



SPECIAL EDUCATION DUE PROCESS PROCEDURES IN PENNSYLVANIA

A. Due Process Overview and Statute of Limitations:

What is a due process hearing and how does this shape the experience that parents have with their child’s local education authority (LEA)? First, a due process hearing is the means by which parents and school districts resolve disputes pertaining to their child’s education. A due process hearing differs from other means of resolving disputes, as it relies on a Hearing Officer to render the final decision. A due process hearing is also similar to a trial, as it allows lawyers and pro-se parties to examine and cross examine witnesses, present and admit evidence into the record, all of which allows the hearing officer to render a decision. Once the hearing officer reviews all evidence and testimony, he or she will produce a written decision. This written decision is a legally enforceable document, which establishes the legal obligations of the parties.

When filing for a due process hearing against an LEA, the parent should be aware of the statute of limitations that determines how far into the future they may request relief. Simply stated, a statute of limitations is a “Timeline for requesting a hearing.”¹ In Pennsylvania, parents or an agency must file for a due process hearing, based on their due process complaint, within two years of the cause of action. As parents seek to resolve their dispute, they should keep the statute of limitations in mind.

¹ Office for Dispute Resolution, Understanding Special Education Due Process Hearings, 33, available at, http://odr-pa.org/wp-content/uploads/pdf/DPH_parent_guide.pdf.

When a parent or school district seeks to resolve a dispute through a due process hearing, they will submit their request for relief to the Office for Dispute Resolution (ODR). ODR, which oversees the due process hearing, is a federally funded program under the Individuals with Disabilities Education Act (IDEA). ODR provides parents and schools with a menu of options for resolving disputes, which includes due process hearings, mediation, and other forms of dispute resolution.

B. Due Process Complaints and Responses:

Once a parent or school district files for due process, they will have to complete forms pertaining to their complaint. The Due Process Complaint Notice is a form, which parents file to initiate the legal action. The form also apprizes the school district that the parent has filed for a due process hearing. Parents should send the complaint to the opposing party and to the ODR at the same time. This can be done through email. Pennsylvania law requires a party to file the due process complaint before the ODR will hold a due process hearing. The opposing party may challenge the “sufficiency of the Due Process Complaint Notice” if the form lacks necessary information. This means that the parent filing the form must describe the “nature of their problem” and support their allegation with facts that support the request for relief. Finally, the parent must propose a resolution to this problem.

ODR will find that the due process complaint is sufficient, unless the recipient of the complaint notifies the hearing officer and the filing party that they do not believe the due process complaint meets ODR’s criteria for relief. The receiving party must notify the hearing officer and other party, in writing, within fifteen days of receiving the complaint that it is insufficient. The hearing officer, upon receiving the challenge to the sufficiency of due process, must make a determination “on the face of the complaint.”

Upon being notified of the due process hearing, the LEA must file a response. First, the LEA must provide an explanation of why it “proposed or refused to take the action raised in the due process complaint.”² Second, the LEA must describe the options that the IEP team considered and why they chose to reject them. Third, the response must describe each “evaluation procedure, assessment, record,” and the reasons why they rejected those options.³ Finally, the LEA must describe the other factors that allowed them to decide to reject the particular action.

ODR also permits parties to amend their Due Process Complaint. The ODR, however, establishes several conditions, under which a party may amend their complaint. ODR holds that a party may only amend if the other party to the action “consents in writing.” Further, ODR must afford the opposing party an opportunity to “resolve the complaint through a resolution meeting.” In the alternative, a party may amend if the hearing officer gives permission for the amendment. If given permission, the party may do so “any time no later than five days before the due process hearing.”⁴ Parties should bear in mind that if they seek to amend their due process complaint, the resolution period begins again at the filing of the amended complaint. In other words, the clock for the timeline to complete the resolution period is reset at the date of the amended filing.

