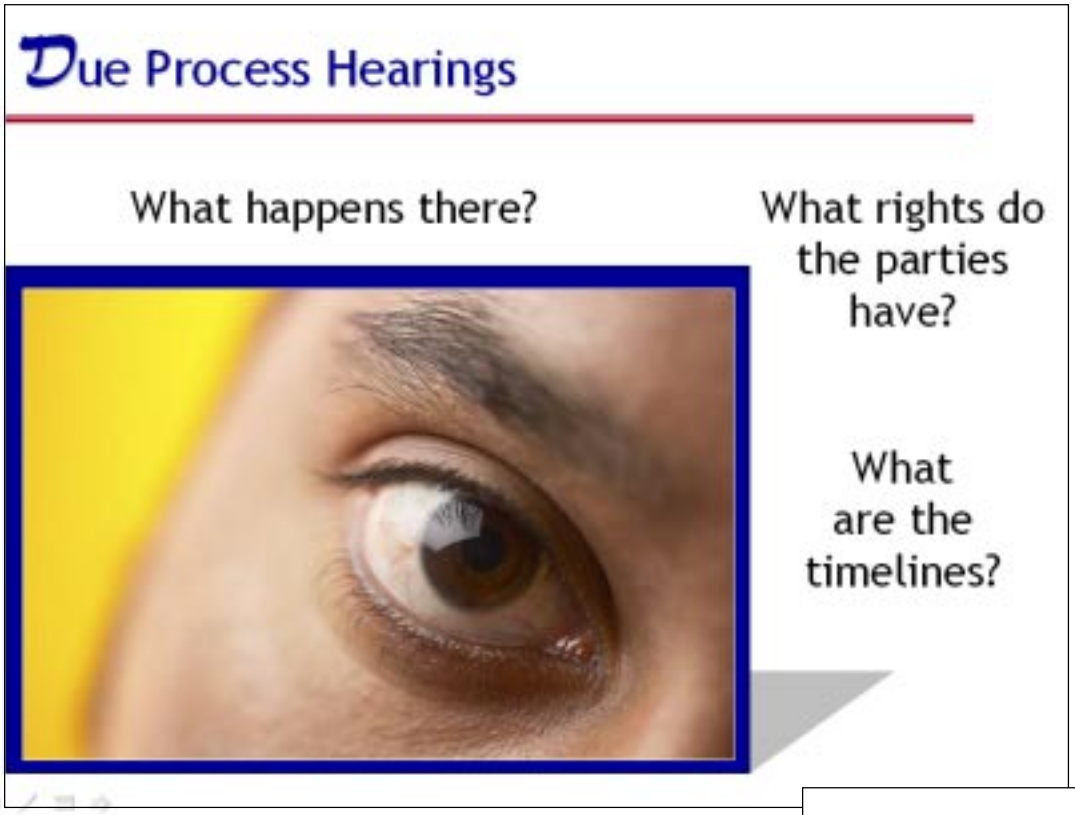
Slide 13 Due Process Hearings *(Slide 1 of 7)*



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Before launching into a close look at the due process hearing, it's helpful to know that States organize their due process systems in two different ways:

- one-tier, or
- two-tier.

In a **one-tier** system, the SEA or another State-level agency is responsible for conducting due process hearings, and an appeal from a due process hearing decision goes directly to court.

In a **two-tier** due process system, the school district is responsible for conducting due process hearings, and an appeal from a due process hearing is to a State-level review hearing before appealing to court.

There are differences in the timelines for issuing decisions and rights of appeal for each of these systems.

According to the findings of the Study of State and Local Implementation and Impact of the Individuals with Disabilities Education Act (SLIIDEA):

- 57% of the nation's school districts use a one-tiered system (hearings held only at the State level),
- 43% use the two-tiered (hearings at the local level, with right to appeal to State-level hearing officer or panel).[1]

The public agency's procedural safeguards notice provides information about the type of

Trainer Note

For the upcoming discussion, refer participants to **Handout E-13**.

due process system used in the State. The notice should identify the agency that is responsible for conducting hearings (e.g., the school district, the SEA, or another State-level agency or entity).

IDEA's Due Process Provisions

We've just looked at IDEA's provisions governing the filing of a due process complaint as reflected in the final Part B regulations at §300.507 and the due process complaint itself as reflected at §300.508. Included in that discussion were IDEA's new provisions regarding the resolution process as reflected at §300.510. If the resolution process does not succeed in resolving the dispute that was the subject of the parent's due process complaint, then other provisions of IDEA come into play. Now it's time to examine IDEA's provisions on:

- Impartial due process hearing (§300.511);
- Hearing rights (§300.512);
- Hearing decisions (§300.513);
- Finality of decision, appeal, and impartial review (§300.514); and
- Timelines and convenience of hearings and reviews (§300.515).

All of these provisions are presented on **Handout E-13** for participants to refer to as you move through Slides 13-18.

What's a due process hearing, and what happens there?

There are times when the parties have been unable or unwilling to resolve the dispute themselves, and so they proceed to a due process hearing. There, an impartial, trained hearing officer hears the evidence and issues a hearing decision.

During a due process hearing, each party has the opportunity to present their views in a formal legal setting, using witnesses, testimony, documents, and legal arguments that each believes is important for the hearing officer to consider in order to decide the issues in the hearing. Since the due process hearing is a legal proceeding, a party will often choose to be represented by an attorney.

Important point: The party requesting the hearing can only raise the issues included in the due process complaint, filed under §300.508(b) unless the other party agrees otherwise. [§300.511(d)]

What rights does each party have in a due process hearing?

IDEA affords specific rights to any party to a due process hearing. These rights are found

The Beginning of...

§300.512 Hearing rights.

(a) *General.* Any party to a hearing conducted pursuant to §§300.507 through 300.513 or §§300.530 through 300.534, or an appeal conducted pursuant to §300.514, has the right to—

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;

(4) Obtain a written, or, at the option of the parents, electronic, verbatim record of the hearing; and

(5) Obtain written, or, at the option of the parents, electronic findings of fact and decisions.

[§300.512(a)]

at §300.512. The beginning of that section—paragraph (a)—is provided in the box on the previous page and, of course, on **Handout E-13**. Direct participants to §300.512(a) and go over the rights that are identified there (e.g., the right to be accompanied and advised by counsel; the right to confront, cross-examine, and compel the attendance of witnesses; and so on).

The next paragraph of §300.512—(b)—states that, at least five business days prior to a hearing conducted under §300.511(a), each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing. The hearing officer may prevent any party that fails to comply with this requirement from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

The final Part B regulations continue, as they have done in the past, to provide parents with additional rights in due process hearings. These are identified at §300.512(c), shown in the box on this page.

Go over these provisions with participants. You'll see that they include a reference to "paragraphs (a)(4) and (a)(5) of this section." Have participants find these paragraphs and review what they contain, so that the full meaning of §300.512(c)(3) is understood—which is that parents have the right:

Additional, Parent-Specific Rights—More Provisions of:

§300.512 Hearing rights.

(c) *Parental rights at hearings.* Parents involved in hearings must be given the right to—

(1) Have the child who is the subject of the hearing present;

(2) Open the hearing to the public; and

(3) Have the record of the hearing and the findings of fact and decisions described in paragraphs (a)(4) and (a)(5) of this section provided at no cost to parents.

[§300.512(c)]

- to have the record of the hearing made available to them at no cost, in written or electronic form, at their option; and
- to obtain findings of fact and decisions at the due process hearing and State-level review, if applicable, also in written or electronic form, at no cost to parents.

Who has the burden of proof in an IDEA due process hearing?

The question of which party has the burden of proof in an IDEA due process hearing—the parent or public agency—was addressed in the Supreme Court case *Shaffer v. Weast*.[2] While the IDEA is silent on the issue of burden of proof, the Supreme Court has held that, unless State law assigns the burden of proof differently, in general, the party who requests the hearing will have the burden of proving their case.

