

CHAPTER 12

DUE PROCESS HEARINGS

INTRODUCTION

Due process is a set of procedures that seeks to ensure fairness of educational decisions and accountability, both for parents and for educational professionals. Due process rights begin when educational professionals or the parents request an initial evaluation to determine whether or not a student is eligible and needs special education and related services. Every special education due process hearing and review must be provided for at no cost to the child or the parent of the child. The costs of the initial hearing must be provided for and paid by the school district except for attorney fees.

The due process hearing provides a forum where disagreements about the identification, evaluation, educational placement, and provision of a free appropriate public education for students with exceptionalities may be adjudicated. Although Federal regulations refer to due process rights for educators and parents of students with disabilities, in Kansas those same rights are also afforded to students with giftedness.

Usually parents and school personnel assume their responsibilities in regard to the education of children with exceptionalities and have little or no difficulty in reaching mutual agreement about the initiation, continuation, or termination of special education services. When disagreements arise, due process is available to bring in an impartial special education due process hearing officer to make a ruling. Ultimately, the intent of Federal and State special education due process requirements is to protect the rights of children from inappropriate actions by schools or by parents.

Parents are encouraged to contact Families Together (800-264-6343), the Disability Rights Center of Kansas (877-776-1541) other parent advocacy groups, or the Kansas State Department of Education (800-203-9462) to seek assistance. Other avenues to resolve disagreements include mediation (Chapter 10) and formal complaint (Chapter 11). Only as a last resort should the legal method of a special education due process hearing and appeal procedure be used. The special education due process hearing procedures are somewhat complicated. This chapter describes these procedures, but it is not a substitute for competent legal advice. Parents considering a request for a due process hearing are encouraged to consult with an attorney who practices in special education law.

At the end of the chapter is a timeline showing the steps in special education due process, sample forms may be found at <http://www.ksde.org/Default.aspx?tabid=3456>. See also Chapter 1, Parent Rights (Procedural Safeguards), for additional information about other rights of parents.

Topics addressed within this chapter are:

- A. Filing for Due Process
- B. Assigning A Special education due process hearing officer
- C. Resolution Meeting
- D. Pre-hearing Requirements
- E. Conducting A Due Process Hearing
- F. Reaching A Decision
- G. Appealing the Due Process Decision
- H. Stay-Put
- I. Civil Actions
- J. Attorney Fees

A. FILING FOR DUE PROCESS

Either the school district or the parents of an exceptional child may initiate a special education due process hearing to resolve differences about a child's identification, evaluation, educational placement, or provision of a free appropriate public education.

The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint.

There are some exceptions to this timeline, including when a school has misrepresented that it has resolved the problem or the school has withheld information that it was legally required to give to the parent (34 C.F.R. 300.507(a)(2); K.S.A. 72-972a(a)(1)(A)).

If the student is age 18, the student has the right to file for a due process hearing, unless a court has determined otherwise. To make their request, the party filing the complaint or the attorney for that party sends a copy of the Due Process Complaint Notice to the other party and to the Kansas State Department of Education, Special Education Services. This notice is confidential and must contain the following information:

- name of the child;
- address of the child's residence (or in the case of a homeless child or youth, available contact information for the child);
- name of the school the child is attending;
- description of the nature of the problem and the facts that form the basis of the complaint; and
- a proposed resolution of the problem. (K.S.A. 72-972a(a)(B))

When the school receives this request for a due process hearing, school personnel are required to:

- inform parents about mediation;
- inform parents of free or low-cost legal services; and
- provide a copy of the Parent Rights document for the first due process complaint in the school year (34 C.F.R. 300.504).

B. ASSIGNING A SPECIAL EDUCATION DUE PROCESS HEARING OFFICER

The school district is responsible for due process hearings, including assigning special education due process hearing officers (K.S.A. 72-973; K.S.A. 72-973a). After May 20, 2000, any newly appointed special education due process hearing officer must be an attorney. A special education due process hearing officer can have no personal or professional interest that would conflict with his/her objectivity. The special education due process hearing officer may not be an employee of the school district that is responsible for the child's education. The Due Process Timeline at the end of this chapter shows how special education due process hearing officers are appointed.

Kansas regulations also provide for a system of choice for parents in selecting and approving potential special education due process hearing officers. The school district's responsibility is to maintain a current list of trained, qualified special education due process hearing officers (not more than 3). This list must include the names and qualifications of the special education due process hearing officers who are available. It is good practice for the school to contact potential special education due process hearing officers before placing their names on the list to ensure that they would be available for the hearing.

Not more than 5 business days after a due process complaint is received the school must furnish the parents a list of qualified special education due process hearing officers (not more than 3) and a description of the process for selecting a special education due process hearing officer. Generally, the school district provides a list of two to three names of special education due process hearing officers and their qualifications to the parents. After the parents receive the list, the parent has five days to strike any or all special education due process hearing officers from the list. If the parent does NOT strike all names from the list, the school may select any special education due process hearing officer not stricken.

