New Mexico Public Education Department

Special Education Bureau

POLICIES AND PROCEDURES FOR THE PROVISION OF SPECIAL EDUCATION SERVICES FOR STUDENTS WITH DISABILITIES AND GIFTED STUDENTS

Chapter 2. - PROCEDURAL SAFEGUARDS

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Chapter 2. - PROCEDURAL SAFEGUARDS

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Chapter 2 - PROCEDURAL SAFEGUARDS

I. PROCEDURAL SAFEGUARDS NOTICE

Authority: 34 CFR §300.504 Procedural safeguards notice.

(a) General. A copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents only 1 time a school year, except that a copy also must be given to the parents--

(1) Upon initial referral or parent request for evaluation;

(2) Upon receipt of the first State complaint under §§300.151 through 300.153 or a due process complaint under §300.507 in a school year; and

(3) In accordance with the discipline procedures in §300.530(h); and

(4) Upon request by a parent.

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

D. Notice requirements

(3) Notice of procedural safeguards. A copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents, only one time a school year, except that a copy must be given to the parents,

(a) upon initial referral for evaluation;

(b) upon receipt of the first state complaint under 34 CFR §§300.151-300.153;

(c) upon receipt of the first due process complaint under 34 CFR Sec. 300.507 of the school year;

(d) in accordance with the discipline procedures in 34 CFR §§300.530(h); and

(e) upon request of the parents. The notice must meet all requirements of 34 CFR §300.504, including the requirement to inform the parents of their obligation under 34 CFR §300.148 to notify the public agency if they intend to enroll the child in a private school or facility and seek reimbursement from the public agency. The public agency may place a current copy of the procedural safeguards notice on its internet website if a website exists.

The public agency will provide the procedural safeguards to each parent of a child with a disability 1 time per year at the annual IEP Team meeting. A copy will also be given as described above.

(b) Internet Website. The public agency may place a current copy of the procedural safeguards notice on its Internet Web site if a Web site exists.

(c) Contents. The procedural safeguards notice must include a full explanation of all of the procedural safeguards available under 34 CFR §300.148, §§300.151 through 300.153, §300.300, §§300.502 through 300.503, §§300.505 through 300.518, §300.520, §§300.530 through 300.536, and §§300.610 through 300.625 relating to-

(1) Independent educational evaluations;

(2) Prior written notice;

(3) Parental consent;

(4) Access to education records;

(5) Opportunity to present and resolve complaints through the due process complaint or State complaint procedures, including--

(i) The time period in which to file a complaint;

(ii) The opportunity for the agency to resolve the complaint; and

(iii) The difference between the due process complaint and the State complaint procedures, including the jurisdiction of each procedure, what issues may be raised, filing and decisional timelines, and relevant procedures;

(6) The availability of mediation;

(7) The child's placement during the pendency of any due process complaint;

(8) Procedures for students who are subject to placement in an interim alternative educational setting;

(9) Requirements for unilateral placement by parents of children in private schools at public expense;

(10) Hearings on due process complaints, including requirements for disclosure of evaluation results and recommendations;

(11) State-level appeals (if applicable in that State);
(12) Civil actions, including the time period in which to file those actions; and
(13) Attorneys' fees.

(d) Notice in understandable language. The notice required under paragraph (a) of this section must meet the requirements of §300.503(c). *(found in Section II below)*

Authority: 34 CFR §300.29 Native language.
(a) Native language, when used with respect to an individual who is limited English proficient, means the following:
(1) The language normally used by that individual, or, in the case of a child, the language normally used by the parents of the child, except as provided in paragraph (a)(2) of this section.
(2) In all direct contact with a child (including evaluation of the child), the language normally used by the child in the home or learning environment.
(b) For an individual with deafness or blindness, or for an individual with no written language, the mode of communication is that normally used by the individual (such as sign language, Braille, or oral communication).
The native language information may be found in the student's cumulative folder which includes the public agency enrollment information. Upon enrollment, parents complete the home language portion which states the language most frequently spoken by the parents in the student's home.

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies
D. Notice requirements
(3) Notice of procedural safeguards. A copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents, only one time a school year, except that a copy must be given to the parents,
(a) upon initial referral for evaluation;
(b) upon receipt of the first state complaint under 34 CFR §§300.151-300.153;
(c) upon receipt of the first due process complaint under 34 CFR Sec. §300.507 of the school year;
(d) in accordance with the discipline procedures in 34 CFR §300.530(h); and
(e) upon request of the parents. The notice must meet all requirements of 34 CFR §300.504, including the requirement to inform the parents of their obligation under 34 CFR Sec. 300.148 to notify the public agency if they intend to enroll the child in a private school or facility and seek reimbursement from the public agency. The public agency may place a current copy of the procedural safeguards notice on its internet website if a website exists.

E. Communications in understandable language.
Pursuant to 34 CFR §§300.9(a), 300.322(e), 300.503(c) and 300.504(d), the public agency must communicate with parents in understandable language, including the parent's native language or other mode of communication, unless it is clearly not feasible to do so, if necessary for understanding, in IEP meetings, in written notices and in obtaining consent where consent is required.

II. PRIOR WRITTEN NOTICE

Authority: 34 CFR §300.503 Prior notice by the *cm; content of notice.

(a) Notice. Written notice that meets the requirements of paragraph (b) of this section must be given to the parents of a child with a disability a reasonable time before the public agency--
(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child; or
(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child.
(Written notice within a "Reasonable Time" is defined on the next page.)

(b) Content of notice. The notice required under paragraph (a) of this section must include--

(1) A description of the action proposed or refused by the agency;

(2) An explanation of why the agency proposes or refuses to take the action;

(3) A description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(4) A statement that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(5) Sources for parents to contact to obtain assistance in understanding the provisions of this part;

(6) A description of other options that the IEP Team considered and the reasons why those options were rejected; and

(7) A description of other factors that is relevant to the agency's proposal or refusal.

The regulation §300.503 is required for all Notices including:

- *Notice of Evaluation and*
- *Notice of Proposal or Notice of Refusal.*

Prior Written Notice forms will contain the required information listed above. All required areas will be addressed by staff when completing the appropriate Prior Written Notice form.

The Invitation to the IEP meeting requirements are described in IV. Parent Participation.

(c) Notice in understandable language.

(1) The notice required under paragraph (a) of this section must be--

(i) Written in language understandable to the general public; and

(ii) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(2) If the native language or other mode of communication of the parent is not a written language, the public agency must take steps to ensure--

(i) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(ii) That the parent understands the content of the notice; and

(iii) That there is written evidence that the requirements in paragraphs (c)(2)(i) and (ii) of this section have been met.

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

E. Communications in understandable language. Pursuant to 34 CFR §§300.9(a), 300.322(e), 300.503(c) and 300.504(d), the public agency must communicate with parents in understandable language, including the parent's native language or other mode of communication, unless it is clearly not feasible to do so, if necessary for understanding, in IEP meetings, in written notices and in obtaining consent where consent is required.

The native language information may be found in the student's cumulative folder which includes the public agency enrollment information. Upon enrollment, parents complete the home language portion which states the language most frequently spoken by the parents in the student's home.

Authority: 34 CFR §300.505 Electronic mail.

A parent of a child with a disability may elect to receive notices required by §§300.503 *(Prior Written Notice)***, 300.504** *(Proc. Safeguards/Notice)***, and 300.508** *(Due Process complaints)* **by electronic mail communication, if the public agency makes that option available.**

Authority: NMAC 6.31.2.10 IDENTIFICATION, EVALUATION AND ELIGIBILITY DETERMINATIONS

D. Evaluations and reevaluations

(2) (d) Procedures for conducting evaluations and reevaluations:

(i) the public agency must provide notice to the parents of a child with a disability that describes any evaluation procedures the agency proposes to conduct in compliance with 34 CFR §300.503.

Timeline for Notice (Reasonable Time)

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

D. Notice requirements.

(1) Notice of meetings. The public agency shall provide the parents of a child with a disability with advance written notice that complies with 34 CFR §300.322 for IEP meetings and any other meetings in which the parent has a right to participate pursuant to 34 CFR §300.501.

(2) Notice of agency actions proposed or refused. The *cm must give written notice that meets the requirements of 34 CFR §300.503 to the parents of a child with a disability a reasonable time before the public agency proposes or refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of FAPE to the child. If the notice relates to a proposed action that also requires parental consent under 34 CFR §300.300, the agency may give notice at the same time it requests parental consent.

"Reasonable time" required for the written notice to parents under 34 CFR §300.503(a) is defined as at least five school days, unless the parents agree otherwise.

(3) Notice of procedural safeguards. A copy of the procedural safeguards available to the parents of a child with a disability must be given to the parents, only one time a school year, except that a copy must be given to the parents,

(a) upon initial referral for evaluation;
(b) upon receipt of the first state complaint under 34 CFR §§300.151-300.153;
(c) upon receipt of the first due process complaint under 34 CFR §§300.507 of the school year;
(d) in accordance with the discipline procedures in 34 CFR §300.530(h); and
(e) upon request of the parents. The notice must meet all requirements of 34 CFR §300.504, including the requirement to inform the parents of their obligation under 34 CFR §300.148 to notify the public agency if they intend to enroll the child in a private school or facility and seek reimbursement from the public agency. The public agency may place a current copy of the procedural safeguards notice on its internet website if a website exists.

III. CONSENT

Authority: 34 CFR §300.9 Consent. Consent means that--

(a) The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and

(c) (1) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at anytime.

(2) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

The native language information may be found in the student's cumulative folder which includes the public agency enrollment information. Upon enrollment, parents complete the home language portion which states the language most frequently spoken by the parents in the student's home.

Authority: 34 CFR §300.300 Parental consent.

(a) Parental consent for initial evaluation.

(1) (i) If the public agency is proposing to conduct an initial evaluation to determine if a child qualifies as a child with a disability under §300.8 must after providing notice consistent with §§300.503 and 300.504, obtain informed consent from the parent of the child before conducting the evaluation.

(ii) Parental consent for initial evaluation must not be construed as consent for initial provision of special education and related services.

(iii) The public agency must make reasonable efforts to obtain the informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability.

(2) For initial evaluations only, if the child is a ward of the State and is not residing with the child's parent, the public agency is not required to obtain informed consent from the parent for an initial evaluation to determine whether the child is a child with a disability if--

(i) Despite reasonable efforts to do so, the public agency cannot discover the whereabouts of the parent of the child;

(ii) The rights of the parents of the child have been terminated in accordance with New Mexico law; or

(iii) The rights of the parent to make educational decisions have been subrogated by a judge in accordance with New Mexico law and consent for an initial evaluation has been given by an individual appointed by the judge to represent the child.

(3) (i) If the parent of a child enrolled in public school or seeking to be enrolled in public school does not provide consent for initial evaluation under paragraph (a)(1) of this section, or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the procedural safeguards in subpart E of this part (including the mediation procedures under §300.506 or the due process procedures under §§300.507 through 300.516), if appropriate, except to the extent inconsistent with State law relating to such parental consent.

(ii) The public agency does not violate its obligation under §§300.111 and 300.301 through §§300.311 if it declines to pursue the evaluation.

Reasonable Efforts Initial Evaluation: Minimum 3 Attempts Providing the Notice of Evaluation to Obtain Consent for Evaluation and the Consent for Evaluation forms.

In accordance with State and Federal requirements, the public agency will notify parents and make reasonable efforts to obtain Consent. After the first written Notice of Evaluation and Consent for Evaluation is provided, if the parent does not respond, the public agency will document and send a second written Notice of Evaluation and Consent for Evaluation. Again, if the parent still does not respond, a third Notice of Evaluation and Consent for Evaluation will be sent in an attempt to get parental informed Consent. After three attempts the public agency may, but is not required to pursue due process described above. Contact the Special Education Administrator to discuss options and documentation. The first attempt MUST be in written form, the second should also be in writing and the third may be a documented follow-up phone call. Detailed records of phone calls made or attempted and the results must be documented on the written Invitation form, including copies of correspondence sent and any visits to the home or place of employment and results. All dates and personnel initials must be documented in writing.

(b) Parental consent for services.

(1) A public agency (public agency) that is responsible for making FAPE available to a child with a disability must seek to obtain informed consent from the parent of the child before the initial provision of special education and related services to the child.

(2) The public agency must make reasonable efforts to obtain informed consent form the parent for the initial provision of special education and related services to the child.

(3) If the parent of a child fails to respond or refuses to consent to services under paragraph (b)(1) of this section, the public agency may not use the procedures in Subpart E of this part (including the mediation procedures under §300.506 or the due process procedures under §§300.507 through 300.516) in order to obtain agreement or a ruling that the services may be provided to the child.

(4) If the parent of the child refuses to consent to the initial provision of special education and related services, or the parent fails to respond to a request to provide consent for the initial provision of special education and related services, the public agency--

(i) Will not be considered to be in violation of the requirement to make available FAPE to the child for the failure to provide the child with the special education and related services for which the public agency requests consent; and

(ii) Is not required to convene an IEP Team meeting or develop an IEP for the child under §300.300 for the special education and related services for which the public agency requests such consent.

If the public agency campus staff is aware that the parent does not intend on giving consent for services, contact the Special Education Department administrator to assure appropriate documentation of FAPE is planned and offered in the IEP meeting. If campus staff is aware and the parent refuses in the IEP

meeting, contact the Special Education Department administrator after the IEP meeting to assure all efforts are exhausted.

Reasonable Efforts – Consent for Initial Services: Minimum 3 Attempts Providing the Notice of Proposal to Provide Services and the Consent for Services forms.

In accordance with State and Federal requirements, the public agency will notify parents and make reasonable efforts to obtain Consent. After the first written Notice of Proposal to Provide Services and Consent for Services is provided, if the parent does not respond, the public agency will document and send a second written Notice of Proposal to Provide Services and Consent for Services. Again, if the parent still does not respond, a third Notice of Proposal to Provide Services and Consent for Services will be sent in an attempt to get parental informed Consent. After three attempts the public agency may NOT use due process procedures to obtain Consent for Services. Contact the Special Education Administrator to discuss options and documentation of FAPE. The first attempt MUST be in written form, the second should also be in writing and the third may be a documented follow-up phone call. Detailed records of phone calls made or attempted and the results must be documented on the written Invitation form, including copies of correspondence sent and any visits to the home or place of employment and results. All dates and personnel initials must be documented in writing.

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

F. Parental consent.

(1) Informed parental consent as defined in 34 CFR §300.9 must be obtained in compliance with 34 CFR §300.300 before

(a) conducting an initial evaluation or reevaluation; and

(b) initial provision of special education and related services to a child with a disability. Consent for initial evaluation must not be construed as consent for initial provision of special education and related services. If parental consent is not provided for the initial evaluation or the parent fails to respond to a request to provide consent, the public agency may, but is not required to, pursue the initial evaluation of the child by utilizing the due process and mediation procedures in Subsection I of 6.31.2.13 NMAC.

(2) Pursuant to 34 CFR §300.300(d)(1), parental consent is not required before (a) reviewing existing data as part of an evaluation or a reevaluation; or (b) administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.

(3) Pursuant to 34 CFR §300.300(b), if the parents of a child with a disability refuse consent for the initial provision of special education and related services, the public agency may not use the due process and mediation procedures in Subsection I of 6.31.2.13 NMAC in order to obtain agreement or a ruling that the services may be provided to the child. If the parent refuses consent or fails to respond to a request to provide consent for the initial provision of special education and related services, the public agency will not be considered to be in violation of the requirement to make FAPE available to the child and is not required to convene an IEP team meeting or develop an IEP under 34 CFR §§300.320 and 300.324. All provisions of 34 CFR §300.300 must be followed with respect to parental consent.

(4) Pursuant to 34 CFR §300.300(c)(2), informed parental consent need not be obtained for reevaluation if the public agency can demonstrate that it has taken reasonable measures to obtain that consent by using procedures consistent with those in 34 CFR §300.322(d) and the child's parent has failed to respond.

(5) Pursuant to 34 CFR §300.300(d)(3), the public agency may not use a parent's refusal to consent to one service or activity for which consent is required to deny the parent or child any other service, benefit or activity of the public agency, except as required by 34 CFR Part 300.

(c) Parental consent for reevaluations. and NMAC 6.31.2.13 F. (4)

(1) Subject to paragraph (c)(2) of this section, the public agency

(i) Must obtain informed parental consent, in accordance with §300.300(a)(1), prior to conducting any reevaluation of a child with a disability.

(ii) If the parent refuses to consent to the reevaluation the public agency may, but is not required to , pursue the reevaluation by using the consent override procedures described in paragraph (a)(3) of this section.

(iii) The public agency does not violate its obligation under §300.111 and §§300.301 through 300.311 if it declines to pursue the evaluation or reevaluation.

(2) The informed parental consent described in paragraph (c)(1) of this section need not be obtained if the public agency can demonstrate that--

(i) It made reasonable efforts to obtain such consent; and

(ii) The child's parent has failed to respond.

Reasonable Efforts: Minimum 3 Attempts Providing the Notice of Evaluation to Obtain Consent for Reevaluation and the Consent for Evaluation forms.

In accordance with State and Federal requirements, the public agency will notify parents and make reasonable efforts to obtain Consent. After the first written Notice of Reevaluation and Consent for Evaluation is provided, if the parent does not respond, the public agency will document and send a second written Notice of Reevaluation and Consent for Evaluation. Again, if the parent still does not respond, a third Notice of Reevaluation and Consent for Evaluation will be sent in an attempt to get parental informed Consent. After three attempts and no response, the public agency may go forward with the reevaluation. The first attempt MUST be in written form, the second should also be in writing and the third may be a documented follow-up phone call. Detailed records of phone calls made or attempted and the results must be documented on the written Invitation form; copies of correspondence sent and any visits to the home or place of employment and results. All dates and personnel initials must be documented in writing.

