MEMORANDUM #05-5

TO: All Illinois Parents, Local Education Agencies and Special Education Cooperatives

FROM: Christopher A. Koch, Ed.D.
Assistant Superintendent for Special Education

DATE: July 12, 2005

RE: Guidance on Changes to Special Education Due Process & Discipline Resulting from Implementation of IDEA 2004

As you are aware, the new Individuals With Disabilities Education Improvement Act of 2004 ("IDEA 2004") contains an array of significant changes to Due Process and Discipline of students with disabilities. On July 1st, these provisions will be taking effect. This memorandum presents initial guidance pertaining to these changes. Specifically, this memo will address, among other things:

1) Requirements for initiating due process requests;
2) New procedures for seeking dismissal of, and responding to, due process requests;
3) Guidelines for conducting resolution sessions or seeking mediation;
4) New timelines for non-expedited hearing requests; and
5) Interim guidelines on discipline of students with disabilities.

It is clear that certain portions of IDEA 2004 may impact the conduct of school districts and parents in the realm of due process and student discipline, despite the maintenance of our School Code and regulations. This memorandum outlines the views of this agency on how school districts, parents and other stakeholders should proceed in due process and disciplinary matters from July 1 through the time period prior to the issuance of final federal regulations by the United States Department of Education (USDE) and the final revisions to the Illinois School Code and relevant state regulations (the "Interim Period").

This memorandum should be treated solely as advisory in nature, without the force or effect of law or regulation. The contents herein are subject to change resulting from the finalization of federal regulations, future revisions to Article 14 of the Illinois School Code and 23 Ill.Admin.Code Section 226, or subsequent advisory memoranda that supersede the guidance provided herein.
As you also know, our School Code and the relevant provisions of the Illinois Administrative Code are being maintained pending the finalization of implementing regulations by the USDE. We have begun the process of considering changes to Article 14 of the School Code as well as potential changes to our Section 226 rules. However, in the interest of ensuring the smoothest possible transition to the new IDEA 2004 procedures, we have opted to refrain from publishing legislative and regulatory proposals until such time as the Federal regulations have been finalized, or nearly so.

I. STANDARD DUE PROCESS PROCEDURES

In cases where a parent’s due process request has been received by a school district on or after July 1, or for district requests initiated on or after July 1, the new due process procedures described below will apply (hereinafter, such requests shall be referred to as “Post-IDEA 2004 Requests”). Otherwise, due process requests will be guided by our existing due process procedures.¹

A. Due Process Filing Requirements and Dismissals

IDEA 2004 imposes new requirements for the initiation of due process requests, some of which we believe are applicable immediately upon the effective date of the statute. In the view of ISBE, we believe that our existing regulations will guide the content and service of due process requests pending further revisions of Article 14 and Section 226 of our Administrative Code, while IDEA 2004 will guide the process for challenging the content of due process requests and the required responses by the non-requesting party.

It is our view that during this interim period, the requirements of 23 Ill. Admin. Code Sec. 226.610 and 226.615 will still control the content of due process requests. Though not identical to the requirements set forth in Section 615 of IDEA 2004, we believe that parents and districts that follow the requirements of 226.610 (in the case of parental requests) and 226.615 (in the case of district requests) in their current form should be allowed to go forward with their requests until our new regulations have been finalized (notwithstanding any request for dismissal by the non-requesting party (discussed herein)). However, in accordance with the new requirements of IDEA 2004, we will also expect the due process request to include available contact information and the name of the school the student is attending in cases where the child is deemed to be homeless. IDEA 2004, Sec. 615(b)(7)(A)(ii)(II). Please note that districts will continue to be expected to forward all parental or student requests for due process to ISBE within five days of receipt of the parental request. Thus, throughout the Interim Period, districts will continue (a) to initiate their own requests following the procedures set forth at 23 Ill. Admin. Code Sec. 226.615(a); and (b) their past practice of forwarding parental requests to the ISBE, accompanied by ISBE’s existing Form 19-86. Districts also are encouraged to continue providing parents with ISBE Form 19-86a (Parental Request for

