

**PROCEDURAL SAFEGUARDS
(Parents' Rights)
Individuals With Disabilities Education Act
July 2005**

Children with disabilities and their parents are afforded the procedural safeguards contained in the Individuals with Disabilities Education Act (IDEA), as amended in 2004. The rights that are listed in this document are exercisable by parents of children with disabilities until those children reach the age of majority. In Kentucky the age of majority is eighteen (18). When a child reaches the age of majority, the rights listed here transfer to the child unless there has been a court determination of incompetence and the child has been given a legal guardian.

NOTICE

The local education agency (LEA) shall give the parents of a child with a disability a copy of the procedural safeguards upon initial referral or request for evaluation, upon invitation of each Admissions and Release Committee (ARC) meeting, upon reevaluation of the child, upon the occurrence of the filing of the first written complaint or a due process hearing request, and upon request by the parent.

Parents of a child with a disability may choose to receive the procedural safeguards, prior written notice and notices required when a due process hearing is requested by electronic mail communication if the LEA (school district) makes that option available.

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The document shall contain a full explanation of the procedural safeguards, written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner. The document shall contain information on the following:

- 1) parental opportunity to access and examine records and participate in meetings;
- 2) independent educational evaluation;
- 3) prior written notice;
- 4) parental consent;
- 5) the opportunity to present and resolve complaints, including
 - the time period in which to make a complaint
 - the opportunity for the LEA to resolve the complaint,
 - the difference between the state-level written complaint and a due process hearing including the jurisdiction of each procedure, what issues may be raised, filing and decision timelines and relevant procedures;
 - due process hearings, including requirements for disclosure of evaluation results and recommendations;
 - state-level appeals; and
 - the availability of mediation;
- 6) the child's placement during the pendency of due process proceedings;
- 7) procedures for students who are subject to placement in an interim alternative educational setting;
- 8) requirements when parents unilaterally place children in private schools;
- 9) civil actions, including the time period in which to file such actions; and
- 10) attorneys' fees.

This information is described as follows:

1. Parental opportunity to examine records and to participate in meetings

Records:

The parents of a child with a disability must be given the opportunity to inspect and review all education records with respect to

- the identification, evaluation, and educational placement of the child and
- the provision of a free, appropriate public education of the child.

Parents have the right to inspect and review educational records of their children including the right to a response from the LEA to reasonable requests for explanations and interpretations of the records. Parents have the right to request copies of the records if failure to provide copies would effectively prevent the parent from exercising the right to inspect and review the records. A representative of the parent also has the right to inspect and review records. The LEA must respond to parent's request to review records without unnecessary delay or before any Admissions and Release Committee (ARC) meeting or due process hearing and in no case more than forty-five (45) calendar days after the request has been made.

The LEA may presume that the child's parents can see the child's records unless the LEA has been provided evidence that there is a court order, Kentucky law, or legally binding document relating to such matters as divorce, separation, or custody that specifically revokes these rights.

The LEA may charge a fee for copies of records that are made for parents as long as the fee does not effectively prevent the parents from exercising their right to inspect and review records. The LEA may not charge a fee for searching for or retrieval of information.

If a parent believes that any information in the record is wrong, misleading, or violates the child's privacy or other rights, the parent may ask the LEA to change the information. The LEA must make a decision on changing the record within a reasonable period of time. If the LEA refuses to change the information, it must inform the parent and advise the parent of the right to a hearing on that matter. This type of hearing is not the same as an IDEA due process hearing.

If, as a result of the hearing, the LEA decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it must amend the information accordingly and inform the parent in writing.

If, as a result of the hearing, the LEA decides that the information is not inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it must inform the parent of the right to place in the records a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency. Any explanation placed in the records by the parents must be kept by the LEA with the contested part of the record as long as the record or contested part is kept by the LEA. If the records, or the contested part, are disclosed by the LEA to any party, the parent's explanation or comments must be disclosed as well.

