

Dispute Resolution in Special Education

Georgia Charter Schools Association

March 15, 2023

Types of Dispute Resolution

- Formal Complaint
- Due Process Complaint & Hearing
 - Expedited Hearing
 - Resolution Session
- Mediation
- Facilitated IEP Meetings
- Federal Complaints

Formal Complaints

34 CFR 300.151 – 300.153

GA Rule 160-4-7-.12

Formal Complaint – What is it?

- An administrative complaints process set out by IDEA with the specific procedures developed and implemented by the Georgia Department of Education.
- A written complaint submitted to GADOE must include the following information:
 - Identify specific student and school, if applicable
 - Allege a violation of federal IDEA regulations or GADOE Rules for Special Education.
 - Facts supporting the alleged violation
 - A proposed resolution of the problem

Formal Complaints – The Basics

- WHO CAN FILE A FORMAL COMPLAINT?

- Any individual or organization

- WHEN CAN A COMPLAINT BE FILED?

- Must allege a violation that occurred not more than one calendar year from the date complaint is received

- WHAT ISSUES CAN BE RESOLVED?

- Violations of IDEA or Georgia Special Education Rules

Formal Complaints – Important Deadlines

- The LEA is requested to provide a written response to the GADOE and the complainant within 10 business days of upon receipt of the DOE's letter initiating the Complaint.
- Complaints are investigated and action is taken within 60 calendar days of the GADOE's receipt of the Complaint.
- Upon receipt of the first written complaint in a school year, LEA must provide a copy of procedural safeguards to the child's parent

Formal Complaints – React & Respond

- **WHAT DO I DO WHEN I RECEIVE NOTICE OF A COMPLAINT?**

- Consult your school board attorney
- Provide notice to all involved to maintain and preserve records
- Consider notifying your insurance company
- Provide copy of parental rights
- Assess the allegations
- Gather and review *all* relevant records

- **HOW DO I RESPOND?**

- Respond to the issues identified by the DOE, along with supporting documentation
- Are there other individuals you believe the DOE needs to interview, or documentation or statements needed to support your position?
- Provide a copy of the response to the parent when provide a copy to the DOE

Formal Complaints – Resolution

- **WHO DECIDES?**

- GADOE will assign an investigator who will review all of the information provided and make recommendations to the GADOE Division of Special Education Services (DSES)
- DSES will review the recommendations and issue a written decision that addresses each of the allegations in the complaint, contains a finding of fact and a determination of compliance or noncompliance. If a violation is found to have occurred, then the decision will identify the necessary corrective actions.
- The decision of GADOE DSES is final and cannot be appealed by either party.

Formal Complaints – Possible Outcomes

• WHAT ARE POSSIBLE RESOLUTIONS?

Sample resolutions for findings of violations:

- Revise discipline procedures and send them to the State for review.
- Revise procedures regarding notices to parents and send them to the State for review.
- After the State's approval of procedures, train all School employees. Provide signature pages of all personnel that attend that training.
- Award of compensatory education; Schedule an IEP meeting to determine how compensatory education will be provided.
- Potential for compliance review: For example, if a complainant raises issues that implicate other students, the DOE could request submission of all special education students' file on a specific topic and render further resolutions related to that issue.
- There are no attorney's fees available under formal complaint.

Formal Complaints – Other Helpful Information

- There is no requirement for early resolution, but mediation is available.
- There is no appeal, so what DOE decides is final. There is no way to get a different outcome, which is different than other some other States' process.
- Get the DOE all the information that you believe is helpful because once the decision is made they will not consider additional information.
- Orders of compensatory education for procedural violations without consideration of whether any violation impacted FAPE.

Due Process Complaint & Hearing

34 CFR 300.507 – 300.518

GA Rule 160-4-7-.12

Due Process Complaint and Hearing- What is it?

- An impartial due process hearing heard by an administrative law judge assigned by the Office of State Administrative Hearings
- Parties present evidence, testimony in support of their case
- Petitioner bears the burden of proof and persuasion

Due Process Complaint – The Basics

- **WHO CAN FILE A REQUEST FOR A DUE PROCESS HEARING?**
 - The complainant must have standing to bring a due process hearing request.
 - Courts have held that both the student and the parent have rights under IDEA.
 - The LEA can also request a due process hearing
- **WHEN CAN COMPLAINT BE FILED?**
 - Must be filed within two years of when the party knew or should have known of the alleged problem
- **WHAT IDEA ISSUES CAN BE RESOLVED?**
 - Any matter relating to the identification, evaluation, educational placement or the provision of FAPE
 - Includes proposing or refusing to initiate or change

Due Process Complaint – Is it sufficient?

