

Proposed Rule
LSA Document #09-795

DIGEST

Amends [511 IAC 7-37-1](#) to eliminate notice of administrative appeal. Amends [511 IAC 7-45-3](#) to eliminate the reference that the independent hearing officer is being appointed on behalf of the public agency. Amends [511 IAC 7-45-7](#) to reflect that attorney's fees may be recoverable if the court determines the parent prevailed at the due process hearing or judicial review, to reflect the change in content of the independent hearing officer's written decision regarding the manner in which the decision may be appealed and the conditions affecting the timeline for requesting attorney's fees, to establish that a hearing officer's decision and orders are final unless a petition for judicial review is filed, and to establish the timeline for requesting judicial review. Amends [511 IAC 7-45-9](#) to repeal the establishment and responsibilities of the board of special education appeals and to establish that a petition for judicial review as the sole means to appeal a hearing officer's decision in a due process hearing. Amends [511 IAC 7-45-10](#) to eliminate an appeal to the Board of Special Education Appeals and to establish that a petition for judicial review as the sole means of appealing the hearing officer's decision in an expedited due process hearing. Amends [511 IAC 7-45-11](#) to eliminate references to the board of special education appeals in the hearing officer's written notice regarding attorney's fees. Effective 30 days after filing with the Publisher.

[IC 4-22-2.1-5 Statement Concerning Rules Affecting Small Businesses](#)

[511 IAC 7-37-1](#); [511 IAC 7-45-3](#); [511 IAC 7-45-7](#); [511 IAC 7-45-9](#); [511 IAC 7-45-10](#); [511 IAC 7-45-11](#)

SECTION 1. [511 IAC 7-37-1](#) IS AMENDED TO READ AS FOLLOWS:

[511 IAC 7-37-1](#) Notice of procedural safeguards

Authority: [IC 20-19-2-8](#); [IC 20-19-2-16](#)

Affected: [IC 20-19-2](#); [IC 20-35](#)

Sec. 1. (a) The public agency shall establish, maintain, and implement procedures in accordance with this section to ensure that students with disabilities and their parents are afforded procedural safeguards with respect to the provision of a free appropriate public education by the agency.

(b) The written notice of procedural safeguards shall be:

- (1) a standard notice;
- (2) written in language understandable to the general public;
- (3) provided in the:
 - (A) native language; or
 - (B) other mode of communication;used by the parent unless it clearly is not feasible to do so; and
- (4) printed in a format that is easy to read.

(c) When the native language or other mode of communication of the parent is not a written language, the public agency shall take steps to ensure the following:

- (1) The procedural safeguards are translated orally or by other means to the parent in his or her native language or other mode of communication.
- (2) The parent understands the content of the notice.
- (3) There is written documentation that the requirements of this subsection are met.

(d) A copy of the notice of procedural safeguards shall be given to the parent of a student with a disability one (1) time a school year, except that a copy also must be given to the parent upon:

- (1) initial referral or parental request for evaluation;
- (2) receipt of the first filing of a complaint under [511 IAC 7-45-1](#) in a school year;
- (3) receipt of the first due process hearing request under [511 IAC 7-45-3](#) in a school year;
- (4) the date the public agency decides to make a removal that results in a disciplinary change of placement under [511 IAC 7-44-2](#), which includes removals to interim alternative education settings for:

- (A) weapons;
 - (B) drugs; and
 - (C) serious bodily injury;
- under [511 IAC 7-44-6](#); and
- (5) request by a parent.

(e) A public agency may place a copy of the notice of procedural safeguards on its Internet website if a website exists. However, such posting does not satisfy the requirement of providing the notice of procedural safeguards to a parent.

(f) The written notice of procedural safeguards must include a full explanation of the following:

(1) The parent's right to receive written notice before the public agency proposes to initiate or change, or refuses to initiate or change, the:

- (A) identification, evaluation, or educational placement of the student; or
 - (B) provision of a free appropriate public education to the student;
- as required in [511 IAC 7-40-4](#), [511 IAC 7-40-8](#), [511 IAC 7-42-4](#), and [511 IAC 7-42-7](#).

