed to meet the needs of children who have one or more disabilities as defined by federal law. The Individuals with Disabilities Education Act (IDEA), Part B regulations at 34 CFR Sec. 300.8, defines thirteen categories of disabilities: autism, deafness, deaf-blindness, hearing impairment, mental retardation, multiple disability, orthopedic impairment, other health impairment, serious emotional disturbance, specific learning disability that includes Dyslexia, speech language impairment, traumatic brain injury, and visual impairment, including blindness. In New Mexico, developmental delay is considered a disability under special education for children aged three - nine. According to Subsection B(18) of 6.31.27 New Mexico Administrative Code (NMAC), Special Education in New Mexico may include speech-language pathology services.

It is important to note that not all children who have a disability or who are struggling, qualify for special education services. To be eligible for special education services, the child must meet two requirements. First, the child must be found to have a disability as defined by the IDEA or New Mexico State Rules. Second, the disability must affect the child's ability to learn and progress in the same educational program or setting provided for all children. The purpose of special education services is to help a child with a qualifying disability to learn the information and skills that all children are learning.

## Procedural Safeguards

Procedural Safeguards are procedures designed to protect legal rights for the child and parent. You as a parent or guardian play a vital role in your child's education. A federal law called the IDEA ensures that all children with qualifying disabilities have the opportunity to receive publicly funded special education services. The law also requires districts to inform and include parents in the educational decisions made regarding their child's education. Under the IDEA, the child's and the parents' rights are spelled out and protected. One of the requirements of the IDEA is to provide the parent with this document. It is designed to inform the parent of the requirements set by federal regulations and state rules that apply to everyone responsible for the education and welfare of a child such as school districts and other public education agencies, teachers, related service providers, and the family. All listed share the common goal of providing the child with his or her right to a Free Appropriate Public Education (FAPE).

*Note:* The term "district" includes any public education agency responsible for providing special education services and related services.

The term "special education services" includes related services such as speech language pathology services, occupational therapy, physical therapy, counseling, etc.

### **Decision Makers under the IDEA**

With a rare exception for adolescents and young adults who are incarcerated, the IDEA requires that every child who is below the legal age of adulthood (18 in New Mexico) must have an adult available to make educational decisions and protect the child's legal rights. Usually that person is a natural or adoptive parent. If no parent is available, the adult decision-maker may be any of the following:

- A person acting in the place of a parent, such as a grandparent
- A step-parent, or other relative that the child lives with
- A legal guardian (but not the state, if the child is in state custody)
- A foster parent who is willing to make educational decisions required of parents under the IDEA
- If none of the above are available, a surrogate parent who is appointed by the district to make educational decisions and protect the child's educational rights

All of the above are included in the IDEA's broad definition of a "parent."

In New Mexico, children become legal adults at age 18. Under the IDEA, they are then entitled to make their own educational decisions and protect their own rights unless the courts have declared them incompetent and appointed guardians for them. Unless this is completed before the child's 18<sup>th</sup> birthday, the child will automatically have all rights and responsibilities of adulthood when he or she reaches the age of 18, which includes making educational decisions. The district will inform the parent of the laws and options regarding transfer of rights beginning at each annual Individual Education Program (IEP) review for a child who is 14 or older.

*Note:* In the rest of this document, the terms "parent" or "you" includes any of the above kinds of decision-makers for a student who is 18 or older and has not graduated from high school.

### **An Overview of the Special Education Process**

In the United States, all school districts are responsible for providing a FAPE to every child. Districts provide a general education curriculum designed to meet the needs of most children and prepare them to function as independent adults and participate in their community. Districts must provide special education services to children with disabilities, who need these services in order to learn and reach these same goals. It is the goal of IDEA to provide services to children in the Least Restrictive Environment (LRE), alongside children without disabilities.

Decisions about a child's program and/or placement are not simple. Districts must follow a process outlined in the IDEA. It takes a team of people, which includes the parents or guardians, using their combined knowledge and expertise to make decisions that are in the best interest of the child. The child is also included whenever appropriate. The district must invite the child to participate in

these decisions if he or she is 14 years of age or older and the purpose of the meeting is to discuss post-secondary goals, and the transition services needed to reach those goals.

## **The Special Education Process**

To understand your role and rights in the decisions made for your child, it may be helpful to first look at how the special education process works. Please refer back to this page later as needed when reading about your rights.

### **Step One:**

**TIER I AND TIER II INTERVENTIONS:** The district or the parent(s) refers the child for consideration of a possible need for special education services. Districts must provide screening and interventions through a Student Assistance Team (SAT) child study process before referring a child for a full special education evaluation, unless a child has an obvious disability or a serious and urgent problem.

