



DUE PROCESS PREPARATION CHECKLIST

Before and After Receipt of Complaint

The Individuals with Disabilities Education Act (“IDEA”) set up a system for resolving disagreements about students’ Individualized Education Programs (“IEPs”) and Local Educational Agency’s (“LEA’s”) offers of Free Appropriate Public Education (“FAPE”) that involves one of two things: (1) filing a complaint with the state department of education (CDE), or (2) filing a “due process complaint.” In California, due process complaints are heard by a state agency called the Office of Administrative Hearings, Special Education Division (“OAH”). A due process complaint typically arises in one of three situations. First, and most commonly, a parent files a due process complaint against an LEA in which the parent indicates that he/she believes that the LEA has not provided the student with a FAPE. Second, an LEA files a due process complaint when the parent does not consent to a proposed IEP, and the non-consented-to changes are necessary for the student to receive a FAPE. Finally, an LEA can file a due process complaint to defend its assessment of a student in lieu of funding an Independent Educational Evaluation (“IEE”).

Due process complaints and the resulting hearings have high costs associated with them. These costs include necessary legal fees to prepare for and litigate the due process matter, and hidden costs like the time and resources LEA personnel must devote to preparing for and participating in the due process matter. Additionally, the IDEA is a fee-shifting statute, which means that, if the student prevails at hearing, the LEA has to pay some or all of the parent’s attorney’s fees

How to Prepare for Due Process Prior to Receiving a Complaint

1. *Proper Documentation:* Proper documentation throughout the special education process is critical to any dispute between a parent and a school district that results in a due process complaint. If something was not documented, it is hard to prove that it happened. Special education documentation should be accurate and thorough.
 - a. Special education records should show that:
 - i. Procedural aspects were covered, including parental participation in the IEP process; compliance with timelines; lack of predetermination and robust discussion of options; and a clear offer of FAPE.
 - ii. Substantive aspects were covered, including that the IEP addressed the student’s needs; that the student made appropriate progress on his/her IEP goals in light of his/her disabilities; that the IEP was materially implemented; and that the student was placed in the Least Restrictive Environment (“LRE”).
 - b. Records should be appropriately maintained in a central location that is accessible to administrators, and should be kept up to date. An LEA should never have to hunt down records in response to a request by a parent for student records. Providing clearly deficient records that are incomplete in response to a records request will increase the likelihood of a due process filing against the LEA.
 - c. Well-maintained records greatly assist with a due process filing. Generally, more thorough and accurate records increase the chance of prevailing at hearing or of

attaining a more favorable settlement, decrease the time an LEA's attorney needs to spend understanding the facts of a case, and bolster witness testimony.

2. *Maintain Good Relationships with Parents:* Remember that disagreements about a child's IEP are not personal, and strive to keep parents informed and fully involved in the development of students' IEPs.
3. *Resolve Issues Prior to Filing:* Do not let disagreements about a student's IEP sit without action. The Humboldt-Del Norte SELPA has staff available to facilitate IEP meetings, engage in Alternative Dispute Resolution ("ADR"), and to discuss complicated cases. If the LEA and the parents are in disagreement, it is best practice for the LEA to look to resolve the issue. If it goes unresolved, the LEA could be forced by law to file for due process.

How to Prepare for Due Process Subsequent to Receiving a Complaint

1. *Contact your legal counsel.* The due process timelines are short, and your counsel will need to get up to date on the case quickly. Your counsel will guide you through the next steps as well.
 - a. If you receive a scheduling order in a due process case that the LEA has no record of ever receiving, you should immediately confirm that no one received the complaint, including the student's teachers, site administrators and administrative assistants, and LEA administrators and administrative assistants. You should also let legal counsel know, as legal counsel may be able to get the case dismissed for failure to serve the LEA.
2. *Contact the Humboldt-Del Norte SELPA.* The SELPA can assist with support during the pendency of the due process complaint, including facilitating a resolution session.
3. *Gather Records.* Your counsel will need a copy of the student's pupil records. Upon receiving a complaint, you should have a copy of relevant records, as discussed with your counsel, made.
 - a. If you receive a records request from a law firm, it is recommended that you make a second copy of the records sent to the family in order to give to your legal counsel in the event a due process complaint is filed.
4. *File a Response/Answer.* The IDEA requires an LEA to provide a response to a parent's due process complaint within ten calendar days of receipt of the complaint, except in certain limited circumstances. Your legal counsel likely will draft this response for the LEA.
5. *Schedule a Resolution Session.* The IDEA requires an LEA to hold a resolution session within fifteen calendar days of receiving notice of a due process complaint. The resolution session can be waived if both parties agree to waive it, or if both parties agree to use mediation in lieu of a resolution session.
 - a. A resolution session must include the parent/guardian and members of the IEP team with specific knowledge of the facts in the complaint. Attorneys are not supposed to attend resolution sessions.
 - a. You should document in writing your efforts to coordinate and schedule a resolution session. Parents are not permitted to refuse to attend a resolution session.
 - b. Unlike mediation, resolution sessions are not necessarily confidential. The parties can agree to confidentiality. However, if a confidentiality agreement is not signed

by all parties, anything said at the resolution session can be used as evidence in the future. Accordingly, discussions at the resolution session should be focused on resolutions, not factual disputes.

6. *Attend Mediation.* Mediation typically occurs at the LEA, with an Administrative Law Judge (“ALJ”) facilitating. Ninety-five percent of due process cases settle without a hearing.
7. *Prepare for and Attend Hearing.*
 - a. School staff who might be witnesses will need to be interviewed by legal counsel and prepared for hearing.
 - b. The LEA likely want to make a statutory offer of settlement, also known as a ten-day offer.
 - i. The IDEA provides that a court cannot award attorneys’ fees for services performed after a school district makes an offer of settlement, so long as: (1) the offer was made within ten days of the start of the due process hearing; and (2) the parent does not accept the offer within ten days; and (3) the relief obtained by the parents is not more favorable than the relief offered in the proposed settlement.
 - ii. A court can award fees to a parent if the parent prevails and was “substantially justified” in rejecting the district’s settlement offer.
 - iii. Having all the records in a timely manner, and having records that thoroughly document the student’s IEP process and implementation help in making this settlement offer.
 - c. Legal counsel will prepare a Prehearing Conference (“PHC”) Statement that lists the witnesses and documentary evidence the LEA intends to rely on at hearing. Legal counsel will then attend a telephonic hearing in which various matters related to hearing will be discussed and decided by the ALJ assigned to the hearing.
 - d. The parties must exchange documentary evidence at least five business days before hearing.
 - e. Hearing occurs, which involves witness testimony and cross-examination.

The OAH publishes a guide called “Special Education Handbook” that covers what occurs after a due process complaint is filed in detail. It is available online at the following address:

<https://www.documents.dgs.ca.gov/oah/SE/SE%20Handbook.pdf>