(d) Other consent requirements. and NMAC 6.31.2.13 F. (2) (5)

(1) Parental consent is not required before -

(i) Reviewing existing data as part of an evaluation or a reevaluation; or

(ii) Administering a test or other evaluation that is administered to all children unless, before administration of that test or evaluation, consent is required of parents of all children.

(2) In addition to the parental consent requirements described in paragraph (a) of this section, a State may require parental consent for other services and activities under this part if it ensures that each public agency in the State establishes and implements effective procedures to ensure that a parent's refusal to consent does not result in a failure to provide the child with FAPE.

(3) The public agency may not use a parent's refusal to consent to one service or activity under paragraphs (a) and (d)(2) of this section to deny the parent or child any other service, benefit, or activity of the public agency, except as required by this part.

(4) (i) If a parent of a child who is home schooled or placed in a private school by the parents at their own expense does not provide consent for the initial evaluation or the reevaluation, or the parent fails to respond to a request to provide consent, the public agency may not use the consent override procedures (described in paragraphs (a)(3) and (c)(1) of the section); and

(ii) The public agency is not required to consider the child as eligible for services under §§300.132 through 300.144.

(5) To meet the reasonable efforts requirement in paragraphs (a)(1)(iii), (a)(2)(i), (b)(2), and (c)(2)(i) of this section, the public agency must document its attempts to obtain parental consent using the procedures in §300.322(d) – (*Parent Participation section*).

Release of Records

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

L. (3) Transfer of student records

(a) Pursuant to 34 CFR Sec. 99.31(a)(2), an educational agency may transfer child records without parental consent when requested by another educational agency in which a child seeks or intends to enroll as long as the sending agency has included the proper notification that it will do so in its required annual FERPA notice to children and parents. In view of the importance of uninterrupted educational services to children with disabilities, each New Mexico public agency is hereby directed to include such language in its **annual FERPA notice** and to ensure that it promptly honors each proper request for records from an educational agency that has become responsible for serving a child with a disability.

(b) State-supported educational programs and the educational programs of juvenile or adult detention or correctional facilities are educational agencies for purposes of the Family Educational Rights and Privacy Act (FERPA) and are entitled to request and receive educational records on children with disabilities on the same basis as local school districts. Public agencies shall promptly honor requests

for records to assist such programs in providing appropriate services to children within their educational jurisdiction.

(c) Pursuant to 34 CFR §99.34(b), an educational agency that is authorized to transfer student records to another educational agency without parental consent under §99.31(a)(2) may properly transfer to the receiving agency all educational records the sending agency maintains on a child, including medical, psychological and other types of diagnostic and service information which the agency obtained from outside sources and used in making or implementing educational programming decisions for the child.

(d) Pursuant to Paragraph (3) of Subsection E of 6.29.1.9 NMAC, 34 CFR §300.229 and the federal No Child Left Behind Act at 20 USC 7165, any transfer of educational records to a private or public elementary or secondary school in which a child with disabilities seeks, intends, or is instructed to enroll must include the following:

(i) transcripts and copies of all pertinent records as normally transferred for all students;

(ii) the child's current individualized education program with all supporting documentation, including the most recent multidisciplinary evaluations and any related medical, psychological or other diagnostic or service information that was consulted in developing the IEP; and

(iii) disciplinary records with respect to current or previous suspensions or expulsions of the child.

(4) Parental refusals of consent for release of information. If parental consent is required for a particular release of information regarding a child with a disability and the parent refuses consent, the sending or receiving public agency may use the impartial due process hearing procedures specified in Subsection I of 6.31.2.13 NMAC to determine if the information may be released without parental consent. If the hearing officer determines that the proposed release of information is reasonably necessary to enable one or more public agencies to fulfill their educational responsibilities toward the child, the information may be released without the parent's consent. The hearing officer's decision in such a case shall be final and not subject to further administrative review.

34 CFR §99.31 FERPA – Family Educational Rights and Privacy Act

Generally, schools must have written permission from the parent or eligible student in order to release any information from a student's education record. However, FERPA allows schools to disclose those records, without parental consent, to the following parties or under the following conditions:

34 CFR § 99.31 FERPA:

- **School officials with legitimate educational interest;**
- **Other schools to which a student is transferring;**
- **Specified officials for audit or evaluation purposes;**
- **Appropriate parties in connection with financial aid to a student;**
- **Organizations conducting certain studies for or on behalf of the school;**
- **Accrediting organizations;**
- **To comply with a judicial order or lawfully issued subpoena;**
- **Appropriate officials in cases of health and safety emergencies; and**
- **State and local authorities, within a juvenile justice system, pursuant to specific State law.**

Parental Consent to Release records will be obtained in all other instances not described above.
See also section V. Confidentiality and Consent for Disclosure of Records §300.622 on page 18.

Authority: 34 CFR §300.154. Methods of ensuring services.

(d) Children with disabilities who are covered by public benefits or insurance.

(1) The public agency may use the Medicaid or other public benefits or insurance programs in which a child participates to provide or pay for services required under this part, as permitted under the public benefits or insurance program, except as provided in paragraph (d)(2) of this section.

(2) With regard to services required to provide FAPE to an eligible child under this part, the public agency--

(i), *(ii), and (iii) are found in Chapter 8 - General Administration*

(iv) (A) Must obtain parental consent consistent with §300.9 each time that access to public benefits or insurance is sought; and

(B) Notify parents that the parents' refusal to allow access to their public benefits or insurance does not relieve the public agency of its responsibility to ensure that all required services are provided at no cost to the parents.

Medicaid Services

The public agency will meet the parental consent requirement in section 300.154 by obtaining one parent's signed consent that:

1) specifies the number of times the school will access Medicaid benefits over a definite period of time, such as a semester or school year, and
2) meets requirements for informed parental consent in section §300.9 on previous pages.

Parents should be fully informed regarding the purpose of the consent consistent with federal regulations. In this case, fully informing parents should include an explanation that the school may not:

1) require parents to incur out-of-pocket expenses or sign up for public benefits in order for their child to receive services,
2) use benefits that would decrease a child's lifetime coverage or result in the family paying for services that would otherwise be covered, or
3) use benefits if that use would increase premiums, lead to the discontinuation of benefits or risk loss of eligibility for home and community-based waivers as described in section 300.154. A new consent should be sought at least every school year and may occur at the student's annual IEP meeting.

Consent for Individual Family Service Plan (IFSP) – 34 CFR §300.323(b)(2)(ii)

Authority: 34 CFR §300.323 When IEPs must be in effect.

(b) IEP or IFSP for children aged three through five.

(1) In the case of a child with a disability aged three through five, the IEP Team must consider an IFSP that contains the IFSP content (including the natural environments statement) described in section 636(d) of the Act and its implementing regulations (including an educational component that promotes school readiness and incorporates pre-literacy, language, and numeracy skills for children with IFSPs under this section who are at least three years of age), and that is developed in accordance with the IEP procedures under this part. The IFSP may serve as the IEP of the child, if using the IFSP as the IEP is--

(i) Consistent with State policy; and

(ii) Agreed to by the agency and the child's parents.

(2) In implementing the requirements of paragraph (b)(1) of this section, the public agency must--

(i) Provide to the child's parents a detailed explanation of the differences between an IFSP and an IEP; *(use the New Mexico FIT program IFSP documents as public agency is required to explain the difference to parents - http://www.health.state.nm.us/ddsd//fit/otherdoc.html)* **and**

(ii) If the parents choose an IFSP, obtain written informed consent from the parents.

(Written informed consent from the parents means consent as described at the beginning of this Consent section III.)

IV. PARENT PARTICIPATION IN MEETINGS *(also in Chapter 5.1-IEP)*

Authority: 34 CFR §300.30 Parent.

(a) Parent means--

(1) A biological or adoptive parent of a child;

(2) A foster parent, unless State law, regulations or contractual obligations with a State or local entity prohibit a foster parent from acting as a parent;

(3) A guardian generally authorized to act as the child's parent, or authorized to make educational decisions for the child (but not the State if the child is a ward of the State);

(4) An individual acting in the place of a biological or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or

(5) A surrogate parent who has been appointed in accordance with §300.519 or §639(a)(5) of the Act.

(b) (1) Except as provided in paragraph (b)(2) of this section, the biological or adoptive parent, when attempting to act as the parent under this part and when more than one party is qualified under paragraph (a) of this section to act as a parent, must be presumed to be the parent for purposes of this section unless the biological or adoptive parent does not have legal authority to make educational decisions for the child.

(2) If a judicial decree or order identifies a specific person or persons under paragraph (a)(1) through (4) of this section to act as the "parent" of a child or to make educational decisions on behalf of a child, then such person or persons shall be determined to be the "parent" for purposes of this section, except that a public agency that provides education or care for the child may not act as the parent. (Authority: 20 USC 1401(23))

Authority: NMAC 6.31.2.7

B. Terms.

(15) "Parent**"** includes, in addition to the persons specified in 34 CFR §300.30, a child with a disability who has reached age 18 and for whom there is no court-appointed general guardian, limited guardian or other court-appointed person who has legal custody or has otherwise been authorized by a court to make educational decisions on the child's behalf as provided in Subsection K of 6.31.2.13 NMAC. Pursuant to 34 CFR §300.519 and department policy, a foster parent of a child with a disability may act as a parent under Part B of the IDEA if: (i) the foster parent or the state children, youth and families department (CYFD) provides appropriate documentation to establish that CYFD has legal custody and has designated the person in question as the child's foster parent; and (ii) the foster parent is willing to make the educational decisions required of parents under the IDEA; and has no interest that would conflict with the interests of the child. A foster parent who does not qualify under the above requirements but who meets all requirements for a surrogate parent under 34 CFR §300.519 may be appointed as a surrogate if the public agency responsible for making the appointment deems such action appropriate. (See Subsection J of 6.31.2.13 NMAC.)

Authority: 34 CFR §300.45 Ward of the State.

(a) General. Subject to paragraph (b) of this section, ward of the State means a child who, as determined by the State where the child resides, is--

(1) A foster child;

(2) A ward of the State; or§

(3) In the custody of a public child welfare agency.

(b) Exception. Ward of the State does not include a foster child who has a foster parent who meets the definition of a parent in §300.30.

Authority: 34 CFR §300.322 Parent Participation.

(a) The public agency responsibility—general. The *cm must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including--

(1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

Minimum of 3 Attempts - Beginning 15 school days prior to the Proposed IEP Meeting Date

In accordance with State and Federal requirements, the public agency will notify parents early enough of the IEP meeting in order to arrange a mutually agreeable time and location. After the first written invitation to IEP meeting is provided 15 school days prior, if the parent does not respond, the public agency will document and send a second written invitation to the IEP meeting 10 school days prior. Again, if the parent still does not respond, a third invitation to IEP meeting will be sent in an attempt to get parental participation 5 school days prior to the scheduled IEP meeting. After three attempts and no response, the public agency may go forward with the IEP Team meeting as scheduled. The first attempt MUST be in written form, the second should also be in writing and the third may be a follow-up phone call. Detailed records of phone calls made or attempted and the results must be documented on the written Invitation form, including copies of correspondence sent and any visits to the home or place of employment and results. All dates and personnel initials must be documented in writing.

(b) Information provided to parents.

(1) The notice required under paragraph (a)(1) of this section must--

(i) Indicate the purpose, time, and location of the meeting and who will be in attendance; and

(ii) Inform the parents of the provisions in §300.321(a)(6) and (c) (relating to the participation of other individuals on the IEP Team who have knowledge or special expertise about the child), and §300.321(f) (relating to the participation of the Part C service coordinator or other representatives of the Part C system at the initial IEP Team meeting for a child previously served under Part C of the Act).

(2) For a child with a disability beginning not later than the first IEP to be in effect when the child turns 16, or younger if determined appropriate by the IEP Team, the notice also must--

(i) Indicate--

(A) That a purpose of the meeting will be the consideration of the postsecondary goals and transition services for the child, in accordance with §300.320(b); and

(B) That the agency will invite the student; and

(ii) Identifies any other agency that will be invited to send a representative.

(c) Other methods to ensure parent participation. If neither parent can attend an IEP Team meeting, the public agency must use other methods to ensure parent participation, including individual or conference telephone calls, consistent with §300.328 (related to alternative means of meeting participation).

(d) Conducting an IEP meeting without a parent in attendance. A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case, the public agency must keep a record of its attempts to arrange a mutually agreed on 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 the parents and any responses received; and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) Use of interpreters or other action, as appropriate. The public agency must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP Team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English.

(f) Parent copy of child's IEP. The public agency must give the parent a copy of the child's IEP at no cost to the parent.

Authority: 34 CFR §300.321 IEP Team Attendance.

(f) Initial IEP meeting for child under Part C. In the case of a child who was previously served under Part C of the Act, an invitation to the initial IEP meeting must, at the request of the parent, be sent to the Part C service coordinator or other representatives of the Part C system to assist with the smooth transition of services.

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

C. Parent and student participation in meetings. The public agency shall afford the parents of a child with a disability and, as appropriate, the child, an opportunity to participate in meetings with respect to the identification, evaluation and educational placement or the provision of FAPE to the child, in compliance with 34 CFR §§300.322, 300.501(b) and (c), and any other applicable requirements of these or other department rules and standards.

Authority: 34 CFR §300.501 Parent participation in meetings.

(a) Opportunity to examine records. The parents of a child with a disability must be afforded, in accordance with the procedures of §§300.613 through 300.621, an opportunity to inspect and review all education records with respect to--

(1) The identification, evaluation, and educational placement of the child; and

(2) The provision of FAPE to the child.

(b) Parent participation in meetings.

(1) The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to--

(i) The identification, evaluation, and educational placement of the child; and

(ii) The provision of FAPE to the child.

(2) The public agency must provide notice consistent with §300.322(a)(1) and (b)(1) to ensure that parents of children with disabilities have the opportunity to participate in meetings described in paragraph (b)(1) of this section.

(3) A meeting does not include informal or unscheduled conversations involving the public agency personnel and conversations on issues such as teaching methodology, lesson plans, or coordination of service provision. A meeting also does not include preparatory activities that public agency personnel engage in to develop a proposal or response to a parent proposal that will be discussed at a later meeting.

(c) Parent involvement in placement decisions.

(1) The public agency must ensure that a parent of each child with a disability is a member of any group that makes decisions on the educational placement of the parent's child.

(2) In implementing the requirements of paragraph (c)(1) of this section, the public agency must use procedures consistent with the procedures described in §300.322(a) through (b)(1).

(3) If neither parent can participate in a meeting in which a decision is to be made relating to the educational placement of their child, the public agency must use other methods to ensure their participation, including individual or conference telephone calls, or video conferencing.

(4) A placement decision may be made by a group without the involvement of a parent, if the public agency is unable to obtain the parent's participation in the decision. In this case, the public agency must have a record of its attempt to ensure their involvement.

Minimum of 3 Attempts - Beginning 15 school days prior to the Proposed IEP Meeting Date

In accordance with State and Federal requirements, the public agency will notify parents early enough of the IEP meeting in order to arrange a mutually agreeable time and location. After the first written invitation to IEP meeting is provided 15 school days prior, if the parent does not respond, the public agency will document and send a second written invitation to the IEP meeting 10 school days prior. Again, if the parent still does not respond, a third invitation to IEP meeting will be sent in an attempt to get parental participation 5 school days prior to the scheduled IEP meeting. After three attempts and no response, the public agency may go forward with the IEP Team meeting as scheduled. The first attempt MUST be in written form, the second should also be in writing and the third may be a follow-up phone call. Detailed records of phone calls made or attempted and the results must be documented on the written Invitation form; copies of correspondence sent and any visits to the home or place of employment and results. All dates and personnel initials must be documented in writing.

Written Notice of Proposal will be provided to the parent who was not in attendance or not participating via conference telephone calls, or video conferencing explaining the placement decision and providing person's name and phone number to contact at the school and an opportunity to schedule an IEP meeting.

Mandatory Medications

Authority: 34 CFR §300.174 Prohibition on mandatory medication.

(a) General. The NMPED must prohibit State and the public agency personnel from requiring parents to obtain a prescription for substances identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 USC 812(c)) for a child as a condition of attending school, receiving an evaluation under §§300.300 through 300.311, or receiving services under this part.

(b) Rule of construction. Nothing in paragraph (a) of this section shall be construed to create a Federal prohibition against teachers and other school personnel consulting or sharing classroom-based observations with parents or guardians regarding a student's academic and functional performance, or behavior in the classroom or school, or regarding the need for evaluation for special education or related services under §300.111 (related to child find).

Authority: NMAC 6.31.2.9 Public Agency Responsibilities

J. Prohibition on mandatory medication. Each LEA and other public agencies serving students with disabilities are prohibited from requiring parents to obtain a prescription for substances identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 USC 812(c)) for a student as a condition of

attending school, receiving an evaluation under 34 CFR §§300.300 through 300.311, or receiving services under Part B of the IDEA. This prohibition shall be construed as provided in 34 CFR §300.174(b).
[6.31.2.9 NMAC - Rp, 6.31.2.9 NMAC, 6/29/07; A, 12/31/09; A, 7/29/11]

1. At no time, and in no way, will the public agency personnel state or suggest that a student with a disability or a suspected disability must obtain a prescribed medication that is covered by the *Controlled Substances Act* before that student may attend school, return to school, receive an evaluation for a suspected disability or receive special education and related services.
2. The public agency personnel may consult with parents or guardians about school-based observations involving a student's academic, functional, and behavioral performance in the classroom or school, or regarding the need for an evaluation for special education and related services under the agency's child find obligations. *Observations* must be concrete and fact-based, and may not include *opinions* about how a particular medication may or could affect a student.
3. Nothing in the IDEA 2004 prohibits the public agency from administering medications at school to a student with a disability or a suspected disability, upon parental consent, provided the medication is maintained and dispensed according to applicable federal and state laws, rules, and guidelines for the administration of medication of the schools.