If the parents notify the school that they are striking all names on the list, the school contacts Special Education Services (800-203-9462) within 3 business days of receiving the parents' notice. Special Education Services then must appoint a special education due process hearing officer within 3 business days of receiving the school's request to appoint a special education due process hearing officer. The complete list of qualified special education due process hearing officers is maintained by KSDE. (K.S.A. 72-973(a); K.A.R. 91-40-28(d))

The school will also have hearing officers to resolve other matters not related to special education, such as the school's disciplinary hearing officer. For special education due process hearings, however, a special education due process hearing officer is required. This person is trained and qualified to conduct special education due process hearings. To differentiate between hearing officers, the complete term "special education due process hearing officer" will be used in this chapter.

C. RESOLUTION MEETING

When the parent has requested a due process hearing, the school must schedule a resolution meeting within 15 days of receiving the complaint notice. The school must convene a resolution meeting with the parent and the member or members of the IEP team who have specific knowledge of the facts identified in the complaint and a representative of the school who has the authority to make binding decisions on behalf of the school. The parent and the school determine which members of the IEP team will attend the meeting. The school may not include their attorney unless the parents bring their attorney.

The purpose of this meeting is for the parent of the child to discuss and explain the complaint, including the facts that form the basis of the complaint. The school then has an opportunity to resolve the complaint. If the meeting results in a resolution of the complaint, the parties develop a legally binding written agreement that both the parent and the representative of the school signs. The agreement is, by law, enforceable in any state or federal court. However, the law also permits either party to void the agreement within 3 business days of the date the agreement was signed.

If a resolution of the complaint is not reached at the meeting and the school has not resolved the complaint to the satisfaction of the parent within 30 days of the school's receipt of the complaint, the due process hearing procedures will be implemented and all of the applicable timelines for a due process hearing will commence.

Failure of the parent to participate in a resolution meeting when s/he has not waived the resolution process or requested to use mediation will delay the timelines for the resolution process and due process until the meeting is held (K.A.R. 91-40-28(f); 34 C.F.R. 300.510(b)(3)). In addition, if the school is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented) the school may, at the conclusion of the 30 day resolution period, request that the special education due process hearing officer dismiss the parents due process complaint (K.A.R. 91-40-28(f)(2); 34 C.F.R. 300.510(b)(4)).

If an agency fails to hold and participate a resolution meeting within 15 days of receiving a due process complaint, the parent may request the special education due process hearing officer to begin the due process hearing and commence the 45 day timeline for its completion (K.A.R. 91-40-28(f)(3); 34 C.F.R. 300.510(b)(5)).

A resolution meeting, however, is not required if the parent and the school agree, in writing, to waive the resolution meeting, or they agree to use mediation to attempt to resolve the complaint. (K.S.A. 72-973(a))

D. PREHEARING REQUIREMENTS

The party receiving a due process hearing notice must send to the party filing the notice, a response that specifically addresses the issues raised in the complaint within 10 days of receiving the complaint (K.S.A. 72-972a(d)).

If either the school or the parent believes that a notice of due process it has received does not meet the legal notice requirements (see Section A of this chapter), they may submit to the special education due process hearing officer a notice of insufficiency of the due process notice. A notice of insufficiency must be submitted within 15 days of the date of the party's receipt of the due process notice. The special education due process hearing officer has an additional 5 days to determine whether or not the original complaint notice is sufficient. The special education due process hearing officer shall immediately notify the parents and the school in writing of his/her decision.

If the school has not sent a prior written notice to the parent regarding the problem described in the parent's due process complaint notice, the school, within 10 days of receiving the complaint, must send to the parent a response that includes: (1) an explanation of why the agency proposed or refused to take the action raised in the complaint; (2) a description of other options that the IEP team considered and the reasons why those options were rejected; (3) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and (4) a description of the other factors that are relevant to the agency's proposed or refused action (34 DFR 300.508(e)(1); K.S.A. 72-972a(c)).

A party may **amend its due process complaint notice** only if: (a) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a resolution meeting; or (b) the special education due process hearing officer grants permission not less than 5 days before a due process hearing occurs (K.S.A. 72-972a(e)). When a complaint is amended the timelines start over.

Within five business days prior to a hearing, each party must disclose to the other party any evidence the party plans to use at the hearing, including all evaluations and recommendations based on the evaluation that they intend to use at the hearing (K.S.A. 72-973(b)(5)). Failure to timely provide this evidence to the other party gives the other party a right to prohibit presentation of the evidence at the hearing.

If the school and the parent agreed to the resolution meeting but have not resolved the issues within 30 days of the date the notice of due process was received, the hearing may begin. Also, note that, if both parties agree in writing to waive the resolution meeting, the 45 day timeline to complete the due process hearing begins the day after the written agreement is signed.

E. CONDUCTING A DUE PROCESS HEARING

The due process hearing must be held at a time and place reasonably convenient to the parent of the child and be a closed hearing, unless the parent requests an open hearing. Unless a resolution meeting is agreed to by both parties, the due process hearing shall be held not later than 35 days from the date on which the request is received. The parties shall be notified in writing of the time and place of the hearing at least five days prior to the hearing (K.S.A. 72-973(c)).

Both parties have the right to be present at the hearing and be accompanied and advised by legal counsel and people who have special knowledge about children with exceptionalities.