Do parents of children with disabilities have the right to represent themselves in an IDEA case in federal court?

Yes. Generally, federal law allows any person to represent themselves in federal court to protect their own federal rights. In *Winkelman v. Parma City Sch. Dist.*,[3] the U.S. Supreme Court held that non-lawyer parents of a child with a disability may represent themselves pro se (i.e., without an attorney) in federal court, because the IDEA grants parents independent, enforceable rights that encompass the entitlement to FAPE and are not limited to procedural or reimbursement rights. Since parents have rights under IDEA, they can bring and defend IDEA claims on their own and without an attorney in federal court.

May other individuals who are not attorneys assist parents in a due process hearing and recover fees for their services?

The question naturally arises as to whether parents are entitled to recover fees for expert services.

The straight answer: No.

The details: The U.S. Supreme Court decided this matter in *Arlington Cent. Sch. Dist. Bd. of Educ. V. Murphy*.[4] In that case, the court held that section 1415(i)(3)(B) of the statute, which authorizes courts to award reasonable attorneys' fees to parents who are prevailing parties in actions or proceedings brought under the IDEA, does *not* authorize recovery of fees for experts' services.

What is the timeline for issuing the hearing decision?

Regardless of whether a State has a one- or two-tier system for handling due process hearings, the SEA or the public agency directly responsible for the child's education (whichever agency is responsible for conducting the hearing in your State) must ensure that, not later than 45 days after the 30-day resolution period expires (or any of the adjustments made to that period that were discussed under Slide 12), a final decision is reached in the hearing and a copy of the decision is mailed to each of the parties. The hearing officer may grant specific extensions of this time period at the request of either party. You'll recall the provisions at §300.515(a) that were presented under Slide 12, too, but we've repeated them in the box on this page for convenience.

What else does IDEA have to say about the final decision of the hearing officer?

Here's a list of additional points to be made about the all-important decision of the hearing officer.

- A copy of the hearing officer's decision must be mailed to each of the parties within the 45-day timeline [§300.515(a)(2)], unless the hearing officer grants a specific extension of this timeline at the request of either party. [(§300.515(c)]
- If the hearing officer's decision is not appealed, it is final. [§300.514(a)]
- Consistent with IDEA's procedural safeguards, the public agency must implement the hearing decision as soon as possible and, in any event, within a reasonable period of time. If the public agency fails to implement the hearing decision, parents may seek court enforcement of an administrative decision. Parents may also file a complaint with the SEA as specified at §300.152(c)(3) and discussed earlier in this training module.

What Were Those Timelines Again?

§300.515 Timelines and convenience of hearings and reviews.

(a) The public agency must ensure that not later than 45 days after the expiration of the 30 day period under §300.510(b), or the adjusted time periods described in §300.510(c)—

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

[§300.515(a)(1)-(2)]

And then there's this timeline-related provision...

(c) A hearing…officer may grant specific extensions of time. . . beyond the period set out in paragraph (a) of this section at the request of either party.

[§300.515(c)]

- Did you know that, after personally identifiable information is deleted, due process hearing findings and decisions must be made available to the public? That provision is longstanding and is found in the final Part B regulations at §300.513(d)(2). Many States have this information available in searchable online databases, too. Additionally, findings and decisions in due process hearings, with the deletion of personally identifiable information, must be transmitted to the State advisory panel established under §300.167. [§300.513(d)(1)]

References

[1] O'Reilly, F. (2003, April). *Dispute resolution: Year 1 survey findings and Year 1 and 2 focus study findings*. Paper presented at the annual meeting of the IDEA Part B Data Managers, Arlington, Virginia. (Available online at: www.abt.sliidea.org/Reports/DisputeResolution_04012003.ppt)

[2] *Shaffer v. Weast*, 546 U.S. 49 (2005). (The decision is available online at: www.law.cornell.edu/supct/html/04-698.ZO.html)

[3] *Winkelman v. Parma City Sch. Dist.*, 127 S.Ct. 1994 (2007). (Read all about it at: http://www.abanet.org/publiced/preview/briefs/pdfs/06-07/05-983_Petitioner.pdf)

[4] *Arlington Cent. Sch. Dist. Bd. Of Educ. v. Murphy*, 548 U.S., 126 S.Ct. 2455 (2006). (The decision is available online at: http://www.law.cornell.edu/supct/html/05-18.ZO.html)

Slide 14

Due Process Hearings *(Slide 2 of 7)*

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We have devoted some discussion to hearing officers, because the hearing officer has an important role as the individual who presides over a due process hearing conducted under Part B of the IDEA. You will see that IDEA spells out a set of minimum qualifications that hearing officers must have and why one entire slide in this training module is devoted to the subject.

IDEA's list of qualifications for hearing officers is found at §300.511(c) and is provided in the box on the next page and on the first page of **Handout E-13**.

What qualifications must a hearing officer have?

Under IDEA and §300.511(c), the hearing officer may not be an employee of the SEA or the public agency involved in the education or care of the child [§300.511(c)(1)(I)(A)]. Although the public agency pays selected individuals to serve as hearing officers, IDEA explicitly states that they are not to be considered employees of the agency [§300.511(c)(2)]. To safeguard the impartiality of the hearing process, the hearing officer must not have a personal or professional interest that will conflict with the hearing officer's objectivity in the hearing [§300.511(c)(1)(B)]. This is an exceedingly important qualification, because it points directly to the requirement that the hearing

Trainer Note

For the upcoming discussion, refer participants to **Handout E-13**.

officer, the person who makes decisions on the issues in the due process complaint, must be impartial.

Impartiality of the hearing officer is essential!

In addition, an individual serving in this capacity must also be knowledgeable about and understand the provisions of IDEA, federal and State regulations pertaining to IDEA, and legal interpretations of IDEA by federal and State courts [§300.511(c)(1)(B)(ii)]. He or she must have the knowledge and ability to conduct hearings and to make and write decisions, consistent with appropriate, standard legal practice. [§300.511(c)(1)(B)(iii)]

Using This Slide With Participants

Have participants take a look at §300.511(c) on **Handout E-13**. Reflect back on some of those methods for deciding disputes discussed at the beginning of this module (for example, thumb wars and foot races, as well as what they listed on the activity sheet that's **Handout E-8**). IDEA's emphasis on impartiality in due process hearings is distinct from those methods, and the outcome of a due process hearing will not rest on physical prowess or the ability to shoot marbles.

§300.511(c): Qualifications of a Hearing Officer

(c) *Impartial hearing officer.* (1) At a minimum, a hearing officer—

(i) Must not be—

(A) An employee of the SEA or the LEA that is involved in the education or care of the child; or

(B) A person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) Must possess knowledge of, and the ability to understand, the provisions of the Act, Federal and State regulations pertaining to the Act, and legal interpretations of the Act by Federal and State courts;

(iii) Must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) Must possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(2) A person who otherwise qualifies to conduct a hearing under paragraph (c)(1) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer. .

