

# **PARENTAL RIGHTS IN SPECIAL EDUCATION**

**Revised May 2009**

(Reflects Federal Regulations Changes of 12.31.2008)

Nebraska Department of Education  
Office of Special Education  
301 Centennial Mall South  
P.O. Box 94987  
Lincoln, NE 68509-4987  
402.471.2471

**PARENT RIGHTS IN SPECIAL EDUCATION  
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## **PARENT RIGHTS IN SPECIAL EDUCATION**

As a parent of a child with a disability, you have certain rights which are guaranteed by state (Rule 51) and federal (Individuals with Disabilities Education Act {IDEA}) laws. Those procedural safeguards, or rights, are contained in this document.

If you would like further information or have any questions regarding your rights, you may wish to contact your school district's superintendent or special education director. You may also contact:

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**A copy of the procedural Safeguards Notice must be provided to parents one (1) time a school year.**

**A copy must also be provided:**

- a. Upon request by the parent;
- b. Upon initial referral or parental request for evaluation;
- c. Upon the first occurrence of the filing of a state complaint and the first occurrence of filing a special education due process complaint; and
- d. In accordance with discipline procedures

A parent may choose to receive notices via e-mail if the school district makes that option available.

A school district may place a copy of the procedural safeguards notice on a website.

### **Prior Written Notice**

Parents have the right to receive a **written notice** within a reasonable amount of time: **before** the school district **proposes** or **refuses** to initiate or change the **identification, evaluation, or educational placement** of a child or the **provision of a free appropriate public education** (FAPE). If parents **revoke consent**, for special education and related services, parents will receive **written notice** regarding the changes in their child's **educational placement** and **services**.

This notice must include:

- a. A description of the action proposed or refused by the school district;
- b. An explanation for why the school district is proposing or refusing to take the action;
- c. A description of each evaluation procedure, assessment, record, or report the school district used as a basis for the proposed or refused action;
- d. A description of other options considered by the IEP team and the reasons why those options were rejected;
- e. A description of any other factors that are relevant to the school district's proposal or refusal;
- f. A statement that the parents of a child with a disability have protection under the procedural safeguards set forth in state and federal laws, and, if the notice is not an initial referral for an evaluation, the way in which a copy of a description of the procedural safeguards can be obtained; and
- g. Sources for parents to contact to receive help in understanding their rights as parents of a child with a disability.

The prior written notice must be written in an easily understandable manner, and provided in the parent's native language or other mode of communication unless it is clearly not possible to do so. If the parents' native language or other method of communication is not a written language, they have the right to be notified by any other appropriate means in order for them to understand the contents of the notice.

A parent may choose to receive prior written notices via e-mail if the school district makes that option available.

## Parental Consent

Consent means that:

- a. The parent has been fully informed of all information relevant to the activity for which consent is being asked, in his or her native language, or other mode of communication;
- b. The parent understands and agrees **in writing** to the proposed activity;
- c. The consent describes the proposed activity and lists the records (if any) that will be released and to whom; and
- d. The consent is voluntary and may be revoked at any time.

If a parent revokes, or takes back, their consent, that revocation is not retroactive, which means it does not stop an action that has occurred after consent was given and before the consent was revoked.

Parental consent must be given before a school district:

- a. Conducts an initial multidisciplinary evaluation;
- b. Conducts a reevaluation; and
- c. Places a child with disabilities **for the first time** in a program providing special education and related services or early intervention services to infants and toddlers.

If a **parent refuses to provide consent for an initial evaluation or reevaluation**, the school district has the option of initiating a mediation procedure or a due process complaint hearing to determine if a child can be evaluated or reevaluated without parental consent. A due process hearing officer may order that an initial evaluation or reevaluation be conducted, and a parent may appeal the hearing officer's decision through the court system.

If the parents of a **child who is home schooled or placed in a nonpublic school by the parents** at their own expense **do not provide consent** for the initial evaluation or the reevaluation, the school district may not file a due process hearing, or use the mediation process. The school district will not be required to consider that child a child with a disability.

For a child who is a **ward of the State**, school districts do not need to obtain parental consent for initial evaluations if:

- a. Despite reasonable efforts, the school cannot discover the whereabouts of the parents;
- b. The rights of the parents of the child have terminated in accordance with State law; or
- c. The rights of the parents to make educational decisions have been subrogated, or substituted, and the person appointed by the judge to represent the child has given consent.

If the district can demonstrate that it has taken reasonable steps to obtain consent to conduct a reevaluation, **and the parent did not respond**, informed parental **consent is not required** before a school district conducts the **reevaluation**.