Special education due process hearing officers may administer oaths before hearing testimony (K.S.A. 72-975). The parties have the right to confront and cross-examine witnesses who appear in person at the hearing, either voluntarily or as a result of a subpoena. Each party may present witnesses in person or present their testimony by affidavit, including expert medical, psychological or educational testimony. Each party has a right to prohibit the other party from raising any issue at the hearing that was not raised in the due process complaint notice or in a prehearing conference held prior to the hearing (K.S.A. 72-973(b); K.S.A. 72-975).

Both parties have the right to have a written or, at the option of the parent, an electronic, verbatim record of the hearing. They also have the right to a written, or at the option of the parent, electronic decision, including the

findings of facts and conclusions. Both the record of the hearing and the decision of the special education due process hearing officer must be provided at no cost to the parents (K.S.A. 72-973(b)(7)(8); K.S.A. 72-975(e)).

F. REACHING A DECISION

The 45 day timeline for completion of a due process hearing starts on the day after one of the following events occurs:

- both parties to the due process proceedings agree, in writing, to waive the resolution meeting;
- the parties begin a resolution meeting or a mediation but agree, in writing, that resolution of their dispute is not possible before the end of the 30 day resolution period; or
- both parties agreed, in writing, to continue to engage in mediation beyond the end of the 30 day resolution period, but later, one, or both, of the parties withdraws from the mediation. (K.A.R. 91-40-28(g))

The special education due process hearing must be completed within 35 days of the receipt of the notice of due process. A Special education due process hearing officer may grant extensions of time upon request of either party, unless the due process hearing is an expedited hearing (K.S.A. 72-975(c)).

After the close of the special education due process hearing the special education due process hearing officer must render a decision on the matter, including findings of fact and conclusions, within 10 calendar days. The decision must be written or, at the option of the parent, must be an electronic decision. Any action of the special education due process hearing officer resulting from a due process hearing shall be final, subject to appeal and review (K.S.A. 71-973(h)).

A written notice of the result of any hearing must be given to the school providing for the hearing and must be sent by certified mail to the parent, or attorney of the child within 24 hours after the result is determined. In addition, the special education due process hearing officer must delete personally identifiable information from the report and send a copy to the State Board of Education, which must make the decision available to the Special Education Advisory Council. (K.S.A. 72-974(a); 34 C.F.R. 300.509(d))

G. APPEALING THE DUE PROCESS DECISION

If school personnel or the parents are dissatisfied by the findings of the special education due process hearing officer, either party may file a notice of appeal to the Commissioner of the State Department of Education not later than 30 calendar days after the date of the postmark on the written decision. A review officer appointed by the State Board of Education must conduct an impartial review of the hearing and make an independent decision based on the review. The review officer must conduct the review according to the requirements of K.S.A. 72-974 and 72-975. The review must be completed and the decision sent to both parties and the State Board within 20 calendar days after the notice of appeal is filed. Personally identifiable information is also deleted from the report, and is made available to the Special Education Advisory Council.

The decision of the review officer is final unless either party chooses to bring a civil action in either State or Federal district court.

Whenever an order of a due process hearing officer or state review officer requires a local education agency (LEA) to take some action, and no further appeal is available, Special Education Services will provide written notification to the LEA that it must provide Special Education Services with documentation of compliance with the order. The notification will identify the specific documentation to be provided and the date by which the documentation must be delivered to Special Education Services. Whenever an order of a due process hearing officer or state review officer requires the State Educational Agency (SEA) to take some action, and no further appeal is available, Special Education Services will identify the specific written documentation needed to verify that the order has been implemented, and produce the identified documentation. The documentation will be placed in the SEA due process file, and a copy of the documentation will be sent to the hearing officer and to the prevailing party.

H. STAY PUT

While the due process hearing is pending, the student involved in the complaint must remain ("stay-put") in the current educational placement, unless:

- The parents and the school agree to a different placement.
- The proceedings arise in connection with the initial admission of the child to school, in which case the child will be placed in the appropriate regular education classroom or program, unless otherwise directed by a special education due process hearing officer because a child's behavior is substantially likely to result in injury to the student or to others.
- The student is in an interim alternative educational setting for disciplinary reasons. (K.S.A. 72-993(a); 34 C.F.R. 300.533)

See Chapter 13 about suspension and expulsion of students with disabilities for a more complete explanation of stay-put requirements under disciplinary actions. These provisions are addressed in Federal regulations (34 C.F.R. 300.533), and State statute (K.S.A. 72-993(a)).

If the due process hearing involves an evaluation or initial services under Part B for a child who is transitioning from Part C services to Part B services and is no longer eligible for Part C services because the child has turned age three, the district is not required to provide the Part C services that the child had been receiving. However, if the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services, then the district must provide those special education and related services that are not in dispute between the parent and the district (K.A.R. 91-40-31(c)).

I. CIVIL ACTIONS

After a due process hearing, or an appeal to that hearing, has been completed either the parents or the school district may pursue a civil action through a State or Federal court for reimbursement of attorneys' fees. Federal and state regulations allow the civil action by either party. The State statute adds the timeline; in Kansas, a civil action must be filed within 30 calendar days after the review officer's decision (K.S.A. 72-974(c)(d); (34 C.F.R. 300.516).

