Chapter 89. Adaptations for Special Populations

Subchapter AA. Commissioner's Rules Concerning Special Education Services

Division 7. Dispute Resolution

§89.1151. Special Education Due Process Hearings.
(a) A parent or public education agency may initiate a due process hearing as provided in 34 Code of Federal Regulations (CFR), §300.507 and §300.508.

(b) The Texas Education Agency (TEA) [shall] implement a one-tier system of hearings. The proceedings in hearings [shall] be governed by the provisions of 34 CFR, §§300.507-300.515 and 300.532, if applicable, and this division.

(c) A parent or public education agency must request a hearing within one year of the date the parent or public education agency [complainant] knew or should have known about the alleged action that serves as the basis for the request.

(d) The timeline described in subsection (c) of this section does not apply to a parent if the parent was prevented from filing a request for a due process hearing [complaint] due to:
   (1) specific misrepresentations by the public education agency that it had resolved the problem forming the basis of the request for a hearing [due process complaint] ; or
   (2) the public education agency's withholding of information from the parent that was required by 34 CFR, §300.1, et seq. to be provided to the parent.

§89.1165. Request for Special Education Due Process Hearing.
(a) A request for a due process hearing (due process complaint) must be in writing and must be filed with the Texas Education Agency (TEA). The request may be filed by mail, hand-delivery, or facsimile.

(b) The party filing a request for a hearing must forward a copy of the request to the non-filing party at the same time that the request is filed with the TEA. The timelines applicable to hearings [shall] commence the calendar day after the non-filing party receives the request. Unless rebutted, it will be presumed that the non-filing party received the request on the date it is sent to the parties by the TEA.

(c) The request for a hearing must include:
   (1) the name of the child;
   (2) the address of the residence of the child;
   (3) the name of the school the child is attending;
   (4) in the case of a homeless child or youth (within the meaning of §725(2) of the McKinney-Vento Homeless Assistance Act (42 United States Code §11434a(2)), available contact information for the child, and the name of the school the child is attending;
   (5) a description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and
   (6) a proposed resolution of the problem to the extent known and available to the party at the time.

(d) A party may not have a hearing until the party files a request for a hearing that meets the requirements of subsection (c) of this section.

(e) The TEA has developed a model form that may be used by parents and public education agencies to request a hearing. The form is available on request from the TEA and on the TEA website.
§89.1175. Representation in Special Education Due Process Hearings.

(a) A party to a due process hearing may represent himself or herself or be represented by:

(1) an attorney who is licensed in the State of Texas; or

(2) an individual who is not an attorney licensed in the State of Texas but who has special knowledge or training with respect to problems of children with disabilities and who satisfies the qualifications of this section.

(b) A party who wishes to be represented by an individual who is not an attorney licensed in the State of Texas must file a written authorization with the hearing officer promptly after filing the request for a due process hearing or promptly after retaining the services of the non-attorney representative. The party must forward a copy of the written authorization to the opposing party at the same time that the written authorization is filed with the hearing officer.

(c) The written authorization must [shall] be on the form provided in this subsection.

Figure: 19 TAC §89.1175(c)

(d) The written authorization must include the non-attorney representative's name and contact information and a description of the non-attorney representative's:

(1) special knowledge or training with respect to problems of children with disabilities;

(2) knowledge of the rules and procedures that apply to due process hearings, including those in 34 Code of Federal Regulations, §§300.507-300.515 and 300.532, if applicable, and this division;

(3) knowledge of federal and state special education laws, regulations, and rules; and

(4) educational background.

(e) The written authorization must state the party's acknowledgment of the following:

(1) the non-attorney representative has been given full authority to act on the party's behalf with respect to the hearing;

(2) the actions or omissions by the non-attorney representative are binding on the party, as if the party had taken or omitted those actions directly;

(3) documents are deemed to be served on the party if served on the non-attorney representative;

(4) communications between the party and a non-attorney representative are not generally protected by the attorney-client privilege and may be subject to disclosure during the hearing proceeding;

(5) neither federal nor state special education laws provide for the recovery of fees for the services of a non-attorney representative; and

(6) it is the party's responsibility to notify the hearing officer and the opposing party of any change in the status of the authorization and that the provisions of the authorization will [shall] remain in effect until the party notifies the hearing officer and the opposing party of the party's revocation of the authorization.

(f) The written authorization must be signed and dated by the party.

