SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES

Chapter 6

Information on Due Process/Compliance Procedures

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SPECIAL EDUCATION RIGHTS AND RESPONSIBILITIES

Chapter 6

Information on Due Process/Compliance Procedures

1. What is a due process hearing?

When the parents of a student with disabilities and the school district disagree about the student's eligibility, placement, program needs, or related services, either side can request a due process hearing. At the hearing, both sides present evidence by calling witnesses and submitting any reports and evaluations that support their position. A state hearing officer decides whose witnesses and documents are correct and what program is appropriate. A due process hearing is generally not appropriate for issues addressed by the compliance complaint process.

2. What is a compliance complaint?

When the district appears to have violated a part of special education law or procedure, a parent, individual, public district or organization can file a complaint with the California State Department of Education (CDE). Examples of violations include: (1) failure to implement an individualized education program (IEP); (2) failure to assess or refer a student to special education; (3) failure to follow timelines for assessment and referral; (4) failure to inform parents of an IEP meeting; or (5) failure to implement a due process hearing decision or mediation agreement. An investigator from the CDE investigates the allegations and makes a written determination of whether the district was "out of compliance" with law or

with the student's IEP. If a district is found "out of compliance," the district should be ordered to come back into compliance. In addition, the CDE may order the district to submit a "corrective action plan" — a document describing the steps the district has taken, or will take, to assure that the problem does not occur again, as well as the timelines for taking those steps. CDE must approve or modify the plan.

3. What is the difference between a compliance complaint and a due process hearing?

Although people often confuse compliance complaints and due process, the main difference is:

(1) When there is a disagreement about what should go into a student's IEP, or where to implement the IEP, then due process is appropriate; but,

(2) When the district has not followed special education laws or procedures or has not implemented what is already specifically written into a student's IEP, then a compliance complaint is appropriate.

In other words, due process procedures involve a disagreement over what a student's program should include, while a compliance complaint involves a failure by the district to follow the rules or to do what has already been agreed to in writing in the IEP.

4. Who can file a compliance complaint?

Any individual, public agency or organization (such as a parent group) may file a written complaint. [Title 5 California Code of Regulations (C.C.R.) Sec. 4600(c).] The complaint may concern a single student, a group of students or a local district policy which you think violates federal or state special education law. If the complaint concerns more than one student, CDE calls this a "various" complaint. Although the statute does not say so, the Department may require that more than one student be named in the complaint.

5. When should I file a compliance complaint directly with the CDE?

In most cases, you can file a compliance complaint directly with the CDE. The Department must directly intervene (that is, not refer the complaint to the local district for self-investigation) in any of the following situations:

(1) The student or group of students may be in immediate physical danger or that the "health, safety or welfare" of a student or group of students is threatened.

(2) A public agency, other than a school district, has failed to comply with an applicable law or regulation relating to the provision of a free, appropriate public education (FAPE) to individuals with disabilities. [Cal. Gov. Code Sec. 7570, commonly referred to as "AB 3632" or "Chapter 26.5."]

(3) A district or public agency has failed to comply with the due process procedures established in federal and state law and regulations, or has failed or refused to implement a due process hearing order.

(4) A student with disabilities is not receiving the special education or related services specified in his IEP.

(5) A violation of federal law governing special education or its implementing regulations. [5 C.C.R. Sec. 4650(a)(7).]

If the facts of your situation fit into any one or more of the five situations described above, you should specifically request that the CDE investigate your complaint directly. See *Sample Letter - Compliance Complaint*, Appendices Section – Appendix I. You should identify the situations outlined above that most resemble your situation. You should mention the specific situation in your complaint letter. Since numbers (1) through (5) cover most of the situations that can lead to filing a compliance complaint, you should be able to identify a subsection that fits your situation.

Outline the reasons for your request in your complaint letter. Your reasons may not conform exactly to the criteria stated above. However, this should not prevent you from at least making the request. The CDE will determine whether to accept

your complaint for direct state investigation or to refer your complaint for a local investigation by your district.

6. How do I file a compliance complaint with the CDE?

Send your compliance complaint letter to:

Complaint Management and Mediation Unit
Special Education Division
California State Department of Education
1430 N Street
Sacramento, CA 95814

You should fully describe your situation, including which parts of the law have been violated and the basis for your request. You may not know the exact sections of law that have been violated. If you describe the situation adequately, the Complaint Management and Mediation Unit should match the correct sections with your particular situation. If your child's IEP or other documents are relevant to your complaint, you should attach them. See *Sample Letter - Compliance Complaint*, Appendices Section – Appendix I.

7. Is there a time limit on when I must file a compliance complaint?

Yes. CDE must receive your complaint no later than one year after you claim the violation of special education law occurred. [34 C.F.R. Sec. 300.153(c); Cal. Ed. Code Secs. 56043(y) & 56500.2(b).]

8. What happens after I file a complaint?

Under federal and state law, the CDE has 60 calendar days from receipt of the complaint to carry out any necessary investigation and to resolve the complaint. [34 C.F.R. Secs. 300.152(a)(1)-(5).] When CDE receives your complaint, it must review the complaint to determine if it is a matter for state or local investigation.

Once it makes this determination, the Department must immediately notify you of its decision and either refer the complaint for local investigation or begin its direct investigation. [5 C.C.R. Sec. 4651.]

Although the state regulations appear to allow for a longer timeline, the federal regulation requires that the complaint be investigated and a decision issued within 60 days. [34 C.F.R. Secs. 300.152(a)(1)-(5); 5 C.C.R. Sec. 4662(b).] As the federal law provides more protection, the 60-day time limit for investigation of the complaint and issuance of a decision must apply. [*Town of Burlington v. Department of Education*, 736 F.2d 773, 792 (1st Cir., 1984); *David D. v. Dartmouth School Committee*, 775 F.2d 411, 418-20 (1st Cir. 1985); *Geis v. Board of Education*, 774 F.2d 575, 581-83 (3d Cir., 1985); *Board of Education v. Rowley*, 458 U.S. 176, 205 (1982); *California School for the Blind v. Honig*, 736 F.2d 538, 546 (9th Cir., 1984) *reversed on other grounds*, 471 U.S. 148 (1985).]

If your complaint involves one or two simple compliance issues, you may wish to ask in your complaint that the investigation be expedited or "fast tracked." Examples might include: (1) your child's IEP specifies that he is to receive transportation and the bus has not come for two days; (2) your child's teacher does not attend his IEP meetings; (3) your child's IEP specifies that he have an instructional aide during certain periods of the day and the aide has not been provided; or (4) your child's principal has told you that because of the child's behavior at school, you should not bring him back. After filing your complaint, you may also wish to call the compliance office to find out who has been assigned the complaint to remind that investigator of your request and reasons for expedited processing. The CDE's Special Education Dispute Resolution Process is available at www.cde.ca.gov/ls/cs/k3/dispute.asp.

Whether or not you file a fast-track complaint, if you do not hear from CDE within 10 days after you mail your complaint, you should call 800-926-0648 to follow up. You can also fax the CDE at 916-327-3704.

9. How does the CDE investigate complaints?

If both you and the district want to mediate the dispute, CDE must offer a mediation process to do so. [5 C.C.R. Secs. 4660(a)(1)-(2).] There will be no investigation of your complaint by CDE if you and the district mediate the dispute and resolve all issues. [5 C.C.R. Sec. 4660(a)(3).]

If an investigation is necessary, the CDE will appoint a compliance investigator to act on your complaint. The CDE will send a written notice of the investigator's name and the investigation dates. The notice will also explain the investigation process. The investigator will contact you and the local district to obtain both views of the problem and will review records if necessary. [5 C.C.R. Secs. 4662 & 4663.]

10. What happens when CDE finds a district to be out of compliance?

If the investigation indicates a failure by the district to comply with the law, the CDE may require "corrective action." The CDE investigation report must set forth the timelines the district must follow to correct its violations. [5 C.C.R. Sec. 4664.]

If the noncompliance is not corrected, CDE shall take further action. Actions may include a court proceeding for an order requiring compliance, or a proceeding to recover or stop state funding to the noncompliant local district.

[5 C.C.R. Sec. 4670(a).]

If CDE finds that a district has not provided appropriate services, it must address the failure through corrective actions that address the needs of the affected student, such as compensatory services or monetary reimbursement. The federal regulations also require CDE in its corrective action plan to "address…appropriate future provision of services for all children with disabilities."

[34 C.F.R. Sec. 300.151(b) (italics added).]

11. What can I do if I do not agree with the CDE's decision?

Within 35 days of receiving CDE's investigation decision, you or the district may request reconsideration of the decision by the Superintendent of Public Instruction. The Superintendent may respond in writing within 35 days, either modifying the conclusions or corrective action, or denying the request outright. The CDE decision remains in effect and enforceable pending the Superintendent's reconsideration. [5 C.C.R. Sec. 4665.]

12. Who handles complaints when CDE does not intervene directly?

If CDE chooses not to intervene directly, it must send the complaint immediately to the district involved for investigation. [5 C.C.R. Secs. 4640(a)-(b).] In addition, CDE must notify you by letter that it has transferred the complaint and that the Department is requesting "local resolution" of the complaint. The letter must also advise you of the appeal procedures should you disagree with the results of the local investigation. [5 C.C.R. Secs. 4640(a)-(b)]

13. How do I file a compliance complaint with my local district?

If your complaint does not meet the grounds for *direct state intervention* by CDE, you should send the complaint to your district superintendent of schools or director of special education. [5 C.C.R. Sec. 4630(b)(2).]

