

PROCEDURAL SAFEGUARDS NOTICE

for Parents and Students Under The Individuals With Disabilities Education Act and Hawaii Law
and Regulations¹

April 2020

This document is available electronically at:

<http://www.hawaiipublicschools.org/TeachingAndLearning/SpecializedPrograms/SpecialEducation/Pages/Rights.aspx>

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¹Based on the U.S. Department of Education's Model Form: Procedural Safeguards Notice

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The Individuals with Disabilities Education Act (IDEA), the Federal law, and Hawaii law and regulations (Hawaii Administrative Rules [HAR], Title 8, Chapter 60, Provision of a Free Appropriate Public Education for a Student with a Disability) concerning the education of students with disabilities, requires schools to provide you, the parents of a student with a disability, with a notice containing a full explanation of the procedural safeguards available under IDEA and U.S. Department of Education regulations, and Hawaii law and regulations (HAR §8-60-59). A copy of this notice must be given to you only one time a school year, except that a copy must also be given to you: (1) upon initial referral or your request for evaluation; (2) upon receipt of your first State complaint (under 34 Code of Federal Regulations [CFR] §§300.151 through 300.153 and HAR §§8-60-52 through 8-60-54) and upon receipt of your first due process complaint (under 34 CFR §300.507 and HAR §8-60-61) in a school year; (3) when a decision is made to take a disciplinary action against your child that constitutes a change of placement; and (4) upon your request [34 CFR §300.504(a) and HAR §8-60-59(a)].

This procedural safeguards notice includes a full explanation of all of the procedural safeguards available under:

34 CFR §300.148 and HAR §8-60-27 (unilateral placement of a student in a private school at public expense);

34 CFR §§300.151 through 300.153 and §§8-60-52 through 8-60-54 (State Complaint Procedures);

34 CFR §300.300 and HAR §8-60-31 (Parental consent);

34 CFR §§300.502 and 300.503 and HAR §§8-60-57 (Independent educational evaluation) and 8-60-58 (prior written notice);

34 CFR §§300.505 through 300.518 and HAR §§8-60-60 through 8-60-72 (other procedural safeguards);

34 CFR §§300.530 through 300.536 and HAR §§8-60-75 through 8-60-81 (Discipline Procedures); and

34 CFR §§300.610 through 300.625 and HAR §8-60-84 (Confidentiality of Information).

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GENERAL INFORMATION**PRIOR WRITTEN NOTICE****34 CFR §300.503**

HAR §8-60-58

Notice

The Hawaii Department of Education (Department) must give you written notice (provide you certain information in writing), within a reasonable amount of time before it:

1. Proposes to initiate or to change the identification, evaluation, or educational placement of your child, or the provision of a free appropriate public education (FAPE) to your child; **or**
2. Refuses to initiate or to change the identification, evaluation, or educational placement of your child, or the provision of FAPE to your child.

Content of notice

The written notice must:

1. Describe the action that the Department proposes or refuses to take;
2. Explain why the Department is proposing or refusing to take the action;
3. Describe each evaluation procedure, assessment, record, or report the Department used in deciding to propose or refuse the action;
4. Include a statement that you have protections under the procedural safeguards provisions in Part B of the Individuals with Disabilities Education Act (IDEA) and Hawaii law and regulations for special education (HAR 8-60), and if this notice is not an initial referral for evaluation, the means by which a copy of HAR §8-60-59 (procedural safeguards notice) can be obtained;
5. Include resources for you to contact for help in understanding Part B of IDEA and provisions of HAR 8-60.
6. Describe any other options that your child's Individualized Education Program (IEP) Team considered and the reasons why those options were rejected; **and**
7. Provide a description of other reasons why the Department proposed or refused the action.

Notice in understandable language

The notice must be:

1. Written in language understandable to the general public; **and**
2. Provided in your native language or other mode of communication you use, unless it is clearly not feasible to do so.

If your native language or other mode of communication is not a written language, the Department must ensure that:

1. The notice is translated for you orally or by other means in your native language or other mode of communication;
2. You understand the content of the notice; **and**
3. There is written evidence that the requirements in paragraphs 1 and 2 have been met.

NATIVE LANGUAGE - DEFINITION

34 CFR §300.29

HAR §8-60-2

Native language, when used regarding an individual who has limited English proficiency, means the following:

1. The language normally used by that person, or, in the case of a student, the language normally used by the student's parents;
2. In all direct contact with a student (including evaluation of the student), the language normally used by the student in the home or learning environment.

For a person with deafness or blindness, or for a person with no written language, the mode of communication is what the person normally uses (such as sign language, Braille, or oral communication).

PARENTAL CONSENT - DEFINITION

34 CFR §300.9

HAR §8-60-2

Consent means:

1. You have been fully informed in your native language or other mode of communication (such as sign language, Braille, or oral communication) of all information about the action for which you are giving consent.
2. You understand and agree in writing to that action, and the consent describes that action and lists the records (if any) that will be released and to whom; **and**
3. You understand that the consent is voluntary on your part and that you may withdraw your consent at any time.

If you wish to revoke (cancel) your consent after your child has begun receiving special education and related services, you must do so in writing. Your withdrawal of consent does not negate (undo) an action that has occurred after you gave your consent but before you withdrew it. In addition, the school is not required to amend (change) your child's education records to remove any references that your child received special education and related services after your withdrawal of consent.

PARENTAL CONSENT**34 CFR §300.300**

HAR §8-60-31

Consent for initial evaluation

The Department cannot conduct an initial evaluation of your child to determine whether your child is eligible under Part B of IDEA to receive special education and related services without first providing you with prior written notice (PWN) of the proposed action and obtaining your consent (when assessments are required as part of the evaluation) as described under the headings **Prior Written Notice** and **Parental Consent**.

The Department must make reasonable efforts to obtain your informed consent for an initial evaluation to decide whether your child is a student with a disability.

Your consent for initial evaluation does not mean that you have also given your consent for the school to start providing special education and related services to your child.

The Department may not use your refusal to consent to one service or activity related to the initial evaluation as a basis for denying you or your child any other service, benefit, or activity, unless another Part B requirement of IDEA requires the Department to do so.

If your child is enrolled in public school or you are seeking to enroll your child in a public school and you have refused to provide consent or failed to respond to a request to provide consent for an initial evaluation, the Department may, but is not required to, seek to conduct an initial evaluation of your child by using the IDEA's mediation or due process complaint, resolution meeting, and impartial due process hearing procedures. The Department will not violate its obligations to locate, identify and evaluate your child if it does not pursue an evaluation of your child in these circumstances.

Special rules for initial evaluation of wards of the State

Ward of the State, as used in IDEA & HAR 8-60, means a student who, as determined by the State where the student lives, is:

1. A foster child;
2. Considered a ward of the State under State law; **or**
3. In the custody of a public child welfare agency.

There is one exception that you should know about. *Ward of the State* does not include a foster child who has a foster parent who meets the definition of a *parent* as used in IDEA and HAR 8-60.

If a student is a ward of the State and is not living with his/her parent - the Department does not need consent from the parent for an initial evaluation to determine if the student is a student with a disability if:

1. Despite reasonable efforts to do so, the Department cannot find the student's parent;
2. The rights of the parents have been terminated in accordance with Hawaii law; **or**
3. A judge has assigned the right to make educational decisions to an individual other than the parent and that individual has provided consent for an initial evaluation.

Parental consent for services

The Department must obtain your informed consent before providing special education and related services to your child for the first time.

The Department must make reasonable efforts to obtain your informed consent before providing special education and related services to your child for the first time.

If you do not respond to a request to provide your consent for your child to receive special education and related services for the first time, or if you refuse to give such consent or later revoke (cancel) your consent in writing, the Department may not use the procedural safeguards (i.e., mediation, due process complaint, resolution meeting, or an impartial due process hearing) in order to obtain agreement or a ruling that the special education and related services (recommended by your child's IEP Team) may be provided to your child without your consent.

If you refuse to give your consent for your child to receive special education and related services for the first time, or if you do not respond to a request to provide such consent or later revoke (cancel) your consent in writing and the Department does not provide your child with the special education and related services for which it sought your consent, the Department:

1. Is not in violation of the requirement to make FAPE available to your child for its failure to provide those services to your child; **and**
2. Is not required to have an IEP meeting or develop an IEP for your child for the special education and related services for which your consent was requested.