J. ATTORNEY FEES

If the parents prevail in the due process hearing or upon appeal, the Court may award some or all of the attorney fees they have paid in conjunction with the due process hearing. Only a Court can award attorney fees to the parents. The special education due process hearing officer has no authority to do so. However, there may be limitations on the amount paid. For example, if it is found that the parents prolonged the process or if the fees charged are more than the hourly rate usually charged, the judge has the authority to reduce the award paid to the parents.

The school may be awarded attorney fees if a parent files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation. The school may be awarded attorney fees if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

In determining the amount of the reimbursement of attorney fees, the judge must follow Federal regulations (34 C.F.R. 300.517) and State law (K.S.A. 72-988(b)(12)):

Sec. 300.517. Attorneys' fees

(a) In general.

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

- (i) The prevailing party who is the parent of a child with a disability;
- (ii) To a prevailing party who is an SEA or LEA against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or
- (iii) To a prevailing SEA or LEA against the attorney of a parent, or against the parent, if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

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

(b) Prohibition on use of funds.

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

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

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

(1) Fees awarded under section 615(i)(3) of the Act must be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this paragraph.

- (2) (i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under section 615 of the Act for services performed subsequent to the time of a written offer of settlement to a parent if--
- (A) The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;
 - (B) The offer is not accepted within 10 days; and
 - (C) The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

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

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

- (A) A meeting convened as a result of an administrative hearing or judicial action; or
- (B) An administrative hearing or judicial action for purposes of this section.

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

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

- (i) The parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;
- (ii) The amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;
- (iii) The time spent and legal services furnished were excessive considering the nature of the action or proceeding; or
- (iv) The attorney representing the parent did not provide to the LEA the appropriate information in the due process request notice in accordance with §300.508.

(5) The provisions of paragraph (c)(4) of this section do not apply in any action or proceeding if the court finds that the State or local agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of the Act.

K.A.R. 72-972a. Due process hearing, initiation of; complaint notice; response to notice.

(a) (1) Subject to the requirements in this section, the parent of an exceptional child or the agency responsible for providing services to the child may initiate a due process hearing regarding any problem arising in regard to any matter governed by this act, if:

- (A) The problem about which complaint is made occurred not more than two years before the filing of the complaint and the party filing the complaint knew or should have known about the alleged action that forms the basis of the complaint;
- (B) the party filing the complaint or the attorney for that party provides to the other party and to the department, a written due process complaint notice that shall remain confidential and include the following information:
 - (i) the name of the child, the address of the residence of the child (or 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;
 - (ii) a description of the nature of the problem and the facts that form the basis of the complaint; and
 - (iii) a proposed resolution of the problem.

(2) A parent or an agency shall not be entitled to a due process hearing until the parent or agency, or their attorney, files a notice that meets the requirements of this subsection.

(b) (1) Any due process complaint notice filed by a parent shall be deemed to be timely even if presented more than two years after the occurrence of the facts giving rise to the complaint, if:

- (A) The agency made specific misrepresentations that it had resolved the problem forming the basis of the complaint; or
- (B) the agency withheld information from the parent that is required to be given to the parent under this act.

(2) The due process complaint notice required by subsection (a) shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party, in writing, within 15 days of receiving the complaint, that the receiving party believes the notice does not meet the requirements.

- (3) Within five days of receipt of the notification provided under subsection (a), the hearing officer shall make a determination of whether the notification meets the requirements of subsection (b)(2) and shall immediately notify the parties, in writing, of such determination.
- (c) (1) If the complaint is filed by a parent and the agency has not sent a prior written notice to the parent regarding the problem described in the parent's due process complaint notice, the agency, within 10 days of receiving the complaint, shall send to the parent a response that includes:
- (A) An explanation of why the agency proposed or refused to take the action raised in the complaint, or an appropriate reply if the problem does not address proposed or refused action by the agency;
 - (B) a description of other options that the IEP team considered and the reasons why those options were rejected;
 - (C) a description of each evaluation procedure, assessment, record or report the agency used as the basis for any action it has proposed or refused; and
 - (D) a description of the factors that are relevant to the agency's proposal or refusal, or in reply to the complaint.
- (2) The fact an agency gives notice to a parent pursuant to paragraph (1) shall not preclude such agency from asserting that the parent's due process complaint notice is insufficient.
- (d) The non-complaining party, within 10 days of receiving the complaint, shall send to the complaining party a response that specifically addresses the issues raised in the complaint.
- (e) (1) A party may amend its due process complaint notice only if:
- (A) The other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to K.S.A. 72-973, and amendments thereto; or
 - (B) the hearing officer grants permission, except that such permission shall be granted not less than five days before a due process hearing occurs.
- (2) The applicable timeline for a due process hearing shall recommence at the time the party files an amended notice, including the timeline for resolution of the complaint.
- (f) (1) Nothing in this section shall be construed to preclude a parent or an agency from filing a separate due process complaint on an issue different from issues presented in a due process complaint already filed.
- (2) Upon motion of either party and if deemed appropriate by the due process hearing officer presiding in the initial hearing, the issues raised in the separate complaints may be considered and resolved in the same due process hearing.

K.S.A. 72-973. Due process requirements; time limitations; access to records; hearing officers.