The LEA must keep a record of everyone who obtains access to the child's education records that are collected, maintained or used under IDEA. The record must include the name of the person, the date the person was given access, and the purpose for which the person was allowed to view the records. The LEA does not have to keep a record of parents or school district employees with a "legitimate education interest" who access the records.

If the education record includes 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 (ren) or to be informed of that specific information.

Each LEA must provide parents, upon request, a list of the types and locations of education records collected, maintained, or used by the LEA.

Participation in meetings:

A brief summary of the procedures that are followed by LEA's to determine eligibility for and provision of special education and related services is as follows:

- someone makes a referral which means there is a suspected disability that may be affecting the child's educational performance;
- an Admissions and Release Committee (ARC) is convened to discuss the referral;
- the ARC is made up of at least, the parent, special education teacher, regular education teacher, a representative of the LEA, others with special knowledge or expertise about the child and the disability and the child if appropriate;
- the ARC must review the child's educational performance and determine whether individualized assessments are necessary to determine the presence of a disability and its effect on the child's educational performance;
- the parent must give informed consent prior to any individualized evaluations;
- after the evaluations are completed, the ARC is reconvened to discuss the results and make a determination about eligibility for special education services;
- if the child is determined eligible, the ARC must develop an Individual Education Program (IEP) which will list among other items, the annual goals for the child, the specially designed instruction that will be provided to the child, any related services that may be necessary in order for the child to benefit from his/her education and the method that will be used to collect data on the progress that the child is making;
- after the IEP is developed, the ARC must make a determination of the educational setting in which the IEP can be implemented and is the least restrictive for the child; and
- the IEP and placement must be reviewed at least annually by the ARC to make sure the child continues to make progress and benefit from his or her educational services.

The parents of a child with a disability must be afforded an opportunity to participate in Admission and Release Committee (ARC) meetings with respect to the identification, evaluation and educational placement of the child and the provision of a free, appropriate public education. The parents do not have the right to attend any meetings or conversations among LEA personnel that are held in preparation prior to an ARC meeting.

The LEA must provide notice to parents prior to each ARC meeting to make sure parents have an opportunity to participate. This notice must:

- be sent early enough to ensure that the parents have an opportunity to attend;
- include a mutually agreed upon time and place for the meeting;
- indicate the purpose, time, and location of the meeting and who will be in attendance;
- inform parents that at their discretion, other individuals with knowledge or special expertise regarding the child may attend the ARC meeting; and
- for ARC meetings that will address postsecondary transition issues, include information about the purpose of the meeting, that the student will be invited, and the identity of any other agency that will be invited to send a representative.

If either parent cannot attend an ARC meeting, the LEA must use other methods to ensure parent participation including individual, conference, or videoconference telephone calls. The LEA must

give the parents a copy of the child's Individual Education Program (IEP) at no cost to the parent, whether the parent attended the ARC meeting or not.

2. Independent Education Evaluation

The parents of a child with a disability have the right to get an independent education evaluation of their child. An independent education evaluation means an evaluation conducted by a qualified examiner who is not employed by the LEA responsible for the education of the child. The LEA must provide information about where an independent education evaluation may be obtained and the LEA's criteria applicable to independent education evaluation upon receiving the request from the parent.

If the parents disagree with the evaluation obtained by the LEA, they have a right to an independent education evaluation *at public expense* subject to the following conditions:

- if the parent requests an independent education evaluation at public expense, the LEA must without unnecessary delay either file a due process hearing request to show that its evaluation is appropriate or ensure that an independent education evaluation is provided at public expense;
- if the LEA prevails at a due process hearing that shows that its evaluation was appropriate, the parents still have a right to an independent education evaluation, but not at public expense;
- if the parent requests an independent education evaluation, the LEA may ask the parent the reasons why he/she objects to the public evaluation; however, the explanation is not required and it may not delay the provision of the independent education evaluation;
- if the independent education evaluation is at public expense, the criteria under which it is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the LEA uses to the extent those criteria are consistent with the parents' right to an independent education evaluation.