- IDEA allows a due process complaint to be dismissed if it is found to be insufficient.
- Must file objection to sufficiency within 15 days of receiving complaint
 - Hearing officer will make a determination on sufficiency within 5 calendar days
- A sufficient complaint must include the following:
 - Name of the child
 - Address of child's residence
 - Name of the school the child is attending
 - If the child is homeless, available contact information for the child and the name of the school the child is attending
 - A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and
 - A proposed resolution of the problem to the extent known and available to the party at the time

Due Process Complaint – Important Deadlines

- Response to Complaint is 10 calendar days
- Provide Prior Written Notice if not already provided 10 calendar days
- Objection to Sufficiency of Complaint is 15 calendar days
- Early Resolution Session is 15 calendar days
- Resolution period is 30 calendar days
- Timeline for the hearing and issuing a decision 45 calendar days
 - 45 days after the end of the 30-day resolution period or earlier if a settlement is not reached by resolution or mediation
- Provide list of potential witnesses and evidence that will be used at the hearing at least 5 business days before
- Deadline to file a motion for voluntary dismissal 5 days before scheduled hearing

Due Process Complaint – Expedited Hearing Requests

- An expedited due process hearing can be requested if arising out of a manifestation determination or disciplinary placement
- Deadline to respond to request 7 days
- Resolution period 7 days
- Hearing held within 20 school days of request or conclusion of resolution period
- Response issued within 10 school days after the hearing
- “Stay Put” placement is the interim alternative placement

Due Process Complaint – React & Respond

- WHAT DO I DO WHEN I RECEIVE NOTICE OF A DUE PROCESS COMPLAINT?
 - Consult your school board attorney
 - Provide notice to all involve to maintain and preserve records
 - Notify your insurance company
 - Provide copy of parental rights
 - Assess the allegations, strengths and weaknesses
 - Gather and review *all* relevant records
 - Identify potential witnesses, including expert witnesses
 - Review family's request for relief
- Stay Put Placement: Student remains in the “stay put placement” set out in the last agreed upon IEP through pendency of the litigation

Due Process – Early Resolution Session

- Required under IDEA - must be held within 15 calendar days
 - May only be waived if *both* parties waive the ERS
- LEA may only bring an attorney if family brings an attorney
- If LEA offers the ERS and the family does not attend, the LEA may seek dismissal of the case at the end of the 30-day resolution period – documentation is key
- Participation in the ERS may be in person or virtual
- There is no requirement that the ERS is confidential, unless the parties agree to confidentiality
- Parties may agree to mediation in lieu of or in addition to ERS
- If a resolution is reached, the parties must execute a legally binding agreement that is enforceable in any state or district court or through the formal complaint process
- ERS is an opportunity for the LEA to get an understanding of the allegations in the complaint and to attempt to resolve the complaint

Due Process Complaint – Who participates?

EARLY RESOLUTION SESSION

- Parent(s)
- Relevant members of IEP Team who have knowledge of the facts, as determined by parent and LEA
- LEA Representative who has decision-making authority on behalf of LEA
- Attorneys
 - Parents are not required to be represented by an attorney in this process
 - The LEA attorney can only be present if the parent is accompanied by an attorney

MEDIATION

- Parties
- Mediator

DUE PROCESS HEARING

- Impartial administrative law judge or hearing officer
- Parties to the hearing
 - Party's counsel and individuals with special knowledge or training with respect to the problems with children of disabilities
 - Parent may have the child who is subject of the hearing present
- Previously identified witnesses

Due Process Complaint – Resolution

- WHO DECIDES?

- Administrative law judge

- APPEAL

- Aggrieved party has 90 days from the date of the decision to file a civil action to appeal to state court or US district court

- WHAT ARE POSSIBLE OUTCOMES?

Judges have broad authority to craft remedies (examples below):

- Private School;
- Change of placement;
- Tuition Reimbursement;
- Tutoring
- Evaluations;
- Parent training;
- Changes to IEPs;
- Injunctive relief; and/or
- Compensatory Education.
- Attorney's fees through fee shifting provision.

Due Process Resolution – Private School Reimbursement

- To obtain reimbursement for a unilateral private school placement, the parents must:
 - Give notice of private placement at public expense.
 - Show that the LEA failed to provide FAPE in the least restrictive environment, that their private placement was appropriate, and that they provided written notice of their placement 10 days prior to the child's removal.

