

# PROCEDURAL SAFEGUARDS NOTICE

**for Parents and Students  
Under The Individuals With Disabilities Education Act of 2004  
and Hawaii Law and Regulations**

## **PROCEDURAL SAFEGUARDS NOTICE for Parents and Students Under The Individuals With Disabilities Education Act of 2004 and Hawaii Law and Regulations<sup>1</sup>**

The Individuals with Disabilities Education Act of 2004 (IDEA 2004), the Federal law, and Hawaii law and regulations (Hawaii Administrative Rules, Title 8, Chapter 56, Provision of a Free Appropriate Public Education for a Student with a Disability) concerning the education of students with disabilities, require the Hawaii Department of Education (Department) to provide parents of a child with a disability with a notice containing a full explanation of the procedural safeguards available under the IDEA 2004 and U.S. Department of Education regulations and Hawaii law and regulations. A copy of this notice must be given to parents only one time a school year, except that a copy must be given to the parents: (1) Upon initial referral or parent request for evaluation; (2) Upon receipt of the first State complaint under 34 CFR §§300.151 through 300.153 and upon receipt of the first request for due process complaint under §300.507 in a school year; (3) When a decision is made to take a disciplinary action that constitutes a change of placement; (4) Upon each notification of an IEP meeting; (5) Upon giving the parent a prior written notice for any purpose requiring a prior written notice (see “Prior Written Notice” below); and (6) Upon parent request. [34 CFR §300.504(a)]

This procedural safeguards notice must include a full explanation of all of the procedural safeguards available under §300.148 (unilateral placement at private school at public expense), §§300.151 through 300.153 (State complaint procedures), §300.300 (consent), §§300.502 through 300.503, §§300.505 through 300.518, and §§300.530 through 300.536 (procedural safeguards in Subpart E of the Part B regulations), and §§300.610 through 300.625 (confidentiality of information provisions in Subpart F).

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<sup>1</sup> **Based on the U.S. Department of Education’s Model  
Procedural Safeguards Notice**

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## GENERAL INFORMATION

### PRIOR WRITTEN NOTICE

#### 34 CFR §300.503

##### Notice

The Department must give you written notice (provide you certain information in writing), whenever it:

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

##### Content of notice

The written notice must:

1. Describe the action that the Department proposes or refuses to take;
2. Explain why the Department is proposing or refusing to take the action;
3. Describe each evaluation procedure, assessment, record, or report the Department used in deciding to propose or refuse the action;
4. Include a statement that you have protections under the procedural safeguards provisions in Part B of the IDEA 2004 and Hawaii law and regulations for special education. These rights are explained in this brochure;
5. Tell you how you can obtain a description of the procedural safeguards (a copy of this brochure);
6. Include resources for you to contact for help in understanding Part B of the IDEA 2004;
7. Describe any other choices considered, including those considered by your child's Individualized Education Program (IEP) team, and the reasons why those choices were rejected; **and**
8. Provide a description of other reasons why the Department proposed or refused the action.

##### Notice in understandable language

The notice must be:

1. Written in language understandable to the general public; **and**

2. Provided in your native language or other mode of communication you use, unless it is clearly not feasible to do so.

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

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

## **NATIVE LANGUAGE**

### **34 CFR §300.29**

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

1. The language normally used by that person, or, in the case of a child, the language normally used by the child's parents;
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.

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

## **PARENTAL CONSENT - DEFINITION**

### **34 CFR §300.9**

#### **Consent**

*Consent* means:

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

Your withdrawal of consent does not negate (undo) an action that has occurred after you gave your consent and before you withdrew it.

## **PARENTAL CONSENT**

### **34 CFR §300.300**

#### **Consent for initial evaluation**

The Department cannot conduct an initial evaluation of your child to determine whether your child is eligible under Part B of the IDEA 2004 to receive special education and related services without first providing you with prior written notice of the proposed action and without obtaining your consent as described under the heading ***Parental Consent***.

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

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

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

#### **Special rules for initial evaluation of wards of the State**

If a child is a ward of the State and is not living with his/her parent —

1. The Department does not need consent from the parent for an initial evaluation to determine if the child is a child with a disability if:
2. Despite reasonable efforts to do so, the Department cannot find the child's parent;
3. The rights of the parents have been terminated in accordance with Hawaii law; **or**
4. A judge has assigned the right to make educational decisions and to consent for an initial evaluation to an individual other than the parent.

*Ward of the State*, as used in the IDEA 2004, means a child who, as determined by the State where the child lives, is:

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

*Ward of the State* does not include a foster child who has a foster parent who meets the definition of parent under the IDEA 2004 and Chapter 56.

### **Parental consent for services**

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

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

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

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

1. Is not in violation of the requirement to make FAPE available to your child for its failure to provide those services to your child; **and**
2. Is not required to have an individualized education program (IEP) meeting or develop an IEP for your child for the special education and related services for which your consent was requested; **and**
3. Your child will be treated as a general education student.

### **Parental consent for re-evaluations**

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

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

If you refuse to consent to your child's re-evaluation, the Department may, but is not required to, pursue your child's re-evaluation by using the mediation, due process complaint, resolution meeting, and impartial due process hearing procedures to seek to override your refusal to consent to your child's re-evaluation. As with initial evaluations, the Department does not violate its obligations under Part B of the IDEA 2004 if it declines to pursue the re-evaluation in this manner.

### **Documentation of reasonable efforts to obtain parental consent**

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

1. Detailed records of telephone calls made or attempted and the results of those calls;
2. Copies of correspondence sent to 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.

### **Other consent requirements**

Your consent is not required before the Department may:

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

The Department may not use your refusal to consent to one service or activity to deny you or your child any other service, benefit, or activity.

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

equitable services (services made available to parentally-placed private school children with disabilities).