¹ The sole change affecting due process requests prior to July 1 will be in instances where mediations take place on or after July 1. We believe that regardless of the initiation date of the request, all mediations occurring on or after July 1 will be fully enforceable in a court of law, per the requirements of Sec. 615(e)(2)(F) of IDEA 2004.
Impartial Due Process Hearing) in response to parent inquiries about filing for due process.²

IDEA 2004 provides an express two-year statute of limitations for requesting due process that we believe will apply immediately to all Post-IDEA 2004 Requests. Per the requirements of IDEA 2004, Sec. 615(b)(6)(B), due process requests may only set forth alleged violations that occurred within two years prior to the date of the request. We believe the exceptions to this provision, set forth at Sec. 615(f)(3)(D), will also apply immediately to Post-IDEA 2004 Requests.

An additional change we believe will take effect immediately concerns the potential dismissal of due process requests for lack of “sufficiency.” Section 615 of IDEA provides the opportunity for the non-requesting party to seek dismissal of a due process request for lack of sufficiency. IDEA 2004, Sec. 615(c)(2)(A). During the Interim Period, we believe that this procedure should be allowed to go forward for all Post-IDEA 2004 Requests. However, the controlling rule for determining sufficiency will be the content requirements supplied by 23 Ill. Admin. Code Sec. 226.610(a) (regarding parental requests) and 226.615(b)(1)(A, C & D) (pertaining to district requests). Per the requirements of IDEA 2004, the non-requesting party will be permitted 15 days from the receipt of the request to provide notice to the hearing officer of a request for dismissal. IDEA 2004, Sec. 615(c)(2)(C). The non-requesting party may file the notice directly with the Hearing Officer if known at the time, or with the ISBE (to the attention of Andrew Eulass, Due Process Coordinator) if not yet known. Timelines and rights for requesting a substitution of Hearing Officer will not be affected by this new procedural requirement. In the event that a party provides notice of a request to dismiss with a Hearing Officer that is ultimately substituted, the notice shall be forwarded to the new Hearing Officer and the new Hearing Officer will be provided five days from the date of his or her receipt of the notice to decide upon the motion. As required by IDEA 2004, the Hearing Officer will be permitted only to decide the request for dismissal based upon an examination of the due process request itself. IDEA 2004, Sec. 615(c)(2)(D). Though no clear guidance is supplied either by IDEA 2004 itself or the draft regulations promulgated by the USDE, we believe that in response to a motion to dismiss a due process request, the Hearing Officer is empowered either to (a) dismiss the request with prejudice (where the request involves a question of jurisdiction or standing under IDEA 2004), (b) dismiss the request without prejudice,³ or (c) grant leave to the requesting party to file an amended request by a date certain. Per the requirements of Section 615 of IDEA 2004, timelines will restart upon the filing of an amended request. IDEA 2004, Sec. 615(c)(2)(E). In the event a request is dismissed without prejudice, we believe that the

² Both the Form 19-86 (District Request for Impartial Due Process Hearing Officer) and Form 19-86a (Parental Request for Due Process Hearing) may be downloaded and printed by clicking on the appropriate links at http://www.isbe.net/spec-ed/html/due_process.htm in the “Forms” section.³ When using the terms “with prejudice” and “without prejudice”, we are referring to the right of the
requesting party to refile a due process request. If the due process request is dismissed “without prejudice”, it means that the party may refile the request, so long as the new request corrects the problems which caused the hearing officer to dismiss the request in the first place. If a request is dismissed “with prejudice”, the party will be barred from filing another request on the same issue.
jurisdictional rule set forth in Section 14-8.02a of the School Code will apply whereby
the Hearing Officer will retain jurisdiction over the case for one calendar year following
the dismissal without prejudice.