### **Step Two:**

**INITIAL EVALUATION:** The child is evaluated. This will involve formal testing, observations, or even outside specialists. Parents must give written informed consent before an initial evaluation or a reevaluation can begin. A special education initial evaluation must be conducted within 60 days of the parent(s) giving written consent for evaluation.

### **Step Three:**

**DETERMINE IF ELIGIBLE:** Based on all the information gathered, a group of qualified professionals and the parent determine whether the child is eligible for special education services. A child may be found to be eligible for services because he or she has a defined disability that directly affects learning. The child may be ineligible for services because the disability does not directly affect learning, or there is no evidence that a disability exists.

### **Step Four:**

**IEP DEVELOPMENT:** If the child is found eligible, a team meets to develop an Individualized Education Program (IEP). The IEP is the master plan for the child's special education services, such as speech therapy or physical therapy, that the child needs to benefit from instruction. The district must invite the parent(s) to the meeting, and provide opportunities for parent(s) to participate as members of the IEP team.

### **Step Five:**

**IEP IMPLEMENTATION:** Parental consent is required before beginning any initial special education services. Once the plan is developed, the district implements the IEP as written.

### **Step Six:**

**IEP REVIEW/REVISION:** The IEP team, which includes the parent(s), must formally review the child's IEP at least once a year. The IEP team may review the IEP more often if necessary, as requested by the district, or if requested by the parent(s).

### **Step Seven:**

**REEVALUATION:** The district must reevaluate a child receiving services at least every three years unless the parent and the district agree that a specific reevaluation is not needed.

### **Step Eight:**

**DETERMINE IF ELIGIBLE:** The IEP team must reexamine and determine if the child continues to be eligible for services after a reevaluation, as stated in steps two and three.

### **Step Nine:**

**Exit from Services or Continue Services:** If the child is eligible, the IEP team begins again at step four. If the child is not eligible, he or she exits the program. Your child must be evaluated before it is determined that he/she is no longer a child with a disability.

The following sections will explain more details regarding the rights of the child and the parent in the special education process.

## **Prior Written Notice of Proposed Action**

Prior Written Notice (PWN) is a written notice that the IDEA requires the district to give to the parent(s). This notice must be provided before the district takes or refuses to take any action regarding:

- Identifying your child as a child with a disability; or
- evaluating your child to determine eligibility for special education services; or
- initiating and/or changing the special education services provided for your child, including IEP development or changes.

The district is required to inform the parent(s) before the district can formally evaluate or reevaluate your child, beyond the requirements for all students, before the district identifies or refuses to identify your child as needing special education services, and before the district can change your child's existing IEP.

The PWN must include:

- a description of the action the district proposes or refuses to take;
- a description of the reasons for its decision;
- a description of other options that have been considered by the IEP team and the reasons why those options were rejected;
- a description of other factors that are relevant to the district's proposal or refusal;
- a description of the information the team used to arrive at its conclusion;
- a notice of Procedural Safeguards or information about how to obtain a copy; and
- sources for parents to contact to receive help in understanding their IDEA rights.

The district must provide the parent(s) the PWN in a manner that is understandable and in the parent's native language or other mode of communication, unless it is clearly not feasible to do so. In certain cases, the notice may be given orally through a translator or other mode of communication.

## **Actions Requiring Parent's Consent**

Whether you are a parent, guardian, or an adult student, it is important that you know and understand the information given to you regarding what the district plans to do or not to do, so that you can participate fully in making decisions. The district must obtain your informed consent in writing before the district can evaluate or reevaluate your child for special education, and before it

can provide your child with initial special education services. Consent is also required each time the district will be asking you to use your private or public insurance or other benefits to cover the cost of the special education or related services for your child but refusal to allow access to your insurance does not relieve the district of its responsibility to ensure that all required services are provided at no cost to you. Consent is also required before a district invites an outside agency, such as the Division of Vocational Rehabilitation, for the purpose of transition planning for children age 14 or above. By signing your name on the consent form, you are stating that you understand, give permission, and agree with the action for which consent is required. It is important to let the district know if you do not understand or have questions.

