

# DEPARTMENT OF EDUCATION

## OFFICE OF THE SECRETARY

Statutory Authority: 14 Delaware Code, Section 122(b) (14 **Del.C.** §122(b))  
14 **DE Admin. Code** 926

### FINAL

#### REGULATORY IMPLEMENTING ORDER

##### 926 Children with Disabilities Subpart E Procedural Safeguards for Parents and Children

#### I. SUMMARY OF THE EVIDENCE AND INFORMATION SUBMITTED

The Secretary of Education seeks the consent of the State Board of Education to amend 14 **DE Admin. Code** 926 Children with Disabilities Subpart E Procedural Safeguards for Parents and Children. This regulation is being amended to align with changes made to 14 **Del.C.** Ch. 31, regarding the appointment of individuals to represent the educational interest of children with disabilities.

Notice of the proposed regulation was published in the *News Journal* and the *Delaware State News* on October 1, 2016 in the form hereto attached as Exhibit "A". Comments were received from the Attorney General's Office, Governor's Advisory Council for Exceptional Citizens and the State Council for Persons with Disabilities endorsing the proposed regulation. However, the Councils did suggest that Section 20.1.2 could be clarified to include the option of a "supported decision-making agreement" as a new Health and Social Services law specifically authorizes agents appointed in this matter to assist with accessing educational records and assisting with the education decision-making. The Department does not believe this statement is needed, as the intent of the amended regulation is to provide for an educational representative to make decisions on behalf of students with disabilities, not to regulate for supported or assisted decision making for all adults. There was only a slight change to the Authority reference in Section 20.0. The reference was moved to the end of the section and §3132 was added for further clarification.

#### II. FINDINGS OF FACTS

The Secretary finds that it is appropriate to amend 14 **DE Admin. Code** 926 Children with Disabilities Subpart E Procedural Safeguards for Parents and Children in order to align with changes made to 14 **Del.C.** Ch. 31, regarding the appointment of individuals to represent the educational interest of children with disabilities.

#### III. DECISION TO AMEND THE REGULATION

For the foregoing reasons, the Secretary concludes that it is appropriate to amend 14 **DE Admin. Code** 926 Children with Disabilities Subpart E Procedural Safeguards for Parents and Children.

Therefore, pursuant to 14 **Del.C.** §122, 14 **DE Admin. Code** 926 Children with Disabilities Subpart E Procedural Safeguards for Parents and Children attached hereto as Exhibit "B" is hereby amended. Pursuant to the provision of 14 **Del.C.** §122(e), 14 **DE Admin. Code** 926 Children with Disabilities Subpart E Procedural Safeguards for Parents and Children hereby amended shall be in effect for a period of five years from the effective date of this order as set forth in Section V. below.

#### IV. TEXT AND CITATION

The text of 14 **DE Admin. Code** 926 Children with Disabilities Subpart E Procedural Safeguards for Parents and Children amended hereby shall be in the form attached hereto as Exhibit "B", and said regulation shall be cited as 14 **DE Admin. Code** 926 Children with Disabilities Subpart E Procedural Safeguards for Parents and Children in the Administrative Code of Regulations for the Department of Education.

#### V. EFFECTIVE DATE OF ORDER

The actions hereinabove referred to were taken by the Secretary pursuant to 14 **Del.C.** §122 on December 15, 2016. The effective date of this Order shall be ten (10) days from the date this Order is published in the *Delaware Register of Regulations*.

**IT IS SO ORDERED** the 15<sup>th</sup> day of December 2016

Approved this 15<sup>th</sup> day of December 2016

**State Board of Education**

Teri Quinn Gray, Ph.D., President  
G. Patrick Heffernan  
Barbara B. Rutt

Gregory B. Coverdale, Jr.  
Terry M. Whittaker, Ed.D.  
Nina L. Bunting

**926 Children with Disabilities Subpart E Procedural Safeguards for Parents and Children**

**Non-regulatory note:** Some sections of this regulation are shown in *italics*. Federal law requires that the Delaware Department of Education identify in writing any Delaware rule, regulation or policy that is a state-imposed requirement rather than a federal requirement (see 20 USC §14079(a)(2)). The *italicized portions* of this regulation are Delaware-imposed requirements for the education of children with disabilities and are not specifically required by federal special education law and regulations.

**1.0 General Procedural Safeguards and Opportunity to Examine Records and Educational Programs**

- 1.1 Each LEA and other public agency shall establish, maintain, and implement procedural safeguards that meet the requirements of 926.1.2, 926.2.0 through 926.5.0, 926.10.0, 926.18.0, 926.30.0 through 926.31.0, and 926.33.0 through 926.36.0.  
(Authority: 20 U.S.C.1415(a); 14 **Del.C.** §3110 and 14 **Del.C.** Ch. 31, Subchapter V)
- 1.2 Opportunity to Examine Records and Educational Programs
  - 1.2.1 Opportunity to examine records: The parents of a child with a disability, either personally or through representative, shall be afforded an opportunity to inspect and review all relevant education records with respect to the identification, evaluation, and educational placement of the child; and the provision of FAPE to the child.
  - 1.2.2 Parents shall have the right to obtain copies of all educational records, except the actual evaluation or examination instrument, either without charge, or, at the discretion of the public 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.
  - 1.2.3 *The parents of a student with a disability shall have the right to visit and observe, either personally or through a representative, their child's current or proposed educational program. The public agency may require advance notice when parents or guardians wish to visit a proposed educational program.*
- 1.3 Parent participation in meetings: The parents of a child with a disability shall be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child.
  - 1.3.1 Each public agency shall provide notice consistent with 14 **DE Admin. Code** 925.22.1.1 and 925.22.2 to ensure that parents of children with disabilities have the opportunity to participate in meetings described in 1.3.
  - 1.3.2 A meeting does not include informal or unscheduled conversations involving public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.
- 1.4 Parent involvement in placement decisions: Each public agency shall ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.
  - 1.4.1 In implementing the requirements of 1.4, the public agency shall use procedures consistent with the procedures described in 14 **DE Admin. Code** 925.22.1 through 925.22.2.
  - 1.4.2 If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency shall use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.
  - 1.4.3 A placement decision may be made by a group without the involvement of a parent, if the public agency is unable to obtain the parent's participation in the decision. In this case, the public agency shall have a record of its attempt to ensure their involvement.
- 1.5 *Minutes of Meetings. A parent, a parent's authorized representative, or any public agency conducting a meeting, review or conference may take minutes of the meeting, review or conference concerning a child with*

*a disability's free and appropriate public education. Minutes may be taken by a disclosed recording device or by a stenographer. The cost of recording the minutes is the responsibility of the person or agency electing to take minutes. Once taken, public agency minutes shall be maintained subject to the confidentiality requirements of these regulations and any other applicable Delaware or federal law. If initiated by the public agency, parents must be offered a free digital copy.*