B. Written Response to Due Process Request

An additional requirement of IDEA 2004 is the requirement of the non-requesting party
to transmit a written response to the due process request within 10 days of receipt. IDEA
2004, Sec. 615(c)(2)(B)(i, ii). Following receipt of a due process request, ISBE will
include a written supplement in our standard mailings outlining the required timeline for
completion of the written response, as well as the timelines for requesting dismissal and
the convening of a resolution session. In instances where the district is the non-
requesting party, the district will be expected to provide a written response to the extent
that it has not previously supplied the parent with “prior written notice” (i.e., a document
regarding the subject matter contained in the parent’s due process complaint notice). See
IDEA 2004, Sec. 615(c)(2)(B)(i). The response shall include: (a) an explanation of why
the district proposed or refused to take the action raised in the complaint; (b) a
description of other options that the IEP Team considered and the reasons why those
options were rejected; (c) a description of each evaluation procedure, assessment, record,
or report the agency used as the basis for the proposed or refused action. IDEA 2004,
Sec. 615(c)(2)(B)(i). In cases where the district believes that it has previously served a
sufficient “prior written notice” response to the due process request, the district should
provide the Hearing Officer with a copy of the document or documents it believes
constitutes the prior written notice within 10 days of receiving the due process request.
Similarly, where the parent is the non-requesting party, the parent will be expected to
provide a written response to the district’s request, specifically addressing the issues
raised in the complaint (to the extent such facts are known to the parent at the time of
writing the response). IDEA 2004, Sec. 615(c)(2)(B)(ii). In the event that the Hearing
Officer is unknown to the district or the parent at the time of transmitting the required
response, the responding party may transmit its response to the attention of Andrew
Eulass, Due Process Coordinator for ISBE, who will forward the response to the Hearing
Officer.

C. Resolution Sessions and Mediation

Synopsis of Principal “Resolution Session” Requirements

- Must be convened within 15 days of date when non-requesting party received
the due process request (unless the resolution session is properly waived)
- May not include a school district attorney unless the parent chooses to use a
legal representative
- District must secure attendance of person with decision-making authority on
the district’s behalf and members of the student’s IEP team who possess
specific knowledge of the facts identified in the due process request
- Parties should engage in a full and frank discussion of the issues that led to
the decision to file for due process
• District is provided until the 30th day after the non-requesting party received the due process request to resolve the issues in the due process request
• Any agreement must be committed to writing and signed by the parties, which is enforceable in State or Federal court (and either party may void this agreement within 3 business days of its execution)
• If the parties choose to use mediation instead of resolution session, or to waive the resolution session completely, parties must agree in writing to the change

Discussion

IDEA 2004 now requires school districts to convene a resolution session within 15 days of receiving a due process request (unless the parties agree to waive such a session as discussed below). See IDEA 2004, Sec. 615(f)(1)(B). Because the resolution session is a procedure for which there is no similar provision in State law, we believe that districts must begin to initiate such procedures for all parental Post-IDEA 2004 Requests.

These resolution sessions must go forward unless both the parent and the school district agree to use mediation as a substitute mechanism, or to waive the resolution session and mediation altogether. Any agreement to use mediation or to waive the resolution session, must be captured in a written document signed by the parent (or the parent representative) and the district administrator responsible for decision-making in the case (or the district’s representative). We have provided a suggested form that may be used by the parties to document their agreement to use mediation or to waive resolution procedures altogether (see attached Appendix A1 and A2). In the event that the parties opt to pursue mediation or waive the resolution process, the parties will be expected to inform the Hearing Officer by telephone or email (if permitted by the Hearing Officer) within three business days of the agreement to seek mediation or to waive the resolution session and simultaneously forward a copy of the signed intent described above to the Hearing Officer.

Per the requirements of IDEA 2004, districts will be expected to document their effort to convene a resolution session “preliminary meeting” within 15 days of its receipt of a parental due process request. In the event that the initial meeting cannot occur within 15 days, districts will be expected to document their efforts to schedule the meeting with the parent and clearly document any reasons why the preliminary meeting could not or cannot occur by the 15th day after receipt of the parental due process request. Such evidence may include phone logs, conference notices or correspondence.

