

SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES

Chapter 6

Information on Due Process Hearings/Complaints

From a 13-Chapter Manual

Available by Chapter and in Manual Form

Written by:

Community Alliance for Special Education (CASE)

and

Protection and Advocacy, Inc. (PAI)

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Federal special education law was significantly amended by Congress in 1997 and further clarified by regulations from the U.S. Department of Education in March 1999. The California Education Code has been amended to reflect some of the federal law changes but not all. In October 1999, Governor Davis vetoed a significant piece of state legislation which would have further amended California law to be consistent with federal law. Therefore, in certain circumstances where it provides greater protections or entitlements, California law will continue to control special education pupils' rights unless it is amended to completely conform to federal law.

CASE and PAI will monitor the development of conforming state law and regulations, so that revised state laws and regulations can be incorporated into later supplements and editions of SERR.

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COMMUNITY ALLIANCE FOR SPECIAL EDUCATION (CASE) provides legal support, representation, technical assistance consultations, and training to parents throughout the greater San Francisco Bay Area whose children need appropriate special education services. Trained advocates and attorneys assist parents at IEP meetings, Mediation Conferences and Due Process Hearings. CASE also provides free consultations about special education rights and services to parents and professionals by telephone or face-to-face. CASE is a nonprofit organization serving all children with disabilities who need or may need special education services. For more information, contact:

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Chapter 6

Information on Due Process Hearings/Complaints

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SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES

Chapter 6

Information on Due Process Hearings/Complaints

1. What is a due process hearing?

When the parents of a student with disabilities and the educational agency disagree about the child's eligibility, placement, program needs or related services, either side can request a due process hearing. At the hearing, both sides present evidence by calling witnesses and submitting any reports and evaluations that support their position. An independent hearing officer (hired by the state) decides whose witnesses and documents are correct and what program is appropriate. A DUE PROCESS HEARING IS GENERALLY NOT APPROPRIATE FOR ISSUES ADDRESSED BY THE COMPLIANCE COMPLAINT PROCESS. See Question 2.

2. What is a compliance complaint?

When the educational agency appears to have violated a part of special education law or procedure, a parent, individual, public agency or organization can file a complaint with the California State Department of Education (CDE). A violation could be: (1) failure to assess or refer a child to special education; (2) failure to follow timelines for assessment and referral; (3) failure to inform parents of an individualized education program (IEP) meeting; (4) failure to implement the IEP; or (5) failure to implement a due process hearing decision or mediation agreement. An investigator from the CDE or your local school district investigates the allegations and makes a written determination of whether the education agency was "out of compliance" with law or with the student's IEP. If an education agency is found "out of compliance," the school district should be ordered to come back into compliance. In addition, the CDE may order the agency to submit a plan of correction – a document describing the steps the agency has taken and will take to

assure that the problem does not occur again, either to this student or to others, as well as the timelines for taking those steps.

3. What is the difference between a compliance complaint and a due process hearing?

Although people often confuse compliance complaints and due process hearings, the main difference is:

- (1) When there is a disagreement about what should go into a child's IEP, or where to implement the IEP, then a **due process hearing** is appropriate; but
- (2) When the education agency has not followed special education laws or procedures or has not implemented what is already specifically written into a student's IEP, then a **compliance complaint** is appropriate.

In other words a due process hearing involves a disagreement over what a child's program should include, while a compliance complaint involves a failure by the educational agency to follow the rules or to do what has already been agreed to in writing in the IEP.

4. Would I follow different complaint procedures if OT/PT or mental health services are not provided as specified in my child's IEP?

If occupational or physical therapy (OT/PT) or mental health services are not provided in accordance with your child's IEP, you can file the complaint described in Question 2 and/or a complaint under the Assembly Bill (AB) 3632 interagency dispute resolution procedures. Filing complaints under both processes may bring a quicker resolution. The interagency dispute resolution procedures apply if your child is not receiving OT/PT or mental health services as specified in the IEP. In that situation, you can file a notice of failure to provide related services with the Superintendent of Public Instruction (Superintendent) or the Secretary of Health and Welfare (Secretary). [California Government Code (Cal. Gov. Code) Sec. 7585(a).]

Secretary of Health & Welfare
1600 Ninth Street, 4th Floor
Sacramento, CA 95814

Superintendent of Public Instruction
721 Capitol Mall, Room 524
Sacramento, CA 95814

Before reviewing your complaint, the agencies involved will want to see a copy of your child's IEP. You should send a copy of the IEP with your complaint.

The Superintendent and the Secretary must meet to resolve the issue within 15 calendar days of receiving the complaint. They must mail a written copy of the meeting resolution to you, to the local education agency, and to the affected departments, within 10 days of the meeting. [Cal. Gov. Code Sec. 7585(b).]

If the issue cannot be resolved within 15 days to the satisfaction of the departments involved, it can be appealed to the Office of Administrative Hearings (OAH). The OAH will review the issue and submit findings within 30 days of receipt of the case. The OAH decision is binding on all parties to the dispute. [Cal. Gov. Code Sec. 7585(c)–(e).]

When a complaint is filed pursuant to Section 7585(a), the student affected by the dispute must receive the service pending resolution of the dispute if the student had been receiving it. [Cal. Gov. Code Sec. 7585(f).]

5. Who can file a compliance complaint?

Any individual, public agency, or organization (such as a parent group) may file a written complaint. [Title 5 California Code of Regulations (C.C.R.) Sec. 4600(b).] The complaint may concern a single child, a group of children, or a local education agency policy which you think violates federal or state special education law.

Beginning in 2003, teachers and other staff may use the complaint process to address problems they experience from their superiors when they (teachers and other staff) have tried to help parents or special education students obtain appropriate special education services. As of 2003, no district employee may directly or indirectly use or attempt to use his/her official authority or influence to intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any person, including, but not limited to, a teacher, related services provider, paraprofessional, aide, contractor, or subordinate for the purpose of interfering with that person's effort to assist a parent or guardian of a special education student to obtain services or accommodations for that student. [Cal. Ed. Code Sec. 56046(a).] If a teacher or other employee of the district believes an administrator or other employee of the district has violated this prohibition, he/she can file a complaint with the State Department of Education and ask the Department for an investigation. [Cal. Ed. Code Sec. 56046(b).]

6. What can I do if a teacher or other school staff person hurts my child – other than bringing a civil lawsuit against a school district or reporting the incident to the appropriate law enforcement authorities?

If a child or group of children is in immediate physical danger, or the health, safety or welfare of a child or group of children is threatened, you may file a complaint with the CDE under the Uniform Complaint Procedure [5 C.C.R. Sec. 4600 et seq.], and the CDE must investigate directly. [5 C.C.R. Secs. 4611(a) and 4650(a)(viii)(C).]

7. When should I file a compliance complaint directly with the CDE?

Nearly all the violations that can form the basis of a compliance complaint should be filed with the CDE. The CDE must directly intervene (not refer the complaint to the local agency for self-investigation) in any of the following situations:

- (1) The complaint indicates that a public agency, other than a local educational agency, as specified in Cal. Gov. Code Sec. 7570 (AB 3632), has failed or refused to comply with an applicable law or regulation relating to the provision of free, appropriate public education to individuals with disabilities.
- (2) The complaint indicates that the local educational agency or public agency has failed or refused to comply with the due process procedures established in federal and state law and regulations, or has failed or refused to implement a due process hearing order.
- (3) The complaint indicates that the child or group of children may be in immediate physical danger or that the health, safety or welfare of a child or group of children is threatened.
- (4) The complaint indicates that a student with disabilities is not receiving the special education or related services specified in the student's IEP.
- (5) The complaint involves a violation of federal law governing special education, 20 U.S.C. Sec. 1400 et seq., or its implementing regulations. [5 C.C.R. Sec. 4650(a)(viii).]

If the facts of your situation fit into any one or more of the five situations described above, and if you feel that your local school district should not investigate your

complaint, you should specifically request that the CDE investigate your complaint directly. See *Sample Letter - Compliance Complaint*, at the end of this chapter. You should identify the situations outlined above - (1) through (5) - that most resembles your situation. You should mention the specific situation in your complaint letter. Since numbers (1) through (5) cover most of the situations that can lead to filing a compliance complaint, you should be able to identify a subsection that fits your situation.

Outline the reasons for your request in your complaint letter. Your reasons may not conform exactly to the criteria stated above. However, this should not prevent you from at least making the request. The Compliance Unit will determine whether or not to first refer your complaint for a local investigation.

8. How do I file a compliance complaint with the CDE?

To file a compliance complaint with the CDE, write to:

Complaint Management and Mediation Unit
Special Education Division
California State Department of Education
~~515 L Street, Suite 270~~ 1430 N Street, Suite 2401
Sacramento, CA 95814

You should fully describe the situation that caused you to request the compliance investigation, including which parts of the law have been violated and the basis for your request. You may not know the exact sections of law that have been violated. That is all right. If you describe the situation adequately, the Complaint Management and Mediation Unit should match the correct sections with your particular situation. If your child's IEP or other documents are relevant to your complaint, you should attach them. See *Sample Letter - Compliance Complaint* at the end of this chapter.

9. What happens after I file a complaint?

Under federal and state law, the CDE has 60 calendar days from receipt of the complaint to carry out any necessary investigation and to resolve the complaint. [34 Code of Federal Regulations (C.F.R.) Sec. 300.661; 5 C.C.R. Sec 4631(a).] When it receives your complaint, the CDE must review the complaint to determine if it is a matter for state or local investigation. Once the CDE makes its determination, CDE must immediately notify you of its decision and either refer

the complaint for local investigation or begin its direct investigation. [5 C.C.R. Sec. 4651.]

Although the complaint office must process your complaint within 60 days, the office has developed a process to “fast-track” certain complaints which present a small number of uncomplicated issues and provide resolution sooner than 60 days. Very often parents need resolution much more quickly than 60 days. The most obvious examples of this are when school districts attempt to “indefinitely” suspend students beyond the legal limits, or do not comply with an IEP or with the laws during an extended school year program, or when certain services are to be provided by a school district during any field trip or end-of-the-year activity and the school district refuses such services just days before the event.