If you revoke (cancel) your consent in writing at any point after your child is first provided special education and related services, then the Department may not continue to provide such services, but must provide you with a PWN, as described under the heading **Prior Written Notice**, before discontinuing those services.

Parental consent for reevaluations

The Department must obtain your informed consent before it reevaluates your child, unless the Department can demonstrate that:

1. It took reasonable steps to obtain your consent for your child's reevaluation; **and**
2. You did not respond.

If you refuse to consent to your child's reevaluation, the Department may, but is not required to, pursue your child's reevaluation by using the mediation, due process complaint, resolution meeting, and impartial due process hearing procedures to seek to override your refusal to consent to your child's reevaluation. As with initial evaluations, the Department does not violate its obligations under Part B of IDEA if it declines to pursue the reevaluation in this manner.

Documentation of reasonable efforts to obtain parental consent

Your school must maintain documentation of reasonable efforts to obtain your consent for initial evaluations, to provide special education and related services for the first time, for a reevaluation, and to locate parents of wards of the State for initial evaluations. The documentation must include a record of the Department's attempts in these areas, such as:

1. Detailed records of telephone calls made or attempted and the results of those calls;

2. Copies of correspondence sent to you and any responses received; **and**
3. Detailed records of visits made to your home or place of employment and the results of those visits.

Other consent requirements

Your consent is not required before the Department may:

1. Review existing data as part of your child's evaluation or a reevaluation; **or**
2. Give your child a test or other evaluation that is given to all students unless, before that test or evaluation, consent is required from parents of all students.

If you have enrolled your child in a private school at your own expense or if you are home schooling your child, and you do not provide your consent for your child's initial evaluation or your child's reevaluation, or you fail to respond to a request to provide your consent, the Department may not use its dispute resolution procedures (i.e., mediation, due process complaint, resolution meeting, or an impartial due process hearing) and is not required to consider your child as eligible to receive equitable services (services made available to some parentally-placed private school students with disabilities).

INDEPENDENT EDUCATIONAL EVALUATIONS**34 CFR §300.502**

HAR §8-60-57

General

As described below, you have the right to obtain an independent educational evaluation (IEE) of your child if you disagree with the evaluation of your child that was obtained by the Department.

If you request an IEE, the Department must provide you with information about where you may obtain an IEE and about the Department's criteria that apply to IEEs.

Definitions

Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the Department.

Public expense means that the Department either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to you, consistent with the provisions of Part B of IDEA, which allow each State to use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of Part B of the Act.

Right to evaluation at public expense

You have the right to an IEE of your child at public expense if you disagree with an evaluation of your child obtained by the Department, subject to the following conditions:

1. If you request an IEE of your child at public expense, the Department must, without unnecessary delay, **either**: (a) File a due process complaint to request a hearing to show that its evaluation of your child is appropriate; **or** (b) Provide an IEE at public expense,

unless the Department demonstrates in a hearing that the evaluation of your child that you obtained did not meet the Department's criteria.

2. If the Department requests a hearing and the final decision is that the Department's evaluation of your child is appropriate, you still have the right to an IEE, but not at public expense.
3. If you request an IEE of your child, the Department may ask why you object to the evaluation of your child obtained by the Department. However, the Department may not require an explanation and may not unreasonably delay either providing the IEE of your child at public expense or filing a due process complaint to request a due process hearing to defend the Department's evaluation of your child.

You are entitled to only one IEE of your child at public expense each time the Department conducts an evaluation of your child with which you disagree.

Parent-initiated evaluations

If you obtain an IEE of your child at public expense or you share with the Department an evaluation of your child that you obtained at private expense:

1. The Department must consider the results of the evaluation of your child, if it meets the Department's criteria for an IEE, in any decision made with respect to the provision of a FAPE to your child; **and**
2. You or the Department may present the evaluation as evidence at a due process hearing regarding your child.

Requests for evaluations by hearing officers

If a hearing officer requests an IEE of your child as part of a due process hearing, the cost of the evaluation must be at public expense.

Department criteria

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 Department uses when it initiates an evaluation (to the extent those criteria are consistent with your right to an IEE).

Except for the criteria described above, the Department may not impose conditions or timelines related to obtaining an IEE at public expense.

CONFIDENTIALITY OF INFORMATION**HAR §8-60-84**

PARENTS, OR STUDENTS AGE 18 OR OLDER, ARE AFFORDED THE RIGHTS WITH RESPECT TO THE EDUCATION RECORDS OF THEIR CHILD UNDER THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) AND HAWAII'S RULES RELATING TO THE PROTECTION OF EDUCATIONAL RIGHTS AND PRIVACY OF STUDENTS AND PARENTS. UNDER FERPA AND HAWAII'S RULES, WHEN A STUDENT BECOMES 18 YEARS OF AGE, THE RIGHTS OF THE PARENTS REGARDING THE STUDENT'S EDUCATION RECORDS, INCLUDING THE RIGHT OF CONSENT TO RELEASE RECORDS, TRANSFER TO THE STUDENT.

DEFINITIONS**34 CFR §300.611**

As used under the heading **Confidentiality of Information**:

- *Destruction* means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.
- *Education records* means the type of records covered under the definition of "education records" in 34 CFR Part 99 (the regulations implementing the FERPA of 1974, 20 U.S.C. 1232g).
- *Participating agency* means any school district, agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under Part B of IDEA.

PERSONALLY IDENTIFIABLE**34 CFR §300.32**

Personally identifiable means information that includes:

1. Your child's name, your name as the parent, or the name of another family member;
2. Your child's address;
3. A personal identifier, such as your child's social security number or student identification number; **or**
4. A list of personal characteristics or other information that would make it possible to identify your child with reasonable certainty.

NOTICE TO PARENTS**34 CFR §300.612**

The Department must give notice that is adequate to fully inform parents about confidentiality of personally identifiable information, including:

1. A description of the extent to which the notice is given in the native languages of the various population groups in the State;
2. A description of the students on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information;

3. A summary of the policies and procedures that participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; **and**
4. A description of all of the rights of parents and students regarding this information, including the rights under FERPA and its implementing regulations in 34 CFR Part 99.

Before any major activity to identify, locate, or evaluate students in need of special education and related services (also known as “child find”), the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of these activities.

ACCESS RIGHTS**34 CFR §300.613**

The participating agency must permit you to inspect and review any education records relating to your child that are collected, maintained, or used by the Department under Part B of IDEA. The participating agency must comply with your request to inspect and review any education records on your child without unnecessary delay and before any meeting regarding an IEP, or any impartial due process hearing (including a resolution meeting or a hearing regarding discipline), and in no case more than 45 calendar days after you have made a request unless otherwise specified in the HAR pertaining to the Protection of Educational Rights and Privacy of Students and Parents.

Your right to inspect and review education records includes:

1. Your right to a response from the participating agency to your reasonable requests for explanations and interpretations of the records;
2. Your right to request that the participating agency provide copies of the records if you cannot effectively inspect and review the records unless you receive those copies; **and**
3. Your right to have your representative inspect and review the records.

The participating agency may presume that you have authority to inspect and review records relating to your child unless advised that you do not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

RECORD OF ACCESS**34 CFR §300.614**

Each participating agency must keep a record of parties obtaining access to education records collected, maintained, or used under Part B of IDEA (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

RECORDS ON MORE THAN ONE STUDENT**34 CFR §300.615**

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

LIST OF TYPES AND LOCATIONS OF INFORMATION

34 CFR §300.616

On request, each participating agency must provide you with a list of the types and locations of education records collected, maintained, or used by the participating agency.

FEEES

34 CFR §300.617

Each participating agency may charge a fee for copies of records that are made for you under Part B of IDEA, if the fee does not effectively prevent you from exercising your right to inspect and review those records. Under the HAR chapter pertaining to the Protection of Educational Rights and Privacy of Students and Parents, the charge may not exceed the actual reproduction cost and, in case of financial hardship, the participating agency may waive the reproduction cost.

A participating agency may not charge a fee to search for or to retrieve information under Part B of IDEA.

AMENDMENT OF RECORDS AT PARENT'S REQUEST

34 CFR §300.618

If you believe that information regarding your child in the education records collected, maintained, or used under Part B of IDEA is inaccurate, misleading, or violates the privacy or other rights of your child, you may request the participating agency change the information.