When providing notice to parents of scheduling the resolution session preliminary meeting (and any subsequent meetings), school districts should provide such notice in

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4 In instances where the parties fail to agree on the utilization of the resolution session or mediation (or waiver of all dispute resolution mechanisms), we believe that the resolution session must go forward by default.
5 These forms will be available for download on our website located at http://www.isbe.net/spec-ed/html/due_process.htm. A link will be provided in the “Forms” section on this page.
writing (a letter is adequate), clearly stating the date, time and location of the initial meeting for the resolution session. In addition, the district should supply in the notice the names of the individuals from the district who are expected to attend the meeting. In accordance with IDEA 2004, district attendees must include those members of the student’s IEP team who have specific knowledge of the facts identified in the parent’s due process request and one representative of the district with decision-making authority and who may bind the district to any written agreement reached during the resolution session. Districts are reminded that unless the parent chooses to utilize an attorney during a resolution session, districts may not utilize their own attorney at such meetings with the parent. In the event that a parent attorney appears at a meeting without reasonable prior notice to the district, districts will not be required to go forward with the meeting, but will be expected to reschedule the meeting to such time as the district can secure the attendance of its own legal counsel.

Any agreements reached between the parties during the course of the resolution session (or in mediation, discussed further below) must be memorialized in a written agreement signed by both parties. Parents and districts are encouraged to reach agreement on as many issues as possible, even if such agreements do not fully resolve the underlying due process request. Where partial agreements are reached, the parties will be expected promptly (i.e., no more than three business days after completion of the resolution session) to report to the Hearing Officer what issues remain for hearing. For any written agreement reached between the parties, either party will have the option of voiding the agreement within 3 business days after the agreement has been signed by the parties. The written agreement resulting from the resolution session shall set forth, among other things, that it is fully enforceable in a State or Federal court of competent jurisdiction, if needed. IDEA 2004, Sec. 615(f)(1)(B)(iii). Neither the Hearing Officer nor ISBE will have the authority to enforce the terms of the written agreement.

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6 We are fully aware that, in some instances, districts may be required to obtain ratification of the agreement by their respective school boards. Inasmuch as possible, district representatives are encouraged to discuss the parameters of their negotiating authority with their boards in advance of the resolution session. Where this is not possible and the agreement requires subsequent ratification by a school board, districts will be expected to document this contingency clearly in any written agreement reached during the resolution session. Such a contingency should clearly include the fact that the agreement is contingent upon school board approval and a date certain upon which board action shall be taken. The date certain should be the next regular or special meeting of the board. Where the due process issues are of a time-sensitive nature, districts are strongly encouraged if possible to schedule special meetings of their school boards within the guidelines permitted by the School Code and the Open Meetings Act in order facilitate prompt implementation of the written agreement.

7 Where a written agreement is reached during the resolution session, districts will be expected to inform the parent of the right to void the agreement within 3 business days of the signing of the agreement. This term must be clearly included in the written agreement that is reached by the parties. We suggest, at a minimum, the inclusion of the following language in all written agreements reached during the resolution session:

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In accordance with the requirements of Section 615(f)(1)(B)(iv) of the Individuals With Disabilities Education Improvement Act of 2004, Public Law 108-466, this agreement may be voided by either party by transmitting the party’s written intent to void this agreement to the other party within three (3) business days of the signing of this agreement.

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In the event the parties opt to use the mediation process in lieu of the resolution session, the current procedures for mediation shall continue during the Interim Period. The parties may contact Sherry Colegrove, Mediation Coordinator for ISBE, at 217-782-5589 to assist in facilitating a mediation session. It must be emphasized that as of July 1, mediation agreements will be fully enforceable in a court of competent jurisdiction, if needed. IDEA 2004, Sec. 615(e)(2)(F).  

Where a resolution session or mediation agreement fully resolves the issues between the parties, resulting in the withdrawal of the due process request, and a party refuses to comply with such agreement, parties will be expected to seek enforcement directly in a court of competent jurisdiction, if needed. We do not believe that Hearing Officers or ISBE will have jurisdiction to enforce agreements that resolve all of the issues underlying the due process request.