(Authority: 20 U.S.C. 1414(e), 1415(b)(1); 14 **Del. C.** §§3110, 3130 and 3131)

**14 DE Reg. 1065 (04/01/11)**

**19 DE Reg. 1018 (05/01/16)**

## **2.0 Independent Educational Evaluation**

- 2.1 General: The parents of a child with a disability have the right to obtain an independent educational evaluation of the child subject to 2.4 through 2.9.
- 2.2 Each public agency shall provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in 2.9.
- 2.3 Definitions for the purposes of this subpart:
  - "Independent Educational Evaluation"** means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.
  - "Public Expense"** means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with 14 **DE Admin. Code** 923.3.0.
- 2.4 Parent right to evaluation at public expense; A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in 2.4.1 through 2.5.
  - 2.4.1 If a parent requests an independent educational evaluation at public expense, the public agency shall, without unnecessary delay, either:
    - 2.4.1.1 File a due process complaint to request a hearing to show that its evaluation is appropriate; or
    - 2.4.1.2 Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to 14 **DE Admin. Code** 926.7.0 through 926.13.0 that the evaluation obtained by the parent did not meet agency criteria.
  - 2.4.2 If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.
- 2.5 If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.
- 2.6 A parent is entitled to only one (1) independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.
- 2.7 Parent initiated evaluations: If the parent obtains an independent educational evaluation at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation shall be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and may be presented by any party as evidence at a hearing on a due process complaint under 14 **DE Admin. Code** 926 regarding that child.
- 2.8 Requests for evaluations by hearing officers. If a hearing panel or a single hearing officer appointed for expedited appeals under 32.0 requests an independent educational evaluation as part of a hearing on a due process complaint, the cost of the evaluation shall be at public expense.
- 2.9 Agency criteria: If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, shall be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.
- 2.10 Except for the criteria described in 2.9, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

(Authority: 20 U.S.C. 1415(b)(1) and (d)(2)(A); 14 **Del.C.** §3110)

## **3.0 Prior Notice by the Public Agency: Content of Notice**

- 3.1 Notice: Written notice that meets the requirements of 3.2 shall be given to the parents of a child with a disability no less than ten (10) school days before the public agency:
  - 3.1.1 Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
  - 3.1.2 Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; and
  - 3.1.3 *In cases involving a change of placement for a disciplinary removal, written notice shall be provided no less than five (5) school days before the public agency proposes to change the child's placement.*
- 3.2 Content of notice: The notice required in 3.1 shall include:
  - 3.2.1 A *written* description of the action proposed or refused by the agency; and
  - 3.2.2 A *written* explanation of why the agency proposes or refuses to take the action; and
  - 3.2.3 A *written* description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action; and
  - 3.2.4 A *written* statement that the parents of a child with a disability have protection under the procedural safeguards of *state and federal* regulations and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained; and
  - 3.2.5 Sources for parents to contact to obtain assistance in understanding the provisions of these regulations, *including contact information for parent assistance programs, legal assistance programs, and the Delaware State Bar Association*; and
  - 3.2.6 A *written* description of any other options the IEP Team considered and the reasons why those options were rejected; and
  - 3.2.7 A *written* description of other factors which are relevant to the agency's proposal or refusal; and
  - 3.2.8 A *written summary of procedural safeguards must be available to the parents under state and federal law and regulations.*
    - 3.2.8.1 *A full copy of the procedural safeguards under state and federal law and regulations shall be provided to the parents at the IEP meeting.*
- 3.3 Notice in understandable language: The notice required in 3.1 shall be:
  - 3.3.1 Written in language understandable to the general public; and
  - 3.3.2 Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.
- 3.4 If the native language or other mode of communication of the parent is not a written language, the public agency shall take steps to ensure that:
  - 3.4.1 The notice is translated orally or by other means to the parent in his or her native language or other mode of communication; and
  - 3.4.2 The parent understands the content of the notice; and
  - 3.4.3 There is written evidence that the requirements in 3.4.1 and 3.4.2 have been met.

(Authority: 20 U.S.C. 1415(b)(3) and (4), 1415(c)(1), 1414(b)(1)); 14 **Del.C.** §3110, 14 **Del.C.** §3130, 14 **Del.C.** §3133, 14 **Del.C.** §3134)

14 DE Reg. 1065 (04/01/11)

15 DE Reg. 354 (09/01/11)

19 DE Reg. 1018 (05/01/16)

#### 4.0 Procedural Safeguards Notice

- 4.1 General: A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only one (1) time a school year, except that a copy also shall be given to the parents:
  - 4.1.1 Upon initial referral or parent request for evaluation;
  - 4.1.2 Upon receipt of the first State complaint 14 **DE Admin. Code** 923.51.0 through 923.53.0 and upon receipt of the first due process complaint in 7.0 in a school year;
  - 4.1.3 *Upon the decision to remove a child with a disability from his or her educational placement because of a violation of a code of student conduct*; and
  - 4.1.4 Upon request by a parent.
  - 4.1.5 *In addition, a copy of the procedural safeguards notice shall be ~~offered~~ provided to the parents of a child with a disability at each IEP meeting convened for the child.*
- 4.2 Internet Web site: A public agency may place a current copy of the procedural safeguards notice on its Internet Web site if a Web site exists.

- 4.3 Contents: The procedural safeguards notice shall include a full explanation of all of the procedural safeguards available under these regulations relating to:
- 4.3.1 Independent educational evaluations;
  - 4.3.2 Prior written notice;
  - 4.3.3 Parental consent;
  - 4.3.4 Access to education records;
  - 4.3.5 Opportunity to present and resolve complaints through the due process procedures, including:
    - 4.3.5.1 The time period in which to file a complaint;
    - 4.3.5.2 The opportunity for the agency to resolve the complaint; and
    - 4.3.5.3 The difference between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures.
  - 4.3.6 The availability of mediation;
  - 4.3.7 Procedures for students who are subject to placement in an interim alternative educational setting;
  - 4.3.8 Requirements for unilateral placement by parents of children in private schools at public expense;
  - 4.3.9 Hearings on due process complaints, including requirements for disclosure of evaluation results and recommendations;
  - 4.3.10 Appeal rights;
  - 4.3.11 Civil actions, including the time period in which to file those actions; and
  - 4.3.12 Attorneys' fees.
- 4.4 Notice in understandable language: The notice required in 4.1 shall meet the requirements of 3.3.  
(Authority: 20 U.S.C. 1415(d))

**14 DE Reg. 1065 (04/01/11)**

**5.0 Electronic Mail**

A parent of a child with a disability may elect to receive notices required by 3.0, 4.0 and 8.0 by an electronic mail communication, if the public agency makes that option available.  
(Authority: 20 U.S.C. 1415(n); 14 Del.C. §3110)