Each district must have its own written complaint investigation policy and procedure that has been approved by its board of education. Be sure to request a copy of your district's complaint investigation process before you file a complaint.

You should fully describe your situation, including which parts of the law have been violated. You may not know the exact sections of law that have been

violated. If you describe the situation adequately, the district should match the correct sections with your particular situation. If your child's IEP or other documents are relevant to your complaint, you should attach them.

If your complaint concerns *discrimination*, it must be filed within six months from the date the discrimination occurred, or from the date you first knew about the discrimination. This six month period may be extended by the district superintendent, if you ask for an extension in writing. [5 C.C.R. Sec. 4630(b).]

14. How does a district conduct investigations?

The district has 60 calendar days after receiving your complaint to complete its investigation. This time period may be extended only with your written agreement. [5 C.C.R. Sec. 4631(a).]

You or your representative, or both, and the district must have the opportunity to present information relevant to the complaint. Depending on your district's policies and procedures, the investigation may include a way for you and district staff to meet and discuss the complaint or to question each other or each other's witnesses. [5 C.C.R. Sec. 4631(b).]

The district's decision after investigation must be in writing. It should contain findings of fact, a determination of whether the district was out of compliance, corrective actions required by the district (if any), and the reasons for making the decision. The decision should also include a notice of your right to appeal to CDE and the procedures you must follow in making an appeal. [5 C.C.R. Sec. 4631(e).]

15. Can a school district try to mediate (or otherwise informally resolve) a complaint before beginning a formal investigation?

Yes. School districts may develop a mediation or other "alternative dispute resolution" (ADR) procedure in order to resolve complaints informally before conducting an official investigation. This mediation or other informal process cannot extend the 60-day timeline for resolving complaints unless you agree in

writing to the extension. However, mediation or ADR cannot be a mandatory part of the process. You may waive this step. [5 C.C.R. Secs. 4631(f)-(g).]

16. What happens if I disagree with the district's investigation decision?

You may appeal directly to the CDE for review of the local decision within 15 days after you receive the district's final written decision. [5 C.C.R. Sec. 4632(a).]

When appealing a district decision, your complaint to CDE must set out the reasons for appealing. The appeal must include a copy of the original complaint and a copy of the local district decision. [5 C.C.R. Secs. 4632(b)-(c).]

If CDE finds that the school district failed to address one or more of your issues, it will refer those back to the district for investigation, which should be completed within 20 days. [5 C.C.R. Sec. 4632(e).]

The district must forward to CDE a complete copy of its investigation file. The CDE generally limits its review to the local investigation file, but may contact the parties for further information. If the Department finds that the district's decision is supported by "substantial evidence" and that the district followed proper complaint investigation procedures, it will deny the appeal. If the local decision is *not* supported by substantial evidence or the required procedures were not followed, CDE may send the complaint back to the district for further investigation, or issue a decision based on the evidence in the file, or conduct more investigation itself and issue a decision on the complaint. [5 C.C.R. Sec. 4633.]

17. What can I do if a teacher (or other staff) hurts my child – other than bringing a civil lawsuit against the school district or reporting the incident to the appropriate law enforcement authorities?

If a student or group of students is in immediate physical danger, or the health, safety or welfare of a student or group of students is threatened, you may file a

complaint with the CDE and the Department must investigate directly. [5 C.C.R. Secs. 4611(a) & 4650(a)(7)(C).]

18. Would I follow different complaint procedures if the community mental health agency or CCS (California Children's Services) fails to provide services as specified in my child's IEP?

If your complaint is about services provided by CCS or community mental health, you can file a complaint for direct state intervention, as described above, *or* under the inter-agency dispute resolution procedures. Filing complaints under both processes may bring a quicker resolution. The inter-agency complaint may be filed with *either* the Superintendent of Public Instruction (Superintendent) or the Secretary of Health and Human Services (Secretary). [California Government Code (Cal. Gov. Code) Sec. 7585(a).]

Secretary of Health and Human Services
1600 Ninth Street, 4th Floor
Sacramento, CA 95814

Superintendent of Public Instruction
California Department of Education
1430 N Street
Sacramento, CA 95814

Before reviewing your complaint, the agencies involved will want to see a copy of your child's IEP. You should send a copy of it with your complaint.

The Superintendent and the Secretary must meet to resolve the issue within 15 calendar days of receiving the complaint. They must mail a written copy of the meeting resolution to you, to the local school district, and to the affected agencies, within 10 days of the meeting. [Cal. Gov. Code Sec. 7585(b).]

If the agencies cannot resolve the issue within 15 days, the complaint can be appealed to the Office of Administrative Hearings ("OAH" or "hearing office"). The OAH will review the issue and submit findings within 30 days of receipt of the

case. The OAH decision is binding on all parties to the dispute. [Cal. Gov. Code Secs. 7585(c)–(e).]

When a complaint is filed pursuant to Section 7585(a), the student affected by the dispute must receive the service pending resolution of the dispute if the student had been receiving it. [Cal. Gov. Code Sec. 7585(f).]

19. Can teachers and other staff also file a compliance complaint?

Yes. Teachers and other staff may use the complaint process to address problems they experience from their superiors when they (teachers and other staff) have tried to help parents or special education students obtain appropriate special education services. No district employee may directly or indirectly use or attempt to use hisr official authority or influence to intimidate, threaten, coerce, or attempt to intimidate, threaten, or coerce any person, including, but not limited to, a teacher, related services provider, paraprofessional, aide, contractor, or subordinate for the purpose of interfering with that person's effort to assist a parent or guardian of a special education student to obtain services or accommodations for that student. [Cal. Ed. Code Sec. 56046(a).] If a teacher or other employee of the district believes an administrator or other employee of the district has violated this prohibition, he can file a complaint with the CDE and ask the Department for an investigation. [Cal. Ed. Code Sec. 56046(b).]

20. Can I file a complaint with any other agencies?

Yes. If your complaint involves an issue of educational discrimination under Section 504 of the Rehabilitation Act of 1973, you can file a disability-based discrimination complaint with the U.S. Department of Education, Office of Civil Rights (OCR). Complaints of educational discrimination against students with disabilities by school districts may also be filed with the CDE, using the complaint procedures described above. [5 C.C.R. Secs. 4600(c) & 4630(b).] Issues of disability-based educational discrimination, however, are usually appropriate for filing with OCR.

21. How would I file a complaint with OCR?

The OCR is responsible for investigation of complaints regarding allegations of discrimination in education on the basis of disability that may constitute violations of Section 504 of the Rehabilitation Act of 1973. [29 U.S.C. Sec. 794.] You will find the regulations defining discrimination in education at 34 C.F.R. Sec. 104.1 and following. See Chapter 1, *Information on Basic Rights and Responsibilities*.

If you wish to file a complaint with OCR, you should write or call OCR at the address below and ask for a copy of the complaint form and instruction sheet for filing a complaint:

Office for Civil Rights, Region IX
U.S. Department of Education
50 Beale Street, Suite 7200
San Francisco, CA 94105
Telephone: 415-486-5555
TTY: 877-521-2172
FAX: 415-486-5570

Complaints that do not allege violations of Section 504, but may constitute violations of Federal Special Education Law, should be filed with the CDE as a compliance complaint. See OCR's webpage for a definition of educational discrimination at www.ed.gov/about/offices/list/ocr/index.html.

22. When would I file a Section 504 discrimination complaint with OCR?

A parent, other interested person or organization may file a Section 504 complaint whenever a student with a disability does not receive educational benefit from his instructional program that is not equal to that received by his nondisabled peers, as a result of the conduct or policy of the district. This includes the situation where a student with a disability is excluded from participation in any federally funded program or activity, such as public education. [34 C.F.R. Sec. 104.4(a).] Schools generally receive federal funding. A student does not have to have a special

education qualifying disability for you to file a discrimination complaint with OCR against a district. Complaints could include issues related to architectural barriers, "program access" or the failure to implement an agreed upon accommodation plan for a student. You must file a discrimination complaint within 180 days from the date of the discrimination, unless the time for filing is extended by the responsible Department official. [34 C.F.R. Sec. 100.7.]

Section 504 complaints may also be filed on behalf of students who are not officially special education students and whose disabilities are not being acknowledged by a school district. This is often the case when a student is excessively suspended for behavioral problems (but is not identified as having a disability) or is suspended for disability-related behaviors. Before a district suspends a non-special education student with a disability for more than a total of 10 days, it must evaluate the student and determine whether the student's behavior is a manifestation of his disability. [*West Contra Costa Unified School District* (OCR Region IX, 2004) 42 IDELR 121; *Newport-Mesa Unified School District* (OCR, Region IX, 2004), 43 IDELR 11; *Santa Barbara School District* (OCR Region IX, 2004) 43 IDELR 172.]

23. How does the OCR investigate complaints?

The OCR will "promptly" acknowledge your complaint once they receive it. However, the OCR will close your complaint if you do not send your written consent within 20 days of receiving the letter of acknowledgement.

Once OCR determines that it will investigate, it may review documents and/or conduct interviews or site visits.