(2) The prerequisite of written parental consent, as defined in [511 IAC 7-32-17](#), for the following:

- (A) An initial evaluation, as required in [511 IAC 7-40-4\(h\)](#).
- (B) A reevaluation, as required in [511 IAC 7-40-8\(i\)](#), unless the parent fails to respond to a public agency's reasonable efforts to obtain consent as described in [511 IAC 7-40-8\(k\)](#).
- (C) Initial special education services, as required in [511 IAC 7-42-7\(f\)](#).
- (D) A public agency's access to a student's public benefits or insurance programs or private insurance proceeds, as required in [511 IAC 7-33-4](#).
- (E) The release of a student's educational records, in accordance with [511 IAC 7-38-1\(q\)\(1\)](#), to officials of participating agencies providing or paying for transition services under and in accordance with [511 IAC 7-43-3](#).
- (F) The exchange of educational records, in accordance with [511 IAC 7-38-1\(q\)\(2\)](#), regarding a parentally-placed nonpublic school student, between officials of the public agency where the nonpublic school is located and the school district of legal settlement, as required in [511 IAC 7-34](#).
- (G) The public agency inviting, under [511 IAC 7-42-3\(d\)](#), a representative of any participating agency (other than the public agency) likely to be responsible for providing or paying for transition services.
- (H) An excusal, under [511 IAC 7-42-3\(h\)](#), of a CCC member described in [511 IAC 7-42-3\(b\)\(1\)](#) through [511 IAC 7-42-3\(b\)\(4\)](#), from a CCC meeting, in whole or in part, when the meeting involves a modification to or discussion of the member's area of the curriculum or related services.

(3) The parent's right to the following:

- (A) To participate as a member of the CCC and the requirements of [511 IAC 7-42-5](#) and [511 IAC 7-42-6](#).
- (B) To request a CCC meeting, under [511 IAC 7-42-5\(a\)\(3\)](#), if he or she believes that a required component of the IEP should be changed to ensure the provision of a free appropriate public education.
- (C) To request one (1) or both of the following in accordance with [511 IAC 7-40-5\(h\)](#):
 - (i) A copy of the initial educational evaluation report, at no cost to the parent, prior to the CCC meeting.
 - (ii) A meeting with an individual who can explain the results of the educational evaluation prior to the CCC meeting.
- (D) To request a reevaluation as described in [511 IAC 7-40-8](#).
- (E) To obtain an independent educational evaluation as described in [511 IAC 7-40-7](#), including the following:
 - (i) The right to have the results of the independent educational evaluation considered by the CCC or the independent hearing officer in a due process hearing.
 - (ii) The circumstances under which an independent educational evaluation may be obtained at public expense.
 - (iii) The criteria that must be met when an independent educational evaluation is conducted at public expense.

(4) The parent's rights with regard to the student's educational record as described in [511 IAC 7-38](#), including the following:

- (A) Accessing the record.
- (B) Inspecting and reviewing the record.
- (C) Challenging information in the record.
- (D) Amending information in the record.
- (E) The consent required for disclosure, use, and destruction of records under [511 IAC 7-38-1](#).
- (F) Any fees associated with copying the record.

(5) The transfer of rights to the student at eighteen (18) years of age under [511 IAC 7-43-5](#), unless a guardian or an educational representative has been appointed for the student.

- (6) The availability of mediation and the mediation process under [511 IAC 7-45-2](#).
- (7) The right of the parent, or any interested party, to file a complaint in accordance with [511 IAC 7-45-1](#).
- (8) The parent's right to request a due process hearing, in accordance with [511 IAC 7-45-3](#), to challenge the public agency's proposed or refused action regarding a student with a disability.
- (9) The difference between a complaint and due process hearing request, including the following:
 - (A) The jurisdiction of each procedure, including what issues may be raised under each procedure.
 - (B) The allowable time period in which to file a:
 - (i) complaint; or
 - (ii) due process hearing request.
 - (C) The opportunity for the public agency to resolve a:
 - (i) complaint; or
 - (ii) a parent's request for a due process hearing.
 - (D) The filing procedures for:
 - (i) complaints; and
 - (ii) requests for due process.
 - (E) The decisional timelines for:
 - (i) complaints; and
 - (ii) due process hearings.
- (10) The student's placement during the pendency of any due process hearing in accordance with [511 IAC 7-44-8](#) and [511 IAC 7-45-7\(u\)](#).
- (11) Due process hearings, including requirements for disclosure of evaluation results and recommendations, as described in [511 IAC 7-45-7](#).
- ~~(12) Administrative appeal, as described in [511 IAC 7-45-9](#).~~
- ~~(13) (12) Civil action, including the time period in which to file a civil action, as described in [511 IAC 7-45-9\(n\)](#).~~
- ~~(14) (13) Attorney's fees, as described in [511 IAC 7-45-11](#).~~
- ~~(15) (14) The requirements under [511 IAC 7-34-10](#) for a parent's unilateral placement of a student with a disability in a nonpublic school at public expense.~~
- ~~(16) (15) The protections and procedures for students who are subject to the following:
 - (A) Disciplinary changes of placement under [511 IAC 7-44-2](#), which includes manifestation determinations under [511 IAC 7-44-5](#).
 - (B) Placement in an interim alternative educational setting as described in [511 IAC 7-44-6](#) and [511 IAC 7-44-7](#).~~
- ~~(17) (16) The protections for students who have not been determined eligible for special education and related services under [511 IAC 7-44-9](#).~~
- ~~(18) (17) Reporting of crimes allegedly committed by students to appropriate authorities as described in [511 IAC 7-38-1\(o\)](#) and [511 IAC 7-44-10](#).~~
- ~~(19) (18) The names and addresses of agencies and organizations, including the public agency, that provide assistance to parents in understanding this article.~~