Transfer of Rights at Age 18

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

K. Transfer of parental rights to students at age 18
   (1) Pursuant to Sections 12-2A-3 and 28-6-1 NMSA 1978, a person's age of majority begins on the first instant of his or her 18th birthday and a person who has reached the age of majority is an adult for all purposes not otherwise limited by state law. A guardianship proceeding under the probate code is the only way an adult in New Mexico can legally be determined to be incompetent and have the right to make his or her own decisions taken away. Public agencies and their IEP teams are not empowered to make such determinations under New Mexico law. Accordingly, pursuant to 34 CFR §300.520, when a child with a disability reaches age 18 and does not have a court-appointed general guardian, limited guardian or other person who has been authorized by a court to make educational decisions on the student's behalf or who has not signed a power of attorney as provided under New Mexico law:
      (a) the public agency shall provide any notices required by 34 CFR Part 300 to the child and the parents;
      (b) all other rights accorded to parents under Part B of the IDEA, New Mexico law or department rules and standards transfer to the child; and
      (c) the public agency shall notify the individual and the parents of the transfer of rights.
   (2) Pursuant to 34 CFR §300.320(c), each annual IEP review for a child who is 16 or older must include a discussion of the rights that will transfer when the child turns 18 and, as appropriate, a discussion of the parents' plans for obtaining a guardian before that time. The IEP of a child who is 14 or older must include a statement that the child and the parent have been informed of the rights that will transfer to the child at age 18.

V. CONFIDENTIALITY OF STUDENT INFORMATION

Authority: 34 CFR §300.610 Confidentiality.
The Secretary takes appropriate action, in accordance with section 444 of GEPA, to ensure the protection of the confidentiality of any personally identifiable data, information, and records collected or maintained by the Secretary and by the NMPED and the public agency pursuant to Part B of the Act, and consistent with §§300.611 through 300.627.

Authority: 34 CFR §300.611 Definitions and **NMAC 6.31.2.13 L (6)(a)**
As used in §§300.611 through 300.625--
(a) Destruction means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

(b) Education records means the type of records covered under the definition of "education records" in 34 CFR part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 USC 1232g (FERPA)).
(c) Participating agency means any agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under Part B of the Act.

34 CFR §300.32 Personally identifiable. Personally identifiable means information that contains--
(a) The name of the child, the child's parent, or other family member;
(b) The address of the child;
(c) A personal identifier, such as the child's social security number or student number; or
(d) A list of personal characteristics or other information that would make it possible to identify the child with reasonable certainty.

34 CFR §300.612 Notice to parents.
(a) The NMPED must give notice that is adequate to fully inform parents about the requirements of §300.123, including--
(1) A description of the extent that the notice is given in the native languages of the various population groups in the State;
(2) A description of the children 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 children regarding this information, including the rights under FERPA and implementing regulations in 34 CFR Part 99.
(b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

34 CFR §300.613 Access rights and NMAC 6.31.2 B. Examination of Records
(a) Each participating agency must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the agency under this part. The agency must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to §300.507 or §§300.530 through 300.532, or resolution session pursuant to §300.510, and in no case more than 45 days after the request has been made.
(b) The right to inspect and review education records under this section includes--
(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;
(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and
(3) The right to have a representative of the parent inspect and review the records.
(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

Authority: 34 CFR §300.614 Record of access.
Each participating agency must keep a record of parties obtaining access to education records collected, maintained, or used under Part B of the Act (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.

1. The public agency will maintain a record, kept with the eligibility file of each student, that indicates all individuals, agencies or organizations that have requested or obtained access to a student's educational records collected, maintained or used under IDEA Part B (except access by parents and authorized employees of the public agency).

The records shall include:

a. at least the name of the person or agency that made the request,

b. the date access was given, and

c. the purpose for which the person or agency is authorized to use the records.

**If parts of the student eligibility folder are maintained in classrooms, access records are required if the folder contains information such as an IEP report, modification sheet(s), or any assessment reports.*

2. *The record of access will be maintained as long as the public agency maintains the student's education record. The record of access shall be available only to parents, school officials responsible for custody of the records, and those state and federal officials authorized to audit the operation of the system.*
3. *Access Procedures: The cumulative record and special education legal folder shall be made available to the parent. Records may be reviewed during regular school hours upon request to the appropriate record custodian. The record custodian or designee shall be present to explain the record and to answer questions. The confidential nature of the student's records shall be maintained at all times, and the records shall be restricted to use only in the offices of the Superintendent, a principal, a counselor, or Special Education as designated by the appropriate record custodian. The original copy of the record or any document contained in the cumulative record shall not be removed from the school or the Special Education office.*

Authority: 34 CFR §300.615 Records on more than one child.
If any education record includes information on more than one child, the parents of those children have the right to inspect and review only the information relating to their child or to be informed of that specific information.

Authority: 34 CFR §300.616 List of types and locations of information.
The public agency will provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency. *This information may be provided by the campus principal.*

Authority: 34 CFR §300.617 Fees.

(a) The public agency may charge a fee for copies of records that are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part. *No fee may be charged to search for or to retrieve the education record of a student. A fee of $0.10 (10¢) per page may be charged for copies of education records that are made for the parents or students under this procedure, provided that the fee does not effectively prevent them from exercising their right to inspect and review those records. A waiver of fee should be requested in writing. No fee will be charged to search for, or to retrieve, information.*

Authority: 34 CFR §300.618 Amendment of records at parent's request.

(a) A parent who believes that information in the education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child may request the participating agency that maintains the information to amend the information.

(b) The agency must decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the public agency decides to refuse to amend the information in accordance with the request, it must inform the parent of the refusal and advise the parent of the right to a hearing under §300.619.

Authority: 34 CFR §300.619 Opportunity for a hearing.
The public agency must, on request, provide an opportunity for a hearing to challenge information in education records to ensure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

Authority: 34 CFR §300.620 Result of hearing.

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

(b) If, as a result of the hearing, the public agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child, it must inform the parent of the parent's right to place in the records the public agency maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the records of the child under this section must--

(1) Be maintained by the public agency as part of the records of the child as long as the record or contested portion is maintained by the public agency; and

(2) If the child's records, or the contested portion, are disclosed by the public agency to any party, the explanation must also be disclosed to the party.

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

L. Confidentiality of information

(2) Parental rights to inspect, review and request amendment of education records. The public agency shall permit parents or their authorized representatives to inspect and review any education records relating to their children that are collected, maintained or used by the agency under Part B of the IDEA pursuant to 34 CFR §300.613. A parent who believes that information in the education records is inaccurate or misleading or violates the privacy or other rights of the child may request the agency that maintains the information to amend the information pursuant to 34 CFR §300.618 and shall have the opportunity for a hearing on that request pursuant to 34 CFR §300.619-300.621 and 34 CFR §99.22.

Authority: 34 CFR §300.621 Hearing procedures.

A hearing held under §300.619 must be conducted according to the procedures under 34 CFR §99.22. (FERPA)

Authority: 34 CFR §300.622 Consent.

(a) Parental consent must be obtained before personally identifiable information is disclosed to parties other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b)(1) of this section unless the information is contained in education records, and the disclosure is authorized without parental consent under 34 CFR part 99 (*FERPA*).

(b) (1) Except as provided in paragraphs (b)(2) and (b)(3) of this section, parental consent is not required before personally identifiable information is released to officials of participating agencies for purposes of meeting a requirement of this part.

(2 Parental consent, or the consent of an eligible child who has reached the age of majority under State law, must be obtained before personally identifiable information is released to officials of participating agencies providing or paying the transition services in accordance with §300.321(b)(3).

(3) If a child is enrolled, or is going to enroll in a private school that is not located in the LEA of the parent's residence, parental consent must be obtained before any personally identifiable information about the child is released between officials in the LEA where the private school is located and officials in the LEA of the parent's residence.

Authority: 34 CFR §300.535 Referral to and action by law enforcement and judicial authorities.

(a) Rule of construction. Nothing in this part prohibits an agency from reporting a crime committed by a child with a disability to appropriate authorities or prevents 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 child with a disability.

(b) Transmittal of records.

(1) An agency reporting a crime committed by a child with a disability must ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

(2) An agency reporting a crime under this section may transmit copies of the child's special education and disciplinary records only to the extent that the transmission is permitted by the Family Educational Rights and Privacy Act.

Authority: 34 CFR §300.623 Safeguards.

(a) The public agency must protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency must assume responsibility for ensuring the confidentiality of any personally identifiable information.
Custodian of Records: Unless otherwise specified in board policy, the principal is custodian of all records for currently enrolled students at the assigned school. The superintendent is the custodian of records for students who have withdrawn or graduated. The special education director is custodian of all special education records.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under §300.123 and 34 CFR Part 99.
Campus principal will annually train all new and returning campus staff on personally identifiable information. As new staff is employed throughout the school year, the training will be provided. The special education director is responsible for training all central office special education staff. Documentation of the date and persons attending training will be maintained by the campus principal and the special education director.

(d) The public 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.
Each local campus will have a listing of all personnel trained in confidentiality of student records and those who have access to the student records.

Authority: 34 CFR §300.624 Destruction of information.

(a) The public agency must inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.
The public agency will provide notice when records are going to be destroyed and provide an opportunity for the records to be acquired prior to destruction by the adult student or parent/guardian.

Authority: NMAC §6.31.2.13 Additional Rights of Parents, Students and Public Agencies

L. Confidentiality of information
(5) Destruction of information.
(a) Pursuant to 34 CFR §300.624, the public agency shall inform parents when personally identifiable information collected, maintained, or used under 34 CFR Part 300 is no longer needed to provide educational services to the child. As at other times, the parents shall have the right to inspect and review all educational records pertaining to their child pursuant to 34 CFR §300.613. The information must be destroyed at the request of the parents or, at their option the records must be given to the parents. When informing parents about their rights to destruction of personally identifiable records under these rules, the public agency should advise them that the records may be needed by the child or the parents for social security benefits and other purposes.
(b) If the parents do not request the destruction of personally identifiable information about their children, the public agency may retain that information permanently. In either event, a permanent record of a student's name, address and phone number, grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation. Additional information that is not related to the student's IDEA services may be maintained if allowed under 34 CFR Part 99.
(6) Educational records retention and disposition schedules.
(a) Definitions as used in this paragraph:
(i) "Destruction" means physical destruction or removal of personal identifiers from educational records so that the information is no longer personally identifiable; and
(ii) "Educational records" means the type of records covered under the definition of "educational records" in 34 CFR Part 99 of the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 USC 1232g (FERPA).
(b) Pursuant to 1.20.2.102 NMAC, the public agency must notify the parents that the public agency must retain specific information for five years to include:
(i) most recent IEP;
(ii) most recent 2-year child progress reports or referral form;
(iii) related services reports;
(iv) summary of academic achievement and functional performance;
(v) parent communication;

(vi) agency community action;
(vii) writing sample; and
(viii) staff reports on behavior.

(c) Federal regulation and department rules require public agencies to inform parents of proposed destruction of special education records (34 CFR §300.624).

(d) Pursuant to 34 CFR §300.624, the information must be destroyed at the request of the parents. However, a permanent record of a child's name, address and phone number, his or her grades, attendance record, classes attended, grade level completed and year completed may be maintained without time limit. Notice of destruction of child records must include:
   (i) informing parents at the last IEP meeting of personally identifiable information that is no longer needed to provide special education and related service and information that must be retained according to the state for five years under 1.20.1.102 NMAC;
   (ii) documentation at the last IEP meeting and prior written notice of the information that is required to be maintained indefinitely;
   (iii) documentation at the last IEP meeting and the prior written notice that the parent accepted or rejected the proposed action to maintain records;
   (iv) if the parent requests that the agency destroy information not required indefinitely, the public agency must maintain the last IEP and prior written notice that states the parent required the public agency to destroy allowable information that must be maintained for 5 years; and
   (v) the public agency must inform the parents of the proposed date of destruction of records at the last IEP meeting and document on the prior written notice of action the proposed date of destruction of records.

VI. SURROGATE / FOSTER PARENT

Authority: 34 CFR §300.30 Parent. – *As defined under IV. Parent Participation.*

Authority: NMAC 6.31.2.7 B(15) Parent. – *As defined under IV. Parent Participation.*

Authority: 34 CFR §300.45 Ward of the State.

(a) General. Subject to paragraph (b) of this section, ward of the State means a child who, as determined by the State where the child resides, is--
   (1) A foster child;
   (2) A ward of the State; or
   (3) In the custody of a public child welfare agency.

(b) Exception. Ward of the State does not include a foster child who has a foster parent who meets the definition of a parent in §300.30.

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

J. Surrogate parents and foster parents
   (1) The public agency shall ensure that a qualified surrogate parent is appointed in compliance with 34 CFR §300.519 when needed to protect the rights of a child with a disability who is within the agency's educational jurisdiction. A surrogate parent need not be appointed if a person who qualifies as a parent under 34 CFR §300.30(b) and Paragraph (14) of Subsection B of 6.31.2.7 NMAC can be identified.
   (2) A foster parent who meets all requirements of 34 CFR §300.30 may be treated as the child's parent pursuant to that regulation. A foster parent who does not meet those requirements, but meets all requirements of 34 CFR §300.519, may be appointed as a surrogate parent if public agency ~~who~~ that is responsible for the appointment deems such action appropriate.
   (3) Pursuant to 34 CFR §300.519, a surrogate parent may represent the child in all matters relating to the identification, evaluation and educational placement of the child and the provision of FAPE to the child.

Authority: 34 CFR §300.519 Surrogate parents – criteria.

(a) General. The *cm must ensure that the rights of a child are protected when--
   (1) No parent (as defined in §300.30) can be identified;
   (2) The public agency, after reasonable efforts, cannot locate a parent;

(3) The child is a ward of the State under the laws of New Mexico; or
(4) The child is an unaccompanied homeless youth as defined in section 725(6) of the McKinney-Vento Homeless Assistance Act (42 USC 11434a(6)). *(see Chapter 8. General Administration)*

(b) Duties of the public agency. The duties of the public agency under paragraph (a) of this section include the assignment of an individual to act as a surrogate for the parents. This must include a method--
(1) For determining whether a child needs a surrogate parent; and
(2) For assigning a surrogate parent to the child.

(c) Wards of the State. In the case of a child who is a ward of the State, the surrogate parent alternatively may be appointed by the judge overseeing the child's case, provided that the surrogate meets the requirements in paragraphs (d)(2)(i) and (e) of this section.

(d) Criteria for selection of surrogate parents.
(1) The public agency may select a surrogate parent in any way permitted under State law.
(2) The public agency must ensure that a person selected as a surrogate parent--
(i) Is not an employee of the NMPED, the public agency, or any other agency that is involved in the education or care of the child;
(ii) Has no personal or professional interest that conflicts with the interest of the child the surrogate parent represents; and
(iii) Has knowledge and skills that ensure adequate representation of the child.

(e) Non-employee requirement; compensation. A person otherwise qualified to be a surrogate parent under paragraph (d) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a surrogate parent.
Whether any person acting as a surrogate parent should be paid is at the discretion of the Special Education Director.

(f) Unaccompanied homeless youth. In the case of a child who is an unaccompanied homeless youth, appropriate staff of emergency shelters, transitional shelters, independent living programs, and street outreach programs may be appointed as temporary surrogates without regard to paragraph (d)(2)(i) of this section, until a surrogate can be appointed that meets all of the requirements of paragraph (d) of this section.

(g) Surrogate parent responsibilities. The surrogate parent may represent the child in all matters relating to-
(1) The identification, evaluation, and educational placement of the child; and
(2) The provision of FAPE to the child.

(h) NMPED responsibility. The NMPED must make reasonable efforts to ensure the assignment of a surrogate parent not more than 30 days after public agency determines that the child needs a surrogate.

Requirements of Surrogate

Staff Training: Method of determining whether a child needs a surrogate parent.
Annually, the local campus principals, counselors and staff, along with the special education staff, are trained on the situations in §300.519 in which a student would need a surrogate parent appointed or would need the surrogate parent required training. Staff is asked to assist in identifying those students who need surrogates. The special education director or designee will maintain the list of trained surrogates and schedule training for new surrogates.

Surrogate Parent Assignment Guidelines:
The principal or other person makes the request for a surrogate parent for an eligible public agency child. Procedures for requesting a surrogate parent are as follows:

a. Principal or other assigned staff person notifies the special education director of need and of potential surrogate parents if they are aware of any potential volunteers.
b. The special education director or designee schedules and conducts the training using application form to document assurances below.
c. The special education director notifies campus administration of completed training and the names of new surrogate parents.
d. The special education director, principal or designee notifies/contacts the student's assigned surrogate parent when appropriate.

Assurances

Assurances must be made by the individual selected to serve as a surrogate or foster parent. These assurances are reviewed at the training and documented on the application form signed by the surrogate / foster parent.

- *The individual may not have any personal or professional interest that conflicts with the interest of the child the surrogate parent represents;*
- *The individual may not be an employee of the public agency or of any other public agency responsible for, or involved in, the education or care of the child the surrogate parent represents;*
- *The individual must have knowledge and skills that ensure adequate representation of the child;*
- *The individual must be a resident of the member school district which the student attends, and*
- *The public agency may select as a surrogate a person who is an employee of a nonpublic agency that only provides non-educational care for the child and who meets the standards above.*

A foster parent in a home verified by the New Mexico Department of Health or a child-placing agency shall not be deemed to have a financial conflict of interest by virtue of serving as the foster parent in that home. These homes include, but are not limited to, basic, habilitative, primary medical, or therapeutic foster or foster group homes. In addition, issues concerning quality of care of the child do not constitute a conflict of interest. Concerns regarding quality of care of the child should be communicated, and may be statutorily required to be reported, to the New Mexico Department of Health.