Keep in mind that you and the district may have a difference of opinion. If you decide that you do not agree and do not give your consent for the proposed actions as stated, you can request a new IEP meeting, a facilitated IEP meeting at district expense, mediation at State expense, or an impartial due process hearing to resolve the difference of opinion. At any time subsequent to the initial provision of special education and related services, you may revoke your consent for the continued provision of both special education and related services. If you as the parent(s) wish to revoke (cancel) your consent for your child to receive special education and/or related services, the revocation must be in writing. Withdrawal of consent does not undo (negate) any action that occurred before the withdrawal. It is important to consider the new role and responsibilities the district will have as a result of revoking your parental consent. Once a parent has revoked his/her consent for all such services, the district is not required to convene an IEP meeting, nor is it required to amend educational records regarding any reference to receiving special education services. The district may not use the procedural safeguards (i.e., mediation, state level complaint, resolution meeting, or an impartial due process hearing) to obtain an agreement or a ruling that special education and related services be provided to your child if: 1) you as the parent(s) did not respond to an initial request to provide written request; or 2) you as the parent(s) refused or later revoked the written consent. It is important to note that the district will not be considered to be in violation of any state rules or federal regulations for not providing any further special education and/or related services. The child will then be considered a general education child and therefore, the district is not required to develop an IEP or conduct an IEP meeting. If you choose to revoke your consent in writing at any point after your child was provided special education and related services, the district cannot continue to provide such services. If a parent revokes only one service, then the district is still required to maintain an IEP for remaining services and the child will still be considered a child who receives special education services. The district is however, obligated to provide **Prior Written Notice** before ceasing to provide those services. For more information on resolving differences, see page ten.

### **Student Records**

The IEP team may use your child's school records as one source of information when determining your child's eligibility for special education services. You the parent(s), or someone who has your permission, can inspect and review all of your child's records kept by the district. You can review your child's records 1) before any meeting involving your child's IEP; or 2) before a due process hearing. You can request to review the records at other times, but the district has up to 45 days to honor your request. You can also request a copy of the records, but the district may charge you a reasonable fee unless the fee would prevent you from acquiring a copy. Note that there may be certain instances in which the district will not allow viewing of full records. This may occur if

there are names or information about individuals other than your child in the record, or if authorities direct the district to exclude certain people from viewing the records.

You or your authorized representatives are entitled to have the district explain anything in your child's records that you do not understand. If, after reviewing the records, you feel there is incorrect information or something that violates the privacy rights of your child, you can ask the district to amend the records. If the district refuses to amend the records, you may file a request with the district for a formal hearing to challenge the contents of the records. You can also ask to have records destroyed once they are no longer needed for educational purposes.

The district is responsible for keeping children's records confidential. Parents may review their child's records kept by certain district personnel. Districts must transfer educational records when your child moves to a new district.

### **Educational Evaluation**

It is unfair for one person or a group of individuals to decide who is and who is not eligible for special education services, based solely on their "feelings" or "impressions" of a child. Though some subjective data is useful, such as direct observations by parents or trained observers, there must also be an evaluation that uses objective, measurable information concerning the child's levels of performance, strengths, and weaknesses. An evaluation can offer information about a child, such as a score on a vocabulary test or a rating on a physical exam. An observation or opinion can add insight into the "how's and why's" of a child's performance. During an evaluation these are examined together, which helps paint a picture of the whole child including strengths, skills, abilities, and this helps the IEP team to better address the child's needs. This information is gathered by assessments or tests performed by an education diagnostician. By combining and analyzing the various types of information collected and drawing conclusions based on all of the information gathered, both fact and opinion, the result is a more comprehensive picture of the child's abilities and skills.

If the district or you suspect that your child has a disability, and of possibly needing special education services, the district will need more information in order to be able to make that determination. If your child is already receiving special education services, and a review is due or requested, the district will want to do a reevaluation. In either case, this may involve any number of different types of assessments and/or observations, depending upon the information the district needs to gather about your child. The district will give the parent(s) a Prior Written Notice (PWN) of the district's intent to evaluate or reevaluate the child and identify the assessment tools the district will use. The district will ask for your consent to conduct the evaluation, and you will receive a copy of the results.

### **Evaluation "Safeguards"**

The evaluation process is important because the conclusions drawn from the evaluation are likely to determine not only if your child has a disability, but also if he or she qualifies for special education services. The facts listed below are safeguards built into the evaluation process:

- The district will inform the parent(s) ahead of time about what tests and other assessments they will use for the evaluation.

- The parent(s) must give informed written consent before any action is taken.
- The district will complete the initial evaluation within 60 days of your giving written consent for the evaluation to begin.
- The district will not discriminate against your child due to race, culture, language, or because of a disability. The evaluator will present tests and procedures in the child's language and/or mode of communication that will most likely yield accurate information about what your child knows and can do academically, developmentally, and functionally.
- When the evaluation is complete, the district will schedule a meeting with the parent(s) to discuss the results and conclusions drawn from the tests.
- If you disagree with the evaluation results for your child, you have the right to request an Independent Educational Evaluation (IEE) at the school district's expense. An IEE is an evaluation performed by a person who does not work for the school district, but who is a qualified evaluator. The district may ask your reason for objecting to the district's evaluation but you are not required to provide an explanation. Your request should not cause unreasonable delay in the provision of an IEE at the district's expense or the filing of a due process hearing to defend the district's evaluation. If you request an IEE, the district is required to provide you with the information regarding where you can obtain an IEE and what criteria the district will use to decide whether to accept the results and pay for the evaluation. The criteria the districts use to decide if an evaluator is qualified should be the same criteria the district uses to select district evaluators. However, if the district feels that its evaluation is appropriate, it can request a due process hearing. The hearing officer decides if the district's evaluation was correct and complete. If the hearing officer decides in the district's favor, you can still get an IEE at your own expense. Any of the results from all evaluations are considered in planning your child's program. The IEE can be used as evidence in a due process hearing.