If the parent obtains an independent education evaluation at private expense, the LEA must consider the results of the evaluation, if it meets LEA criteria, in any decisions made concerning the provision of a free appropriate public education for the child. This independent education evaluation may be presented by any party as evidence at a due process hearing.

3. Prior Written Notice

The LEA must provide a written notice to the parents of a child with a disability a reasonable time before the LEA:

- proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education; or
- refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education.

The notice must include:

1. a description of the action proposed or refused by the LEA;
2. an explanation of why the LEA proposes or refuses to take the action;
3. a description of each evaluation procedure, assessment, record, or report the LEA used as a basis for the proposed or refused action;
4. a statement that the parents have the protections listed in IDEA and if this notice is not an initial referral for evaluation, the means by which the parents can obtain a copy of their rights;
5. sources for the parents to contact to obtain assistance in understanding the provisions of IDEA;

6. a description of other options the ARC considered and reasons why those options were rejected; and
7. a description of other factors that is relevant to the LEA's proposal or refusal.

The notice must be written in language understandable to the general public and provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. If the native language of the parent is not a written language, the LEA must take steps to ensure that the notice is translated orally or by other means to the parent in his or her native language or other mode of communication. The LEA must take steps to ensure parents understand the contents of the notice and must have written evidence that these requirements have been met.

4. Parental Consent

"Consent" means that the parent:

- has been fully informed in the parent's native language or other mode of communication of all information relevant to the activity for which consent is sought;
- understands and agrees in writing to the carrying out of the activity for which the consent is sought and the consent describes that activity and lists the records (if any) that will be released and to whom; and
- understands the granting of the consent is voluntary and may be revoked at any time.

The LEA must obtain written informed consent from the parent before conducting an initial evaluation of the child to determine eligibility under IDEA. Parental consent for the initial evaluation is not consent for the provision of special education and related services. If the child is a ward of the state, the LEA must make reasonable efforts to obtain informed consent from the parent for an initial evaluation. The LEA is not required to obtain informed consent from the parent for an initial evaluation if, despite reasonable efforts,

- the LEA cannot discover the whereabouts of the parents; or
- the rights of the parents have been terminated accordance to Kentucky law; or
- the rights of the parents to make educational decisions have been subrogated by a judge in accordance with Kentucky law.

If the parents do not provide informed consent for an initial evaluation or the parents fail to respond to a request to provide the consent, the LEA may, but is not required to, pursue mediation or a due process hearing, if appropriate, to obtain the permission to conduct the evaluation.

If the parents give informed consent for an initial evaluation and the child has been determined eligible, the LEA must obtain informed consent from the parent of the child before the initial provision of special education and related services.

If the parents do not provide informed consent for the initial provision of special education and related services, the LEA may not pursue mediation or a due process hearing to obtain permission to provide these services.

If the parents do not provide or fail to respond to a request for informed consent for the initial provision of special education and related services, the LEA will not be in violation of IDEA for the failure to provide a free appropriate public education to the child and is not required to convene an ARC meeting to develop an IEP for the child.

The LEA must obtain informed parental consent prior to conducting any reevaluation of the child with a disability unless the LEA can demonstrate that it has taken reasonable measures to obtain such consent and the parents have failed to respond.

Informed parental consent is not necessary before reviewing existing data as part of an evaluation or reevaluation and administering a test or other evaluation that is administered to all children unless consent is required of all parents.

The LEA may not use a parent's refusal to provide consent to one service or activity to deny the parent or child any other service, benefit or activity of the LEA except as listed above.

The LEA is required to provide notice to the parents of children with a disability prior to the child's eighteenth (18th) birthday that the rights afforded parents under IDEA will be transferred to the child unless there is a court appointed guardian for the child. Once that transfer occurs, all rights will transfer to the child and can be exercised by the child.

5. The Opportunity to Present and Resolve Complaints

Parents have the right to present complaints about any matter related to the identification, evaluation, or educational placement or the provision of a free appropriate public education of their child. There are three options that parents can use to present complaints about services for their child:

- state-level written complaint;
- mediation; and
- due process hearing.