Documentation of Training for Volunteers to Serve as Surrogate Parent:

a. *The individual assigned to act as a surrogate parent must complete a training program within 90 calendar days after the effective date of initial assignment as a surrogate parent.*
b. *Once the individual has completed a training program conducted or provided by or through the New Mexico Department of Health, a school district, an education service center, or any entity that receives federal funds to provide IDEA training to parents, the individual shall not be required by any school to complete additional training in order to continue serving as the student's surrogate parent or to serve as the surrogate parent for other students with disabilities.*
c. *The public agency may provide additional training to surrogate parents and/or parents; however, the public agency cannot deny an individual who has received the training from serving as a surrogate parent on the grounds that the individual has not been trained.*
d. *Training should be provided prior to assigning an individual to act as a surrogate parent.*
e. *Individuals already serving as surrogate parents, who are identified as not having received previous training, will receive training within 90 calendar days of identification.*
f. *The public agency will keep records of those individuals who have received training and each person trained by the public agency will be given a certificate to use should they move to another school and need evidence of training.*

Documentation of Training for Assignment of Foster Parents as Surrogate Parents:

a. *A foster parent may act as parent of a child with a disability, in accordance with §300.20 relating to the definition of parent.*
b. *The foster parent must complete the training within 90 calendar days after the effective date of this rule or the date of initial assignment as foster parent, whichever comes later. The foster parent will be exempt if training has already been conducted by the New Mexico Department of Health and evidence is provided to the public agency.*
c. *Once the individual has completed a training program conducted or provided by or through the NM Department of Health, the public agency, or any entity that receives federal funds to provide IDEA training to parents, the individual will not be required by any school to complete additional training in order to continue serving as the student's surrogate parent or to serve as the surrogate parent for other students with disabilities.*
d. *The public agency may provide additional training to surrogate parents and/or parents; however, the public agency cannot deny an individual who has received the training from serving as a surrogate parent on the grounds that the individual has not been trained.*
e. *Individuals already serving as surrogate parents, who are identified as not having received previous training, will receive training within 90 calendar days of identification if there is no evidence training was previously provided by the New Mexico Department of Health*

f. The public agency will keep records of those individuals who have received training and each person trained by the public agency will be given a certificate to use should they move to another school and need evidence of training.

g. If the foster parent does not meet the criteria to serve as parent, the public agency will appoint a surrogate parent. The public agency will give preferential consideration to the foster parent of a student with a disability when assigning a surrogate parent for the child.

Surrogate Training Completed

When the applicant successfully completes the Surrogate Parent Training, a list of those individuals trained as Surrogate Parents will be filed in the office of the Special Education Director.

VII. INDEPENDENT EDUCATIONAL EVALUATION (IEE)

34 CFR §300.502 Independent educational evaluation.

(a) General.

(1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) The public agency must provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.

Information on where an IEE may be obtained will be provided to parents on request. A list of individuals who can provide an IEE is available from the Special Education Office. The district criteria (State/Federal requirements) applicable for all evaluations (Chapter 3-Evaluation and Chapter 4 of this document) must also be followed for the IEE. See Evaluator Requirements found below.

(3) For the purposes of this subpart--

(i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and

(ii) Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with §300.103.

(b) Parent right to evaluation at public expense.

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency, subject to the conditions in paragraphs (b)(2) through (4) of this section.

(2) If a parent requests an independent educational evaluation at public expense, the *cm must, without unnecessary delay, either--

(i) File a due process complaint to request a hearing to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

If the parent requests an IEE from any staff member or campus principal, the parent will be provided the name and phone number of the Special Education Director and asked to notify that administrator immediately so that proper steps may be taken to address their request for an IEE. The Special Education Director, in consultation with appropriate public agency staff, will determine whether to pay for the IEE or file for a due process hearing.

(3) If the public agency files a due process complaint notice to request a hearing and the final decision is that the public agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not required the parent to provide an explanation and may not unreasonably delay either providing the independent educational evaluation at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation.

(5) A parent is entitled to only one independent educational evaluation at public expense each time the public agency conducts an evaluation with which the parent disagrees.

If the parent requests an IEE during an IEP meeting, the minutes will document that the parent was asked to provide reasons why they objected to the public agency evaluation. If the parent does not provide any specific reason, that also will be documented in the minutes.

(c) Parent-initiated evaluations. If the parent obtains an independent educational evaluation at private expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation--

(1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and

(2) May be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding that child.

(d) Requests for evaluations by hearing officers. If a hearing officer requests an independent educational evaluation as part of a hearing on a due process complaint, the cost of the evaluation must be at public expense.

(e) Agency criteria.

(1) If an independent educational evaluation 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 public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

(2) Except for the criteria described in paragraph (e)(1) of this section, the public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense. (Authority: 20 USC 1415(b)(1) and (d)(2)(A))

EVALUATOR REQUIREMENTS

- *The independent examiner will have the same qualifications as the public agency assessment personnel (e.g., psychologist, associate psychologist, or educational diagnostician), as required by New Mexico law and also described in Chapter 8- General Administration)*
- *The evaluation will be conducted in the school building to which the student is assigned, unless clearly not feasible.*
- *The independent examiner will have access to the student's cumulative folder and special education folders in gathering information about the student.*
- *The independent examiner may meet with the school IEP Team to gather information about a student prior to the assessment and ~~to~~ share information following the assessment.*
- *The independent examiner will follow federal and state assessment regulations and rules, reporting requirements and established eligibility criteria for the diagnosis of students with disabilities.*
- *The independent evaluation may be restricted to one assessment area upon mutual agreement by the public agency and parent.*
- *The evaluator must be located within a **200 mile radius** of the public agency. This will allow the evaluator access to the public school for observation of the student and access to the IEP meetings.*
- *The evaluator must provide information in the same timely manner as required by public agency personnel, including an original typed report to the public agency within 30 calendar days from the date that an IEE is approved by the public agency and 5 days prior to the IEP meeting. The report must address the public agency format (which will be provided to the evaluator) for assessment and eligibility. Protocols must be available for review and the report must include an original signature and title of all assessment personnel involved in the evaluation. The report must comply with all requirements of state and federal regulations.*

Steps to Follow for Parent to Request an IEE at Public Expense:

1. *Parent should request an IEP Team meeting to discuss evaluation concerns and allow for possible resolution during the IEP meeting.*
2. *Make request to the IEP Team for action.*
3. *Request IEE as soon as possible but no later than **six months** following the public agency evaluation in question.*

4. *Specify areas of disagreement with the public agency's evaluation and list assessment questions to be addressed by IEE.*
5. *Provide name of evaluator to allow the public agency to:*
   a. *check certification/license of evaluator and*
   b. *contract directly with the evaluator.*
6. *Review all Evaluator Requirements listed above.*
7. *If the parent requests an IEE from any staff member or campus principal outside of an IEP Team meeting, the parent will be provided the name and phone number of the Special Education Director and asked to notify that administrator immediately so that proper steps may be taken to address their request for an IEE. The Special Education Director, in consultation with appropriate public agency staff, will determine whether to pay for the IEE or file for a due process hearing.*

Reimbursement or Payment

Reimbursement/payment will be made directly to evaluator upon receipt of IEE which meets all of the public agency's assessment criteria. Parents obtaining an IEE without following these procedures will risk non-payment. Whenever an IEE is at public expense, the criteria under which the IEE is obtained~~,~~ must be the same as the criteria which the school uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's rights to an IEE.

Criteria For Fee Setting

- *The *cm will pay a fee for the IEE which allows a parent to choose from among the qualified professionals in the area.*
- *The public agency will not pay unreasonably excessive fees. An unreasonably excessive fee is one which is 10% above the prevailing fees in the area (or 20% above the Medicaid rate) for the specific test being considered.*
- *Upon receipt of a request for payment of an unreasonably excessive fee, the public agency may request a hearing to challenge the right of parents to be reimbursed.*
- *Parents will be allowed the opportunity to demonstrate to an IEP Team that unique circumstances justify an IEE that does not fall within the public agency's criteria.*
- *When service providers have a sliding scale fee based on parent income, the public agency will pay the amount charged to the parent.*
- *In the event that a parent pursues an IEE independently, an original billing form must be submitted to the public agency prior to payment. Before reimbursement or direct payment is authorized, criteria must be met and the written report received.*
- *Travel costs for examiner and/or parents will not exceed public agency rates for travel as established by New Mexico State guidelines.*

Parents Seeking Reimbursement For A Unilaterally Obtained IEE

- *The public agency will not consider a parent request for payment for a unilaterally parent-initiated IEE unless the request is made within a reasonable time after receipt of the results of the evaluation.* ***A reasonable time is defined as 90 calendar days.***
- *The request will be presented to the IEP Team for action.*
- *The public agency can request a due process hearing to prove its own evaluation is appropriate. This can occur before an IEE is conducted or, after the parent has obtained one and is seeking reimbursement.*
- *The public agency will deny payment of an IEE conducted by an evaluator who does not meet minimum qualifications.*
- *The public agency will deny payment of an IEE which does not meet minimum NMPED criteria for the specific disability identified.*
- *The public agency will deny payment of an IEE which does not meet all state and federal requirements.*

Consideration of Parent Initiated IEE

The results of a parent-initiated IEE obtained at private expense will be considered by the IEP Team in any decision made with respect to the provision of a free appropriate public education to the student (if the IEE

meets NMPED criteria). Such consideration does not make the public agency liable for payment of the evaluation.

VIII. CONFLICT RESOLUTION / COMPLAINT PROCEDURES

*If there is a dispute relating to the identification, evaluation, or educational placement, or the provision of a free appropriate public education (FAPE), to a student with a disability, it is the intent of the public agency to encourage and support the resolution of any dispute at the **lowest level possible** and in a prompt, efficient, and effective manner.*

If there is disagreement expressed by the parent, the public agency should always be sure the parents have a current Procedural Safeguards document: Parent and Child Rights in Special Education, a copy of which may be found on the NMPED website at: http://www.ped.state.nm.us/seo/parents/index.htm
If the parents say they do not have the document, provide them with the document, and an explanation of the information, and keep a record that parents have received the document. Documentation of receipt of the Procedural Safeguards is kept in the special education student's eligibility file.

VIII. Conflict Resolution / Complaint Procedures | **IX. - X. - XI.** Due Process sections

Conflict Resolution		**Complaint filed with NMPED**	**Due Process Complaint filed with NMPED**	**Due Process filed with NMPED**
Lowest Level of Conflict Resolution		Violation occurred not more than **1 year** to date complaint received *34 CFR §300.153* and Impartial Review by NMPED in 60 days	Violation occurred not more than **2 years** before date parent/LEA knew or should have known about alleged action *34 CFR §300.507* and Impartial Review by NMPED in 60 days *34 CFR §300.510(a)*	34 CFR §300.511 - .515
Informal Dispute Resolution NMAC 6.31.2.13 G. (2)(a)	3rd Party Assisted Intervention NMAC 6.31.2.13 G. (2)(b)	Offer CAIEP (Complaint Assisted IEP meeting) NMAC 6.31.2.13 G (2)(c)(i) **or**	Convene Resolution Session unless both agree to waive or both agree to mediation	Convene Resolution Session unless waived by both NMAC 6.31.2.13 G. (2)(c)(ii) **or**
↓	↓	↓	↓	↓
Offer IEP Team Meeting	Both parties agree to FIEP– (Facilitated IEP) or Mediation	Both parties agree to FIEP or Mediation	Both parties agree to FIEP or Mediation, Summary Due Process Hearing	Both parties agree to FIEP or Mediation
	Mediation Procedures *34 CFR §300.506* and NMAC 6.31.2.13 G. (2)(b) H. (3)(c)	Complaint Procedures NMAC 6.31.2.13 H. (1 – 8)	Complaint Procedures NMAC 6.31.2.13 H. (1 – 8)	Due Process Procedures Resolution session, etc., *34 CFR §300.511 - 34 CFR §300.515* and NMAC 6.31.2.13 I.

In order to discuss the ADR (Alternative Dispute Resolution) options available, schools should contact the Special Education Administrator as soon as there is reason to believe any type of complaint will be made.

A. Conflict Management and ADR (Alternative Dispute Resolutions)

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

G. Conflict management and resolution

(1) The *cm seeks to establish and maintain productive working relationships with the parents of each child the agency serves and to deal constructively with disagreements. Toward that end, the public agency is strongly encouraged to provide appropriate training for staff and parents in skills and techniques of conflict prevention and management and dispute resolution, and to utilize an informal dispute resolution method as set forth under Subparagraph (a) of Paragraph (2) of Subsection G of 6.31.2.13 NMAC to resolve disagreements at the local level whenever practicable.

(2) Spectrum of dispute resolution options. To facilitate dispute prevention as well as swift, early conflict resolution whenever possible, the department and the public agency shall ensure that the following range of dispute resolution options is available to parents and public agency personnel.

(a) Informal dispute resolution option. If a disagreement arises between parents and the public agency over a student's IEP or educational program, either the parents or the public agency may convene a new IEP meeting at any time to attempt to resolve their differences at the local level, without state-level intervention.

(b) Third-party assisted intervention. The special education bureau (SEB) of the department will ensure that mediation is available to parents and public agencies who request such third-party assisted intervention before filing a state-level complaint or a request for a due process hearing. The SEB will honor a request for mediation that:

(i) is in writing;
(ii) is submitted to the SEB;
(iii) is a mutual request signed by both parties or their designated representatives;
(iv) includes a statement of the matter(s) in dispute and a description of any previous attempts to resolve these matters at the local level; and
(v) any request that does not contain all of these elements will be declined, with an explanation for the SEB's decision and further guidance, as appropriate.

(c) Formal dispute resolution.

(i) A state-level complaint may be filed with the SEB of the department by the parents of a child, or by another individual or organization on behalf of a child, as described under Subparagraph (a) of Paragraph (2) of Subsection H of 6.31.2.13 NMAC. Once a complaint has been filed, the parties may agree to convene a FIEP meeting or mediation instead, as described under Paragraph (3) of Subsection H of 6.31.2.13 NMAC.

(ii) A request for a due process hearing may be filed by parents or their authorized representative, or by the public agency, as described under Paragraph (5) of Subsection I of 6.31.2.13 NMAC. A resolution session between the parties must be convened by the public agency following a request for a due process hearing, unless the parties agree in writing to waive that option or to convene a FIEP meeting or mediation instead, as described under Paragraph (8) of Subsection I of 6.31.2.13 NMAC.

(d) The Mediation Procedures Act does not apply to mediations conducted under 6.31.2 NMAC.

The public agency may offer a new IEP meeting, a CAIEP, a FIEP or mediation prior to a parent filing a state level complaint. For further information on each of the IEP meetings, see C., D., and E. in this section VIII.

B. NMPED Complaint Procedures (violation that occurred not more than **1 year prior to the date** that the complaint is received in accordance with §300.151).

34 CFR §300.151 Adoption of NMPED complaint procedures.

(a) General. The NMPED adopted written procedures for--

(1) Resolving any complaint, including a complaint filed by an organization or individual from another State, that meets the requirements of §300.153 by--

(i) Providing for the filing of a complaint with the NMPED; and

(ii) At the NMPED's discretion, providing for the filing of a complaint with a public agency and the right to have the NMPED review the public agency's decision on the complaint; and

(2) Widely disseminating to parents and other interested individuals, including parent training and information centers, protection and advocacy agencies, independent living centers, and other appropriate entities, the State procedures under §§300.151 through 300.153.

The NMPED provides "Parent and Child Rights in Special Education" for dissemination to parents as well as on the website, which provides technical assistance fact sheets explaining the FIEP, the CIEP, and due process hearings. The fact sheets can be found at the NMPED website: http://www.ped.state.nm.us/SEB/community/index.html

In addition, the NMPED provides complaint procedure information and training to parents and other interested individuals, including, but not limited to:

- *Parents Reaching Out (PRO),*
- *ABRAZOS Family Support System for Native American Families, and*
- *Protection and Advocacy (PA).*

(b) Remedies for denial of appropriate services. In resolving a complaint in which the NMPED has found a failure to provide appropriate services, the NMPED, pursuant to its general supervisory authority under Part B of the Act, must address--

(1) The failure to provide appropriate services, including corrective action appropriate to address the needs of the child (such as compensatory services or monetary reimbursement); and

(2) Appropriate future provision of services for all children with disabilities.

34 CFR §300.152 Minimum State complaint procedures.

(a) Time limit; minimum procedures. The NMPED included in its complaint procedures a time limit of 60 days after a complaint is filed under §300.153 to--

(1) Carry out an independent on-site investigation, if the NMPED determines that an investigation is necessary;

(2) Allow the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;

(3) Provide the public agency with the opportunity to respond to the complaint, including, at a minimum--

(i) At the discretion of the public agency, a proposal to resolve the complaint; and

(ii) An opportunity for a parent who has filed a complaint and the public agency to voluntarily engage in mediation consistent with §300.506;

(4) Review all relevant information and make an independent determination as to whether the public agency is violating a requirement of Part B of the Act or of this part; and

(5) Issue a written decision to the complainant that addresses each allegation in the complaint and contains--

(i) Findings of fact and conclusions; and

(ii) The reasons for the NMPED's final decision.

(b) Time extension; final decision; implementation. The NMPED's procedures described in paragraph (a) of this section also must--

(1) Permit an extension of the time limit under paragraph (a) of this section only if--

(i) Exceptional circumstances exist with respect to a particular complaint; or

(ii) The parent (or individual or organization, if mediation or other alternative means of dispute resolution is available to the individual or organization under State procedures) and the public agency involved agree to extend the time to engage in mediation pursuant to paragraph (a)(3)(ii) of this section; or to engage in other alternative means of dispute resolution, if available in the State; and

(2) Include procedures for effective implementation of the NMPED's final decision, if needed, including--

(i) Technical assistance activities;

(ii) Negotiations; and

(iii) Corrective actions to achieve compliance.