**6.0 Mediation**

- 6.1 General: The DOE shall offer and ensure that procedures are established and implemented to allow parties to disputes involving any matter under these regulations, including matters arising prior to the filing of a due process complaint, to resolve disputes through a mediation process.
- 6.2 Requirements: The mediation process offered by the DOE shall be:
- 6.2.1 Voluntary on the part of the parties;
  - 6.2.2 Not used to deny or delay a parent's right to a hearing on the parent's due process complaint, or to deny any other rights afforded under Part B of the Act; and
  - 6.2.3 Conducted by a qualified and impartial mediator who is trained in effective mediation techniques. *In addition, parents will be permitted to be accompanied and advised at mediation by individuals of their choice. Any public agency involved in mediation shall assure that an individual from the public agency with the authority to make decisions and commit resources to agreed upon services attends the mediation.*
- 6.3 Any LEA or other public agency 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 an appropriate alternative dispute resolution entity, or a parent training and information center or community parent resource center in the State established under section 671 or 672 of the Act; and who would explain the benefits of, and encourage the use of, the mediation process to the parents.
- 6.3.1 The DOE shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services, select mediators on a random, rotational, or other impartial basis and bear the cost of the mediation process, including the costs of meetings described in 6.3.
- 6.4 Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

- 6.5 If the parties resolve a dispute through the mediation process, the parties shall execute a legally binding agreement that sets forth that resolution and that:
- 6.5.1 States that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding; and
  - 6.5.2 Is signed by both the parent and a representative of the agency who has the authority to bind such agency.
- 6.6 A written, signed mediation agreement in 6.5 is enforceable in any State court of competent jurisdiction or in a district court of the United States. Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any Federal court or Delaware court.
- 6.7 Impartiality of mediator; An individual who serves as a mediator under these regulations may not be an employee of the DOE or the LEA that is involved in the education or care of the child; and shall not have a personal or professional interest that conflicts with the person's objectivity.
- 6.7.1 A person who otherwise qualifies as a mediator is not an employee of an LEA, the DOE or other State agency described in 14 **DE Admin. Code** 924.28.0 solely because he or she is paid by the agency to serve as a mediator.
- (Authority: 20 U.S.C. 1415(e); 14 **Del.C.** §3110)

## **7.0 Filing a Due Process Complaint**

- 7.1 General: A parent or a public agency may file a due process complaint with the Secretary relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child.
- 7.2 The due process complaint shall allege a violation that occurred not more than two (2) years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, except as provided in 11.9.
- 7.3 Information for parents: The public agency shall inform the parent of any free or low cost legal and other relevant services available in the area if the parent requests the information. The DOE shall inform the parent of any such services if the parent or an agency files a due process complaint under this section.
- (Authority: 20 U.S.C. 1415(b)(6); 14 **Del.C.** §3135)

## **8.0 Due Process Complaint**

- 8.1 General: When a party submits a due process complaint to the Secretary, that party, or the attorney representing that party, shall also provide a copy of the complaint (which shall remain confidential) to the opposing party.
- 8.2 Content of complaint: The due process complaint required in 8.1 shall include:
- 8.2.1 The name of the child; and
  - 8.2.2 The address of the residence of the child; and
  - 8.2.3 The name of the school the child is attending; and
  - 8.2.4 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;
  - 8.2.5 A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and
  - 8.2.6 A proposed resolution of the problem to the extent known and available to the party at the time.
- 8.3 Notice required before a hearing on a due process complaint: A party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements in 8.2.
- 8.4 Sufficiency of complaint: The due process complaint required by this section shall be deemed sufficient unless the party receiving the due process complaint notifies the hearing panel and the other party in writing, within fifteen (15) days of receipt of the due process complaint, that the receiving party believes the due process complaint does not meet the requirements in 8.2 of this section.
- 8.5 Within five (5) days of receipt of notification under 8.4, the hearing panel shall make a determination on the face of the due process complaint of whether the due process complaint meets the requirements in 8.2, and shall immediately notify the parties in writing of that determination.
- 8.6 A party may amend its due process complaint only if:

- 8.6.1 The other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting held pursuant to 10.0 (resolution meeting); or
- 8.6.2 The hearing panel grants permission, except that the hearing panel may only grant permission to amend at any time not later than five (5) days before the due process hearing begins.
- 8.7 If a party files an amended due process complaint, the timelines for the resolution meeting in 10.1 and the time period to resolve in 10.4 begin again with the filing of the amended due process complaint.
- 8.8 LEA response to a due process complaint: If the LEA has not sent a prior written notice under 3.0 to the parent regarding the subject matter contained in the parent's due process complaint, the LEA shall, within ten (10) days of receiving the due process complaint, send to the parent a response that includes:
  - 8.8.1 An explanation of why the agency proposed or refused to take the action raised in the due process complaint; and
  - 8.8.2 A description of other options that the IEP Team considered and the reasons why those options were rejected; and
  - 8.8.3 A description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and
  - 8.8.4 A description of the other factors that are relevant to the agency's proposed or refused action.
- 8.9 A response by an LEA under 8.8 of this section shall not be construed to preclude the LEA from asserting that the parent's due process complaint was insufficient, where appropriate.
- 8.10 Other party response to a due process complaint: Except as provided in 8.8 and 8.9, the party receiving a due process complaint shall, within ten (10) days of receiving the due process complaint, send to the other party a response that specifically addresses the issues raised in the due process complaint.  
(Authority: 20 U.S.C. 1415(b)(7), 1415(c)(2); 14 **Del.C.** §3110)

## 9.0 Model Forms

- 9.1 The DOE shall provide model forms to assist parents and public agencies in filing a due process complaint in accordance with 7.0 and 8.0 and to assist parents and other parties in filing a State complaint under 14 **DE Admin. Code** 923.51.0 through 923.53.0. However, the use of the model forms is not required.
- 9.2 Parents, public agencies, and other parties may use the appropriate model form described in 9.1, or another form or other document, so long as the form or document that is used meets, as appropriate, the content requirements in 7.0 and 8.2 for filing a due process complaint, or the requirements in 14 **DE Admin. Code** 923.53.2 for filing a State complaint.  
(Authority: 20 U.S.C. 1415(b)(8); 14 **Del.C.** §3110)

## 10.0 Resolution Process

- 10.1 Resolution meeting: Within fifteen (15) days of receiving notice of the parent's due process complaint, and prior to the initiation of a due process hearing under 11.0, the LEA shall convene a meeting with the parent and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process complaint that:
  - 10.1.1 Includes a representative of the public agency who has decision-making authority on behalf of that agency; and
  - 10.1.2 May not include an attorney of the LEA unless the parent is accompanied by an attorney.
- 10.2 The purpose of the meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the LEA has the opportunity to resolve the dispute that is the basis for the due process complaint.
- 10.3 The meeting described in 10.1 and 10.2 need not be held if the parent and the LEA agree in writing to waive the meeting; or the parent and the LEA agree to use the mediation process described in 6.0.
  - 10.3.1 The parent and the LEA determine the relevant members of the IEP Team to attend the meeting.
- 10.4 Resolution period:
  - 10.4.1 If the LEA has not resolved the due process complaint to the satisfaction of the parent within thirty (30) days of the receipt of the due process complaint, the due process hearing may occur.
  - 10.4.2 Except as provided in 10.5, the timeline for issuing a final decision under 15.0 begins at the expiration of this thirty (30) day period.
  - 10.4.3 Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding 10.4.1 and 10.4.2, the failure of the parent filing a due process complaint to participate in

the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.