The participating agency must decide whether to change the information in accordance with your request within a reasonable period of time of receipt of your request.

If the participating agency refuses to change the information in accordance with your request, it must inform you of the refusal and advise you of your right to a hearing as described under the heading ***Opportunity For a Hearing***.

OPPORTUNITY FOR A HEARING

34 CFR §300.619

The participating agency must, on request, provide you an opportunity for a hearing to challenge information in education records regarding your child to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of your child.

HEARING PROCEDURES

34 CFR §300.621

A hearing to challenge information in education records must be conducted according to the procedures for such hearings under FERPA and the HAR chapter pertaining to the Protection of Educational Rights and Privacy of Students and Parents.

RESULT OF HEARING

34 CFR §300.620

If, as a result of the hearing, the participating agency decides that the information is inaccurate, misleading, or otherwise in violation of the privacy or other rights of your child, it must change the information accordingly and inform you in writing.

If, as a result of the hearing, the participating agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of your child, it must inform you of your right to place in the records that it maintains on your child a statement commenting on the information or providing any reasons you disagree with the decision of the participating agency.

Such an explanation placed in the records of your child must:

1. Be maintained by the participating agency as part of the records of your child as long as the record or contested portion is maintained by the participating agency; **and**
2. If the participating agency discloses the records of your child or the challenged information to any party, the explanation must also be disclosed to that party.

CONSENT FOR DISCLOSURE OF PERSONALLY IDENTIFIABLE INFORMATION

34 CFR §300.622

Unless the information is contained in education records, and the disclosure is authorized without parental consent under FERPA, your consent must be obtained before personally identifiable information is disclosed to parties other than officials of participating agencies. Except under the circumstances specified below, your consent is not required before personally identifiable information is released to officials of participating agencies for purposes of meeting a requirement of Part B of IDEA.

Your consent, or consent of an eligible student who has reached the age of majority under State law, must be obtained before personally identifiable information is released to officials of agencies providing or paying for transition services.

SAFEGUARDS

34 CFR §300.623

Each participating agency must protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

One official at each participating agency must assume responsibility for ensuring the confidentiality of any personally identifiable information.

All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures regarding confidentiality under Part B of IDEA and FERPA.

Each participating agency must maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

DESTRUCTION OF INFORMATION

34 CFR §300.624

The Department must inform you when personally identifiable information collected, maintained, or used under Part B of IDEA is no longer needed to provide educational services to your child.

The information must be destroyed at your request. However, a permanent record of your child's name, address, and phone number, his/her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

At your request, the Department must also provide you access to the education records before the destruction of records.

STATE COMPLAINT PROCEDURES**DIFFERENCES BETWEEN THE PROCEDURES FOR DUE PROCESS COMPLAINTS AND HEARINGS AND FOR STATE COMPLAINTS****34 CFR §§300.151 through 300.153 and 300.507 through 300.518**

HAR §§8-60-52 through 8-60-54 and 8-60-61 through 8-60-72

The regulations for Part B of IDEA set forth separate procedures for State complaints and for due process complaints and hearings. As explained below, any individual or organization may file a State complaint alleging a violation of any Part B requirement by the Department. Only you or the Department may file a due process complaint on any matter relating to a proposal or a refusal to initiate or change the identification, evaluation, or educational placement of a student with a disability, or the provision of FAPE to the student. While staff of the Department generally must resolve a State complaint within a 60-calendar-day timeline, unless the timeline is properly extended, an impartial hearing officer must hear a due process complaint (if not resolved through a resolution meeting or through mediation), and issue a written decision within 45 calendar days after the end of the resolution period, as described in this document under the heading **Resolution Process**, unless the hearing officer grants a specific extension of the timeline at your request or the Department's request. The hearing officer shall consider the negative impact on the student's education should the extension of time be granted, the request from the parent or the Department and their ability to have avoided the necessity for an extension, the negative effects of denying the request for an extension, the intent of IDEA and HAR 8-60 to ensure expeditious attention to a due process complaint and whether the extension will override the intent of IDEA and HAR 8-60 for the convenience of either party involved. The State complaint and due process complaint, resolution and hearing procedures are described more fully below. The model forms to help you file a due process complaint and help you or other parties to file a State complaint are described under the heading **Model Forms**.

ADOPTION OF STATE COMPLAINT PROCEDURES**34 CFR §300.151**

HAR §§8-60-52

General

The Department must have written procedures for:

1. Resolving any complaint, including a complaint filed by an organization or individual from another State;
2. The filing of a complaint with the Department; and
3. Widely disseminating the State complaint procedures to parents and other interested individuals, including parent training and information centers, protection and advocacy agencies, independent living centers, and other appropriate entities.

Remedies for denial of appropriate services

In resolving a State complaint in which the Department has found a failure to provide appropriate services, the Department must address:

1. The failure to provide appropriate services, including corrective action appropriate to address the needs of the student (such as compensatory services or monetary reimbursement); **and**
2. Appropriate future provision of services for all students with disabilities.

MINIMUM STATE COMPLAINT PROCEDURES**34 CFR §300.152**

HAR §8-60-53

Time limit; minimum procedures

The Department must include in its State complaint procedures a time limit of 60 calendar days after a complaint is filed to:

1. Carry out an independent on-site investigation, if the Department determines that an investigation is necessary;
2. Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;
3. Provide the Department with the opportunity to respond to the complaint, including, at a minimum: (a) at the option of the Department, a proposal to resolve the complaint; **and** (b) an opportunity for a parent who has filed a complaint and the Department to agree voluntarily to engage in mediation;
4. Review all relevant information and make an independent determination as to whether the Department is violating a requirement of Part B of IDEA; **and**
5. Issue a written decision to the complainant that addresses each allegation in the complaint and contains: (a) findings of fact and conclusions; **and** (b) the reasons for the Department's final decision.

Time extension; final decision; implementation

The Department's procedures described above also must:

1. Permit an extension of the 60-calendar day time limit only if: (a) exceptional circumstances exist with respect to a particular State complaint; **or** (b) you and the Department voluntarily agree to extend the time to resolve the matter through mediation or alternative means of dispute resolution.
2. Include procedures for effective implementation of the Department's final decision, if needed, including: (a) technical assistance activities; (b) negotiations; **and** (c) corrective actions to achieve compliance.

State complaints and due process hearings

If a written State complaint is received that is also the subject of a due process hearing as described under the heading **Filing a Due Process Complaint**, or the State complaint contains multiple issues of which one or more are part of such a hearing, the State must set

aside any part of the State complaint that is being addressed in the due process hearing until the conclusion of the hearing. Any issue in the State complaint that is not a part of the due process hearing must be resolved using the time limit and procedures described above.

If an issue raised in a State complaint has previously been decided in a due process hearing involving the same parties (for example, you and the Department), then the due process hearing decision is binding on that issue and the Department must inform the complainant that the decision is binding.

A complaint alleging the school's failure to implement a due process hearing decision must be resolved by the Department.

FILING A STATE COMPLAINT**34 CFR §300.153**

HAR §8-60-54

An organization or individual may file a signed written State complaint under the procedures described previously.

Address written complaints to:

Complaints Management Program
Monitoring and Compliance Branch
Office of the Deputy Superintendent
P.O. Box 2360
Honolulu, HI 96804

The State complaint must include:

1. A statement that the Department has violated a requirement of Part B of IDEA or its implementing regulations in 34 CFR Part 300 or HAR 8-60;
2. The facts on which the statement is based;
3. The signature and contact information for the party filing the complaint; and
4. If alleging violations regarding a specific student:
 - (a) The name of the student and address of the residence of the student;
 - (b) The name of the school the student is attending;
 - (c) In the case of a homeless student or youth, available contact information for the student, and the name of the school the student is attending;
 - (d) A description of the nature of the problem of the student, including facts relating to the problem; **and**
 - (e) A proposed resolution of the problem to the extent known and available to the party filing the complaint at the time the complaint is filed.

The complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received as described under the heading ***Adoption of State Complaint Procedures***.

The party filing the State complaint must forward a copy of the complaint to the Complex Area Superintendent serving the student at the same time the party files the complaint with the Monitoring and Compliance Branch, Attn: Complaints Management Program.