(c) Complaints filed under this section and due process hearings under 34 CFR §300.507 and §§300.530 through 300.532.

(1) If a written complaint is received that is also the subject of a due process hearing under §300.507 or §§300.530 through 300.532, or the NMPED must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the

complaint that is not a part of the due process action must be resolved using the time limit and procedures described in paragraphs (a) and (b) of this section.

(2) If an issue is raised in a complaint filed under this section has previously been decided in a due process hearing involving the same parties--

(i) The due process hearing decision is binding on that issue; and

(ii) The NMPED must inform the complainant to that effect.

(3) A complaint alleging the public agency's failure to implement a due process hearing decision must be resolved by the NMPED.

34 CFR § 300.153 Filing a complaint.

(a) An organization or individual may file a signed written complaint under the procedures described in §§300.151 through 300.152.

(b) The complaint must include--

(1) A statement that a public agency has violated a requirement of Part B of the Act or of this part;

(2) The facts on which the statement is based;

(3) The signature and contact information for the complainant; and

(4) If alleging violations with respect to a specific child--

(i) The name and address of the residence of the child;

(ii) The name of the school the child is attending;

(iii) In the case of a homeless child or youth (within the meaning of §725(2) of the McKinney-Vento Homeless Assistance Act (42 USC 11434a(2)), available contact information for the child, and the name of the school the child is attending;

(iv) A description of the nature of the problem of the child, including facts relating to the problem; and

(v) A proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed.

(c) The complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received in accordance with §300.151.

(d) The party filing the complaint must forward a copy of the complaint to the public agency or public agency serving the child at the same time the party files the complaint with the NMPED.

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

G. Conflict management and resolution

(2) Spectrum of dispute resolution options.

(c) Formal dispute resolution.

(i) A state-level complaint may be filed with the SEB of the department by the parents of a child, or by another individual or organization on behalf of a child, as described under Subparagraph (a) of Paragraph (2) of Subsection H of 6.31.2.13 NMAC. Once a complaint has been filed, the parties may agree to convene a FIEP meeting or mediation instead, as described under Paragraph (3) of Subsection H of 6.31.2.13 NMAC.

(ii) A request for a due process hearing may be filed by parents or their authorized representative, or by the public agency, as described under Paragraph (5) of Subsection I of 6.31.2.13 NMAC. A resolution session between the parties must be convened by the public agency following a request for a due process hearing, unless the parties agree in writing to waive that option or to convene a FIEP meeting or mediation instead, as described under Paragraph (8) of Subsection I of 6.31.2.13 NMAC.

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

H. State complaint procedures

(1) Scope. This Subsection H of 6.31.2.13 NMAC prescribes procedures to be used in filing and processing complaints alleging the failure of the department or the public agency to comply with state or federal laws or regulations governing programs for children with disabilities under the IDEA or with state statutes or regulations governing educational services for gifted children.

(2) Requirements for complaints.

(a) The SEB of the department shall accept and investigate complaints from organizations or individuals that raise issues within the scope of this procedure as defined in the preceding Paragraph (1) of Subsection H of 6.31.2.13 NMAC. The complaint must:
  (i) be in writing;
  (ii) be submitted to the SEB (or to the Secretary of Education, in the case of a complaint against the department);
  (iii) be signed by the complainant or a designated representative and have the complainant's contact information;
  (iv) if alleging violations with respect to a specific child, include the name, and address of the child and the school the child is attending;
  (v) include a statement that the department or the public agency has violated a requirement of an applicable state or federal law or regulation;
  (vi) contain a statement of the facts on which the allegation of violation is based; and
  (vii) include a description of a proposed resolution of the problem to the extent known.
  Any complaint that does not contain each of these elements will be declined, with an explanation for the SEB's decision and further guidance, as appropriate
(b) If the complaint alleges violations with respect to a specific child, the complaint must include the information required by 34 CFR §300.153(b)(4).
(c) The party filing the complaint must forward a copy of the complaint to the public agency serving the child at the same time the party files the complaint with the SEB of the department.
(d) Pursuant to 34 CFR §300.153(c), the complaint must allege a violation that occurred not more than **one year** before the date the complaint is received by the SEB, in accordance with Subparagraph (a) of Paragraph (2) of Subsection H of 6.31.2.13, NMAC.

(3) Preliminary meeting.
(a) **FIEP meeting**: mediation. Parties to a state-level complaint may choose to convene a FIEP meeting or mediation. To do so, the public agency must (and the parent may) notify the SEB of the department in writing within one (1) business day of reaching their decision to jointly request one of these ADR options. A FIEP meeting or mediation shall be completed no later than 14 days after the assignment of the IEP facilitator or mediator by the SEB, unless a brief extension is granted by the SEB based on exceptional circumstances. Each session in the FIEP or mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the complaint.
(b) **Mediation requirements**. If the parties choose to use mediation, the following requirements apply.
  (i) Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings.
  (ii) Any mediated agreement must state that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. Any such agreement must also be signed by both the parent and a representative of the agency who has the authority to bind such agency, and shall be enforceable in any state court of competent jurisdiction or in a district court of the United States.
  (iii) If a mediated agreement involves IEP-related issues, the agreement must state that the public agency will subsequently convene an IEP meeting to inform the student's service providers of their responsibilities under that agreement, and revise the student's IEP accordingly.
  (iv) The mediator shall transmit a copy of the written mediation agreement to each party within seven days of the meeting at which the agreement was concluded. A mediation agreement involving a claim or issue that later goes to a due process hearing may be received in evidence if the hearing officer rules that part or all of the agreement is relevant to one or more IDEA issues that are properly before the hearing officer for decision.
  (v) Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.
  (vi) Any other requirement provided in 34 CFR §300.506(b) that is not otherwise provided herein.

(4) Complaints and due process hearings on the same issues pursuant to 34 CFR §300.152(c).
(a) The SEB of the department shall set aside any part of a written complaint that is also the subject of a due process hearing under Subsection I of 6.31.2.13 NMAC until the conclusion of the hearing and any civil action. Any issue in the complaint that is not a part of the due process hearing or civil action will be resolved by the SEB as provided in Subsection H of 6.31.2.13 NMAC.

(b) If an issue is raised in a complaint that has previously been decided in a due process hearing involving the same parties, the hearing decision is binding and the SEB must inform the complainant to that effect.
(c) A complaint alleging the public agency's failure to implement a due process decision will be resolved by the SEB as provided in this Subsection H of 6.31.2.13 NMAC.

(5) Complaints against public agencies.
(a) Impartial review. Upon receipt of a complaint that meets the requirements of Paragraph (2) of Subsection H of 6.31.2.13 NMAC above, the SEB of the department shall:
(i) undertake an impartial investigation which shall include complete review of all documentation presented and may include an independent on-site investigation, if determined necessary by the SEB;
(ii) allow the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;
(iii) provide the public agency with the opportunity to respond to the allegations in the complaint; and
(iv) review all relevant information and make an independent determination as to whether the public agency is violating a requirement of an applicable state or federal statute or regulation.
(b) Decision. A written decision, which includes findings of fact, conclusions, and the reasons for the decision and addresses each allegation in the complaint, shall be issued by the SEB and mailed to the parties within sixty (60) days of receipt of the written complaint, regardless of whether or not the parties agree to convene a CAIEP meeting, a FIEP meeting, or mediation. Such decision shall further include procedures for effective implementation of the final decision, if needed, including technical assistance, negotiations, and if corrective action is required, such action shall be designated and shall include the timeline for correction and the possible consequences for continued noncompliance.
(c) Failure or refusal to comply. If the public agency fails or refuses to comply with the applicable law or regulations, and if the noncompliance or refusal to comply cannot be corrected or avoided by informal means, compliance may be effected by the department by any means authorized by state or federal laws or regulations. The department shall retain jurisdiction over the issue of noncompliance with the law or regulations and shall retain jurisdiction over the implementation of any corrective action required.

(6) Complaints against the department. If the complaint concerns a violation by the department and: is submitted in writing to the secretary of education; is signed by the complainant or a designated representative; includes a statement that the department has violated a requirement of an applicable state or federal law or regulation; contains a statement of facts on which the allegation of violation is based, and otherwise meets the requirements of Paragraph (2) of Subsection H of 6.31.2.13 NMAC, the secretary of education or designee shall appoint an impartial person or impartial persons to conduct an investigation.
(a) Investigation. The person or persons appointed shall: acknowledge receipt of the complaint in writing; undertake an impartial investigation which shall include a complete review of all documentation presented and may include an independent onsite investigation, if necessary; give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint; provide the department with the opportunity to respond to the complaint; and review all relevant information and make an independent determination as to whether the department is violating a requirement of an applicable state or federal statute or regulation.
(b) Decision. A written decision, including findings of fact, conclusions, recommendations for corrective action, and the reasons for the decision and addressing each allegation in the complaint, shall be issued by the person or persons appointed pursuant to this paragraph and mailed to the parties within sixty (60) days of receipt of the written complaint. The person appointed pursuant to this paragraph has no authority to order rulemaking by the department.

(7) Extension of time limit. An extension of the time limit under Subparagraph (b) of Paragraph (5) or Subparagraph (b) of Paragraph (6) of this Subsection H of 6.31.2.13 NMAC shall be permitted by the SEB of the department only if exceptional circumstances exist with respect to a particular complaint or if the parent or any other party filing a complaint and the public agency involved agree to extend the time to engage in mediation or a CAIEP or FIEP meeting.

(8) Conflicts with federal laws or regulations. If any federal law or regulation governing any federal program subject to this regulation affords procedural rights to a complainant which exceed those set forth in Subsection H of 6.31.2.13 NMAC for complaints within the scope of these rules, such statutory or

regulatory right(s) shall be afforded to the complainant. In acknowledging receipt of such a complaint, the SEB shall set forth the procedures applicable to that complaint.

C. CAIEP - Complaint Assisted Individualized Education Program Meeting

Authority: NMAC 6.31.2.7 Definitions

C. Definitions related to dispute resolution. The following terms are listed in the order that reflects a continuum of dispute resolution options and shall have the following meanings for the purposes of these rules.

(1) "Facilitated IEP (FIEP) meeting" means an IEP meeting that utilizes an independent, state-approved, state-funded, trained facilitator as an IEP facilitator to assist the IEP team to communicate openly and effectively, in order to resolve conflicts related to a student's IEP.

Authority: NMAC 6.31.2.13

(H) Additional Rights of Parents, Students and Public Agencies

H. State complaint procedures

(3) Preliminary meeting

(a) FIEP meeting: mediation. Parties to a state-level complaint may choose to convene a FIEP meeting or mediation To do so, the public agency must (and the parent may) notify the SEB of the department in writing within one (1) business day of reaching their decision to jointly request one of these ADR options. A FIEP meeting or mediation shall be completed no later than 14 days after the assignment of the IEP facilitator or mediator by the SEB, unless a brief extension is granted by the SEB based on exceptional circumstances. Each session in the FIEP or mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the complaint.

You may also see the fact sheet at the NMPED website: http://ped.state.nm.us/SEB/community/2012/FIEP%20Fact%20Sheet%20May%202012%20Final.doc

D. FIEP - Facilitated Individualized Education Program Meeting

Authority: NMAC 6.31.2.7 Definitions

C. Definitions related to dispute resolution. The following terms are listed in the order that reflects a continuum of dispute resolution options and shall have the following meanings for the purposes of these rules.

(1) "Facilitated IEP (FIEP) meeting" means an IEP meeting that utilizes an independent, state approved, state-funded, trained facilitator as an IEP facilitator to assist the IEP team to communicate openly and effectively, in order to resolve conflicts related to a student's IEP.

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

H. State complaint procedures

(3) Preliminary meeting

(a) FIEP meeting: mediation. Parties to a state-level complaint may choose to convene a FIEP meeting or mediation. To do so, the public agency must (and the parent may) notify the SEB of the department in writing within 1 business day of reaching their decision to jointly request one of these ADR options. A FIEP meeting or mediation shall be completed no later than 14 days after the assignment of the IEP facilitator or mediator by the SEB, unless a brief extension is granted by the SEB based on exceptional circumstances. Each session in the FIEP or mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the complaint.

If the parent agrees to a FIEP, the role of an IEP Facilitator is to ensure that the IEP Team does their best thinking, interacts respectfully, the perspectives of all participants are heard, and the IEP team focuses on future action. Thus, an IEP Facilitator serves the *whole group* rather than an individual, and assists the group with the *process* of the IEP meeting rather than the *content* of the IEP. The agenda for a facilitated IEP meeting is the IEP process, and the focus of the meeting is the student and his or her needs. An IEP Facilitator also has the opportunity to gather issues from, and then exchange issues between, the key participants *prior* to the IEP meeting. This process provides the participants some private time to consider possible resolutions and options for discussion before the day of the IEP

meeting. The IEP Facilitator then supports the group in collaboratively creating solutions for the student. As a result, all members equally share responsibility for the IEP meeting process and the results. Keep in mind that the IEP Facilitator is not the IEP chair, nor is he or she a decision maker. Rather, the IEP Facilitator supports the *collaborative process* of the meeting and assists the parties to reach consensus where possible.
You may also see the fact sheet at the NMPED website:
http://www.ped.state.nm.us/SEB/community/dl10/FIEP%20HANDOUT.pdf

E. Mediation

34 CFR § 300.506 Mediation.

(a) General. The public agency must ensure that procedures are established and implemented to allow parties to disputes involving any matter under this part, including matters arising prior to the filing of a due process complaint, to resolve disputes through a mediation process.

(b) Requirements. The procedures must meet the following requirements:

(1) The procedures must ensure that the mediation process--

(i) Is voluntary on the part of the parties;

(ii) Is not used to deny or delay a parent's right to a hearing on the parent's due process complaint, or to deny any other rights afforded under Part B of the Act; and

(iii) Is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(2) The public agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party--

(i) Who is under contract with an appropriate alternative dispute resolution entity, or a parent training and information center or community parent resource center in the State established under section 671 or 672 of the Act; and

(ii) Who would explain the benefits of, and encourage the use of, the mediation process to the parents.

(3) (i) The New Mexico PED maintains a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(ii) The NMPED must select mediators on a random, rotational, or other impartial basis.

(4) The New Mexico PED bears the cost of the mediation process, including the costs of meetings described in paragraph (b)(2) of this section.

(5) Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.

(6) If the parties resolve a dispute through the mediation process, the parties must execute a legally binding agreement that sets forth that resolution and that--

(i) States that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding arising from that dispute; and

(ii) Is signed by both the parent and a representative of the agency who has the authority to bind such agency.

(7) A written, signed mediation agreement under this paragraph is enforceable in any New Mexico court of competent jurisdiction or in a district court of the United States. Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceedings arising from that dispute of any Federal court or State court of a State receiving assistance under this part.

(c) Impartiality of mediator.

(1) An individual who serves as a mediator under this part--

(i) May not be an employee of the NMPED or the public agency that is involved in the education or care of the child; and

(ii) Must not have a personal or professional interest that conflicts with the person's objectivity.

(2) A person who otherwise qualifies as a mediator is not an employee of the public agency or NMPED described under §300.228 solely because he or she is paid by the agency to serve as a mediator.

Authority: NMAC 6.31.2.7 Definitions

C. Definitions related to dispute resolution. The following terms are listed in the order that reflects a continuum of dispute resolution options and shall have the following meanings for the purposes of these rules.
(1) "Facilitated IEP (FIEP) meeting" means an IEP meeting that utilizes an independent, state approved, state-funded, trained facilitator as an IEP facilitator to assist the IEP team to communicate openly and effectively, in order to resolve conflicts related to a student's IEP.
(2) "Mediation" means a meeting or series of meetings that utilizes an independent, state-approved, state-funded, trained mediator to assist parties to reconcile disputed matters related to a student's IEP or other educational, non-IEP-related issues.

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

H. State complaint procedures
(3) Preliminary meeting
(a) FIEP meeting: mediation. Parties to a state-level complaint may choose to convene a FIEP meeting or mediation. To do so, the public agency must (and the parent may) notify the SEB of the department in writing within one (1) business day of reaching their decision to jointly request one of these ADR options. A FIEP meeting or mediation shall be completed no later than 14 days after the assignment of the IEP facilitator or mediator by the SEB, unless a brief extension is granted by the SEB based on exceptional circumstances. Each session in the FIEP or mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the complaint.
(b) Mediation requirements. If the parties choose to use mediation, the following requirements apply.
(i) Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings.
(ii) Any mediated agreement must state that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding. Any such agreement must also be signed by both the parent and a representative of the agency who has the authority to bind such agency, and shall be enforceable in any state court of competent jurisdiction or in a district court of the United States.
(iii) If a mediated agreement involves IEP-related issues, the agreement must state that the public agency will subsequently convene an IEP meeting to inform the student's service providers of their responsibilities under that agreement, and revise the student's IEP accordingly.
(iv) The mediator shall transmit a copy of the written mediation agreement to each party within 7 days of the meeting at which the agreement was concluded. A mediation agreement involving a claim or issue that later goes to a due process hearing may be received in evidence if the hearing officer rules that part or all of the agreement is relevant to one or more IDEA issues that are properly before the hearing officer for decision.
(v) Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.
(vi) Any other requirement provided in 34 CFR 300.506(b) that is not otherwise provided herein.
(4) Complaints and due process hearings on the same issues, pursuant to 34 CFR §300.152(c).
(a) The SEB of the department shall set aside any part of a written complaint that is also the subject of a due process hearing under Subsection I of 6.31.2.13 NMAC until the conclusion of the hearing and any civil action. Any issue in the complaint that is not a part of the due process hearing or civil action will be resolved by the SEB as provided in Subsection H of 6.31.2.13 NMAC.
(b) If an issue is raised in a complaint that has previously been decided in a due process hearing involving the same parties, the hearing decision is binding and the SEB must inform the complainant to that effect.
(c) A complaint alleging the public agency's failure to implement a due process decision will be resolved by the SEB as provided in this Subsection H of 6.31.2.13 NMAC.