Informed parental **consent is not required** before:

- a. **Reviewing existing data** as part of an evaluation or reevaluation; or
- b. Administering a test or other evaluations that are **given to all children unless consent is required of parents of all children**.

A school district **may not initiate** a due process complaint hearing or mediation if a parent refuses to provide consent for initial placement into special education and related services.

If a parent refuses to consent to the provision of special education and related services, or if the parent fails to respond to a request to provide consent:

- a. The school district will not be considered to be in violation of the requirement to make available a free appropriate public education (FAPE) to the child; and
- b. The school district will not be required to develop an individualized education plan (IEP), or convene an IEP meeting.

A parent's consent for an evaluation **does not mean** that their child can be evaluated **and** placed in a special education program. If a parent provides consent to conduct an evaluation, they must also provide written consent if the school district wishes to place their child in a special education program.

A school district may not use a parent's refusal to consent to one service or activity to deny the parent or child any other service, benefit, or activity, for which the parent has provided their consent.

## Parental Revocation of Consent

If a parent is revoking consent for their child to receive special education and related services, the parent **must provide this request to the district in writing.**

## Access to Educational Records

Parents have the right to inspect and review any educational records which are collected, maintained, or used by the school district with respect to the identification, evaluation, and educational placement of their children and the provision of a free appropriate public education (FAPE).

The school district must comply with the request:

- a. Without unnecessary delay;
- b. Before any meeting regarding an individualized education program (IEP) or hearing related to the identification, evaluation, or placement of the child; or
- c. **In no case, more than forty-five (45) days after the request has been made.**

If any education record contains **information on more than one child**, the parents of those children have the right to inspect and review only the information relating to their child or to be informed of that information.

The right to inspect and review educational records includes:

- a. The right to a response from the school district regarding reasonable requests for explanations and interpretations of the records;
- b. The right to request that the school district provide copies of the records if not providing those copies would prevent the parent from inspecting or reviewing them;
- c. The right to provide or withhold consent to disclose the records;
- d. The right to review records unless the school district has other information that denies the parent authority under state law (guardianship, divorce, etc.);
- e. The right to inspect only the information relating to their child if the record contains information about more than one child;
- f. The right to have a representative of the parent inspect and review the records;
- g. The requirement of the school district to keep a record of persons obtaining access the child's education records (except access by the parent and authorized employees of the school district), which includes the name of the party, the date access was given, and the purpose of which the party is authorized to use the records.
- h. The requirement of the school district to assume that the parent has the authority to review records relating to their child unless it has other information that denies the parent authority under state law (guardianship, divorce, etc.);
- i. The right to request a list of the types and locations of education records collected, maintained, or used by the school district; and
- j. The right to request that the school district amend the information in the record if the parent believes the information is inaccurate or misleading or violates the privacy or other rights of the child.

A parent has the right to request a hearing if the school district refuses, upon request by the parent, to amend, or change, the educational record of a child.

The school district must conduct the hearing to decide whether or not to amend the information at the request of the parent within a reasonable period of time upon receipt of the request.

If, as a result of the hearing, the school district decides that the information contained in the record is inaccurate, misleading, or a violation of the child's privacy, the district must amend the record and inform the parent in writing of the amendment.

If, as a result of the hearing, the school district decides that the information contained in the record is accurate, not misleading, and does not violate the privacy of the child, they must inform the parent of their right to place in the record maintained on the child a statement regarding the reasons the parent disagrees with the school district's decision.

**Parental consent must be obtained** before personally identifiable information is disclosed to anyone other than officials of the school district collecting or using the information unless specifically not required in the Family Education Rights and Privacy Act (FERPA).

If a child with a disability is, or going to be, **enrolled in a nonpublic school** that is not located in the same district where the child resides, **parental consent must be given** before any personally identifiable information about the child is shared between the district where the nonpublic school is located and the school district where the child resides.

A school district may charge a fee for copies of records which are made for parents if the fee does not prevent the parents from exercising their right to inspect and review those records.

A school district **may not charge a fee to search for or retrieve** information.

The school district must **retain special education records for five (5) years** after the completion of the activities for which special education funds were used.

The school district must inform parents when personally identifiable information collected, maintained, or used by the district is no longer needed to provide educational services to the child. The information must be destroyed at the request of the parents. However, a permanent record including the child's name, address and phone number, grades, attendance record, classes attended, and grade level and year completed may be kept by the school district without time limitations.

## **Evaluations**

Evaluations means procedures used to assist in the determination of whether a child has a disability and the nature and extent of the special education and related services that the child needs.