### **Individualized Education Program (IEP)**

If it is determined that your child meets the criteria for special education services (see page three), the next step is to develop an IEP for your child. An IEP is a written statement of the educational program designed for a child to meet his or her needs. Every child who receives special education services must have an IEP. The IEP has two general purposes: 1) to set reasonable annual learning and/or functional goals for your child; and 2) to state the accommodations, services, and classroom setting the district will provide to help achieve the annual goals.

An IEP will state:

- your child's present levels of academic achievement and functional performance;
- annual goals and how progress will be measured;
- what special education and related services will be provided, including how often and by whom;
- to what extent the child will participate with other children in the general education curriculum;
- what modifications and/or accommodations, if any, will be used for instruction and assessment and;
- transition services (pre-planning for high school and beyond) if your child is age 14 or above, the IEP must include:
  - appropriate measurable post-secondary goals, updated annually, based on an age appropriate transition assessment;

- transition services;
- courses of study;
- annual IEP goals related to the child's transition service needs.

The IEP is developed by two parties, the parent(s) and the school team. Each person who participates in the development of the IEP has information or insight about the child that will contribute to designing a program that is appropriate for him or her. Because you are the person, who knows your child best, your active participation and input is very valuable and must be considered by the IEP team.

IEP team participants will vary depending on the needs of the child. Generally, participants will include:

- the parent(s);
- at least one regular education teacher if the child is likely to be participating in the general education program and environment;
- at least one special education teacher or specialist;
- one or more qualified district representatives;
- your child if appropriate especially if transition services are being discussed and;
- anyone else the parent or the district invites who may have special expertise or knowledge about your child. This may include advocates who are invited by you.

### **An IEP Meeting**

An IEP meeting is not the same as a parent-teacher conference where you discuss your child's progress or needs. The IEP meeting is a formal gathering of a team of people for the purpose of setting annual goals for your child and determining what services he or she needs to achieve them. Because of the scope and importance of the meeting, the district will make every reasonable effort to involve the parent(s), including providing an interpreter if needed, or person who can present the information in a manner that the parent can understand. An IEP meeting is needed when there are plans to do any of the following:

- make decisions about a child's initial plan for special education services
- significantly change or review an existing IEP (an IEP must be reviewed at least once a year)
- change or review the child's program or placement
- evaluate or reevaluate a child whenever the parent(s) request it

As mentioned, you are an important member of your child's IEP team. Before the meeting, you may request any proposals that the district has drafted about your child. When scheduling a meeting, the district will make every effort to inform and invite the parent(s) to participate in the development of the IEP. You will receive written notice of an upcoming meeting. If you want to participate but cannot attend at that time, let the district know that you want to reschedule the meeting. If you cannot attend for other reasons or do not respond, the district will attempt to involve you in other ways such as telephone conferences, home visits, or delivering written information for your review. If unsuccessful after trying to include you, the district can have the meeting without you and mail your child's IEP and the district's Prior Written Notice (PWN) of its proposed action. The district provides the PWN so that you can review the IEP before any program begins and gives you the opportunity to disagree with the district's plans for your child.

### **Discipline**



To function as a safe learning community, districts must have Rules of Conduct. Under the IDEA, children with disabilities may be suspended or placed in alternative settings to the same extent that these options would be used for children without disabilities. However, certain conditions apply regarding students with identified disabilities who are receiving special education services: (Note: these conditions do not apply to students in New Mexico identified as gifted.)