(Indiana State Board of Education; [511 IAC 7-37-1](#); filed Jul 14, 2008, 1:24 p.m.: [20080813-IR-511080112FRA](#))

SECTION 2. [511 IAC 7-45-3](#) IS AMENDED TO READ AS FOLLOWS:

[511 IAC 7-45-3](#) Due process hearing requests

Authority: [IC 20-19-2-8](#); [IC 20-19-2-16](#)

Affected: [IC 20-19-2](#); [IC 20-35](#)

Sec. 3. (a) A parent, a public agency, or the state educational agency may initiate a due process hearing that is conducted by an independent hearing officer when there is a dispute regarding any of the following:

- (1) A student's identification and eligibility for services under this article.
- (2) The appropriateness of the:
 - (A) educational evaluation; or
 - (B) student's proposed or current level of special education services or placement.
- (3) Any other dispute involving the provision of a free appropriate public education for the student.

(b) A request for a due process hearing and for the appointment of an independent hearing officer shall:

- (1) be in writing and signed;

- (2) include:
 - (A) the student's name and address; or
 - (B) in the case of a homeless student as defined at [511 IAC 7-32-46](#), available contact information for the student;
- (3) include the name of the school the student is attending;
- (4) specify the reasons for the hearing request including:
 - (A) a description of the nature of the problem; and
 - (B) any facts related to the problem;
- (5) include a proposed resolution of the problem to the extent known and available to the parents at the time; and
- (6) be sent simultaneously to the superintendent of public instruction and the opposing party.

(c) The due process hearing request must allege a violation that occurred not more than two (2) years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process hearing request unless the parent was prevented from filing a due process hearing request due to:

- (1) specific misrepresentations by the public agency that it had resolved the problems forming the basis of the due process hearing; or
- (2) the public agency's withholding of information from the parent that was required under this article to be provided to the parent.

(d) The state superintendent of public instruction shall appoint the independent hearing officer. ~~on behalf of the public agency. The independent hearing officer shall be an administrative law judge.~~ When a due process hearing request is received, the department of education shall send the public agency and the parent a:

- (1) written notice of the name of the independent hearing officer who has been appointed; and
- (2) copy of the letter requesting a due process hearing.

(e) The public agency must inform the parent of the availability of free or low cost legal and other relevant services available in the area if:

- (1) the parent requests the information; or
- (2) the parent or the public agency files a due process hearing request under this section.

(f) Due process timelines begin upon the opposing party's receipt of the due process hearing request.

(Indiana State Board of Education; [511 IAC 7-45-3](#); filed Jul 14, 2008, 1:24 p.m.: [20080813-IR-511080112FRA](#))

SECTION 3. [511 IAC 7-45-7](#) IS AMENDED TO READ AS FOLLOWS:

[511 IAC 7-45-7](#) Conducting the hearing

Authority: [IC 20-19-2-8](#); [IC 20-19-2-16](#)

Affected: [IC 4-21.5-3-15](#); [IC 20-19-2](#); [IC 20-35](#)

Sec. 7. (a) If the due process hearing is requested by the public agency:

- (1) due process hearings shall be conducted;
- (2) a final written decision reached; and
- (3) a copy of the written decision mailed to each of the parties;

not later than forty-five (45) calendar days after the request is received by the parent.

(b) If the due process hearing is requested by a parent, the hearing shall be conducted, a final written decision reached, and a copy of the written decision mailed to each of the parties not later than forty-five (45) calendar days after:

- (1) the thirty (30) day resolution period in section 6(f) of this rule; or
- (2) one (1) of the events in section 6(f)(1) through 6(f)(3) of this rule.

(c) An independent hearing officer may grant specific extensions of time beyond the forty-five (45) day timeline at the request of either party. Any extension of time granted by the independent hearing officer shall be:

- (1) in writing to all parties; and
- (2) included in the record of the proceedings.