If your reason for filing a compliance complaint involves one or two simple compliance issues, you may wish to ask in your complaint for “fast-track” treatment. Examples of a simple complaint might include: “my child’s IEP specifies that he is to receive transportation and the bus has not come for two days,” or “my child’s teacher does not attend his IEP meetings,” or “my child’s IEP specifies that he have an instructional aide during certain periods of the day and the aide has not been provided,” or “my child’s principal has told me that because of my child’s behavior at school I should not bring him back.” After filing your complaint, you may also wish to call the compliance office to find out who the complaint has been assigned to and to remind that individual of the simplicity of your complaint and your desire or need for expedited processing.

Whether or not you file your complaint as a fast-track complaint, if you do not hear from the Complaint Management and Mediation Unit within 10 days after you mail your complaint, you should call the Compliance Unit at (916) 445-4632, fax (916) 327-3516 to follow up.

10. How does the CDE investigate complaints?

When the CDE either directly investigates your complaint or you appeal a local education agency’s decision after a self-investigation, the CDE must offer to mediate the dispute. The mediation must be conducted within the 60-calendar-day timeline for completion of the complaint investigation. The time to complete the mediation cannot exceed 30 days unless you and the local education agency agree to the extension. [5 C.C.R. Sec. 4660(a)(1) and (c).]

Either you or the local education agency can waive (give up) your right to the mediation process. If mediation is waived or if mediation does not resolve the

issues, CDE must conduct an on-site investigation of the complaint. However, the parties may agree to mediate some of the issues and submit the other issues for state investigation. [5 C.C.R. Sec. 4660(a)(2), (b).]

If an on-site investigation is necessary, the CDE will appoint a compliance investigator to act on your complaint. At least two weeks before the investigation, the CDE will send a written notice of the investigator's name and the investigation dates. The notice will also explain the investigation process. The investigator will contact you and the local education agency to obtain both views of the problem and will review records if necessary. [5 C.C.R. Secs. 4662, 4663.]

The CDE must complete its investigation and resolve the complaint within 60 calendar days after receiving a request for direct state intervention or an appeal of a local investigation. [34 C.F.R. Sec. 76.78; 5 C.C.R. Sec. 4662(d).]

11. Who handles complaints when the CDE does not intervene directly?

If the CDE chooses not to intervene directly, it must send the complaint immediately to the local education agency involved for investigation. [5 C.C.R. Sec. 4640(a)(1).] In addition, the CDE must notify you by letter that it has transferred the complaint and that the CDE is requesting local resolution of the complaint. The letter must also advise you of the appeal procedures should you disagree with the results of the local investigation. [5 C.C.R. Sec. 4640(a)(2).]

12. How do I file a compliance complaint with my local school district?

You should file a compliance complaint with your local school district unless you are requesting a direct investigation by the CDE. See Question 6. You should send the complaint to your Superintendent of Schools or the Director of Special Education. [5 C.C.R. Sec. 4630(b)(2).]

Each school district must have its own written complaint investigation policy and procedure that has been approved by its Board of Education. Be sure to request a copy of your school district's specific complaint investigation process before you file a complaint with your local district.

You should fully describe the situation that has caused you to request the compliance investigation, including which parts of the law have been violated. You may not know the exact sections of law that have been violated. That is all right. If you describe the situation adequately, the school district should match the correct

sections with your particular situation. If your child's IEP or other documents are relevant to your complaint, you should attach them. See Sample Letter - *Compliance Complaint* at the end of this chapter.

13. How does a local school district conduct investigations?

The school district has 60 calendar days after receiving your complaint to complete an investigation. This time period may be extended only with your written agreement. [5 C.C.R. Sec. 4631(a).]

You or your representative, or both, and the school district must have the opportunity to present information relevant to the complaint. Depending on your school district's policies and procedures, the investigation may include a way for you and the school district to meet and discuss the complaint or to question each other or each other's witnesses. [5 C.C.R. Sec. 4631(b).]

The school district's decision after investigation must be in writing. It should contain findings of fact, a determination of whether the school district was out of compliance, corrective actions required by the school district (if any), and the reasons for making the decision. The decision should also include a notice of your right to appeal to the CDE and the procedures you must follow in making an appeal to the CDE. [5 C.C.R. Sec. 4631(c).]

14. Can a local school district try to mediate a complaint as part of its local investigation process?

Yes. School districts may develop a mediation procedure in order to resolve complaints before conducting a formal investigation. This mediation process cannot extend the 60-day timeline for resolving complaints unless you agree in writing to the extension. However, mediation cannot be a mandatory part of the process. You may waive this mediation step. [5 C.C.R. Sec. 4631(d).]

15. What happens if I disagree with the local education agency's report?

You may appeal directly to the CDE, Superintendent of Public Instruction, for review of the local decision. You must make any appeal to the CDE for review of a local education agency decision within 15 days after you receive the final written decision of the local agency. [5 C.C.R. Sec. 4652(a).] If you appeal a decision to the Superintendent of Public Instruction, an impartial review must be completed

and a report mailed within 60 days of receipt of the request for appeal. [5 C.C.R. Sec. 4662(d).] See Questions 9 and 10 for the CDE investigation process.

When appealing a local education agency decision, your complaint must set out the reasons for appealing the decision. The appeal must include a copy of the original complaint and a copy of the local education agency decision. [5 C.C.R. Sec. 4652(b) and (c).]

16. What happens when the CDE finds a public education agency to be out of compliance?

If the investigation indicates a failure by the public education agency to comply with the law, the CDE may require corrective action. The CDE investigation report must set forth the corrective actions the education agency is to take, along with timelines for correction. [5 C.C.R. Sec. 4664.]

If the noncompliance is not remedied, the Superintendent shall take further action. Actions may include a court proceeding for an order compelling compliance, or a proceeding to recover or curtail state funding to the noncompliant local education agency. [5 C.C.R. Sec. 4670(a).]

The CDE has indicated that it does have the authority to order compensatory services to make up for services lost during a period of noncompliance. The CDE has also indicated that it can order a local district to reimburse a parent for any out-of-pocket expenses incurred as a result of purchasing IEP services for a child during a period in which a school district failed to provide these services.

17. What can I do if I do not agree with the CDE's decision?

If you or the local education agency are dissatisfied with the CDE's investigation report, either of you may request reconsideration by the Superintendent within 35 days of receipt of the CDE's investigation report. The Superintendent may respond in writing within 15 days, either modifying the conclusions or corrective actions of the CDE's report, or denying the request outright. The CDE's report remains in effect and enforceable pending the Superintendent's reconsideration. [5 C.C.R. Sec. 4665(a).]

18. Can I file a complaint with any other agencies?

Yes. If your complaint involves an issue of educational discrimination under Section 504 of the Rehabilitation Act of 1973 (see Question 19), you can file a

discrimination complaint with the U.S. Department of Education, Office of Civil Rights (OCR). Complaints of educational discrimination against students by education agencies may also be filed with the CDE (California Department of Education). [5 C.C.R. Secs. 4600(c), 4630(b), 4650(a)(ii).] Issues of disability-based educational discrimination, however, are usually appropriate for filing with the OCR under Section 504.

19. How would I file a complaint with the OCR?

The OCR is responsible for investigation of complaints regarding allegations of discrimination on the basis of disability that may constitute violations of Section 504 of the Rehabilitation Act of 1973. [29 U.S.C. Sec. 794.] You will find the regulations defining what constitutes discrimination in education under Section 504 at 34 C.F.R. Sec. 104.1 et seq.

If you wish to file a complaint with the OCR, you should write or call OCR at the address below and ask for a copy of the complaint form and instruction sheet for filing such a complaint.

U.S. Department of Education, Office for Civil Rights
Region IX Office, Old Federal Building
50 United Nations Plaza, Room 239
San Francisco, CA 94102

Telephone: (415) 556-4275;
TTY (415) 437-7786;
FAX (415) 437-7783

Complaints that do not allege violations of Section 504, but may constitute violations of Federal Special Education Law, should be filed with the CDE as a compliance complaint. See Questions 1, 2, 3, 5, 6, 19 and 20.

20. When would I file a Section 504 discrimination complaint with OCR?

A parent or other interested party may wish to file a Section 504 complaint whenever, as a result of the conduct or policy of the education agency, a student with a disability does not receive educational benefit from the program commensurate with that received by her nondisabled peers. This includes, of course, the situation where a student with a disability is excluded from participation in any federally funded program or activity, such as public education. [34 C.F.R. Sec. 104.4(a).] Schools generally receive federal funding. A student

does not have to have a special education qualifying disability for you to file a discrimination complaint with OCR against a school. (See Chapter 1, Question 6 of this manual.) Such complaints could include, for example, access issues like architectural barriers or program access or the failure of a district to implement an agreed-upon accommodation plan for a student. You must file a discrimination complaint within 180 days from the date of the discrimination. [34 C.F.R. Sec. 100.7(b).]

21. How does the OCR act on complaints?

The OCR will acknowledge your complaint within 15 days of its receipt. However, OCR may take up to 45 days to review your complaint to determine if additional information is necessary to process your complaint. OCR will investigate your complaint and send you a letter of finding within 120 days from the start of the investigation. If it finds the school district to be out of compliance, OCR will seek voluntary compliance within 60 days from date the school district receives the letter of finding. If arrangements for compliance cannot be achieved, OCR will begin enforcement measures within the next 30 days.

If you requested a state due process fair hearing on the same issue that you filed with OCR, OCR will postpone action on your complaint until resolution of your request for a hearing.

22. Can I file a discrimination complaint with the CDE?

Yes. You may file a complaint of discrimination under the CDE compliance complaint process. Complaints alleging discrimination are one type that calls for direct CDE intervention, as opposed to local education agency self-investigation. [5 C.C.R. Sec. 4650(a)(ii).] Complaints alleging discrimination must be filed within six months of: (1) the discriminatory conduct or (2) the date the complaining party first learned of the discriminatory conduct. The Superintendent of Public Instruction may extend the six-month filing period by 90 days for good cause upon a written request that describes the reasons for needing the extension. [C.C.R. Sec. 4630(b).]

The individual who files the complaint must ask for direct CDE intervention pursuant to Section 4650(a)(ii). Otherwise, the complaint should have been filed with the local education agency. [C.C.R. Sec. 4630(b)(2).]

These investigations must be conducted in a manner that protects the confidentiality of the parties and the facts. [5 C.C.R. Sec. 4630(b)(3).]