## **INDEPENDENT EDUCATIONAL EVALUATIONS**

### **34 CFR §300.502**

#### **General**

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

If you request an independent educational evaluation, the Department must provide you with information about where you may obtain an independent educational evaluation and about the Department's criteria that apply to independent educational evaluations.

#### **Definitions**

*Independent educational evaluation* means an evaluation conducted by a qualified examiner who is not employed by the Department responsible for the education of your child.

*Public expense* means that the Department either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to you, consistent with the provisions of Part B of the IDEA 2004, which allow each State to use whatever State, local, Federal and private sources of support are available in the State to meet the requirements of Part B of the Act.

#### **Parent right to evaluation at public expense**

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

1. If you request an independent educational evaluation of your child at public expense, the Department must, without unnecessary delay, either: (a) File a due process complaint to request a hearing to show that its evaluation of your child is appropriate; or (b) Provide an independent educational evaluation at public expense, unless the Department demonstrates in a hearing that the evaluation of your child that you obtained did not meet the Department's criteria.
2. If the Department requests a hearing and the final decision is that the Department's evaluation of your child is appropriate, you

still have the right to an independent educational evaluation, but not at public expense.

3. If you request an independent educational evaluation of your child, the Department may ask why you object to the evaluation of your child obtained by the Department. However, the Department may not require an explanation and may not unreasonably delay either providing the independent educational evaluation of your child at public expense or filing a due process complaint to request a due process hearing to defend the Department's evaluation of your child.

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

#### **Parent-initiated evaluations**

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

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

#### **Requests for evaluations by hearing officers**

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

#### **Department criteria**

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

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

## CONFIDENTIALITY OF INFORMATION

PARENTS, OR STUDENTS AGE EIGHTEEN OR OLDER, ARE AFFORDED THE RIGHTS WITH RESPECT TO THE EDUCATION RECORDS OF THEIR CHILD UNDER THE FAMILY EDUCATIONAL RIGHTS AND PRIVACY ACT (FERPA) AND HAWAII'S REGULATIONS, CHAPTER 34 - PROTECTION OF EDUCATIONAL RIGHTS AND PRIVACY OF STUDENTS AND PARENTS. UNDER FERPA AND CHAPTER 34, WHEN A STUDENT BECOMES EIGHTEEN YEARS OF AGE, THE RIGHTS OF THE PARENTS REGARDING THE STUDENT'S EDUCATION RECORDS, INCLUDING THE RIGHT OF CONSENT TO RELEASE RECORDS, TRANSFER TO THE STUDENT.

### DEFINITIONS

#### 34 CFR §300.611

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

- *Destruction* means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.
- *Education records* means the type of records covered under the definition of "education records" in 34 CFR Part 99 (the regulations implementing the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. 1232g (FERPA)).
- *Participating agency* means the Department, agency or institution that collects, maintains, or uses personally identifiable information, or from which information is obtained, under Part B of the IDEA 2004.

### PERSONALLY IDENTIFIABLE

#### 34 CFR §300.32

*Personally identifiable* means information that has:

- (a) Your child's name, your name as the parent, or the name of another family member;
- (b) Your child's address;
- (c) A personal identifier, such as your 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 your child with reasonable certainty.

## NOTICE TO PARENTS

### 34 CFR §300.612

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

1. A description of the extent to which the notice is given in the native languages of the various population groups in the State;
2. A description of the 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 the Family Educational Rights and Privacy Act (FERPA) and its implementing regulations in 34 CFR Part 99.

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

### ACCESS RIGHTS

#### 34 CFR §300.613

The participating agency must permit you to inspect and review any education records relating to your child that are collected, maintained, or used by the agency under Part B of the IDEA 2004. The participating agency must comply with your request to inspect and review any education records on your child without unnecessary delay and before any meeting regarding an individualized education program (IEP), or any impartial due process hearing (including a resolution meeting or a hearing regarding discipline), and, as specified in Chapter 34, in no case more than 30 calendar days after you have made a request.

Your right to inspect and review education records includes:

1. Your right to a response from the participating agency to your requests for explanations and interpretations of the records;

2. Your right to obtain copies of the records (which will be at your own expense unless you cannot effectively inspect and review the records without receiving copies); **and**
3. Your right to have your representative inspect and review the records.

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

### **RECORD OF ACCESS**

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#### **34 CFR §300.614**

Each participating agency must keep a record of parties obtaining access to education records collected, maintained, or used under Part B of the IDEA 2004 (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

### **RECORDS ON MORE THAN ONE CHILD**

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#### **34 CFR §300.615**

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.

### **LIST OF TYPES AND LOCATIONS OF INFORMATION**

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#### **34 CFR §300.616**

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

### **FEES**

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#### **34 CFR §300.617**

Each participating agency may charge a fee for copies of records that are made for you under Part B of the IDEA 2004, if the fee does not effectively prevent you from exercising your right to inspect and review those records. Under Chapter 34, the charge may not exceed the actual reproduction cost and, in case of financial hardship, the Department may waive the reproduction cost.

A participating agency may not charge a fee to search for or to retrieve information under Part B of the IDEA 2004.

### **AMENDMENT OF RECORDS AT PARENT'S REQUEST**

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#### **34 CFR §300.618**

If you believe that information in the education records regarding your child collected, maintained, or used under Part B of the IDEA 2004 is inaccurate, misleading, or violates the privacy or other rights of your child, you may request the participating agency that maintains the information to change the information.

The participating agency must decide whether to change the information in accordance with your request within a reasonable period of time of receipt of your request. (See Chapter 34 for meeting with school personnel and timeline (10 days) for submitting the request for a hearing after the meeting.)