State-level written complaint:

An organization or individual can file a complaint with the Kentucky Department of Education (KDE) if there is a suspected violation of IDEA. The complaint must be in writing, signed, and the alleged violations must not have occurred more than one year prior to the date of the complaint except in certain circumstances. Those circumstances are if the alleged violation is continuing or the complainant is requesting compensatory services for a violation that occurred not more than three (3) years prior to the date of the complaint. It must include:

- a statement that the LEA has violated a requirement of IDEA;
- the facts on which the statement is based;
- information on how to contact the complainant;
- if the complaint is about a specific child;
 - a) there must be information on the name and address of the child;
 - b) the name of the school that the child attends;
 - c) or if the child is homeless, information must include the school that the child attends;
 - d) a description of the nature of the problem, including facts related to the problem; and
 - e) a proposed resolution to the problem to the extent known and available to the party at the time of filing the complaint.

The written complaint should be sent to:

Director, Division of Exceptional Children Services
Kentucky Department of Education
8th Floor, Capital Plaza Tower
500 Mero Street
Frankfort, Kentucky 40601
(Phone number 502/564-4970)

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The party filing the written complaint must also send a copy to the LEA.

Once a complaint is received the Division for Exceptional Children Services (DECS) has sixty (60) calendar days (unless exceptional circumstances exist which would necessitate additional time or the parties request additional time to pursue alternative methods to resolve the dispute) to:

- carry out an independent on-site investigation if it determines that such an investigation is necessary;
- give the person who submitted the complaint an opportunity to submit additional information, either orally or in writing;
- give the LEA named in the complaint an opportunity to respond to the complaint which could include a proposal to resolve the complaint or a request, with the consent of the parent, to pursue mediation or other alternative means of dispute resolution;
- review all relevant information and make an independent determination about the alleged violations;
- issue a written decision to the complainant that addresses each allegation and contains findings of fact, conclusions, the reasons for the final decision, and procedures for effective implementation of the decision such as technical assistance, negotiations, or corrective actions.

If a written complaint is received that is also the subject of a due process hearing, DECS must set aside the complaint until the conclusion of the hearing proceedings. If the issue that was raised in the complaint has previously been decided in a due process hearing, DECS must notify the complainant of that fact and explain that the hearing decision is binding on the issue.

Mediation:

Mediation is a process that is offered to LEAs and parents to resolve disputes about the identification, evaluation, educational placement or provision of a free appropriate public education to a child. The costs of Mediation are paid by DECS.

Mediation is:

- voluntary;
- cannot be used to deny or delay a parent's right to due process hearing or other rights afforded under IDEA;
- conducted by an impartial qualified mediator, trained in effective mediation techniques and impartially assigned by DECS to a mediation session; and
- scheduled in a timely manner and held in a location that is convenient to the parties.

The parties to the mediation may be required to sign a confidentiality pledge prior to the beginning of the mediation. If the parties resolve the issues through mediation, the parties must execute and sign a legally binding written agreement that sets forth the resolution. The agreement should state that discussions that occurred during the mediation process must be kept confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding arising from that dispute. This agreement will be enforceable in any State court of competent jurisdiction or in federal district court.

Due process hearings:

A parent or a LEA may file a request for a due process hearing on any matter relating to identification, evaluation, educational placement or provision of a free appropriate public education of a child. The alleged violation must have occurred not more than three (3) years before the person filing the request knew or should have known about the alleged action. This 3-year timeline will not apply if the parent was prevented from filing the request due to:

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- specific misrepresentations by the LEA that the problem had been resolved; or
- the LEA withheld information from the parent that was required by IDEA to be provided.

The LEA must inform the parent of any free or low cost legal or other relevant services if the parent requests such information or if the parent request a due process hearing.