If it finds the district to be out of compliance, it will give the district 30 days to voluntarily comply before sending out a "Letter of Finding" documenting the failure to meet legal standards. If the district enters into negotiations with you, it will have 10 days to come to an agreement before the OCR sends out a "Letter of Finding." OCR will periodically monitor the district to ensure that it continues to be in compliance with any resolution agreement. If the district does not voluntarily

comply, OCR may enforce its findings by withholding funds or by referring the case to the Department of Justice for possible legal action. See OCR, Case Processing Manual, Sec. 103, at www.ed.gov/about/offices/list/ocr/docs/ocrcpm.html#I_3 and Complaint Processing Procedures at www.ed.gov/about/offices/list/ocr/complaints-how.html. For more information, you may also visit www.ed.gov/about/offices/list/ocr/qa-complaints.html (Frequently Asked Questions).

24. Can I file a discrimination complaint with the CDE?

You may file a discrimination complaint using the local complaint investigation process. [5 C.C.R. Secs. 4600(c) & 4630(b).] It must be filed within six months of: (1) the discriminatory conduct or (2) the date you first learned of the discriminatory conduct. The district superintendent may extend the six month filing period by 90 days for good cause, upon a written request that describes the reasons for needing the extension. [5 C.C.R. Sec. 4630(b).]

The local investigation must be conducted in a manner that protects the confidentiality of the parties and the facts. [5 C.C.R. Sec. 4630(b)(3).] You may file a discrimination complaint directly with CDE if it meets one of the conditions for direct state intervention, as described above. [5 C.C.R. Sec. 4650(a).]

25. If the school district and I disagree about proposed changes to my child's special education program, must the district give me some kind of notice before I file for a due process hearing?

An important first step to the due process procedures is adequate notice from the school district of exactly what the district is proposing or refusing to do and why. This is called a "prior written notice." Any time a district proposes to initiate or change the identification, evaluation, or educational placement of a student or the provision of a free, appropriate public education (FAPE), it must provide you with a written notification a "reasonable time" before it proposes or refuses:

(1) To change your child's special education eligibility category (for example, learning disability) including a determination that he has no special education qualifying condition;

(2) To initiate or change an evaluation of your child;

(3) To change your child's educational placement; and

(4) To change a component of your child's IEP.

[34 C.F.R. Sec. 300.503(a).]

26. What information should the district include in this notice?

The prior written notice must contain all of the following:

(1) A full explanation of all procedural rights available to the student, including rights to pursue due process procedures and rights to confidentiality of information as provided in federal special education regulations;

(2) A description of the action proposed or refused by the district, an explanation of why the district proposes or refuses to take the action, and a description of any options the district considered and the reasons why those options were rejected;

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

(4) A description of any other factors that are relevant to the district's proposal or refusal; and

(5) A statement that the parents have certain rights and how the parents can obtain a written description of those rights.

(6) The notice must be written in language that is understandable to the general public and provided in the native language or other mode of communication of the parent, unless it is clearly not feasible to do so.

[20 U.S.C. Sec. 1415(c); 34 C.F.R. Sec. 300.503(c).]

The information contained in a written notice is crucial to a parent making intelligent and informed decisions. In *Union School District v. B. Smith*, 15 F.3d 1519, 1526 (9th Cir. 1994), a federal court of appeals ruled that notice provisions were not merely technical requirements but substantive rights, and precluded the district from arguing the appropriateness of a placement that had been verbally offered by the district and refused by the parents, but never officially offered in writing to the parents under the written notice requirements described above.

27. What other notice should I get from the district about my procedural rights and when should I get it?

The district must give you written notice of your procedural rights at the time your child is first referred for special education or when you request an evaluation; before you are notified of a disciplinary action requiring a change of placement; when you file for a due process hearing or compliance complaint; or at your request. [20 U.S.C. Sec. 1415(d)(1); 34 C.F.R. Sec. 300.504.]

28. What information must be contained in the procedural rights notice?

The procedural rights notice must be in your native language (unless the school district is clearly unable to do so). It must be written in an easily understandable way and must contain a full explanation of all of the following:

(1) Your right to an independent educational evaluation (See Chapter 2, Information on Evaluations/Assessments);

(2) Your right to prior written notice of change or refusal to change a program or service;

(3) Your right to consent, or not, to the assessment, program and/or placement of your child;

(4) Your right to review your child's educational records;

(5) Your right to request a due process hearing;

(6) Your child's right to remain in his current placement while due process is pending;

(7) The district's procedures for students subject to placement in "alternative educational settings" for limited periods of time by school officials or hearing officers;

(8) The requirements for when you wish to place your child in a private school and seek public financing;

(9) The availability of and procedures for mediation;

(10) The procedures concerning due process, including the requirement that all evaluation results and recommendations be disclosed by the parent to the district and by the district to the parent at least five days before the hearing;

(11) The availability of "civil actions" such as court appeals following a due process hearing decision;

(12) The availability of attorneys' fees from a district to parents where the parents are the "prevailing party" in a due process hearing, and a full explanation of any limitation on that right or potential denial of or reduction in attorneys' fees for parents; and

(13) The availability of the state compliance complaint procedures, including a description of how to file a complaint and the timelines under that process.

[20 U.S.C. Sec. 1415(d)(2); 34 CFR Sec. 300.504(c).]

29. When would I request a due process hearing?

You would request due process after an IEP meeting: (1) if you disagree with the special education eligibility category, the assessment results, the placement, or the services being proposed by the district; or (2) when the district refuses to change the eligibility category, assessment, placement, or a services for your child which you believe is are necessary; or (3) if you and the district disagree about the availability of an appropriate program for your child. [34 C.F.R. Sec. 300.507(a); Cal. Ed. Code Sec. 56501(a).] Under state law, students cannot initiate due

process procedures unless they are "emancipated" or are wards or dependents of the court (and where no parent can be identified or located and no "surrogate" parent has been appointed). [Cal. Ed. Code Sec. 56501(a).]

You must file your due process complaint with OAH within two years from the date you knew (or had reason to know) of the facts underlying the basis for your complaint. This deadline does not apply if you were prevented from filing a complaint because the district: (1) made a "specific misrepresentation" to you that it had resolved the problem you are complaining about; or (2) withheld information from you that it was legally required to provide. [20 U.S.C. Secs. 1415(b)(6) & (f)(3)(D); 34 C.F.R Secs. 300.507(a)(2) & 300.511(f); Cal. Ed. Code Sec. 56505(l).]

You should mail or FAX your written complaint to:

Office of Administrative Hearings
Special Education Division
2349 Gateway Oaks Drive
Sacramento, CA 95833
Fax: (916) 376-6319
Tel: (916) 263-0880

30. Should I file for due process as soon as I realize that the district and I cannot agree about services or placement?

If the school district is threatening to change your child's program or placement without your consent, and you wish to keep things the way they are, you may have to file for due process just to preserve the "status quo" by taking advantage of the "stay-put" provision. [34 C.F.R. Sec. 300.518; Cal. Ed. Code Sec. 56505(d).]

However, you should generally not file for due process until you are prepared, even if you feel your child is currently being inappropriately served. Nothing about the inappropriate program is likely to change simply by your filing for due process. On the other hand, time spent preparing your evidence will increase your chances of a successful result.

Within a few days of filing for due process, you will receive a notice from the hearing office. The notice will contain the date set for the hearing and mediation.

31. What are the issues that can be addressed in due process?

Yes. The OAH thoroughly reviews a request for due process (known as a "complaint") to make sure that the request is clear to both the parent and the district. You need to make sure your problems, disputes or disagreements are matters which an Administrative Law Judge ("ALJ" or "hearing officer") is authorized to consider. Also, your complaint must contain a description of each problem and your proposed solution. The problem, dispute or disagreement you can address through due process must fall into at least one of the categories listed below:

(1) The district proposes to initiate or change your child's disability eligibility or eligibility category and you disagree;

(2) The district proposes to conduct an evaluation or re-evaluation of your child and you refuse to give consent for the assessment (in this case, the district is most likely to request due process);

(3) The district proposes to initiate or change your child's educational placement and you disagree. If the district proposes to change your child's placement, either you or the district could request due process to resolve a dispute;

(4) The district proposes to initiate or change the provision of FAPE for a student. If there is a disagreement concerning FAPE, either the parent or school could request due process to resolve a dispute.

(5) You ask the district to find a student eligible for special education and the district refuses;

(6) You asked to change a student's special education eligibility category and the district refuses;

(7) You ask for an assessment of the student and the district refuses;

(8) You ask for a certain placement or to change your child's existing placement and the district refuses;

(9) You ask the for certain special education services or to change the student's IEP and the refuses;

(10) You and the district, county office of education, and/or Special Education Local Plan Area (SELPA) disagree about the availability of an appropriate program, and which district or educational agency is financially responsible for providing it to the student.

[Cal. Ed. Code Sec. 56501.]

32. Can the school district also request a due process hearing?

Yes. Either the parent or the district may request a due process hearing. [34 C.F.R. Sec. 300.507(a); Cal. Ed. Code Sec. 56501(a).]

33. If I refuse to consent to an assessment or services, can the district use due process to force me to sign an assessment plan or IEP?

The district must get your "informed consent" in writing before it conducts an assessment or provides special education services to your child. Providing your informed consent means not only that you sign a document but that you have been "fully informed of all information relevant to the activity for which consent is sought, in [your] native language…" [34 C.F.R. Sec. 300.9; Cal. Ed. Code Sec. 56021.1.] The district cannot conduct an assessment or provide special education services to your child if you have not given your consent. The district must make "reasonable efforts" to get your consent.

If your fail to respond to a request for your consent for an assessment or you *refuse to consent to a request for assessment*, the district may use due process to obtain a hearing officer's ruling that you must provide consent for an assessment [Cal. Ed. Code Sec. 56501(a)(3).]