(3) Each public agency must keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

[§300.511(c)]

Due Process Hearings *(Slide 3 of 7)*

Starting View

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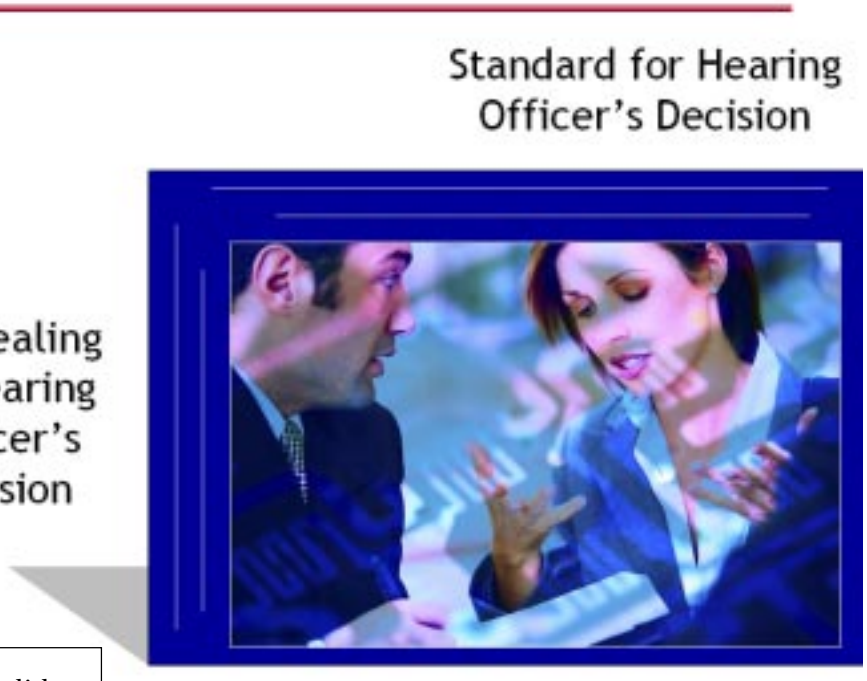

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Due process hearings occur when the LEA and parent are unable to resolve their differences through less formal means. Since the parties are at an impasse, it is essential that the hearing officer be impartial, and, as we've seen, IDEA contains such a requirement. It's the hearing officer's job to weigh the merits of each party's argument, evidence, and witnesses, in light of what IDEA and State law require, also bearing in mind relevant federal and State regulations pertaining to the Act and legal interpretations of the Act by federal and State courts. The hearing officer must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice. How does the hearing officer do this?

What is the standard for the hearing officer's decision?

The regulations set forth the standard that must be applied when a hearing officer is deciding whether a child received FAPE. These requirements are found at §300.513(a) and in the box at the right for your reference—again, refer participants to **Handout E-13**.

It's interesting that IDEA's provisions reference two contrasting words *substantive* and *procedural*. A hearing officer's decision on whether a child received FAPE must be made on "substantive grounds." But due process hearings are also requested because of alleged procedural violations. IDEA and the final Part B regulations are very specific about when a hearing officer can find that there is a denial of FAPE as the result of an alleged procedural violation.

The essence of the contrast between *substantive* and *procedural* is well captured in the National Center for State Courts' definition of "substantive law," which reads:

> SUBSTANTIVE LAW - The law dealing with rights, duties, and liabilities, as contrasted with *procedural law*, which governs the technical aspects of enforcing civil or criminal laws.[1]

So, under what circumstances would "procedural inadequacies" be sufficient for a hearing officer to find that a child did not receive FAPE?

According to IDEA, a hearing officer may so find when those procedural violations:

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

§300.513(a): The Standard for Hearing Officer Decisions

§300.513 Hearing decisions.

(a) *Decision of hearing officer on the provision of FAPE.* (1) Subject to paragraph (a)(2) of this section, a hearing officer's determination of whether a child received FAPE must be based on substantive grounds.

(2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies—

(i) Impeded the child's right to a FAPE;

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

(iii) Caused a deprivation of educational benefit.

(3) Nothing in paragraph (a) of this section shall be construed to preclude a hearing officer from ordering an LEA to comply with procedural requirements under §§300.500 through 300.536.

[§300.513(a)]

- caused a deprivation of educational benefit. [§300.513(a)(2)]

Can the hearing officer's decision be appealed?

If a party disagrees with the hearing officer's decision, do they have recourse for appealing that decision? Yes, they do. However, if not appealed, the decision made by the hearing officer is final. This is unchanged from the 1997 Amendments to IDEA and is stated as follows:

> **§300.514 Finality of decision; appeal; impartial review.**
>
> `(a) *Finality of hearing decision.* A decision made in a hearing conducted pursuant to §§300.507 through 300.513 or §§300.530 through 300.534 is final, except that any party involved in the hearing may appeal the decision under the provisions of paragraph (b) of this section and §300.516.

And what might "paragraph (b)" have to say? We've provided paragraph (b) in its entirety in the box on this page. These provisions will be used to guide much of this slide's look at appealing a hearing officer's decision.

First, though, let us mention *another* paragraph (b) that's pertinent here. We're talking about §300.513(b)—513, not 514—a construction clause that immediately follows the provisions we cited on the previous page. Section 300.513(b) *also* provides the right to appeal, as follows:

> (b) *Construction clause.* Nothing in §§300.507 through 300.513 shall be construed to affect the right of a parent to file an appeal of the due process hearing decision with the SEA under §300.514(b), if a State level appeal is available. [§300.513(b)]

You'll notice, though, that the right to appeal expressed under this provision refers to the "right of the parent," while the right to appeal expressed under §300.514(a) refers to "*any* party involved in the hearing" [emphasis added]. Equally noticeable is that both provisions reference the *same* paragraph (b), namely §300.514(b). Let's have a look at that mysterious, but obviously important, paragraph now.

§300.514(b): Appeal of Decisions and Impartial Review

(b) *Appeal of decisions; impartial review.* (1) If the hearing required by §300.511 is conducted by a public agency other than the SEA, any party aggrieved by the findings and decision in the hearing may appeal to the SEA.

(2) If there is an appeal, the SEA must conduct an impartial review of the findings and decision appealed. The official conducting the review must—

(i) Examine the entire hearing record;

(ii) Ensure that the procedures at the hearing were consistent with the requirements of due process;

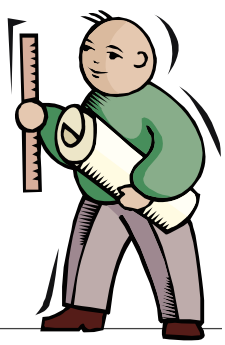
(iii) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in §300.512 apply;

(iv) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(v) Make an independent decision on completion of the review; and

(vi) Give a copy of the written, or, at the option of the parents, electronic findings of fact and decisions to the parties.

[§300.514(b)]



You Guessed It!

For the upcoming discussion, refer participants to **Handout E-13**.

What's involved in appealing the hearing officer's decision?

The specific actions required to appeal the hearing officer's decision are dependent upon the SEA's type of due process system (one-tier or two-tier), as described below.

Appealing in a one-tier system. In States using a one-tier system for due process hearings, the SEA is the entity that conducts the initial due process hearing and issues the decision. So, in a one-tier system, a State-level review of a hearing decision is not available. If one of the parties disagrees with the decision, the only "appeal" will be for the party to bring a civil action in an appropriate State or Federal court. This is discussed after we take a look at appealing in a two-tier system.

Appealing in a two-tier system. In States that have a two-tier system, a State-level appeal to the SEA is available. This occurs where the initial due process hearing was conducted by the public agency directly responsible for the child's education, so appeal to the SEA exists as an option. This is a longstanding provision of IDEA.

In such cases, the SEA must conduct an impartial review of the findings and decision in the hearing, as specified at §300.514(b). That's our mysterious (b) paragraph, which was presented in the box on the previous page. Go over those provisions with participants, using **Handout E-13** and discussing the various aspects of an impartial review. As can be seen in these provisions, the review conducted by the SEA:

- is based on examining the entire hearing record;
- must ensure that the procedures used in the original due process hearing were consistent with due process requirements; and
- may involve the SEA asking for additional evidence, if necessary, and holding a hearing to receive it.

If a hearing is held to receive additional evidence, the rights in §300.512 apply. These were discussed earlier under Slide 13 (e.g., the right to be accompanied and advised by counsel; the right to confront, cross-examine, and compel the attendance of witnesses; and so on).

It also bears mentioning that IDEA uses slightly different language in referring to *where* and *when* hearings and reviews that involve oral arguments must be conducted. With respect to scheduling IEP meetings, the phrase IDEA uses is "mutually agreed on time and place" (see §300.322(a)(2) and discussed in the module *Meetings of the IEP Team*). The phrase IDEA uses with respect to scheduling hearings and reviews involving oral arguments is "reasonably convenient to the parents and child involved." This is found in the provision at §300.515(d), which reads:

> (d) Each hearing and each review involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved. [§300.515(d)]

Why the difference? Why is there no requirement that the parties mutually agree to the hearing time and place?