If an LEA receives a parent-filed due process complaint, a thirty-day resolution period begins. The LEA within fifteen days of receipt of the complaint must convene a meeting with the parent and members of the IEP team. Members from the IEP team should be those members that have knowledge of the facts alleged in the complaint. The goal of this meeting is to facilitate a conversation about the complaint, which includes the

² Office for Dispute Resolution, Pennsylvania Special Education Dispute Resolution Manual, 25, available at <http://odr-pa.org/wp-content/uploads/pdf/Dispute-Resolution-Manual.pdf>.

³ *Id.*

⁴ *Id.*

underlying concerns that led to the parents filing the complaint. Furthermore, the meeting maintains the goal of affording the LEA with opportunity to resolve the issues with the parents.

Parents should be aware that the LEA is not permitted to bring their attorney, unless the parent's attorney is present. Both the parent and the LEA decide what members of the IEP team should be present at the meeting. Parents should further be aware that the resolution meeting is mandatory, unless the parties agree in writing to waive their right to the meeting. Alternatively, the parties do not need to convene a meeting if the parties elect to use mediation in place of the due process hearing.

If, within thirty days of receipt, the LEA has not resolved the parents' due process complaint the due process hearing may take place. At this point, the timeline for completing the hearing and rendering a decision starts. Parents should be aware, if they fail to participate in the resolution process, and after reasonable, documented attempts to obtain their presence, then at the conclusion of the thirty-day period, the LEA may request that the hearing officer dismiss the complaint for due process. Conversely, if the LEA does not convene the resolution meeting within fifteen days or refuses to participate in a resolution meeting, then the parent may move to request that the hearing officer to start the due process hearing timelines and procedures.

What happens if the parties reach an agreement in a resolution meeting? If the parties reach a resolution, then the parties form a legally binding agreement. Both the parents and an LEA representative, who has authority to bind the LEA, sign the agreement. Any federal or state court may enforce the agreement. The parties have up to three business days to void the agreement. If either of the parties voids the agreement, then the hearing officer holds the hearing.

Parties must, at least five business days before the due process hearing, disclose to

the opposing party, all of its evidence. Evidence includes any witnesses or evidence that parties will present at the hearing. In addition, within at least five business days of the hearing, the parties must disclose to the opposing party any evaluations and recommendations based on those evaluations that they wish to present. Parties also have the right to request that hearing officer exclude undisclosed evidence. The hearing officer maintains discretion to grant or deny the party's motion to exclude.

C. Dispute Resolution

Parties may elect, prior to filing for a due process hearing, to resolve their issues. Rather than the hearing, they may resolve their differences through alternative dispute resolution (ADR). The Pennsylvania Office for Dispute Resolution presents parties with several avenues to resolve their disputes, which have been shown to be successful. In Pennsylvania, ADR often settles special education conflicts without the due process hearing. The next few paragraphs will treat several of the dominant modes of dispute resolution provided by ODR.

IEP facilitation: This is a voluntary means of resolving the dispute, which involves all parties being present at an IEP meeting. Here, the parties use a facilitator, who helps the parties to overcome disputes arising during the IEP process. The neutral also helps the parties to draft the IEP. Parties tend to invoke the process when they cannot come to an agreement or when the IEP meeting results in a hostile environment. The facilitator will work to resolve disagreements between parents and the LEA. The facilitator will help the parties to keep "open communication" between the parties. Both parties should bear in mind that the facilitator will not write the IEP.

Resolution meeting facilitation: This is a process where parties voluntarily participate in a meeting where a facilitator resolves disagreements with both parties.

Resolution meeting facilitation lends itself to parties resolving the dispute early in the process. Parties tend to invoke this process when they have reached an impasse. IDEA 2004 mandates resolution meetings when parents initiate due process requests. Parties, however, may agree to waive participation in this meeting or, instead, may wish to use mediation. In order to waive participation in the meeting, both parties must agree. IDEA holds that the first thirty days after a parent requests due process constitutes a resolution period. If both parties believe that a third-party neutral will enable them to resolve their dispute, the Office of Dispute Resolution will provide a facilitator. Parties should be aware that ODR does not charge for the services provided by their facilitator.