If your fail to respond to a request for your consent for special education services or you *refuse to consent to a request for the provision of special education*

services, the district may **not** use due process to force your consent. If you refuse to give your consent for the district's initial request to provide special education services to your child, the district will not be in violation of their responsibility to provide FAPE. It is also not required to hold an IEP meeting or develop an IEP. [34 C.F.R. Sec. 300.300(b), Cal. Ed. Code Sec. 56501(a)(3).]

If you revoke or withdraw your consent in writing for special education services called for in an IEP for your child, the district may not continue to provide those services and must provide you with prior written notice before it stops the services. [34 C.F.R. Sec. 300.300(b)(4)(i).]

34. How do I know if I am prepared for the due process hearing?

At the due process hearing, you will be required to present evidence which establishes that your child needs the services or placement you are seeking through due process. The following are some examples of common disputes:

(1) You are dissatisfied with the goals and objectives of your child's IEP, believing that they are unclear, or that your child could accomplish more with certain services than the district is willing to acknowledge. You will need evidence that the objectives you would like to write are reasonable expectations for learning and acquiring skills, given your child's disability and the amount of time in which you would expect the objectives to be reached.

(2) You agree with the IEP goals and objectives, but disagree with the district on the level of services needed to accomplish these objectives. You will need evidence regarding the level of services required by your child.

(3) You disagree with the placement the district is proposing, believing that it does not offer your child maximum appropriate interaction with nondisabled students. You will need evidence regarding the supportive services that could be used to make it possible to serve your child in the regular classroom, or in a more inclusive or integrated way.

You should not consider requesting a due process hearing until after you have familiarized yourself with the *legal standards* for the IEP services or placement

you hope to obtain. You must also make sure that the proof you need to meet those legal standards will be available to you when you need it. If some of your proof is in the form of documents, you must have those documents at least five business days before the hearing to exchange with the school district. The witnesses you intend to use to prove your case must appear, prepared to testify at the date, time and place set for the hearing.

The following are examples of typical hearing issues the hearing officer will examine if you are challenging the *appropriateness* of a school's IEP for your child:

(1) The school's IEP designed to meet your child's unique needs? For example, were IEP goals written for all the areas of educational deficit that were identified in assessments of your child? Were the services offered related to making progress toward those goals? In other words, were your child's educational deficits considered when decisions were made about services and strategies to address those learning problems or were decisions made based on availability of space, administrative convenience, or some other factors that have nothing to do with individualizing a program for a particular student?

(2) Was the IEP "reasonably calculated to provide educational benefit"? If your child did not make progress toward goals, this is evidence supporting a finding that the IEP was not reasonably calculated to result in progress. Or, if the services or placement offered were not related to the goals to be achieved, the IEP was not reasonably calculated to provide benefit.

(3) Was the program that was implemented for your child consistent with what was written in the IEP? In other words, were the services promised in the IEP actually provided? And, were they provided with the frequency, duration and setting called for in the IEP?

If you are challenging the *restrictiveness* of the placement in which to implement the IEP, the hearing officer generally will examine these basic factors:

(1) Is the restrictive placement offered by the district necessary in order for your child to benefit, that is, to make progress toward his goals? Or, could progress occur in a less restrictive setting, one with greater access

to nondisabled peers? What supplemental services (such as instructional or behavioral support or curriculum modifications) could be used to obtain benefit in a less restrictive setting? [Cal. Ed. Code Sec. 56364.2(a).]

(2) What nonacademic benefit (such as socialization, behavioral or communication skills development) could be gained by placement in a less restrictive setting?

(3) What would be the effect on the teacher and nondisabled students if your child is placed in the less restrictive setting? Would your child take up too much of the teacher's time in class or in preparation outside class? Would your child be disruptive or distracting to the other students in the less restrictive setting? If the teacher or other students would be adversely impacted, what supplemental services could be added to address these issues?

(4) What will be the cost to the district of any supplemental services needed for appropriate placement in the least restrictive setting? Will that cost be burdensome to the district and adversely affect the availability of services to other students in the district? (Although this is one of the factors that may be considered, it is not usually raised by the district as a reason for keeping a student from being placed in a less restrictive setting). [See *Sacramento City Unified School District v. Holland*, 786 F. Supp. 874, 878 (E.D. Cal. 1992).] See Chapter 7, *Information on Least Restrictive Information*.

Therefore, in the typical situations listed above, you are not prepared for the hearing until you are able to introduce evidence in the form of testimony and documents which speak to these issues in a way which will give a hearing officer the information needed to write a decision in your child's favor.

35. How specific should I be in my due process complaint?

Your complaint should be very specific. You must include the following information in your due process request:

(1) The name of the student;

(2) The residential address of the student, or contact information for a homeless student;

(3) A description of the problems, disputes or disagreements. The description must give enough of the facts to clearly describe the problem; and

(4) A description of the proposed resolution - that is, what needs to happen to solve the problem.

[20 U.S.C. Sec. 1415(b)(7); 34 C.F.R. Sec. 300.508(b); Cal. Ed. Code Sec. 56502(c).]

You should visit the OAH website www.oah.dgs.ca.gov and review the OAH complaint form and the "Frequently Asked Questions" (FAQs) before filing your request for a due process hearing. (See *Sample Requests for Mediation and/or Hearing (Complaint) and Request for Stay-Put*, Appendices Section, Appendix J.) It is not enough to say: "my child is not learning anything" or "my child is not making progress" as your statement of the problem. Similarly, it is not sufficient to say: "I want him to be in a class where he can learn" or, "I want him to go to a private school" as your statement of the solution. Your statement of the problem should relate to one of the ten issues listed above, and must contain enough information to clearly describe the problem and what you want the hearing officer to order the district to do to solve the problem and why.

OAH states:

> Please do not phrase problems as "issues," rather, list contentions or allegations as such. For example, if a parent is requesting a due process hearing and the perceived problem is the alleged failure of a district to assess [a student] in an area of suspected disability, do not phrase the "issue" as: 'Whether the district assessed in all areas of suspected disability.' Rather, include in your contention the area(s) of suspected disability allegedly known by the district and the assessments you contend the district failed to undertake.

Be sure to include all the problems you want to have heard and decided at the hearing in your request for due process. Problems that are not described in the

request for due process cannot be considered at the hearing unless the other side agrees. [20 U.S.C. Sec. 1415(f)(3)(B); 34 C.F.R. Sec. 300.511(d); Cal. Ed. Code Sec. 56502(i).]

Be sure to review and follow all OAH instructions about how, when and where to file your due process complaint.

36. What is a "Notice of Insufficiency"?

A district may file a Notice of Insufficiency (NOI) to have a hearing officer determine that your request for a due process hearing is not "sufficient," that is, does not clearly describe your problem, dispute or disagreement with the district. If the hearing officer finds the request to be insufficient, the hearing officer will usually allow you to file an amended complaint. [20 U.S.C. Sec. 1415(c)(2); 34 C.F.R. Sec. 00.508(d); Cal. Ed. Code Sec. 56502(d), (e).]

The district must file a NOI with OAH within 15 days of receiving your complaint and must send you a copy as well. A hearing officer must rule on the NOI within five days. [20 U.S.C. Secs. 1415(c)(2)(C)-(D); 34 C.F.R. Sec. 300.508(d); Cal. Ed. Code Sec. 56502(d)(1).] A parent also has the right to file a NOI.

If you have to file an *amended* complaint, the 45-day timeline to complete the hearing process (including a resolution session or mediation and issuing a decision) begins again. [20 U.S.C. Sec. 1415(c)(2)(E)(ii); 34 C.F.R. Sec. 300.508(d)(4); Cal. Ed. Code Sec. 56502(e).]

37. When must a response to a complaint be filed?

If no NOI is filed, the district must send you a written response specifically addressing the issues you raised in your request within ten days of receiving your complaint. If the *district* files for due process, you must also file a similar response within ten days. [20 U.S.C. Sec. 1415(c)(2)(B)(ii); 34 C.F.R. Sec. 300.508(f); Cal. Ed. Code Sec. 56502(d)(2).]

38. If the district does not provide "prior written notice" of its IEP proposal and a parent disagrees with the proposal, does the district have to provide me that notice once I request due process?

Yes. If the district has not provided prior written notice before you request due process, it must send you a response (within 10 days of getting a copy of your complaint) which includes all of the following:

(1) An explanation of why the district is doing or not doing whatever it is that created the problem;

(2) A description of other options the IEP team considered and why those were rejected;

(3) A description of each evaluation, procedure, test, report, etc. the district used as a basis for doing or not doing whatever it is that created the problem; and

(4) Other reasons for the district's action or inaction.

Under these circumstances, the district does not to file a separate response within ten days as described above.

[20 U.S.C. Sec. 1415(c)(2)(B)(i)(I); 34 C.F.R. Sec. 300.508(e); Cal. Ed. Code Sec. 56502(d)(2).]

39. May a district file a Notice of Insufficiency if it did not give you prior written notice before you filed your due process complaint?

Yes. Even if the district never sent you a "prior written notice" before you filed, the district can still claim that your complaint is not clear enough or is insufficient. [20 U.S.C. Sec. 1415(c)(2)(B)(II); 34 C.F.R. Sec. 300.508(e)(2).]