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

### **OPPORTUNITY FOR A HEARING**

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#### **34 CFR §300.619**

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

## HEARING PROCEDURES

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### 34 CFR §300.621

A hearing to challenge information in education records must be conducted according to the procedures for such hearings under the Family Educational Rights and Privacy Act (FERPA) and Chapter 34. (See Chapter 34 for specific hearing procedures and rights.)

## RESULT OF HEARING

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### 34 CFR §300.620

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

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

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

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

## CONSENT FOR DISCLOSURE OF PERSONALLY IDENTIFIABLE INFORMATION

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### 34 CFR §300.622

Unless the information is contained in education records, and the disclosure is authorized without parental consent under the Family Educational Rights and Privacy Act (FERPA), your consent must be obtained before personally identifiable information is disclosed to parties other than officials of participating agencies. Except under the circumstances specified below, your consent is not required before

personally identifiable information is released to officials of participating agencies for purposes of meeting a requirement of Part B of the IDEA 2004.

Your consent, or consent of an eligible child who has reached the age of majority (age 18 in Hawaii), must be obtained before personally identifiable information is released to officials of participating agencies providing or paying for transition services.

If your child is in, or is going to go to, a private school that is not located in the state you reside in, your consent must be obtained before any personally identifiable information about your child is released between officials in the state where the private school is located and officials in the state where you reside.

## SAFEGUARDS

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### 34 CFR §300.623

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

One official at each participating agency must assume responsibility for ensuring the confidentiality of any personally identifiable information. All persons collecting or using personally identifiable information must receive training or instruction regarding your State's policies and procedures regarding confidentiality under Part B of the IDEA 2004 and the Family Educational Rights and Privacy Act (FERPA).

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

## DESTRUCTION OF INFORMATION

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### 34 CFR §300.624

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

The information must be destroyed at your request. However, a permanent record of your child's name, address, and phone number, his

or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

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

## STATE COMPLAINT PROCEDURES

### DIFFERENCE BETWEEN DUE PROCESS HEARING COMPLAINT AND STATE COMPLAINT PROCEDURES

The regulations for Part B of IDEA 2004 set forth separate procedures for State complaints and for due process complaints and hearings. As explained below, any individual or organization may file a State complaint alleging a violation of any Part B requirement by the Department, or any other public agency. Only you or the Department may file a due process complaint on any matter relating to a proposal or a refusal to initiate or change the identification, evaluation or educational placement of a child with a disability, or the provision of a free appropriate public education (FAPE) to the child. While staff of the Department generally must resolve a State complaint within a 60-calendar-day timeline, unless the timeline is properly extended, an impartial due process hearing officer must hear a due process complaint (if not resolved through a resolution meeting or through mediation) and issue a written decision within 45 calendar days after the end of the resolution period, as described in this document under the heading Resolution Process, unless the hearing officer grants a specific extension of the timeline at your request or the Department's request. The State complaint and due process complaint, resolution and hearing procedures are described more fully below.

### ADOPTION OF STATE COMPLAINT PROCEDURES

#### 34 CFR §300.151

##### General

The Department must have written procedures for:

1. Resolving any complaint, including a complaint filed by an organization or individual from another State;
2. The filing of a signed, written complaint with the Department;

Address: Hawaii Department of Education  
Special Education Services Branch  
637 18th Avenue, Room C-102  
Honolulu, HI 96816

3. Widely disseminating the State complaint procedures to parents and other interested individuals, including parent training and information centers, protection and advocacy agencies, independent living centers, and other appropriate entities.

##### Remedies for denial of appropriate services

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

1. The failure to provide appropriate services, including corrective action appropriate to address the needs of the child; **and**
2. Appropriate future provision of services for all children with disabilities.

### MINIMUM STATE COMPLAINT PROCEDURES

#### 34 CFR §300.152

##### Time limit; minimum procedures

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

1. Carry out an independent on-site investigation, if the Department determines that an investigation is necessary;
2. Give the complainant the opportunity to submit additional information, either orally or in writing, about the allegations in the complaint;
3. Provide the school district or other public agency with the opportunity to respond to the complaint, including, at a minimum: (a) at the option of the agency, a proposal to resolve the complaint; **and** (b) an opportunity for a parent who has filed a complaint and the agency to agree voluntarily to engage in mediation;
4. Review all relevant information and make an independent determination as to whether the school district or other public agency is violating a requirement of Part B of the IDEA 2004; **and**
5. Issue a written decision to the complainant that addresses each allegation in the complaint and contains: (a) findings of fact and conclusions; **and** (b) the reasons for the Department's final decision.

### **Time extension; final decision; implementation**

The Department's procedures described above also must:

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

### **State complaints and due process hearings**

If a written State complaint is received that is also the subject of a due process hearing as described below under the heading **Filing a Due Process Complaint** on page 21, or the State complaint contains multiple issues of which one or more are part of such a hearing, the State must set aside the State complaint, or any part of the State complaint that is being addressed in the due process hearing until the hearing is over. Any issue in the State complaint that is not a part of the due process hearing must be resolved using the time limit and procedures described above. If an issue raised in a State complaint has previously been decided in a due process hearing involving the same parties (you and the school district), then the due process hearing decision is binding on that issue and the Department must inform the complainant that the decision is binding.

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

### **FILING A COMPLAINT**

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#### **34 CFR §300.153**

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

The State complaint must include:

1. A statement that the Department, including any district/complex, or other public agency has violated a requirement of Part B of the IDEA 2004 or its regulations;
2. The facts on which the statement is based;

3. The signature and contact information for the complainant; and
4. If alleging violations regarding a specific child:
  - (a) The name of the child and address of the residence of the child;
  - (b) The name of the school the child is attending;
  - (c) In the case of a homeless child or youth, available contact information for the child, and the name of the school the child is attending;
  - (d) A description of the nature of the problem of the child, including facts relating to the problem; **and**
  - (e) A proposed resolution of the problem to the extent known and available to the party filing the complaint at the time the complaint is filed.

The complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received, unless a longer period is reasonable because the violation is continuing or services are being requested for a violation that occurred not more than three years before the date the complaint was received as described under the heading **Adoption of State Complaint Procedures** on page 17.

## DUE PROCESS COMPLAINT PROCEDURES

### FILING A DUE PROCESS COMPLAINT

#### 34 CFR §300.507

##### General

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

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

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

1. The Department specifically misrepresented that it had resolved the issues identified in the complaint; **or**
2. The Department withheld information from you that it was required to provide you under Part B of the IDEA 2004.

If you disagree with the availability of a free appropriate education in the public schools, and place your child in a private school or facility and have questions regarding the financial responsibility for the private placement, a hearing for reimbursement must be requested within 90 days of placement, as described under the sub-heading ***Statute of Limitations in Claiming Reimbursements for Unilateral Placements in Private Schools*** on page 30.

##### Information for parents

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

## DUE PROCESS COMPLAINT

### 34 CFR §300.508

##### General

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

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

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

##### Content of the complaint

The due process complaint must include:

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

##### Notice required before a hearing on a due process complaint

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

##### Sufficiency of complaint

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

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

### **Complaint amendment**

You or the Department may make changes to the complaint only if:

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

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

### **Department's response to a due process complaint**

If the Department has not sent a prior written notice to you, as described under the heading **Prior Written Notice** on page 4, regarding the subject matter contained in your due process complaint, the Department must, within 10 calendar days of receiving the due process complaint, send to you a response that includes:

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

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

### **Other party response to a due process complaint**

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

## **MODEL FORMS**

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### **34 CFR §300.509**

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

## **MEDIATION**

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### **34 CFR §300.506**

#### **General**

The Department must make mediation available to allow you and the Department to resolve disagreements involving any matter under Part B of the IDEA 2004, including matters arising prior to the filing of a due process complaint. Thus, mediation is available to resolve disputes under Part B of the IDEA 2004, whether or not you have filed a due process complaint to request a due process hearing as described under the heading **Filing a Due Process Complaint** on page 21.

#### **Requirements**

The procedures must ensure that the mediation process:

1. Is voluntary on your part and the Department's part;
2. Is not used to deny or delay your right to a due process hearing, or to deny any other rights you have under Part B of the IDEA 2004; **and**
3. Is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

The Department must have a list of people who are qualified mediators and know the laws and regulations relating to the provision of special

education and related services. The Department must select mediators on a random, rotational, or other impartial basis.

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

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

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

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

A written, signed mediation agreement is enforceable in any State court of competent jurisdiction (a court that has the authority under State law to hear this type of case) or in a district court of the United States. Discussions that happened during the mediation process must be confidential. They cannot be used as evidence in any future due process hearing or civil proceeding of any Federal court or State court of a State receiving assistance under Part B of IDEA 2004. (Parties are no longer required to sign a confidentiality pledge before mediation begins.)

#### **Impartiality of mediator**

The mediator:

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

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

## **THE CHILD'S PLACEMENT WHILE THE DUE PROCESS COMPLAINT AND HEARING ARE PENDING**

### **34 CFR §300.518**

Except as provided below under the heading **PROCEDURES WHEN DISCIPLINING CHILDREN WITH DISABILITIES** on page 37, once a due process complaint is sent to the other party, during the resolution process time period, and while waiting for the decision of any impartial due process hearing or court proceeding, unless you and the Department agree otherwise, your child must remain in his or her current educational placement.

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

If the due process complaint involves an application for initial services under Part B of the IDEA 2004 for a child who is transitioning from being served under Part C of the IDEA 2004 to Part B of the IDEA 2004 and who is no longer eligible for Part C services because the child has turned three, the Department is not required to provide the Part C services that the child has been receiving. If the child is found eligible under Part B of the IDEA 2004 and you consent for the child to receive special education and related services for the first time, then, pending the outcome of the proceedings, the Department must provide those special education and related services that are not in dispute (those which you and the Department both agree upon).

## **RESOLUTION PROCESS**

### **34 CFR §300.510**

#### **Resolution meeting**

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

1. Must include a representative of the Department who has decision-making authority on behalf of the Department; **and**

2. May not include an attorney of the Department unless you are accompanied by an attorney.

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

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

The resolution meeting is not necessary if:

1. You and the Department agree in writing to waive the meeting;  
**or**
2. You and the Department agree to use the mediation process, as described under the heading **Mediation** on page 24.

### **Resolution period**

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

The 45-calendar-day timeline for issuing a final decision begins at the expiration of the 30-calendar-day resolution period, with certain exceptions for adjustments made to the 30-calendar-day resolution period, as described below.

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

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

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

3. Detailed records of visits made to your home or place of employment and the results of those visits.

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

### **Adjustments to the 30-calendar-day resolution period**

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

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

If you and the Department agree to use the mediation process, at the end of the 30-calendar-day resolution period, both parties can agree in writing to continue the mediation until an agreement is reached.

However, if either you or the Department withdraws from the mediation process, then the 45-calendar-day timeline for the due process hearing starts the next day.

### **Written settlement agreement**

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

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

### **Agreement review period**

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

## HEARINGS ON DUE PROCESS COMPLAINTS

### IMPARTIAL DUE PROCESS HEARING

#### 34 CFR §300.511

##### General

Whenever a due process complaint is filed, you or the Department must have an opportunity for an impartial due process hearing, as described in the ***Due Process Complaint*** and ***Resolution Process*** sections on pages 22 and 26.

The Department is responsible for convening hearings under a “one-tier” system. “One-tier” refers to a due process system in which the Department or another State-level agency or entity is responsible for convening due process hearings, and an appeal from a due process hearing decision is directly to a court.

