

DUE PROCESS HEARINGS: Parent Information Frequently Asked Questions:

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1. What happens to my child if I file for a due process hearing?

Under federal law, your child will remain in his current educational placement and have his current IEP fully implemented (including all related services) from the time you request a hearing until the due process hearing proceedings (and judicial proceedings, if any) are completed. This "status quo" can be altered only if the parents and local agency agree to a change in placement or services. This protection is sometimes called the "stay-put" provision. [20 U.S.C. Sec. 1415(e)(3); 34 C.F.R. Sec. 300.513; CA. Ed. Code Sec. 56505(d).] Note: Although the "stay-put" provision applies after filing for a due process hearing and during the period of any due process mediation conference, this protection does not apply to the pre- due process mediation conference provided for by CA. Ed. Code Sec. 56500.3.

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

Yes. Either the parent or the local education agency may request a due process hearing. [34 C.F.R. Sec. 300.506(a); CA. Ed. Code Sec. 56501(a).]

3. Once a request for a due process hearing is made, how long does the DOE have to hold the hearing and make a decision?

The Department of Education (DOE) has 45 days from the day it receives the due process hearing request to make a decision. [34 C.F.R. Sec. 300.512; CA. Ed. Code Sec. 56502(a).] A continuance for good cause can be granted upon request. [CA. Ed. Code Sec. 56505(9).]

4. Where is the due process hearing held?

The due process hearing is often held at the educational agency offices. It must be at a time and place that is convenient for you and your child. [CA. Ed. Code Sec. 56505(b).]

5. Who attends the due process hearing?

As a parent, you have the right to have the hearing open or closed. If the hearing is open, members of the public can attend. However, even if the hearing is open, you can still have witnesses sequestered, meaning that witnesses cannot be present at the hearing to hear the testimony of other witnesses. [CA. Ed. Code Sec. 56501(c)(2).] If the hearing is closed, members of the public cannot attend. A closed hearing usually consists of you (and your child if you want), your representative, the hearing officer, the education agency's representative and their advocate.

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

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

7. How does the hearing proceed?

Normally, both sides give opening statements which generally describe the issues in the case. The party that calls for the hearing (the petitioner) then presents her case by calling witnesses. The responding party (the respondent) may then cross-examine the petitioner's witnesses, and the petitioner has the right to ask additional questions (re-direct) after the respondent has cross-examined. After petitioner finishes his/her case, respondent calls his/her witnesses (the same procedure as before, examination, cross-examination, and then re-direct examination). Finally, both parties give closing arguments. You can also request that the record remain open so that you can submit a written closing argument. [34 C.F.R. Sec. 300508(a)(2)]

8. What is the record?

The record is simply all evidence (written or oral, other than opening and closing statements) submitted to the hearing officer. Oral evidence (testimony from witnesses), the opening and closing statements of the parties, and questions asked of witnesses are tape recorded by the hearing officer. The record also includes exhibits and other written material which have been accepted into evidence by the hearing officer. You are entitled to receive a copy of the tape recording if you ask for it. [34 C.F.R. Sec. 300-508(a)(4); CA. Ed. Code Sec. 56505(e)(4).]

9. Are experts allowed to testify at a due process hearing?

Yes. It is often very important to have expert witnesses at a due process hearing. An expert witness is someone who has a great deal of knowledge about special education and, specifically, about your child's disability and special education needs. Usually the expert witness can assess your child and the various components of the programs at issue and- make a professional observation as to is and is not appropriate for your child.

10. How are expert witnesses used?

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

11. What if a witness does not want to attend?

The law provides that witnesses can be subpoenaed for a due process hearing. This means that the Special Education Hearing Office will give you subpoena forms to fill out and personally serve on the proposed witness. (For more information on personal service of subpoenas and other requirements for compelling attendance of witnesses, see Special Education Hearing Office Practice and Procedures Bulletin 90-1, pages 8 and 9; it is available from the Special Education Hearing Office where you made your request for a due process hearing.) The subpoena is an order from the state; it orders the witness to attend the due process hearing. [34 C.F.R. Sec. 300.508(a)(2); CA. Ed. Code Sec. 56505(e)(3)]

12. Can I represent myself at the due process hearing?

You can represent yourself at the hearing. However, you should consult with an advocate or attorney about the procedure and strategy.

13. Can I have a lawyer at the due process hearing or mediation?

Yes. So can the educational agency. [34 C.F.R. Sec. 300.508 (a)(1).] Anyone who chooses to be represented by an attorney at the due process hearing must notify the other party 10 days prior to the hearing. [CA. Ed. Code Sec. 56507.1]

14. Can I get the public education agency to pay for my attorney and expert witnesses?

Under federal law, if you are successful or partially successful in a mediation, a due process hearing, or a court hearing, then the court may award you reasonable attorneys' fees. Attorneys' fees are generally not available when you have an attorney represent you at an IEP meeting. [20 U.S.C. Sec. 1415(e)(4).]

The term "reasonable attorneys' fees" means the lawyer's hourly charges consistent with rates in your area and the costs of pursuing the case—for example, the cost of expert witnesses. The education agency may offer a settlement agreement which asks you to waive your right to attorneys' fees. If so, you should discuss this with your lawyer. Other specific details regarding the federal attorneys' fee law cannot be included here. However, you can review these laws with your lawyer at the time you hire him.

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

Both sides have the right to go to court and appeal the decision made by the due process hearing officer. Any appeal to court must be filed within 90 calendar days of receipt of the administrative hearing decision. [34 C.F.R. Sec. 300.51 1; CA. Ed. Code Sec. 56505(i).]