40. Are there opportunities to resolve my complaint before an actual hearing?

Yes. If you file a due process request, the district must offer you the opportunity to participate in a pre-hearing "resolution session" or "resolution meeting." However, both sides may waive the resolution session in writing and agree to use mediation instead. You cannot proceed to hearing without participating in either mediation or a resolution session. If the *district* files for due process, there is no resolution meeting required, but mediation is available. [20 U.S.C. Sec. 1415(f)(1)(B); 34 C.F.R. Sec. 300.510; Cal. Ed. Code Sec. 56501.5.]

The resolution session is attended by you and a district representative who has authority to resolve the problem. Attorneys for the district may not attend unless you are represented by an attorney. At the meeting, you must be able to discuss the basis for your complaint and the district is given an opportunity to resolve it. All discussions which take place during the resolution session are not confidential and can be disclosed in a subsequent hearing or court case. However, it is good practice for both sides to agree to confidentiality at the meeting.

If the meeting leads to an agreement, the agreement must be put into writing and signed by both sides. The agreement is legally binding on you and the district and can be enforced in court. Either you or the district has three days after signing the agreement to "void" or revoke your signature. [20 U.S.C. Secs. 1415(f)(1)(B)(iii) & (iv); 34 C.F.R. Sec. 300.510; Cal. Ed. Code Sec. 56501.5.]

The resolution session must occur within 15 days of the district receiving the parent's request for due process. It must be finished within 30 days of the district receiving the parent's request. The days before the resolution session is finished do not count toward the total number of days the state has to complete the hearing process and issue a decision. [20 U.S.C. Sec. 1415(f)(1)(B)(ii); 34 C.F.R. Sec. 300.510(b)(2); Cal. Ed. Code Sec. 56501.5(c).]

41. What is a mediation conference?

OAH will provide a mediator to sit down informally with you and the district before a due process hearing is held to try to resolve the problem, if both sides agree to mediate. This occurs either when the resolution meeting is waived or the meeting ends without agreement. The mediator has no power to force either side to do anything, but only tries to help you and the district reach an agreement. The mediator will generally meet in one room with all persons attending, but may hold separate "caucuses" with either side in an attempt to resolve the problem. The mediator is usually an ALJ in the role of a facilitator and not a judge. The ALJ acting as mediator will not be the hearing officer assigned to hear your case should the dispute go to hearing. [Cal. Ed. Code Secs. 56500.3(c)–(e), 56501(b)(2).]

If the mediation has failed to resolve all the issues in dispute, nothing you (or the district representatives) said or wrote as part of the mediation may be submitted to the hearing officer at the hearing for the purpose of trying to prove either side's case. [5 C.C.R. Sec. 3086.] Therefore, just because a district offered to meet you halfway in terms of a program during a mediation conference, it does not mean that such an offer can then be admitted into evidence at the hearing. If mediation fails and all offers are withdrawn, each side must prove his entire case without any reference to whatever may have been said or whatever progress may have been made at the mediation conference.

Although many disputes are settled in mediation, you cannot assume that your dispute will be resolved. It is in your best interest to be as prepared as possible for the hearing before mediation. Remember that mediation is voluntary and may be waived by either side. If waived, you will go directly to hearing.

42. What are the pros and cons of mediation?

Mediation is encouraged because it gives both sides another chance to reach agreement. An impartial mediator increases the possibility of resolution. The mediation does not change the 45-day timeline, although parents are sometimes asked to extend the 45-day timeline to aid in the mediation process. From a

tactical standpoint, mediation often gives parents more information about the district's point of view. Such information may be helpful if there is a due process hearing.

On the other hand, mediation requires additional time and energy. It may be best to waive mediation if you have a time-sensitive dispute. However, before waiving mediation, make sure that you are prepared to proceed to the due process hearing. Waiving mediation may result in the due process hearing being scheduled sooner than if you participated in mediation.

43. Are there any other dispute resolution procedures?

Yes. After identification of a disputed issue, you may ask for a "prehearing request mediation conference," commonly known as "mediation only." This "prehearing" mediation is not mandatory and you may proceed directly to filing for a due process hearing if you are not successful.

A *pre*-due process mediation conference is conducted exactly like a due process mediation, except no attorneys or legal advocacy contractors may attend the session and the mediation must be conducted and resolved in a shorter period of time The OAH will provide a mediator to sit down informally with both sides and try to resolve the disagreement. The mediator is usually an administrative law judge (ALJ), but in this case, he acts as a facilitator and not an adjudicator. The same ALJ cannot hear your case if you eventually go to a due process hearing. The mediation conference must be scheduled within 15 days and completed within 30 days of receipt of your request by OAH. [Cal. Ed. Code Sec. 56500.3.] A copy of the written agreement, if any, must be mailed to you and the district within 10 days following the mediation conference. If you are not successful and then file for hearing, OAH will likely not offer another mediation.

You must make your "mediation only" request in writing. You may use the state's form for this purpose. Visit the OAH website at www.oah.dgs.ca.gov, click on Special Education and then on Forms and use the "Mediation ONLY Request Form."

There are some disadvantages to participating in mediation only. First, parents cannot have attorneys or "independent contractors used to provide legal advocacy services" attend or "otherwise participate in" the mediation conference. This may not be a problem if you are knowledgeable about special education programs and entitlements. Other parents could be at a significant disadvantage when negotiating an agreement with special education administrators. It may be difficult to negotiate and to know whether the agreement that is reached is fair and reasonable, given the law and the facts. [Cal. Ed. Code Sec. 56500.3(a).]

Second, federal law appears to say the "stay-put" rule (the rule that a student must remain in his last agreed upon program pending resolution of the dispute) applies during "mediation only." [20 U.S.C. Secs. 1415(e)(1) & (j).] However, CDE has taken the position that it will not issue "stay-put" orders as part of a compliance complaint. **If maintaining your child's current placement or services while you are in the "mediation only" process is important to you, you should participate only if the district (and any other agencies) has given its written assurances that stay-put will be honored while mediation is pending.**

You may be accompanied by a family member, friend and/or non-attorney advocate. (It is an open question whether a paralegal or law student can attend if they are considered the "agent" of any attorney).

Other forms of alternative dispute resolution (ADR) may be offered by your district or SELPA. This may involve a session with a district and parent team of facilitators, an ombudsperson or liaison or a "facilitated" IEP meeting. For more information about ADR and special education, visit the website of the Center for Appropriate Dispute Resolution in Special Education (CADRE) at www.directionservice.org/cadre.

There are benefits to each of the alternative dispute resolution methods referred to above. However, formal due process procedures — including resolution meetings and mediation conferences — may offer specific protections to you and your child that are not necessarily applicable to the informal mechanisms.

44. How is mediation different from a "resolution session"?

Mediation differs from the resolution meeting in four important ways. First, in mediation, there is a neutral person (the mediator) to help parents and the district reach an agreement. The resolution meeting is more like holding another IEP meeting with school staff. Second, in a mediation conference, all discussions remain confidential and cannot be disclosed in a subsequent hearing or court case. Resolution session regulations do not prohibit participants from disclosing this information in a later hearing (unless confidentiality is voluntarily agreed to). Third, unlike an agreement reached at a resolution session, there is no automatic three-day "grace period" in which either side can void the agreement. Fourth, the 45-day timeline for a final decision in the case continues to run while mediation is pending; the time period *stops* running during the resolution session process. [20 U.S.C. Sec. 1415(i)(3)(D)(iii); 34 C.F.R. Sec. 300.510; Cal. Ed. Code Sec. 56501.5; 5 C.C.R. Sec. 3086.]

You should examine these factors in deciding whether to mediate instead of going to a resolution meeting. Remember, however, you must attend a resolution meeting unless both sides choose to use mediation through the OAH.

45. If I filed for due process and went through OAH mediation but could not settle my case, and the district approaches me to try to settle before the hearing (but outside of OAH mediation), what should I do?

Generally, agreements which are made outside of due process, including OAH mediation, are not recommended. The hearing office does not enforce these agreements. The CDE is required to enforce IEPs, mediation agreements and due process hearing decisions. It has expressed its willingness to enforce other settlement agreements, but it has not officially published this willingness in any regulation, Advisory, or Notice. If a district intends to comply with the terms of an agreement, it should be willing to put the terms in an OAH mediation agreement or in an IEP. However, if the district makes a settlement offer after the mediation

conference and you agree with its terms, you may consider signing it after having it reviewed by an advocate or attorney. While this type of agreement is enforceable, you may have to go to court to enforce it.

46. What happens to my child's placement and services if I file for a due process hearing?

Except in certain circumstances discussed below, your child must remain in his current educational placement and have his *current* agreed upon IEP fully implemented (including all related services) from the time you request a hearing until the due process hearing proceedings (and court appeals, if any) are completed. [Cal. Ed. Code Sec. 56505(d); 34 C.F.R. Sec. 300.518.] This protection is usually called a "stay-put" provision. The stay-put may be changed if the parent and district agree to a change in placement or services while due process is pending.

Once the hearing is over, if a case goes on to court, the stay-put placement and services become whatever the hearing officer has ordered in the administrative hearing. [*Clovis Unified District v. Office of Administrative Hearings*, 903 F.2d 635, 648 (9th Cir. 1990); Cal. Ed. Code Sec. 56505(d).]