Evaluative Conciliation Conference (ECC): Like facilitation, ECC uses an impartial party, called an ECC consultant, to help parents and the LEA to reach an agreement. The ECC consultant begins by assessing the strengths and weaknesses of each party's case. The ECC bases this assessment on their understanding relevant law, similar special education legal decisions, and the facts of the parties' case. If the parties agree to move to the second phase of ECC, the ECC consultant facilitates a conversation between the parties. If the conversation is successful, then the parties bear the responsibility of executing the settlement agreement. The process is voluntary, which means that parties may withdraw their participation at any time. Parties may also pursue other forms of dispute resolution. Finally, parties are permitted to resolve their differences without the ECC consultant.

D.) Mediation:

Parties also have the option to mediate their dispute. Mediation is a voluntary process, where both parties agree to use a third party to help craft a resolution. ODR's list of mediators provides parties with qualified mediators, who are knowledgeable about special education law. Parties may request mediation directly from the LEA or through

ODR. To request mediation through ODR, parties fill out a mediation request form and mail it to ODR. Parties may request mediation by itself or along with their request for a due process hearing. ODR will offer a timely scheduling of the mediation that is in a convenient location for the parties. If only one of the child's parents request mediation, ODR will notify the other parent of the time and place of the mediation. ODR, however, will not contact the other parent if that parent's educational rights have been terminated.

Mediators will ask parties to sign an agreement to mediate and a confidentiality clause. The parties will agree that they cannot call the mediator as a witness in any future proceedings pertaining to that child. Parties will further agree that any conversations that take place during the mediation process will remain confidential. ODR bars parties from using any statements made during mediation as evidence in a subsequent proceeding.

If parties resolve their dispute through mediation, they must execute an agreement, which is legally binding. Both the parents and the LEA will sign this agreement. This final agreement will be enforceable by the court. One final note: The LEA must not use mediation to deny or delay the parents' rights to a due process hearing. Moreover, the LEA must not engage in any dilatory action with the intent to deny the parent any of their rights.

E. Preparing for the hearing:

Prior to participating in a due process hearing, ODR recommends assessing the strength of your case. ODR indicates that a parent should not expend money and energy prosecuting a case "if you are not likely to win."⁵ According to ODR, parents should ask themselves, "what is the likelihood that a hearing officer would agree with you?"⁶ Parents should, consider what the law states and how the facts of their situation fit within the

⁵ Pennsylvania Special Education Dispute Resolution Manual at 20.

⁶ *Id.*

relevant law.

Once a parent has decided that the facts of the case will likely allow them to prevail, they will need to prepare for the actual hearing. First, parents should obtain the required documents for the hearing. These documents may include your child's IEP, 504 plan, school evaluations, report cards, homework and tests, written communication with the school, and assessments by other education professionals. These documents will function as evidence, and will help the hearing officer to render their final decision. Along with necessary documents, parents should then decide what witnesses they wish to bring to the hearing. Like the documents, the witnesses will also help the hearing officer to render a decision.

ODR suggests that while preparing for the hearing, "do not stop talking to and working with the school."⁷ By working with the school, both parties may come to share valuable information with each other. This, in turn, may help both parties to reach a resolution prior to the date of the hearing.

F. At the Hearing:

IDEA and ODR confer rights on Parents and LEAs at the due process hearing. Both parties have the right to present evidence, including testimony. They also have the right to confront witnesses, examine and cross-examine, and even to compel a witness to attend the hearing. Both parties may also obtain both an electronic record of the hearing and written, electronic copy of the decision.