23. SEE ALSO CHAPTER 1, QUESTIONS AND ANSWERS 24 THROUGH 24(I). When would I request a due process hearing?

Normally, you would request a due process hearing after an IEP meeting: (1) if you disagree with the special education service or placement being proposed by the district; or (2) when the district refuses to provide an assessment, a service or a placement for your child which you believe is necessary. [34 C.F.R. Sec. 300.507(a); Cal. Ed. Code Sec. 56501(a).] Under state law, students cannot initiate due process procedures unless they are emancipated or are wards or dependents of the court for whom no parent can be identified or located and for whom no appropriate surrogate parent has been appointed. [Cal. Ed. Code Sec. 56501(a).]

24. When must a school district notify me if the district proposes to change or modify my child's special education program?

An important first step to due process of law in special education is an adequate written notice from the school district to you of exactly what the district is proposing or refusing to do and why. Any time a school district proposes to initiate or change the identification, evaluation, or educational placement of a student or the provision of a free, appropriate public education, it must provide the parent of the student with a written notification. In other words, a district must notify you any time it proposes:

- (1) To change your child's special education qualifying condition or "label" (for example, learning disability) including a determination that she has no special education qualifying condition;
- (2) To initiate or change an evaluation of your child;
- (3) To change your child's educational placement; and
- (4) To change a component of your child's IEP, it must give you a written notice that contains all the information described in Question 25.

[34 C.F.R. Sec. 300.503(a)(1)(i).]

In addition, any time a district refuses a parent's request for a specific identification (qualifying condition) change, for a certain evaluation or change to an existing evaluation, for an educational placement change, for a change in a component of her child's IEP, the district must provide the parent with the same

kind of written notice described below which explains and supports the reasons for its refusal. [34 C.F.R. Sec. 300.503(a)(1)(ii).]

25. What information should the school district include in this notice?

The written notice required above must contain all of the following:

- (1) A full explanation of all procedural rights available to the student, including rights to pursue due process procedures and rights to confidentiality of information as provided in federal special education regulations;
- (2) A description of the action proposed or refused by the district, an explanation of why the district proposes or refuses to take the action, and a description of any options the district considered and the reasons why those options were rejected;
- (3) A description of each evaluation procedure, test, record, or report the district used as a basis for the proposed or refused action;
- (4) A description of any other factors that are relevant to the district's proposal or refusal; and
- (5) A statement that the parents have certain rights and how the parents can obtain a written description of those rights.

The notice must be written in language that is understandable to the general public and must be provided in the native language or other mode of communication of the parent, unless it is clearly not feasible to do so.

[20 U.S.C. Sec. 1415(c); 34 C.F.R. Sec. 300.503(b).]

The information contained in a written notice is crucial to a parent making intelligent and informed decisions. In *Union School District v. B. Smith* [20 IDELR 987], a Federal Circuit Court in California ruled that notice provisions were not merely technical requirements but substantive rights, and precluded the district from arguing the appropriateness of a placement that had been verbally offered by the district and refused by the parents but never officially offered in writing to the parents under the written notice requirements described above.

Unfortunately, this notice of proposed or refused changes by districts is one of the most universally ignored provisions of special education law in California.

26. Are there any other notices that the school district must give?

Yes. The district must give parents a written notice of their procedural rights at the time the child is first referred for special education evaluation, every time the parents are notified of an IEP meeting, whenever a child is reevaluated, and whenever a parent files for a due process hearing. [20 U.S.C. Sec. 1415(d)(1); 34 C.F.R. Sec. 300.504.]

27. What information must the procedural rights notice contain?

The procedural rights notice must be in the native language of the parents (unless the school district is clearly unable to do so). It must be written in an easily understandable way and must contain a full explanation of all of the following:

- (1) Your rights to an independent educational evaluation (see Chapter 2 of this manual);
- (2) Your rights to prior written notice of change or refusal to change a program or service, etc., for a pupil (see Question 25 above);
- (3) The requirement of parental consent to the assessment, program and placement of your child;
- (4) Your rights to access your child's educational records;
- (5) Your right to request a due process hearing;
- (6) Your child's right to remain in his current placement while a due process hearing is pending, and any limitations or exceptions to that right;
- (7) The required procedures school districts use for pupils who are subject to placement in alternative educational settings for limited periods of time by school officials or hearing officers;
- (8) The requirements for parents when they wish to place their children in private schools and seek public financing for such placements;
- (9) The availability of and procedures for mediation;
- (10) The procedures concerning due process hearings including the requirement that all evaluation results and recommendations be disclosed by the parent to the district and by the district to the parent at least five days before the hearing;
- (11) The availability of court appeals following a due process hearing decision;

- (12) The availability of attorneys' fees from a school district to the parents where the parents are the prevailing party in a due process hearing, and a full explanation of any limitation on that right or potential denial of or reduction in attorneys' fees for parents; and
- (13) The availability of the state compliance complaint procedure, including a description of how to file a complaint and the timelines under that process.

[20 U.S.C. Sec. 1415(d)(2); 34 CFR Sec. 300.504(b).]

**28. SEE ALSO CHAPTER 1, QUESTION AND ANSWER 25.
What happens to my child if I file for a due process hearing?**

Except in certain circumstances discussed below, your child must remain in her then current educational placement and have her current IEP fully implemented (including all related services) from the time you request a hearing until the due process hearing proceedings (and court appeals, if any) are completed. [Cal. Ed. Code Sec. 56505(d); 34 C.F.R. Sec. 300.514.] This protection is usually called the "stay put" placement. Once the due process hearing is over, if a case goes on to a court appeal, the stay put placement becomes whatever the hearing officer has ordered in the administrative hearing. [Cal. Ed. Code Sec. 56505(d).] Your child's current educational placement is whatever his IEP says it is if there is an agreed upon IEP that has gone into effect. If no IEP has been agreed to or has gone into effect, the current educational placement for stay-put purposes is the operative placement actually functioning at the time the dispute first arises. [*Thomas v. Cincinnati Bd. of Educ.*, 918 F.2d 618 (6th Cir. 1990).] The stay-put placement may be altered if the parent and school agree to a change in placement or services. The child's stay-put placement might also change pending the results of the due process hearing in one of the following situations:

- (1) The child has engaged in a weapons or drugs offense; the school may change the child's placement, even if the parent has asked for a due process hearing, to an interim alternative educational setting (IAES) for up to 45 days [34 C.F.R. Sec. 300.520(a)(2)];
- (2) The school persuades a hearing officer that the child's presence in his current placement is substantially likely to result in injury to the child or someone else; the hearing officer may place the child in an interim alternative educational setting (IAES) for up to 45 days [34 C.F.R. Sec. 300.521];

- (3) The school persuades a state or federal judge that the child's presence in his current placement is substantially likely to result in injury to the child or someone else; whether the child goes to school anywhere and what his education consists of pending the due process hearing will depend on the terms of the judge's order [*Honig v. Doe*, 484 U.S. 305 (1988); *Gadsden City Bd. of Ed. v. B.P.*, 3 F.Supp.2d 1299 (N.D. Ala. 1998)]; however, as a "suspended" student, pursuant to the court's order, the student continues to be eligible for a free appropriate public education during such a period of extended suspension [20 U.S.C. Sec. 1412(a)(1)(A).]; or
- (4) The alternative educational settings referred under numbers 1 and 2 above, must be selected so as to enable the child to continue to progress in the general curriculum and to continue to receive those services and modifications to which she is entitled.

29. SUPERSEDED. SEE ONLY CHAPTER 1, QUESTIONS AND ANSWERS 37 THROUGH 37(B). ~~The school district changed my child's placement without my consent and without following the procedures described in the three situations listed above. They said all they had to do was to have a meeting and determine that my child's behavior was not due to his disability and they could do whatever they wanted to with him. Is that true?~~

~~No, the ability of school officials to change special education pupil's placements is limited to the situations listed in the previous answer. Some districts have attempted to only do what is called a "manifestation review" and then do whatever they want to regarding a special education student's placement.~~

~~If a school proposes to change a child's placement or to expel or suspend a student for a long period of time (more than 10 consecutive days or more than 10 total days in a pattern of suspensions), the school must, no later than 10 days after it makes this decision, do a "manifestation determination." A manifestation determination is a review of the relationship between the child's disability and his behavior. [34 C.F.R. Sections 300.523(a) and 300.519.] The IEP team and any other qualified persons conduct this review. [34 C.F.R. Sec. 300.523(b).] This is a critical process because only if the team finds that the behavior is not a manifestation of the child's disability may the school change the child's placement or take other disciplinary action against the student. [34 C.F.R. Sec. 300.523(c).]~~

~~In making a manifestation determination, the team must review the child's IEP and placement, evaluations and diagnostic results, information from the parents, and observations of the child. [34 C.F.R. Sec. 300.523(c)(1).] In light of that information, the team must find each of the following three statements to be true in order to proceed against the child or change his placement:~~

- ~~(1) In relationship to the behavior subject to discipline, the child's IEP and placement were appropriate and the special education, supplementary aids and services, and behavioral intervention strategies were provided consistent with that IEP and placement;~~
- ~~(2) The child's disability did not impair his ability to understand the impact and consequences of the behavior subject to discipline; and~~
- ~~(3) The child's disability did not impair his ability to control the behavior subject to discipline.~~

30. The school district had such a meeting and decided that my child's behavior was not a manifestation of his disability. I disagree. What can I do to stop the change of placement?

You can appeal the determination to a due process hearing. The hearing will be an expedited hearing and will likely be scheduled within 20 or 25 days. [34 C.F.R. Sec. 300.525.] While that appeal is pending, your child must remain in his current placement [34 C.F.R. Sections 300.524(c) and 300.514.], unless the child has been moved to an alternative educational setting or there has been a court order prohibiting him from school attendance. [See next Q&A.]

31. ~~SUPERSEDED. SEE ONLY CHAPTER 1, QUESTION AND ANSWER 37(B). I appealed but the school told me that my child's placement during the appeal process will be his new placement not his prior one. Is that correct?~~

~~No, unless the behavior your child engaged in involved weapons or drugs or a hearing officer has already determined that there is a substantial likelihood of injury to someone if your child returns to his prior placement. The only exceptions to the rule that your child must return to his previous placement pending an appeal procedure occur when you are appealing the interim alternative educational setting (IAES) your child was placed in (by the school for weapon or drug offenses or by a hearing officer for substantial likelihood of injury), or when you are appealing the manifestation determination resulting from either of those IAES placement~~

procedures. [34 C.F.R. Sections 300.524(e) and 300.526(a).] In those two situations, but in no others, your child's placement pending the hearing will be the IAES until the hearing decision is issued or until the 45 days allowed for IAES placements expires, whichever comes first. [34 C.F.R. Sec. 300.526(a).]