A copy of the request for the due process hearing must be submitted to the other party and to:

Director, Division of Exceptional Children Services
Kentucky Department of Education
8th Floor, Capital Plaza Tower
500 Mero Street
Frankfort, Kentucky 40601
(Phone number 502/564-4970)

DECS has developed a form that can be used to submit the request for the due process hearing. This form will be provided to any party upon inquiry. Whether the DECS form is used, the request for a due process hearing must contain:

- the name, address and school of the child;
- a description of the nature and the facts of the problem relating to the proposed or refused or changed action; and
- a proposed resolution of the problem to the extent known and available to the party.

Once this request that contains all the above items is received by DECS, a hearing officer will be appointed. Within fifteen (15) days of receiving notice of the request for a hearing, the LEA must convene a meeting with the parents and the relevant members of the ARC who have specific knowledge of the facts identified in the request. The LEA and the parents will determine the exact ARC members that should be present. This meeting must include a representative of the LEA who has decision-making authority and may not include the attorney for the LEA unless an attorney also accompanies the parent. The purpose of the meeting is for the parents to discuss the due process request and the facts that formed the basis of it so that the LEA has the opportunity to resolve the dispute. This meeting does not have to be held if the parents and the LEA agree in writing to waive the meeting or the parents and the LEA agree to use mediation.

If the parents and the LEA reach a resolution at this meeting, a legally binding agreement must be written and signed by each party. This agreement would be enforceable in any State court of competent jurisdiction or in a federal district court. Either party could void this agreement within three (3) business days. If the parents and the LEA do not reach a resolution to the satisfaction of the parents within thirty (30) days of the hearing request, the due process hearing must occur.

The hearing officer that is appointed to conduct the hearing must not be an employee of the Kentucky Department of Education or the LEA that is involved in the education of the child or have a personal or professional interest that conflict with the person's objectivity. The hearing officer must be trained in the provisions of IDEA and how to conduct a hearing and render a decision in accordance with appropriate standard legal practice.

Any party to a due process hearing has the right to:

- be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
- present evidence and confront, cross-examine, and compel the attendance of witnesses;
- prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five (5) business days before the hearing;
- obtain a written, or at the option of the parents, electronic verbatim record of the hearing; and
- obtain a written, or at the option of the parents, electronic findings of fact and decisions.

At least five (5) business days prior to the hearing, each party must disclose to all other parties all evaluations completed by that date and recommendations based on those evaluations that are intended to be used at the hearing. The hearing officer may bar any party that fails to comply with this 5 day rule from introducing relevant evaluations or recommendations without the consent of the other party.

Parents have the right to have the child who is the subject of the hearing present at the hearing, have the hearing open to the public and have a record of the hearing, findings of fact and decisions at no cost to them. There is nothing in IDEA that would prevent parents from filing a separate due process hearing request on an issue separate from the request that has already been filed.

No later than forty-five (45) days after DECS received the request for a due process hearing is received or no later than forty-five (45) days after the parties have held their resolution meeting, the hearing officer shall make a final decision and mail the decision to all parties. If either party asks for an extension of time, the hearing officer may extend this 45 day limit. The hearing officer's decision is final unless the LEA or the parents file for an administrative appeal.

State administrative appeals:

If the parent or the LEA disagrees with the findings of fact or decisions in the due process hearing, either party may appeal the decision to the Exceptional Children Appeals Board. The appeal must be sent in writing by certified mail to DECS within thirty (30) calendar days after the hearing officer's decision was received by DECS. The address is:

Director, Division of Exceptional Children Services
Kentucky Department of Education
8th Floor, Capital Plaza Tower
500 Mero Street
Frankfort, Kentucky 40601
(Phone number 502/564-4970)

If an appeal is requested, the Exceptional Children Appeals Board will conduct a fair, impartial review of the hearing. No later than thirty (30) days after the receipt of the written request for the appeal is received, the review will be completed and the Board will issue a final decision. However, at the request of either the parent or the LEA, the Board may extend the timeline. A copy of the decision will be mailed to the parent, the LEA and DECS.

The decision of the Exceptional Children Appeals Board is final unless the parent or the LEA appeals that decision to either a State court of competent jurisdiction or federal district court.