In the Analysis of Comments and Changes, the Department responded to a public comment seeking clarification about the standard for determining the time and place for conducting hearings, stating:

> The Department believes that every effort should be made to schedule hearings at times and locations that are convenient for the parties involved. However, given the multiple individuals that may be involved in a hearing, it is likely that hearings would be delayed for long periods of time if the times and locations must be "mutually convenient" for all parties involved. (71 Fed. Reg. 46707)

Okay, then, all the evidence is in. What happens next? As might be expected, the reviewing official must make an independent decision and issue findings of fact and decisions, providing a copy to both parties. Under

§300.512(c)(3), the parent has the right to a copy of the findings of fact and decision on appeal in written or electronic form, at the parent's option, at no cost.

Are there timelines for issuing a final decision in the review?

Yes. The SEA must ensure that, not later than 30 days after receipt of a request for review, a final decision is reached in the review and a copy of the decision is mailed to the parties. This requirement is stated at §300.515(b)—oh no, another paragraph (b)!—which you'll find on **Handout E-13** and in the box on this page.

Note: The 30-day timeline may be extended by the reviewing officer at the request of either party, as specified at §300.515(c) and mentioned under Slide 13. This provision is also presented in the box on this page.

Can the SEA's decision be appealed?

Suppose that one of the parties is still not satisfied with the decision? Can the SEA's decision be appealed? Yes, by bringing a *civil action*.

This is the same dispute resolution process mentioned just a bit ago when we were talking about one-tier due process systems where there is no right to appeal to the SEA for any party aggrieved by the decision in the initial hearing.

Who can bring a civil action, and what's involved?

First, let us re-state, for clarity, who may bring a civil action. Under §300.516(a)—shown on **Handout E-13** and in the box on the next page—a civil action may be brought by:

- any party aggrieved by the decision in a initial due process hearing in a one-tier State (where there is no right to appeal to the SEA); and
- any party aggrieved by the decision in the SEA-level review in a two-tier State (where an appeal of the initial hearing decision *can* be made to the SEA) .

The civil action may be brought in a State court of competent jurisdiction (a State court that has authority to hear this type of case) or in a district court of the United States without regard to the amount in controversy.

Under a new provision in the statute and regulations, there is now a timeline for filing a civil action. Under §300.516(b), in a one-tier system, the party must bring the civil action within 90 days of the date of the hearing officer's decision (or, if the State has established a different timeframe, within the time allowed under the State's law). In a two-tier due process system, the civil action must be brought within 90 days from the date of the State review official's decision (or, if the State has established a different timeframe, within the time allowed under the State's law). It's important to

§300.515(b) and (c):
Timelines for Impartial Review

(b) The SEA must ensure that not later than 30 days after the receipt of a request for a review—

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

[§300.515(b) and (c)]

note that, under the final Part B regulations, the public agency must, through the procedural safeguards notice, notify parents of the time period to file a civil action [§300.504(c)(12)].

In any civil action, the court receives the records of the administrative proceedings and hears additional evidence at the request of either party. Refer to §300.516(c), shown in the box on this page and on **Handout E-13**.

The court bases its decision on the preponderance of the evidence and grants the relief that the court determines to be appropriate [§300.516(c)(3)]. IDEA provides that the district courts of the United States have the authority to rule on actions brought under Part B of the IDEA without regard to the amount in controversy [§300.516(d)].

It's also important to note that IDEA sets forth a "rule of construction" at §300.516(e) that pertains to civil actions.

> (e) *Rule of construction.* Nothing in Part B of the IDEA restricts or limits the rights, procedures, and remedies available under the U.S. Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973 (Section 504), or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under Part B of the IDEA, the due process procedures described above must be exhausted to the same extent as would be required if the party filed the action under Part B of the IDEA.

What does that mean? The Department explains:

> This means that you may have remedies available under other laws that overlap with those available under the IDEA, but in general, to obtain relief under those other laws, you must first use the available administrative remedies under the IDEA (i.e., the due process complaint, resolution meeting, and impartial due process hearing procedures) before going directly into court.[2]

§300.516:
Bringing a Civil Action

§300.516 Civil action.

(a) *General.* Any party aggrieved by the findings and decision made under §§300.507 through 300.513 or §§300.530 through 300.534 who does not have the right to an appeal under §300.514(b), and any party aggrieved by the findings and decision under §300.514(b), has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under §300.507 or §§300.530 through 300.532. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(b) *Time limitation.* The party bringing the action shall have 90 days from the date of the decision of the hearing officer or, if applicable, the decision of the State review official, to file a civil action, or, if the State has an explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by that State law.

(c) *Additional requirements.* In any action brought under paragraph (a) of this section, the court—

(1) Receives the records of the administrative proceedings;

(2) Hears additional evidence at the request of a party; and

(3) Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.

[§300.516(a), (b), and (c)]

Space for Notes

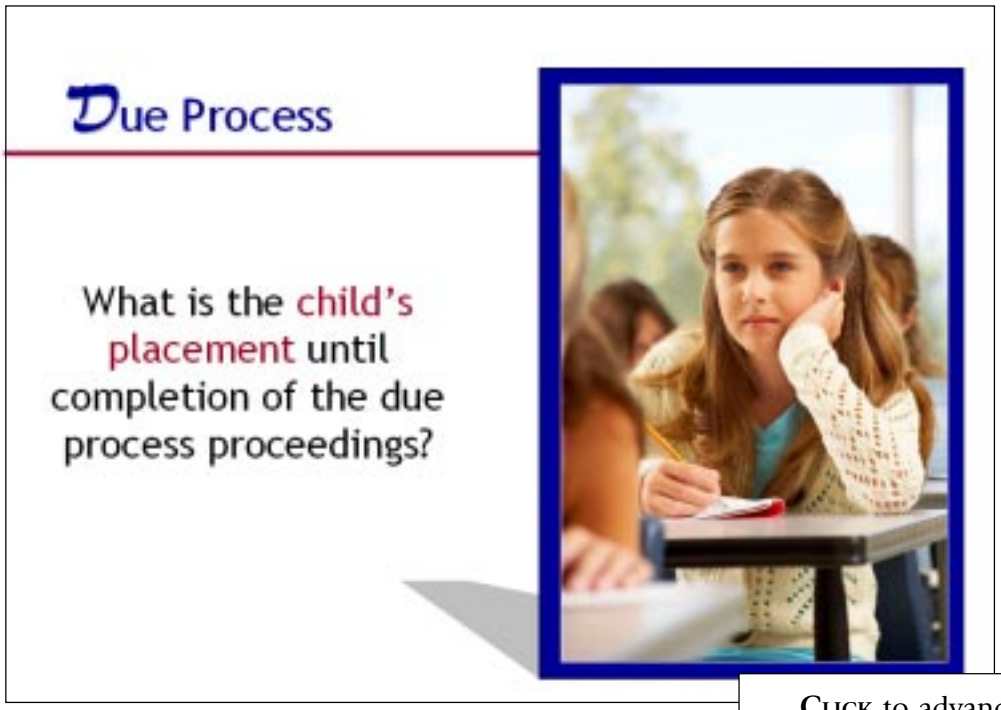
References

[1] National Center for State Courts. (2001). *English legal glossary*. Retrieved on June 15, 2007, at http://www.ncsconline.org/wc/publications/Res_CtInte_EnglishLegalGlossaryPub.pdf

[2] U.S. Department of Education. (2006, August). *Model form: Procedural safeguards notice*. Washington, DC: Author. (Quote from pp. 32-33. Available online at: http://idea.ed.gov/download/modelform3_Procedural_Safeguards_Notice.pdf)

Slide 16

Due Process Hearings *(Slide 4 of 7)*



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IDEA requires that, once notice of a due process complaint requesting a due process hearing is sent to the other party, during the resolution process time period, and while waiting for the decision of any impartial due process or court proceeding, unless the parent and the State or school district agree otherwise, the child must remain in his or her current educational placement, pending the completion of the proceedings. This requirement is found in §300.518, on **Handout E-13**, and in the box on the next page. The child's status during proceedings is sometimes referred to as "stay put."