IX. DUE PROCESS COMPLAINT (within 2 years of alleged violation)

34 CFR § 300.507 Filing a due process complaint.

(a) General.

(1) A parent or the public agency may file a due process complaint on any of the matters described in §300.503(a)(1) and (2) (relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child).

(2) The due process complaint must allege a violation that occurred not more than two years before the date the parent or the public agency knew or should have known about the alleged action that forms the basis of the due process complaint, or, if the State has an explicit time limitation for filing a due process complaint under this part, in the time allowed by that State law, except that the exceptions to the timeline described in §300.511(f) apply to the timeline in this section.

(b) Information for parents. The public agency must inform the parent of any free or low-cost legal and other relevant services available in the area if--

(1) The parent requests the information; or

(2) The parent or the agency files a hearing under this section.

(Authority: 20 USC 1415(b)(6))

34 CFR § 300.508 Due process complaint.

(a) General.

(1) The public agency must have procedures that require either party, or the attorney representing a party, to provide to the other party a due process complaint (which must remain confidential).

(2) The party filing a due process complaint must forward a copy of the due process complaint to the New Mexico PED Special Education Bureau.

(b) Content of complaint. The due process complaint required in paragraph (a)(1) of this section must include--

(1) The name of the child;

(2) The address of the residence of the child;

(3) The name of the school the child is attending;

(4) In the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 USC 11434a(2)), available contact information for the child, and the name of the school the child is attending;

(5) A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and

(6) A proposed resolution of the problem to the extent known and available to the party at the time.

(c) Notice required before a hearing on a due process complaint. A party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements of paragraph (b) of this section.

(d) Sufficiency of complaint.

(1) The due process complaint required by this section must be deemed sufficient unless the party receiving the due process complaint notifies the hearing officer and the other party in writing, within 15 days of receipt of the due process complaint, that the receiving party believes the due process complaint does not meet the requirements in paragraph (b) of this section.

(2) Within five days of receipt of notification under paragraph (d)(1) of this section, the hearing officer must make a determination on the face of the due process complaint of whether the due process complaint meets the requirements of paragraph (b) of this section, and must immediately notify the parties in writing of that determination.

(3) A party may amend its due process complaint only if--

(i) The other party consents in writing to the amendment and is given the opportunity to resolve the due process complaint through a meeting held pursuant to §300.510; or

(ii) The hearing officer grants permission, except that the hearing officer may only grant permission to amend at any time not later than five days before the due process hearing begins.

(4) If a party files an amended due process complaint, the timelines for the resolution meeting in §300.510(a) and the time period to resolve in §300.510(b) begin again with the filing of the amended due process complaint.

(e) Public agency response to a due process complaint.

(1) If the public agency has not sent a prior written notice under §300.503 to the parent regarding the subject matter contained in the parent's due process complaint, the public agency must, within 10 days of receiving the due process complaint, send to the parent a response that includes--

(i) An explanation of why the public agency proposed or refused to take the action raised in the due process complaint;

(ii) A description of other options that the IEP Team considered and the reasons why those options were rejected;

(iii) A description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

(iv) A description of the other factors that are relevant to the agency's proposed or refused action.

(2) A response by the public agency under paragraph (e) (1) of this section shall not be construed to preclude the public agency from asserting that the parent's due process complaint was insufficient, where appropriate.

(f) Other party response to a due process complaint. Except as provided in paragraph (e) of this section, the party receiving a due process complaint must, within 10 days of receiving the due process complaint, send to the other party a response that specifically addresses the issues raised in the due process complaint. (Authority: 20 USC 1415(b)(7), 1415(c)(2))

34 CFR § 300.509 Model forms.

(a) The NMPED has developed model forms to assist parents in filing a due process complaint in accordance with §§300.507(a) and 300.508(a) through (c) and to assist parents and other parties in filing a State complaint under §§300.151 through 300.153. However the NMPED or the public agency may not require the use of the model forms.

Due Process Complaint form: http://ped.state.nm.us/SEB/2013/Complaint_Form_08_20_2013.doc

Due Process Hearing form: http://ped.state.nm.us/SEB/2012/Due_Process_Hearing_Form_08_22_2013.doc

(b) Parents, public agencies, and other parties may use the appropriate model form described in paragraph (a) of the section, or another form or other document, so long as the form or document that is used meets, as appropriate, the content requirements in §300.508(b) for filing a due process complaint, or the requirements in §300.153(b) for filing a State complaint. (Authority: 20 USC 1415(b)(8))

The list specified in §§300.151 through 300.153 includes the information needed to file the due process complaint and may be found on page 29 ***or*** *the NMPED model forms can be requested from the SEB.*

The list specified in NMAC 6.31.2.13 I. (5) on page 44 includes the information needed to file for a due process hearing.

Children with Disabilities Enrolled by their Parents in Private Schools

34 CFR § 300.140 Due process complaints and NMPED complaints. *(See also Chapter 6. of this manual which includes Parentally-Placed Students in Private Schools)*

(a) Due process not applicable, except for child find.

(1) Except as provided in paragraph (b) of this section, the procedures in §§300.504 through 300.519 do not apply to complaints that an LEA has failed to meet the requirements of §§300.132 through 300.139, including the provision of services indicated on the child's services plan.

(b) Child find complaints—to be filed with the LEA in which the private school is located.

(1) The procedures in §§300.504 through 300.519 apply to complaints that an LEA has failed to meet the child find requirements in §§300.131 including the requirements in §§300.300 through 300.311.

(2) Any due process complaint regarding the child find requirements (as described in paragraph (b)(1) of the section) must be filed with the LEA in which the private school is located and a copy must be forwarded to the NMPED.

(c) State complaints.

(1) Any complaints that the NMPED or public agency has failed to meet the requirements of §§300.132 through 300.135 and §§300.137 through 300.134 must be filed under the procedures in §§300.151 through 300.153.

(2) A complaint filed by a private school official under §300.136(a) must be filed with the NMPED in accordance with the procedures in §300.136(b).

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

I. Due Process Hearings.

(15) Summary due process hearing. *(see page 45)*

X. DUE PROCESS RESOLUTION SESSION REQUIRED

Authority: 34 CFR § 300.510 Resolution process.

(a) Resolution meeting.

(1) Within 15 days of receiving notice of the parents' due process complaint, and prior to the initiation of a due process hearing under §300.511, the public agency must convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process complaint that--

(i) Includes a representative of the public agency who has decision-making authority on behalf of that agency; and

(ii) May not include an attorney of the public agency unless the parent is accompanied by an attorney.

(2) The purpose of the meeting is for the parents of the child to discuss their due process complaint, and the facts that form the basis of the due process complaint, so that the public agency has the opportunity to resolve the dispute that is the basis for the due process complaint.

(3) The meeting described in paragraph (a)(1) and (2) of this section need not be held if--

(i) The parents and the public agency agree in writing to waive the meeting; or

(ii) The parents and the public agency agree to use the mediation process described in §300.506.

(4) The parents and the public agency determine the relevant members of the IEP Team to attend the meeting.

(b) Resolution period.

(1) If the public agency has not resolved the due process complaint to the satisfaction of the parents within 30 days of the receipt of the due process complaint, the due process hearing must occur.

(2) Except as provided in paragraph (c) of this section, the timeline for issuing a final decision under §300.515 begins at the expiration of this 30-day period.

(3) Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding paragraphs (b)(1) and (2) of this section, the failure of a parent filing a due process complaint to participate in the resolution meeting will delay the timelines for the resolution process and due process hearing until the meeting is held.

(4) If the public agency is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented using the procedures in §300.322(d)), the public agency may, at the conclusion of the 30-day period, request that a hearing officer dismiss the parent's due process complaint.

(5) If the public agency fails to hold the resolution meeting specified in paragraph (a) of this section within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline.

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

I. Due Process Hearing.

(8) Preliminary meeting

(a) Resolution session. Before the opportunity for an impartial due process hearing under Paragraphs (3) or (4) of Subsection I of 6.31.2.13 NMAC above, the public agency shall convene a resolution session with the parents and the relevant member or members of the IEP team who have specific knowledge of the facts identified in the due process request, unless the parents and the public agency agree in writing to waive such a meeting, or agree to use the FIEP or mediation process instead. The resolution session:

(i) shall occur within 15 days of the respondent's receipt of a request for due process;

(ii) shall include a representative of the public agency who has decision-making authority on behalf of that agency;

(iii) may not include an attorney of the public agency unless the parent is accompanied by an attorney; and

(iv) shall provide an opportunity for the parents of the child and the public agency to discuss the disputed issue(s) and the facts that form the basis of the dispute, in order to attempt to resolve the dispute;

(v) if the parties desire to have their discussions in the resolution session remain confidential, they may agree in writing to maintain the confidentiality of all discussions and that such discussions cannot later be used as evidence in the due process hearing or any other proceeding; and

(vi) if an agreement is reached following a resolution session, the parties shall execute a legally binding agreement that is signed by both the parent and a representative of the agency who has the authority to bind that agency, and which is enforceable in any state court of competent jurisdiction or in a district court of the United States; if the parties execute an agreement pursuant to a resolution session, a party may void this agreement within three business days of the agreement's execution; further, if the resolution session participants reach agreement on any IEP-related matters, the binding agreement must state that the public agency will subsequently convene an IEP meeting to inform the student's service providers of their responsibilities under that agreement, and revise the student's IEP accordingly.

(b) FIEP meeting; mediation. Parties to a due process hearing may choose to convene a FIEP meeting or mediation instead of a resolution session. To do so, the party filing the request for the hearing must (and the responding party may) notify the hearing officer in writing within one business day of the parties' decision to jointly request one of these options. A FIEP meeting or mediation shall be completed no later than 14 days after the assignment of the IEP facilitator or mediator by the SEB, unless, upon joint request by the parties, an extension is granted by the hearing officer. Each session in the FIEP or mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the hearing. The requirements for mediation, as set forth at Subparagraph (c) of Paragraph (3) of Subsection H of 6.31.2.13 NMAC, apply to mediation in this context, as well.

(c) Applicable timelines.

(i) If the parties agree to convene a resolution session, the applicable timelines for the due process hearing shall be suspended for up to 30 days from the date the due process request was received by the SEB (except in the case of an expedited hearing), and the meeting shall proceed according to the requirements set forth under Subparagraph (a) of Paragraph (8) of Subsection I of 6.31.2.13 NMAC above.

(ii) If the parties agree to convene a FIEP meeting or mediation, the public agency shall contact the person or entity identified by the SEB to arrange for mediation or a FIEP meeting, as appropriate. Except for expedited hearings, the parties to the FIEP meeting or mediation process may jointly request that the hearing officer grant a specific extension of time for the prehearing conference and for completion of the hearing beyond the 20 school day period for issuance of the hearing decision. The hearing officer may grant such extensions in a regular case but may not exceed the 45 day deadline in an expedited case.

(iii) If the parties agree to waive all preliminary meeting options and proceed with the due process hearing, the hearing officer shall send written notification to the parties that the applicable timelines for the due process hearing procedure shall commence as of the date of that notice. The hearing officer shall thereafter proceed with the prehearing procedures, as set forth under Paragraph (12) of Subsection I of 6.31.2.13 NMAC.

(d) Resolution. Upon resolution of the dispute, the party who requested the due process hearing shall transmit a written notice informing the hearing officer and the SEB that the matter has been resolved and withdrawing the request for hearing. The hearing officer shall transmit an appropriate order of dismissal to the parties and the SEB.

(e) Hearing. If the parties convene a resolution session and they have not resolved the disputed issue(s) within 30 days of the receipt of the due process request by the SEB in a non-expedited case, the public agency shall (and the parents may) notify the hearing officer in writing within one business day of reaching this outcome. The hearing officer shall then promptly notify the parties in writing that the due process hearing will proceed and all applicable timelines for a hearing under this part shall commence as of the date of such notice.

(f) Further adjustments to the timelines may be made as provided in 34 CFR §300.510(b) and (c).

(g) The resolution of disputes by mutual agreement is strongly encouraged and nothing in these rules shall be interpreted as prohibiting the parties from engaging in settlement discussions at any time before, during or after an ADR meeting, a due process hearing or a civil action.

Authority: 34 CFR §300.510 Resolution process (continued).

(c) Adjustments to 30-day resolution period. The 45-day timeline for the due process hearing in §300.515(a) starts the day after one of the following events:
- **(1) Both parties agree in writing to waive the resolution meeting;**
- **(2) After either the mediation or resolution meeting starts but before the end of the 30-day resolution period, the parties agree in writing that no agreement is possible;**
- **(3) If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or the public agency withdraws from the mediation process.**

(d) Written settlement agreement. If a resolution to the dispute is reached at the meeting described in paragraphs (a)(1) and (2) of this section, the parties must execute a legally binding agreement that is--
- **(1) Signed by both the parent and a representative of the agency who has the authority to bind the agency; and**
- **(2) Enforceable in any State court of competent jurisdiction or in a district court of the United States, or by the NMPED, if the State has other mechanisms or procedures that permit parties to seek enforcement of resolution agreements, pursuant to §300.537.**

(e) Agreement review period. If the parties execute an agreement pursuant to paragraph (c) of this section, a party may void the agreement within 3 business days of the agreement's execution.

This process allows an opportunity for the school to resolve the parent's complaint. This can take up to 30 days, and the timelines for a due process hearing begin to run only after the first 30 days. Also, there is an "expedited hearing" in the case of a disciplinary appeal.

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

H. State complaint procedures.
- (4) Complaints and due process hearings on the same issues. Pursuant to 34 CFR §300.152(c):
  - (a) The SEB of the department shall set aside any part of a written complaint that is also the subject of a due process hearing under Subsection I of 6.31.2.13 NMAC until the conclusion of the hearing and any civil action. Any issue in the complaint that is not a part of the due process hearing or civil action will be resolved by the SEB as provided in Subsection H of 6.31.2.13 NMAC.
  - (b) If an issue is raised in a complaint that has previously been decided in a due process hearing involving the same parties, the hearing decision is binding and the SEB must inform the complainant to that effect.
  - (c) A complaint alleging the public agency's failure to implement a due process decision will be resolved by the SEB as provided in this Subsection H of 6.31.2.13 NMAC.

XI. DUE PROCESS HEARING

After the due process complaint is filed and the resolution process followed as described in section IX. and X., above, the due process procedures below are implemented.

34 CFR § 300.511 Impartial due process hearing.

(a) General. Whenever a due process complaint is filed under §300.507, the parents or the public agency involved in the dispute must have an opportunity for an impartial due process hearing, consistent with the procedures in §§300.507 through 300.508, and §300.510.

(b) Agency responsible for conducting the due process hearing. The hearing described in paragraph (a) of this section must be conducted by the NMPED or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the NMPED.

(c) Impartial hearing officer.
- **(1) At a minimum, a hearing officer--**
  - **(i) Must not be—**

(A) An employee of the NMPED or the public agency that is involved in the education or care of the child; or

(B) A person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) Must possess knowledge of, and the ability to understand, the provisions of the Act, Federal and State regulations pertaining to the Act, and legal interpretations of the Act by Federal and State courts;

(iii) Must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) Must possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(2) A person who otherwise qualifies to conduct a hearing under paragraph (c)(1) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(3) The public agency must keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

The NMPED maintains a list of hearing officers and their qualifications. The list may be requested by calling the NMPE or at the following link on the SEB website: http://ped.state.nm.us/SEB/community/2013/2103-14%20-%20Mediator%20and%20Facilitator%20Contact%20List.pdf

(d) Subject matter of due process hearings. The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under §300.508(b), unless the other party agrees otherwise.

(e) Timeline for requesting a hearing. A parent or public agency must request an impartial hearing on their due process complaint within two years of the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint, or if the NMPED has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by the State law.

(f) Exceptions to the timeline. The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to--

(1) Specific misrepresentations by the public agency that it had resolved the problem forming the basis of the due process complaint; or

(2) The public agency's withholding of information from the parent that was required under this part to be provided to the parent.

Hearing Rights

34 CFR §300.512 Hearing rights.

(a) General. Any party to a hearing conducted pursuant to §§300.507 through 300.513 or §§300.530 through 300.534, or an appeal conducted pursuant to §300.514, has the right to--

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;

(2) Present evidence and confront, cross-examine, and compel 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 business days before the hearing;

(4) Obtain a written, or, at the option of the parents, electronic, verbatim record of the hearing; and

(5) Obtain written, or, at the option of the parents, electronic findings of fact and decisions.

(b) Additional disclosure of information.

(1) At least five business days prior to a hearing conducted pursuant to §300.511(a), each party must disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing.

(2) A hearing officer may bar any party that fails to comply with paragraph (b)(1) of this section from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(c) Parental rights at hearings. Parents involved in hearings must be given the right to--

(1) Have the child who is the subject of the hearing present;

(2) Open the hearing to the public; and

(3) Have the record of the hearing and the findings of fact and decisions described in paragraphs (a)(4) and (a)(5) of this section provided at no cost to parents.

(Authority: 20 USC 1415(f)(2), 1415(h))

Authority: 34 CFR § 300.513 Hearing decisions and NMAC 6.31.2.13 - I. (21)

(a) Decision of hearing officer.

(1) Subject to paragraph (a)(2) of this section, a hearing officer's determination of whether a child received FAPE must be based on substantive grounds.