32. SUPERSEDED. SEE ONLY CHAPTER 1, QUESTIONS AND ANSWERS 24 THROUGH 24(F). ~~How do I set up a due process hearing?~~

~~You must make your hearing request in writing and send it to:~~

~~Special Education Hearing Office
Institute for Administrative Justice
McGeorge School of Law
3200 Fifth Avenue
Sacramento, CA 95817
(916) 739-7053
(916) 739-7066 (FAX)~~

~~You should also send a copy to the local education agency. [Cal. Ed. Code Sec. 56502.] If you ultimately prevail in the due process hearing, and if you have used an attorney to represent you and wish to collect your attorney's fees from the school district, your request for fees may be reduced if you have not provided certain information in your letter initially requesting a due process hearing. At a minimum, your letter requesting a due process hearing must include: the name and residence address of the child and the name of the school the child is attending, a description of the nature of the problem, and a description of your proposed resolution or resolutions to the extent known to you at the time. [20 U.S.C. Sec. 1415(b)(7).] CDE is required to develop a model form to assist parents in filing for due process which includes all necessary information. [20 U.S.C. Sec. 1415(b)(8); 34 C.F.R. Sec. 300.507(e)(3); Cal. Ed. Code Sec. 56502(b).] The Special Education Hearing Office (SEHO), which conducts the due process hearings and mediations, recommends that the letter requesting due process contain some additional information. For that reason, you should use the Sample Letter—Due Process Hearing Request at the end of this chapter.~~

~~When you make your written request for a due process hearing, you should also ask for a copy of the Special Education Hearing Office Notice of Procedural Safeguards so that you know all the rules for participating in the hearing process.~~

~~After receipt of your request, the local education agency must inform you of free or low cost legal services available in the area. [Cal. Ed. Code Sec. 56502.]~~

33. Can the local education agency request a due process hearing?

Yes. Either the parent or the local education agency may request a due process hearing. [34 C.F.R. Sec. 300.507(a); Cal. Ed. Code Sec. 56501(a).]

34. SUPERSEDED. SEE ONLY CHAPTER 1, QUESTIONS AND ANSWERS 24(G) THROUGH 24(H). ~~Once a request for a due process hearing is made, how long does SEHO have to hold the hearing and make a decision?~~

~~SEHO has 45 days from the day it receives the due process hearing request to make a decision. [34 C.F.R. Sec. 300.511; Cal. Ed. Code Sec. 56502(a).] Upon request, SEHO can grant a continuance for good cause. [Cal. Ed. Code Sec. 56505(f).]~~

**35. SEE ALSO CHAPTER 1, QUESTION AND ANSWER 24(I).
What is a mediation conference?**

After a due process hearing request is made, SEHO will provide a mediator to sit down informally with both sides and try to resolve the disagreement. The first step in due process is usually a mediation conference where a mediator from SEHO helps the parent and school district to resolve their disagreement. The mediator will meet with the parties together and/or separately in an attempt to find common ground and issues on which the parties can move toward resolution. The mediator has no power to force either side to do anything, but only tries to help you reach an agreement.

If both you and the school district agree to participate in mediation, a mediation will take place in between the filing for due process and the hearing. Requesting or participating in a mediation conference is not a prerequisite to requesting a due process hearing. [Cal. Ed. Code Secs. 56500.3(c), 56501(b)(2).] As a practical matter, SEHO will assume that both parties are interested in mediation and will assign a mediator to each case and ask that the parties contact the mediator to arrange for a mediation conference.

Although many disputes are settled in mediation, you cannot assume that your dispute will be resolved. Accordingly, it is in your best interests to be as prepared as possible for the hearing even prior to the mediation. The benefits of being well

prepared for hearing include having increased negotiating power at mediation, and advanced preparation for the due process hearing if that becomes necessary.

36. What are the pros and cons of going through mediation?

Mediation is encouraged because it gives both sides another chance to reach agreement. An impartial mediator increases the possibility of resolution. The mediation does not change the 45-day rule, although parents are sometimes asked to extend the 45 days to aid in the mediation process. From a tactical standpoint, mediation often gives parents more information about the education agency's point of view. Such information may be helpful if there is a due process hearing.

On the negative side, mediation requires additional time and energy. If it appears that there is absolutely no hope for agreement, it may be best to waive mediation. However, before waiving mediation, make sure that you are prepared to proceed to the due process hearing. Waiving mediation may result in the due process hearing being scheduled sooner than if you participated in mediation.

See Question 37 for a discussion of the distinction between "pre-due process mediation" and "due process mediation" conferences, and the disadvantages of the "pre-due process mediation" conference.

37. Are there any dispute resolution procedures other than the compliance complaint and due process mediation and hearing?

Yes. After identification of a disputed issue, you may ask for a "pre-due process" mediation. This pre-due process mediation is not mandatory and you may proceed directly to filing for a due process hearing.

A pre-due process mediation is conducted exactly like a due process mediation. The state will provide a mediator to sit down informally with both sides and try to resolve the disagreement. The pre-due process mediation must be scheduled within 15 days and completed within 30 days of receipt of your request by SEHO. [Cal. Ed. Code Sec. 56500.3.] A copy of the written resolution, if any, must be mailed to you and the school district within 10 days following the pre-due process mediation conference. SEHO will likely not offer a due process mediation after the parties have participated in a pre-due process mediation without success.

You must request your pre-due process mediation in writing. You should send your request to the Special Education Hearing Office with a copy to your local school district. See Question 32 for the address. In order to assist SEHO, you should

include a specific request for a pre-due process mediation in your letter. [Cal. Ed. Code Sec. 56500.3.]

There are several disadvantages to participating in a pre-due process mediation. One disadvantage is that parents cannot have an attorney or independent legal advocacy contractor attend or otherwise participate in the mediation conference. This may not be a problem for a parent who is knowledgeable about special education programs and entitlements. However, the parent who does not have this knowledge may be at a significant disadvantage when negotiating an agreement with special education officials and in knowing whether the agreement that is reached is consistent with the law and the facts of the child's needs. Although state law provides that the "stay-put" rule (the rule that a child must remain in his last agreed upon program pending resolution of the dispute) applies during pre-due process mediation [Cal. Ed. Code Sec. 56346(b)], SEHO has taken the position that it cannot order a stay-put where no due process has been filed. CDE has taken the position that it will not issue "stay-put" orders as part of a compliance complaint. For these reasons, parents may only wish to participate in a voluntary pre-due process mediation if the school district and any other agencies have given their written assurances that stay-put will be honored during the pendency of pre-due process mediation.

This is not to imply that school districts are ever permitted to unilaterally change special education pupils' placements or programs without going through the IEP process and obtaining the parent's consent. You should not have to file for a hearing to maintain what was promised in an IEP meeting and written in an IEP document. However, when disputes arise between parents and districts, sometimes districts ignore their obligations to implement the current IEP and want to move ahead with whatever change they wish to make. In this situation, if you intended to file for due process anyway on other issues, you can do that and also ask the hearing office to order the district to continue to honor the IEP during the process. However, if you are satisfied with the IEP and would not otherwise be filing for a hearing, you should not have to file for a hearing and ask for a stay-put just to maintain the school district's obligation. When a school district unilaterally changes a placement or terminates a service without going through the IEP process, you may instead wish to file a complaint with the CDE for the district's failure to comply with the IEP. You should ask CDE to order the district to provide compensatory services to make up for any lost services or to pay your out-of-pocket expenses if you incurred any in privately maintaining services. The parent should also ask CDE for "fast-track" processing of the complaint in order to minimize the disruption to your child.

38. SEE ALSO CHAPTER 1, QUESTIONS AND ANSWERS 24(A) THROUGH 24(E). Should I file for due process immediately, that is, as soon as it becomes apparent that the school district and I are at an impasse over services or placement at the IEP meeting?

If the school district is threatening to change your child's program or placement without your consent, and you wish to keep things the way they are, you may have to file for due process just to preserve the status quo by taking advantage of the "stay-put" provision. See Question 28 of this chapter.

However, you should generally not file for due process until you are prepared to properly participate, even if you feel your child is currently being inappropriately served. Nothing about the inappropriate program is likely to change simply by your filing for due process; on the other hand, the time spent preparing your evidence will increase your chances of a successful result.

Within a few days of filing for due process, you will receive a notice from SEHO. The notice will contain the dates (two consecutive days) set for the hearing. The notice will also include the name and telephone number of the assigned mediator. It will be up to you and the district to contact the mediator and make arrangements for a mediation conference prior to the hearing dates, if possible. If you are unable to arrange for mediation prior to the hearing dates, you will need to postpone the hearing. The due process hearing dates will be set for approximately five weeks from the date SEHO receives your request for due process. The reason these dates for mediation and hearing are set approximately three and five weeks from the date of receipt of your request for due process is because of SEHO's attempt to comply with the federal law requiring your receipt of the due process hearing decision within 45 days of your request for due process.

39. SEE ALSO CHAPTER 1, QUESTIONS 24(A) THROUGH 24(E). How do I know if I am prepared for the due process hearing?

At the due process hearing, you will be required to present evidence which establishes that your child needs the services or placement you are seeking through due process. The following are some examples of common disputes.

- (1) You are dissatisfied with the goals and objectives of your child's IEP. For example, you believe that they are unclear or that your child could

accomplish more with certain services than the district is willing to acknowledge. You will need evidence that the objectives you would like to write are reasonable expectations for learning and skill acquisition for your child in light of his/her disability and the amount of time in which you would expect the objective to be reached.

- (2) You may agree with the goals and objectives but disagree with the district on the level of services needed to accomplish these objectives. You will need evidence regarding the level of services required by your child to achieve the IEP objectives.
- (3) You may disagree with the placement the district is proposing. For example, you may believe that the placement does not offer your child maximum appropriate interaction with nondisabled children. You will need evidence regarding the supportive services that could be employed to make it possible to serve your child in the regular classroom or in a more integrated way than that which the district is proposing.

At a minimum, you may be prepared to enter a due process hearing after you have familiarized yourself with what the legal standards are for the IEP services or placement you hope to obtain. Before entering a due process hearing, you must also make sure that the proof you need to meet those legal standards will be available to you when you need it. If some of your proof is in the form of documents, you must have those documents at least five business days before the hearing to exchange with the school district. SEHO asks that you supply it with a copy of those documents seven days before the hearing. The witnesses you intend to use to prove your case must appear, prepared to testify at the date, time and place set for the hearing.