##### Impartial hearing officer

At a minimum, a hearing officer:

1. Must not be an employee of the Department or any State agency that is involved in the education or care of the child. However, a person is not an employee of the agency solely because he/she is paid by the agency to serve as a hearing officer;
2. Must not have a personal or professional interest that conflicts with the hearing officer’s objectivity in the hearing;
3. Must be knowledgeable and understand the provisions of the IDEA 2004, and Federal and State regulations pertaining to the IDEA 2004, and legal interpretations of the IDEA 2004 by Federal and State courts; **and**
4. Must have the knowledge and ability to conduct hearings, and to make and write decisions, consistent with appropriate, standard legal practice.

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

##### Subject matter of due process hearing

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

##### Timeline for requesting a hearing

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

##### Exceptions to the timeline

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

1. The Department specifically misrepresented that it had resolved the problem or issue that you are raising in your complaint; **or**
2. The Department withheld information from you that it was required to provide to you under Part B of the IDEA 2004.

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

In accordance with Hawaii Revised Statutes, §302A-443 Administrative hearing procedures and subpoena power relating to the education of children with a disability, there is a 90-day statute of limitations in claiming reimbursements for unilateral placements in private schools. That is, if you disagree with the availability of a free appropriate education in the public schools, place your child in a private school or facility and have questions regarding the financial responsibility for the private placement, a hearing for reimbursement must be requested **within 90 days of placement**. Please note that placement occurs on the date the student enrolls or has his/her name placed on the private school or facility register, which may be prior to the student’s (physical) attendance.

### HEARING RIGHTS

#### 34 CFR §300.512

##### General

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

1. Be accompanied and advised by a lawyer and/or persons with special knowledge or training regarding the problems of children with disabilities;
2. Present evidence and confront, cross-examine, and require the attendance of witnesses;
3. Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing;

4. Obtain a written, or, at your option, electronic, word-for-word record of the hearing; **and**
5. Obtain written, or, at your option, electronic findings of fact and decisions.

#### **Additional disclosure of information**

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

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

#### **Parental rights at hearings**

You must be given the right to:

1. Have your child present;
2. Open the hearing to the public; **and**
3. Have the record of the hearing, the findings of fact and decisions provided to you at no cost.

## **HEARING DECISIONS**

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### **34 CFR §300.513**

#### **Decision of hearing officer**

A hearing officer's decision on whether your child received a free appropriate public education (FAPE) must be based on substantive grounds.

In matters alleging a procedural violation, a hearing officer may find that your child did not receive FAPE only if the procedural inadequacies:

1. Interfered with your child's right to a free appropriate public education (FAPE);
2. Significantly interfered with your opportunity to participate in the decision-making process regarding the provision of FAPE to your child; **or**
3. Caused a deprivation of an educational benefit.

A hearing decision will be based on a preponderance of evidence (the greater weight of the evidence).

#### **Construction clause**

None of the provisions described above can be interpreted to prevent a hearing officer from ordering the Department to comply with the requirements in the procedural safeguards section of the Federal regulations under Part B of the IDEA 2004 (34 CFR §§300.500 through 300.536).

#### **Separate request for a due process hearing**

Nothing in the procedural safeguards section of the Federal regulations under Part B of the IDEA 2004 (34 CFR §§300.500 through 300.536) can be interpreted to prevent you from filing a separate due process complaint on an issue separate from a due process complaint already filed.

#### **Findings and decision to advisory panel and general public**

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

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

## APPEALS

### FINALITY OF DECISION; APPEAL; IMPARTIAL REVIEW

#### 34 CFR §300.514

##### Finality of hearing decision

A decision made in a due process hearing (including a hearing relating to disciplinary procedures) is final, except that any party involved in the hearing (you or the Department) may appeal the decision by bringing a civil action, as described below.

### TIMELINES AND CONVENIENCE OF HEARINGS AND REVIEWS

#### 34 CFR §300.515

The Department must ensure that not later than 45 calendar days after the expiration of the 30-calendar-day period for resolution meetings **or**, as described under the sub-heading **Adjustments to the 30-calendar-day resolution period** on page 28, not later than 45 calendar days after the expiration of the adjusted time period:

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

A hearing officer may grant specific extensions of time beyond the 45-calendar-day time period described above at the request of either party.

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

### CIVIL ACTIONS, INCLUDING THE TIME PERIOD IN WHICH TO FILE THOSE ACTIONS

#### 34 CFR §300.516

##### General

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

##### Time limitation

The party (you or the Department) bringing the action has 30 calendar days from the date on which the party received the hearing decision to file a civil action.

##### Additional procedures

In any civil action, the court:

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

##### Jurisdiction of district courts

The district courts of the United States have authority to rule on actions brought under Part B of the IDEA 2004 without regard to the amount in dispute.

##### Rule of construction

Nothing in Part B of the IDEA 2004 restricts or limits the rights, procedures, and remedies available under the U.S. Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973 (Section 504), or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under Part B of the IDEA 2004, the due process procedures described above must be exhausted to the same extent as would be required if the party filed the action under Part B of the IDEA 2004. This means that you may have remedies available under other laws that overlap with those available under the IDEA 2004, but in general, to obtain relief under those other laws, you must first use the available administrative remedies under the IDEA 2004 (i.e., the due process complaint, resolution meeting, and impartial due process hearing procedures) before going directly into court.

## ATTORNEYS' FEES

### 34 CFR §300.517

#### General

In any action or proceeding brought under Part B of the IDEA 2004, if you prevail, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to you.

In any action or proceeding brought under Part B of the IDEA 2004, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to a prevailing State Educational Agency (the Department), to be paid by your attorney, if the attorney: (a) filed a complaint or court case that the court finds is frivolous, unreasonable, or without foundation; **or** (b) continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; **or**

In any action or proceeding brought under Part B of the IDEA 2004, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to a prevailing State Educational Agency (the Department), to be paid by you or your attorney, if your request for a due process hearing or later court case was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to unnecessarily increase the cost of the action or proceeding.