## **Independent Educational Evaluations**

An independent educational evaluation (IEE) is an evaluation conducted by a qualified examiner who **is not employed by the public school that is responsible for the child's education.**

Parents have the right to request an IEE at public expense **if they disagree with the results of the evaluation conducted by the school district.**

Parents are entitled to only **one IEE of their child** each time the school district conducts an evaluation with which the parents do not agree.

Public expense means that the school district either:

- a. Pays for the full cost of the evaluation; or
- b. Ensures that the evaluation is otherwise provided at not cost to the parent.

When a parent requests an IEE, the school district **must**:

- a. Insure that an IEE is provided at public expense; **or**
- b. Initiate a due process hearing to show that its evaluation is appropriate.

A school district **must** provide parents with information on how and where to obtain an IEE.

If a parent requests an IEE, the school district may ask the reason why the parents object to the district's evaluation. However, a parent does not have to give a reason, and the district cannot unreasonably delay either providing the IEE or initiating a due process to show that its evaluation is appropriate.

If an IEE is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner must be the same as the criteria that the school district uses when it conducts an evaluation to the extent that those criteria are consistent with the parent's right to an IEE.

If a school district initiates a due process hearing and the hearing officer requests an IEE as part of the hearing, the cost of the evaluation is at public expense.

If the final decision in the hearing is that the school district's evaluation is appropriate, parents still have the right to an IEE, **but not at public expense.**

If an IEE is obtained at the expense of the parent or at public expense:

- a. The **school district must consider the results** of the IEE in any decision it makes about the child's educational program, and
- b. The IEE may be presented as evidence at a due process hearing regarding the child.

## **Mediation**

Mediation:

- a. Is a process in which a qualified, impartial mediator, who is trained in effective mediation techniques and is knowledgeable about laws relating to special education and related services, meets with the parents, school district personnel, and others involved in a disagreement about any part of the special education process;
- b. Is voluntary for all parties;
- c. Must be scheduled in a timely manner;



- d. Must be held in a location that is convenient to the parties involved in the dispute;
- e. Is free to the school district and parents;
- f. May be requested by either the school or the parents; and
- g. May not be used to deny or delay a parent's rights to a due process hearing.

Discussions which occur during the mediation process must remain confidential, and may not to be used as evidence in any due process hearings or civil proceedings.

In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth the resolution and that:

- a. States that all discussion that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;
- b. Is signed by both the parent and a representative of the school district who has the authority to bind such agency; and
- c. Is enforceable in any State court of competent jurisdiction or in a district court of the United States.

The Nebraska Department of Education maintains a list of qualified mediators in the state.

Mediators:

- a. May not be an employee of the Nebraska Department of Education or the school district that is involved in the education of the child who is the subject of the mediation process; and
- b. Must not have a personal or professional interest which conflicts with mediator's objectivity.

Further information regarding the mediation process may be obtained by contacting the local school district's superintendent or special education director or by contacting the Nebraska Department of Education.

## Due Process Hearings

The parents of a child with a disability have the right to file a due process if they **do not agree with school district's identification, evaluation, or proposed placement of their child.**

In order to request a due process hearing, the parent must **file a petition with the Nebraska Department of Education (NDE)**. A sample petition is contained in 92 NAC 55, and a copy of that information may be obtained by contacting the Department.

The petition must contain the following information:

- a. The name and address of the petitioner and must be signed by the party filing the petition (or, when represented by an attorney, the signature of the attorney);
- b. The name and address of the school district or educational agency against whom the complaint is made;

- c. The name of the child whose special education is the subject of the petition, the address of the residence of the child, and the name of the school the child is attending;
- d. A description of the nature of the problem of the child relating to the proposed or refused initiation of, or change in, the identification, evaluation or educational placement of the child, or the provision of a free appropriate public education to the child including facts relating to the problem; and
- e. A proposed resolution of the problem to the extent known and available to the party at the time.

A parent must **request a due process hearing within 2 years** of the date they knew or should have known about the issues in the due process petition. This **timeline will not apply** to a parent if they were prevented from requesting a hearing due to:

- a. Specific misinformation by the school district that it had resolved the issues contained in the due process petition; or
- b. The school district withheld information from the parent that was required to be provided to the parent.

A hearing officer appointed by the Nebraska Department of Education (NDE) will conduct the due process hearing. A list, including qualifications, of persons who serve Nebraska as hearing officers is maintained by NDE.