D. Impact of Resolution Session and Mediation on Hearing Timelines

Given the resolution session is a procedure that, in our view, must be implemented immediately for Post-IDEA 2004 Requests, we also believe that the new timelines created by the resolution session shall also apply. Under the terms of IDEA 2004, districts and parents will be permitted up to the 30th day following the district’s receipt of the parent request (or the district’s initiation of its request) to complete the resolution session. Upon completion of the 30th day, we believe that the formal 45-day timeline for the due process hearing will begin. IDEA 2004, Sec. 615(f)(1)(B)(ii). Thus, in those instances where the parties have not properly waived the resolution session process, a 75-day timeline exists for the completion of the due process hearing, absent an appropriately granted extension of time by the Hearing Officer. We further believe that the 30-day resolution-session timeline must elapse before the 45-day hearing timeline may begin, absent an agreement between the parties to proceed immediately to the 45-day hearing timeline.

Exceptions to the timeline described above are discussed in IDEA 2004 and this agency believes that these exceptions also immediately apply to Post-IDEA 2004 Requests. One instance pertains to cases where the requesting party is permitted to file an amended due process request raising new issues pertaining to the same student (see below Section E). See IDEA 2004, Sec. 615(e)(2)(E)(ii). In such cases, we believe that the filing of the amended request will result in a new triggering of the 30-day resolution session timeline. In such a case, the non-requesting party should be permitted the same opportunities to provide a written response, seek dismissal, and to engage in the resolution process. The deadlines for filing responses and motions, and to convene a resolution session shall

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8 Mediation also will remain available to the parties in the event the resolution session is unsuccessful. Where an agreement has been reached on some issues during the resolution session, though, the mediator will not be permitted to work with the parties either to re-formulate or nullify the terms of a pre-existing agreement resulting from a resolution session.

9 Our view pertaining to the re-initiation of the 30-day resolution session timeline is supported by the draft regulations for IDEA 2004.
remain the same as described above, numbered from the date of the non-requesting party’s receipt of the amended due process request.

A second exception to the timeline addresses instances in which a party fails to cooperate in the process of scheduling and convening the resolution session. The effect of a party’s failure to cooperate in the scheduling or convening of the resolution session should result in a suspension of the 30-day resolution session timeline until such time as the initial resolution session meeting has been convened. However, districts are encouraged to exercise maximum appropriate flexibility when working with parents in an effort to schedule the resolution session. Districts should consider flexibility of time and means (i.e., use of video- or tele-conferencing where appropriate) in order to secure parental participation in the resolution meeting. Where scheduling difficulties may result in delay in convening the resolution session, parties should notify the Hearing Officer. We believe that the Hearing Officer may, in his or her discretion, order suspension of the resolution session timeline and, with it, a denial of the right to proceed to hearing in response to refusal by a party to participate in the convening of a resolution session.

What remains somewhat unclear at the present time is the impact of the parties’ decision to utilize mediation in place of the resolution session. It is not apparent from IDEA 2004 whether the decision to use mediation in lieu of the resolution session still requires the full implementation of the 30-day timeline. However, in our view, the overall structure of IDEA 2004 appears to contemplate providing parties with additional time to undertake alternative dispute resolution mechanisms before proceeding to hearing. In keeping with this structure, we believe that where the parties choose to utilize mediation in lieu of the resolution session, the initiation of the 45-day hearing timeline should be delayed pending partial or full resolution of the due process issues at mediation, or declaration of an impasse by the mediator. Thus, the 45-day hearing timeline will begin on the day after either a partial agreement is signed by the parties or an impasse is declared. Upon signing the partial agreement or reaching an impasse, the parties will be expected to inform the Hearing Officer no later than the next business day.

Where the parties opt to forego all alternative resolution mechanisms, the 45-day hearing timeline will begin upon the parties providing written notice to the Hearing Officer of the mutual agreement to waive the use of the resolution session and mediation.

To better illustrate our views on the new timelines created by IDEA 2004, a brief outline of the new timelines is attached. (See attached APPENDIX B.)