- 10.4.4 If the LEA is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made and documented using the procedures in 14 **DE Admin. Code** 925.22.4; the LEA may, at the conclusion of the thirty (30) day period request the hearing panel dismiss the parent's due process complaint.
- 10.4.5 If the LEA fails to hold the resolution meeting specified in 10.1 within fifteen (15) days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of the hearing panel to begin the due process hearing timeline.
- 10.5 Adjustments to thirty (30) day resolution period: The forty five (45) day timeline for the due process hearing in 15.1 starts the day after one (1) of the following events:
  - 10.5.1 Both parties agree in writing to waive the resolution meeting;
  - 10.5.2 After either the mediation or resolution meeting starts, but before the end of the thirty (30) day period, the parties agree in writing that no agreement is possible;
  - 10.5.3 If both parties agree in writing to continue the mediation at the end of the thirty (30) day resolution period, but later, the parent or public agency withdraws from the mediation process.
- 10.6 Written settlement agreement: If a resolution to the dispute is reached at the meeting described in 10.1 and 10.2, the parties shall execute a legally binding agreement that is:
  - 10.6.1 Signed by both the parent and a representative of the agency who has the authority to bind the agency; and
  - 10.6.2 Enforceable in any State court of competent jurisdiction or in a district court of the United States.
- 10.7 Agreement review period. If the parties execute an agreement pursuant to 10.6, a party may void the agreement within three (3) business days of the agreement's execution.  
(Authority: 20 U.S.C. 1415(f)(1)(B); 14 **Del.C.** §3110)

## **11.0 Impartial Due Process Hearing**

- 11.1 General: Whenever a due process complaint is received under 7.0 or 32.0 (expedited appeal), the parents or the LEA involved in the dispute shall have an opportunity for an impartial due process hearing, consistent with the procedures in 7.0, 8.0, and 10.0.
- 11.2 The DOE shall be responsible for conducting the due process hearing as further provided in this section. Upon receipt of a due process complaint, the Secretary shall appoint a three (3) member hearing panel, on a rotating basis, consisting of:
  - 11.2.1 An attorney admitted to practice in ~~Delaware~~ and in good standing with the bar of a state;
  - 11.2.2 An educator knowledgeable in the field of special education and special education programming, and;
  - 11.2.3 A lay person with demonstrated interest in the education of the disabled included on an approved list compiled by the Advisory Council for Exceptional Citizens and submitted to the Secretary.
- 11.3 Impartial hearing officers: Hearing officers shall not be an employee of the DOE or the LEA that is 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.
- 11.4 The impartial hearing officer shall:
  - 11.4.1 Possess knowledge of, and the ability to understand, the provisions of the Act, Federal and State regulations pertaining to the Act, and legal interpretations of the Act by Federal and State courts;
  - 11.4.2 Possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice, *in cooperation and consultation with other hearing officers appointed to a given hearing panel*;
  - 11.4.3 Possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice, *in cooperation and consultation with other hearing officers appointed to a given hearing panel*; and
  - 11.4.4 *Complete training as required by the Secretary to ensure the adequate knowledge and competent performance of hearing officers.*
- 11.5 A person who otherwise qualifies to conduct a hearing under 11.3 is not an employee of the DOE solely because he or she is paid by the DOE to serve as a hearing officer.
- 11.6 The Secretary shall keep a list of the persons eligible to serve as hearing officers. The list shall include a statement of the qualifications of each of those persons.



- 11.7 Subject matter of due process hearings: The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under 8.2, unless the other party agrees otherwise.
- 11.8 Timeline for requesting a hearing: A parent or agency shall request an impartial hearing on their due process complaint within two (2) years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint.
- 11.9 Exceptions to the timeline; The timeline described in 11.8 does not apply to a parent if the parent was prevented from filing a due process complaint due to:
  - 11.9.1 Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or
  - 11.9.2 The LEA's withholding of information from the parent that was required under these regulations to be provided to the parent.
- 11.10 *Burden of proof: The burden of proof and persuasion in the due process hearing shall be on the public agency which is a party to the proceeding.*  
(Authority: 20 U.S.C. 1415(f)(1)(A), 1415(f)(3)(A)-(D); 14 Del.C. §§3110, 3137, 3140)

## **12.0 Hearing Rights**

- 12.1 General: Any party to a due process hearing conducted pursuant to 7.0 through 13.0, or 30.0 through 34.0, has the right to:
  - 12.1.1 Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities, except whether parties have the right to be represented by non-attorneys at due process hearings is determined by State law;
  - 12.1.2 Present evidence and confront and cross examine adverse witness;
  - 12.1.3 Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five (5) business days before the hearing;
  - 12.1.4 Obtain a written, or, at the option of the parents, electronic verbatim record of the hearing at public expense;
  - 12.1.5 Obtain a written, or, at the option of the parents, electronic decision which includes findings of fact and law; and
  - 12.1.6 Compel the attendance of witnesses:
    - 12.1.6.1 *Authority to issue subpoenas rests with the Secretary, or the Secretary's designee.*
    - 12.1.6.2 *Upon the application of any party to the Secretary at least twelve (12) days prior to a hearing, a subpoena shall be issued requiring the attendance of the person or persons listed in the application. A copy of the application for subpoenas shall be provided to the hearing panel and to the other party no later than the time it is provided to the Secretary.*
    - 12.1.6.3 *If a person subpoenaed to attend a hearing fails to obey without reasonable cause, or if such person 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 the such person to show cause why he or she should not appear to testify. Upon return of the rule, the Family Court shall examine such person under oath, and if the Family 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 Family 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.*
- 12.2 Additional disclosure of information; At least five (5) business days prior to a hearing conducted pursuant to 1.1, each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.
  - 12.2.1 The hearing panel may bar any party that fails to comply with paragraph 12.2 of this section from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.
- 12.3 Parental rights at hearings: *Any testimony presented at a due process hearing shall be under oath or affirmation. The hearing panel shall ensure that parents have been advised of their procedural safeguards.* Parents involved in hearings shall also be given the right to:
  - 12.3.1 Have the child who is the subject of the hearing present;
  - 12.3.2 Open the hearing to the public;
  - 12.3.3 Have the record of the hearing and the findings of fact and decisions provided at no cost to parents; and

12.3.4 *Have the hearing conducted at a time and place which is reasonably convenient to the parents and child involved.*

12.4 The due process hearing shall be conducted in accordance with hearing rules and procedures as from time to time developed by the DOE for the conduct of special education due process hearings.