Parents should understand what rights IDEA confers on them. First, parents have the right to representation by an attorney. They also have the right to seek advisement from experts or persons with knowledge about children with disabilities. These experts, too, may accompany parents to the due process hearing. In addition, IDEA permits parents to bring their child to the hearing. Parents may also have access to the child's education

⁷ *Understanding Special Education Due Process Hearings* at 22.

records in preparation for the hearing. Furthermore, parents have the right to request that the meeting be made open to the public. At the conclusion of the hearing, parents may have a copy of the record and the decision. It is important to note, that parents are permitted access to these copies free of charge.

Parents attending the hearing may be curious to know how the process will unfold. Parents, as well as the LEA, should understand that the hearing officer maintains the “discretion to regulate the conduct of the hearing.”⁸ This discretion permits the hearing officer to decide the order of presentation. The following description is based on the typical order hearing officers tend to follow. First, the hearing officer will begin by offering introductory remarks. This often includes a personal introduction, comment on the record, “stating the general purpose of the hearing,” determining the representatives for each party, and advising pro-se parties of their right to be represented by an attorney. Following the introduction by the hearing officer, each party is presented with the opportunity to make an opening statement. The opening statement is often a succinct and “specific” description of the issues.⁹ The opening statement is not a testimony, maintaining the goal to put facts into evidence. Rather, it summarizes positions and the relief that the parties seek. In some instances, the hearing officer may restate the issues, following the opening statements.

Once the parties conclude their opening statements, parties will then present their evidence. The general rule is that the party who filed for the hearing maintains the initial burden of production of evidence. Once the first party finishes presenting their evidence, the opposing party presents their case. Parties present evidence by calling witnesses and by producing exhibits. When a party calls a witness, the party elicits testimony from the

⁸ *Id.* at 17.

⁹ *Id.*

witness through direct examination. The opposing party then has the opportunity to cross-examine the witness. The hearing officer may also examine witnesses at any time. Once the parties have concluded presenting their witnesses and evidence, the parties will make their closing statements. The hearing officer has discretion to decide whether the closing statements are to be oral or written. Finally, the hearing officer makes his or her own concluding remarks. Here, the hearing officer will confirm the period of when they will render a decision. At this time, the hearing officer states on the record that they have concluded the hearing.

G. Receiving the decision:

The hearing officer must render a written decision to the parties or to their counsel. The decision must be in a written or electronic format, depending on the preferences of the parties. Once a hearing officer has rendered the decision, the Pennsylvania Department of Education has the authority to ensure that LEA is implementing the educational program in accordance with the hearing officer's decision. Unlike the Pennsylvania Department of Education, ODR and the hearing officer do not have the ability to enforce the hearing officer's decision.

Upon rendering a decision, the hearing officer will issue the LEA an assurance form. The LEA is required to fill out this form, which guarantees that it will adhere to the hearing officer's decision. Once completed, the LEA sends the form to ODR. If, however, the hearing officer has not mandated that the LEA take action, then the LEA is not required to complete the assurance form.

ODR is then required to publish all decisions, except for those pertaining to gifted students without a disability. ODR must publish the decision after they redact the student's personal information. All hearing officer decisions are available at ODR's website;

<http://odr-pa.org/due-process/hearing-officer-decision>.

A party to the dispute may appeal the final decision of a hearing office to a “court of competent jurisdiction.”¹⁰ Either party may appeal a hearing officer decision to a state court within thirty calendar days. Furthermore, either party may appeal the decision to a federal court within ninety calendar days of the date of the decision

If a party, after receiving the hearing officer’s decision, wishes to file a civil action, then they must exhaust administrative remedies. A party must exhaust administrative remedies in order to bring an action under the U.S. Constitution, § 504 of the Rehabilitation Act, or the Americans with Disabilities Act. Pennsylvania law adds, under Chapter 15 of the Pennsylvania Code, a party filing a claim of discrimination is not required to exhaust all administrative remedies in Chapter 15 before filing under § 504.

¹⁰ *Id.* at 45.