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10 This timeline will only apply to instances where the parties utilize mediation as a replacement for the resolution session. As noted above (see footnote 5), mediation will remain available to parties where the resolution session is unsuccessful in resolving all due process issues. However, where parties utilize mediation after an unsuccessful resolution session, the 45-day timeline will proceed while the mediation takes place.
E. Pre-Hearing Conferences and Hearing Procedures

In large part, we believe that many of the hearing procedures that were in place prior to July 1 will remain in effect during the Interim Period. Nonetheless, some procedural changes will occur immediately with respect to Post-IDEA 2004 Requests.

We believe that our existing rules and procedures pertaining to Pre-Hearing Conferences will remain in effect during the Interim Period. We do not believe, however, that Hearing Officers are empowered to convene Pre-Hearing Conferences prior to the time that the 45-day hearing timeline is initiated, although the parties and the Hearing Officer are certainly encouraged to convene the Pre-Hearing Conference as soon as possible after the initiation of the 45-day hearing timeline.\(^1\)

Save for one aspect, none of the procedures used in Pre-Hearing Conferences will be affected by IDEA 2004. The one significant change pertains to the identification of issues to be heard at hearing. IDEA 2004 now makes clear that the Hearing Officer may not decide issues that were not part of the initial due process request, unless the non-requesting party otherwise agrees. IDEA 2004, Sec. 615(f)(3)(B). We believe under the new IDEA 2004 requirements, Hearing Officers are therefore mandated to bar additional issues outside the due process request unless (a) the non-requesting party assents to the entry of the additional issues, or (b) the requesting party could not have raised the issue at the time of the initial request (e.g., due to withholding of information by the non-requesting party that was essential to the identification of the issue by the requesting party). Thus, issues which a requesting party could have identified in the request but failed to identify must be barred.\(^2\) Hearing Officers and parties are cautioned, however, about the impact and effect of identifying issues during the Pre-Hearing Conference that were not identified in the requesting party’s initial due process or a properly amended request. If additional issues are set for hearing that were not part of the initial due process request, the parties must be permitted the opportunity to engage in the resolution-session process to resolve the newly identified issues. In such cases, the Hearing Officer should anticipate re-convening the Pre-Hearing Conference at the end of the new 30-day resolution-session period.

Upon completion of the Pre-Hearing Conference, we believe that hearing deadlines established under our existing rules will remain in effect. Thus, the parties will be expected to submit all documentary evidence (including all evaluations completed by that date and recommendations based on such evaluations) and final witness lists no later than five days prior to the first day of hearing. With the exception of the area described

\(^{11}\) Indeed, we believe that although the Hearing Officer cannot convene the Pre-Hearing Conference prior to the expiration of the 30-day resolution session timeline, the Hearing Officer and the parties may certainly schedule the Pre-Hearing Conference during the resolution session timeline. Thus we believe that the Pre-Hearing Conference may occur as early Day 1 of the 45-day hearing timeline.

\(^{12}\) This is not to suggest, however, that evidence bearing on barred issues may not be admitted at hearing if it bears on the ultimate issues of whether the district provided the student with a FAPE. IDEA 2004, Sec. 615(f)(2)(E)(i).
below, we believe that all other rules pertaining to the conduct of the hearing will also remain in effect, including the existing timelines for issuing a decision following the close of the evidence at hearing.

IDEA 2004 does make one significant change in the procedures for conducting hearings. Hearing Officers are now empowered to distinguish between procedural findings that are of a substantial nature versus those that are *de minimis* procedural findings (i.e., procedural violations that result in no fundamental deprivation of educational benefit to the student). We believe that the new standard pertaining to procedural findings should apply immediately as to Post-IDEA 2004 Requests. With respect to such Requests, we do not believe that Hearing Officers may find that a procedural matter negatively impacted the provision of FAPE unless the procedural matter either:

(a) impeded the student’s right to a free appropriate public education;
(b) significantly impeded the parents’ opportunity to participate in the decision-making process regarding the provision of FAPE to the student; or
(c) caused a deprivation of educational benefits.