(Authority: 14 Del.C. §§3110, 3135, 3137, 3139)

#### **14 DE Reg. 1065 (04/01/11)**

### **13.0 Hearing Decisions**

13.1 Decisions of hearing panel: Subject to 13.2 a hearing panel's determination of whether a child received FAPE shall be based on substantive grounds.

13.2 In matters alleging a procedural violation, a hearing panel may find that a child did not receive a FAPE only if the procedural inadequacies:

13.2.1 Impeded the child's right to a FAPE;

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

13.2.3 Caused a deprivation of educational benefit.

13.3 Nothing in 13.1 or 13.2 shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under 1.0 through 36.0.

13.4 Construction clause: Nothing shall be construed to affect the right of a parent to file an appeal of the due process hearing decision under 16.0.

13.5 Separate request for a due process hearing: Nothing shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

13.6 Findings and decision to Governor's Advisory Council for Exceptional Citizens and general public: The DOE, after deleting any personally identifiable information, shall transmit the findings and decisions referred to in 12.1.5 to the chairperson of the Governor's Advisory Council for Exceptional Citizens and make those findings and decisions available to the public *by placing legal notice annually in newspapers of sufficient circulation in each of the three (3) Delaware counties, that this information may be obtained through the DOE, and by placing the findings and decision on its Website.*

(Authority: 20 U.S.C. 1415(f)(3)(E) and (F), 1415(h)(4), 1415(o); 14 Del.C. §§3110, 3137, 3138(f))

### **14.0 Finality of Decision; Appeal; Impartial Review**

Finality of hearing decision: A decision made in a hearing conducted pursuant to 7.0 through 13.0 or 30.0 through 34.0 is final, except that any party involved in the hearing may file a civil action under 16.0.

(Authority: 20 U.S.C. 1415(g) and (h)(4), 1415(i)(1)(A), 1415(i)(2); 14 Del.C. §§3110, 3141 and 3142)

### **15.0 Timelines and Convenience of Hearings and Reviews**

15.1 The Secretary shall ensure that, not later than forty five (45) days after the expiration of the thirty (30) day period in 10.4, or the adjusted time periods described in 10.5, a final decision is reached in the hearing; and a copy of the decision is mailed to each of the parties.

15.2 *The hearing panel, for good cause, may grant specific extensions of time beyond the periods set out in 15.1 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 fifteen (15) days of the date of the hearing, or where applicable, within fifteen (15) days of the completion of post-hearing argument. In granting specific extensions, the panel shall ensure that a party's right to redress is in no way diminished or unnecessarily delayed.*

15.3 Each hearing shall be conducted at a time and place that is reasonably convenient to the parents and child involved.

(Authority: 20 U.S.C. 1415(f)(1)(B)(ii), 1415(g), 1415(i)(1) 14 Del.C. §§3110, 3136)

### **16.0 Civil Action**

16.1 General: Any party aggrieved by the findings and decision made under 7.0 through 13.0, or 30.0 through 34.0, has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under 7.0 or 30.0 through 32.0. The action may be brought in the Family Court or in a district court of the United States without regard to the amount in controversy.

16.2 Time limitation: The party bringing the action shall have ninety (90) days from the date of the decision of the hearing panel to file a civil action.

- 16.3 Additional requirements: In any action brought under 16.1, the Secretary, 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. The court:
- 16.3.1 Receives the records of the administrative proceedings;
  - 16.3.2 Hears additional evidence at the request of a party; and
  - 16.3.3 Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.
- 16.4 Jurisdiction of the district courts: The district courts of the United States have jurisdiction of actions brought under section 615 of the Act without regard to the amount in controversy.
- 16.5 Rules of Construction: Nothing in these regulations restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the Act, the procedures in 7.0 shall be exhausted to the same extent as would be required had the action been brought under section 615 of the Act.
- (Authority: 20 U.S.C. 1415(i)(2) and (3)(A), 1415(l) 14 **Del.C.** §§3110, 3142)

## **17.0 Attorneys' Fees**

- 17.1 In general: In any action or proceeding brought under section 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to:
- 17.1.1 The prevailing party who is the parent of a child with a disability;
  - 17.1.2 To a prevailing party who is an LEA or the DOE against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or
  - 17.1.3 To a prevailing LEA or the DOE 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.
- 17.2 Reserved.
- 17.3 Prohibition on use of funds: Funds under Part B of the Act may not be used to pay attorneys' fees or costs of a party related to any action or proceeding under section 615 of the Act and Subpart E of these regulations.
- 17.3.1 The prohibition in 17.3 does not preclude a public agency from using funds under Part B of the Act for conducting an action or proceeding under section 615 of the Act.
- 17.4 Award of fees: A court awards reasonable attorneys' fees under section 615(i)(3) of the Act consistent with the following:
- 17.4.1 Fees awarded under section 615(i)(3) of the Act shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this paragraph.
  - 17.4.2 Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under section 615 of the Act for services performed subsequent to the time of a written offer of settlement to a parent if:
    - 17.4.2.1 The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten (10) days before the proceeding begins;
    - 17.4.2.2 The offer is not accepted within ten (10) days; and
    - 17.4.2.3 The court or administrative hearing panel finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.
  - 17.4.3 Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless the meeting is convened as a result of an administrative proceeding or judicial action.
    - 17.4.3.1 A resolution meeting conducted pursuant to 10.0 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 17.0.
  - 17.4.4 Notwithstanding paragraph 17.4.2, an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.
    - 17.4.4.1 Except as provided in 17.4.5, the court reduces, accordingly, the amount of the attorneys' fees awarded under section 615 of the Act, if the court finds that:

- 17.4.4.1.1 The parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;
  - 17.4.4.1.2 The amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;
  - 17.4.4.1.3 The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or
  - 17.4.4.1.4 The attorney representing the parent did not provide to the LEA the appropriate information in the due process request notice in accordance with 8.0.
- 17.4.5 The provisions of 17.4.4.1 do not apply in any action or proceeding if the court finds that the State or local agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of the Act.
- (Authority: 20 U.S.C. 1415(i)(3)(B)-(G).)