A model can be found at:

<http://www.hawaiipublicschools.org/DOE%20Forms/Special%20Education/WrittenComplaint.pdf>

DUE PROCESS COMPLAINT PROCEDURES**FILING A DUE PROCESS COMPLAINT****34 CFR §300.507**

HAR §8-60-61

Hawaii Revised Statutes (HRS) §302A-443(a)(2)

General

You or the Department may file a due process complaint on any matter relating to a proposal or a refusal to initiate or change the identification, evaluation or educational placement of your child, or the provision of a FAPE to your child.

The due process complaint must allege a violation that happened not more than two (2) years before you or the Department knew, or should have known, about the alleged action that forms the basis of the due process complaint.

If you disagree with the availability of a free appropriate education in the public schools, and place your child in a private school or facility and have questions regarding the financial responsibility for the costs of the placement, including special education and related services, a due process hearing for reimbursement must be requested within 180 days of enrollment in the private school or facility. The 180-day enrollment timeline begins on the student's first day of attendance, as described under the subheading ***Statute of Limitations in Claiming Reimbursements for Unilateral Placements in Private Schools.***

The above timeline does not apply to you if you could not file a due process complaint within the timeline because:

1. The Department specifically misrepresented that it had resolved the issues identified in the complaint; or
2. The Department withheld information from you that it was required to provide you under Part B of IDEA.

Information for parents

The Department must inform you of any free or low-cost legal and other relevant services available in the area if you request the information, or if you or the Department files a due process complaint.

DUE PROCESS COMPLAINT**34 CFR §300.508**

HAR §8-60-62

General

In order to request a hearing, you or the Department (or your attorney or the Department's attorney) must submit a due process complaint to the other party. That complaint must contain all of the content listed below and must be kept confidential.

The Department is responsible for the conduct and costs of the hearing.

A request for a hearing can be made to the appropriate Complex Area Superintendent of the complex in which the student is enrolled.

Content of the complaint

The due process complaint must include:

1. The name of the student;
2. The address of the student's residence;
3. The name of the student's school;
4. If the student is a homeless student or youth, the student's contact information and the name of the student's school;
5. A description of the nature of the problem of the student relating to the proposed or refused initiation or change, including facts relating to the problem; **and**
6. A proposed resolution of the problem to the extent known and available to the complaining party (you or the Department) at the time.

Notice required before a hearing on a due process complaint

You or the department may not have a due process hearing until you or the Department (or your attorney of the Department's attorney) files a due process complaint that includes the information listed above.

Sufficiency of complaint,

In order for a due process complaint to go forward, it must be considered sufficient. The due process complaint will be considered sufficient (to have met the content requirements above) unless the party receiving the due process complaint (you or the Department) notifies the hearing officer and the other party in writing, within 15 calendar days of receiving the complaint, that the receiving party believes the due process complaint does not meet the requirements listed above.

Within five (5) calendar days of receiving the notification that the receiving party (you or the Department) considers a due process complaint insufficient, the hearing officer must decide if the due process complaint meets the requirements listed above, and notify you and the Department in writing immediately.

Complaint amendment

You or the Department may amend the complaint only if:

1. The other party approves of the changes in writing and is given the chance to resolve the due process complaint through a resolution meeting, described under the heading **Resolution Process**; **or**
2. By no later than five (5) days before the due process hearing begins, the hearing officer grants permission for the changes.

If the complaining party (you or the Department) makes changes to the due process complaint, the timelines for the resolution meeting (within 15 calendar days of receiving the complaint) and the time period for resolution (within 30 calendar days of receiving the complaint) start again on the date the amended complaint is filed.

Department response to a due process complaint

If the Department has not sent a PWN to you, as described under the heading **Prior Written Notice**, regarding the subject matter contained in your due process complaint, the Department must, within 10 calendar days of receiving the due process complaint, send to you a response that includes:

1. An explanation of why the Department proposed or refused to take the action raised in the due process complaint;
2. A description of other options that your child's IEP Team considered and the reasons why those options were rejected;
3. A description of each evaluation procedure, assessment, record, or report the Department used as the basis for the proposed or refused action; **and**
4. A description of the other factors that are relevant to the Department's proposed or refused action.

Providing the information in items 1-4 above does not prevent the Department from asserting that your due process complaint was insufficient.

Other party response to a due process complaint

Except as stated under the subheading immediately above, **Department response to a due process complaint**, the party receiving a due process complaint must, within 10 calendar days of receiving the complaint, send the other party a response that specifically addresses the issues in the complaint.

MODEL FORMS

34 CFR §300.509

HAR §8-60-63

The Department must develop model forms to help you to file a due process complaint and to help you and other parties to file a State complaint. However, the Department may not require the use of these model forms. In fact, you can use the model form or another appropriate form, as long as it contains the required information for filing a due process complaint or a State complaint.

A model due process hearing request form can be found at:

<http://www.hawaiipublicschools.org/DOE%20Forms/Special%20Education/RequestforDueProcessHearing.pdf>

MEDIATION

34 CFR §300.506

HAR §8-60-60

General

The Department must make mediation available to allow you and the Department to resolve disagreements involving any matter under Part B of IDEA, including matters arising prior to the filing of a due process complaint. Thus, mediation is available to resolve disputes under Part B

of IDEA, whether or not you have filed a due process complaint to request a due process hearing as described under the heading ***Filing a Due Process Complaint***.

Requirements

The procedures must ensure that the mediation process:

1. Is voluntary on your part and the Department's part;
2. Is not used to deny or delay your right to a due process hearing, or to deny any other rights provided under Part B of IDEA; **and**
3. Is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

The Department must have a list of people who are qualified mediators and know the laws and regulations relating to the provision of special education and related services. The Department must select mediators on a random, rotational, or other impartial basis.

The Department is responsible for the cost of the mediation process, including the costs of the meetings.

Each meeting in the mediation process must be scheduled in a timely manner and held at a place that is convenient for you and the Department.

If you and the Department resolve a dispute through the mediation process, both parties must enter into a legally binding agreement that sets forth the resolution and:

1. States that all discussions that happened during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding; **and**
2. Is signed by both you and a representative of the Department who has the authority to bind the Department.

A written, signed mediation agreement is enforceable in any State court of competent jurisdiction (a court that has the authority under State law to hear this type of case) or in a district court of the United States.

Discussions that happened during the mediation process must be confidential. They cannot be used as evidence in any future due process hearing or civil proceeding of any Federal court or State court of a State receiving assistance under Part B of IDEA 2004. (Parties are no longer required to sign a confidentiality pledge before mediation begins.)

Impartiality of mediator

The mediator:

1. May not be an employee of the Department that is involved in the education or care of your child; **and**
2. Must not have a personal or professional interest which conflicts with the mediator's objectivity.

A person who otherwise qualifies as a mediator is not an employee of the Department solely because he or she is paid by the Department to serve as a mediator.

RESOLUTION PROCESS**34 CFR §300.510**

HAR §8-60-64

Resolution meeting

Within 15 calendar days of receiving notice of your due process complaint, and before the due process hearing begins, the Department must convene a meeting with you and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in your due process complaint. The meeting:

1. Must include a representative of the Department who has decision-making authority on behalf of the Department; **and**
2. May not include an attorney of the Department unless you are accompanied by an attorney.

You and the Department determine the relevant members of the IEP Team to attend the meeting.

The purpose of the meeting is for you to discuss your due process complaint, and the facts that form the basis of the complaint, so that the Department has the opportunity to resolve the dispute.

The resolution meeting is not necessary if:

1. You and the Department agree in writing to waive the meeting; **or**
2. You and the Department agree to use the mediation process, as described under the heading **Mediation**.

Resolution period

If the Department has not resolved the due process complaint to your satisfaction within 30 calendar days of the receipt of the due process complaint (during the time period for the resolution process), the due process hearing may occur.

The 45-calendar day timeline for issuing a final due process hearing decision, as described under the heading **Hearing Decisions**, begins at the expiration of the 30-calendar day resolution period, with certain exceptions for adjustments made to the 30-calendar day resolution period, as described below.

Except where you and the Department have both agreed to waive the resolution process or to use mediation, your failure to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.

If after making reasonable efforts and documenting such efforts, the Department is not able to obtain your participation in the resolution meeting, the Department may, at the end of the 30-calendar day resolution period, request that a hearing officer dismiss your due process complaint. Documentation of such efforts must include a record of the Department's attempts to arrange a mutually agreed upon time and place, such as:

1. Detailed records of telephone calls made or attempted and the results of those calls;
2. Copies of correspondence sent to you and any responses received; and
3. Detailed records of visits made to your home or place of employment and the results of those visits.