#### Award of fees

A court awards reasonable attorneys' fees as follows:

1. Fees must be based on rates prevailing in the community in which the action or hearing arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded.
2. Fees may not be awarded and related costs may not be reimbursed in any action or proceeding under Part B of the IDEA 2004 for services performed after a written offer of settlement to you if:
  - a. The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of a due process hearing or State-level review, at any time more than 10 calendar days before the proceeding begins;
  - b. The offer is not accepted within 10 calendar days; **and**

- c. The court or administrative hearing officer finds that the relief finally obtained by you is not more favorable to you than the offer of settlement.

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

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

A resolution meeting, as described under the sub-heading **Resolution meeting** on page 26, is not considered a meeting convened as a result of an administrative hearing or court action, and also is not considered an administrative hearing or court action for purposes of these attorneys' fees provisions.

The court reduces, as appropriate, the amount of the attorneys' fees awarded under Part B of the IDEA 2004, if the court finds that:

1. You, or your attorney, during the course of the action or proceeding, unreasonably delayed the final resolution of the dispute;
2. The amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably similar skill, reputation, and experience;
3. The time spent and legal services furnished were excessive considering the nature of the action or proceeding; **or**
4. The attorney representing you did not provide to the Department the appropriate information in the due process request notice as described under the heading **Due Process Complaint** on page 22.

However, the court may not reduce fees if the court finds that the Department unreasonably delayed the final resolution of the action or proceeding or there was a violation under the procedural safeguards provisions of Part B of the IDEA 2004.

## PROCEDURES WHEN DISCIPLINING CHILDREN WITH DISABILITIES

### AUTHORITY OF SCHOOL PERSONNEL

#### 34 CFR §300.530

##### Case-by-case determination

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

##### General

To the extent that they also take such action for children without disabilities, school personnel may, for not more than **10 school days** in a row, remove a child with a disability who violates a code of student conduct from his or her current placement to an appropriate interim alternative educational setting (which must be determined by the child's individualized education program (IEP) Team), another setting, or suspension. School personnel may also impose additional removals of the child of not more than **10 school days** in a row in that same school year for separate incidents of misconduct, as long as those removals do not constitute a change of placement as described under the heading ***Change of Placement Because of Disciplinary Removals*** on page 42. If the removal does constitute a change in placement, school personnel must follow additional procedures in this brochure, including a manifestation determination.

Once a child with a disability has been removed from his or her current placement for a total of **10 school days** in the same school year, the Department must, during any subsequent days of removal in that school year, provide services to the extent required below under the sub-heading ***Services*** on page 38.

##### Additional authority

If the behavior that violated the student code of conduct was not a manifestation of the child's disability as described under the sub-heading ***Manifestation determination*** on page 39, and the disciplinary change of placement would exceed **10 school days** in a school year, school personnel may apply the disciplinary procedures to that child with a

disability in the same manner and for the same duration as it would to children without disabilities, except that the school must provide services to that child as described below under the sub-heading ***Services***. The child's IEP Team determines the interim alternative educational setting for such services.

##### Services

The services that must be provided to a child with a disability who has been removed from the child's current placement may be provided in an interim alternative educational setting.

A child with a disability who is removed from the child's current placement for **more than 10 school days** must:

1. Receive services to the extent necessary to enable the student to participate in the general education curriculum, although in another setting, and appropriately advance toward achieving the goals set out in the student's IEP; **and**
2. Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not happen again. (See discussion below.)

For removals of 10 school days or less in a school year, the provision of services is not required for any student, disabled or non-disabled.

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

If the removal is a change of placement (see definition below), the child's IEP Team determines the appropriate services to enable the child to continue to progress in the general education curriculum, although in another setting, and appropriately advance toward achieving the goals set out in the child's IEP.

### **Functional Behavioral Assessment/Behavioral Intervention**

- Either before or not later than 10 business days after removing the child for more than 10 consecutive or cumulative school days, an IEP meeting must be convened to develop an assessment plan if the Department has not already conducted a functional behavioral assessment of the child.
- As soon as possible after developing the assessment plan, the assessment must be completed and the IEP team must develop appropriate behavioral interventions and modifications to address the misconduct so that it does not recur and the interventions and modifications must be implemented.
- If the child already has a behavioral intervention plan, the IEP team must review the plan and its implementation and modify the plan and its implementation, as necessary to address the behavior.

If a child with a disability who has a behavioral intervention plan and has been removed for more than 10 school days in a school year is then subjected to a removal that does not constitute a change of placement for purposes of disciplinary removals, the IEP team members must review the behavioral intervention plan and its implementation to determine if modifications are necessary. If one or more of the team members, including the parent, believe that modifications are needed, the team must meet to modify the plan and its implementation, to the extent the team determines necessary.

### **Manifestation determination**

Within **10 school days** of any decision to change the placement of a child with a disability because of a violation of a code of student conduct (except for a removal that is for **10 school days** in a row or less and not a change of placement), the Department, the parent, and the IEP Team must review all relevant information in the child's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents.

Then, the IEP team and other qualified personnel may only determine the misconduct was not a manifestation of the child's disability if:

- In relationship to the misconduct, the child's IEP and placement were appropriate and the special education services, supplementary aids and services, and behavior intervention strategies were provided consistent with the IEP and placement; and

- The child's disability did not impair the child's ability to understand the impact and consequences of the misconduct and to control the misconduct.

If in the conduct of the manifestation determination review, the Department identifies deficiencies in the IEP or placement or in their implementation, the Department must take immediate steps to correct the deficiencies.