## 18.0 Child's Status During Proceedings

- 18.1 Except as provided in 33.0, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under 7.0, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint shall remain in his or her current educational placement.
  - 18.2 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 the proceedings.
  - 18.3 If the complaint involves an application for initial services under these regulations from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned three (3), the public agency is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services under 14 **DE Admin. Code** 925.1.2 then the public agency shall provide those special education and related services that are not in dispute between the parent and the public agency.
  - 18.4 If the hearing panel in a due process hearing conducted by the DOE agrees with the child's parents that a change of placement is appropriate, that placement shall be treated as an agreement between the State and the parents for purposes of 18.1.
- (Authority: 20 U.S.C. 1415(j); 14 **Del.C.** §§3110, 3143)

## 19.0 Surrogate Parents.

- 19.1 Definition: As used in this section,
  - "**Educational Surrogate Parent**", "**Surrogate Parent**" and "**ESP**" all mean a person appointed by the DOE to represent a child who receives, or may be in need of, special education and related services in all educational decision making pertaining to the identification, evaluation, and educational placement of the student and the provision of FAPE to the child.
- 19.2 General: The DOE shall determine a child's eligibility for a surrogate parent. The DOE shall appoint a surrogate parent when:
  - 19.2.1 No parent as defined in 14 **DE Admin. Code** 922.3.0 can be identified;
  - 19.2.2 The public agency, after reasonable efforts, cannot locate a parent. Reasonable efforts shall include, but not be limited to, telephone calls, letters, certified letter with return receipt, or visit to the parents' last known address;
  - 19.2.3 The parental rights of the child's parents have been terminated and legal responsibility of the child has not been granted by a court of law to an individual, not to include a State agency, and the child has not been adopted;
  - 19.2.4 The child's parent has consented voluntarily, in writing, to the appointment of an educational surrogate parent. Such consent is revocable by the parent at any time by written notice to the DOE;
  - 19.2.5 The child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(6)); or
  - 19.2.6 *The child is in the custody of the Department of Services for Children, Youth, and their Families and in need of an educational surrogate parent.*
- 19.3 The DOE shall make reasonable efforts to appoint a surrogate parent within thirty (30) days after a request is submitted by an LEA or other public agency.

- 19.4 A surrogate parent shall not be required for a child who receives, or may be in need of, special education and related services when the child is living in the home of a relative who agrees to act in the place of the parent and for whom a Caregiver's School Authorization executed in compliance with 14 Del.C. §202(f)(10) is on file.
- 19.5 A child between the ages of eighteen (18) and twenty-one (21) shall remain eligible for the services of a surrogate parent appointed by the DOE, and unless declared incompetent by a court of law, such child shall have the right of access to a surrogate parent; the right to refuse the appointment of a surrogate parent; the right to participate in the selection of a surrogate parent; and the right to terminate the services of the surrogate parent.
- 19.6 Duties of LEAs and public agencies: All LEAs and public agencies responsible for providing special education and related services to children with disabilities have a duty to:
- 19.6.1 Identify and locate children who may be in need of surrogate parents;
  - 19.6.2 Develop procedures to identify and locate children who may be in need of surrogate parents; and
  - 19.6.3 Promptly submit a written request to the DOE to appoint a surrogate parent for each child who may be in need of a surrogate parent under these regulations.
  - 19.6.4 For a child in the custody of the Department of Services for Children, Youth and Their Families (DSCYF) who may be in need of a surrogate parent, the DSCYF shall promptly make a written request to the DOE to appoint a surrogate parent. The Family Court may, in the exercise of its proper jurisdiction, order the DSCYF to make a referral.
- 19.7 Candidacy of surrogate parents: To serve as a surrogate parent, each candidate shall:
- 19.7.1 Be at least eighteen (18) years of age;
  - 19.7.2 Be a legal resident of the United States;
  - 19.7.3 Be competent to represent the child;
  - 19.7.4 Not be an employee of the DOE, an LEA or any other public or private agency responsible for, or involved in the education or care of the child;
  - 19.7.5 Have no interest that conflicts with the interest of the child he or she may represent, including, but not limited to, any professional or personal interest that might restrict or bias his or her ability to advocate for all of the services required to ensure a free, appropriate public education the child;
  - 19.7.6 Receive training about Delaware and federal law and regulations, including due process procedures, disability conditions, educational programs, and special education services for children with disabilities, as required by the DOE in consultation with the Office of the Educational Surrogate Parent Program.
  - 19.7.7 Be able to converse in the primary communication mode used by the child whenever possible; and
  - 19.7.8 Have knowledge and skills that ensure adequate representation of the child.
- 19.8 Non employee requirement: compensation: A person otherwise qualified to be a surrogate parent under 19.7 is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent. Nor are foster parents considered employees for purposes of these regulations.
- 19.9 Unaccompanied homeless youth: In the case of a child who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs may be appointed as temporary surrogate parents without regard to 19.7.4, until a surrogate parent can be appointed that meets all of the requirements of 19.7.
- 19.10 Surrogate parent responsibilities: Each surrogate parent shall be responsible for:
- 19.10.1 Representing the child in all matters relating to the identification, evaluation, and educational placement of the child, and the provision of FAPE to the child;
  - 19.10.2 Becoming thoroughly acquainted with the child's educational history and other information contained in school records and reports relating to the child's educational needs;
  - 19.10.3 Granting or denying permission for initial evaluation or placement, and safeguarding the confidentiality of all records and information pertaining to the child to comply with State and federal regulations, including the use of discretion when sharing information with appropriate people for the purpose of furthering the interests of the child;
  - 19.10.4 Participating in the development of an IEP for the child;
  - 19.10.5 Reviewing and evaluating special education programs pertaining to the child and other such programs as may be available;
  - 19.10.6 Initiating mediation, complaint, hearing, or appeal procedures when necessary regarding the identification, evaluation, or educational placement of the child, and seeking qualified legal assistance when such assistance is in the best interest of the child; and

19.10.7 Participating in training provided or required by the DOE, in consultation with the Office of the Educational Surrogate Parent Program, concerning Delaware and federal laws and regulations related to the education of children with disabilities.

19.11 Termination of Surrogate parent services

19.11.1 Voluntary Termination: If the surrogate parent wishes to terminate his or her services, he or she shall notify the DOE in writing, at least thirty (30) days prior to the termination of such services.

19.11.2 Other Termination: The DOE may terminate a surrogate parent's appointment when it determines that the child no longer qualifies for surrogate parent services under 19.2. The DOE may also terminate a surrogate parent's appointment for cause, including the failure of the surrogate to discharge his or her duties or to maintain the child's confidentiality.

19.12 Compensation

19.12.1 The DOE shall compensate surrogate parents for all reasonable and necessary expenses incurred in performance of their duties, including, but not limited to,

19.12.1.1 Mileage for attendance at meetings concerning the child being represented by the surrogate; long distance telephone calls to the school in which the child is being served; and photocopying of the child's records.

19.13 Liability of the Surrogate Parent

19.13.1 A person appointed by the DOE as surrogate parent shall not be held liable for actions taken in good faith on behalf of the child in protecting the special education rights of the child.