Examples of typical hearings are as follows:

If you are challenging the appropriateness of a school's IEP for your child; generally, the hearing officer will examine these basic issues:

- (1) Is the school's IEP designed to meet your child's unique needs? For example, were there IEP goals written for all the areas of educational deficit that your child's assessments discovered? And were the services offered related to making progress toward those goals? In other words, were your child's various educational deficits considered when decisions were made about services and strategies to address those learning problems; or were decisions made based just on availability of space, administrative convenience, or some other factors that have nothing to do with individualizing a program for a particular child?

- (2) Was the IEP reasonably calculated to provide educational benefit? If your child did not make progress toward goals, this is evidence supporting a finding that the IEP was not reasonably calculated to result in progress. If the services or placement offered were not related to the goals to be achieved, the IEP was not reasonably calculated to provide benefit.
- (3) Was the program your child actually experienced consistent with the IEP? In other words, were the services promised on the IEP actually provided and in the amounts, on the schedule, and in the environments which the IEP said they would be?

If the parent is challenging the restrictiveness of a placement offered by a school in which to implement an IEP, the hearing officer generally will examine these basic issues:

- (1) Is the restrictive placement offered by the district necessary in order for your child to benefit, that is, to make progress toward goals; or could that progress occur in a less restrictive setting, that is, a setting with greater access to nondisabled peers? What supplemental services (such as instructional or behavioral support or curriculum modifications) [see Cal. Ed. Code Sec. 56364(a)] could be used to enable benefit to occur in a less restrictive setting?
- (2) What noneducational benefit (such as socialization, behavioral or communication skills development) could be gained by placement in a less restrictive setting?
- (3) What will be the effect on the teacher and nondisabled pupils if the child with a disability is placed in the less restrictive setting of their class or school? Will the student with a disability monopolize the teacher's time in class; or will the teacher's time outside of class and in preparation for class be monopolized by activities necessary to prepare lessons and activities for the child with the disability? Will the child be disruptive, unruly, or distracting to the other children in the less restrictive setting? If the teacher or other students would be adversely impacted, what supplemental services could be added to minimize and address these issues?
- (4) What will be the cost to the district of any supplemental services needed for appropriate placement in the least restrictive setting? Will that cost be burdensome to the district's funds and adversely affect the availability of services to other students in the district?

Therefore, in the typical situations listed above, you are not prepared for the hearing until you are able to introduce evidence in the form of testimony and documents which speak to these questions and factors in a way which will give a hearing officer the information needed to write a decision in favor of the parent.

40. Where do I get the evidence I will need to present at the due process hearing?

The information you will need to support and establish your beliefs on these issues may come from your testimony if you can give examples of other similar learning experiences, good or bad, which you have had with your child when she received a certain level or type of service or when she was placed in a certain environment.

However, it is much more likely that there may be a need for testimony from someone who knows your child and is knowledgeable in the education or training of persons with disabilities to establish some of these elements and to describe what kinds of services may be needed, in what amounts, in what environments, and why. The school district will present witnesses who are professional educators, psychologists, therapists, and administrators who have degrees and credentials in the fields which are related to the disputed issues. Therefore, you will likely have to have knowledgeable educators and/or other professionals to establish the facts you need to prove in order to obtain the services or placement you are seeking.

Some children already have tutors, counselors, doctors, psychologists, or other professionals involved in their lives who can offer the kind of testimony the parent must present. Sometimes, parents are able to obtain publicly financed evaluations from independent educational professionals under the law regarding the right to an independent assessment. See Chapter 2. Other parents may have to spend their own money to hire an independent evaluator who advertises as an educational psychologist or learning disabilities specialist.

Before requesting due process, the parent, who believes such additional testimony is necessary or desirable for the best chance of success, must find such a witness and make sure that she is both willing and available to provide that kind of testimony approximately five weeks from the time the parent is contemplating filing for due process.

41. Can experts testify at a due process hearing?

Yes. It is often very important to have expert witnesses at a due process hearing. An expert witness is someone who has a great deal of knowledge about special

education and, specifically, about your child’s disability and special education needs. The expert witness can assess your child and the various components of the programs at issue and make a professional observation about what is and is not appropriate for your child.

42. How would I use an expert witness?

Since both sides usually have witnesses who will testify that their position is correct, it is important to have an “expert” testify for you. Normally, the expert will meet your child, review his educational records, visit his class, speak with his teachers, and generally analyze his special education needs and the programs/services the educational agency is offering. You will then call that expert as a witness to testify.

43. Instead of having witnesses come to the due process hearing, can I submit letters, records, or other documents to prove my case?

SEHO follows a regulation that provides that a hearing officer may not base his decision on hearsay alone, but must have some other evidence to support the decision. [5 C.C.R. Sec. 3082(b).] Most documents are considered hearsay because they cannot be cross-examined by the other parties like live witnesses can. The right to cross-examine is an essential part of due process. Therefore, it is crucial to bring witnesses to the hearing who can testify about what they observed and/or what their opinions are concerning the issues in the hearing.

Documents further support and establish the testimony of the witness. You should gather and submit any and all documents that are supportive of your position in the case. However, you should always make sure that some competent witness is available and willing to testify at the hearing on each major point you must establish in order to obtain what you believe your child needs for an appropriate education.

If the mediation has failed to resolve all the issues in dispute, nothing the parties said or wrote at the mediation may be submitted to the hearing officer at the hearing for the purpose of trying to prove a party’s case. [5 C.C.R. Sec. 3086.] Therefore, just because a school district offered to meet you halfway in terms of a program during a mediation conference, it does not mean that such an offer can then be admitted into evidence at the hearing. If mediation fails and all offers are

withdrawn, each party must prove his entire case without any reference to whatever may have been said or whatever progress may have been made at the mediation.

44. Will the hearing officer read all the documents that I submit and the district submits?

You cannot assume that the hearing officer will read all of the records submitted by the parties prior to issuing a written decision. Therefore, it is crucial to point out important statements and passages in the records you submit to the hearing officer, either directly or by references to those records by your witnesses while they are testifying. In addition, you should organize all the documents you plan to submit and identify them by numbers or letters. That way the hearing officer can easily refer to and locate documents both during and after the hearing.

45. Must I be represented by a lawyer in order to go through due process?

No, it is not required that you be represented by a lawyer. However, whether you need a lawyer depends on whether you can collect and properly present the evidence you will need to prevail. If you do not use a lawyer in due process, you should make every effort to consult with a lawyer or advocate who has training and experience in special education law and procedure.

A special education lawyer or advocate is important because he can inform you of what law applies to your child's situation. It is important to know what the legal standards are regarding the extent of your child's entitlement to special education services and placement. Your presentation of evidence through your witnesses and documents should be consistent with the legal standards that apply. The things which you and your witnesses will say and the contents of the documents you will submit must be consistent with what your child is entitled to under the special education laws in terms of the types and intensity of services and the location of the program.

If you choose to be represented by an attorney at the hearing, you must notify the other parties of this at least 10 days prior to the hearing. [Cal. Ed. Code Section 56507.]

If you do not use an attorney, you may wish to view Protection and Advocacy's video tape on preparing for and conducting a due process hearing.

46. SUPERSEDED. SEE ONLY CHAPTER 1, QUESTION AND ANSWER 26(A). ~~What if I have already initiated due process, but I need more time to prepare or to find a representative before the hearing?~~

~~As soon as you realize that you need more time, you should contact the school district to ask for its agreement to a postponement. If the school district does not agree to a postponement, you should immediately make a written request for a postponement to SEHO. A copy of that written request must also be sent to the district. Your written request to SEHO must also indicate that a copy has been sent to the district. SEHO has the authority to grant postponements for “good cause.” What constitutes good cause is not specified by SEHO. Therefore, you should mention as many reasons as you have for needing the postponement (for example, the need to obtain an independent educational evaluation, the unavailability of an important witness or the inability to retain an advocate or attorney to represent you). Recently, SEHO has not found the unavailability of a witness, in and of itself, sufficient good cause to justify a postponement. The first postponement may be granted by SEHO, but any further postponements may require much greater justification. If, for example, mediation is continuing, and if the school district agrees, SEHO may take the hearing “off calendar” to allow the mediation to conclude. [Cal. Ed. Code Sec. 56501(b)(2).] The hearing will be rescheduled only if the mediation fails to resolve all the disputed issues.~~

47. Where is the due process hearing held?

The due process hearing is often held at the educational agency offices. It must be at a time and place that is convenient for you and your child. [Cal. Ed. Code Sec. 56505(b).] However, you will not be consulted by SEHO regarding convenient dates. If it is not possible for you to appear on the date assigned, you should request a postponement.

48. Who attends the due process hearing?

As a parent, you have the right to have the hearing open or closed. [5 C.C.R. Sec. 3082(f).] If the hearing is open, members of the public can attend. However, even if the hearing is open, you can still have witnesses sequestered. [5 C.C.R. Sec. 3082(c)(3).] “Sequestered” means that witnesses cannot be present at the hearing to hear the testimony of other witnesses. [34 C.F.R. Sec. 300.509; Cal. Ed. Code Sec. 56501(c)(2).]

If the hearing is closed, members of the public cannot attend. A closed hearing usually consists of you (and your child if you want), your representative, the hearing officer, the education agency's representative and the agency's advocate. Testimony can be taken by telephone at the discretion of the hearing officer if each participant can hear and participate in the entire proceeding while it is taking place. [5 C.C.R. Sec. 3082(g).] If you hope to present testimony by telephone, you should make sure you have the hearing officer's permission to do so well in advance of the hearing so that the necessary equipment is present at the hearing site. SEHO does not grant permission to present testimony by telephone in every situation, so you should be prepared to explain the importance of the witness' testimony and why the circumstances make it extremely difficult or impossible to have the witness appear personally at the hearing to testify.

49. Can the parties submit written information to the hearing officer? How soon must they submit it? Do the parties have to disclose their exhibits and lists of witnesses before the hearing?