### **Determination that behavior was a manifestation of the child's disability**

If the Department, the parent, and the IEP Team determine that the conduct was a manifestation of the child's disability, the IEP Team must either:

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

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

If a parent disagrees with the manifestation determination or with any decision regarding disciplinary removals, the parent may request a hearing. If a hearing is requested under either of these circumstances, the Department must provide for an expedited hearing.

In reviewing a decision with respect to a manifestation determination, a hearing officer must determine whether the Department has demonstrated that the child's behavior was not a manifestation of the child's disability consistent with the requirements described above.

### **Special circumstances**

Whether or not the behavior was a manifestation of the child's disability, school personnel may remove a child to an interim alternative

educational setting (determined by the child's IEP Team) for up to 45 calendar days, if the child:

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

A hearing officer may order a change in placement to an appropriate interim alternative educational setting for not more than 45 calendar days if the hearing officer, in an expedited hearing:

- Determines the Department has demonstrated by substantial evidence that keeping the child in the current placement is substantially likely to result in injury to the child or others;
- Considers the appropriateness of the current placement;
- Considers whether the Department has made reasonable efforts to minimize the risk of harm in the current placement, including the use of supplementary aids and services; and
- Determines that the interim alternative educational setting proposed by school personnel, in consultation with the child's special education teacher, enables the child to continue to participate in the general education curriculum, to receive the services and modifications that will enable the child to meet the goals set out in the IEP, and includes services and modification that are designed to address the behavior that resulted in the violation so that it does not recur.

In reviewing a decision of school personnel to place a child in an interim alternative educational setting for misconduct involving a weapon, illegal drugs or controlled substances as described above, a hearing officer will apply these same standards.

### Definitions

*Controlled substance* means a drug or other substance identified under schedules I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

*Illegal drug* means a controlled substance; but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act or under any other provision of Federal law.

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

*Weapon* has the meaning given the term "dangerous weapon" under paragraph (2) of the first subsection (g) of section 930 of title 18, United States Code.

### Notification

Not later than the date it makes the decision to make a removal that is a change of placement of the child because of a violation of a code of student conduct, the Department must notify the parents of that decision, and provide the parents with a procedural safeguards notice.

### Services

The interim alternative educational setting must be determined by the IEP team and enable the child to continue to participate in the general education curriculum and toward meeting goals set out in the IEP, and receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications that are designed to address the behavior that resulted in the violation so that it does not recur.

## **CHANGE OF PLACEMENT BECAUSE OF DISCIPLINARY REMOVALS**

### **34 CFR §300.536**

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

1. The removal is for more than 10 school days in a row; **or**
2. The series of removals total more than 10 school days in a school year (Chapter 56); **or**
3. The child has been subjected to a series of removals that constitute a pattern because:
  - a. The series of removals total more than 10 school days in a school year;

- b. The child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals;
- c. Of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another; **and**

Whether a pattern of removals constitutes a change of placement is determined on a case-by-case basis by the Department and, if challenged, is subject to review through due process and judicial proceedings.

#### **DETERMINATION OF SETTING**

##### **34 CFR § 300.531**

The individualized education program (IEP) Team must determine the interim alternative educational setting for removals that are **changes of placement**, and removals under the sub-headings **Additional authority** and **Special circumstances**, on pages 37 and 40.

#### **APPEAL**

##### **34 CFR § 300.532**

###### **General**

The parent of a child with a disability may file a due process complaint (see above) to request a due process hearing if he or she disagrees with:

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

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

###### **Authority of hearing officer**

A hearing officer that meets the requirements described under the sub-heading **Impartial Hearing Officer** on page 29, must conduct the due process hearing and make a decision. The hearing officer may:

- 1. 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 the requirements described under the

heading **Authority of School Personnel** on page 37, or that the child's behavior was a manifestation of the child's disability; **or**

- 2. Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 calendar 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.

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

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

- 1. The Department must arrange for an expedited due process hearing, which must occur within **20** school days of the date the hearing is requested and must result in a determination within **10** school days after the hearing, but in no case can it result in a decision being mailed to the parties more than 45 calendar days after the Department's receipt of the request for the hearing, without exceptions or extensions. The hearing officer may set a shorter timeline for the issuance of the decision at the pre-hearing conference at the request of either party.
- 2. Unless the parents and the Department agree in writing to waive the meeting, or agree to use mediation, a resolution meeting must occur within **seven** calendar days of receiving notice of the due process complaint. The hearing may proceed unless the matter has been resolved to the satisfaction of both parties within **15** calendar days of receipt of the due process complaint.
- 3. The timeline for disclosure of evidence and evaluations may be less than five business days and must be set by the hearing officer at the pre-hearing conference.

With the above exceptions, the procedural rules for expedited due process hearings are the same as other due process hearings.

A party may appeal the decision in an expedited due process hearing to court in the same way as they may for decisions in other due process hearings as described under the heading **Appeals**, on page 33.

## PLACEMENT DURING APPEALS

### 34 CFR §300.533

When, as described above, the parent or Department has filed a due process complaint related to disciplinary matters, the child must (unless the parent and the Department agree otherwise) remain in the interim alternative educational setting pending the decision of the hearing officer, whichever occurs first, or, until the expiration of the time period of removal as provided for and described under the heading **Authority of School Personnel** on page 37.

## PROTECTIONS FOR CHILDREN NOT YET ELIGIBLE FOR SPECIAL EDUCATION AND RELATED SERVICES

### 34 CFR §300.534

#### General

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

#### Basis of knowledge for disciplinary matters

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

1. The parent of the child expressed concern in writing (or orally if the parent does not know how to write or has a disability that prevents a written statement) that the child is in need of special education and related services to personnel of the appropriate educational agency, including a teacher of the child;
2. The parent requested an evaluation related to eligibility for special education and related services under Part B of the IDEA 2004;
3. The child's teacher, or other Department personnel:
  - a. Expressed concerns about the behavior or performance of the child to personnel of the Department in accordance with the child find and referral procedures;**or**

- b. Expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education or to other supervisory personnel of the Department; **or**
4. The behavior or performance of the student demonstrates the need for special education and related services;

#### Exception:

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

1. The child's parent has not allowed an evaluation of the child or refused special education services; **or**
2. The child has been evaluated and determined to not be a child with a disability under Part B of the IDEA 2004.