(Authority: 20 U.S.C. 1415(b)(2); 14 Del.C. §§3110, 3132)

**14 DE Reg. 1065 (04/01/11)**

**20.0 Transfer of Parental Rights at Age of Majority**

20.1 ~~Age of majority: When a child with a disability reaches the age of majority (eighteen (18)) years old (except a child with a disability who has been determined to be incompetent under State law):~~ To assure that children with disabilities who have reached age 18 have an identified decision-maker, which may be the child with a disability, the IEP team shall discuss the potential need for an educational representative during the transfer of rights at age of majority review, and annually thereafter. In determining the need for an educational representative, the IEP team shall consider:

~~20.1.1 All rights accorded to parents under Part B of the Act transfer to the child; and~~

20.1.1 A child with a disability without a court-appointed guardian of the person shall be presumed to have capacity and be accorded the rights of a parent upon attainment of age 18.

20.1.1.1 The public agency shall notify both the child and the parents that all rights accorded to parents under 14 Del.C. §3132(b) transfer to the child.

~~20.1.2 The public agency shall notify both the child and the parents that all rights accorded to parents under Part B of the Act transfer to the child.~~

20.1.2 A child with a disability with capacity may authorize an adult agent to exercise rights through execution of a power of attorney or a standard voluntary grant of authority form published by the Department of Education.

20.1.3 The determination of capacity shall be made by the IEP team during an IEP meeting and shall conform to the following standards:

20.1.3.1 In cases where capacity is uncertain, a school psychologist familiar with the child must attend the initial meeting. For purposes of this section, the term "familiar with the child" means the school psychologist has conducted a recent in-person evaluation of the child which conforms to evaluation procedures established by the Department of Education. In subsequent annual IEP meeting reviews, the participation of a school psychologist is discretionary if it is clear there has been no change in the child's capacity.

20.1.3.2 The child with a disability and parent, as defined in 14 Del.C. §3101(7), must be invited to participate in the meeting regardless of whether the child has already attained the age of 18.

20.1.3.3 The IEP team may consider information from sources apart from school personnel and may authorize evaluation if necessary to inform its deliberations.

20.1.3.4 If information is ambiguous, any benefit of the doubt shall be exercised in favor of a finding of capacity.

20.1.4 If the IEP team determines that the child lacks capacity, the IEP team shall appoint an individual to serve as an educational representative in the following descending order of priority:

20.1.4.1 Willing and available biological or adoptive parent;

20.1.4.2 Willing and available adult relative.

20.2 If such an individual is not identified, the IEP team shall promptly facilitate a referral to the Department of Education for appointment of an educational surrogate parent. An appointed educational representative shall have the same authority as a parent under 14 Del.C. §3101(7).

20.2.1 If a child with a disability or parent disagrees with the capacity determination, either may contest the determination by pursuing dispute resolution options described in the procedural safeguards in this regulation or in 14 Del.C. Ch. 31.

20.2.2 The capacity determination is limited to exercise of rights under 14 Del.C. Ch. 31 or this regulation and shall not affect exercise of rights in any other context. In furtherance of this limitation, any other statute notwithstanding, the capacity determination shall not be admissible as evidence of competency or capacity in any non-educational judicial or administrative proceeding.

(Authority: 20 U.S.C. 1415(m); 14 Del.C. §§3110[, 3132])

**21.0 to 29.0 Reserved**

**30.0 Discipline Procedures Authority of School Personnel.**

30.1 Case by case determination: School personnel may consider any unique circumstances on a case by case basis when determining whether a change in placement, consistent with the other requirements of this section, is appropriate for a child with a disability who violates a code of student conduct.

30.2 School personnel under 30.0 may remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than ten (10) consecutive school days (to the extent those alternatives are applied to children without disabilities), and for additional removals of not more than ten (10) consecutive school days in that same school year for separate incidents of misconduct (as long as those removals do not constitute a change of placement under 36.0).

30.2.1 After a child with a disability has been removed from his or her current placement for ten (10) school days in the same school year, during any subsequent days of removal the public agency shall provide services to the extent required under 30.4 of this section.

30.3 Additional authority: For disciplinary changes in placement that would exceed ten (10) consecutive school days, if the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to 30.5, school personnel may apply the relevant disciplinary procedures to children with disabilities in the same manner and for the same duration as the procedures would be applied to children without disabilities, except as provided in 30.4.

30.4 Services:

30.4.1 A child with a disability who is removed from the child's current placement pursuant to 30.3 or 30.7 shall continue to receive educational services, as provided in 14 **DE Admin. Code** 923.1.2 so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

30.4.2 The services required by paragraphs 30.4.1, 30.4.3, 30.4.4, and 30.4.5 may be provided in an interim alternative educational setting.

30.4.3 A public agency is only required to provide services during periods of removal to a child with a disability who has been removed from his or her current placement for ten (10) school days or less in that school year, if it provides services to a child without disabilities who is similarly removed.

30.4.4 After a child with a disability has been removed from his or her current placement for ten (10) school days in the same school year, if the current removal is for not more than ten (10) consecutive school days and is not a change of placement under 36.0, school personnel, in consultation with at least one (1) of the child's teachers, determine the extent to which services are needed, as provided in 14 **DE Admin. Code** 923.1.2 so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP.

30.4.5 If the removal is a change of placement in 36.0, the child's IEP Team determines appropriate services in 30.4.1.

30.5 Manifestation determination: Within ten (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 LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the 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:

- 30.5.1 If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- 30.5.2 If the conduct in question was the direct result of the LEA's failure to implement the IEP.
- 30.5.3 The conduct shall be determined to be a manifestation of the child's disability if the LEA, the parent, and relevant members of the child's IEP Team determine that a condition in either 30.5.1 or 30.5.2 was met.
- 30.5.4 If the LEA, the parent, and relevant members of the child's IEP Team determine the condition described in 30.5.2 was met, the LEA shall take immediate steps to remedy those deficiencies.
- 30.6 Determination that the behavior was a manifestation: 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 either:
  - 30.6.1 Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or
  - 30.6.2 If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and
  - 30.6.3 Except as provided in 30.7, 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 behavioral intervention plan.
- 30.7 Special circumstances: School personnel may remove a student to an interim alternative educational setting for not more than forty five (45) school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child:
  - 30.7.1 Carries a weapon to or possesses a weapon at school, on school premises, or to or at a school function under the jurisdiction of the DOE or an LEA;
  - 30.7.2 Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of the DOE or an LEA; or
  - 30.7.3 Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of the DOE or an LEA.
- 30.8 Notification: *The LEA or other public agency shall ensure that the parents, guardian or Relative Caregiver of each child with disabilities receive written notice of the rules and regulations applicable to such children with respect to discipline, suspension, expulsion, and exclusion as a treatment procedure at the beginning of each school year or upon entry into a special education program during the school year; and*
  - 30.8.1 On the date on which the decision is made to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct, the LEA shall notify the parents of that decision, and provide the parents the procedural safeguards notice described in 4.0.
- 30.9 Definitions: For purposes of this section, the following definitions apply:
  - "Controlled Substance"** means a drug or other substance identified under schedules I, II, III, IV, or V in section 202c of the Controlled Substances Act (21 U.S.C. 812(c)).
  - "Illegal Drug"** means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.
  - "Serious Bodily Injury"** has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.
  - "Weapon"** has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.(Authority: 20 U.S.C. 1415(k)(1) and (7); 14 Del.C. §3110)

Determination of Setting

**14 DE Reg. 1065 (04/01/11)**

### **31.0 Determination of Setting.**

The child's IEP Team determines the interim alternative educational setting for services in 30.3, 30.4.5 and 30.7.