- (a) (1) Except as hereinafter provided, within 15 days of receipt of a due process complaint notice from a parent, the agency shall convene a meeting with the parent and the member or members of the IEP team who have specific knowledge of the facts identified in the complaint, and a representative of the agency who has the authority to make binding decisions on behalf of the agency. This meeting shall not include the agency's attorney unless the parent is accompanied by an attorney.
- (2) At this meeting, the parent of the child shall discuss and explain the complaint, including the facts that form the basis of the complaint and the agency shall be provided the opportunity to resolve the complaint.
- (3) If the meeting of the parties results in a resolution of the complaint, the parties shall execute a written agreement that both the parent and the representative of the agency shall sign and that, at a minimum, includes the following statements:
- (A) The agreed upon resolution of each issue presented in the complaint;
 - (B) that each party understands that the agreement is legally binding upon them, unless the party provides written notice to the other party, within three days of signing the agreement, that the party giving notice is voiding the agreement; and
 - (C) if not voided, each party understands that the agreement may be enforced in state or federal court.
- (4) If a resolution of the complaint is not reached at the meeting held under this subsection and the agency has not resolved the complaint to the satisfaction of the parent within 30 days of the agency's receipt of the complaint, the due process hearing procedures shall be implemented and all of the applicable timelines for a due process hearing shall commence. All discussions that occurred during the meeting shall be confidential and may not be used as evidence in any subsequent hearing or civil proceeding.
- (5) A meeting shall not be required under this subsection if the parent and the agency agree, in writing, to waive such a meeting, or they agree to use mediation to attempt to resolve the complaint.
- (b) Any due process hearing provided for under this act, shall be held at a time and place reasonably convenient to the parent of the involved child, be a closed hearing unless the parent requests an open hearing, and be conducted in accordance with procedural due process rights, including the following:
- (1) The right of the parties to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities;
 - (2) the right of the parties to be present at the hearing;
 - (3) the right of the parties to confront and cross-examine witnesses who appear in person at the hearing, either voluntarily or as a result of the issuance of a subpoena;
 - (4) the right of the parties to present witnesses in person or their testimony by affidavit, including expert medical, psychological or educational testimony;
 - (5) the right of the parties to prohibit the presentation of any evidence at the hearing which has not been disclosed to the opposite party at least five days prior to the hearing, including any evaluations completed by that date and any recommendations based on such evaluations;
 - (6) the right to prohibit the other party from raising, at the due process hearing, any issue that was not raised in the due process complaint notice or in a prehearing conference held prior to the hearing;
 - (7) the right of the parties to have a written or, at the option of the parent, an electronic, verbatim record of the hearing; and
 - (8) the right to a written or, at the option of the parent, an electronic decision, including findings of facts and conclusions.
- (c) Except as provided by subsection (a), each due process hearing, other than an expedited hearing under K.S.A. 72-993, and amendments thereto, shall be held not later than 35 days from the date on which the request therefore is received. The parties shall be notified in writing of the time and place of the hearing at least five days prior thereto. At any reasonable time prior to the hearing, the parent and the

counsel or advisor of the involved child shall be given access to all records, tests, reports or clinical evaluations relating to the proposed action.

- (d) (1) Except as otherwise provided in K.S.A. 72-993, and amendments thereto, during the pendency of any proceedings conducted under this act, unless the agency and parent otherwise agree, the child shall remain in the then-current educational placement of such child.
(2) If proceedings arise in connection with the initial admission of the child to school, the child shall be placed in the appropriate regular education classroom or program in compliance with K.S.A. 72-1111, and amendments thereto, unless otherwise directed pursuant to section 18, and amendments thereto.
- (e) Subject to the provisions of K.S.A. 72-973a, and amendments thereto, the agency shall appoint a hearing officer for the purpose of conducting the hearing. Members of the state board, the secretary of social and rehabilitation services, the secretary of corrections, the commissioner of the juvenile justice authority, and members of any board or agency involved in the education of the child shall not serve as hearing officers. No hearing officer shall be any person responsible for recommending the proposed action upon which the hearing is based, any person having a personal or professional interest which would conflict with objectivity in the hearing, or any person who is an employee of the state board or any agency involved in the education of the child. A person shall not be considered an employee of the agency solely because the person is paid by the agency to serve as a hearing officer. Each agency shall maintain a list of hearing officers. Such list shall include a statement of the qualifications of each hearing officer. Each hearing officer and each state review officer shall be qualified in accordance with standards and requirements established by the state board and shall have satisfactorily completed a training program conducted or approved by the state board.
- (f) (1) Any party to a due process hearing who has grounds to believe that the hearing officer cannot afford the party a fair and impartial hearing due to bias, prejudice or a conflict of interest may file a written request for the hearing officer to disqualify such officer and have another hearing officer appointed by the state board. Any such written request shall state the grounds for the request and the facts upon which the request is based.
(2) If a request for disqualification is filed, the hearing officer shall review the request and determine the sufficiency of the grounds stated in the request. The hearing officer then shall prepare a written order concerning the request and serve the order on the parties to the hearing. If the grounds are found to be insufficient, the hearing officer shall continue to serve as the hearing officer. If the grounds are found to be sufficient, the hearing officer immediately shall notify the state board and request the state board to appoint another hearing officer.
- (g) (1) Except as provided in paragraph (2), the decision of the hearing officer in each due process hearing shall be based on substantive grounds and a determination of whether the child received a free appropriate public education.
(2) In due process hearings in which procedural violations are alleged, the hearing officer may find that the child did not receive a free appropriate public education only if the hearing officer concludes the procedural violations did occur and those violations:
(A) Impeded the child's right to a free appropriate public education
(B) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or
(C) caused a deprivation of educational benefits.
(3) Nothing in this subsection shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this act.
- (h) Whenever a hearing officer conducts any hearing, such hearing officer shall render a decision on the matter, including findings of fact and conclusions, not later than 10 days after the close of the hearing. The decision shall be written or, at the option of the parent, shall be an electronic decision. Any action of the hearing officer in accordance with this subsection shall be final, subject to appeal and review in accordance with this act.