- A child with a disability may be suspended for 10 days or less during a school year according to the same procedures that apply to all students. If the student exhibits problem behaviors, a functional behavior assessment should be considered before behavior continues to interfere with the student benefitting from their education. The district is not required to provide any educational services during the first 10 days of removal.
- If a child with a disability is suspended for more than 10 days during a school year, the district must provide services that will allow the child to continue to progress in the general education curriculum and advance toward his or her IEP goals.
- If a child is removed from his or her IEP placement for more than 10 consecutive days during a school year (or when the removal otherwise represents a change of placement), a meeting must be held to determine if the undesirable behavior is directly related to or caused by the child's disability, or directly related to a failure by the district to implement the IEP. If the behavior is caused by a disability or if the district has failed to implement the IEP, the child may not be suspended or expelled and the IEP team must modify the child's placement or services as needed. If the behavior is not the direct result of a disability or a failure to implement the IEP, the child may be suspended or expelled according to normal procedures but the district must continue to provide services that will enable the child to progress in the general education curriculum and advance toward his or her IEP goals.
- The IEP team must conduct a Functional Behavioral Assessment (FBA) and develop a Behavioral Intervention Plan (BIP) (or review the current BIP if already in place) when a child has been removed for more than 10 consecutive days in the district year or when the removal represents a change of placement.

A BIP is an individualized behavior plan that provides specific actions for redirecting undesired behavior in a positive way. As a member of your child's IEP team, if your son or daughter requires a BIP, you will be able to give your input.

### **Protecting Everyone's Right to a Safe District**

Educators and parents share concerns over the issues of drugs, guns, and other weapons in schools. As a result, the IDEA has expanded the authority of district personnel regarding the removal of children with disabilities who bring or have drugs or weapons on school grounds or at school functions, or who inflict serious bodily injury on another person. For the protection of everyone's right to a safe school setting, any child with a disability may be removed to a temporary placement immediately for up to 45 school days for one of these violations.

The IDEA also allows a district to ask a state-appointed due process hearing officer to move a child to a temporary placement for up to 45 school days at a time, if the district believes that the child presents a serious danger of injury to self or others in the child's current placement. The IDEA refers to these temporary placements as Interim Alternative Educational Settings (IAES). The IDEA requires that the setting be determined by the IEP team and be designed so that the child

continues to receive all the special education services that the IEP requires. It also requires the district, the parent(s), and relevant members of the IEP team to decide whether a child's behavior is a direct result of either a disability or the district's failure to implement the IEP, and to develop appropriate behavioral intervention services when a child is placed in an IAES for disciplinary reasons. Also, the district can report any student to law enforcement authorities for the commission of a crime. If the student is a child receiving special education services, the district can give the authorities copies of the student's special education records but only to the extent permitted by the Family Educational Rights and Privacy Act.

If you request a hearing to challenge a manifestation determination or a disciplinary placement for your child, your child remains in the IAES until a hearing officer decides the matter or until the time for the disciplinary procedure ends, whichever comes first. In disputes over non-disciplinary placement issues and other matters, your child will remain in his or her current placement until the matter is resolved.

### **Educational Placement**

The IDEA (federal law) and state rules give children with disabilities the right to a Free Appropriate Public Education (FAPE). Through the IEP process, a group of knowledgeable people (including the parent(s)) decide what educational provisions may be needed for the child based on the child's needs. The first step is to adjust or modify the child's educational program or provide additional services, so that he or she may continue to learn alongside students in the general education program and regular classroom setting. Though it is desirable to have children with disabilities working with others their own age in the regular classroom, sometimes that placement is not the most appropriate learning environment for the child. The goal is to eliminate obstacles that restrict him or her. The Least Restrictive Environment (LRE) may be the regular education classroom or classrooms designated to provide special education services, to providing instruction in the home, a hospital, or a setting outside the district. The decision in every case depends on the unique needs of the child.

If the district plans a change of placement for your child, you will be asked to attend an IEP meeting and given the reasons why the district is proposing the change. The parent always has the right to disagree with a proposed placement. The procedures for disagreeing will be described on the pages that follow. Keep in mind that a planned placement change for the purpose of providing the most appropriate program for a child's learning is different from a temporary placement in an IAES for disciplinary reasons, as described above. An IAES is temporary. However, as indicated under "Discipline" above, certain behaviors that the IEP team decides are the direct result of a child's disability may result in a plan to change placement long-term to better serve your child.

### **Resolving Differences**

As two parties with the same goal, to provide an opportunity for success for your child, the parent(s) and the district need to communicate opinions and concerns. This cooperative approach usually results in agreement and a smooth implementation of special education services for the child. However, each child and circumstances are unique and there may be times when you and the district may not agree on the special education services your child needs. Under federal law and state rules, both the district and the parent(s) have the right to have their opinions heard and considered. The parent has the right to disagree with the district's findings, plans, or actions

regarding their child. Also, after considering the parent's opinions or requests, the district has the right to disagree as well.

Federal law and state rules provide several avenues for resolving differences. As they are discussed below, keep in mind that even in disagreement, the focus is the child's best interest and the outcome should be that the child is the winner.