The student's stay-put placement might also change in one of the following situations:

(1) If your child has engaged in a weapon or drug offense or inflicted serious bodily injury on another person, the district may change his placement (even if you have asked for a due process hearing) to an "interim alternative educational setting" (IAES) for up to 45 days [34 C.F.R. Sec. 300.530(g)];

(2) If the district persuades a hearing officer that your child's presence in his current placement is "substantially likely to result in injury to the student or someone else," the hearing officer may place him in an IAES for up to 45 days [34 C.F.R. Secs. 300.532(a) & (b)]; or

(3) If the district persuades a state or federal court that your child's presence in his current placement is "substantially likely to result in injury to the

student or someone else," what his education consists of pending a due process hearing will depend on the terms of the court order. [*Honig v. Doe,* 484 U.S. 305, 307 (1988); *Gadsden City Bd. of Ed. v. B.P.*, 3 F. Supp. 2d 1299, 1303 (N.D. Ala. 1998) (upholding *Honig* decision after amendments to the IDEA).]

The IAES must be selected so that the student can continue to participate in the general curriculum and to continue to progress toward meeting the goals set out in his IEP. [34 C.F.R. Sec. 300.530(d)(1)(i).]

47. How can you ensure that a district honors the "stay-put" provision?

Most districts are aware of, and usually honor, the "stay-put" provision. However, in recent years, disputes about stay-put have become more common. There are several alternatives available to help you enforce your "stay-put" rights:

(1) As in all special education process interactions, you should let the district know that you know your rights. This simple action puts the district on notice that you expect them to fulfill their responsibilities according to federal and state law. Therefore, you could include a statement in your hearing request (a copy of which should be sent to your district) asking the district to confirm your child's right to maintain his current placement and/or services. If the district does not respond within five days, or refuses to honor your "stay-put" rights, you may want to utilize option (2) or (3) below.

(2) You could file a compliance complaint with CDE. Since CDE action may take too long for this to be of assistance, you could call the quality assurance office to request a "fast-track" investigation or call your district directly. However, CDE has the discretion to agree to or refuse to fast-track processing.

Once you have requested due process, you could immediately file a "stay-put" motion with the hearing office, which requires OAH to rule on your "stay-put" request prior to mediation or hearing. In order to file a motion, just write a brief letter outlining your request and why you think the "stay-put" provision should apply to your child's situation. A hearing officer will review this basic information

and issue an order either granting or denying your request. Please see *sample paragraph - Due Process Request for Stay-put*, Appendices Section – Appendix M.

48. Do I need to request due process and ask for stay-put if the district is not implementing my IEP?

No. Districts are not permitted to unilaterally change special education students' placements or services without going through the IEP process and obtaining your consent. However, when disputes arise between parents and districts, sometimes districts ignore their obligations to implement the current IEP and want to move ahead with whatever change they wish to make. In this situation, if you intended to file for due process anyway on other issues, you can do that and also ask the hearing office to order the district to continue to honor the IEP during the process.

However, if you are satisfied with the IEP and would not otherwise be filing for a hearing, you should file a compliance complaint with the CDE for the district's failure to comply with the IEP. You should ask CDE to order the district to provide compensatory services to make up for any lost services or to pay your out-of-pocket expenses if you incurred any in privately maintaining services. [34 C.F.R. Sec. 300.151(b)(1).] You should also ask CDE for "fast-track" processing of the complaint in order to minimize the disruption to your child.

49. What rights do I have in due process?

You have many rights in due process, including the right to:

(1) Be informed of available free or low-cost legal services. [Cal Ed. Code Sec. 56502(h).]

(2) Attend a mediation conference, which is an informal meeting held between you, the district and a state mediator, in an attempt to negotiate a resolution to the dispute, if you and the district both agree to mediate. [20 U.S.C. Sec. 1415 (e); 34 C.F.R. Sec. 300.506; Cal. Ed. Code Secs. 56501(b)(1)(2) & 56503.]

(3) Have the hearing held at a time and place reasonably convenient to you. [34 C.F.R. Sec. 300.515; Cal. Ed. Code Sec. 56505(b).] An extension of the hearing timeline can be obtained from the ALJ upon a "showing of good cause." [Cal. Ed. Code Sec. 56505(f)(3).] However, not being ready for the hearing or not being able to produce an important witness at the time the hearing is scheduled may not be "good cause" for a postponement. You also have the right to have your child attend the hearing and to have the hearing open or closed to the public, if desired. [34 C.F.R. Sec. 300.512(c); Cal. Ed. Code Sec. 56501(c).]

(4) Have the hearing conducted by an impartial hearing officer. [20 U.S.C. Sec. 1415(f)(3); 34 C.F.R. Sec. 300.511; Cal. Ed. Code Sec. 56505(c).]

(5) Be represented by an attorney or advocate. [20 U.S.C. Sec. 1415 (h)(1); 34 C.F.R. Sec. 300.512(a)(1).] If either side uses an attorney, that side must notify the other in writing ten days before the hearing. [Cal. Ed. Code Sec. 56507.]

(6) Present evidence and written and oral arguments; confront, cross-examine and require the attendance of witnesses; and, obtain a written or electronic record of the hearing. [20 U.S.C. Sec. 1415 (h)(2); 34 C.F.R. Sec. 300.512; Cal. Ed. Code Sec. 56505(e).]

(7) Prohibit the introduction at the hearing of any evidence which has not been disclosed at least five business days before the hearing. [20 U.S.C. Sec. 1415(f)(2)(B); 34 C.F.R. Sec. 300.512; Cal. Ed. Code Sec. 56505(e).]

(8) Obtain a written, reasoned decision containing findings of fact. The completed decision must be mailed to all parties within 45 days after the conclusion of the 30-day resolution meeting period. [34 C.F.R. Sec. 300.515(a); Cal. Ed. Code Secs. 56501.5, 56502(f) & 56505(f)(3).]

If you are successful at the due process hearing or in court (the prevailing party), and you were represented by an attorney, the attorneys' fees and the costs of pursuing the case may have to be paid by the district. [20 U.S.C. Sec. 1415(i)(3)(B); 34 C.F.R. Sec. 300.517.]

The due process hearing decision is the final administrative determination, and is binding on both sides. [34 C.F.R. Sec. 300.514; Cal. Ed. Code Sec. 56505(h).] Either side may appeal the hearing decision in state or federal court if it disagrees.

The appeal must be filed within 90 days of the date of receipt of the decision. [20 U.S.C. Sec. 1415(i)(2); 34 C.F.R. Sec. 300.516(b); Cal. Ed. Code Sec. 56505(k).]

50. At a special education due process hearing, must I persuade the hearing officer that the district has offered my child an inappropriate program or must the district persuade the hearing officer that it has offered my child an appropriate program?

The U.S. Supreme Court has decided that whoever is asking the hearing officer to order something against the other side, has the burden of proving that what they want is appropriate and that the other side's proposal is not appropriate. This applies to both parents and districts, whichever side files for the hearing. If a parent wants a service or placement in the IEP that the district is unwilling to provide and the parent files for a due process hearing, the parent must persuade the hearing officer that the service or placement is necessary for the student's program to be appropriate. The parent will have to produce enough evidence to persuade the hearing officer that his proposal is appropriate and that the district's proposal is not appropriate. [*Schaffer v. Weast*, 546 U.S. 49, 62 (2005).]

51. Where do I get the evidence I will need to present at the due process hearing?

The information you will need to support your case may come from your testimony if you can give examples of other similar learning experiences, good or bad, which you have had with your child when he received a certain level or type or service or when he was placed in a certain setting.

It is more likely that a teacher or specialist who knows your child or an independent "expert" knowledgeable in the education or training of persons with disabilities, will need to testify in support of your position. The district will present witnesses — including current teachers and specialists — who are professional educators, psychologists, therapists, and administrators who have degrees and credentials in the fields which are related to the disputed issues.

Therefore, you will likely have to have knowledgeable educators and/or other professionals to establish the facts you need to prove in order to obtain the services or placement you are seeking. Some students already have tutors, counselors, doctors, psychologists, or other professionals involved in their lives who can offer the kind of testimony you must present. Sometimes, you can obtain publicly financed evaluations from an independent educational professional. See Chapter 2, *Information on Evaluation/Assessments*. You may have to spend your own money to hire an independent evaluator, such as an educational psychologist or learning disabilities specialist.

Before requesting due process, you must find potential witnesses and make sure they are willing and available to provide that kind of testimony. You will also need to consider: the time necessary to conduct an observation or evaluation and to prepare a report and testimony; the availability of the witness to attend a hearing; and the cost of their services.

52. How would I use an expert witness?

Generally, the expert will meet with you and your child, review his educational records, visit his class, speak with his teachers, conduct an independent evaluation, analyze his special education needs, review the programs and services the district is offering, and, then, make service and/or placement recommendations. If those recommendations support your position, you may then call that expert to testify.

53. Instead of having witnesses come to the due process hearing, can I submit letters, records, or other documents to prove my case?

No. The right to cross-examine is an essential part of due process. Therefore, it is crucial to bring witnesses to the hearing who can testify about what they observed and/or what their opinions are concerning the issues in the hearing. Hearing officers may not base a decision on “hearsay” alone, but must have some other evidence to support the decision. [5 C.C.R. Sec. 3082(b).] Most documents are considered hearsay if a witness is not present to identify or testify about them.

Documents further support and establish the testimony of the witness. You should gather and submit any and all documents that are supportive of your position in the case. However, you should always make sure that some competent witness is available and willing to testify at the hearing on each major point you must establish in order to obtain what you believe your child needs for an appropriate education.