If the Department fails to hold the resolution meeting within 15 calendar days of receiving notice of your due process complaint **or** fails to participate in the resolution meeting, you may ask a hearing officer to begin the 45-calendar day due process hearing timeline.

Adjustments to the 30-calendar day resolution period

If you and the Department agree in writing to waive the resolution meeting, then the 45-calendar day timeline for the due process hearing starts the next day.

After the start of mediation or the resolution meeting and before the end of the 30-calendar day resolution period, if you and the Department agree in writing that no agreement is possible, then the 45-calendar day timeline for the due process hearing starts the next day.

If you and the Department agree to use the mediation process but have not yet reached an agreement, at the end of the 30-calendar day resolution period the mediation process may be continued until an agreement is reached if both parties agree to the continuation in writing. However, if either you or the Department withdraws from the mediation process during this continuation period, then the 45-calendar day timeline for the due process hearing starts the next day.

Written settlement agreement

If a resolution to the dispute is reached at the resolution meeting, you and the Department must enter into a legally binding agreement that is:

1. Signed by you and a representative of the Department who has the authority to bind the Department; **and**
2. Enforceable in any State court of competent jurisdiction (a State court that has authority to hear this type of case) or in a district court of the United States.

Agreement review period

If you and the Department enter into an agreement as a result of a resolution meeting, either party (you or the Department) may void the agreement within three (3) business days of the time that both you and the Department signed the agreement.

HEARINGS ON DUE PROCESS COMPLAINTS**IMPARTIAL DUE PROCESS HEARING****34 CFR §300.511**

HAR §8-60-65

General

Whenever a due process complaint is filed, you or the Department involved in the dispute must have an opportunity for an impartial due process hearing, as described in the ***Due Process Complaint*** and ***Resolution Process*** sections.

Impartial hearing officer

At a minimum, a hearing officer:

1. Must not be an employee of the Department or any State agency that is involved in the education or care of the student. However, a person is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer;
2. Must not have a personal or professional interest that conflicts with the hearing officer's objectivity in the hearing;
3. Must be knowledgeable and understand the provisions of IDEA, Federal and State regulations pertaining to IDEA, and legal interpretations of IDEA by Federal and State courts; **and**
4. Must have the knowledge and ability to conduct hearings, and to make and write decisions, consistent with appropriate, standard legal practice.

The Department must keep a list of those persons who serve as hearing officers that includes a statement of the qualifications of each hearing officer.

Subject matter of due process hearing

The party (you or the Department) that requests the due process hearing may not raise issues at the due process hearing that were not addressed in the due process complaint, unless the other party agrees.

Timeline for requesting a hearing

You or the Department must request an impartial hearing on a due process complaint within two (2) years of the date you or the Department knew, or should have known, about the issue addressed in the complaint.

Statute of Limitations in Claiming Reimbursements for Unilateral Placements in Private Schools

In accordance with HRS §302A-443 Administrative hearing procedures and subpoena power relating to the education of students with a disability, there is a 180-day statute of limitations in claiming reimbursements for unilateral placements, including special education and related services, in private schools. That is, if you disagree with the availability of a free appropriate public education in the public schools and place your child in a private school or facility and seek payment or reimbursement for the costs of the placement, including special education

and related services, a hearing for special education and/or related services must be requested within 80 days of enrollment in the private school or facility. The 180-day enrollment timeline begins on the student's first day of attendance.

Exceptions to the timeline

The above timeline does not apply to you if you could not file a due process complaint because:

1. The Department specifically misrepresented that it had resolved the problem or issue that you are raising in your complaint; **or**
2. The Department withheld information from you that it was required to provide to you under Part B of IDEA.

HEARING RIGHTS

34 CFR §300.512

HAR §8-60-66

General

Any party to a due process hearing (including a hearing relating to disciplinary procedures) has the right to:

1. Be accompanied and advised by an attorney and/or persons with special knowledge or training regarding the problems of students with disabilities;
2. Present evidence and confront, cross-examine, and require the attendance of witnesses;
3. 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;
4. Obtain a written, or, at your option, electronic, word-for-word record of the hearing; **and**
5. Obtain written, or, at your option, electronic findings of fact and decisions.

The party initiating the due process complaint has the burden of proof, or responsibility of proving the allegations of the complaint.

Additional disclosure of information

At least five (5) business days prior to a due process hearing, you and the Department must disclose to each other all evaluations completed by that date and recommendations based on those evaluations that you or the Department intend to use at the hearing.

A hearing officer may prevent any party that fails to comply with this requirement from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

Parental rights at hearings

You must be given the right to:

1. Have your child present at the hearing;
2. Open the hearing to the public; **and**

3. Have the record of the hearing, the findings of fact, and the decisions provided to you at no cost.

HEARING DECISIONS**34 CFR §300.513**

HAR §8-60-67

Decision of the hearing officer

A hearing officer's decision on whether your child received FAPE must be based on evidence and arguments that directly relate to FAPE.

In matters alleging a procedural violation (such as "an incomplete IEP Team"), a hearing officer may find that your child did not receive FAPE only if the procedural violations:

1. Interfered your child's right to FAPE;
2. Significantly interfered with your opportunity to participate in the decision-making process regarding the provision of FAPE to your child; **or**
3. Caused your child to be deprived of an educational benefit.

None of the provisions described above can be interpreted to prevent a hearing officer from ordering the Department to comply with the requirements in the procedural safeguards section of the Federal regulations under Part B of IDEA (34 CFR §§300.500 through 300.536).

Following a student's placement in a private school, or for continued placement in a private school, the private school cannot be determined to be an appropriate placement by the hearing officer if the department has not been allowed to exercise its responsibility to ensure the provision of FAPE for the student.

Separate request for a due process hearing

Nothing in the procedural safeguards section of the Federal regulations under Part B of IDEA (34 CFR §§300.500 through 300.536; HAR §§8-60-55 through 8-60-81) can be interpreted to prevent you from filing a separate due process complaint on an issue separate from a due process complaint already filed.

Findings and decision provided to the advisory panel and general public

The Department, after deleting any personally identifiable information, must:

1. Provide the findings and decisions in the due process hearing to the State special education advisory panel; **and**
2. Make those findings and decisions available to the public.

APPEALS

FINALITY OF DECISION; APPEAL; IMPARTIAL REVIEW**34 CFR §300.514**

HAR §8-60-68

Finality of hearing decision

A decision made in a due process hearing (including a hearing relating to disciplinary procedures) is final, except that any party involved in the hearing (you or the Department) may appeal the decision by bringing a civil action, as described under the heading ***Civil Actions, Including the Time Period in Which to File Those Actions.***

TIMELINES AND CONVENIENCE OF HEARINGS AND REVIEWS**34 CFR §300.515**

HAR §8-60-69

The Department must ensure that not later than 45 calendar days after the expiration of the 30-calendar day period for resolution meetings **or**, as described under the subheading ***Adjustments to the 30-calendar day resolution period***, not later than 45 calendar days after the expiration of the adjusted time period:

1. A final decision is reached in the hearing; **and**
2. A copy of the decision is mailed to each of the parties.

A hearing officer may grant specific extensions of time beyond the 45-calendar day time period described above at the request of either party (you or the Department). Each extension shall be for no more than 45 days. For consideration for an extension, a hearing officer shall consider the following:

1. The negative effects of extending the time in which a student's education is delayed due to the extension;
2. The requesting party's ability to have avoid requesting for an extension;
3. If the extension request is from the petitioner, whether the petitioner had the opportunity to adequately prepare before filing for a hearing;
4. The negative effects of denying the request for an extension;
5. The intent of IDEA 2004 and HAR 8-60 to expedite an informal administrative proceeding; and
6. Whether granting the request for an extension will override the intent of the law in favor of the convenience of the parties.

The hearing officer shall not grant an extension for a hearing, unless provided with a compelling reason or a specific showing of substantial hardship.

The hearing officer shall respond in writing to each request for an extension. Each response shall include findings of fact and conclusions as to why good cause exists. Each response shall become a part of the records. If an extension is granted, the hearing officer shall set a new date for the hearing and notify the parties in writing of the date.