### **The Avenues to Resolve Disputes**

If you are in disagreement with the district on any aspect of your child's program, you have the right to be heard and your opinions considered. In many cases, differences can be resolved quickly and efficiently at the school or district level simply by asking for another IEP meeting.

#### **Avenue One: Working Directly With District Personnel**

- A. The first option is designed to resolve a problem as soon as it arises among the people directly involved. As the first step, you should voice your concerns directly to the school or district level personnel responsible for your child's program. Ask for a new IEP meeting. In many cases, the district will gather information about the situation from all concerned and attempt to work with you to resolve the problem. You may also ask the district to provide a Facilitated IEP (FIEP) meeting, agreed upon by both parties, where a third party assists the parties in communication and problem solving to reach a consensus on the child's IEP. The district is responsible for paying for the FIEP.
- B. An additional option is for you and the district to file a joint request with the Special Education Bureau (SEB) of the New Mexico Public Education Department (NMPED) for a mediation that is conducted by a state-assigned, state-funded, trained mediator. A mediator is trained to be objective in helping you and the district find a mutually agreeable solution to your dispute. Use of this option is voluntary, will not deny or delay any of your rights, and is intended to result in a legally binding written agreement between you and the district. The SEB will provide a mediator if you and the district jointly submit a signed, written request to the SEB in which you describe the matter(s) in dispute and any previous attempts to resolve these matters at the local level. If you and the district reach agreement about any IEP related matter(s) during mediation, it will then be necessary to hold an IEP meeting to inform the child's service provider(s) of their responsibilities under that agreement, and revise the child's IEP accordingly or develop an IEP Amendment.

#### **Avenue Two: Contacting Available Resources for Help and Support**

- A. There may be times when you feel you need more help or support. There are many resources available to guide and help you. (Several are listed on the final page of this guide).
  - You and your family can receive advice and support by contacting parent assistance and advocacy groups in the community or state. Advocacy groups provide people to speak with or speak on your behalf with regard to ensuring that both your rights and your child's rights are being exercised and protected.
  - In addition to community support, you can receive information and guidance by accessing state and federal websites which offer extensive and detailed information for parents regarding special education services.

- B. You can also call the SEB and ask to speak to the Parent Liaison. This person can answer your questions or may be able to act as an unofficial go-between by calling the district in an informal attempt to resolve your concerns.

### **Avenue Three: Filing a Formal State-Level Complaint or Request for a Due Process Hearing**

- A. If you believe the district has violated some part of your child's IEP or failed to follow the special education procedures required by law, you may file a formal complaint with the SEB. If you choose to file a formal state-level complaint, be sure to include all the information needed for a response and/or investigation. If you want an investigation or a written finding from the State, your complaint must be signed by you or your representative, be submitted in writing to the SEB State Director of Special Education, must describe your concern and what right(s) under the law or procedure(s) you think the district has violated, and must describe the facts about the complaint and what steps have already been taken to try to resolve it. Your concerns must not be older than one year. If the SEB accepts the complaint as sufficient, it will acknowledge the complaint to the parties in writing and inform them of any available state-funded Alternative Dispute Resolution (ADR) options such as mediation or a FIEP meeting. The SEB will investigate and respond within 60 days or a timeline extended for exceptional circumstances with respect to a particular complaint, or because the parent (or individual or organization) and the district agree to extend the time to engage in mediation or other ADR. Based on the information gathered, the SEB will make a finding as to whether the law has been followed or not. If it finds the district is not in compliance with the law, it will direct the district to correct the action.
- B. Sometimes you and the district may not agree about the provisions of your child's IEP or his or her placement despite honest attempts to do so. When that happens, and informal attempts to resolve such a dispute fail, you may consider the option known as a due process hearing. A request for a due process hearing is filed with the SEB. This is a legal action in which a hearing officer makes a decision based on the facts and evidence presented. Since this is a formal proceeding, several legal requirements apply and must be followed. Your rights and responsibilities with regard to requesting a due process hearing are outlined below:
- You have the right to request an impartial due process hearing over any issue regarding the identification, evaluation, educational placement, or provision of a Free Appropriate Public Education (FAPE) of your child under the IDEA and state rules.
  - To request a hearing, you must provide the request in writing to the district and SEB. The request must include complete information about your child (name, address or available contact information), and the name of school and district; a description of the problem including known facts and any efforts you and the district have made to resolve the problem, informally, before filing this request; your proposed solution to the problem; your name, address, and telephone number and that of the child's attorney, if any; a written statement that says the advocate attorney named may represent your child; and your dated signature plus the dated signature of the advocate attorney, if any. The request must be filed within two years of the date that you knew or should have known about the problem. The district will have an opportunity to respond in writing to your request. If you need help with this, ask the district to give you an official due process hearing request form. The form can also be found on the SEB website at:  
<http://www.ped.state.nm.us/seo/dispute/Due%20Process%20Hearing%20Form%202007%201ock.doc>.