Due Process Resolution – Attorney's Fees

- In any action brought under the IDEA, a court may award reasonable attorney's fees to a prevailing party who is the parent of a child with a disability.
- If a state education agency or local education agency prevails in an IDEA action and the court determines that the action was frivolous, unreasonable, or without foundation, the court may order the parent's attorney to pay reasonable attorney's fees. (34 CFR § 300.517 (a)(1)(ii). *Oscar v. Alaska Dep't of Educ. and Early Dev.*, (9th Cir. 2008); *A.A. and L.A. v. Clovis Unified Sch. Dist.*, (E.D. Cal. 2015).)

Mediation

34 CFR 300.506

GA Rule 160-4-7-.12

Mediation – What is it?

- An impartial individual - a mediator - assists the parties in discussing concerns and attempting to reach a mutually agreeable resolution.
- The process often involves a collaborative discussion and then separate discussions called a “caucus.”
- Mediation discussions are confidential. They cannot be used as evidence in a subsequent due process hearing or civil proceeding

Mediation – The Basics

- WHO CAN INITIATE MEDIATION?

- Either party can initiate mediation, but both parties must agree to participate

- WHEN CAN MEDIATION BE REQUESTED?

- At any time, in connection with a complaint; or simply to resolve an issue in contention

- WHAT ISSUES CAN BE RESOLVED?

- Any matter under the IDEA or GADOE Rules for Special Education, including matters arising prior to the filing of a due process hearing request
- If you are seeking to resolve a complaint, ensure that the agreement includes a withdrawal of the complaint

Mediation – Who Participates?

- Mediator
 - Mediation can be conducted through with a GADOE-assigned mediator or the parties can engage a private mediator
- Parties
 - Parties can be represented by an attorney
- Other persons knowledgeable about the issue
 - Consider who is necessary? You do not need to have your entire IEP Team participate in settlement discussions.

Mediation – Resolution

- **WHO DECIDES?**

- A mediator listens and assists, but does not make any decisions on behalf of either party
- The parties agree to a legally binding solution in writing

- **POSSIBLE OUTCOMES**

- Mediation might ultimately result in an agreement, no agreement, or a partial agreement
- This is a great opportunity for the parties to have a say and control in the outcome

Mediation – Other Helpful Information

- Some issues are better for mediation than others
 - Issues better for mediation
 - Need for more/different special education services
 - Classroom or school placement
 - Eligibility decisions
 - Compensatory services
 - Issues less likely to be resolved through mediation
 - Assignment to a particular teacher or other personnel
 - Hiring or firing of school staff

Facilitated IEP Meetings

Facilitated IEP Meeting – What is it?

- An optional service provided by GADOE to assist in the IEP process
- A facilitator – neutral party – assists the IEP Team with communication and in working through the IEP process
- The facilitator is not an IEP Team member and does not make IEP decisions for the Team
- The facilitator will help the IEP Team create an agenda, set ground rules, and desired outcomes, and address issues during the IEP Team meeting that produce tension within the Team so that the Team is able to find their own solutions.
- The facilitator will also guide the discussions during the IEP Team meeting by asking student-focused questions

Facilitated IEP Meetings – The Basics

• WHO CAN REQUEST?

- Either party may initiate a request for a facilitated IEP meeting
- Parents, including guardians and surrogate parents, of a child with a disability, an adult student with a disability (18 years or older), and school personnel with the approval of the special education director
- Both the parents and the LEA must agree to participate

• WHEN CAN IT BE REQUESTED?

- At any point in the IEP process
- A complete and signed request form and notice of meeting must be submitted to the GADOE at least 7-10 days before the scheduled IEP Team meeting.

• WHAT ISSUES CAN BE RESOLVED?

- Any issues that the IEP Team would typically address

Facilitated IEP – Steps to a successful meeting

- PREPARATION, PREPARATION, PREPARATION
- Ensure all evaluations and tests are completed and the results are available to the placement committee
- Ensure placement committee reviews the reports before the meeting
- If the parents have obtained any independent evaluations, ensure the school has received copies and made them available to members of the committee
- Organize all files and documents and know the content of the file, the teacher's file, records, data, student work, and the communication log between parents and school
- Don't appear indifferent or incompetent due to unfamiliarity and lack of preparation!