6. The child's placement during the pendency of due process proceedings

The child that is involved in any administrative or judicial proceeding will remain in his or her present educational placement unless the parent and the LEA agree otherwise *except* as described in the **Section 7. Procedures for students who are subject to placement in an interim alternative educational setting.**

If the administrative or judicial proceeding involves an application for initial admission to the LEA, the child, with parental consent, will be placed in the LEA until the completion of all the proceedings.

7. Procedures for students who are subject to placement in an interim alternative educational setting

Removal for less than ten (10) school days:

School personnel may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative education setting, another setting, or suspension for not more than ten (10) consecutive school days (to the extent those alternatives are applied to children without disabilities). These removals would not be considered a change in the student's educational placement agreed upon by the ARC. Educational services do not have to be provided to a student removed for less than ten (10) school days unless educational services are provided to students without disabilities who have been similarly removed.

Additional removals:

School personnel may also remove a child with a disability for not more than ten (10) consecutive school days in that same school year for separate incidents of misconduct as long as those removals do not constitute a change in the student's educational placement agreed upon by the ARC.

After a child with a disability has been removed from his or her current placement for ten (10) school days in the same school year, during any subsequent days of removal the LEA must provide services that include participation in the general education curriculum, although in another setting, progress toward meeting the goals set out in the IEP, and, as appropriate, receiving a functional behavioral assessment and behavioral intervention services and modifications that are designed to address the behavior. The determination of the extent of these services and their location must be made in consultation with at least one of the child's teachers. These services could be provided in an interim alternative educational setting.

Removals when the behavior is not a result of the child's disability:

If a child with a disability displays behavior that violates the student code of conduct and the behavior is determined not to be a manifestation of the child's disability (as explained below), school personnel may apply the relevant disciplinary procedures in the same manner and for the same duration as would be applied to students without disabilities. If a child with a disability is removed from his or her current placement for a period of time that does constitute a change in placement, the LEA must continue to provide services that include participation in the general education curriculum, although in another setting, progress toward meeting the goals set out in the IEP, and, as appropriate, receiving a functional behavioral assessment and behavioral intervention services and modifications that are designed to address the behavior. The child's ARC must make the determination of the extent of these services and their location.

Interim alternative educational settings:

A child with a disability may be subject to placement in an interim alternative educational setting for up to forty-five (45) days if the child:

- carries a weapon to school or to a school function under the jurisdiction of the LEA or KDE;
- knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of the LEA or KDE;
- or
- is in a current placement that is substantially likely to resulting in injury to the child or others.

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If a child with a disability carries a weapon or knowingly possesses or uses illegal drugs or sells or solicits the sale of a controlled substance to school or to a school function under the jurisdiction of the LEA or KDE, then school personnel may order a change in the child's placement to an interim alternative educational setting. The change would be the same as that imposed on a child without disabilities but not more than forty-five (45) days.

If school personnel order this change in placement, the ARC must meet to decide the nature of the setting. The setting must:

- allow the child to continue to participate in the general curriculum, although in another setting;
- allow the child to continue to receive those services and modifications described in the child's IEP that will enable the child to make progress toward the goals listed in the IEP; and
- include services and modifications designed to address the child's behavior in question so that the behavior does not happen again.

No later than ten (10) days after the decision is made to place a child with a disability in an interim alternative educational setting, the ARC must convene to plan a functional behavioral assessment (or review a functional behavioral assessment that has already been completed). Once the assessment is completed or reviewed, appropriate behavioral interventions plans must be developed and implemented. If a behavioral plan already exists, the ARC must review and revise the plan as needed and implement the revised plan.

If school personnel believe that the child's current placement is substantially likely to result in injury to the child or others, an expedited due process hearing may be requested. A due process hearing officer may order the child to an interim alternative educational setting for no more than forty-five (45) days if the hearing officer:

- determines that the LEA has demonstrated by substantial evidence that maintaining the current placement is substantially likely to result in injury to the child or others;
- considers the appropriateness of the current placement;
- considers whether the LEA has made reasonable efforts to minimize the risk of harm in the current placement including the use of supplementary aids and services; and
- determines that the interim alternative educational setting will allow the child to participate in the general curriculum, receive the special education and related services in the child's IEP and include services and modifications designed to address the behavior in question.