- The district may also request a due process hearing to resolve a disagreement over the appropriateness of its evaluation, to request authorization to conduct an evaluation or a reevaluation when a parent refuses consent, or to ask a hearing officer to move a child to an interim alternative educational setting because his or her presence in the current placement poses a substantial likelihood of risk of injury to the child or others.
- As part of the due process procedure, the district will offer to hold a resolution session with you and other relevant members of the IEP team to address the issues raised in your request, unless you and the district agree jointly not to do so. You will also have the option of having a facilitated IEP meeting or mediation at state expense to see if the issue can be resolved without a due process hearing. Often a dispute can be settled simply by bringing in an impartial person trained to help the parties find a plan that is mutually agreeable to both sides. Facilitated IEP meetings and mediation sessions are voluntary.

### **Due Process Hearing**

If you are involved in a due process hearing, whether it was initiated by you or by the district, here are some basics you should know:

- You have the right to a fair and impartial hearing before a state-appointed hearing officer who is knowledgeable about the laws governing special education and administrative hearing procedures.
- The hearing will be scheduled at a time and place that is reasonably convenient for you and your child.
- You have the right to be represented by an attorney.
- Upon request, the SEB will inform you of any known free or low-cost legal services and such services are listed on the final page of this guide.
- During the hearing, you or your attorney may present evidence and written and oral arguments. You may require witnesses to attend and you may also confront and cross-examine the district's witnesses. No more than five (5) business days before a hearing, you must share with the district all evaluations completed by that date, and any recommendations based on those evaluations, which you intend to use at the hearing. The district must share the same information with you. If you or the district fail to do this, the hearing officer may prohibit you or the district from using that information at the hearing.
- You may choose to have the hearing open to the public and to have your child present at the hearing.
- At any point during the proceedings you may have a mediation conference and/or the party requesting the hearing may withdraw its request.
- You should expect a written decision within 45 days of when the timeline for the hearing process began, unless the hearing officer grants an extension.
- You should expect to receive, at no cost to you, your choice of a written or electronic word-for-word record of the hearing and the hearing officer's findings and decision.
- The decision of the hearing officer is final unless either party files a civil action in a state or federal district court.
- A civil action must be filed no later than 30 days from receipt of the hearing decision.
- The findings and decisions of a hearing may be made public.
- The district pays the costs of a hearing, with the exception of attorney's fees, which are the individual parties' responsibility. In some cases, a court may award part or all of the attorney's

fees to you (if you are the prevailing party) or to the district (if the district is the prevailing party and your claims are frivolous, unreasonable or without foundation or filed for improper purposes). However, hearing officers are not authorized to award attorney's fees.

- Except for disputes over disciplinary placements and manifestation determinations, the child remains in his or her current placement during due process proceedings until a final decision is reached, unless you and the district agree otherwise or the hearing officer directs other interim placement. Except in the case of short-term suspension (up to 10 days in a district year), the child will continue to receive special education services as directed by his or her IEP.
- At the conclusion of the hearing, either party has the right to bring a civil action in a court of law with respect to the due process hearing issues. The laws governing jurisdiction and procedures will apply to any action brought before the court. If the parent prevails in the court's decision, the court may, at the court's discretion, award reasonable attorney's fees. This means that if the parents decide to take the matter to court, they must pay for the attorney's services, and that they may or may not get full or part reimbursement of these expenses if they win the case.

### **Private Schools/Home Schools and Special Education**

In most cases, a FAPE can be offered to a child in the public school setting. However, if it is determined by the public agency through the IEP process that a child's right to a FAPE is best served in a specialized private school, then the public agency will fund the child's special education needs in the private setting. Parents, who choose to enroll their children with disabilities in private schools without the participation of the local district in the decision regarding special education services, are responsible for paying the private school tuition and costs. Though each district is obligated to spend a portion of its federal IDEA funds to assist children with disabilities enrolled by their parents in private schools, these children are not entitled to receive all the special education services the child would receive if enrolled in public schools. It is up to the district to decide, on an individual basis, the types of services, if any, to offer a child. Local districts will consult with appropriate representatives of private school children to determine what services will be provided and where the services will be delivered. Children with disabilities that are parentally-placed in private schools receive services under a service plan, which is different from an IEP. If you choose to home school your child, under the IDEA and New Mexico law, the local district is not required to provide a FAPE for your child. Parent(s) who home school their child(ren) must register as a home school parent with the Public Education Department.