(g) An individual is prohibited from being a party's representative under subsection (a)(2) of this section if the individual has prior employment experience with the school district and the school district raises an objection to the individual serving as a representative based on the individual's prior employment experience. No other objections to a party's representation by a non-attorney are permitted under this section.

(h) Upon receipt of a written authorization filed under this section, the hearing officer must [shall] promptly determine whether the non-attorney representative is qualified to represent the party in the hearing and must [shall] notify the parties in writing of the determination. A hearing officer's determination is final and not subject to review or appeal.

(i) A non-attorney representative may not file pleadings or other documents on behalf of a party, present statements and arguments on behalf of a party, examine and cross-examine witnesses, offer and introduce
evidence, object to the introduction of evidence and testimony, or engage in other activities in a representative capacity unless the hearing officer has reviewed a written authorization filed under this section and determined that the non-attorney representative is qualified to represent the party in the hearing.

(j) In accordance with the Texas Education Code, §38.022, a school district may require an attorney or a non-attorney representative who enters a school campus to display his or her driver's license or another form of government-issued identification. A school district may also verify whether the representative is a registered sex offender and may apply a policy adopted by its board of trustees regarding the action to be taken when a visitor to a school campus is identified as a sex offender.

§89.1180. Prehearing Procedures.
(a) Promptly upon being assigned to a due process hearing, the hearing officer will forward to the parties a scheduling order which sets the time, date, and location of the hearing and contains the timelines for the following actions, as applicable:

(1) Response to Request for a Due Process Hearing (34 Code of Federal Regulations (CFR), §300.508(f));
(2) Resolution Meeting (34 CFR, §300.510(a));
(3) Contesting Sufficiency of the Request for a Hearing [Complaint] (34 CFR, §300.508(d));
(4) Resolution Period (34 CFR, §300.510(b));
(5) Five-Business Day Disclosure (34 CFR, §300.512(a)(3)); and
(6) the date by which the final decision of the hearing officer must [shall] be issued (34 CFR, §300.515 and §300.532(c)(2)).

(b) The hearing officer must [shall] schedule a prehearing conference to be held at a time reasonably convenient to the parties to the hearing. The prehearing conference must [shall] be held by telephone unless the hearing officer determines that circumstances require an in-person conference.

(c) The prehearing conference must [shall] be recorded and transcribed by a court reporter, who will [shall] promptly prepare a transcript of the prehearing conference for the hearing officer with copies to each of the parties.

(d) The purpose of the prehearing conference will [shall] be to consider any of the following:

(1) specifying issues as set forth in the request for a hearing [due process complaint];
(2) admitting certain assertions of fact or stipulations;
(3) establishing any limitations on the number of witnesses and the time allotted for presenting each party's case; and/or
(4) discussing other matters which may aid in simplifying the proceeding or disposing of matters in controversy, including settling matters in dispute.

(e) Promptly upon the conclusion of the prehearing conference, the hearing officer will issue and deliver to the parties a written prehearing order which confirms and/or identifies:

(1) the time, place, and date of the hearing;
(2) the issues to be adjudicated at the hearing;
(3) the relief being sought at the hearing;
(4) the deadline for disclosure of evidence and identification of witnesses, which must be at least five business days prior to the scheduled date of the hearing (hereinafter referred to as the "Disclosure Deadline");
(5) the date by which the final decision of the hearing officer must [shall] be issued; and
(6) other information determined to be relevant by the hearing officer.
No pleadings, other than the request for a hearing, and the response to the request for a hearing, if applicable, are mandatory, unless ordered by the hearing officer. Any pleadings after the request for a hearing must be filed with the hearing officer. Copies of all pleadings must be sent to all parties of record in the hearing and to the hearing officer. If a party is represented by an attorney or a non-attorney determined by the hearing officer to be qualified to represent the party, all copies must be sent to the attorney of record or non-attorney representative, as applicable. Facsimile copies may be substituted for copies sent by other means. An affirmative statement that a copy of the pleading has been sent to all parties and the hearing officer is sufficient to indicate compliance with this subsection.

Discovery methods are limited to those specified in the Administrative Procedure Act (APA), Texas Government Code, Chapter 2001, and may be further limited by order of the hearing officer. Upon a party's request to the hearing officer, the hearing officer may issue subpoenas and commissions to take depositions under the APA. Subpoenas and commissions to take depositions must be issued in the name of the Texas Education Agency.