If the hearing officer orders the child to be placed in an interim alternative educational setting, the ARC must be convened to determine the nature of that setting in the same fashion as listed above for students involved with weapons or illegal drugs.

The child with a disability will remain in the interim alternative educational setting while any appeals of the ARC decision to place the child in such a setting are proceeding or until the expiration of the time period set by the school personnel or hearing officer, whichever occurs first, unless the parent and LEA agree otherwise.

Manifestation determination:

An ARC must be convened for all situations in which school personnel consider a disciplinary action for a child with a disability who:

- carry a weapon to school or to a school function under the jurisdiction of the LEA or KDE;
- knowingly possesses or uses illegal drugs or sell or solicits the sale of a controlled substance while at school or a school function under the jurisdiction of the LEA or KDE;
- is in a current placement that is substantially likely to result in injury to the child or to others; and

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- has engaged in behavior that violates any rule or code of conduct of the LEA that applies to all children and a disciplinary action involving a change of placement for more than ten (10) school days in a given school year is considered for the child.

If school personnel consider disciplinary action, then no later than the date on which the decision is made, the parents must be informed of that decision and all procedural safeguards under IDEA. Immediately, if possible, but no later than ten (10) school days after the date of the decision, a review must be conducted by the ARC and other qualified personnel about the relationship between the child's disability and the behavior subject to the disciplinary action.

During this ARC meeting, the members must consider all relevant information about the behavior including evaluations, other diagnostic results, information supplied by the parents, if any, observations of the child and the child's IEP and placement. In relation to that information, the ARC must determine:

- in relationship to the behavior in question, was the child's IEP appropriate;
- in relationship to the behavior in question, was the child's placement appropriate;
- were the special education services, supplementary aids and services, and behavior interventions strategies provided consistent with the IEP and placement?

If the answer to the above questions is that the IEP and placement were appropriate and all services were being provided consistent with the IEP and placement, the ARC then must decide the following two (2) questions:

- Does the child's disability impair the child's ability to understand the impact and consequences of the behavior in question? and
- Does the child's disability impair the child's ability to control the behavior in question?

If the ARC determines the answer to either question to be yes, then the ARC must determine the behavior to be a manifestation of the disability. If this decision is reached, the disciplinary procedures that are applied to children without disabilities may not be applied to this child with a disability.

If the behavior is not a manifestation of the disability, then the disciplinary procedures that are applied to children without disabilities may be applied to this child with a disability. However, in not event shall the student's educational services be terminated. If it is determined that behavior is not a manifestation of the disability and the LEA initiates disciplinary procedures, the LEA must make sure the special education and disciplinary records of the child are made available to person or persons who make the final decision about the disciplinary action.

If a parent disagrees with the manifestation determination, they may request a due process hearing. This hearing would be requested using the procedures listed in **Section 5** above.

Protections for children not yet eligible for special education and related services

If a child has not been determined eligible for special education and related services and engages in behavior that violates any rule or code of conduct of the LEA, the parent may assert any of the procedural protections provided by IDEA if the LEA has knowledge that the child was a child with a disability before the behavior occurred.

A LEA will be deemed to have had knowledge that the child was a child with a disability if:

- the parent expressed concern in writing (unless the parent is illiterate or has a disability that would prevent it) to personnel of the LEA that their child was in need of special education and related services;
- the behavior or performance of the child demonstrates the need for special education and related services;

- the parent has requested evaluations of the child to determine eligibility; or
- a teacher or other personnel of the LEA expressed concerns about the behavior or performance of the child to the LEA's director of special education or other personnel.

If the LEA does not have knowledge that a child is a child with a disability prior to taking disciplinary actions, the child will be subject to the same disciplinary measures as those applied to children without disabilities. However, if a request is made for an evaluation of the child during the time period in which the child is subject to disciplinary measures, then the evaluation must be conducted in an expedited manner. The child will remain in the educational placement determined by school personnel pending the results of the evaluation.