(d) Any party to a due process hearing has the right to the following:

- (1) Be accompanied and advised by legal counsel and by individuals with special knowledge or training with respect to special education or the problems of students with disabilities.
- (2) Be represented by an individual who is not an attorney as permitted by [IC 4-21.5-3-15\(b\)](#).
- (3) Present evidence and:
 - (A) confront;
 - (B) cross-examine; and
 - (C) compel the attendance of;

witnesses.

- (4) Conduct discovery in accordance with [IC 4-21.5-3](#), Indiana Rules of Trial Procedure, and this section.
- (5) Prohibit the introduction of any evidence at the hearing that has not been disclosed at least five (5) business days prior to the hearing.
- (6) A separation of witnesses who are not parties to the dispute.
- (7) Obtain a written or, at the option of the parents, an electronic verbatim transcript of the hearing.
- (8) Obtain written or, at the option of the parents, electronic findings of facts and decision.
- (9) Be provided with an interpreter, if any party to the hearing has a hearing or speaking impairment or other difficulty in communicating, or whose native language is not English.

(e) A parent, or the parent's representative, involved in a due process hearing has the right to the following:

- (1) Have the student who is the subject of the hearing attend.
- (2) Have the hearing opened or closed to the public.
- (3) Inspect and review, prior to the hearing, any records pertaining to the student maintained by the public agency, its agents, or employees, including all tests and reports upon which the proposed action may be based.
- (4) Recover reasonable attorney's fees if a court determines the parent ultimately prevailed at the:
 - (A) due process hearing;
 - ~~(B) administrative appeal;~~ or
 - (B)** judicial review.
- (5) Obtain a written or electronic verbatim transcript of the proceedings at no cost.
- (6) Obtain written or electronic findings of fact and decisions at no cost.

(f) The independent hearing officer has the discretion and authority to do the following:

- (1) Issue subpoenas.
- (2) Determine whether individuals are knowledgeable with respect to special education in order to assist in the proceedings.
- (3) Frame and consolidate issues in the hearing to provide clarity.
- (4) Rule on any other matters with respect to the conduct of a due process hearing, subject to administrative or judicial review of abuse of such discretion or authority, mistake in law as to exercise of such discretion or authority, or that such authority was exercised in an arbitrary or capricious manner.
- (5) Bar any party that fails to comply with subsection (h) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.
- (6) Order a student with a disability to be placed in an interim alternative educational setting for not more than forty-five (45) instructional days under [511 IAC 7-44-7](#).

(g) The party requesting the due process hearing may not raise issues at the hearing that were not raised in the due process hearing request unless the other party agrees otherwise. However, nothing in this rule shall be construed to preclude a party from filing a separate due process hearing request on an issue separate from the due process hearing already requested.

(h) At least five (5) business days prior to the hearing, each party shall disclose to all other parties all evaluations completed by that date and recommendations based on the offering party's evaluations that the party intends to use at the hearing. A hearing officer may bar any party that fails to comply with this subsection from introducing the relevant evaluation or recommendation at the hearing without consent of the other party.

(i) The party requesting the due process hearing:

- (1) shall present evidence and testimony first regarding the appropriateness of the proposed or refused action; and
- (2) has the burden of persuading the hearing officer of its position.

(j) The independent hearing officer shall render a written or, at the option of the parents, an electronic decision. The decision shall be dated and must include the following:

- (1) Findings of fact and conclusions of law.
- (2) A decision and orders, if necessary.
- (3) A notice ~~of the right and the process to appeal~~ **that a party may seek judicial review of the decision and orders by filing a petition for judicial review in a civil court with jurisdiction within thirty (30) calendar days after receipt of the independent hearing officer's final decision.**
- (4) A notice that an action for attorney's fees must be filed in a civil court within thirty (30) calendar days after receipt of the independent hearing officer's final decision if no request for **judicial review** is filed. ~~with the board of special education appeals.~~

(k) The decision of the independent hearing officer shall be based solely upon the oral and written evidence presented at the hearing. In addition, an independent hearing officer's determination of whether a student received a free appropriate public education must be based on substantive grounds. In matters alleging a procedural violation, an independent hearing officer may find that a student did not receive a free appropriate public education only if the procedural inadequacies:

- (1) impeded the child's right to a free appropriate public education;
- (2) significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parent's child; or
- (3) caused a deprivation of educational benefit.

(l) Nothing in subsection (k) shall be construed to preclude an independent hearing officer from ordering a public agency to comply with procedural requirements under this rule and [511 IAC 7-37](#).

(m) The independent hearing officer shall mail a copy of the hearing decision via certified mail, return receipt requested, to each party involved in the hearing. The independent hearing officer's decision is a final order unless ~~appealed under a petition for judicial review is filed as described in~~ section 9 of this rule.