Each hearing must be conducted at a time and place that is reasonably convenient to you and your child.

There is nothing in HAR 8-60 (HAR §§8-60-56 through 8-60-81) that prevents you from filing a separate due process complaint on an issue that is separate from the due process complaint that has already been filed.

CIVIL ACTIONS, INCLUDING THE TIME PERIOD IN WHICH TO FILE THOSE ACTIONS**34 CFR §300.516**

HAR §8-60-70

General

Any party (you or the Department) who does not agree with the findings and decision in the due process hearing (including a hearing relating to disciplinary procedures) has the right to bring a civil action with respect to the matter that was the subject of the due process hearing. The action may be brought in a State court of competent jurisdiction (a State court that has authority to hear this type of case) or in a district court of the United States without regard to the amount in dispute.

Time limitation

The party (you or the Department) bringing the action shall have 30 calendar days from the date of the decision of the hearing officer to file a civil action.

Additional procedures

In any civil action, the court:

1. Receives the records of the administrative proceedings;
2. Hears additional evidence at your request or at the Department's request; **and**
3. Bases its decision on the preponderance of the evidence and grants the relief that the court determines to be appropriate.

Under appropriate circumstances, judicial relief may include reimbursement of private school tuition and compensatory education services.

Jurisdiction of district courts

The district courts of the United States have authority to rule on actions brought under Part B of IDEA without regard to the amount in dispute.

Rule of construction

Nothing in Part B of IDEA restricts or limits the rights, procedures, and remedies available under the U.S. Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973 (Section 504), or other Federal laws protecting the rights of students with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under Part B of IDEA, the due process procedures described above must be exhausted to the same extent as would be required if the party filed the action under Part B of IDEA. This means that you may have remedies available under other laws that overlap with those available under IDEA, but in general, to obtain relief under those other laws, you must

first use the available administrative remedies under IDEA (i.e., the due process complaint; resolution process, including the resolution meeting; and impartial due process hearing procedures) before going directly into court.

THE STUDENT'S PLACEMENT WHILE THE DUE PROCESS COMPLAINT AND HEARING ARE PENDING**34 CFR §300.518**

HAR §8-60-72

Except as provided below under the heading *Procedures When Disciplining Students with Disabilities*, once a due process complaint is sent to the other party, during the resolution process time period, and while waiting for the decision of any impartial due process hearing or court proceeding, unless you and the Department agree otherwise, your child must remain in his/her current educational placement.

If the due process complaint involves an application for initial admission to public school, your child, with your consent, must be placed in the regular public school program until the completion of all such proceedings.

If the due process complaint involves an application for initial services under Part B of IDEA for a student who is transitioning from being served under Part C of IDEA to Part B of IDEA and who is no longer eligible for Part C services because the student has turned three, the Department is not required to provide the Part C services that the student has been receiving. If the student is found eligible under Part B of IDEA and you consent for your child to receive special education and related services for the first time, then, pending the outcome of the proceedings, the Department must provide those special education and related services that are not in dispute (those which you and the Department both agree upon).

If a hearing officer in a due process hearing agrees with you that a change of placement is appropriate, that placement must be treated as your child's current educational placement where your child will remain while waiting for the decision of any impartial due process hearing or court proceeding.

ATTORNEYS' FEES**34 CFR §300.517**

HAR §8-60-71

General

In any action or proceeding brought under Part B of IDEA, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to you, if you prevail (win).

Because the intent of the resolution meeting and mediation is an opportunity for the parent and the Department to resolve the issue and make agreements for resolution, attorney participation in the resolution meeting and mediation meeting are not rights for either party. If you decide to have an attorney present and participating in resolution meetings or mediation meetings, the attorney's fees you are charged may not be reimbursed or covered by the Department.

In any action or proceeding brought under Part B of IDEA, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the prevailing State Educational Agency, the Department, to be paid by your attorney, if the attorney: (a) filed a complaint or court case that the court finds is frivolous, unreasonable, or without foundation; or

(b) continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or in any action or proceeding brought under Part B of IDEA, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the prevailing State Educational Agency, the Department, to be paid by you or your attorney, if your request for a due process hearing or later court case was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to unnecessarily increase the cost of the action or proceeding (hearing).

Award of fees

A court awards reasonable attorneys' fees as follows:

1. Fees must be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded.
2. Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under Part B of IDEA for services performed after a written offer of settlement is made to you 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 a due process hearing or State-level review, at any time more than 10 calendar days before the proceeding begins;
 - b. The offer is not accepted within 10 calendar days; and
 - c. The court or administrative hearing officer finds that the relief finally obtained by you is not more favorable to you than the offer of settlement.

Despite these restrictions, an award of attorneys' fees and related costs may be made to you if you prevail and you were substantially justified in rejecting the settlement offer.

3. Fees may not be awarded relating to any meeting of the IEP Team unless the meeting is held as a result of an administrative proceeding or court action.

Fees also may not be awarded for a mediation as described under the heading **Mediation**.

A resolution meeting, as described under the heading **Resolution Process**, is not considered a meeting convened as a result of an administrative hearing or court action, and also is not considered an administrative hearing or court action for purposes of these attorneys' fees provisions.

The court reduces, as appropriate, the amount of the attorneys' fees awarded under Part B of IDEA, if the court finds that:

1. You, or your attorney, during the course of the action or proceeding, unreasonably delayed the final resolution of the dispute;
2. 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 similar skill, reputation, and experience;
3. The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

4. The attorney representing you did not provide to the Department the appropriate information in the due process request notice as described under the heading ***Due Process Complaint***.

However, the court may not reduce fees if the court finds that the Department unreasonably delayed the final resolution of the action or proceeding or there was a violation under the procedural safeguards provisions of Part B of IDEA.

PROCEDURES WHEN DISCIPLINING STUDENTS WITH DISABILITIES**AUTHORITY OF SCHOOL PERSONNEL****34 CFR §300.530**

HAR §8-60-75

Case-by-case determination

School personnel may consider any unique circumstances on a case-by-case basis when determining whether a change of placement, made in accordance with the following requirements related to discipline, is appropriate for a student with a disability who violates a school code of student conduct.

General

To the extent that they also take such action for students without disabilities, school personnel may, for not more than **10 school days** in a row, remove a student with a disability who violates a code of student conduct from his/her current placement to an appropriate interim alternative educational setting, another setting, or suspension.

Once a student with a disability has been removed from his/her current placement for a total of **10 school days** in the same school year, the Department must, during any subsequent days of removal in that school year, provide services to the extent required under the sub-heading **Services**. Removals of more than 10 cumulative or consecutive school days in that same school year is a change of placement (see the heading **Change of Placement Because of Disciplinary Removals**).

Additional authority

If the behavior that violated the student code of conduct was not a manifestation of the student's disability (see the subheading **Manifestation determination**) and the proposed disciplinary removal would exceed **10 consecutive or cumulative school days** in a school year, school personnel may apply the disciplinary procedures to that student with a disability in the same manner and for the same duration as it would to students without disabilities, except that the school must provide services to that student as described under **Services**. The student's IEP Team determines the interim alternative educational setting for such services.

School personnel may order the crisis removal (see definition on next page) of a student with a disability from the student's current educational placement for up to 10 consecutive school days pursuant to HAR Chapter 19 (HAR §8-19-7). If the crisis removal, together with any previous days of disciplinary suspensions or removals, exceeds 10 school days, the crisis removal would constitute a change of placement only if the removals constitute a pattern because:

1. The student's behavior is substantially similar to the student's behavior in previous incidents that resulted in the series of removals; and
2. Additional factors, such as the length of each removal, the total amount of time the student is removed, and the proximity of the removals one to another.

The crisis removal shall be in accordance with HAR §8-19-7, including the student's right to resume attendance at school as soon as the exclusion pursuant to HAR §8-19-7(a) is no longer necessary.

"Crisis removal" means the immediate exclusion of a student from school in an emergency because the conduct of the student presents a clear, immediate threat to the physical safety of self or others, or the student is so extremely disruptive as to make the immediate removal of the student necessary to preserve the rights of other students to pursue their education free from undue disruption.

Services

The Department may provide services to both a student with a disability and a student without a disability who has been removed from his/her current placement for **10 school days or less** in that school year. The student may be provided with an alternate educational option (such as homework, projects, class assignments) and services may be provided in an interim alternative educational setting.