Both sides can submit exhibits (for example, letters of support, assessment reports, IEPs, etc.) and should do so. At least five business days before the hearing, you must make sure the district has: (1) copies of all documents you intend to submit as exhibits at the hearing; and (2) a list of the potential witnesses you may call to testify at the hearing, along with a brief statement regarding what each witness will testify about. [Cal. Ed. Code Sec. 56505(e)(7).] Mailing this information five business days before the hearing is not sufficient; the local education agency must receive these materials five business days before the hearing. Likewise, the local education agency must submit its documents and list of witnesses to you at least five business days before the hearing. Any exhibits or written material exchanged less than five business days before the hearing can be prevented from going into the record, and any witnesses whose names were not disclosed five business days before the hearing can be prevented from testifying. In addition, SEHO asks both you and the education agency to submit documents and lists of witnesses to SEHO at least seven days before the hearing. The hearing officer or any party to the hearing has the authority to prohibit the introduction of any evidence (document or witness) at the hearing that has not been disclosed to the hearing office or to that party, as the case may be, at least five business days before the hearing. [Cal. Ed. Code Sections 56505.1(f) and 56505(e)(8).] Therefore, you must be sure these documents and witness lists are in the hands of the other parties and the hearing office five business days prior to the hearing.

At least 10 days before the hearing, each party must submit to each other party and the hearing a statement of: (1) what that party believes are the issues to be decided at the hearing and (2) that party's proposed resolution of those issues. As a parent, you may have an attorney represent you and your child at the due process hearing. If you do not have an attorney in the due process proceeding, a mediator must help you identify the proposed issues and resolutions upon your request. [Cal. Ed. Code Sec. 56505(e)(6).]

You may not communicate with the hearing officer outside of the presence of the other parties, and you must send copies to the other parties of any correspondence or other communications you have with the hearing office which ensures receipt in a timely and comparable manner. [5 C.C.R. Sec. 3083, 3084.]

50. Is the due process hearing a trial or like court?

The due process hearing is not a trial, and it is not technically like going to court (although they are similar in that witnesses are called). A due process hearing is an "administrative" hearing and does not take place in a courtroom or before a judge. The hearing officer is someone hired by the state who knows about special education, and who will impartially review all the evidence and make a decision.

51. How does the hearing proceed?

Normally, both sides give opening statements generally describing the issues in the case. The party that calls for the hearing (the petitioner) then presents her case by calling witnesses. The responding party (the respondent) may then cross-examine the petitioner's witnesses, and the petitioner has the right to ask additional questions (re-direct) after the respondent has cross-examined.

After the petitioner finishes her case, the respondent calls her witnesses (the same procedure as before: examination, cross-examination, and then re-direct examination). Finally, both parties give closing arguments. You can also request that the record remain open so that you can submit a written closing argument. [34 C.F.R. Sec. 300.509, Cal. Ed. Code Sec. 56505(e).]

52. What is the record?

The record is simply all the evidence (written or oral) received by the hearing officer. Although not part of the evidence, the oral or written opening and/or closing statements of the parties are also included in the record of the administrative hearing. Oral evidence (testimony from witnesses), the opening and

closing statements of the parties, and questions asked of witnesses are tape recorded by the hearing officer. The record also includes exhibits and other written material which have been accepted into evidence by the hearing officer. You are entitled to receive a copy of the tape recording after a decision is rendered if you ask for it. [34 C.F.R. Sec. 300.509(a)(4); Cal. Ed. Code Sec. 56505(e)(4).]

53. What if a witness does not want to attend the hearing?

The law provides that witnesses can be subpoenaed for a due process hearing. This means that the Special Education Hearing Office will give you subpoena forms to fill out and personally serve on the proposed witness. (For more information on personal service of subpoenas and other requirements for compelling attendance of witnesses, see SEHO Notice of Procedural Safeguards. It is available from the Special Education Hearing Office where you requested due process hearing.) A subpoena is an order from the state. It orders the witness to attend the due process hearing. [34 C.F.R. Sec. 300.509(a)(2); Cal. Ed. Code Sec. 56505(e)(3); 5 C.C.R. Sec. 3082(c)(2).]

54. Does the hearing officer at a due process hearing simply listen to witnesses and review the documents submitted, or can the hearing officer participate in the hearing process?

Hearing officers have a variety of powers in the conduct of a due process hearing, allowing them to participate in the process and to further develop the evidence on which they will base their decision. Hearing officers may do any of the following:

- (1) Question a witness before any party does;
- (2) With the consent of all parties, have conflicting expert witnesses discuss issues with each other on the record;
- (3) Visit a proposed placement site;
- (4) Call a new witness, not identified by any party, to testify if all parties consent or if there is a five-day postponement;
- (5) Order an independent assessment and postpone the hearing until it is completed (with the costs of the assessment to be borne by the hearing officer);
- (6) Call as a witness an independent medical specialist to testify about a student's medical disability (with the cost to be borne by the hearing officer);

- (7) Bar the introduction of any documents or the testimony of any witnesses not disclosed to the other parties or to the hearing office at least five business days prior to the hearing.

[Cal. Ed. Code Sec. 56505.1.]

**55. SEE ALSO CHAPTER 1, QUESTION AND ANSWER 26(B).
Can I get the public education agency to pay for my attorney
and expert witnesses?**

Under federal law, if you are successful or partially successful in a mediation, a due process hearing, or a court hearing, a federal court may award you reasonable attorneys' fees. [20 U.S.C. Sec. 1415(i)(3)(A)(B).] A recent decision of the U.S. Supreme Court in a Fair Housing Amendments Act case has called into question the court's right to award attorneys' fees for a successful settlement agreement or mediation. [See *Buckhannon Board and Care Home, Inc. v. West Virginia Dept. of Health and Human Resources*, 121 S.Ct. 1835 (2001).] In the Ninth Circuit Court of Appeals (in which California is located), there have been three recent non-special education cases since *Buckhannon*. One found that the *Buckhannon* case did not apply to prohibit attorneys' fee awards in settlement agreements under the Americans With Disabilities Act. [See *Barrios v. Cal. Interscholastic Federation*, 2002 DJDAR 579 (9th Cir. 2002).] In the second case, *Labotest, Inc. v. Bonta*, 297 F.3d 892 (9th Cir. 2002), the court found that a party who had obtained a favorable stipulation from the opposing party which was then incorporated into the final decision of the court was a prevailing party on the issue stipulated to. The third Ninth Circuit case found that *Buckhannon* does apply to prohibit attorneys' fees after settlement but before a judgment or consent decree in a case under the Equal Access to Justice Act. [See *Perez-Arellano v. Smith*, 2002 DJDAR 1243 (9th Cir. 2002).] However, a federal district court in California has determined that *Buckhannon* does not apply to IDEA cases and found that a private settlement agreement which was enforceable against a school district made the student a prevailing party in the dispute. [See *Ostby v. Oxnard Union High School District*, 209 F.3d 1035 (C.D. Cal. 2002).] The authors will continue to monitor these developments as to which rule is applied to special education law cases in California. Attorneys' fees are not available when you have an attorney represent you at an IEP meeting, except where the IEP meeting was convened at the order of a hearing officer or judge. [20 U.S.C. Sec. 1415(i)(3)(D).]

The term "reasonable attorneys' fees" means the lawyer's hourly charges consistent with rates in your area and the costs of pursuing the case — for example,

the cost of expert witnesses. The education agency may offer a settlement agreement, which asks you to waive your right to attorneys' fees. Because of this possibility, you should thoroughly discuss it with your attorney at the time you hire him and before you enter into any discussions with the school district. Other specific details about the federal attorneys' fee law cannot be included here. However, you can and should review these laws with your lawyer when you hire her. There are several laws concerning attorney's fees which you should be aware of. Your attorney's fees may be reduced if the court finds that you did not do better as a result of the due process hearing than what the school district offered in writing at least 10 days prior to the hearing beginning. Attorney's fees may be reduced if the court finds that you unreasonably delayed final resolution of the dispute. Attorney's fees may be reduced if you did not provide the required written notice to the district of certain information at the time of filing for a due process hearing. [20 U.S.C. Sec. 1415(i)(3)(D).]

56. If I lose the due process hearing, can I do anything?

Both sides have the right to go to court to appeal the due process hearing officer's decision. Any appeal to court must be filed within 90 calendar days of receipt of the administrative hearing decision. [34 C.F.R. Sec. 300.512; Cal. Ed. Code Sec. 56505(i).]

57. I would like to sue the school district for the way my child's special education was mishandled or ignored over the years, what are my chances of success?

Special education is ultimately controlled by federal law. The United States is divided into eleven appellate-level circuits of federal courts and a twelfth for the District of Columbia. The interpretation of the Individuals With Disabilities Education Act (IDEA) and other federal civil and disability rights laws differs somewhat among the various circuits. If you wish to obtain money damages for the school district's substandard or nonexistent special education of your child, your chances of recovering anything are not good in most parts of the country, including California, which is in the Ninth Circuit Court of Appeals. Since initial passage of the IDEA, the federal courts have turned away lawsuits for money damages for what might be called "educational malpractice" when cases are brought only under the IDEA. [*Mountain View-Los Altos Union H.S. Dist. v. Sharron B.H.*, 709 F.2d 28 (9th Cir. 1981); *Colin K. v. Schmidt*, 715 F.2d 1 (1st Cir. 1983); *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981); *Marvin H. v. Austin Independent Sch.*

Dist., 714 F.2d 1348 (5th Cir. 1983); *Powell v. Defore*, 699 F.2d 1078 (11th Cir. 1983); *Crocker v. Tennessee Secondary Sch. Athletics Ass'n*, 980 F.2d 382 (6th Cir. 1992); *Sellers by Sellers v. School Board of Manassas*, 141 F.3d 524 (4th Cir. 1998); *Bradley ex rel. Bradley v. Arkansas Dept. of Educ.*, 301 F.3d 952 (8th Cir. 2002); *Wenger v. Canastota Cent. Sch. Dist.*, 208 F.3d 204 (2^d Cir. 2000) (table).]

Only the third circuit court has allowed claims for money damages under the IDEA. [*W.B. v. Matula*, 67 F.3d 484 (3^d Cir. 1995); *Jeremy H. v. Mount Lebanon Sch. Dist.*, 95 F.3d 272 (3^d Cir. 1996).]

58. Besides cases for compensatory money damages, is there anything else that can be done to address the failures of school districts to have provided appropriate special education services to a student over a long period of time?