On or before the Disclosure Deadline (which must be at least five business days prior to a scheduled hearing), each party must disclose and provide to all other parties and the hearing officer copies of all evidence (including, without limitation, all evaluations completed by that date and recommendations based on those evaluations) that the party intends to use at the hearing. An index of the documents disclosed must be included with and accompany the documents. Each party must also include with the documents disclosed a list of all witnesses (including their names, addresses, phone numbers, and professions) that the party anticipates calling to testify at the hearing.

A party may request a dismissal or nonsuit of a hearing to the same extent that a plaintiff may dismiss or nonsuit a case under the Texas Rules of Civil Procedure, Rule 162. However, if a party requests a dismissal or nonsuit of a hearing after the Disclosure Deadline has passed and, at any time within one year thereafter requests a subsequent hearing involving the same or substantially similar issues as those alleged in the original hearing, then absent good cause or unless the parties agree otherwise, only evidence disclosed and witnesses identified by the Disclosure Deadline in the original hearing may be introduced at the subsequent hearing.

§89.1183. Resolution Process.

(a) Within 15 calendar days of receiving notice of the parent's request for a due process hearing, the public education agency must convene a resolution meeting with the parent and the relevant members of the admission, review, and dismissal committee who have specific knowledge of the facts identified in the request. The resolution meeting:

(1) must include a representative of the public education agency who has decision-making authority on behalf of the public education agency; and

(2) may not include an attorney of the public education agency unless the parent is accompanied by an attorney.

(b) The purpose of the resolution meeting is for the parent of the child to discuss the hearing issues and the facts that form the basis of the request for a hearing so that the public education agency has the opportunity to resolve the dispute.

(c) The resolution meeting described in subsections (a) and (b) of this section need not be held if:

(1) the parent and the public education agency agree in writing to waive the meeting; or

(2) the parent and the public education agency agree to use the mediation process described in §89.1193 of this title (relating to Special Education Mediation).

(d) The parent and the public education agency determine the relevant members of the admission, review, and dismissal committee to attend the resolution meeting.

(e) The parties may enter into a confidentiality agreement as part of their resolution agreement. There is nothing in this division, however, that requires the participants in a resolution meeting to keep the discussion confidential or make a confidentiality agreement a condition of a parent's participation in the resolution meeting.
(f) If the public education agency has not resolved the hearing issues to the satisfaction of the parent within 30 calendar days of the receipt of the request for a hearing, the hearing may occur.

(g) Except as provided in subsection (k) of this section, the timeline for issuing a final decision begins at the expiration of this 30-day resolution period.

(h) Except where the parties have jointly agreed to waive the resolution process or to use mediation, notwithstanding subsections (f) and (g) of this section, the failure of the parent filing a request for a hearing to participate in the resolution meeting delays the timelines for the resolution process and the hearing until the meeting is held.

(i) If the public education agency is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made (and documented in accordance with the procedures in 34 Code of Federal Regulations, §300.322(d)), the public education agency may at the conclusion of the 30-day resolution period, request that a hearing officer dismiss the parent's request for a hearing.

(j) If the public education agency fails to hold the resolution meeting within 15 calendar days of receiving the parent's request for a hearing or fails to participate in the resolution meeting, the parent may seek the intervention of the hearing officer to begin the hearing timeline.

(k) Notwithstanding subsections (f) and (g) of this section, the timeline for issuing a final decision starts the calendar day after one of the following events:
   (1) both parties agree in writing to waive the resolution meeting;
   (2) after either the mediation or resolution meeting starts but before the end of the 30-day resolution period, the parties agree in writing that no agreement is possible; or
   (3) if both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later the parent or public education agency withdraws from the mediation process.

(l) If a resolution to the dispute is reached at the resolution meeting, the parties must [shall] execute a legally binding agreement that is:
   (1) signed by both the parent and a representative of the public education agency who has the authority to bind the public education agency; and
   (2) enforceable in any state or federal court of competent jurisdiction.

(m) If the parties execute an agreement pursuant to subsection (l) of this section, a party may void the agreement within three business days of the agreement's execution.

§89.1185. Hearing Procedures.

(a) The hearing officer must [shall] afford the parties an opportunity for hearing within the timelines set forth in 34 Code of Federal Regulations (CFR), §300.515 and §300.532, as applicable, unless the hearing officer, at the request of either party, grants an extension of time, except that the timelines for expedited hearings cannot be extended.