(2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies--

(i) Impeded the child's right to a FAPE;

(ii) Significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child; or

(iii) Caused a deprivation of educational benefit.

(3) Nothing in paragraph (a) of this section shall be construed to preclude a hearing officer from ordering the public agency to comply with procedural requirements under §§300.500 through 300.536.

(b) Construction clause and NMAC 6.31.2.13 (I). (22)
Nothing in §§300.507 through 300.513 shall be construed to affect the right of a parent to file an appeal of the due process hearing decision with the NMPED under §300.514(b), if a State level appeal is available.

(c) Separate request for a due process hearing. Nothing in §§300.500 through 300.536 shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

(d) Findings and decision to advisory panel and general public. The public agency, after deleting any personally identifiable information, must--

(1) Transmit the findings and decisions referred to in §300.512(a)(5) to the NMPED advisory panel established under §300.167; and

(2) Make those findings and decisions available to the public.

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

I. Due process hearings

(1) Scope. This Subsection I of 6.31.2.13 NMAC establishes procedures governing impartial due process hearings for the following types of cases:

(a) requests for due process in IDEA cases governed by 34 CFR §300.506-300.518 and 300.530-300.532; and

(b) claims for gifted services.

(2) Definitions. In addition to terms defined in 34 CFR Part 300 and 6.31.2.7 NMAC, the following definitions apply to this Subsection I of 6.31.2.13 NMAC.

(a) "Expedited hearing" means a hearing that is available on request by a parent or a public agency under 34 CFR §§300.532(c) and is subject to the requirements of 34 CFR §300.532(c).

(b) "Gifted services" means special education services to gifted children as defined in Subsection A of 6.31.2.12 NMAC.

(c) "Transmit" means to mail, transmit by electronic mail or facsimile machine, or hand deliver a written notice or other document and obtain written proof of delivery by one of the following means:

(i) an electronic mail system's confirmation of a completed transmission to an e-mail address that is shown to be valid for the individual to whom the transmission was sent;

(ii) a facsimile machine's confirmation of a completed transmission to a number which is shown to be valid for the individual to whom the transmission was sent;

(iii) a receipt from a commercial or government carrier showing to whom the article was delivered and the date of delivery;

(iv) a written receipt signed by the secretary of education or designee showing to whom the article was hand-delivered and the date delivered; or

(v) a **due process** final decision to any party not represented by counsel in a due process hearing by the U.S. postal service, certified mail, return receipt requested, showing to whom the article was delivered and the date of delivery. *(The term "due process" is omitted from 6.31.2.7(E)(3)(e))*

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

I. Due Process Hearings.

(22) Modification of final decision. Clerical mistakes in final decisions, orders or parts of the record and errors therein arising from oversight or omission may be corrected by the hearing officer at any time on the hearing officer's own initiative or on the request of any party and after such notice, if any, as the hearing officer orders. Such mistakes may be corrected after a civil action has been brought pursuant to Paragraph (25) of Subsection I of 6.31.2.13 NMAC below only with leave of the state or federal district court presiding over the civil action.

34 CFR § 300.514 Finality of decision; appeal; impartial review.

(a) Finality of hearing decision. A decision made in a hearing conducted pursuant to §§300.507 through 300.513 or §§300.530 through 300.534 is final, except that any party involved in the hearing may appeal the decision under the provisions of paragraph (b) of this section and §300.516.

(b) Appeal of decisions; impartial review.

(1) If the hearing required by §300.511 is conducted by a public agency other than the NMPED, any party aggrieved by the findings and decision in the hearing may appeal to the NMPED.

(2) If there is an appeal, the NMPED must conduct an impartial review of the findings and decision appealed. The official conducting the review must--

(i) Examine the entire hearing record;

(ii) Ensure that the procedures at the hearing were consistent with the requirements of due process;

(iii) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in §300.512 apply;

(iv) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(v) Make an independent decision on completion of the review; and

(vi) Give a copy of the written, or, at the option of the parents, electronic findings of fact and decisions to the parties.

(c) Findings and decision to advisory panel and general public. The NMPED, after deleting any personally identifiable information, must--

(1) Transmit the findings and decisions referred to in paragraph (b)(2)(vi) of this section to the New Mexico advisory panel established under §300.167; and

(2) Make those findings and decisions available to the public.

(d) Finality of review decision. The decision made by the reviewing official is final unless a party brings a civil action under §300.516.

34 CFR § 300.515 Timelines and convenience of hearings and reviews.

(a) The public agency must ensure that not later than 45 days after the expiration of the 30 day period under §300.510(b) (resolution session), or the adjusted time periods described in 300.510(c)--

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The NMPED must ensure that not later than 30 days after the receipt of a request for a review--

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved.

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

I. Due Process Hearings.

34 CFR § 300.516 Civil action. *(see following pages)*

You may also see the due process hearing fact sheet at NMPED website:
http://www.ped.state.nm.us/seo/dl09/Resolution%20Session%20Fact%20Sheet.pdf

Authority: NMAC 6.31.2.13(I) Additional Rights of Parents, Students and Public Agencies

I. Due Process Hearings.

(3) Bases for requesting hearing. A parent or public agency may initiate an impartial due process hearing on the following matters:

(a) the public agency proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child;

(b) the public agency refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of FAPE to the child;

(c) the public agency proposes or refuses to initiate or change the identification, evaluation or educational placement of, or services to, a child who needs or may need gifted services;

(4) Bases for requesting expedited hearing.

(a) Pursuant to 34 CFR §300.532 and 20 USC §1415(k)(3), a parent may request an expedited hearing to review any decision regarding placement or a manifestation determination under 34 CFR §§ 300.530-300.531.

(b) Pursuant to 34 CFR §300.532(c) and 20 USC §1415(k)(3), the public agency may request an expedited hearing if it believes that maintaining the current placement of a child is substantially likely to result in injury to the child or others.

(5) Request for hearing. A parent requesting a due process hearing shall transmit written notice of the request to the public agency whose actions are in question and to the SEB of the department. A public agency requesting a due process hearing shall transmit written notice of the request to the parent(s) and to the SEB of the department. Sample form: http://ped.state.nm.us/SEB/2012/Due_Process_Hearing_Form_08_22_2013.doc

The written request shall state with specificity the nature of the dispute and shall include:

(a) the name of the child;

(b) the address of the residence of the child (or available contact information in the case of a homeless child);

(c) the name of the school the child is attending;

(d) the name of the public agency, if known;

(e) the name and address of the party making the request (or available contact information in the case of a homeless party);

(f) a description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem;

(g) a proposed resolution of the problem to the extent known and available to the party requesting the hearing at the time;

(h) a request for an expedited hearing must also include a statement of facts sufficient to show that a requesting parent or the public agency is entitled to an expedited hearing under 34 CFR §300.532(c) or 20 USC §1415(k)(3);

(i) a request for a hearing must be in writing and signed and dated by the parent or the authorized public agency representative; an oral request made by a parent who is unable to communicate by writing shall be reduced to writing by the public agency and signed by the parent;

(j) a request for hearing filed by or on behalf of a party who is represented by an attorney shall include a sufficient statement authorizing the representation; a written statement on a client's behalf that is signed by an attorney who is subject to discipline by the New Mexico supreme court for a misrepresentation shall constitute a sufficient authorization; and

(k) a party may not have a hearing on a due process complaint until the party, or the attorney representing the party, files a due process complaint that meets the requirements of this paragraph.

(6) Response to request for hearing.

(a) A request for a hearing shall be deemed to be sufficient unless the party receiving the notice of request notifies the hearing officer and the other party in writing that the receiving party believes the request has not met the requirements of Paragraph (5) of Subsection I of 6.31.2.13 NMAC.

(b) Public agency response.

(i) In general. If the public agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process hearing request, such public agency shall, within 10 days of its receipt of the request, send to the parent a response that meets the requirements of 34 CFR Sec. 300.508(e) and 20 USC §1415(c)(2)(B)(i). This requirement presents an additional opportunity for parties to clarify and potentially resolve their dispute(s).

(ii) Sufficiency. A response filed by the public agency pursuant to (i) of Subparagraph (b) of Paragraph (6) shall not be construed to preclude the public agency from asserting that the parent's due process hearing request was insufficient where appropriate.

(c) Other party response. Except as provided in Subparagraph (b) of Paragraph (6) of Subsection I of 6.31.2.13 NMAC above, the non-complaining party shall, within 10 days of its receipt of the request for due process, send to the requesting party a response that specifically addresses the issues raised in the hearing request. This requirement also presents an opportunity to clarify and potentially resolve disputed issues between the parties.

(d) A party against whom a due process hearing request is filed shall have a maximum of 15 days after receiving the request to provide written notification to the hearing officer of insufficiency under Subparagraph (a) of Paragraph (6) of Subsection I of 6.31.2.13 NMAC. The 15-day timeline for the public agency to convene a resolution session under Paragraph (8) of Subsection I of 6.31.2.13 NMAC below runs at the same time as the 15-day timeline for filing notice of insufficiency.

(e) Determination. Within five days of receipt of a notice of insufficiency under Subparagraph (d) of Paragraph (6) of Subsection I of 6.31.2.13 NMAC above, the hearing officer shall make a determination on the face of the due process request of whether it meets the requirements of Paragraph (5) of Subsection I of 6.31.2.13 NMAC, and shall immediately notify the parties in writing of such determination.

(f) Amended due process request. A party may amend its due process request only if:

(i) the other party consents in writing to such amendment and is given the opportunity to resolve the

(ii) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than five days before a due process hearing occurs.

(g) Applicable timeline. The applicable timeline for a due process hearing under this part shall recommence at the time the party files an amended notice, including the timeline under Paragraph (8) of Subsection I of 6.31.2.13 NMAC.

(7) Duties of the SEB of the department. Upon receipt of a written request for due process, the SEB shall:

(a) appoint a qualified and impartial hearing officer who meets the requirements of 34 CFR Sec. 300.511(c) and 20 USC Sec. 1415(f)(3)(A);

(b) arrange for the appointment of a qualified and impartial mediator or IEP facilitator pursuant to 34 CFR Sec. 300.506 to offer ADR services to the parties;

(c) inform the parent in writing of any free or low-cost legal and other relevant services available in the area; the SEB shall also make this information available whenever requested by a parent; and

(d) inform the parent that in any action or proceeding brought under 20 USC Sec. 1415, a state or federal court, in its discretion and subject to the further provisions of 20 USC Sec. 1415(g)(3)(b) and 34 CFR Sec. 300.517, may award reasonable attorneys' fees as part of the costs to a prevailing party;

(e) the SEB shall also:

(i) keep a list of the persons who serve as hearing officers and a statement of their qualifications;

(ii) appoint another hearing officer if the initially appointed hearing officer excuses himself or herself from service;

(iii) ensure that mediation and FIEP meetings are considered as voluntary and are not used to deny or delay a parent's right to a hearing; and

(iv) ensure that within forty-five (45) days of commencement of the timeline for a due process hearing, a final written decision is reached and a copy transmitted to the parties, unless one or more specific extensions of time have been granted by the hearing officer at the request of either party (or at the joint request of the parties, where the reason for the request is to allow the parties to pursue an ADR option);

(f) following the decision, the SEB shall, after deleting any personally identifiable information, transmit the findings and decision to the state IDEA advisory panel and make them available to the public upon request.

(8) Preliminary meeting – *found in X. Due Process Resolution Session - page 37 of this Chapter*

(9) Hearing officer responsibility and authority. Hearing officers shall conduct proceedings under these rules with due regard for the costs and other burdens of due process proceedings for public agencies, parents and students. In that regard, hearing officers shall strive to maintain a reasonable balance between affording parties a fair opportunity to vindicate their IDEA rights and the financial and human costs of the proceedings to all concerned. Accordingly, each hearing officer shall exercise such control over the parties, proceedings and the hearing officer's own practices as he deems appropriate to further those ends

under the circumstances of each case. In particular, and without limiting the generality of the foregoing, the hearing officer, at the request of a party or upon the hearing officer's own initiative and after the parties have had a reasonable opportunity to express their views on disputed issues:

(a) shall ensure by appropriate orders that parents and their duly authorized representatives have timely access to records and information under the public agency's control which are reasonably necessary for a fair assessment of the IDEA issues raised by the requesting party;

(b) shall limit the issues for hearing to those permitted by the IDEA which the hearing officer deems necessary for the protection of the rights that have been asserted by the requesting party in each case;

(c) may issue orders directing the timely production of relevant witnesses, documents or other information within a party's control, protective orders or administrative orders to appear for hearings, and may address a party's unjustified failure or refusal to comply by appropriate limitations on the claims, defenses or evidence to be considered;

(d) shall exclude evidence that is irrelevant, immaterial, unduly repetitious or excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in federal courts or the courts of New Mexico; and

(e) may issue such other orders and make such other rulings, not inconsistent with express provisions of these rules or the IDEA, as the hearing officer deems appropriate to control the course, scope and length of the proceedings while ensuring that the parties have a fair opportunity to present and support all allowable claims and defenses that have been asserted.

(10) Duties of the hearing officer. The hearing officer shall excuse himself or herself from serving in a hearing in which he or she believes a personal or professional bias or interest exists which conflicts with his or her objectivity. The hearing officer shall:

(a) make a determination regarding the sufficiency of a request for due process within five days of receipt of any notice of insufficiency, and notify the parties of this determination in writing;

(b) schedule an initial prehearing conference within 14 days of commencement of the timeline for a due process hearing, or as soon as reasonably practicable in an expedited case pursuant to Paragraph (12) of Subsection I of 6.31.2.13 NMAC below;

(c) reach a decision, which shall include written findings of fact, conclusions of law, and reasons for these findings and conclusions and shall be based solely on evidence presented at the hearing;

(d) transmit the decision to the parties and to the SEB within 45 days of the commencement of the timeline for the hearing, unless a specific extension of time has been granted by the hearing officer at the request of a party to the hearing, or at the joint request of the parties where the reason for the request is to permit the parties to pursue an ADR option; for an expedited hearing, no extensions or exceptions are permitted beyond the timeframe provided in Subparagraph (a) of Paragraph 19 of Subsection I of 6.31.2.13 NMAC;

(i) if the due date of a decision referenced in Subsection I of 6.31.2.13 NMAC falls on a Saturday, a Sunday or a legal holiday, the decision must be mailed no later than the actual due date. A decision is considered "mailed" when addressed, stamped and placed in a United States postal service mailbox. If a parent exercises the option of receiving the decision electronically, the decision is "mailed" when transmitted electronically.

(e) the hearing officer may reopen the record for further proceedings at any time before reaching a final decision after transmitting appropriate notice to the parties; the hearing is considered closed and final when the written decision is transmitted to the parties and to the SEB; and

(f) the decision of the hearing officer is final, unless a party brings a civil action as set forth in Paragraph (24) of Subsection I of 6.31.2.13 NMAC below.

(11) Withdrawal of request for hearing. A party may unilaterally withdraw a request for due process at any time before a decision is issued. A written withdrawal that is transmitted to the hearing officer, and the other party at least two business days before a scheduled hearing, shall be without prejudice to the party's right to file a later request on the same claims, which shall ordinarily be assigned to the same hearing officer. A withdrawal that is transmitted or communicated within two business days of the scheduled hearing shall ordinarily be with prejudice to the party's right to file a later request on the same claims unless the hearing officer orders otherwise for good cause shown. A withdrawal that is entered during or after the hearing but before a decision is issued shall be with prejudice. In any event, the hearing officer shall enter an appropriate order of dismissal.

(12) Prehearing procedures. Unless extended by the hearing officer at the request of a party, within 14 days of the commencement of the timeline for a due process hearing and as soon as is reasonably practicable in an

expedited case, the hearing officer shall conduct an initial prehearing conference with the parent and the public agency to:

(a) identify the issues (disputed claims and defenses) to be decided at the hearing and the relief sought;
(b) establish the hearing officer's jurisdiction over IDEA and gifted issues;
(c) determine the status of the resolution session, FIEP meeting or mediation between the parties, and determine whether an additional prehearing conference will be necessary as a result;
(d) review the hearing rights of both parties, as set forth in Paragraphs (15) and (16) of Subsection I of 6.31.2.13 NMAC below, including reasonable accommodations to address an individual's need for an interpreter at public expense;
(e) review the procedures for conducting the hearing;
(f) set a date, time and place for the hearing that is reasonably convenient to the parents and child involved; the hearing officer shall have discretion to determine the length of the hearing, taking into consideration the issues presented;
(g) determine whether the child who is the subject of the hearing will be present and whether the hearing will be open to the public;
(h) set the date by which any documentary evidence intended to be used at the hearing by the parties must be exchanged; the hearing officer shall further inform the parties that, not less than 5 business days before a regular hearing or, if the hearing officer so directs, not less than two business days before an expedited hearing, each party shall disclose to the other party all evaluations completed by that date and recommendations based on the evaluations that the party intends to use at the hearing; the hearing officer may bar any party that fails to disclose such documentary evidence, evaluation(s) or recommendation(s) by the deadline from introducing the evidence at the hearing without the consent of the other party;
(i) as appropriate, determine the current educational placement of the child pursuant to Paragraph (26) of Subsection I of 6.31.2.13 NMAC below;
(j) exchange lists of witnesses and, as appropriate, entertain a request from a party to issue an administrative order compelling the attendance of a witness or witnesses at the hearing;
(k) address other relevant issues and motions; and
(l) determine the method for having a written, or at the option of the parent, electronic verbatim record of the hearing; the public agency shall be responsible for arranging for the verbatim record of the hearing; and
(m) the hearing officer shall transmit to the parties and the SEB of the department a written summary of the prehearing conference; the summary shall include, but not be limited to, the date, time and place of the hearing, any prehearing decisions, and any orders from the hearing officer.