Although most courts have not been eager to award money damages for lost educational opportunities and/or for poor educational results, most have allowed claims for out-of-pocket reimbursement of parents who incurred expenses in purchasing special education services for their child when it is later determined a school district had failed to provide an appropriate education. These include the U.S. Supreme Court and California's Ninth Circuit Court. [*Burlington Sch. Committee v. Mass. Dept. of Educ.*, 105 S.Ct. 1996 (U.S. 1985); *Ash v. Lake Oswego Sch. Dist. No. 7J*, 980 F.2d 585 (9th Cir. 1992); *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479 (9th Cir. 1992); *Susquenita Sch. Dist. v. Raelee S.*, 96 F.3d 78 (3^d Cir. 1996); *Parks v. Pavkovic*, 753 F.2d 1397 (7th Cir. 1985).] In the Ninth Circuit, reimbursement is allowed for both substantive denials of appropriate education (those going to the educational services and placement) and for procedural denials (those going to the process used to develop a child's IEP). See *Ash* and *W.G.*, respectively.

59. Does this mean that only parents who have the money to provide appropriate services for their child while a district is failing to do so have any remedy in this system?

No. Courts have also awarded compensatory (in-kind) educational services to students as a remedy for past failures by school districts to appropriately educate special education students. [*Lester H. v. Gilhool*, 916 F.2d 865 (3^d Cir. 1990); *Burr v. Ambach*, 863 F.2d 1071 (2^d Cir. 1988); *Miener v. Missouri*, 800 F.2d 749 (8th Cir. 1986); *Todd v. Andrews*, 933 F.2d 1576 (11th Cir. 1991).] This includes

compensatory services delivered after the student has become ineligible for special education because of age. [*Pihl v. Mass. Dept. of Educ.*, 9 F.3d 184 (1st Cir. 1994); *Jefferson Co. Board of Educ. v. Breen*, 864 F.2d 795 (11th Cir. 1988).] This right to compensatory educational services has been recognized in the Ninth Circuit. [*Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1396 (9th Cir. 1994).]

60. Are there any limitations or obstacles to claims for reimbursement or compensatory education in California?

Yes. One limitation is that California has established a three-year statute of limitations on claims in special education cases. In other words, a claim for compensatory educational services or reimbursement cannot be made on the basis of failures by a school district to have provided appropriate education that occurred more than three years before the case is filed. [Cal. Ed. Code Sec. 56505(j).]

The State, local school districts, and some local school district officials sued in their official capacities, may enjoy some immunity from suits for damages brought in the federal courts under the Eleventh Amendment to the U.S. Constitution. [*Belanger v. Madera Unified Sch. Dist.*, 963 F.2d 248 (9th Cir. 1992); *Porter v. Bd. of Trustees of Manhattan Beach Unified Sch. Dist.*, 123 F.Supp.2d 1187 (C.D. Cal. 2000); *Goleta Union Elem. Sch. Dist. v. Ordway*, 166 F.Supp.2d 1287 (C.D. Cal. 2001).]

In addition, a party cannot simply proceed directly into court to make a claim for reimbursement or compensatory educational services based on a district's failure to provide appropriate services under IDEA. In most cases, a party must first make these claims in the administrative fair hearing process. [*Hoelt v. Tucson Unified Sch. Dist.*, 967 F.2d 1298 (9th Cir. 1992); *Doe by Brockhuis v. Arizona Dept. of Educ.*, 111 F.3d 678 (9th Cir. 1997); *Charlie F. v. Board of Educ. of Skokie Sch. Dist. No. 68*, 98 F.3d 989 (7th Cir. 1996); *Aiello by Aiello v. Grasmick*, 155 F.3d 557 (4th Cir. 1998); *Frazier v. Fairhaven School Committee*, 276 F.3d 52 (1st Cir. 2002); *N.B. v. Alachua Co. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996); *Cudjoe v. Independent Sch. Dist. No. 12*, 297 F.3d 1058 (10th Cir. 2002).]

61. What if my child was simply injured by the acts or negligence of school personnel, do I have to go through a special education due process hearing when I am not making any claim under special education law?

No. Special education due process hearing officers do not have the power to hear claims like this, so going through such a hearing could not result in any order or decision in your favor on such claims. Therefore, the Ninth Circuit and Third Circuits do not require a party to go through a special education due process hearing in cases that do not involve any claims under special education law. [*Witte by Witte v. Clark County Sch. Dist.*, 197 F.3d 1271 (9th Cir. 1999); *W.B. v. Matula*, 67 F.3d 484, 495-496 (3^d Cir. 1995).] However, the Ninth Circuit has narrowed its ruling in *Witte* to cases in which educational issues have been otherwise resolved and the only claims that remain are those which seek relief not available under IDEA. [*Robb v. Bethel School District*, 308 F.3d 1047 (9th Cir. 2002).] A party would not have to go through an administrative proceeding just to enforce the terms of a special education hearing decision. [*Porter v. Board of Trustees of Manhattan Beach Unified Sch. Dist.*, 307 F.3d 1064 (9th Cir. 2002).]

62. Are there any other federal laws that help in bringing a successful case against a school district for compensatory money damages?

Yes, some courts have recognized that another federal law (Section 1983 of Title 42 of the United States Code) gives people who have certain rights under the Constitution or other federal laws the ability to sue those who deprive them of those rights through official actions or inactions. In other words, a special education official or agency who or which breaches his/her/its duties to follow federal special education law can be sued for damages and/or other relief by someone who is adversely affected by denial of those rights. Some courts, such as the Second and Fifth Circuits, that have not allowed actions for damages against schools for violations of the IDEA in the past, have allowed such damages cases under Section 1983 when based on IDEA violations. The courts, however, are divided on whether violations of the IDEA can form the basis for a Section 1983 case. Examples of cases allowing this kind of claim include: *Quackenbush v. Johnson City Sch. Dist.*, 716 F.2d 141, 148 (2^d Cir. 1983); *Frazier v. Fairhaven School Committee*, 276 F.3d 52 (1st Cir. 2002); *Mrs. W. v. Tirozzi*, 832 F.2d 748 (2^d Cir. 1987); *M.B. v. Matula*, 67 F.3d 484 (3^d Cir. 1995); and *Angela L. v.*

Pasadena Indep. Sch. Dist., 918 F.2d 1188 (5th Cir. 1990); *Marie O. v. Edgar*, 131 F.3d 610 (7th Cir. 1997); *N.B. v. Alachua County Sch. Bd.*, 84 F.3d 1376 (11th Cir. 1996). Examples of cases which disallowed this claim include: *Padilla v. Sch. Dist. No. 1*, 233 F.3d 1268 (10th Cir. 2000); and *Sellers by Sellers v. School Board of Manassas*, 141 F.3d 524 (4th Cir. 1998). The Eighth Circuit, although disallowing claims under 1983 for violations of IDEA for the purpose of obtaining money damages, may allow claims under Section 1983 for violations of IDEA where the plaintiff is seeking other relief such as compensatory educational services. [*Heidemann v. Rother*, 84 F.3d 1021 (8th Cir. 1996); *Hoekstra v. Independent Sch. Dist. No. 23*, 103 F.3d 624 (8th Cir. 1996); *Birmingham v. Omaha Sch. Dist.*, 220 F.3d 850 (8th Cir. 2000).]

The only guidance in California on this question are two federal trial court decisions which decided that compensatory damages are available under the IDEA alone or in combination with 42 U.S.C. Sec. 1983. [*Emma C. v. Eastin*, 985 F.Supp. 940 (N.D. Cal. 1997); *Goleta Union Elementary School District v. Ordway*, 2002 WL 32058251 (C.D. Cal.) and *Goleta Union Elem. Sch. Dist. v. Ordway*, 166 F.Supp.2d 1287 (C.D. Cal. 2001).] The *Emma C.* case allowed a claim for damages to go forward under IDEA by itself. In *Ordway*, the court allowed a claim for damages under IDEA in conjunction with 42 U.S.C. Sec. 1983.

In *Ordway* and *Emma C.*, the courts allowed claims to go forward against the school district and against individual special education officials or board members. However, local special education officials may enjoy qualified immunity from suits against them for damages in their individual capacities if the student did not have a clearly established right that was violated or if the local official could not reasonably have known that her conduct was a violation of that clearly established right. [*Harlow v. Fitzgerald*, 457 U.S. 800 (1982); *Act Up!/Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993).]

In the *Emma C.* case, and in the Third Circuit Court of Appeals cases, the courts have warned that schools cannot afford the potential additional financial liabilities that a great many money damages cases might bring. These courts have urged later courts to order compensatory educational services and out-of-pocket reimbursement instead of money damages.

Unpublished decisions of the Ninth Circuit Court indicate that claims under Section 1983 based on violations of the IDEA would have been allowed to go forward had the parents in those cases been able to prove violations of the IDEA. [*Taylor v. Honig*, 977 F.2d 591 (9th Cir. 1992) (Table) Unpublished Dispositions; *Rose v. Simi Valley Unified Sch. Dist.*, 129 F.3d 127 (9th Cir. 1997) (Table)]

Unpublished Dispositions.] A federal trial court within the Ninth Circuit, but in another state (Hawaii), allowed a case for money damages for violations of the IDEA and Section 504 to proceed under Section 1983. [*Patricia N. v. Lemahieu*, 141 F.Supp.2d 1243 (D. Haw. 2001).]

63. What about Section 504 and the ADA, are those laws of any assistance in obtaining compensatory damages against a school district?

At least one federal trial court has found that Section 504 and the ADA are so similar that the criteria for determining a violation of one law should be the same as for the other. [*McGraw v. Board of Education*, 952 F.Supp. 248 (D. Md. 1997).] By statute, the remedies for violations of the ADA and Section 504 are co-extensive with each other. [42 U.S.C. Sec. 12133; 29 U.S.C. Sec. 794a(a)(2).] Most of the damages litigation which has taken place against school districts to date has been under Section 504.

The Ninth Circuit is among those that allow cases for compensatory and even punitive damages to proceed under Section 504 in conjunction with Section 1983. [*Kling v. Los Angeles*, 769 F.2d 532 (9th Cir. 1985) rev'd on other grounds, 474 U.S. 936.] The law created by such cases, however, is not very helpful to students who are seeking to recover money damages from schools. Although courts have found that Section 504 will support a case for these kinds of damages, they have also required that students must prove intentional discrimination, gross misjudgment or bad faith on the part of the public officials under Section 504 or the ADA in order to recover any such damages. [*Scokin v. Texas*, 723 F.2d 432 (5th Cir. 1984); *Smith v. Special Sch. Dist. No. 1*, 184 F.3d 764 (8th Cir. 1999); *Sellers by Sellers v. School Board of Manassas*, 141 F.3d 524 (4th Cir. 1998); *Wenger v. Canastota Cent. Sch. Dist.*, 979 F.Supp. 147 (N.D.N.Y. 1997), aff'd 181 F.3d 84 (2nd Cir. 1999).] In the Ninth Circuit, a party must prove intent to discriminate, or at least deliberate indifference, in order to recover money damages under Section 504 or Title II of the ADA against a public entity. [*Ferguson v. City of Phoenix*, 157 F.3d 668 (9th Cir. 1998).] This standard of proof may prove difficult for parents and students to establish against a public entity such as a school district.