K.S.A. 72-973a. Same; list and appointment of hearing officers; procedure.

Prior to appointing any hearing officer to conduct a due process hearing provided for under this act, the agency shall make its list of hearing officers available to the parent of the involved child and shall inform the parent of the right to request disqualification of any or all of the hearing officers on the list and to request the state board to appoint a hearing officer in accordance with the procedure provided in this subsection. If the parent does not give written notice of disqualification to the agency within five days after the parent receives the list, the agency may appoint from its list any hearing officer whom the parent has not requested to be disqualified. If the parent requests disqualification of all of the hearing officers and requests the appointment of a hearing officer by the state board, the agency shall immediately notify the state board and shall request the state board to appoint a hearing officer.

K.S.A. 72-974. Appeal and review; procedure; review officers, appointment and duties; federal court actions.

- (a) Written notice of the result of any hearing provided for under this act shall be given to the agency providing for the hearing and shall be sent by certified mail to the parent, or attorney of the child within 24 hours after the result is determined. Such decision, after deletion of any personally identifiable information contained therein, shall be transmitted to the state board which shall make the decision available to the state advisory council for special education and to the public upon request.
- (b) (1) Any party to a due process hearing provided for under this act may appeal the decision to the state board by filing a written notice of appeal with the commissioner of education not later than 30 calendar days after the date of the postmark on the written notice specified in subsection (a). A review officer appointed by the state board shall conduct an impartial review of the decision. The review officer shall render a decision not later than 20 calendar days after the notice of appeal is filed. The review officer shall:
(A) Examine the record of the hearing;
(B) determine whether the procedures at the hearing were in accordance with the requirements of due process;
(C) afford the parties an opportunity for oral or written argument, or both, at the discretion of the review officer;
(D) seek additional evidence if necessary;
(E) render an independent decision on any such appeal not later than five days after completion of the review; and
(F) send the decision on any such appeal to the parties and to the state board.
(2) For the purpose of reviewing any hearing and decision under provision (1), the state board may appoint one or more review officers. Any such appointment may apply to a review of a particular hearing or to reviewing a set or class of hearings as specified by the state board in making the appointment.