Other important information you should know about "stay put requirements" includes:

- If the due process complaint involves an application for initial admission to public school, the child, with the parent's consent, must be placed in the regular public school program until the completion of the proceedings. [§300.518(b)]
- If the due process complaint involves an application for initial services under Part B of IDEA for a child transitioning from receiving services under Part C of IDEA to Part B of IDEA and who is no longer eligible for Part C services because the child has turned three, the LEA is not required

Stay Put on E-13!

For the upcoming discussion, refer participants to the last page of **Handout E-13**, where §300.518 appears.

to provide the Part C services that the child has been receiving. If the child is found eligible under Part B of IDEA and the parent provides written consent for the child to receive special education and related services for the first time, then, pending the outcome of the proceedings, the LEA must provide the services that are not being disputed, that is, those which the parent and the school district both agreed upon. [§300.518(c)]

- If the hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents, and the child must remain in that placement during any subsequent appeal of that decision. [§300.518(d)]

An exception to the so-called "stay-put" rule is when the parent or school district has filed a due process complaint in a disciplinary situation, as described on Slide 18. Under those circumstances, the child remains in the interim alternative educational setting chosen by the IEP Team, pending the decision of the hearing officer or the expiration of the time period specified in §300.530(c) or (g) for the disciplinary action, whichever occurs first, unless the parent and the SEA or LEA agree otherwise. This provision is found at §300.533 and is described in more detail in the *Key Issues in Discipline* module (see **Handout E-16**). Within the current module, a due process complaint in a disciplinary situation is addressed on Slide 18.

§300.518:
And Where Is The Child During All This?

---

§300.518 Child's status during proceedings.

(a) Except as provided in §300.533, during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.

(c) If the complaint involves an application for initial services under this part from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned three, the public agency is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services under §300.300(b), then the public agency must provide those special education and related services that are not in dispute between the parent and the public agency.

(d) If the hearing officer in a due process hearing conducted by the SEA or a State review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State and the parents for purposes of paragraph (a) of this section.

Slide 17

Due Process Hearings *(Slide 5 of 7)*

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Discussion of attorneys' fees is likely a topic of interest to the audience, but the statute and regulation set out complex parameters in this area. The relevant provisions are found at the Part B regulation at §300.517 and appear on **Handout E-14**. The regulation is essentially the same as the IDEA statute in this area.

Section 300.517 begins as follows:

> (a) *In general*. In any action or proceeding brought under section 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to...

Then comes a list of the parties to which the court may award reasonable attorneys' fees. These are:

- the prevailing party who is the parent of a child with a disability [§300.517(a)(i)];
- a prevailing party who is an SEA or LEA against the attorney of a parent who files a due process complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation [§300.§517(a)(ii)]; or
- a prevailing SEA or LEA against the attorney of a parent, or against the parent, if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation [§300.517(a)(iii)].

Different Handout!

For the upcoming discussion, refer participants to **Handout E-14**.

How are attorneys' fees awarded?

IDEA is clear that the court, in its discretion, may award reasonable attorneys' fees to the prevailing party who is the parent of a child with a disability and to a prevailing party who is the SEA or LEA under the circumstances set out in §300.517(a). IDEA requires that the public agency include information about attorneys' fees in its procedural safeguards notice to parents [§300.504(c)(13)].

A court awards reasonable attorneys' fees under section 615(i)(3) of the Act consistent with the following:

- Fees must be based on rates prevailing in the community in which the action or hearing arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded. [§300.517(c)(1)]

- Fees may not be awarded and related costs may not be reimbursed in any action or proceeding under Part B of IDEA for services performed after a written offer of settlement to a parent if:

  —The offer is made within the time prescribed by Rule 68 of the Federal Results of Civil Procedure, or, in the case of a due process hearing or State-level review, at any time more than 10 calendar days before the proceeding begins;

  —The offer is not accepted within 10 calendar days; AND

  —The court or administrative hearing officer finds that the relief finally obtained by the parent is not more favorable than the offer of settlement. [§300.517(c)(2)(i)]

Despite these restrictions, attorneys' fees may be awarded and related costs may be made if a parent prevails and was substantially justified in rejecting the settlement offer [§300.517(c)(3)].

Are attorneys' fees available for IEP Team meetings?

As explained at §300.517(c)(2)(ii), IDEA does not permit attorneys' fees to be awarded relating to any meeting of the IEP Team *unless* the meeting is held as a result of an administrative proceeding or judicial (court) action, or at the discretion of the State, for a mediation described in §300.506. Participants can see this provision on **Handout E-14**; it also is provided in the box below.

According to §300.517(c)(2)(ii), then, it is up to each State to decide whether attorneys' fees can be awarded for participation in mediation.

What about attorneys' fees for resolution meetings?

It's important to note that the final Part B regulations expressly *exclude* resolution meetings from what is considered an administrative proceeding or court action [§300.517(c)(2)(iii)]. The Department, however, explained in the Analysis of Comments and Changes that:

> … the Act is silent as to whether attorneys' fees are available for activities that occur outside the resolution meeting conducted pursuant to section 615(f)(1)(B)(i) of the Act and §300.510(a). We decline to regulate on this issue because we believe these determinations will be fact-specific and should be left to the discretion of the court. (71 Fed. Reg. 46708)

§300.517(c)(2)(ii): Attorneys' Fees and IEP Meetings

(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless the meeting is convened as a result of an administrative proceeding or judicial action, or at the discretion of the State, for a mediation described in §300.506.

[§300.517(c)(2)(ii)]

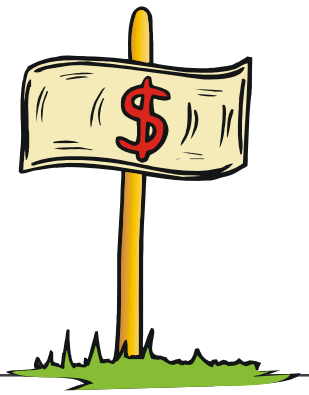
When may the court reduce attorneys' fees?

Attorneys' fees may be reduced if the court finds... well, we'll get to that in a moment. Refer participants to **Handout E-14**, at §300.517(c)(4). It may be difficult to locate with all the (iii) and (A), (B), etc., but they should look for "(c) *Award of fees*" and then advance through the (1), (2), (3) to find the (4), which begins, "(4) Except as provided in paragraph (c)(5) of this section, the court reduces…"

As they'll see, attorneys' fees may be reduced if the court finds that:

- the parent or the parent's attorney, during the course of the action or proceeding, unreasonably delayed the final resolution of the dispute;
- the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably similar skill, reputation, and experience;
- the time spent and legal services furnished were excessive considering the nature of the action or proceeding; *or*
- the attorney representing the parent did not provide to the LEA the appropriate information in the due process complaint. [§300.517(c)(4)]

So what's the "Except as provided in paragraph (c)(5)" involve? The last paragraph on **Handout E-14** is the one at (c)(5). And it states that the court may *not* reduce fees if the court finds that the State or LEA unreasonably delayed the final resolution of the action or proceeding or there was a violation under the procedural safeguards provisions of Part B of IDEA. It is important to note that the statute and regulations provide that a *court* has discretion to award attorneys' fees and, as discussed above, there are numerous factors that are considered when a request for attorneys' fees is made.



§300.517(c)(4): Reducing Attorneys' Fees

(4) Except as provided in paragraph (c)(5) of this section, the court reduces, accordingly, the amount of the attorneys' fees awarded under section 615 of the Act, if the court finds that—

(i) The parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) The amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) The attorney representing the parent did not provide to the LEA the appropriate information in the due process request notice in accordance with §300.508.