8. Requirements when parents unilaterally place children in private schools

If a child is enrolled in a private, including parochial, elementary or secondary school in Kentucky, IDEA requirements for child identification and evaluation apply to that child. If a child is placed in a private school through the ARC process of the LEA, then special education and related services in accordance with an IEP are provided at no cost to the parents.

However, the LEA is not required to pay for the cost of special education and related services at a private school if the LEA made a free appropriate public education available and the parent elected to place their child in a private school.

If a parent disagrees with the appropriateness of the education offered by the LEA, they may request mediation or a due process hearing. If the child with a disability previously received special education and related services from the LEA, and the parent enrolled the child in a private school without the consent or referral from the LEA, a hearing officer or court may require the LEA to reimburse the parent for the cost of that private school if the decision is made that the LEA did not offer a free appropriate public education in a timely manner.

The cost of the reimbursement may be reduced or denied:

- if the parent did not inform the LEA at the most recent ARC meeting attended prior to removal of the child from the LEA, that the parent was rejecting the LEA's placement and did not state the parent's concerns and intent to enroll in a private school;
- if ten (10) business days prior to the removal of the child from the LEA, the parent did not give written notice of the intent to enroll the child in a private school;
- if prior to the removal of the child from the LEA, if the LEA informed the parent of its intent to evaluate the child, and the parent did not make the child available for the evaluation; or
- upon a judicial finding of unreasonableness with respect to action taken by the parents.

9. Civil actions, including the time period in which to file such actions

If a parent or the LEA disagrees with the decision of the Exceptional Children Appeals Board, either party has the right to appeal or bring an action in a State court of competent jurisdiction or in federal district court. The party bringing the action has thirty (30) days from the date of the decision of the Appeals Board to file the action. Nothing in IDEA limits the rights, procedures and remedies available under the United States Constitution, the American with Disabilities Act, Section 504 of the Rehabilitation Act or other federal laws that protect the rights of children with disabilities. However, the procedures explained in Section 5 on hearings must be exhausted in most cases prior to filing a civil action.

10. Attorneys' fees

For cases brought under IDEA, in general, a court, in its discretion, may award attorneys' fees to the prevailing parent of the child with a disability. The court may also award attorneys' fees to the prevailing LEA against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundations or against the attorney of the parent who continues to litigate after the litigation clearly becomes frivolous, unreasonable or without foundation. Lastly, the court could award attorneys' fees to the prevailing LEA against the attorney of the parent or against the parent if the parent's request for a due process hearing or subsequent cause of action was presented for an improper purpose such as to harass, to cause unnecessary delay or to needlessly increase the cost of litigation.

Attorneys' fees awarded under IDEA:

- must be based on prevailing rates in the community with no bonus or multiplier being used in calculating the fee;
- must not be awarded for any work performed subsequent to the time of a written offer of settlement to the parent if:
 - a. the offer was made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or in the case of an administrative hearing at any time more than ten (10) days before the hearing began;
 - b. the offer was not accepted within ten (10) days;
 - c. the court or administrative hearing officer found that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement; or
 - d. notwithstanding the conditions listed in a. through c., an award may be made to a prevailing parent if they were substantially justified in rejecting the settlement offer.
- must not be awarded relating to any ARC meeting unless the meeting is convened as a result of an order from the hearing officer or court;
- must be reduced if the parent or the parent's attorney unreasonably protracted the final resolution of the controversy;
- must be reduced if the hourly rate is consider excessive considering the attorney's skills, reputation and experience;
- must be reduced if the time spent on the case was excessive considering the nature of the action; or
- must be reduced if the parent's attorney did not provide the LEA the appropriate information in the request for the due process hearing; and
- must not be reduced if the court finds that KDE or the LEA unreasonably protracted the final resolution of the action or there was a violation of any of the procedural safeguards in IDEA.

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