(n) Any party involved shall have thirty (30) calendar days from the date the independent hearing officer's written decision is received to:

- (1) implement the order or orders in the hearing decision; or
- (2) ~~initiate an appeal~~ **file a petition for judicial review** as described in section 9 of this rule.

- (o) A verbatim transcript of the hearing shall be made. The independent hearing officer is responsible for:
- (1) ensuring the hearing is transcribed; and
 - (2) determining from the parents at the outset of the hearing whether the transcription will be written or electronic.

The transcript shall be made available by the division of special education at no cost and upon the request of any party to the hearing at the conclusion of the hearing.

- (p) Due process hearings under this section shall be:
- (1) conducted under [IC 4-21.5-3](#) and this section; and
 - (2) held at a time and place reasonably convenient to all parties to the hearing.

The notice of time and place shall be in writing to all parties.

(q) The public agency shall bear all costs pertaining to the conduct of a hearing whether or not a hearing is ultimately held, including transcription and hearing officer fees and expenses. Funds under Part B of the Individuals with Disabilities Education Act may be used to pay the costs of conducting the hearing, but the funds shall not be used to pay attorney's fees or costs of a party.

(r) Class action due process hearings are not permitted. If the parties and the independent hearing officer agree to a hearing involving two (2) or more students, a separate decision with specific findings of fact, conclusions of law, and orders, if necessary, shall be written for each student.

(s) If the issue of the proceedings involves initial enrollment in a public school, the student, with the consent of the parent, shall be placed in the public school program until the completion of the proceedings. If the parties cannot agree to the student's placement during the proceedings, the independent hearing officer shall determine the student's placement as a preliminary matter to the conduct of the due process hearing.

(t) If the issue of the proceedings involves initial enrollment in a public school for a student who is transitioning from Part C of the Individuals with Disabilities Education Act to Part B of the act, and the student is no longer eligible for Part C services because the student has become three (3) years of age, the public agency is not required to provide the Part C services that the child had been receiving. If the:

(1) child is found eligible for special education and related services under Part B; and

(2) parent consents to the initial provision of special education and related services;

the public agency must provide those special education and related services that are not in dispute between the parent and the public agency.

(u) Except as provided in [511 IAC 7-44-8](#), the student shall remain in the student's current educational placement during a due process hearing ~~administrative appeal~~, or judicial proceeding unless the parties agree otherwise. If the:

(1) proceedings extend beyond the end of the school year; and

(2) placement includes normal grade advancement;

that advancement shall proceed unless normal grade advancement is at issue. If the last agreed-upon placement cannot be determined, the independent hearing officer shall determine the student's educational placement.

(v) The division of special education shall maintain the following for the duration of the hearing ~~any appeal~~, and any subsequent civil action:

(1) The original hearing decision.

(2) The transcript of the hearing.

(3) The exhibits admitted by the independent hearing officer.

(4) All:

(A) notices;

(B) pleadings;

(C) exceptions;

(D) motions;

(E) requests; and

(F) other papers;

filed in the hearing.

(w) The division of special education shall, after deleting personally identifiable information from copies of the due process hearing findings, conclusions, and orders, do the following:

(1) Transmit a copy of the document to the state advisory council on the education of children with disabilities.

(2) Maintain a copy of the document for public review in its offices for at least five (5) years after administrative remedies have been exhausted and any litigation completed.

(Indiana State Board of Education; [511 IAC 7-45-7](#); filed Jul 14, 2008, 1:24 p.m.: [20080813-IR-511080112FRA](#); filed Dec 3, 2009, 1:50 p.m.: [20091230-IR-511090057FRA](#))

SECTION 4. [511 IAC 7-45-9](#) IS AMENDED TO READ AS FOLLOWS:

[511 IAC 7-45-9](#) Judicial review of hearing officer decision

Authority: [IC 20-19-2-8](#); [IC 20-19-2-16](#)

Affected: [IC 4-21.5-3](#); [IC 4-21.5-5-5](#); [IC 20-19-2](#); [IC 20-35](#)

Sec. 9. (a) ~~The state board of special education appeals (board) is established. The board shall have three (3) members appointed by the state superintendent of public instruction. The members of the board shall alternate as chair when conducting impartial reviews. A member of the board:~~

~~(1) may not:~~

~~(A) be an officer, employee, or agent of a public agency involved in the education or care of a student; or~~

~~(B) have any personal or professional interest that conflicts with the member's objectivity in the appeal process;~~