#### Conditions that apply if there is no basis of knowledge

If prior to taking disciplinary measures against the child, the Department does not have knowledge that a child is a child with a disability, as described above under the sub-heading **Basis of knowledge for disciplinary matters** and *Exception*, the child may be subjected to the disciplinary measures that are applied to children without disabilities who engaged in comparable behaviors.

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

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

If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the Department, and information provided by the parents, the Department must provide special education and related services in accordance with Part B of the IDEA 2004, including the disciplinary requirements described above.

## REFERRAL TO AND ACTION BY LAW ENFORCEMENT AND JUDICIAL AUTHORITIES

### 34 CFR §300.535

Part B of the IDEA 2004 does not:

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

### Transmittal of records

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

1. Must ensure that copies of the child's special education and disciplinary records are transmitted for consideration by the authorities to whom the agency reports the crime; and
2. May transmit copies of the child's special education and disciplinary records only to the extent permitted by the Family Educational Rights and Privacy Act (FERPA).

## REQUIREMENTS FOR UNILATERAL PLACEMENT BY PARENTS OF CHILDREN IN PRIVATE SCHOOLS AT PUBLIC EXPENSE

### GENERAL

#### 34 CFR §300.148

Part B of the IDEA 2004 does not require the Department to pay for the cost of education, including special education and related services, of your child with a disability at a private school or facility if the Department made a free appropriate public education (FAPE) available to your child and you choose to place the child in a private school or facility. However, the Department, if the private school is located in Hawaii, must include your child in the population whose needs are addressed under the Part B provisions regarding children who have been placed by their parents in a private school under 34 CFR §§300.131 through 300.144.

### Reimbursement for private school placement

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

A hearing must be requested for reimbursement of the costs of the private placement within 90 days of your unilateral special education placement of your child in the private school or facility. (See further discussion under sub-heading ***Statute of Limitations in Claiming Reimbursements for Unilateral Placements in Private Schools*** on page 30.)

### Limitation on reimbursement

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

1. If: (a) At the most recent individualized education program (IEP) meeting that you attended prior to your removal of your child

from the public school, you did not inform the IEP Team that you were rejecting the placement proposed by the Department to provide FAPE to your child, including stating your concerns and your intent to enroll your child in a private school at public expense; or (b) At least 10 business days (including any holidays that occur on a business day) prior to your removal of your child from the public school, you did not give written notice to the Department of that information;

2. If, prior to your removal of your child from the public school, the Department provided prior written notice to you, of its intent to evaluate your child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but you did not make the child available for the evaluation; **or**
3. Upon a court's finding that your actions were unreasonable.

However, the cost of reimbursement:

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

## **FREE AND LOW-COST LEGAL AND OTHER SUPPORT SERVICES**

<p>Aloha United Way 200 N. Vineyard Blvd, Suite 415 Honolulu, HI 96817 Call 211 directly from any island for any resource information on health and human services, including legal assistance in special education.</p>	<p>Children's Community Council Office 1177 Alakea Street, B-100 Honolulu, HI 96813 Telephone: 586-5363 Toll Free: (800) 437-8641</p>
<p>Hawaii Disability Rights Center 900 Fort Street Mall, Suite 1040 Honolulu, HI 96813 Telephone: 949-2922 (Offices on all islands: (800) 882-1057)</p>	<p>Hawaii Families as Allies 99-209 Moanalua Rd. Suite 305 Aiea, HI 96701 Telephone: 487-8785 Toll Free: (866) 361-8825</p>
<p>Lawyer Referral Services 1136 Union mall, Penthouse #1 Honolulu, HI 96813 Telephone: 537-9140</p>	<p>Learning Disabilities Association of Hawaii 200 N. Vineyard Blvd. Suite 310 Honolulu, HI 96817 Telephone: 536-9684</p>
<p>Maximum Legal Service Corporation/Disabled Rights Legal Project 200 N. Vineyard Blvd. Suite 300 Honolulu, HI 96817 Telephone: 585-0920</p>	<p>Special Parent Information Network 919 Ala Moana Blvd., Room 101 Honolulu, Hawaii 96814 Telephone: (808) 586-8126 Email: <a href="mailto:accesshi@aloha.net">accesshi@aloha.net</a></p>

**For assistance in understanding the provisions described in this brochure, or for copies of this brochure, please call:**

<p>OAHU:</p> <ul style="list-style-type: none"><li>• Central 622-6432</li><li>• Honolulu 733-4977</li><li>• Leeward 675-0384, -0386, -0335</li><li>• Windward 233-5710</li></ul>	<p>HAWAII:</p> <ul style="list-style-type: none"><li>• East 974-4535</li><li>• West 323-0015</li><li>• North 775-8895</li><li>• South 982-4252</li></ul>
<p>KAUAI 274-3504</p>	<p>MAUI 873-3527, -3520</p>
<p>STATE OFFICE 733-4400</p>	<p>MOLOKAI / LANAI 553-1724</p>

Hawaii Administrative Rules, Title 8, Department of Education, [Chapter 56 \(Provision of a Free Appropriate Public Education for a Student with a Disability\)](#) and Chapter 34, Protection of Educational Rights and Privacy of Students and Parents are available on the Board of Education website. The site may be accessed through [www.doe.k12.hi.us](http://www.doe.k12.hi.us).