### **Gifted Students**

The procedures that relate to gifted students are the same as school-aged children with disabilities, with four exceptions. The four exceptions include: 1) child find requirements; 2) disciplinary changes of placement; 3) transition planning; and 4) Free Appropriate Public Education (FAPE) as authorized by the IDEA.

### **Extended Part C Option**

For children who are turning three between December 2009 and September 2011 and whose parents opt for continuing their child in the Part C program under the Extended Part C State Incentive Grant will be entitled to the procedural safeguards provided under the IDEA Part B

program if the evaluation conducted under the Part B program qualifies the children for services under the Part B program. The following are the procedural rights that will be provided to the parents on behalf of their child who participates in the Extended Part C program: 1) the parent must provide written consent for the initial evaluation; 2) the parent has the right to consent to the initial provision of free appropriate public education through the initial IEP that identifies special education and related services; 3) the parents have the opportunity to examine their child's records; 4) information about the child is confidential; 5) the parent has the right to receive prior written notice of meetings; 6) the parent has the right to receive prior written notice of any proposed or refused actions; 7) the parent has the right to have information communicated in the parent's native language or mode of communication; 8) the parent has the right to request an independent educational evaluation (IEE); 9) the parent has the right to the various avenues to resolve disputes regarding the evaluation and the eligibility determination for Part B including but not limited to Due Process; 10) the parents have the right to receive a copy of the evaluation and eligibility determination report from the district at no cost. The New Mexico Family Infant Toddler (FIT) Program procedural safeguards will apply to the IDEA Part C early intervention services and all services identified or provided through an individualized family service plan under the Extended Part C option.

### **Parent Resources**

#### **NEW MEXICO PARENT ADVOCACY AND SUPPORT GROUPS**

- Arc of New Mexico (505) 883-4630
- Citizens for the Developmentally Disabled Inc. (575) 445-5674
- Developmental Disabilities Planning Council (505) 476-7330
- Governor's Commission on Disability (505) 827-6465
- Parents for Behaviorally Different Children (505) 265-0430 or (800) 273-7232
- Parents Reaching Out (505) 247-0192; (800) 524-5176
- Education for Parents of Indian Children with Special Needs (EPICS)  
Toll Free (888) 499-2070 or (505) 404-2070 website: [www.epicsproject.org](http://www.epicsproject.org)

#### **FREE OR LOW-COST LEGAL SERVICES**

- Albuquerque Bar Association Volunteer Lawyers (505) 243-2615
- New Mexico Legal Aid (505) 243-7871
- Native American Protection and Advocacy Project (505) 566-5880 or (800) 862-7271
- Disability Rights New Mexico (800) 432-4682

#### **NEW MEXICO PUBLIC EDUCATION DEPARTMENT**

120 South Federal Place, Room 206, Santa Fe, New Mexico 87501  
Special Education Bureau (505) 827-1457

The Special Education Bureau can provide forms and assistance with filing an Alternative Dispute Resolution (ADR), complaint or due process hearing and answer questions about the law. Ask to speak to a Parent Liaison.

## ONLINE RESOURCES IN SPECIAL EDUCATION

For more information about the topics in this guide or other issues regarding special education, extensive help and guidance is available online.

- The website of National Dissemination Center for Children with Disabilities at [www.NICHCY.org](http://www.NICHCY.org) is a comprehensive source for administrators, educators, and parents.
  - The National Disability Rights Network: Protection & Advocacy for Individuals with Disabilities at [www.ndrn.org](http://www.ndrn.org) is a non-profit membership organization for the federally mandated Protection and Advocacy (P&A) Systems Client Assistance Programs (CAP) for individuals with disabilities.
  - Built on the concept of “parents helping parents,” the Pacer Center, Inc., (Parent Advocacy Coalition for Educational Rights) at [www.pacer.org](http://www.pacer.org) offers a wide range of materials, information, and assistance to families.
  - The information presented at [www.pbis.org](http://www.pbis.org) by the Center on Positive Behavioral Interventions and Support is available in both English and Spanish.
  - View the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) or further explore federal regulations and issues at the *United States Office of Special Education Programs* (OSEP) [www.ed.gov/about/offices/list/OSERS/OSEP](http://www.ed.gov/about/offices/list/OSERS/OSEP).
  - Obtain the New Mexico state special education rules online through the Public Education Department at [www.ped.state.nm.us/seo](http://www.ped.state.nm.us/seo), as well as links to other topics related to special education in New Mexico.
  - Parents Reaching Out (PRO) at [www.parentsreaching out.org](http://www.parentsreaching out.org).
  - Education for Parents of Indian Children with Special Needs (EPICS) at [jeanetteT@EpicsProject.org](mailto:jeanetteT@EpicsProject.org).
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