(b) Each hearing must [shall] be conducted at a time and place that are reasonably convenient to the parents and child involved.

(c) All persons in attendance must [shall] comport themselves with the same dignity, courtesy, and respect required by the district courts of the State of Texas. All argument must [shall] be made to the hearing officer alone.

(d) Except as modified or limited by the provisions of 34 CFR, §§300.507-300.514 or 300.532, or this division, the Texas Rules of Civil Procedure will [shall] govern the proceedings at the hearing and the Texas Rules of Evidence will [shall] govern evidentiary issues.

(e) Before a document may be offered or admitted into evidence, the document must be identified as an exhibit of the party offering the document. All pages within the exhibit must be numbered, and all personally identifiable information concerning any student who is not the subject of the hearing must be redacted from the exhibit.

(f) The hearing officer may set reasonable time limits for presenting evidence at the hearing.
Upon request, the hearing officer, at his or her discretion, may permit testimony to be received by telephone.

Granting of a motion to exclude witnesses from the hearing room will be at the hearing officer's discretion.

Hearings conducted under this division must be closed to the public, unless the parent requests that the hearing be open.

The hearing must be recorded and transcribed by a court reporter, who will promptly prepare and transmit a transcript of the evidence to the hearing officer with copies to each of the parties.

Filing of post-hearing briefs will be permitted only upon order of the hearing officer.

The hearing officer must issue a final decision, signed and dated, no later than 45 calendar days after the expiration of the 30-day resolution period under 34 CFR, §300.510(b), and §89.1183 of this title (relating to Resolution Process) or the adjusted time periods described in 34 CFR, §300.510(c), and §89.1183 of this title after a request for a due process hearing is received by the Texas Education Agency (TEA), unless the deadline for a final decision has been extended by the hearing officer as provided in §89.1186 of this title (relating to Extensions of Time). A final decision must be in writing and must include findings of fact and conclusions of law separately stated. Findings of fact must be based exclusively on the evidence presented at the hearing. The final decision must be mailed to each party by the hearing officer on the day that the decision is issued. The hearing officer, at his or her discretion, may render his or her decision following the conclusion of the hearing, to be followed by written findings of fact and written decision.

At the request of either party, the hearing officer must include, in the final decision, specific findings of fact regarding the following issues:

1. whether the parent or the public education agency unreasonably protracted the final resolution of the issues in controversy in the hearing; and
2. if the parent was represented by an attorney, whether the parent's attorney provided the public education agency the appropriate information in the request for a hearing in accordance with 34 CFR, §300.508(b).

The decision issued by the hearing officer is final, except that any party aggrieved by the findings and decision made by the hearing officer, or the performance thereof by any other party, may bring a civil action with respect to the issues presented at the hearing in any state court of competent jurisdiction or in a district court of the United States, as provided in 34 CFR, §300.516.

A public education agency must implement any decision of the hearing officer that is, at least in part, adverse to the public education agency within the timeframe prescribed by the hearing officer or, if there is no timeframe prescribed by the hearing officer, within ten school days after the date the decision was rendered. In accordance with 34 CFR, §300.518(d), a public education agency must implement a hearing officer's decision during the pendency of an appeal, except that the public education agency may withhold reimbursement for past expenses ordered by the hearing officer.

In accordance with 34 CFR, §300.152(c)(3), a parent may file a complaint with the TEA alleging that a public education agency has failed to implement a hearing officer's decision.

§89.1186. Extensions of Time.

A hearing officer may grant extensions of time for good cause beyond the time period specified in §89.1185(1) of this title (relating to Hearing Procedures) at the request of either party. A hearing officer must not solicit extension requests, grant extensions on his or her own behalf, or unilaterally issue extensions for any reason. Any extension must be granted to a specific date, and the reason for the extension must be documented in a written order of the hearing officer and provided to each of the parties.

A hearing officer may grant a request for an extension only after fully considering the cumulative impact of the following factors:

1. whether the delay will positively contribute to, or adversely affect, the child's educational interest or well-being;
the need of a party for additional time to prepare or present the party's position at the hearing;
any adverse financial or other detrimental consequences likely to be suffered by a party in the event of delay; and
whether there has already been a delay in the proceeding through the actions of one of the parties.