A hearing officer:

- a. Must not be an employee of the Department of Education or the school district involved in the education of the child;
- b. Must not have a personal or professional interest that conflicts with their objectivity in the hearing process;
- c. Must possess knowledge of the special education process and laws;
- d. Must possess the knowledge and ability to conduct hearings in accordance with appropriate and standard legal practice; and
- e. Must possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

Regarding the due process hearing, parents have the right to:

- a. Be informed of any free, low-cost legal or their relevant services if requested or if the school district initiates the due process;
- b. Prohibit the introduction of any evidence at the hearing that **has not been shared at least five business days before** the hearing is conducted;
- c. Be accompanied and advised by legal counsel and other individuals with special knowledge or training with respect to children with disabilities;
- d. Present evidence and question witnesses;
- e. Receive a written or electronic record of the hearing;
- f. Open the hearing to the public, if desired;
- g. Have the child present during the hearing; and
- h. Receive written or electronic findings of fact and a decision **no later than 45 days after the request of the hearing** unless a waiver of timelines is granted by the hearing officer at the request of the parent or school district.

## Resolution Session

**After** a due process is filed and **before** a due process hearing is conducted, the school district has the opportunity to convene a meeting with the parents and other relevant members of the IEP team who have specific knowledge of the facts identified in the due process petition.

The resolution session:

- a. Must be **convened within 15 days** of receiving notice of the parent's due process filing;
- b. Must include a representative of the school district;
- c. May not include the school district's attorney unless the parent is accompanied by an attorney;
- d. Offers an opportunity for the parents to discuss the issues in the due process; and
- e. Offers the school district the opportunity to resolve the due process issues, unless the parents and the school district agree **in writing** to waive the session, or agree to use the mediation process.

If the school district **has not resolved** the due process issues to the satisfaction of the parent **within 30 days** of the receipt of the due process, the due process hearing will proceed.

The timeline for issuing a final decision begins at the end of this 30-day period.

The failure of a parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the resolution meeting is held.

If the issues in the due process **are resolved during the resolution session**, the school district and parents must execute a legally binding agreement that is:

- a. Signed by both the parent and the school district; and
- b. Enforceable in any State or District court

If the school district and parents execute such an agreement, either party may **void or back out of the agreement within 3 business days** of the agreement's execution.

## Maintenance of Current Education Placement

**With the exception of disciplinary issues**, during the pendency of any due process proceedings, the child will remain in their current educational placement, unless the State, school district, and parent agree otherwise. If the child is applying for admission into a school district, with the consent of the parent, the child will be placed in the school district program until all due process proceedings have been completed.

## Civil Action

If either the school district or the parent does not agree with the findings and decisions made by the hearing officer, they have the right to file a court action. The action may be brought in state court or in federal district court. The party bringing the court action will

have **90 days from the date of the decision** of the hearing officer to bring such an action.

In any civil action, the court:

- a. Will receive the records of the administrative proceedings;
- b. Will hear additional evidence at the request of either party; and
- c. Grant relief as the court determines is appropriate, based on the evidence.

## **Attorney Fees**

The court, in its discretion, may award reasonable attorneys' fees as part of the costs to a prevailing party, and will be based on rates prevailing in the community in which the hearing arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded.

The school district can recover attorney fees from the parent's attorney who files a due process that is frivolous, unreasonable, or without foundation, or against the attorney of the parent who continues to litigate after the litigation clearly became frivolous, unreasonable, or without foundation.

The school district can recover attorney fees from the parent's attorney or parent, if the parent's due process was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the costs of the litigation.

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding for services performed subsequent to the time of a written offer of settlement to parent if:

- a. The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any more than 10 days before the proceeding begins;
- b. The offer is not accepted within 10 days; and
- c. The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

Attorneys' fees may not be awarded relating to any meeting of the IEP team unless such meeting is convened as a result of an administrative proceeding or judicial action, at the discretion of the State, or mediation that is conducted prior to the filing of a request for a due process hearing. A resolution session will not be considered a meeting convened as a result of an administrative hearing or judicial action.

An award of attorneys' fees may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

The court will reduce, accordingly, the amount of attorneys' fees awarded whenever the court finds:

- a. The parent, or the parent's attorney, during the course of the action or proceeding, unreasonably delayed the final resolution of the controversy;
- b. 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;

- c. The time spent and legal services furnished were excessive considering the nature of the case; or
- d. The attorney representing the parent did not provide to the school district the appropriate information regarding the prior notice requirement informing the school district of the intent of the parent to file a due process petition.

A reduction in attorneys' fees shall not apply in any action or proceeding if the court finds that the State or school district unreasonably delayed the final resolution of the action or proceeding or if there was a violation of Section 615 (Procedural Safeguards) of IDEA.