[§300.517(c)(4)]

Slide 18 Due Process Hearings *(Slide 6 of 7)*

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We're almost through with this series of seven slides on due process hearings! Here, we'll look at IDEA's special rules for due process hearings in disciplinary situations. Before delving into what those special rules are, some background on discipline is in order.

School Discipline and IDEA

As many in the audience will already know, disciplinary procedures were introduced in the 1997 Amendments to IDEA and have since provided the framework within which schools and parents address the appropriate disciplining of children with disabilities who violate a code of student conduct. The 2004 Amendments to IDEA have modified and streamlined the disciplinary procedures (found at §§§300.530 through 300.536), while retaining their central purpose: balancing the protection of children's rights while giving school personnel the authority to maintain safety and order for the benefit of all children. Those procedures are extensive and complex—and quite beyond the scope of this module! They are the subject of a stand-alone module, *Key Issues in Discipline*, Module 19 in this training curriculum.

However, within the context of options for resolving disputes and concluding this discussion of the due process hearing, it's important for the audience to know that there are critical differences in due process hearings associated with disciplinary situations. While we will describe the important differences briefly here, you should

Running Ahead...to E-16

For the upcoming discussion, refer participants to **Handout E-16**. Yes, skip **Handout E-15**...

see the *Key Issues in Discipline* module for a more thorough discussion. The most noteworthy difference in disciplinary situations is the hearing's expedited timelines, as we'll see.

Disagreeing with a Disciplinary "Change of Placement"

It's already been said that parents may file a due process complaint to request a due process hearing if they disagree with any decision regarding the identification, evaluation, educational placement of their child, or the provision of FAPE to their child [§300.507(a)]. Public agencies also have the right to file a due process complaint regarding these matters (*Id*). We will summarize how these due process rights can be exercised by parents and LEAs in disciplinary situations and refer you to Module 19 for more detailed information.

In a nutshell, IDEA gives school personnel the authority to remove a child from his or her current placement under specified circumstances set out in §§300.530 through 300.536. If a child violates a code of student conduct, the child could be placed in an appropriate interim alternative educational setting—an IAES, for short—for misconduct determined not to be a manifestation of the child's disability under §300.530(c) or for drugs, weapons, or serious bodily injury offenses under §300.530(g). If the parent disagrees with a decision to change the child's placement for disciplinary reasons, or if the parent disagrees with the manifestation determination under §300.530(e), the parent has the right to file a due process complaint and request a hearing (just as discussed in the last five slides).

LEAs also have the right to request a due process hearing if they believe that allowing the child to remain in his or her current placement is substantially likely to result in injury to the child or to others.

It is such due process situations that are the subject of this slide, because special rules apply to speed up the process and reach a final decision quickly.

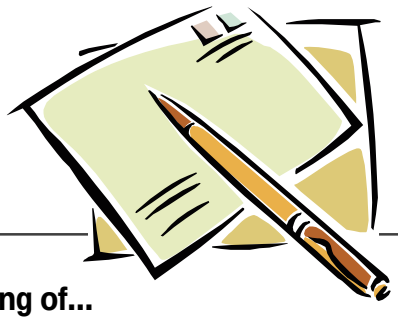
IDEA's Governing Provision

Let's start with the provision at §300.532 (see the box on this page), which spells out both the LEA's and the parent's right to appeal. Refer participants to **Handout E-16**.

As the provision at §300.532(a) makes clear, either the parent of a child with a disability or an LEA has the right to request a due process hearing to appeal decisions made during disciplinary procedures, although the reasons these parties may do so differ as follows:

- The parent may appeal any decision regarding placement of their child under §§300.530 and 300.531;
- The parent may appeal the manifestation determination under §300.530(e); and
- The LEA may appeal a decision to maintain the current placement of the child, if the LEA believes that maintaining that placement is substantially likely to result in injury to the child or others.

The last sentence in the provision indicates that a hearing is requested by filing a due process complaint as described in §§300.507 and 300.508(a) and (b). These provisions appear on **Handout E-11** and have been discussed in this module, but you may wish to ask participants



The Beginning of...

§300.532 Appeal.

(a) *General*. The parent of a child with a disability who disagrees with any decision regarding placement under §§300.530 and 300.531, or the manifestation determination under §300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to §§300.507 and 300.508(a) and (b).

[§300.532(a)]

to tell you what those provisions require as a way of reviewing them. For example:

- The public agency must inform the parent of any free or low-cost legal or other relevant services in the area [§300.507(b)].
- The due process complaint must remain confidential [§300.508(a)(1)].
- The party who files a due process complaint must forward a copy of the complaint to the SEA [§300.508(a)(2)].
- The due process complaint must include specific information: name of the child; address of the child's residence; name of the child's school; description of the nature of the problem, including any related facts; and a proposed resolution of the problem (to the extent known and available to the filing party at the time) [§300.508(b].

Speeding Up The Process: Expedited Hearings

And now to the core of this slide: the expedited hearing under §300.532. The introductory provision for expedited due process hearings is presented in the box on this page and on **Handout E-16**.

As you can see, embedded in the provision are numerous references to other provisions in the final Part B regulations, some of which were added as a result of the 2004 Amendments to the IDEA. Let's take a moment to briefly identify what these references mean, moving sequentially through them.

More Provisions of: §300.532

§300.532(c) on Expedited Due Process Hearings Begins...

(c) *Expedited due process hearing.* (1) Whenever a hearing is requested under paragraph (a) of this section, the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of §§300.507 and 300.508(a) through (c) and §§300.510 through 300.514, except as provided in paragraph (c)(2) through (4) of this section.

[§300.532(c)(1)]

- "§§300.507 and 300.508(a) through (c)" and "§§300.510 through 300.514"—These are the provisions regarding filing a due process complaint; the contents of the complaint; the resolution process; impartial due process hearings; hearing rights; hearing decisions; and the finality of decision, appeal, and impartial review. All are included in the handouts provided with this module.
- "Except as provided in paragraph (c)(2) through (4)"—These provisions, which will be discussed in a moment, address among other things the timelines associated with an expedited hearing and alternatives to a hearing, such as a resolution meeting or mediation.

All right, so what does all that mean? Basically, it means that the parent and the LEA must have the opportunity for an expedited due process hearing on the disciplinary matter about which they disagree. The expedited hearing must comply with IDEA's provisions for due process hearings in general except where its expedited nature affects timelines and the process established under federal or State law for the typical, non-expedited due process hearing.

Clarifying the Nature of an Expedited Due Process Hearing

Some confusion may arise as to whether the due process hearing a parent or LEA may request under §500.532(a) is the same as the expedited hearing described under §300.532(c) or, in fact, a separate and distinct hearing. Be sure to indicate to

participants that these two hearings are not two different hearings; they are the same.

As the Department explained in the Analysis of Comments and Changes:

> The hearing referenced in §300.532(a) and (c) is the same hearing and not separate hearings.... Paragraph (c) of this section clarifies that a hearing requested under paragraph (a) of this section is an impartial due process hearing consistent with the due process hearing requirements of §§300.510 through 300.514 (including hearing rights, such as a right to counsel, presenting evidence and cross-examining witnesses, and obtaining a written decision), except that the timelines for the hearing are expedited and a State may establish different procedural rules for expedited due process hearings as long as the rules ensure the requirements in §§300.510 through 300.514 are met. We believe these regulations will ensure that the basic protections regarding hearings under the Act are met, while enabling States to adjust other procedural rules they may have superimposed on due process hearings in light of the expedited nature of these hearings. Further, we believe it is important that all the due process protections in §§300.510 through 300.514 are maintained because of the importance of the rights at issue in these hearings. (71 Fed. Reg. 46724)

Timeline for Expedited Due Process Hearings

IDEA establishes a timeline within which the expedited due process hearing must be conducted and the hearing officer's determination made, as follows:

> (2) The SEA or LEA is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed. The hearing officer must make a determination within 10 school days after the hearing. [§300.532(c)(2)]

You'll want to note that this provision specifying the timeline refers to a *"school day,"* not a "calendar day," a "business day," or just plain "day." These terms have different meanings in IDEA, as was discussed at the very beginning of this module. For your convenience, we repeat the definitions at §300.11 in the box below. Mention the differences to participants, because these have direct bearing on calculating the actual timeline within which a specific event must occur.