- (c) Subject to the provisions of subsection (e), any action of a review officer pursuant to this section is subject to review in accordance with the act for judicial review and civil enforcement of agency actions or to an action in federal court as allowed by the federal law.
- (d) Consistent with state court actions, any action in federal court shall be filed within 30 days after service of the review officer's decision.
- (e) In any action brought under subsection (c), the court:
- (1) Shall receive the records of the administrative proceedings;
 - (2) if it deems necessary, shall hear additional evidence at the request of a party;
 - (3) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate; and
 - (4) in accordance with the federal law, may award attorneys' fees to the prevailing party in any due process hearing or judicial action brought in accordance with this act.
- K.S.A. 72-975. Administration of oaths; issuance of subpoenas; extension of time; costs; hearing for additional evidence.**
- (a) Any person conducting a hearing or review under this act may administer oaths for the purpose of taking testimony therein.
- (b) Any person conducting a hearing or review under this act or any party to any such hearing or review may request the clerk of the district court to issue subpoenas for the attendance and testimony of witnesses and the production of all relevant records, tests, reports and evaluations in the same manner provided for the issuance of subpoenas in civil actions pursuant to K.S.A. 60-245, and amendments thereto.
- (c) Any person conducting a hearing or review under this act, at the request of either party, may grant specific extensions of time beyond the limitations specified in this act.
- (d) Any person conducting a hearing under this act shall consider any request for discovery in accordance with the provisions of K.S.A. 77-522, and amendments thereto, except that depositions of witnesses who will be available for the hearing shall not be allowed.
- (e) Every hearing and review under this act shall be provided for at no cost to the child or the parent of the child. The costs of any hearing provided for by a board shall be paid by the school district.
- (f) Any review officer conducting a review under this act may hold a hearing to receive additional evidence. Every such hearing shall be conducted in accordance with requirements which are consonant with the requirements of this act.
- K.S.A. 72-988**
- (b) The parents of exceptional children shall have the right to:
- (12) recover attorney fees, as provided in the federal law, if they are the prevailing parties in a due process hearing or court action; however, only a court shall have the authority to award attorney fees, and such fees may be reduced or denied in accordance with federal law.
- K.A.R. 91-40-28. Special education mediation and due process hearings.**
- (a) If a disagreement arises between a parent and an agency concerning the identification, evaluation, or educational placement of the parent's exceptional child, or the provision of FAPE to the child, the parent or the agency, or both, may request mediation or initiate a due process hearing.
- (b) (1) If mediation is requested by either party, the provisions of K.S.A. 72-996 and amendments thereto shall be followed, together with the requirement in paragraph (2) of this subsection.
- (2) When agreement is reached to mediate, the agency shall immediately contact the state board or its designee. A mediator shall be appointed by the state board from its list of qualified mediators, based upon a random or other impartial basis.
- (c) If a disagreement as described in subsection (a) arises, the parent or the agency, or both, may initiate a special education due process hearing by filing a due process complaint notice. Each due process hearing shall be provided for by the agency directly responsible for the education of the child.
- (d) (1) If a special education due process complaint notice is filed, the provisions of K.S.A. 72-972a through 72-975 and amendments thereto shall be followed, together with the requirements in this subsection.
- (2) Not more than five business days after a due process complaint notice is received, the agency providing for the hearing shall furnish to the parent the following information:
- (A) The agency's list of qualified due process hearing officers;
 - (B) written notification that the parent has the right to disqualify any or all of the hearing officers on the agency's list and to request that the state board appoint the hearing officer; and
 - (C) written notification that the parent has the right, within five days after the parent receives the list, to advise the agency of any hearing officer or officers that the parent chooses to disqualify.
- (3) (A) If a parent chooses to disqualify any or all of the agency's hearing officers, the parent, within five days of receiving the list, shall notify the agency of the officer or officers disqualified by the parent.
- (B) An agency may appoint from its list any hearing officer who has not been disqualified by the parent.
- (4) Not more than three business days after being notified that a parent has disqualified all of the hearing officers on its list, an agency shall contact the state board and request the state board to appoint a hearing officer. In making this request, the agency shall advise the state board of the following information:
- (A) The name and address of the parent;
 - (B) the name and address of the attorney, if any, representing the parent, if known to the agency; and
 - (C) the names of the agency's hearing officers who were disqualified by the parent.
- (5) Within three business days of receiving a request to appoint a hearing officer, the parent and agency shall be provided written notice by the state board of the hearing officer appointed by the state board.
- (e) If a due process hearing is requested by a parent or an agency, the agency shall provide written notice to the state board of that action. The notice shall be provided within five business days of the date the due process hearing is requested.
- (f) (1) Unless the agency and parent have agreed to waive a resolution meeting or to engage in mediation, the agency and parent shall participate in a resolution meeting as required by K.S.A. 72-973 and amendments thereto. The parent and agency shall determine which members of the IEP team will attend the meeting.
- (2) If a parent who files a due process complaint fails to participate in a resolution meeting for which the agency has made reasonable efforts to give the parent notice, the timelines to complete the resolution process and begin the due process hearing shall be delayed until

the parent attends a resolution meeting or the agency, at the end of the 30-day resolution period, requests the hearing officer to dismiss the due process complaint.

(3) If an agency fails to hold a resolution meeting within 15 days of receiving a due process complaint or to participate in a meeting, the parent may request the hearing officer to begin the due process hearing and commence the 45-day timeline for its completion.

(g) The 45-day timeline for completion of a due process hearing shall start on the day after one of the following events occurs:

(1) Both parties to the due process proceedings agree, in writing, to waive the resolution meeting.

(2) The parties participate in a resolution meeting or in mediation but agree, in writing, that resolution of their dispute is not possible by the end of the 30-day resolution period.

(3) Both parties agreed, in writing, to continue to engage in mediation beyond the end of the 30-day resolution period, but later one or both of the parties withdraw from the mediation process.

K.A.R. 91-40-29 Qualifications of special education mediators and due process hearing officers.

(a) To initially qualify as a special education mediator, a person shall meet the following requirements:

(1) Have passed a written examination prescribed by the state board concerning special education laws and regulations; and

(2) have completed a program sponsored or approved by the state board concerning effective mediation techniques and procedures, and the role and responsibilities of a mediator.

(b) (1) Except as otherwise provided in paragraph (2) of this subsection, to initially qualify as a special education due process hearing officer or review officer, a person shall meet the following requirements:

(A) Be a licensed attorney in good standing with the licensing agency in the state in which the person is licensed to practice law;

(B) have passed a written examination prescribed by the state board concerning special education laws and regulations;

(C) have completed a program sponsored or approved by the state board concerning due process hearing procedures and the role and responsibilities of a due process hearing officer; and

(D) have passed a written examination prescribed by the state board concerning due process proceedings.

(2) Each person who is on the list of qualified due process hearing officers maintained by the state board shall remain eligible to serve as a due process hearing officer or review officer, if the person the continuing education programs in special education law that are conducted or approved by the state board.

91-40-31. Educational placement during proceedings.

(a) Except as otherwise provided in K.S.A. 72-993 and amendments thereto and this regulation, during the pendency of any special education due process or judicial proceeding, the child's educational placement shall be determined in accordance with K.S.A. 72-973(c) and amendments thereto.

(b) If a state review officer in an administrative appeal agrees with the parent's position as to the appropriate educational placement for the child, the child shall be educated in that placement during any further proceedings, unless the parent and agency agree to another placement or the child's placement is changed in accordance with K.S.A. 72-993 and amendments thereto.