A student with a disability who is removed from the student's current placement for **more than 10 school days in a school year** and whose behavior is not a manifestation of the student's disability (see subheading **Manifestation determination**) or who is removed under special circumstances (see the subheading **Special circumstances**) must:

1. Continue to receive educational services (have available FAPE) so as to enable the student to continue to participate in the general education curriculum, although in another setting (that may be an interim alternative educational setting), and to progress toward meeting the goals set out in the student's IEP; **and**
2. Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, which are designed to address the behavior violation so that it does not happen again.

After a student with a disability has been removed from his/her current placement for **10 school days** in that same school year, and **if** the current removal is for **10 school days** in a row or less **and** if the removal is not a change of placement (see definition below), **then** school personnel, in consultation with at least one of the student's teachers, determine the extent to which services are needed to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP.

If the removal is a change of placement (see the heading **Change of Placement Because of Disciplinary Removals**), the student's IEP Team determines the appropriate services to enable the student to continue to participate in the general education curriculum, although in another setting (that may be an interim alternative educational setting), and to progress toward meeting the goals set out in the student's IEP.

If the removal exceeds 10 cumulative days in the same school year and is a crisis removal, **then** school personnel, in consultation with at least one of the student's teachers, determine the extent to which services are needed to enable the student to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the student's IEP.

Manifestation determination

Excluding crisis removals, within **10 school days** of any decision to change the placement of a student with a disability because of a violation of a code of student conduct, the Department, you, and other relevant members of the IEP Team (as determined by you and the Department) must review all relevant information in the student's file, including the student's IEP, any teacher observations, and any relevant information provided by you to determine:

1. If the conduct in question was caused by, or had a direct and substantial relationship to, the student's disability; **or**
2. If the conduct in question was the direct result of the Department's failure to implement the student's IEP.

If the Department, you, and other relevant members of the student's IEP Team determine that either of those conditions was met, the conduct must be determined to be a manifestation of the student's disability.

If the Department, you, and other relevant members of the student's IEP Team determine that the conduct in question was the direct result of the Department's failure to implement the IEP, the Department must take immediate action to remedy those deficiencies.

Determination that behavior was a manifestation of the student's disability

If the Department, you, and other relevant members of the IEP Team determine that the conduct was a manifestation of the student's disability, the IEP Team must either:

1. Conduct a functional behavioral assessment, unless the Department had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the student; **or**
2. If a behavioral intervention plan has already been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior.

Except as described below under the subheading **Special circumstances**, the Department must return your child to the placement from which your child was removed, unless you and the Department agree to a change of placement as part of the modification of the behavioral intervention plan.

Special circumstances

Whether or not the behavior was a manifestation of your child's disability, school personnel may remove a student to an interim alternative educational setting (determined by the student's IEP Team) for not more than 45 school days, if your child:

1. Carries a weapon (see definition in next section) to school or has a weapon at school, on school premises, or at a school function under the jurisdiction of the Department;
2. Knowingly has or uses illegal drugs (see definition in next section), or sells or solicits the sale of a controlled substance (see the definition in next section), while at school, on school premises, or at a school function under the jurisdiction of the Department; **or**
3. Has inflicted serious bodily injury (see definition in next section) upon another person while at school, on school premises, or at a school function under the jurisdiction of the Department.

Definitions

Controlled substance means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)). “Controlled substance” also includes a drug or substance as defined in I through V in Chapter 329, Hawaii Revised Statutes, Uniform Controlled Substances Act.

Illegal drug means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed healthcare professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law. HAR 8-19 defines “Illicit drugs” as substances, the possession, distribution, ingestion, manufacture, use, sale or delivery, of which are prohibited under Chapter 329, Hawaii Revised Statutes and Chapter 712, part IV, Hawaii Revised Statutes.

Serious bodily injury has the meaning given the term “serious bodily injury” under paragraph (3) of subsection (h) of section 1365 of title 18, United States Code.

Weapon has the meaning given the term “dangerous weapon” under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code. HAR 8-19 defines “dangerous weapon” as an instrument whose sole design and purpose is to inflict bodily injury or death. Examples of such instruments include but are not limited to a dirk, dagger, butterfly knife, switchblade knife, blackjack, slug shot, bill, metal knuckles, or other weapons that inflict bodily injury or death.

Notification

On the date the Department makes the decision to make a removal that is a change of placement of your child because of a violation of a code of student conduct, the Department must notify you of that decision, and provide you with a procedural safeguards notice.

CHANGE OF PLACEMENT BECAUSE OF DISCIPLINARY REMOVALS

34 CFR §300.536

HAR §8-60-81

A removal of your child with a disability from your child’s current educational placement is a **change of placement** if:

1. The removal is for more than 10 school days in a row; **or**
2. The series of removals total more than 10 school days in a school year.

DETERMINATION OF SETTING

34 CFR § 300.531

HAR §8-60-76

The IEP Team determines the interim alternative educational setting for removals that are **changes of placement**, and removals under the subheadings **Additional authority** and **Special circumstances**.

APPEAL**34 CFR § 300.532**

HAR §8-60-77

General

You may file a due process complaint (see the heading ***Due Process Complaint Procedures***) to request a due process hearing if you disagree with:

1. Any decision regarding placement made under these discipline provisions; **or**
2. The manifestation determination described under subheading ***Manifestation determination***.

The Department may file a due process complaint (see heading ***Due Process Complaint Procedures***) to request a due process hearing if it believes that maintaining the current placement of your child is substantially likely to result in injury to your child or to others.

Authority of hearing officer

A hearing officer that meets the requirements described under the subheading ***Impartial hearing officer*** must conduct the due process hearing and make a decision. The hearing officer may:

1. Return your child with a disability to the placement from which your child was removed if the hearing officer determines that the removal was a violation of the requirements described under the heading ***Authority of School Personnel***, or that your child's behavior was a manifestation of your child's disability; **or**
2. Order a change of placement of your child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of your child is substantially likely to result in injury to your child or to others.

These hearing procedures may be repeated, if the Department believes that returning your child to the original placement is substantially likely to result in injury to your child or to others.

Whenever you or the Department files a due process complaint to request such a hearing, a hearing must be held that meets the requirements described under the headings ***Due Process Complaint Procedures and Hearings on Due Process Complaints***, except as follows:

1. The Department must arrange for an expedited due process hearing, which must occur within **20** school days of the date the hearing request is filed and must result in a determination within **10** school days after the hearing.
2. Unless you and the Department agree in writing to waive the meeting, or agree to use mediation, a resolution meeting must occur within seven (**7**) calendar days of receiving notice of the due process complaint. The hearing may proceed unless the matter has been resolved to the satisfaction of both parties within **15** calendar days of receipt of the due process complaint.
3. The timeline for disclosure of evidence and evaluations may be less than five (**5**) business days and must be set by the hearing officer at the pre-hearing conference.

You or the Department may appeal the decision in an expedited due process hearing in the same way as for decisions in other due process hearings (see the heading ***Appeal***).

PLACEMENT DURING APPEALS**34 CFR §300.533**

HAR §8-60-78

When you or the Department file a due process complaint related to disciplinary matters, your child must (unless you and the Department agree otherwise) remain in the interim alternative educational setting pending the decision of the hearing officer, or until the expiration of the time period of removal as provided for and described under the heading ***Authority of School Personnel***, whichever occurs first.

PROTECTIONS FOR STUDENTS NOT YET ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES**34 CFR §300.534**

HAR §8-60-79

General

If your child has not been determined eligible for special education and related services and violates a code of student conduct, but the Department had knowledge (as determined below) before the behavior that brought about the disciplinary action occurred, that your child was a student with a disability, then your child may assert any of the protections described in this notice.

Basis of knowledge for disciplinary matters

The Department will be deemed to have knowledge that your child is a student with a disability if, before the behavior that brought about the disciplinary action occurred:

1. You expressed concern in writing to supervisory or administrative personnel of your child's school, or to your child's teacher, that your child is in need of special education and related services;
2. You requested an evaluation related to eligibility for special education and related services under Part B of IDEA; **or**
3. Your child's teacher or other Department personnel expressed specific concerns about a pattern of behavior demonstrated by your child directly to the supervisory or administrative personnel of your child's school or to other supervisory personnel of the Department.