§89.1191. Special Rule for Expedited Due Process Hearings.

A parent who disagrees with any decision regarding a child’s placement under 34 Code of Federal Regulations (CFR), §300.530 and §300.531, or a manifestation determination under 34 CFR, §300.530(e), or a school district that believes that maintaining the current placement of a child is substantially likely to result in injury to the child or others, may appeal the decision by requesting an expedited due process hearing under 34 CFR [Code of Federal Regulations (CFR)], §300.532. An expedited due process hearing will be governed by the same procedural rules as are applicable to due process hearings generally, except that:
(1) the hearing must occur within 20 school days of the date the request for a due process hearing is filed;
(2) the hearing officer must make a decision within 10 school days after the hearing;
(3) unless the parents and the school district agree in writing to waive the resolution meeting required by 34 CFR, §300.532(c)(3)(i), or to use the mediation process described in 34 CFR, §300.506, the resolution meeting must occur within seven calendar days of the receipt of the request for a hearing;
(4) the hearing may proceed unless the matter has been resolved to the satisfaction of both parties within 15 calendar days of the receipt of the request for a hearing; and
(5) the hearing officer shall not grant any extensions of time or grant permission for the hearing to proceed under the timelines that apply to hearings involving non-disciplinary matters;
(6) the provisions in 34 CFR, §300.508(d), do not apply.

§89.1192. Attorneys’ Fees.

In an action or proceeding brought under this division, a court, in its discretion, may award reasonable attorneys’ fees to the prevailing party under the circumstances described in 34 Code of Federal Regulations, §300.517.

§89.1193. Special Education Mediation.

(a) In accordance with 34 Code of Federal Regulations (CFR), §300.506, the Texas Education Agency (TEA) has established a mediation process to provide parents and public education agencies with an opportunity to resolve disputes involving any matter arising under Part B of the Individuals with Disabilities Education Act (IDEA) or 34 CFR, §300.1 et seq. Mediation is available to resolve these disputes at any time.

(b) The mediation procedures shall ensure that the process is:
(1) voluntary on the part of the parties;
(2) not used to deny or delay a parent's right to a due process hearing or to deny any other rights afforded under Part B of the IDEA; and
(3) conducted by a qualified and impartial mediator who is trained in effective mediation techniques and who is knowledgeable in laws and regulations relating to the provision of special education and related services.

(c) A request for mediation must be in writing and must be filed with the TEA by mail, hand-delivery, or facsimile. The TEA has developed a form that may be used by parties requesting mediation. The form is available on request from the TEA and is also available on the TEA website.
The TEA will maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

An individual who serves as a mediator:

1. must not be an employee of the TEA or the public education agency that is involved in the education or care of the child who is the subject of the mediation process;
2. must not have a personal or professional conflict of interest, including relationships or contracts with schools or parents outside of mediations assigned by the TEA; and
3. is not an employee of the TEA solely because the individual is paid by the TEA to serve as a mediator.

The TEA will select mediators on a random, rotational, or other impartial basis. Selecting mediators on an impartial basis includes permitting the parties involved in a dispute to agree on a mediator from the TEA's list of mediators. If the parties agree to a mediator, they must advise the TEA of the desired mediator and must not contact a mediator to discuss the mediator's availability to conduct the mediation. The parties must not contact a mediator on the TEA's list of mediators until the TEA has provided the parties with the written notice of the mediator assignment.

The parties by agreement may select a mediator from the list maintained by the TEA. If the parties do not select a mediator by agreement, a mediator will be selected on a random basis by the TEA.

If a mediator is also a hearing officer under §89.1170 of this title (relating to Impartial Hearing Officer), that individual may not serve as a mediator if he or she is the hearing officer in a pending due process hearing involving the same student who is the subject of the mediation process or was the hearing officer in a previous due process hearing involving the student who is the subject of the mediation process.

The TEA will bear the cost of the mediation process.

A mediation session must be scheduled in a timely manner and held in a location that is convenient to the parties.

If the parties resolve a dispute through the mediation process, the parties must execute a legally binding agreement that:

1. states that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding; and
2. is signed by both the parent and a representative of the public education agency who has the authority to bind the public education agency.

A written, signed mediation agreement under subsection (j) of this section is enforceable in any state or federal court of competent jurisdiction.

Discussions that occur during the mediation process are confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings of any state or federal court.