(13) Each hearing involving oral arguments must be conducted at a time and place that is reasonably convenient to the parents and child involved.

(14) In order to limit testimony at the hearing to only those factual matters which remain in dispute between the parties, on or before 10 days before the date of the hearing, each party shall submit a statement of proposed stipulated facts to the opposing party. On or before five days before the date of the hearing, the parties shall submit a joint statement of stipulated facts to the hearing officer. All agreed-upon stipulated facts shall be deemed admitted, and evidence shall not be permitted for the purpose of establishing these facts.

(15) Any party to a hearing has the right to:

(a) be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
(b) present evidence and confront, cross-examine and compel the attendance of witnesses;
(c) prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before a regular hearing or, if the hearing officer so directs in the prehearing summary, at least two business days before an expedited hearing;
(d) obtain a written, or, at the option of the parents, electronic verbatim record of the hearing; and
(e) obtain written, or, at the option of the parents, electronic findings of fact and decisions.

(16) Parents involved in hearings also have the right to:

(a) have the child who is the subject of the hearing present; and
(b) open the hearing to the public.

(17) The record of the hearing and the findings of fact and decisions described above must be provided at no cost to the parents.

(18) Limitations on the hearing.

(a) The party requesting the due process hearing shall not be allowed to raise issues at the hearing that were not raised in the request for a due process hearing (including an amended request, if such amendment was previously permitted) filed under Paragraph (5) of Subsection I of 6.31.2.13 NMAC, unless the other party agrees otherwise.

(b) Timeline for requesting hearing. A parent or agency shall request an impartial due process hearing within two years of the date that the parent or agency knew or should have known about the alleged action that forms the basis of the due process request.

(c) Exceptions to the timeline. The timeline described in Subparagraph (b) of Paragraph (19) of Subsection I of 6.31.2.13 NMAC above shall not apply to a parent if the parent was prevented from requesting the hearing due to:

(i) specific misrepresentations by the public agency that it had resolved the problem that forms the basis of the due process request; or

(ii) the public agency's withholding of information from the parent that was required under this part to be provided to the parent.

(19) Rules for expedited hearings. The rules in Paragraphs (4) through (19) of Subsection I of 6.31.2.13 NMAC shall apply to expedited due process hearings with the following exceptions.

(a) The SEB of the department and the hearing officer shall ensure that a hearing is held within 20 school days of the date the request for hearing is received by the SEB, and a written decision is reached within 10 school days of the completion of the hearing, without exceptions or extensions, and thereafter mailed to the parties.

(b) The hearing officer shall seek to hold the hearing and issue a decision as soon as is reasonably practicable within the time limit described in Subparagraph (a) of Paragraph (20) of Subsection I of 6.31.2.13 NMAC above, and shall expedite the proceedings with due regard for any progress in a resolution session, FIEP meeting or mediation, the parties' need for adequate time to prepare and the hearing officer's need for time to review the evidence and prepare a decision after the hearing.

(c) The parties shall decide whether to convene a resolution session, FIEP meeting, or mediation before the commencement of an expedited hearing in accordance with Paragraph (8) of Subsection I of 6.31.2.13 NMAC, and are encouraged to utilize one of these preliminary meeting options. However, in the case of an expedited hearing, agreement by the parties to convene a resolution session, FIEP meeting or mediation shall not result in the suspension or extension of the timeline for the hearing stated under Subparagraph (a) of Paragraph (20) of Subsection I of 6.31.2.13 NMAC above. The timeline for resolution sessions provided in 34 CFR §300.532(c)(3) shall be observed.

(d) The hearing officer may shorten the five business-day rule for exchanging evidence before the hearing to not less than two business days and shall set the deadline and indicate the consequences of the parties' failure to meet that deadline in the written summary of the prehearing conference.

(e) The hearing officer may shorten the 15-day timeline for providing notice of insufficiency of a request for an expedited due process hearing to 10 school days.

(f) The hearing officer may shorten the timeline for the exchange of proposed stipulated facts between the parties as he deems necessary and appropriate given the circumstances of a particular case. The hearing officer may also shorten the timeline for providing agreed-upon stipulated facts to the hearing officer to two school days before the hearing.

(g) Decisions in expedited due process hearings are final, unless a party brings a civil action as provided in Paragraph (25) of Subsection I of 6.31.2.13 NMAC below.

(20) Decision of the hearing officer.

(a) In general. Subject to Subparagraph (b) of Paragraph (21) of Subsection I of 6.31.2.13 NMAC below, a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE).

(b) Procedural issues. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies:

(i) impeded the child's right to a FAPE;

(ii) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student; or

(iii) caused a deprivation of educational benefits.

(c) Rule of construction. Nothing in this paragraph shall be construed to preclude a hearing officer from ordering the public agency to comply with procedural requirements under this section.

(21) Rule of construction. Nothing in this Subsection I shall be construed to affect the right of a parent to file a complaint with the SEB of the department, as described under Subsection H of 6.31.2.13 NMAC.

XII. EXPENSES OF THE DUE PROCESS HEARING

34 CFR § 300.517 Attorneys' fees.

(a) In general.

(1) In any action or proceeding brought under section 615 of the Act, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to--

(i) The prevailing party who is the parent of a child with a disability;

(ii) To a prevailing party who is an SEA or the public agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(iii)To a prevailing SEA or LEA against the attorney of a parent, or against the parent, if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(2) Nothing in this subsection shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(b) Prohibition on use of funds.

(1) Funds under Part B of the Act may not be used to pay attorneys' fees or costs of a party related to any action or proceeding under section 615 of the Act and subpart E of this part.

(2) Paragraph (b)(1) of this section does not preclude the public agency from using funds under Part B of the Act for conducting an action or proceeding under section 615 of the Act.

(c) Award of fees. A court awards reasonable attorneys' fees under section 615(i)(3) of the Act consistent with the following:

(1) Fees awarded under section 615(i)(3) of the Act 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 under this paragraph.

(2) (i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under section 615 of the Act for services performed subsequent to the time of a written offer of settlement to a parent 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 an administrative proceeding, at any time more than 10 days before the proceeding begins;

(B) The offer is not accepted within 10 days; and

(C) The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(ii) Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless the meeting is convened as a result of an administrative proceeding or judicial action, or at the discretion of the State, for a mediation described in §300.506.

(iii) A meeting conducted pursuant to §300.510 shall not be considered--

(A) A meeting convened as a result of an administrative hearing or judicial action; or

(B) An administrative hearing or judicial action for purposes of this section.

(3) Notwithstanding paragraph (c)(2) of this section, an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(4) Except as provided in paragraph (c)(5) of this section, the court reduces, accordingly, the amount of the attorneys' fees awarded under section 615 of the Act, if the court finds that--

(i) The parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) 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 comparable skill, reputation, and experience;

(iii) The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) The attorney representing the parent did not provide to the public agency the appropriate information in the due process request notice in accordance with §300.508.

(5) The provisions of paragraph (c)(4) of this section do not apply in any action or proceeding if the court finds that the State or local agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of the Act.
(Authority: 20 USC 1415(i)(3)(B)–(G))

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

I. Due Process Hearings.

(23) Expenses of the hearing. The public agency shall be responsible for paying administrative costs associated with a hearing, including the hearing officer's fees and expenses and expenses related to the preparation and copying of the verbatim record, its transmission to the SEB, and any further expenses for preparing the complete record of the proceedings for filing with a reviewing federal or state court in a civil action. Each party to a hearing shall be responsible for its own legal fees or other costs, subject to Paragraph (25) of Subsection I of 6.31.2.13 NMAC below.

(24)Civil action (below)

(25) Attorneys' fees.

(a) In any action or proceeding brought under 20 USC §1415, the court, in its discretion and subject to the further provisions of 20 USC §1415(i) and 34 CFR §300.517, may award reasonable attorney fees as part of the costs to:

(i) the parent of a child with a disability who is a prevailing party;

(ii) a prevailing public agency against the attorney of a parent who files a request for due process or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(iii) a prevailing public agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(b) Any action for attorneys' fees must be filed within 30 days of the receipt of the last administrative decision.

(c) Opportunity to resolve due process complaints. A meeting conducted pursuant to Subparagraph (a) of Paragraph (8) of Subsection I of 6.31.2.13 NMAC shall not be considered:

(i) a meeting convened as a result of an administrative hearing or judicial action; or

(ii) an administrative hearing or judicial action for purposes of this paragraph.

(d) Hearing officers are not authorized to award attorneys' fees.

(e) Attorneys' fees are not recoverable for actions or proceedings involving services to gifted children or other claims based solely on state law.

XIII. CIVIL ACTION

34 CFR § 300.516 Civil action.

(a) General. Any party aggrieved by the findings and decision made under §§300.507 through 300.513 or §§300.530 through 300.534 who does not have the right to an appeal under §300.514(b), and any party aggrieved by the findings and decision under §300.514(b), has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under §300.507 or §§300.530 through 300.532. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(b) Time limitation. The party bringing the action shall have 90 days from the date of the decision of the hearing officer or if applicable, the decision of the State review official, to file a civil action, or, if the State has an explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by that State law.

(c) Additional requirements. In any action brought under paragraph (a) of this section, the court—

(1) Receives the records of the administrative proceedings;

(2) Hears additional evidence at the request of a party; and

(3) Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.

(d) Jurisdiction of district courts. The district courts of the United States have jurisdiction of actions brought under section 615 of the Act without regard to the amount in controversy.

(e) Rule of construction. Nothing in this part restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the Act, the procedures under §§300.507 and 300.514 must be exhausted to the same extent as would be required had the action been brought under section 615 of the Act.
(Authority: 20 USC 1415(i)(2) and (3)(A), 1415(l))

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

I. Due Process Hearings.

(24) Civil action.

(a) Any party aggrieved by the decision of a hearing officer in an IDEA matter has the right to bring a civil action in a state or federal district court pursuant to 20 USC Sec. 1415(i) and 34 CFR Sec. 300.516. Any civil action must be filed within 30 days of the receipt of the hearing officer's decision by the appealing party.

(b) A party aggrieved by the decision of a hearing officer in a matter relating solely to the identification, evaluation, or educational placement of or services to a child who needs or may need gifted services may bring a civil action in a state court of appropriate jurisdiction within 30 days of receipt of the hearing officer's decision by the appealing party.

XIV. STUDENT STATUS DURING PROCEEDINGS

34 CFR § 300.518 Child's status during proceedings.

(a) Except as provided in §300.533, during the pendency of any administrative or judicial proceeding regarding a request for a due process complaint notice requesting a due process hearing under §300.507, unless the State or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school until the completion of all the proceedings.

(c) If the complaint involves an application for initial services under this part from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned three, the public agency is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services under §300.300(b), then the public agency must provide those special education and related services that are not in dispute between the parent and the public agency.

(d) If the hearing officer in a due process hearing conducted by the NMPED or a New Mexico review official in an administrative appeal agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the State or local agency and the parents for purposes of paragraph (a) of this section. (Authority: 20 USC 1415(j))

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

I. Due Process Hearings.

(26) Child's status during proceedings.

(a) Except as provided in 34 CFR §300.533 and Paragraph (4) of Subsection I of 6.31.2.13 NMAC, and unless the public agency and the parents of the child agree otherwise, during the pendency of any administrative or judicial proceeding regarding an IDEA due process request, the child involved must remain in his or her current educational placement. Disagreements over the identification of the current

educational placement which the parties cannot resolve by agreement shall be resolved by the hearing officer as necessary.

(b) If the case involves an application for initial admission to public agency, the child, with the consent of the parents, must be placed in the public agency until the completion of all the proceedings.

(c) If a hearing officer agrees with the child's parents that a change of placement is appropriate, that placement must be treated as an agreement between the public agency and the parents for purposes of Subparagraph (a) of Paragraph (26) of Subsection I of 6.31.2.13 NMAC.

XV. APPEAL - EXPEDITED DUE PROCESS HEARING

34 CFR § 300.532 Appeal.

(a) General. The parent of a child with a disability who disagrees with any decision regarding placement under §§300.530 and 300.531, or the manifestation determination under §300.530(e), or an LEA that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to §300.507 and §300.508(a) and (b).

(b) Authority of hearing officer.

(1) A hearing officer under §300.511 hears, and makes a determination regarding, an appeal requested under paragraph (a) of this section.

(2) In making the determination under paragraph (b)(1) of this section, the hearing officer may—

(i) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of §300.530 or that the child's behavior was a manifestation of the child's disability; or

(ii) Order a change of placement of the 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 the child is substantially likely to result in injury to the child or to others.

(3) The procedures under paragraphs (a) and (b)(1) and (2) of this section may be repeated, if the public agency believes that returning the child to the original placement is substantially likely to result in injury to the child or to others.

(c) Expedited due process hearing.

(1) Whenever a hearing is requested under paragraph (a) of this section, the parents or the public agency involved in the dispute must have an opportunity for an impartial due process hearing consistent with the requirements of §§300.507 and 300.508(a) through (c) and §§300.510 through 300.514, except as provided in paragraph (c)(2) through (4) of this section.

(2) The NMPED or public agency is responsible for arranging the expedited due process hearing, which must occur within 20 school days of the date the complaint requesting the hearing is filed. The hearing officer must make a determination within 10 school days after the hearing.

(3) Unless the parents and the public agency agree in writing to waive the resolution meeting described in paragraph (c)(3)(i) of this section, or agree to use the mediation process described in §300.506--

(i) A resolution meeting must occur within seven days of receiving notice, and

(ii) The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 days of receipt of the due process complaint.

(4) A State may establish different State-imposed procedural rules for expedited due process hearings conducted under this section than it has established for other due process hearings, but, except for the timelines as modified in paragraph (c)(3) of this section, the State must ensure that the requirements in §§300.510 through 300.514 are met.

(5) The decisions on expedited due process hearings are appealable consistent with §300.514.

Placement During Appeals

34 CFR §300.533 Placement during appeals.

When an appeal under §300.532 has been requested by either the parent or the public agency, the child must remain in the interim alternative educational setting pending the decision of the hearing officer or until the

expiration of the time period specified in §300.530 (c) or (g), whichever occurs first, unless the parent and the NMPED or public agency agree otherwise.

Authority: NMAC 6.11.2.11 Disciplinary Removals of Students with Disabilities

J. Appeal.

(1) The parent of a student with a disability who disagrees with any decision regarding the placement or the manifestation determination under this section, or an administrative authority that believes that maintaining the current placement of the student is substantially likely to result in injury to the student or others, may appeal the decision by requesting a hearing. The hearing is requested by filing a complaint pursuant to Subsection I of 6.31.2.13 NMAC. *(found in this chapter)*

(2) A hearing officer who hears a matter under Paragraph (1) of Subsection J of 6.11.2.11 NMAC, has the authority provided in 34 CFR §§300.532(b).

(3) When an appeal under this subsection has been made by either the parent or the administrative authority, the student must remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period specified in Subsections B or E of this section, whichever occurs first, unless the parent and the administrative authority agree otherwise. [08-15-97; 6.11.2.11 NMAC - Rn, 6 NMAC 1.4.11 & A, 11-30-00; A, 9-15-05; A, 6/29/07] *(see also Chapter 7 Discipline)*

Authority: NMAC 6.31.2.13 Additional Rights of Parents, Students and Public Agencies

I. Due Process Hearings.

(4) Bases for requesting expedited hearing.

(a) Pursuant to 34 CFR §300.532 and 20 USC §1415(k)(3), a parent may request an expedited hearing to review any decision regarding placement or a manifestation determination under 34 CFR §§300.530-300.531.

(b) Pursuant to 34 CFR §300.532(c) and 20 USC §1415(k)(3), the public agency may request an expedited hearing if it believes that maintaining the current placement of a child is substantially likely to result in injury to the child or others.

(20) Rules for expedited hearings. The rules in Paragraphs (4) through (18) of Subsection I of 6.31.2.13 NMAC shall apply to expedited due process hearings with the following exceptions.

(a) The SEB of the department and the hearing officer shall ensure that a hearing is held within 20 school days of the date the request for hearing is received by the SEB, and a written decision is reached within 10 school days of the completion of the hearing, without exceptions or extensions, and thereafter mailed to the parties.

(b) The hearing officer shall seek to hold the hearing and issue a decision as soon as is reasonably practicable within the time limit described in Subparagraph (a) of Paragraph (19) of Subsection I of 6.31.2.13 NMAC above, and shall expedite the proceedings with due regard for any progress in a resolution session, FIEP meeting or mediation, the parties' need for adequate time to prepare and the hearing officer's need for time to review the evidence and prepare a decision after the hearing.

(c) The parties shall decide whether to convene a resolution session, FIEP meeting, or mediation before the commencement of an expedited hearing in accordance with Paragraph (8) of Subsection I of 6.31.2.13 NMAC, and are encouraged to utilize one of these preliminary meeting options. However, in the case of an expedited hearing, agreement by the parties to convene a resolution session, FIEP meeting or mediation shall not result in the suspension or extension of the timeline for the hearing stated under Subparagraph (a) of Paragraph (19) of Subsection I of 6.31.2.13 NMAC above. The timeline for resolution sessions provided in 34 CFR §300.532(c)(3) shall be observed.

(d) Subparagraph (a) of Paragraph (6) of Subsection I of 6.31.2.13 NMAC relating to sufficiency of the request for the expedited due process hearing does not apply to expedited hearings.

(e) The hearing officer may shorten the timeline for the exchange of proposed stipulated facts between the parties as he deems necessary and appropriate given the circumstances of a particular case. The hearing officer may also shorten the timeline for providing agreed-upon stipulated facts to the hearing officer to two school days before the hearing.

(f) Decisions in expedited due process hearings are final, unless a party brings a civil action as provided in Paragraph (24) of Subsection I of 6.31.2.13 NMAC below.