Exception

The Department would not be deemed to have such knowledge if:

1. You have not allowed an evaluation of your child or have refused special education services; **or**
2. Your child has been evaluated and determined to not be a student with a disability under Part B of IDEA.

Conditions that apply if there is no basis of knowledge

If prior to taking disciplinary measures against your child, the Department does not have knowledge that your child is a student with a disability, as described above under the

subheadings ***Basis of knowledge for disciplinary matters*** and ***Exception***, your child may be subjected to the disciplinary measures that are applied to students without disabilities who engage in comparable behaviors.

However, if a request is made for an evaluation of your child during the time period in which your child is subjected to disciplinary measures, the evaluation must be conducted in an expedited manner.

Until the evaluation is completed, your child remains in the educational placement determined by school authorities, which can include suspension or expulsion without educational services.

If your child is determined to be a student with a disability, taking into consideration information from the evaluation conducted by the Department, and information provided by you, the Department must provide special education and related services in accordance with Part B of IDEA, including the disciplinary requirements described above.

REFERRAL TO AND ACTION BY LAW ENFORCEMENT AND JUDICIAL AUTHORITIES**34 CFR §300.535**

HAR §8-60-80

Part B of IDEA does not:

1. Prohibit an agency from reporting a crime committed by a student with a disability to appropriate authorities; **or**
2. Prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a student with a disability.

Transmittal of records

If the Department reports a crime committed by a student with a disability, the Department:

1. Must ensure that copies of the student's special education and disciplinary records are transmitted for consideration by the authorities to whom the agency reports the crime; **and**
2. May transmit copies of the student's special education and disciplinary records only to the extent permitted by FERPA.

REQUIREMENTS FOR UNILATERAL PLACEMENT BY PARENTS OF STUDENTS IN PRIVATE SCHOOLS AT PUBLIC EXPENSE**GENERAL****34 CFR §300.148**

HAR §8-60-27

Part B of IDEA does not require the Department to pay for the cost of education, including special education and related services, of your child with a disability at a private school or facility if the Department made FAPE available to your child and you choose to place the student in a private school or facility. However, the Department must include your child in the population whose needs are addressed under the Part B provisions regarding students who have been placed by their parents in a private school under 34 CFR §§300.131 through 300.144 and HAR §§8-60-21 through 8-60-27.

Reimbursement for private school placement

If your child previously received special education and related services under the authority of the Department, and you choose to enroll your child in a private preschool, elementary school, or secondary school without the consent of or referral by the Department, a court or a hearing officer may require the Department to reimburse you for the cost of that enrollment if the court or hearing officer finds that the Department had not made FAPE available to your child in a timely manner prior to that enrollment and that the private placement is appropriate. A hearing officer or court may find your placement to be appropriate, even if the placement does not meet the State standards that apply to education provided by the Department.

For a student continuing in private school placement, the determination of an appropriate placement by the hearing officer shall not be made unless the private school allows the Department to exercise its responsibility to ensure the provision of FAPE for the student.

A hearing must be requested for reimbursement of the costs of the private placement, including special education and related services, within 180 days of enrollment in the private school or facility. (See further discussion under the subheading ***Statute of Limitations in Claiming Reimbursements for Unilateral Placements in Private Schools.***)

Limitation on reimbursement

The cost of reimbursement described in the paragraph above may be reduced or denied:

1. If: (a) At the most recent IEP meeting that you attended prior to your removal of your child from the public school, you did not inform the IEP Team that you were rejecting the placement proposed by the Department to provide FAPE to your child, including stating your concerns and your intent to enroll your child in a private school at public expense; or (b) At least 10 business days (including any holidays that occur on a business day) prior to your removal of your child from the public school, you did not give written notice to the Department of that information;
2. If, prior to your removal of your child from the public school, the Department provided prior written notice to you of its intent to evaluate your child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but you did not make the student available for the evaluation; or

3. Upon a court's finding that your actions were unreasonable.

However, the cost of reimbursement:

1. Must not be reduced or denied for failure to provide the notice if: (a) The school prevented you from providing the notice; (b) You had not received notice of your responsibility to provide the notice described above; or (c) Compliance with the requirements above would likely result in physical harm to your child; **and**
2. May, in the discretion of the court or a hearing officer, not be reduced or denied for your failure to provide the required notice if: (a) You are not literate or cannot write in English; or (b) Compliance with the above requirement would likely result in serious emotional harm to your child.

TRANSFER OF RIGHTS**TRANSFER OF PARENTAL RIGHTS AT AGE OF MAJORITY**

34 CFR §300.520

HAR §8-60-74

When a student with a disability reaches the age of 18, all rights accorded to the parents under Part B of the IDEA and HAR 8-60 transfer to the student, unless the student has been determined to be incompetent/lacking decisional capacity under State law. When rights transfer to the adult student, the Department will continue to provide any notice required by the IDEA and HAR 8-60 to both the student and the parents.

Hawaii Revised Statutes §§302A-491 through 302A-498 provides the adult student with three (3) educational decision-making options:

- Appointment of an agent through a (limited) power of attorney for special education to make educational decisions on his/her behalf;
- Appointment of an educational representative for an adult student who lacks decisional-making capacity to make educational decisions for him/herself; or
- Appointment of a guardian, established through court, for an adult student who lacks decisional-making capacity to make educational decisions for him/herself.

OTHER SUPPORT SERVICES

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| <p>Community Children's Council Office 4680 Kalaniana'ole Hwy., TB1A Honolulu, HI 96821</p> <p>Telephone: (808) 305-0695 Website: http://www.hawaiipublicschools.org/ParentsAndStudents/SupportForParents/Pages/CCC.aspx</p> | <p>Leadership in Disabilities & Achievement of Hawaii 245 N. Kukui Street , Suite 205 Honolulu, HI 96817</p> <p>Telephone: (808) 536-9684 Website: www.ldahawaii.org E-mail: info@ldahawaii.org</p> |
| <p>Hawaii Disability Rights Center 1132 Bishop Street, Suite 2102 Honolulu, HI 96813</p> <p>Telephone: (808) 949-2922 Toll Free: (800) 882-1057 Website: www.hawaiidisabilityrights.org E-mail: info@hawaiidisabilityrights.org</p> | <p>Legal Aid Society of Hawaii 924 Bethel Street Honolulu, HI 96813</p> <p>Telephone: Oahu (808) 536-4302 Toll Free: (800) 499-4302 Website: www.legalaidhawaii.org</p> |
| <p>Hawaii Families as Allies P.O. Box 1971 Aiea, HI 96701</p> <p>Telephone: (808) 682-1511 Website: www.hifamilies.org E-mail: hfaa@hfaa.net</p> | <p>Mediation Center of the Pacific 1301 Young Street 2nd floor Honolulu, HI 96814</p> <p>Telephone: (808) 521-6767 Website: https://www.mediatehawaii.org E-mail: mcp@mediatehawaii.org</p> |
| <p>Hawaii State Bar Association Alakea Corporate Tower 1100 Alakea Street, Suite 1000 Honolulu, HI 96813</p> <p>Telephone: (808) 537-1868 Website: https://hsba.org E-mail: webinfo@hsba.org</p> | <p>Special Parent Information Network 1010 Richards Street, Room 118 Honolulu, HI 96813</p> <p>Telephone: (808) 586-8126 Website: www.spinhawaii.org E-mail: spin@doh.hawaii.gov</p> |

For assistance in understanding the provisions described in this brochure, or for copies of this brochure, please call the following Department of Education offices:

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| <p>OAHU:</p> <ul style="list-style-type: none"> • Central (808) 622-6432 • Honolulu (808) 733-4977 • Leeward (808) 675-0384, -0335 • Windward (808) 784-5940 <p>KAUAI: (808) 274-3504 STATE OFFICE: (808) 307-3600</p> | <p>HAWAII:</p> <ul style="list-style-type: none"> • East (808) 974-4401 • West (808) 323-0015 • North (808) 775-8895 • South (808) 982-4252 <p>MAUI: (808) 873-3520 MOLOKAI / LANAI: (808) 553-1723</p> |
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Hawaii Administrative Rules, Title 8, Department of Education, Chapter 60 (Provision of a Free Appropriate Public Education for a Student with a Disability) and Chapter 34, Protection of Educational Rights and Privacy of Students and Parents are available on the Board of Education website: <http://boe.hawaii.gov>