~~(2) must be a resident of Indiana;~~

~~(3) must possess knowledge of and the ability to:~~

~~(A) understand the provisions of:~~

~~(i) the Individuals with Disabilities Education Act (IDEA);~~

~~(ii) federal regulations implementing the IDEA;~~

~~(iii) legal interpretations of the IDEA by federal and state courts; and~~

~~(iv) this article; and~~

~~(B) conduct hearings in accordance with appropriate standard legal practice; and~~

~~(4) must be subject to any other qualifications established by the superintendent of public instruction.~~

~~(b) The general counsel for the department of education shall serve as the agent for the board for the:~~

~~(1) receipt of all correspondence; and~~

~~(2) filing of documents.~~

~~(c) Due process hearing appeals under this section shall be conducted under [IC 4-21.5-3](#) and this section.~~

~~(d) A petition for an impartial review of the independent hearing officer's decision by the board may be initiated by any party to the hearing. The petition must be:~~

~~(1) in writing;~~

~~(2) signed by the party;~~

~~(3) filed simultaneously with the department of education and the opposing party;~~

~~(4) specific as to the reasons for the exceptions to the independent hearing officer's decision, identifying those portions of the findings, conclusions, and orders to which exceptions are taken; and~~

~~(5) filed within thirty (30) calendar days of the date the independent hearing officer's decision is received by the party.~~

~~(e) When a petition for review of an independent hearing officer's decision is received by the department of education, the department of education shall do the following:~~

~~(1) Notify each member of the board that a petition for review has been filed.~~

~~(2) Provide each member with a copy of the following:~~

~~(A) The petition for review.~~

~~(B) The independent hearing officer's findings, conclusions, and orders.~~

~~(C) A transcript of the hearing.~~

~~(D) Exhibits.~~

~~(E) Pleadings.~~

~~(F) Exceptions.~~

~~(G) Motions.~~

~~(H) Requests.~~

~~(I) Any other papers filed with the independent hearing officer or the department of education regarding the hearing.~~

~~(f) Any party to a due process hearing for which a petition for review has been filed may, within ten (10) calendar days from the date on which the petition for review is filed with the department of education, file a reply to the petition for review.~~

~~(g) Any petition for review that does not comply with the requirements of subsection (d) may be dismissed, in whole or in part, at the discretion of the board. Only matters raised in the initial due process hearing may be raised in a petition for review.~~

~~(h) If no petition for review is filed, or is not filed in a timely manner, the decision of the independent hearing officer shall become the decision of the board.~~

~~(i) Within thirty (30) calendar days of the receipt of a petition for review by the department of education, the board shall:~~

~~(1) conduct an impartial review of the findings and decision appealed;~~

~~(2) prepare a written decision; and~~

~~(3) mail the written decision via certified mail, return receipt requested, to all parties.~~

At the option of the parent, the parent's copy of the decision may be in written or electronic format. Specific extensions of time may be requested by any party to the appeal and granted by the chair of the board. The chair shall respond, in writing, to all parties when a request for extension is made. The chair may grant an extension of time to file a petition for review under subsection (d) provided the request is filed within thirty (30) calendar days of the date the independent hearing officer's decision is received by the party.

~~(j) The board, in conducting an impartial review, shall review the entire record of the due process hearing to ensure the procedures of the hearing were consistent with the requirements of sections 3 through 8 of this rule. The board, at its discretion, must afford the parties an opportunity for oral or written argument, or both. The board shall not disturb the findings of fact, conclusions of law, or orders of the independent hearing officer unless the board finds the independent hearing officer's decision to be one (1) or more of the following:~~

~~(1) Arbitrary or capricious.~~

~~(2) An abuse of discretion.~~

~~(3) Contrary to law, contrary to a constitutional right, power, privilege, or immunity.~~

~~(4) In excess the jurisdiction of the independent hearing officer.~~

~~(5) Reached in violation of an established procedure.~~

~~(6) Unsupported by substantial evidence.~~

~~(k) If the board decides to hear oral argument, the parties shall be notified of the decision in advance of the scheduled proceeding. The oral argument shall be held at a time and place reasonably convenient to all parties in the proceeding.~~

~~(l) When the board permits oral argument, each party has the right to be represented by counsel or other individuals with knowledge and training with respect to special education or the problems of students with disabilities. Each party has the opportunity for argument and rebuttal. The board may:~~

~~(1) ask questions of any person present to clarify the record; and~~

~~(2) at its discretion, exercise the same powers as an independent hearing officer under sections 3 through 8 of this rule.~~

When the board receives evidence or testimony, the parties shall have the same rights as under section 7 of this rule.