Can due process be avoided?

As we have indicated elsewhere in this module, Congress included provisions in IDEA that strongly favor avoiding due process hearings when possible and, instead, resolving disputes through alternate, less adversarial and less costly means. So, as is true when a parent files a due process complaint requesting a due process hearing outside of the disciplinary context, the parties can always choose to attempt to resolve

Considering §300.11: What Type of "Day" Are We Talking About?

§300.11 Day; business day; school day.

(a) *Day* means calendar day unless otherwise indicated as business day or school day.

(b) *Business day* means Monday through Friday, except for Federal and State holidays (unless holidays are specifically included in the designation of business day, as in §300.148(d)(1)(ii)).

(c)(1) *School day* means any day, including a partial day that children are in attendance at school for instructional purposes.

(2) *School day* has the same meaning for all children in school, including children with and without disabilities.

their differences by using mediation under §300.506. A resolution meeting is also a required intervening step when a parent requests an expedited due process hearing in the disciplinary context, except that the timelines are different. And, as is true for the resolution meeting outside of the disciplinary context, the LEA is not required to hold a resolution meeting if the parent and the LEA agree in writing to waive the meeting or to use mediation. The reference to the resolution process, in the context of an expedited due process hearing, is as follows:

> (3) Unless the parents and LEA agree in writing to waive the resolution meeting described in paragraph (c)(3)(i) of this section, or agree to use the mediation process described in §300.506—
>
> (i) A resolution meeting must occur within seven days of receiving notice of the due process complaint; and
>
> (ii) The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of the receipt of the due process complaint. [§300.532(c)(3)]

Thus, parents and the LEA have available to them mediation and the resolution meeting as vehicles for avoiding the expedited due process hearing. If the parties do not decide to use mediation and agree to waive the resolution meeting, they would proceed to a due process hearing. Waiving the resolution meeting, however, requires that both parties agree in writing to do so.

How Expedited Due Process Affects Other Timelines and Issues

Speeding up the timeline within which a due process hearing must occur affects other timelines and due process procedures, like a line of dominos going down. For example, does anyone in the audience recall what the timeline is for the LEA to convene the resolution meeting outside of a disciplinary situation?

Wait for a response and then reference the 15-day timeline in §300.510(a)(1) (see **Handout E-12**). When a resolution meeting is held associated with an expedited due process hearing, the timeline is shortened to *seven* days from receipt of the due process complaint.

Similarly, provisions governing non-expedited due process hearings are affected. For example, the provision discussed earlier that allows the non-filing party to challenge the sufficiency of the other party's due process complaint at §300.508(d) does not apply to expedited due process complaints. The Department addressed this matter in the Analysis of Comments and Changes, stating that the sufficiency of complaint provision "is not practical to apply to the expedited due process hearing" because of the shortened timelines to resolve these types of due process complaints. (71 Fed. Reg. 46725)

State-Imposed Procedural Rules

Given that IDEA itself establishes different timelines for what occurs within expedited due process (as opposed to the non-expedited process), it's not surprising that the regulations acknowledge that States may need to adjust their procedural rules for expedited due process hearings regarding disciplinary decisions—and give them limited authority to do so. The relevant provision for this authority is provided in the box on this page and appears at §300.532(c)(4) on **Handout E-16**.

More Provisions of: §300.532

§300.532(c)(4) on State-Imposed Procedural Rules for Expedited Due Process Hearings

(4) A State may establish different State-imposed procedural rules for expedited due process hearings conducted under this section than it has established for other due process hearings, but, except for the timelines as modified in paragraph (c)(3) of this section, the State must ensure that the requirements in §§300.510 through 300.514 are met.

[§300.532(c)(4)]

This provision makes clear that, while a State's procedures for expedited due process hearings may be different from its other due process procedures, the State must ensure that the requirements in §§300.510 through 300.514 are met. These are the requirements regarding the resolution process; impartial due process hearing; hearing rights; hearing decisions, and finality of decision; appeal; and impartial review.

> This will ensure that the basic protections regarding expedited hearings under the Act are met, while enabling States, in light of the expedited nature of these hearings, to adjust other procedural rules they have established for due process hearings. (71 Fed. Reg. 46726)

Authority of the Hearing Officer

If the parents and LEA have not resolved their disagreement through a resolution meeting or mediation, and the due process hearing goes forward, the appeal will be decided by the hearing officer.

The box on this page and **Handout E-16** contain the provisions governing the authority of the hearing officer in expedited due process hearings to resolve disciplinary decisions. The hearing officer is given the clear authority to determine whether a child's removal violated §300.530 (Authority of school personnel) or that a child's behavior was a manifestation of his or her disability, and to order a change of placement if maintaining the child's current placement is substantially likely to result in injury to the child or to others. The hearing officer can also return the child to the placement from which he or she was removed—or order that a child's placement be changed to an appropriate IAES for no more than 45 school days.

Moreover, it is only through the expedited due process hearing that an LEA can appeal a decision to return a child to the original placement if the LEA believes that doing so is substantially likely to result in injury to the child or others. As §300.532(b)(3) states, the procedures "may be repeated."

For example, under the special circumstances provision at §300.530(g)—including drugs, weapons or serious bodily injury offenses—the LEA has the discretion to remove a child with a disability to an IAES, but only up to 45 school days, regardless of whether the child's behavior is a manifestation of the child's disability. To continue the child's placement in an IAES after the 45-school-day period has expired, "[s]chool officials must seek permission from the hearing officer in §300.532"—the process of appeal described in this slide and the one preceding it.

More Provisions of: §300.532

§300.532(b): Authority of the Hearing Officer

(b) *Authority of hearing officer.* (1) A hearing officer under §300.511 hears, and makes a determination regarding an appeal under paragraph (a) of this section.

(2) In making the determination under paragraph (b)(1) of this section, the hearing officer may—

(i) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of §300.530 or that the child's behavior was a manifestation of the child's disability; or

(ii) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.

(3) The procedures under paragraphs (a) and (b)(1) and (2) of this section may be repeated, if the LEA believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.

[§300.532(b)]

Hearing officers have the authority under §300.532 to exercise their judgments after considering all factors and the body of evidence presented in an individual case when determining whether a child's behavior is substantially likely to result in injury to the child or others. (71 Fed. Reg. 46722)

May the hearing officer's determination be appealed?

Yes. Decisions reached in an expedited due process hearing may be appealed in the same way as they may for decisions in other due process hearings. We reviewed these procedures earlier in this module—remember the one-tier and two-tier systems? The regulations at §300.532(c)(5) state: "[t]he decisions on expedited due process hearings are appealable consistent with §300.514."

Section 300.514, in its own turn, states that the decision of the hearing officer is final, save that any "party aggrieved by the findings and decision in the hearing may appeal to the SEA" [§300.514(b)(1)]. In some instances, bringing a civil action is also possible. (See requirements at §300.516 regarding bringing a civil action, as discussed earlier.)

However, "[a]bsent a decision upon appeal," the Department states, "the SEA or the LEA may not augment or alter the hearing officer's decision. The parties, would, therefore, be required to abide by the hearing officer's decision (71 Fed. Reg. 46724).

Summary

It's easy to become confused about the timelines and processes associated with due process hearings and expedited due process hearings. The important point to drive home to participants is that special rules and expedited timelines apply to due process hearings in disciplinary situations. Under these circumstances, there are shorter time frames for the resolution period and, if a hearing is necessary, for conducting the hearing and issuing a decision.

Decisions reached in expedited due process hearings may be appealed in the same way as they may for decisions in other due process hearings. When a hearing is requested by either the parent or the LEA under the expedited procedures for disciplinary hearings, a special provision governs the child's placement during the hearing and any subsequent appeals.

