



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF SPECIAL EDUCATION AND REHABILITATIVE SERVICES
OFFICE OF SPECIAL EDUCATION PROGRAMS

DIRECTOR

November 17, 2021

OSEP Policy 21-02

XXXXXXX

Dear XXXXXX:

This letter addresses your correspondence to the Office of Special Education Programs (OSEP) regarding questions related to the Individuals with Disabilities Education Act's (IDEA's) dispute resolution requirements. Specifically, you ask a series of questions about whether a local educational agency (LEA) may file a due process hearing complaint against a parent to override the parent's refusal to consent to a change in the child's individualized education program (IEP) or placement. You also ask whether a parent has met the exhaustion requirements under IDEA if a hearing officer determines that a State educational agency (SEA) is not a proper party to a due process hearing. We regret the delay in responding.

We note that section 607(d) of the IDEA prohibits the Secretary of the Department from issuing policy letters or other statements that establish a rule that is required for compliance with, and eligibility under, IDEA without following the rulemaking requirements of section 553 of the Administrative Procedure Act. Therefore, based on the requirements of IDEA section 607(e), this response is provided as informal guidance and is not legally binding. It represents an interpretation by the Department of the requirements of IDEA in the context of the specific facts presented and does not establish a policy or rule that would apply in all circumstances. Other than statutory and regulatory requirements included in the document, the contents of this guidance do not have the force and effect of law and are not meant to bind the public. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

In the situation you describe, the LEA filed a due process complaint to request a due process hearing after a parent refused to consent to an LEA's proposed change to the child's IEP or placement. After receipt of the parent's consent for the initial provision of special education and related services, IDEA does not require the public agency to obtain the parent's consent to make subsequent changes to a child's IEP or educational placement. However, under IDEA, a State may adopt additional parental consent requirements, other than those specifically set out by the IDEA at 34 C.F.R. § 300.300(a) - (c), if it ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE. 34 C.F.R. § 300.300(d)(2).

In Massachusetts, the State has enacted an additional consent requirement which states:

603 Code of Massachusetts Regulations (CMR) 28:07: Parent Involvement

(1) **Parental consent.** In accordance with state and federal law, each school district shall obtain informed parental consent as follows:

(a) The school district shall obtain written parental consent before conducting an initial evaluation or making an initial placement of a student in a special education program under 603 F 28.00. Written parental consent shall be obtained before conducting a reevaluation and before placing a student in a special education placement subsequent to the initial placement in special education...

(b) If, subsequent to initial evaluation and initial placement and after following the procedures required by 603 CMR 28.00, the school district is unable to obtain parental consent to a reevaluation or to placement in a special education program subsequent to the initial placement, or the parent revokes consent to such reevaluation or placement, the school district shall consider with the parent whether such action will result in the denial of a free appropriate public education to the student. If, after consideration, the school district determines that the parent's failure or refusal to consent will result in a denial of a free appropriate public education to the student, it shall seek resolution of the dispute through the procedures provided in 603 CMR 28.08. Participation by the parent in such consideration shall be voluntary and the failure or refusal of the parent to participate shall not preclude the school district from taking appropriate action pursuant to 603 CMR 28.08 to resolve the dispute. This provision shall not apply if the parent has revoked consent to all special education and related services as provided in 603 CMR 28.07(1)(a)(4). See 603 CMR 28.07(1)(b).

This State provision requires LEAs to obtain parental consent prior to implementing a change in placement. Further, Massachusetts also requires LEAs to determine whether the parent's refusal to consent to the proposed action will result in a denial of a free appropriate public education (FAPE) to the child, and if so, to seek dispute resolution to prevent a potential denial of FAPE. If an LEA determines that a parent's refusal to consent to a change in the child's IEP or placement will result in a denial of FAPE, the LEA's filing of a due process complaint to address that issue would be consistent with IDEA. Under IDEA, a parent or a public agency may file a due process complaint "on any of the matters described in 34 C.F.R. § 300.503(a)(1) and (2) (relating to the...educational placement of the child with a disability, or the provision of FAPE to the child)." 34 C.F.R. § 300.507(a)(1). This authority, in our view, is broad enough to include situations where a parent refuses to consent to the LEA's proposed change in educational placement and the LEA determines that FAPE will be denied absent such consent. Additionally, as noted above, 34 C.F.R. § 300.300(d)(2) requires that when a State enacts an additional parental consent requirement, like the one at issue here, it must ensure that all public agencies in the State establish procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE. Those procedures may include the filing of a due process complaint. See OSEP's September 20, 1991, *Letter to Williams*.

You also ask whether the LEA must cite a violation of IDEA in its due process complaint, pursuant to 34 C.F.R. § 300.507(a)(2), which states, "... the due process complaint must allege a

violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in 34 C.F.R. § 300.511(f) apply to the timeline in this section.” This provision references the statute of limitations for filing a due process hearing complaint, which is set out at 34 C.F.R. § 300.511(e) and in turn refers to the “alleged action” that forms the basis of the complaint. When 34 C.F.R. § 300.511(e) is read together with 34 C.F.R. § 300.507(a)(1) and (2), we believe that the alleged action in this factual scenario generally would be the parent’s refusal to consent to the proposed change in placement which then resulted in the LEA’s determination that FAPE will be denied absent such consent.

Finally, you discuss a due process complaint to request a due process hearing, in what appears to be a one-tier hearing system, that initially included the SEA as a party, and specifically ask how the hearing officer’s dismissal of the SEA from the hearing proceedings impacts the IDEA exhaustion requirements. As you noted, the hearing officer’s authority in such situations was addressed in OSEP’s [February 15, 2012 verification letter to the State of New Mexico](#) and [enclosure](#). That letter states that a parent may file a due process complaint against an SEA and the hearing officer has the authority to determine, based on the individual facts and circumstances of the case, whether the SEA is a proper party to the due process hearing. This was also addressed in a [January 2, 2017 letter](#) as well as the [Office of Special Education and Rehabilitative Services' Questions and Answers on IDEA Part B Dispute Resolution Procedures](#) (July 23, 2013), Question C-17, which states: “[u]nder the IDEA, hearing officers have complete authority to determine the sufficiency of all due process complaints filed and to determine jurisdiction of issues raised in due process complaints consistent with 34 C.F.R. §§ 300.508(d) and 300.513.” The exhaustion provisions authorize a party aggrieved by the hearing officer’s decision to either request a State-level review, in a State with a two-tier hearing system, or, in a one-tier system, to bring a civil action in an appropriate State or Federal court. See 34 C.F.R. §§ 300.514(d) and 300.516(a). In the scenario that you describe, a hearing officer’s final written or, at the option of the parents, electronic findings of fact and decision to dismiss a party from the due process action would generally satisfy IDEA’s administrative exhaustion requirement.

If you have any further questions, please do not hesitate to contact Lisa Pagano at Lisa.Pagano@ed.gov.

Sincerely,

/s/

David Cantrell, PhD
Acting Director