## State Complaint Procedures

A parent has the right to file a complaint with the Nebraska Department of Education (NDE) regarding the special education and related services of their child if they believe the school district is not complying with state or federal regulations.

The complaint must:

- a. Include a statement that the school district has violated a requirement of 92 NAC 51 (Rule 51);
- b. Include the facts on which the statement is based;
- c. Contain the signature and contact information of the individual filing the complaint;
- d. Include the name, address, and school of the child;
- e. Include a description of the nature of the problem of the child; and
- f. A proposed resolution of the problem to the extent known and available to the party at the time the complaint was filed.

The complaint must allege a violation that **occurred not more than one year prior** to the date that the complaint is received.

The party filing the complaint **must forward a copy of the complaint to the school district** serving the child at the same time the party files the complaint with the Department of Education. This is to ensure that the school district has knowledge of the complaint issues raised and; therefore, an opportunity to resolve them directly with the parent.

## Disciplinary Removal of Students with Disabilities

### Authority of School Personnel:

- a. School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change of placement for a child with a disability who violates a code of student conduct.
- b. School personnel may remove a child with disability who violates a code of student conduct from their current placement to an appropriate **interim alternative educational setting (IAES)**, another setting, or suspension for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).

- c. If school personnel order a change of placement that would exceed 10 school days and the behavior is determined not to be a manifestation of child's disability **(See Manifestation Determination below)**, the same disciplinary procedures which apply to children without disabilities may be applied in the same manner and for the same duration, except services would have to be provided, although they may be provided in another setting.
- d. Services do not need to be provided to a student who has been removed from their placement for 10 school days or less.

### **Special Circumstances**

School personnel may remove a student to an IAES for **not more than 45 school days whether or not the behavior is determined to be a manifestation of the child's disability** if the child:

- a. Carries or possesses a weapon to or on school premises or at a school function under the jurisdiction of a State or local education agency;
- b. Knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or
- c. Has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local education agency.

The interim alternative educational setting (IAES) will be determined by the IEP team.

**On the date it makes a decision to make a removal because of a violation of a code of student conduct, that is, a change of placement**, the school district must notify the parents of the decision and of all procedural safeguards.

### **Manifestation Determination**

**Within 10 school days** of any decision to change the placement of a student with a disability because of disciplinary issues, the school district, parents, and relevant members of the IEP team must review all information to determine:

- a. If the behavior in question was caused by, or had a direct and substantial relationship to, the child's disability; or
- b. If the behavior in question was the direct result of the school district's failure to implement the child's IEP.

If it is decided that either of those conditions was met, then behavior must be determined to be a manifestation of the child's disability.

If the behavior was a manifestation of the student's disability, the IEP team must either:

- a. Conduct a functional behavior assessment, if one was not already done, and implement a behavioral intervention plan (BIP); or
- b. If a BIP had already been developed, review the plan, and modify, if necessary.

If the behavior was a result of the district's failure to implement the IEP, the school must take immediate action to correct those deficiencies.

When a due process regarding placement or the manifest determination has been requested by the parent or school district, **the child will remain in the interim alternative educational setting (IAES) pending the decision of the hearing officer** or until the expiration of time period of the IAES, whichever occurs first, unless the school district and parent agree otherwise.

## **Children with Disabilities Attending Non-Public Schools**

**School districts that refer or place** a child with a disability in a nonpublic school or facility in order to receive a **free appropriate public education (FAPE)** must provide all special education and related services to the child at no cost to the parents. That child will have all the rights of a child with a disability who is served by the school.

If a **parent places a child in a nonpublic school or facility** to receive special education and related services, and the school district made FAPE available to the student, the **school is not required to pay** for the cost of education, including special education and related services. If a parent does not agree with the special education provided to their child, that disagreement is subject to a due process hearing.

**If the parent of a child with a disability, who previously received FAPE under the authority of the school district, enrolls** the student in a nonpublic school or facility as a means of obtaining special education and related services without consent or referral by the school district, **a hearing officer may require the school district to reimburse the parent for the cost of that enrollment if the hearing officer finds that the school district did not make FAPE available to the child in a timely manner** before the child was enrolled, and that the private placement is appropriate.

The reimbursement may be reduced or denied if:

- a. At the most recent IEP meeting that the parent attended before they removed the child from public school, the parent did not inform the IEP team they were rejecting the placement proposed by the school;
- b. At least 10 business days before the removal of the child from public school, the parent did not give written notice to the school about the removal;
- c. Before the removal the child from public school, the school district provided prior written notice to the parent of its intent to evaluate the child, but the parent did not make the child available for the evaluation; or
- d. The court found the actions of the parent unreasonable.