54. Will the hearing officer read all the documents that I submit and the district submits?

You cannot assume that the hearing officer will read all of the records submitted by the parties prior to issuing a written decision. Therefore, it is crucial that important statements and portions of records be referred to in live witness testimony and in a hearing brief, usually submitted after the hearing. In addition, you should organize all the documents you plan to submit and identify them in the manner determined by the ALJ at a "pre-hearing conference" or some time before the hearing. That way the hearing officer can easily refer to and locate documents both during and after the hearing.

55. What is a pre-hearing conference?

Generally, the ALJ assigned to the case will hold a conference by telephone with you, the district and the attorneys, if any, before the hearing, to discuss hearing date(s) and location, length of hearing, dispute issues, exchange and marking of exhibits and witness lists, witness testimony and scheduling, and other matters. After the conference, the ALJ will mail you a pre-hearing order which summarizes the conference.

56. Must I be represented by an attorney in order to go through due process?

No. There is nothing in California or federal law to prevent you from representing yourself or from hiring a non-attorney advocate, as long as the advocate "has special knowledge or training with respect to the problems of children with disabilities." However, you also have the right to be accompanied and advised by an attorney. [34 C.F.R. Sec. 300.512(a)(1).]

Whether you *need* an attorney depends on whether you can collect and properly present the evidence that you will need to prevail. If you do *not* use an attorney, you should make every effort to consult with an attorney (or advocate) who has training and experience in special education law and procedure.

A special education attorney or advocate can inform you of what law applies to your child's situation. It is important to know what the legal standards are regarding the extent of your child's entitlement to special education services and placement. Your presentation of evidence through your witnesses and documents should be consistent with the legal standards that apply.

If you do choose to be represented by an attorney at the hearing, you must notify the other parties of this at least 10 days prior to the hearing. [Cal. Ed. Code Sec. 56507.]

57. Where is the due process hearing held?

The due process hearing is often held at the district office. It must be at a time and place that is convenient for you and your child. [Cal. Ed. Code Sec. 56505(b).] You will not necessarily be consulted by OAH before a hearing date is assigned. If you object to the location and/or hearing date, you should contact the assigned hearing officer to change the location or date. This is usually done at a pre-hearing conference.

58. Who can be present during the due process hearing?

You have the right to have the hearing open or closed. [34 C.F.R. Sec. 300.512(c)(2); 5 C.C.R. Sec. 3082(f); Cal. Ed. Code Sec. 56501(c)(2).] If the hearing is open, members of the public can attend. Even if the hearing is open, you may still wish to request to have witnesses excluded from the hearing, so that they do not hear the testimony of other witnesses. [5 C.C.R. Sec. 3082(c)(3).] If the hearing is closed, members of the public cannot attend. A closed hearing usually consists of you (and your child if you want), your representative, the hearing officer, the district's representative and the district's advocate.

Testimony can be taken by telephone or other electronic means at the discretion of the hearing officer if each participant "has an opportunity to participate in and to hear the entire proceeding" and to observe exhibits. [5 C.C.R. Sec. 3082(g).] In practice, as long as a particular witness has a copy of the exhibits relevant to their testimony and is available for questioning by both sides, the hearing officer will not require that this witness sit through the entire hearing. If you intend to present any testimony by electronic means, you should make sure you have the hearing officer's permission to do so well in advance of the hearing. This is usually discussed at a pre-hearing conference where the logistics and any other concern can be addressed. Since the hearing office may deny your request, you should be prepared to explain the importance of the witness' testimony and why the circumstances make it extremely difficult or impossible to have the witness appear in person.

59. Can written information be submitted to the hearing officer? When must the district and parent submit their exhibits and witness lists?

Both sides can submit exhibits (for example, letters of support, assessment reports, IEPs, etc.) and should do so. At least five business days before the hearing, you must make sure the district has: (1) copies of all documents you intend to submit as exhibits at the hearing, and (2) a list of the potential witnesses you may call to

testify at the hearing, along with a brief statement regarding what each witness will testify about. [34 C.F.R. Sec. 300.512(b)(1); Cal. Ed. Code Sec. 56505(e)(7).] The ALJ *may* order an earlier exchange of information.

The district must receive these materials five business days before the hearing. Likewise, the district must submit its documents and list of witnesses to you at least five business days before the hearing. Any exhibits or written material exchanged less than five business days before the hearing *can* be prevented by the ALJ from going into the record, and any witnesses whose names were not disclosed five business days before the hearing can be prevented from testifying. [34 C.F.R. Sec. 300.512; Cal. Ed. Code Secs. 56505.1(f) & 56505(e)(8).] Therefore, you must be sure these documents and witness lists are in the hands of the other parties and the hearing office five business days prior to the hearing.

At least 10 days before the hearing, each side must submit to OAH and to each other a statement of: (1) the issues to be decided at the hearing, and (2) a proposed resolution of those issues. If you do not have an attorney, a mediator must help you identify the proposed issues and resolutions upon your request to OAH. [Cal. Ed. Code Sec. 56505(e)(6).] OAH may hold a pre-hearing conference and/or issue a “pre-hearing order” which changes the 10-day timeline and/or the detail of the statement required above.

You may not communicate with the hearing officer outside the presence of the other side and you must send copies of any correspondence or other communications you have with OAH to the other side as well. [5 C.C.R. Secs. 3083 & 3084.]

60. Is the due process hearing like a trial or like being in court?

The due process hearing is not a trial. It is an “administrative” hearing and does not take place in a courtroom or before a judge. The hearing officer is someone hired by the state who knows about special education, and who will impartially review all the evidence and make a decision.

61. What happens at the hearing?

Generally, both sides give opening statements describing the case. The petitioner (whoever has filed for the hearing) then presents their case by calling witnesses. The respondent (the other side) may then cross-examine the petitioner's witnesses, and the petitioner has the right to ask additional questions (re-direct) after the respondent has cross-examined.

After the petitioner finishes presenting their case, the respondent calls their witnesses (the same procedure as before: examination, cross-examination, and then re-direct examination). Finally, both the petitioner and respondent give closing arguments. You may wish to ask that the "record" remain open so that you can submit a written closing argument.

62. What is the record?

The record is made up of all the evidence and arguments presented at the hearing. *Oral* evidence includes testimony from witnesses and *written* evidence includes exhibits and other documents. The opening and closing statements and questions asked of witnesses and their answers are tape recorded by the hearing officer. Although not part of the evidence, the opening and closing statements are also included in the record. You are entitled to receive a copy of the tape recording after a decision is issued if you ask for it. [34 C.F.R. Secs. 300.512(a)(3) & (4)(c)(3); Cal. Ed. Code Sec. 56505(e)(4).] You may also request from the hearing officer a daily tape recording or CD of the hearing.

63. What if a witness does not want to attend the hearing?

Witnesses can be required to attend a due process hearing if a subpoena is "served" on that witness. A subpoena is an order from the state requiring the witness to attend the hearing. On request, OAH will provide you subpoena forms to fill out and serve (deliver in approved ways) on the proposed witness. [34 C.F.R. Sec. 300.512(a)(2); 5 C.C.R. Sec. 3082(c)(2); Cal. Ed. Code Sec. 56505(e)(3).]

64. Does the hearing officer simply listen to witnesses and review the documents submitted, or can the hearing officer participate in the hearing process?

Hearing officers have a variety of powers in the conduct of a due process hearing, allowing them to participate in the process and to further develop the evidence on which they will base their decision. Hearing officers may do any of the following:

(1) Question a witness;

(2) With the consent of both sides, have conflicting expert witnesses discuss issues with each other on the record;

(3) Visit a proposed placement site;

(4) Call a new witness, not previously identified by either side, to testify if both sides consent or if there is a five-day postponement;

(5) Order an independent assessment and postpone the hearing until it is completed (with the costs of the assessment to be borne by the hearing officer);

(6) Call as a witness an independent medical specialist to testify about a student's medical disability (with the cost to be borne by the hearing officer);

(7) Bar the introduction of any documents or the testimony of any witnesses not disclosed at least five business days before the hearing;

(8) Limit the length of the hearing

[Cal. Ed. Code Sec. 56505.1.]

65. Can I get the district to pay for my attorney and expert witnesses?

Under federal law, if you are successful or partially successful in a due process hearing, or a court hearing, a federal court may award you reasonable attorneys' fees. [20 U.S.C. Secs. 1415(i)(3)(A) & (B).] Attorneys' fees are not available when you have an attorney represent you at an IEP meeting, except where the IEP

meeting was convened at the order of a hearing officer or judge. [20 U.S.C. Sec. 1415(i)(3)(D)(ii).] Fees are not automatically available if you are successful in a mediation conference, but your attorney may negotiate fees as part of the mediation agreement.

The U.S. Supreme Court has determined that the costs of expert witnesses are not recoverable if you prevail in special education due process hearings. [*Arlington Cent. District Board v. Murphy*, 548 U.S. 291 (2006).]

The district may ask you to waive your right to attorneys' fees as part of a settlement agreement (whether or not this is done through OAH mediation). You should thoroughly discuss this with your attorney before you enter into any discussions with the district.

Your fees may be reduced if the court finds that you did not do better as a result of the due process hearing than what the district offered in writing at least 10 days before the hearing. Attorneys' fees may also be reduced if the court finds that you unreasonably delayed final resolution of the dispute or if you did not provide the required written notice to the district of certain information at the time of filing for a due process hearing. [20 U.S.C. Secs. 1415(i)(3)(D) – (G).]