View

Slide begins with this view. Then, several different "1" images appear automatically.

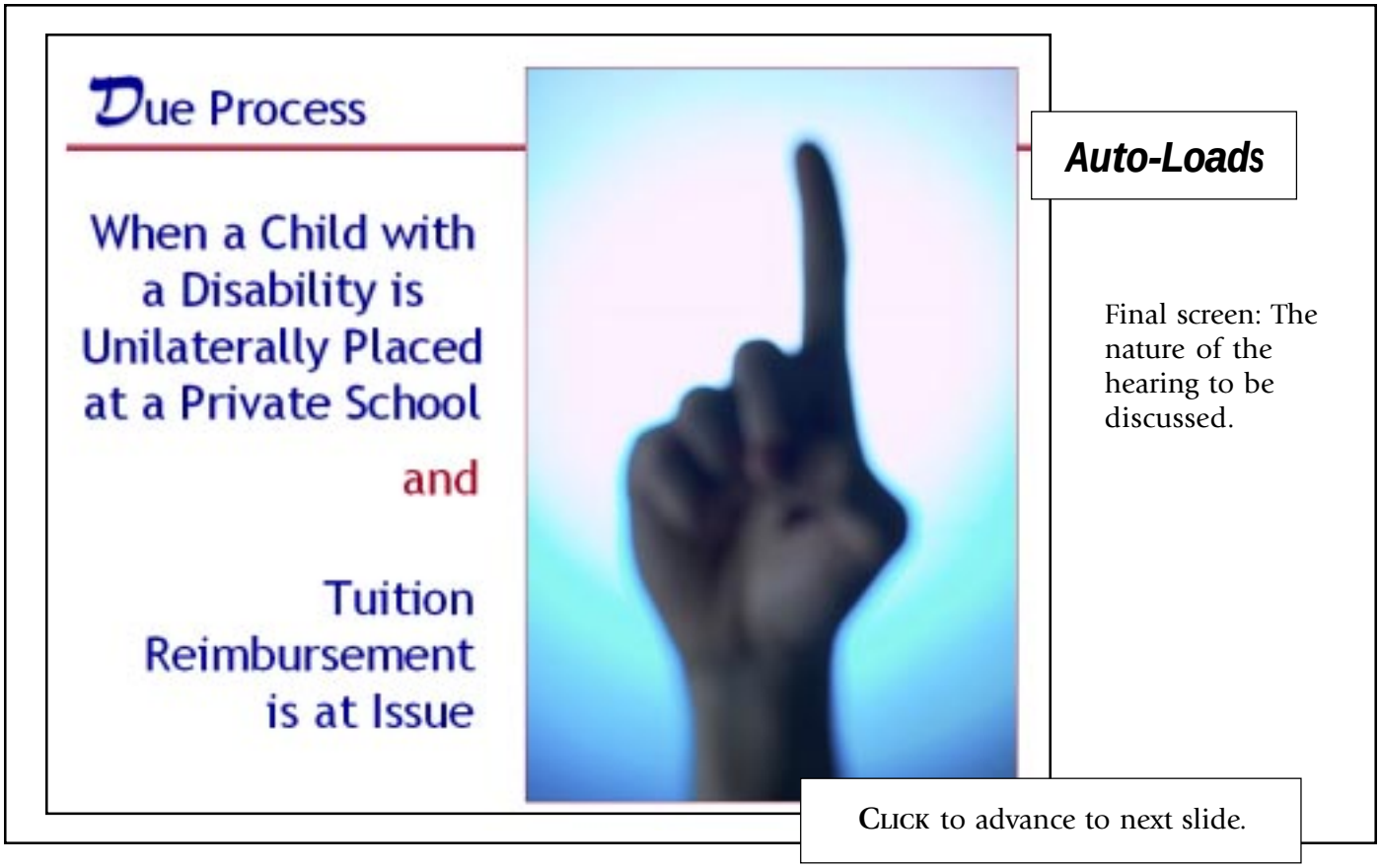
Every change in the slide is *automatic*. No clicks are necessary except to advance to the next slide.

Key images you'll see are shown below, so you know how the slide progresses.

Auto-Loads

The meaning of all the "1" images is made clear: There's "one more hearing" to discuss.

(continued on next page)



Slide 19: Background and Discussion

No Clicks

Just when you thought you had due process hearings and timelines down and it was safe to go back in the water…there's one more hearing to talk about. That's the meaning of all the "1" images at the beginning of the slide—one more, we promise, just one, and then we're done.

Due Process Complaints and Unilateral Placements by Parents of Children in Private Schools at Public Expense

Part B of IDEA does not require a school district to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if the school district made FAPE available to the child and the parent chose to place the child in a private school or facility. However, as shown in the box on the next page:

> (b) *Disagreements about FAPE.* Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures §§300.504 through 300.520. [§300.148(b)]

Note: Notwithstanding what was just said, the school district *where the private school is located* must include the child in the population whose needs are addressed under the Part B provisions regarding children who have been placed by their parents in a private school under §§300.131 through 300.144. These responsibilities are examined in a separate module, *Parentally-Placed Private School Children with Disabilities*, and won't be discussed here. The focus of *this* slide will be on due process complaints seeking tuition reimbursement for the parentally-placed private school child with a disability *when FAPE is at issue.*

Reimbursement for Private School Placement

If the child previously received special education and related services under the authority of a school district, and the parent chooses to enroll the child in a private preschool, elementary school, or secondary school without the consent of, or referral by, the school district, a court or a hearing officer may require the agency to reimburse the parent for the cost of that enrollment, if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A hearing officer or court may find the parent's placement to be appropriate, even if the placement does not meet the State standards that apply to education provided by the SEA and its school districts.

IDEA's relevant provision—§300.148(c)—is presented in the box on the next page.

Limitation on Reimbursement

The cost of reimbursement described in the paragraph above may be reduced or denied in three specific circumstances. IDEA's relevant provisions are found at §300.148(d) but won't be cited here because they are quite lengthy. We've summarized them below and especially noted the "ORs" and "ANDs" they include, to call them to your attention.

Circumstance 1 applies if:

- At the most recent IEP meeting that the parent attended prior to the parent's removal of the child from the public school, the parent did not inform the IEP Team that the parent was rejecting the placement proposed by the school district to provide FAPE to the child. This includes the parent stating his or her concerns and the intent to enroll the child in a private school at public expense.

OR—

- At least 10 business days (including any holidays that occur on a business day) prior to the parent's removal of the child from the public school, the parent did not give written notice to the school district of that information.

Circumstance 2 applies if, prior to the parent's removal of the child from the public school, the school district provided prior written notice to the parent of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parent did not make the child available for the evaluation.

OR—

Circumstance 3 applies upon a court's finding that the parent's actions were unreasonable.

Note the "OR," which means that *any* (not all) of these three circumstances may be sufficient to result in the cost of reimbursement being reduced or denied.

The Beginning of...

§300.148 Placement of children by parents when FAPE is at issue.

(a) *General.* This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. However, the public agency must include that child in the population whose needs are addressed consistent with §§300.131 through 300.144.

(b) *Disagreements about FAPE.* Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures §§300.504 through 300.520.

[§300.148(a) and (b)]

There are, of course, exceptions to the above. Specifically, the cost of reimbursement:

- must not be reduced or denied for failure to provide the notice if:

  —the school prevented the parent from providing the notice;

  —the parent had not received notice of his or her responsibility to provide the notice described above; or

  —compliance with the requirements above would likely result in physical harm to the child;

AND—

- may not be reduced or denied, at the discretion of the court or a hearing officer, for the parents' failure to provide the required notice if:

  —the parent is not literate or cannot write in English; or

  —compliance with the above requirement would likely result in serious emotional harm to the child.

Again, note the "OR" and the "AND"—both are very critical elements in interpreting IDEA's provisions.

§300.148 continues...

Reimbursement for Private School Placement

(c) *Reimbursement for private school placement.* If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs.

[§300.148(c)]