~~(m) The board, upon completion of its impartial review, shall prepare an independent written decision that:~~

~~(1) contains findings of fact, conclusions of law, and, if necessary, orders; and~~

~~(2) includes a notice of the following:~~

~~(A) The right to seek judicial review of the board's decision.~~

~~(B) A party has thirty (30) calendar days from the date the party receives the board's written decision in which to seek judicial review.~~

~~(C) An action for attorney's fees must be filed in a civil court with jurisdiction within thirty (30) calendar days after receipt of the board's final decision if no request for judicial review is filed in federal or state civil court.~~

~~(D) The decision of the board is a final order unless judicial review in federal or state civil court is sought.~~

~~(n)~~ **(a) Any party disagreeing with the decision of the board independent hearing officer may appeal to file a petition for judicial review with a civil court with jurisdiction. Under [IC 4-21.5-5-5](#), an appeal to a petition for review by a state or federal civil court must be filed within thirty (30) calendar days after the date the board's independent hearing officer's written decision is received by the party. The court shall:**

(1) receive the record of administrative proceedings;

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

(3) grant the relief it determines to be appropriate, basing its decision on a preponderance of the evidence.

(b) A federal district court has jurisdiction of an action brought under Section 615 of the Individuals with Disabilities Education Act and this article without regard to the amount in controversy.

~~(o)~~ **(c) Nothing in this article shall be construed to restrict or limit the rights, procedures, and remedies available under:**

(1) the federal or state Constitution;

(2) the Americans with Disabilities Act of 1990;

- (3) Title V of the Rehabilitation Act of 1973; or
- (4) other federal laws protecting the rights of students with disabilities;

except that before the filing of a civil action under such laws seeking relief that is also available under this article, the procedures under sections 3 through 8 of this rule and this section shall be exhausted to the same extent as would be required had the action been brought under this article.

~~(p) The costs of the board, including:~~

- ~~(1) travel;~~
- ~~(2) associated expenses; and~~
- ~~(3) reporting services;~~

~~shall be borne by the department of education.~~

~~(q) The division of special education, after deleting personally identifiable information from the findings, conclusions, and orders of the board, shall do the following:~~

- ~~(1) Transmit a copy of the document to the state advisory council on the education of children with disabilities.~~
- ~~(2) Maintain a copy of the document for public review in its offices for at least five (5) years after administrative remedies have been exhausted and any litigation completed.~~

~~(r) If, as a result of the board's review, the board's decision concurs with the parent's contention that a change of placement is appropriate, the placement ordered by the board shall be treated as a placement agreed upon by the parent and the public agency under section 7(u) of this rule.~~

(Indiana State Board of Education; [511 IAC 7-45-9](#); filed Jul 14, 2008, 1:24 p.m.: [20080813-IR-511080112FRA](#))

SECTION 5. [511 IAC 7-45-10](#) IS AMENDED TO READ AS FOLLOWS:

[511 IAC 7-45-10](#) Expedited due process hearings petition for judicial review

Authority: [IC 20-19-2-8](#); [IC 20-19-2-16](#)

Affected: [IC 4-21.5-3](#); [IC 20-19-2](#); [IC 20-35](#)

Sec. 10. (a) An expedited due process hearing will be conducted in the following situations:

- (1) The parent requests a hearing because the parent disagrees with:
 - (A) a determination that the student's behavior was not a manifestation of the student's disability; or
 - (B) the public agency's decision regarding the student's disciplinary change of placement under [511 IAC 7-44-3](#).
- (2) The public agency requests an expedited hearing because the public agency maintains that it is dangerous for the student to return to the current placement (placement prior to removal to the interim alternative educational setting) after the expiration of the student's placement in an interim alternative educational setting.

(b) An expedited due process hearing shall be conducted under [IC 4-21.5-3](#) and sections 3 through 8 of this rule, except that:

- (1) the expedited due process hearing must:
 - (A) occur within twenty (20) instructional days of the date the request was received by the public agency; and
 - (B) result in a determination within ten (10) instructional days after the hearing;
- (2) a resolution meeting under section 6 of this rule must occur within seven (7) calendar days of the date the hearing request was received by the public agency, unless the parties agree:
 - (A) in writing to waive the resolution meeting; or
 - (B) to use the mediation process described in section 2 of this rule;
- (3) the hearing may proceed unless the matter has been resolved to the satisfaction of both parties within fifteen calendar (15) days of the receipt of the hearing request;
- (4) the independent hearing officer shall not grant any extensions of time; and
- (5) the requirements of sufficiency in section 4 of this rule are not applicable to expedited due process hearings.

(c) An expedited due process hearing must be conducted by an independent hearing officer who meets the requirements under section 8 of this rule.