Federal Complaints

Federal Complaints

- A federal complaint can be filed with the U.S. Department of Education Office for Civil Rights (OCR) for allegations of discrimination on the basis of race, color, national origin, sex, disability, or age.
- **WHO CAN FILE?**
 - Anyone who believes that an education institution that receives federal financial assistance has discriminated against someone on the basis of these characteristics
 - The person or organization filing the complaint does not have to be the victim of the alleged discrimination
- **WHEN CAN A COMPLAINT BE FILED?**
 - An OCR complaint must be filed within 180 calendar days from the date of the incident when discrimination occurred
 - Do not have to first file a complaint at the state level or through the school grievance process

Office for Civil Rights

- In 2021, OCR received 4,870 complaints alleging a total of 6,789 individual violations of Section 504 and/or Title II.
 - Nearly half of these allegations involved claims that a school failed to provide a student with a disability with a free and appropriate public education (FAPE), treated students with disabilities differently from other students, retaliated against individuals who asserted their Section 504/Title II rights or those of others, or failed to make programs or activities accessible to students with disabilities.
 - During 2021, OCR resolved 4,417 Section 504/Title II related complaints

OCR Complaints

- OCR will review the complaint to determine whether it has jurisdiction over the complaint and whether the complaint contains sufficient information
- OCR will decide whether to investigate or dismiss the complaint. Letter of notification will be issued to the complainant and the recipient.
- Opening a complaint for investigation in no way implies that OCR has made a determination with regard to the merits of the complaint.
- During the investigation, OCR will collect and analyze relevant evidence from the complainant, the recipient, and other sources, as appropriate. They may request to interview individuals related to the complaint.
- Documents and information that are confidential under state law may not be protected from an OCR investigation

OCR Complaints - Dismissal

- There are several reasons OCR may decide not to investigate a complaint. Some of the reasons a complaint may be dismissed may include the following:
 - No legal authority;
 - Filed after 180 days
 - Failure to state a violation of one of the laws OCR enforces;
 - Allegations are speculative, conclusory, or incoherent, or lack sufficient detail to infer discrimination;
 - The allegations in the complaint were already resolved; or
 - The allegations have been investigated by another Federal, state, or local civil rights agency.
- If the complaint is untimely, OCR will allow a waiver if there is a reason for the delay.

Potential OCR Resolutions

1. The Rapid Resolution Process (RRP) is an expedited case processing approach that can be used to resolve cases in any of OCR's statutory areas either during the evaluation stage or after issuance of the letter of notification informing the complainant that OCR is opening an investigation.
2. The Facilitated Resolution Between the Parties (FRBP) process facilitates the resolution of complaints by providing an opportunity for the parties involved to voluntarily resolve the complaint allegations. When OCR determines, on an individualized basis with regard to the complaint at issue, that a complaint is appropriate for FRBP, it shall contact the parties to offer this resolution option.
3. Section 302 Resolution Agreement is where allegations under investigation are resolved prior to the point when OCR issues a draft letter of findings. The provisions of the resolution agreement will be tied to the allegations, but simply because the agreement is proposed does not mean the District cannot negotiate.
4. Section 304 Resolution Agreement is where the complaint is resolved and the District, after negotiating with OCR and reaching agreement on its terms and obligations, enters into and fulfills them. This agreement will include specific acts or steps the recipient will take to resolve compliance concerns and/or violations; dates for certain steps; dates for submitting reports to OCR for monitoring purposes.

Potential OCR Consequences (Examples)

- Hold an IEP Team meeting to determine if compensatory education is appropriate and how much the Team determines is appropriate.
- Provide updated/revised special education procedures for ISS procedures to OCR.
- Provide training for all special education teachers at the school for proper procedures.
- Additional monitoring on a yearly basis for procedures.

How can we try to
avoid this?

Practical Tips – Regardless of the Type of Complaint

- Importance of communication with parents/guardians
- A little PR can go a long way
- Act like the experts that you are
- Importance of meeting timelines
- Importance of maintaining documentation of Team decisions and compliance with Section 504 and IDEA procedures
- Make sure if there is a plan that it is tailored to a student's individual needs
- And if there is a plan – make sure it is being implemented

Parents file a complaint when ...

- They no longer trust schools, school administrators or teachers;
- They do not receive timely and useful information;
- They believe educators do not care what happens to their children;
- They perceive communication to be rude and demeaning.

Questions?

Lauren Greer

Partner

lgreer@ghsmlaw.com

Gilbert Harrell Sumerford & Martin

Beth Morris

Counsel

bethmorris@parkerpoe.com

Parker Poe