64. How can a parent ensure that a school district honors the “stay-put” provision?

Most school districts are aware of and usually honor the “stay-put” provision. However, this issue has become more problematic in recent years. There are several alternatives available to help you enforce your “stay-put” rights:

- (1) As in all special education process interactions, you should let the school district know that you know your rights. This simple action puts the school district on notice that you expect them to fulfill their responsibilities according to federal and state law. Therefore, you could include a statement in your hearing request (a copy of which should be sent to your school district) asserting your “stay-put” rights. Ask the school district to confirm your child’s right to maintain his current placement and/or services within five days from the school district’s receipt of your hearing request. If the school district does not respond, or refuses to honor your “stay-put” rights, you may want to utilize option (2) or (3) below.
- (2) You could file a compliance complaint with the CDE. Unfortunately, CDE action may take too long for this to be of assistance to you. You could call the quality assurance office to request a “fast-track” investigation or call your school district directly. However, fast-track processing is in the discretion of the CDE.
- (3) Once you have filed for a due process hearing, you could file a “stay-put” motion with the hearing office. This motion asks the hearing office to rule on your request for “stay-put” prior to the mediation or hearing. Write a brief letter to the hearing office outlining your request and why you think the “stay-put” provision should apply to your child’s situation. A hearing officer will review this basic information and issue an order in favor or against your “stay-put” request. If the ruling is in your favor, the order will force the school district to enforce your “stay-put” rights. Please see sample paragraph *Due Process Request for Stay-put* at the end of this Chapter.

65. I filed for due process and went through mediation but could not settle my case with the school district. I do not have an attorney. Before the due process hearing, the school district approached me to try to settle the case but insisted on doing it outside the mediation and due process system. The district wants me to sign a contract that contains our understanding. Should I do that?

The authors of this manual advise against contracts which are outside the IEP process or the due process system, including mediation. The Special Education Hearing Office does not enforce these contracts. The State Department of Education is required to enforce IEPs and due process hearing decisions. ~~It is willing to enforce mediation agreements, but it may not enforce the terms in other documents.~~ It has expressed its willingness to enforce mediation agreements and other settlement agreements, but it has not officially published this willingness in any regulation, Advisory, or Notice. If the school district fully intended to comply with the terms of the contract, it should be willing to put the terms of the contract in a mediation agreement or IEP. The fact that the school district wishes to settle the case by way of a document with questionable enforceability may mean that the school district is not acting in good faith and wishes to both avoid a hearing and avoid being compelled to comply with a settlement agreement.

66. SUPERSEDED. SEE ONLY CHAPTER 1, ATTACHMENT ENTITLED “SPECIAL EDUCATION FAQs” UNDER “~~CONFERENCES PRIOR TO HEARING.~~” I filed for a due process hearing and received information from the Special Education Hearing Office about having to participate in a “Prehearing Conference” first, and about having to file a “Certificate of Readiness and Request for Prehearing Conference.” What are these conferences and certificates all about and what effect do they have on the due process procedure?

~~If you filed for due process, you should receive a notice from the Special Education Hearing Office (SEHO), which includes the dates of your hearing and the name and telephone number of the assigned mediator. First, a mediation conference will be held to attempt to resolve your disagreement with the school~~

district. Either the parent or the school district may waive mediation. If mediation is successful, the hearing will be dismissed so you will not have to worry about the prehearing conference or certificate.

If mediation is not successful and you are not ready to proceed to the hearing on schedule, you will have to try to get the hearing postponed. You should first try to get the school district to agree to a postponement. If the district agrees, you should contact the SEHO to request the postponement. Tell the SEHO that the school district has already agreed to the postponement. If the school district does not agree, you may still request a postponement. A postponement is not automatically granted, however, even if both parties have agreed to one. You should be prepared to state good reasons for why the hearing should be postponed. Good reasons may include a previously scheduled, unable to be rescheduled, important medical or legal procedure, or an unanticipated physician documented illness of a party. Generally, the unavailability of a certain witness is not good cause for a postponement.

It is best practice not to file for due process (unless filing is necessary to invoke the “stay put” rule) until and unless the parent is ready to proceed to the due process hearing, or is confident that she can quickly become ready for the due process hearing because the issues and facts are few in number and easily presented, or because the parent has done the vast majority of the necessary preparation, although not all of it, by the time of filing.

If the mediation was not successful and you are ready to proceed to the due process hearing, you must file the Certificate of Readiness and Request for Prehearing Conference form **at least 15 days** prior to the first day of the hearing. Obviously, if the mediation takes place less than fifteen days before the first day of the hearing, the party should file this form as soon as possible after the unsuccessful mediation. The prehearing conference lets both sides and the hearing officer know what to expect in the hearing (in terms of what the issues are, how many witnesses there will be, the schedule for the witnesses, the number of days of hearing that will be needed, and other details, including anything a party wants to bring up). The conference may be in person or by telephone. The party who requested the due process hearing, which is most often the parent, must participate in the conference or the case may be dismissed.

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Sample Letter – Compliance Complaint

Ms. Bev Blue
Address
City, CA Zip
Telephone Number

Date

Complaint Management and Mediation Unit
Special Education Division
California State Department of Education
1430 N Street, Suite 2401
Sacramento, CA 95814

Dear Sir or Madam:

This is a special education compliance complaint. [5 C.C.R. Sec. 4600 and following.] I feel that Local Unified School District (LUSD) is out of compliance with federal and state special education laws.

My child's name is John, and he is seven years old. He is developmentally delayed and has a physical disability, which requires him to use crutches. I had the following problems with my school district:

NOTE: Pick the problems that apply to your child's situation. If you have a different problem from those listed, describe the situation fully and include the part of the law that has been violated. If you do not know the law that has been violated, the Compliance Unit should match the correct law to your situation. See Question 8.

- (1) I never consented to psychological assessments done by the district on January 21, 1986. (Failure to get written parental consent for assessment, Cal. Ed. Code Sec. 56321.)
- (2) When I asked the district for a copy of the tests done by the psychologist, they refused to give me a copy. (Failure to provide parent with requested records, Cal. Ed. Code Sec. 56504; 34 C.F.R. Sec. 300.502.)
- (3) At the February 8, 1986, IEP meeting, LUSD refused to write down in the IEP the need for, and frequency and duration of, physical therapy services (related services). (Failure to provide frequency and duration of related service, 5 C.C.R. Sec. 3051; 34 C.F.R. Sec. 300 – 346.)

- (4) John's IEP states that he will have lunch and music class with nondisabled students, but the district has not provided these opportunities. (Failure to implement the IEP, Cal. Ed. Code Sec. 56345; failure to provide least restrictive environment, Cal. Ed. Code Sec. 56364; 34 C.F.R. Sec. 300.550-553.)
- (5) John's IEP states that he is to receive speech therapy twice a week for 30 minutes but LUSD says they do not have a therapist available. (Failure to implement the IEP, Cal. Ed. Code Sec. 56345.)

In order to resolve this complaint, I am asking for the following remedies:

- (1) Allow me access to my child's records;
- (2) Get my consent before future assessments;
- (3) Order the district to allow John to have lunch and music class with nondisabled students as per his IEP;
- (4) Modify the IEP to state that physical therapy three times per week, 30 minutes per week must be provided; and,
- (5) Immediately begin the twice weekly speech therapy sessions specified in John's IEP.

I have enclosed a copy of my child's IEP and a letter to the district asking for a copy of the psychologist's report.

Because my complaint involves a matter which calls for direct State Department of Education intervention pursuant to Title 5 Cal. Code of Regulations Section 4650(a)(viii)(C) [if it involves immediate physical danger or threat to children], (D) [if it involves nonimplementation of a student's IEP], or (E) [if it involves a violation of federal special education statute or regulation (see Question 7 for a listing of those situations in which direct state intervention is required)], I have not filed with the local education agency. Rather, I request direct state intervention in this matter.

I ask for immediate investigation and resolution, as my child cannot afford to wait for these services. Thank you for your assistance.

Very truly yours,

Bev Blue

NOTE: See Due Process Hearings/Complaints for information on timelines that apply to compliance complaints.

NOTE: If you have not heard from the Compliance Unit within 10 days after you mail your complaint, we recommend that you call to follow up at (916) 445-4632 (direct).

Sample Letter – Due Process Hearing Request
SUPERSEDED – Letter Deleted

SEE CHAPTER 1, QUESTION AND ANSWER 24(C)

SEE ALSO CHAPTER 1 ATTACHMENT ENTITLED “SPECIAL EDUCATION
FAQs” UNDER “PLEADING REQUIREMENTS”

SEE ALSO CHAPTER 1 ATTACHMENT ENTITLED “MEDIATION AND DUE
PROCESS HEARING UNDER (IDEA)”

Sample Due Process Request for Stay-put

Sometimes a school district will threaten to change a student's placement or program or to reduce services without a parent's consent. This is a violation of the IEP process and of the child's current IEP. A parent could file a compliance complaint to stop the district's action, but the process for the state department's investigation can take up to 60 days and the state department likely will not intervene to order the district to keep the program as it is pending resolution of the complaint. Parents' most effective recourse in this situation is to file for a due process hearing and to add a request for enforcement of the child's stay-put rights to the letter or form requesting the due process hearing. Parents may wish to include a paragraph similar to the following paragraph in order to request stay put.

I am writing to request a stay-put order from the Hearing Office pursuant to 20 U.S.C. Sec. 1415(j), Cal. Ed. Code Sec. 56505(d), and 5 C.C.R. Sec. 3042(a). My child's last-agreed-upon special education program and placement is reflected by the attached IEP which specifies placement in/at:

and includes the following services and service frequencies:

The district has threatened to terminate [or change] [or has actually terminated or changed] my child's last-agreed-upon program/placement as follows:

I respectfully request the Hearing Office to immediately issue a stay-put order which restores my child's program/placement to its status quo prior to the district's unilateral [or threatened] actions pending the results of the due process hearing.