(Authority: 20 U.S.C. 1415(k)(2); 14 Del. C. §3110)

**14 DE Reg. 1065 (04/01/11)**



### **32.0 Expedited Appeal**

- 32.1 General: The parent of a child with a disability who disagrees with any decision regarding placement in 30.0 and 31.0, or the manifestation determination in 30.5, or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to 7.0, 8.1 and 8.2.
  - 32.2 A single, impartial hearing officer appointed by the DOE from its Registry of Impartial Hearing Officers shall make a determination regarding an appeal under paragraph (a) of this section. The hearing officer may:
    - 32.2.1 Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of 30.0 or that the child's behavior was a manifestation of the child's disability; or
    - 32.2.2 Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than forty five (45) school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.
    - 32.2.3 The procedures in 32.1 and 32.2 may be repeated, if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.
  - 32.3 Expedited due process hearing:
    - 32.3.1 Whenever a hearing is requested in 32.1, the parents or the LEA involved in the dispute shall have an opportunity for an impartial due process hearing consistent with the requirements of 7.0 and 8.1 through 8.3, and 10.0 through 14.0, and 14 **Del.C.** Ch. 31, except as provided in 32.3.2 through 32.3.4.
    - 32.3.2 The DOE shall be responsible for arranging the expedited due process hearing, which shall occur within twenty (20) school days of the date the complaint requesting the hearing is received by the DOE. The hearing officer shall make a determination within ten (10) school days after the hearing.
    - 32.3.3 Unless the parents and LEA agree in writing to waive the resolution meeting described in 32.3.3.1 or agree to use the mediation process described in 6.0:
      - 32.3.3.1 A resolution meeting shall occur within seven (7) days of receiving notice of the due process complaint; and
      - 32.3.3.2 The expedited due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within fifteen (15) days of the receipt of the due process complaint.
    - 32.3.4 The decisions on expedited due process hearings are appealable consistent with 14.0.
- (Authority: 20 U.S.C. 1415(k)(3) and (4)(B), 1415(f)(1)(A) 14 **Del.C.** §3110)

**14 DE Reg. 1065 (04/01/11)**

### **33.0 Placement During Appeals**

When an expedited appeal under 32.0 has been made by either the parent or the LEA, the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period specified in 30.3 and 30.7, whichever occurs first, unless the parent and the DOE or LEA agree otherwise.

(Authority: 20 U.S.C. 1415(k)(4)(A); 14 **Del.C.** §3110)

### **34.0 Protections for Children not Determined Eligible for Special Education and Related Services**

- 34.1 General: A child who has not been determined to be eligible for special education and related services under these regulations and who has engaged in behavior that violated a code of student conduct, may assert any of the protections provided for in these regulations if the public agency had knowledge (as determined in accordance with 34.2) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.
- 34.2 Basis of knowledge: A public agency 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:
  - 34.2.1 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;
  - 34.2.2 The parent of the child requested an evaluation of the child pursuant to 14 **DE Admin. Code** 925.1.0 through 925.12.0; or
  - 34.2.3 The teacher of the child, or other personnel of the LEA, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency.

- 34.3 Exception: A public agency would not be deemed to have knowledge under 34.2 if the parent of the child has not allowed an evaluation of the child pursuant to 14 **DE Admin. Code** 925.1.0 through 925.12.0; or has refused services under these regulations; or the child has been evaluated in accordance with 14 **DE Admin. Code** 925.1.0 through 925.12.0 and determined to not be a child with a disability under these regulations.
- 34.4 Conditions that apply if no basis of knowledge: If a public agency does not have knowledge that a child is a child with a disability (in accordance with 34.2 and 34.3) prior to taking disciplinary measures against the child, the child may be subjected to the disciplinary measures applied to children without disabilities who engage in comparable behaviors consistent with the following requirements:
- 34.4.1 If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures in 30.0, the evaluation shall be conducted in an expedited manner.
- 34.4.2 Until the evaluation is completed, the child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services.
- 34.4.3 If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with these regulations, including the requirements of 30.0 through 36.0 and section 612(a)(1)(A) of the Act.  
(Authority: 20 U.S.C. 1415(k)(5); 14 **Del.C.** §3110)

### **35.0 Referral to and Action by Law Enforcement and Judicial Authorities**

- 35.1 Rule of construction: Nothing in these regulations prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or prevents Delaware law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.
- 35.2 Transmittal of records: An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.
- 35.2.1 An agency reporting a crime under this section may transmit copies of the child's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.  
(Authority: 20 U.S.C. 1415(k)(6); 14 **Del.C.** §3110)

### **36.0 Change of Placement Because of Disciplinary Removals**

- 36.1 For purposes of removals of a child with a disability from the child's current educational placement in 30.0 through 35.0, a change of placement occurs if:
- 36.1.1 The removal is for more than ten (10) consecutive school days; or
- 36.1.2 The child has been subjected to a series of removals that constitute a pattern:
- 36.1.2.1 Because the series of removals total more than ten (10) school days in a school year;
- 36.1.2.2 Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
- 36.1.2.3 Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another; or.
- 36.1.3 *The child has been subjected to a series of in-school removals totaling more than ten (10) school days and it deprives the child from meeting the goals set out in the IEP; progressing in the general curriculum through another setting; and receiving those services and modifications described in the IEP; or the child has been subjected to a series of removals from transportation and it results in the child's absence from school for more than ten (10) school days.*
- 36.2 The public agency determines on a case by case basis whether a pattern of removals constitutes a change of placement.
- 36.3 This determination is subject to review through due process and judicial proceedings.  
(Authority: 20 U.S.C. 1415(k); 14 **Del.C.** §3110)

**10 DE Reg. 1816 (06/01/07)**

**14 DE Reg. 1065 (04/01/11)**

**15 DE Reg. 354 (09/01/11)**

**19 DE Reg. 1018 (05/01/16)**

**20 DE Reg. 550 (01/01/17) (Final)**