(c) If the due process hearing involves the evaluation of or initial services for a child who is transferring from the infant and toddler program under the federal law because the child has reached three years of age, the agency shall not be required to provide the services that the child had been receiving under the infant and toddler program. However, if the child is determined to be eligible for special education and related services, the agency shall provide appropriate services to which the parent consents.

**DUE PROCESS TIME-LINE SEC. 615
(PRE-HEARING PROCEDURES)**

Timeline	Responsible Party	Action
Day 1	Family or LEA	Due process complaint notice (problem about which complaint is made occurred not more than two years before the filing of the complaint) delivered to the other party and to KSDE. Notice must include sufficient information
	LEA	Five business days to furnish parents with the following: (a) list of qualified due process hearing officers; (b) written notice of (1) parent’s right (within five days) to disqualify any or all of the hearing officers on the list; (2) school may select any hearing officers left on the list; (3) if no hearing officers are left on the list, the school will request that the KSDE select a hearing officer; (4) availability of mediation. Also give written notice of the filing of a due process hearing to the KSDE.
	Family	Five days from receipt of list of hearing officers to respond with notice of disqualification of hearing officer(s).
	LEA	If all hearing officers are disqualified, the LEA has three business days after a parent gives notice that all hearing officers have been disqualified to contact KSDE and request appointment of hearing officer. (KSDE then has three business days to appoint a hearing officer.)
By day 10	Family	10 days to respond and specifically address the issues
	LEA	10 days response and notice, unless prior written notice regarding the issues has already been given to parents
By day 15	LEA	15 days to convene a resolution session unless waived by both parties
	Family or LEA	15 days to send notice of insufficiency of notice of complaint to Hearing Officer and to the other party
	Hearing Officer	5 days from receipt of Notice of Insufficiency determine sufficiency of complaint notice and notify parties in writing
N/A	LEA or Family	Amendment of complaint notice may be made any time prior to hearing if the other party consents in writing and has an opportunity for a resolution session or if the hearing officer grants permission for the amendment—if complaint notice is amended, all timelines recommence
	Hearing Officer	May grant request for amendment not later than 5 days prior to hearing
At least 5 days before Hearing	Family and LEA	5 business days prior to hearing (not less than), each party must disclose to the other party all evaluations and recommendations based on the evaluations that they intend to use at the hearing
Not before day 30	Hearing Officer	30 days from receipt of Notice of Complaint, if LEA has not resolved issues, the hearing may begin and applicable timelines for hearing shall commence
By day 65	Hearing Officer	35 days from end of initial 30 day period, hearing must begin, unless time is extended by the Hearing Officer.

QUESTIONS AND ANSWERS ABOUT DUE PROCESS HEARINGS

1. May the parents strike all names of special education due process hearing officers provided by the school district?

Yes. The school district must then request the Kansas State Department of Education to appoint a Special education due process hearing officer.

2. Do the parents have the right to an attorney at the due process hearing at public expense?

No. However, if the parents are the prevailing party, they may request from the Court that attorney fees be reimbursed by the school district. The law provides for exceptions and limitations as appropriate.

3. May the parents or the school district ask that their request for a special education due process hearing be withdrawn or dismissed?

Yes. A party that has filed for a special education due process hearing may, subsequently, request the action be dismissed.

4. May the special education due process hearing officer award attorney fees?

No. Only a Court has the authority to award attorney fees.

5. What if either party disagrees with the decision of the special education due process hearing officer?

If either party wishes to appeal a decision of the due process hearing officer, following the special education due process hearing, school personnel or the parents may appeal to the Kansas State Board of Education (KSBE). If an appeal to the KSBE is unsuccessful, either party may pursue further action through a civil proceeding in State or Federal district court.

6. What are some alternatives to due process hearings?

Parents and school personnel should always try to resolve differences at the local level. If they wish to use the informal process of mediation, they may contact the Special Education Services Team at the Kansas State Department of Education and request mediation (800-203-9462). An impartial third party is assigned to serve as a facilitator in reaching an agreement at no cost to either party. (See Chapter 10, Mediation.) If the parents or an organization wishes to file a formal complaint alleging the school has violated a special education law or regulation, they may do so. (See Chapter 11, Formal Complaint.)

7. When would a formal complaint be filed instead of requesting a due process hearing?

A formal complaint would be considered if the parents or any other person or organization wishes to have their complaint against the school investigated. Formal complaints are filed with the State Department of Education. The complaint must allege a violation of special education law or regulation. The State Department of Education does not have authority to consider complaints regarding differences of opinion or judgment that do not allege a violation of special education law or regulation (34 C.F.R. 300.153).

Due process is usually the last resort. Hopefully, the parties have first attempted all other forms of negotiation or mediation in an attempt to resolve their differences. If all these methods fail, either the parents or the school may file for due process.

8. If a parent or the district brings in an "expert witness" can they be reimbursed for this expense by a court of law?

The United States Supreme Court case, *Arlington Central School Dist. V. Murphy*, 126 S. Ct. 2455, 45 IDELR 267 (S.C. 2006), decided that the IDEA attorney's fees provision did not include any provision for the awarding of expert witness fees. Therefore, a court cannot award recovery of expert witness fees in an IDEA case.