(d) **Any party who disagrees with** the independent hearing officer's decision in an expedited due process hearing is appealable to the board of special education appeals (board). The appeal shall be conducted under [IC 4-21-5-3](#) and may file a petition for review of the decision in accordance with section 9 of this rule. except that:

- (1) the request for review by the board must be filed with the department of education and received by the other parties not later than three (3) business days from the petitioning party's receipt of the independent hearing officer's decision;
- (2) any reply to the petition for review must be filed and received by the other parties within three (3) business days of the date the petition for review is filed; and
- (3) the board:
 - (A) shall issue a written decision not later than ten (10) business days from the date of receipt of the request for review;
 - (B) shall not grant any extensions of time;
 - (C) shall not hear oral argument in reviewing the decision in an expedited due process hearing; and
 - (D) at its discretion, may elect to nominate one (1) of its members to review the independent hearing officer's decision and issue a final decision without the participation of the other two (2) board members.

(e) At any time after the initiation of an expedited due process hearing, or appeal, the parties may agree to waive the requirements of the expedited process and proceed under

- (1) sections 3 through 6 of this rule for a due process hearing. or
- (2) section 7 of this rule for a due process hearing appeal.

(Indiana State Board of Education; [511 IAC 7-45-10](#); filed Jul 14, 2008, 1:24 p.m.: [20080813-IR-511080112FRA](#))

SECTION 6. [511 IAC 7-45-11](#) IS AMENDED TO READ AS FOLLOWS:

[511 IAC 7-45-11](#) Attorney's fees

Authority: [IC 20-19-2-8](#); [IC 20-19-2-16](#)

Affected: [IC 20-19-2](#); [IC 20-35](#)

Sec. 11. (a) Independent hearing officers and the board of special education appeals shall include a notice in their written decisions stating that an action for attorney's fees must be filed in a civil court with jurisdiction within thirty (30) calendar days after receipt of the

- (1) independent hearing officer's final decision if no request for review is filed with the board of special education appeals; or
- (2) board of special education appeals' final decision if no request for judicial review is filed in federal or state civil court.

(b) A court, in its discretion, may award reasonable attorney's fees and related costs to:

- (1) a prevailing party who is the:
 - (A) parent of a child with a disability; or
 - (B) department of education or a public agency against the attorney of a parent who:
 - (i) files a due process hearing request or subsequent cause of action that is frivolous, unreasonable, or without foundation; or
 - (ii) continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or
- (2) the prevailing department of education or the public agency against the attorney of a parent, or against the parent, if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to:
 - (A) harass;
 - (B) cause unnecessary delay; or
 - (C) needlessly increase the cost of litigation.

(c) Attorney's fees awarded shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded.

(d) Attorney's fees may not be awarded and related costs may not be reimbursed in any action or proceeding for services performed subsequent to the time of a written offer of settlement to a parent if:

- (1) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten (10) calendar days before the proceeding begins;
- (2) the offer is not accepted within ten (10) calendar days; and
- (3) the court finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

(e) Notwithstanding subsection (d), a court may award attorney's fees and related costs to a parent who:

- (1) is the prevailing party; and
- (2) was substantially justified in rejecting the settlement offer.

(f) Attorney's fees may not be awarded relating to any meeting of the CCC unless such meeting is convened as a result of an administrative proceeding or judicial action. A resolution meeting shall not be considered a meeting convened as a result of an administrative hearing or judicial action. Attorney's fees may not be awarded for a mediation described in section 2 of this rule that is conducted prior to the filing of the due process hearing.

(g) Unless a court finds that the department of education or the public agency unreasonably protracted the final resolution of the action or proceeding or any other violation of this rule, a court reduces, accordingly, the amount of attorney's fees awarded if the court finds any of the following:

- (1) During the course of the action or proceeding, the parent, or the parent's attorney, unreasonably protracted the final resolution of the controversy.
- (2) The amount of attorney's fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of comparable skills, reputation, and experience.
- (3) The time spent and legal services furnished were excessive considering the nature of the action or proceeding.
- (4) The attorney representing the parent did not provide to the public agency appropriate information in the due process hearing request under sections 3 and 4 of this rule.

(h) A public agency may not use funds under Part B of the Individuals with Disabilities Education Act 20 U.S.C. 1400 et seq., to pay attorney's fees or costs of a party related to an action or procedure under the Individuals with Disabilities Education Act and this article.

(Indiana State Board of Education; [511 IAC 7-45-11](#); filed Jul 14, 2008, 1:24 p.m.: [20080813-IR-511080112FRA](#))

SECTION 7. A request for a due process hearing in accordance with [511 IAC 7-45-3](#) made prior to the effective date of this amendment shall be governed by this rule as it existed prior to this amendment, including the opportunity for appeal to the state board of special education appeals.

[Notice of Public Hearing](#)

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