66. If I am not ready to go to hearing on the scheduled day, can I ask for a postponement?

Yes, but you need to have a "good cause" in order to postpone a hearing. [Cal. Ed. Code Sec. 56505(f)(3).] Good cause is determined by the hearing officer and is generally limited to a postponement due to illness or other unexpected emergencies. The inability to get ready in time for the hearing and the unavailability of a witness on a particular date are not usually considered good cause. You should visit the OAH website (www.oah.dgs.ca.gov) for current guidance on what is "good cause." You should not file for due process hearing unless you, your witnesses and documents will be prepared and available within approximately 45 days. In most cases, matters of scheduling are discussed at a pre-hearing conference.

67. If I lose the due process hearing, can I do anything?

Both sides have the right to go to court to appeal the due process hearing officer's decision. Any appeal to court must be filed within 90 calendar days of receipt of the administrative hearing decision. [34 C.F.R. Sec. 300.512; Cal. Ed. Code Sec. 56505(i).] Although you have a right to represent yourself and your child in court, in most cases, you should not go to court without an attorney.[*Winkelman v. Parama City School Dist*., 550 U.S. 516, 533 (2007).]

68. If I lose my special education due process hearing, will I have to pay the district's attorneys' fees?

It is unlikely that you will have to pay a district's attorneys' fees when the district prevails in a special education hearing. However, fees may be awarded to a "prevailing party" (the side that wins some or all issues) if the case is found to be "frivolous, unreasonable, or without foundation" — even if the suit was not brought "in subjective bad faith" or if the case was brought for any "improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." [*Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978); 20 U.S.C. Secs. 1415(i)(3)(B)(i)(II) and (III); 34 C.F.R. Sec. 300.517; Cal. Ed. Code Sec. 56507(b)(2).] Losing a case does not necessarily mean the case was frivolous, unreasonable, or without foundation.

For a case to be found to have been brought for an improper purpose, such as to harass the defendant, the Ninth Circuit Court of Appeals (which controls California) appears to require that the case also be found to be frivolous. [*Townsend v. Holman Consulting Co*., 929 F.2d 1358, 1362 (9th Cir. 1990).] However, in another Ninth Circuit case, the court determined that "substantial evidence" of either harassment or frivolousness could be enough to award attorneys' fees to the prevailing party. [*Marsch v. Marsch*, 36 F.3d 825 (9th Cir. 1994).] Harassment must be more serious than just annoyance and will be objectively, rather than subjectively, determined. A series of complaints against the same defendant based on propositions of law which have already been rejected

in cases involving that same defendant may constitute harassment. [*Zladivar v. City of Los Angeles*, 780 F.2d 823, 831-32 (9th Cir. 1986), *reversed on other grounds by Cooter and Gell v. Hartmax Corp.*, 496 U.S. 384 (1990).]

Instances in which parents are required to pay a district's attorney's fees following an unsuccessful special education due process hearing are extremely rare. **You should not file a case that has no factual or legal basis and should not take actions designed only to delay or drive up the district's costs in defending your case.**

69. Is there anything I can do to be reimbursed or compensated for the district's failure to provide FAPE to my child?

If a court or hearing officer determines that a school district failed to provide your child an appropriate education, it may order reimbursement to you for out-of-pocket expenses (such as private school tuition or support services). [*Burlington Sch. Committee v. Mass. Dept. of Ed.*, 471 U.S. 359, 105 S.Ct. 1996 (1985); *Ash v. Lake Oswego Sch. Dist. No. 7J*, 980 F.2d 585, 589 (9th Cir. 1992); *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1484-85 (9th Cir. 1992).] In the Ninth Circuit, reimbursement is allowed for both "substantive" denials of appropriate education (disagreement over educational services and placement) and for "procedural" denials (violation of process used to develop the student's IEP). [*Ash*, 980 F.2d at 589; *Target Range*, 960 F.2d at 1484-85.] See Chapter 4, *Information on IEP Process*.

70. What if the district failed to provide FAPE for a period of time and I did not purchase alternate educational services? Do I still have a remedy?

Yes. Courts have also awarded compensatory (in-kind) educational services to students as a remedy for a district's past failure to appropriately educate special education students. [*Lester H. v. Gilhool*, 916 F.2d 865, 867 (3d Cir. 1990); *Burr v. Ambach*, 863 F.2d 1071, 1078 (2d Cir. 1988); *Miener v. Missouri*, 800 F.2d 749,

751 (8th Cir. 1986); *Todd v. Andrews*, 933 F.2d 1576, 1584 (11th Cir. 1991).] This includes compensatory services delivered after the student has become ineligible for special education because of age. [*Pihl v. Mass. Dept. of Ed.*, 9 F.3d 184, 185 (1st Cir. 1994); *Jefferson Co. Board of Ed. v. Breen*, 853 F.2d 853, 857-58 (11th Cir. 1988).] This right to compensatory educational services has been recognized in the Ninth Circuit. [*Parents of Student W. v. Puyallup Sch. Dist. No. 3*, 31 F.3d 1489, 1496-97 (9th Cir. 1994).]

71. Are there any limitations to claiming reimbursement or compensatory education in California?

Yes. California has established a two-year statute of limitations on claims in special education cases. In other words, a claim for compensatory educational services or reimbursement cannot be made for a district's violations that occurred more than two years before the case is filed. [Cal. Ed. Code Sec. 56505(l)]

In addition, you cannot simply proceed directly into court to make a claim for reimbursement or compensatory educational services under IDEA. In most cases, you must first make these claims in an administrative due process hearing. [*Hoeft v. Tucson Unified Sch. Dist.*, 967 F.2d 1298, 1303 (9th Cir. 1992); *Doe by Brockhuis v. Arizona Dept. of Ed.*, 111 F.3d 678, 682 (9th Cir. 1997).] In some instances, it is enough to file "exhaust" your available administrative remedies by first filing a compliance complaint with CDE. [*Christopher S. v. Stanislaus*, 384 F.3d 1205, 1207 (9th Cir. 2004).]

72. I would like to sue the district for money damages for the way my child's special education was mishandled or ignored over the years. What are my chances of success?

All federal appeals courts that have addressed this issue have turned away lawsuits for money damages for what might be called "educational malpractice" when cases are brought only under the Individuals with Disabilities Education Act (IDEA), including California, which is controlled by the Ninth Circuit Court of Appeals.

[*Mountain View-Los Altos Union H.S. Dist. v. Sharron B.H.*, 709 F.2d 28, 31 (9th Cir. 1981).]

73. Can Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act (ADA) be of help me in suing the district for money damages?

The Ninth Circuit is among those federal appellate courts that allow cases for compensatory damages to proceed under Section 504 in conjunction with Section 1983 (of Title 42 of the U.S. Code). [*Kling v. Los Angeles*, 769 F.2d 532, 534 (9th Cir. 1985), *reversed on other grounds*, 474 U.S. 936.] You must prove "discriminatory intent" or "deliberate indifference" by the particular official or agency, in order to recover money damages under Section 504 or the ADA (Title II) against a public entity. [*Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998).] This standard may prove difficult for parents and students to establish against a public school official or district. In addition, lawsuits must be filed in federal court under Section 504 within one year. [*Douglas v. Cal. Dept. of the Youth Authority* 271 F.3d 812, 823 (9th Cir. 2001).]

74. Are there any other federal laws that help me if I sue the district for money damages?

Yes. The law is not very clear, but a few courts have allowed special education students and parents to sue for money damages under the IDEA in combination with section 1983 of Title 42 of the United States Code, a federal "civil rights" statute. [*Emma C. v. Eastin*, 985 F. Supp. 940 (N.D. Cal. 1997); *Goleta Union Elementary Dist. v. Ordway*, 166 F. Supp. 2d 1287 (C.D. Cal. 2001), *reconsideration denied*, 248 F. Supp. 2d 936 (C.D. Cal. 2002 F.2d 591 (9th Cir. 1992) (unpublished opinion) (allowing plaintiff to pursue damages under IDEA). However, not all courts allow money damage claims. [*Alex G. ex el. Stephen G. v. Board of Trustees of Davis Joint Unified Sch. Dist*., 332 F. Supp. 2d 1315, 1319 (E.D.Cal. 2004).] Even those courts that allow parents to sue for money claims are reluctant to grant the claims since they do not want to put too much of a financial

burden on schools. Instead, courts suggest it is preferable to reimburse for actual expenses or to award compensatory education or services rather than award money for pain and suffering or punitive damages. [*Emma C*., 985 F. Supp. at 945; *Goleta Union Elementary District*, 166 F. Supp. 2d at 1296.]

Furthermore, although some courts have allowed claims against individual education officials, these officials can also be "immune" from suit if they could not have reasonably known that their actions were violating a clearly established legal right. [*Harlow v. Fitzgerald*, 457 U.S. 800 (1982); Act Up!/*Portland v. Bagley*, 988 F.2d 868 (9th Cir. 1993); Goleta, 166 F. Supp. 2d at 1299.]

75. What if my child was physically or emotionally injured by negligent acts by school personnel? Do I have to go through a due process hearing when I am not making any claim under special education law before I file a lawsuit in court?

No. OAH hearing officers do not have the power to hear claims like these (personal injury) and you are not required to file a due process hearing which does not involve any claims under special education law before going to a court on these claims. However, you must be sure that any "educational" issues have been resolved through other channels and the only claims that remain in your lawsuit are those for which relief is not available under IDEA. [*Witte by Witte v. Clark County Sch. Dist*., 197 F.3d 1271, 1272 (9th Cir. 1999); *Robb v. Bethel District*, 308 F.3d 1048, 1050 (9th Cir. 2002).]