IDEA 2004, Sec. 615(f)(3)(E). ¹³

F. Hearing Appeals and Attorneys Fees

Although IDEA 2004 outlines significant changes in the areas of hearing appeals and attorneys fees, we do not believe that these rules will have immediate impact in the conduct of due process hearings during the Interim Period. Although IDEA 2004 prescribes a 90-day window for aggrieved parties to file appeals in State or Federal court, such timeline is subject to a state’s existing explicit time limitations. Thus, unless amended at a later date, we believe that the 120-day appeal window currently prescribed in Section 14-8.02a(i) of the School Code will continue to apply. IDEA 2004, Sec. 615(i)(2)(B).

Although the new attorneys’ fees provision in IDEA 2004 may have significant impact on the decision-making of the parties, we do not believe that the new provisions will affect the conduct or jurisdiction of Hearing Officers. As with past practice, we do not believe that Hearing Officers have jurisdiction to award attorneys’ fees, nor to make specific findings that may affect an award of attorneys’ fees subsequent to hearing. Therefore, the parties will be expected to initiate appropriate proceedings subsequent to the due process hearing in order to resolve any outstanding issues pertaining to the award of attorneys’ fees.

¹³ This, of course, is not to suggest that evidence of procedural violations is not relevant in the hearing proceedings. However, the new standard provided by IDEA 2004 tends to suggest that in order for a Hearing Officer to make a conclusion based upon procedural violations, the Hearing Officer will be expected to make a threshold finding that the procedural violations substantially impacted the provision of FAPE based on the standards described above.
II. DISCIPLINE AND EXPEDITED HEARINGS

The suspension of students with disabilities, 45-day removals and provisions regarding manifestation determination reviews (MDRs) have all been significantly affected by IDEA 2004. At the same time, important terms such as “change in placement”, “unique circumstances” and others remain in a state of flux pending the finalization of the proposed federal rules.

Except where noted, all rules and practices now followed by districts pertaining to the discipline and the removal of students with disabilities should continue in full force and effect pending any further revisions to our School Code and 23 Ill. Admin. Code Section 226. Moreover, districts are cautioned that, until any further revision to the School Code and the administrative rules, districts will be expected to process and forward requests for expedited hearings in the same manner and according to the same timelines prescribed under the current version of Section 14-8.02b of the School Code and 23 Ill. Admin. Code Sec. 226.655. Because of the great importance of the issues that are encompassed in the on-going debate pertaining to discipline of students with disabilities, this agency is extremely reluctant to provide suggestions to districts and parents that may be construed to authorize significant changes in the treatment of students with disabilities in matters of discipline at the present time.

Notwithstanding the foregoing paragraph, we note that IDEA 2004 has provided districts with a third express basis for effectuating a unilateral, 45-school-day removal of a student with disabilities (infliction of “serious bodily injury” upon another person while at school, on school premises, or at a school function) and we believe that on and after July 1 school districts should be allowed to initiate a 45-school-day removal on this basis. IDEA 2004, Sec. 615(k)(1)(G). Please note that “serious bodily injury” is defined as set forth in 18 USC Sec. 1365(h)(3), which defines the inflicted injury as involving either:

(a) a substantial risk of death;
(b) extreme physical pain;
(c) protracted and obvious disfigurement; or
(d) protracted loss or impairment of the function of a bodily member, organ or mental faculty.

Again, please note that such an incident will trigger the district’s right to initiate a 45 school-day removal to an appropriate interim alternate educational setting.

The second change that we believe districts may now initiate pertains to the review questions used in the Manifestation Determination Review (“MDR”). Where districts were previously expected to answer affirmatively the three questions outlined in 23 Ill. Admin. Code 226.410(e), districts will now be permitted to administer discipline in accordance a district’s code of conduct unless EITHER of the following two questions are answered in the affirmative:

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(1) if the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or
(2) if the conduct in question was the direct result of the local educational agency’s failure to implement the IEP.

IDEA 2004, Sec. 615(k)(1)(E). At a meeting of the IEP team convened to conduct the MDR, districts will be expected to document its consideration of these questions and its consensus regarding the questions. During this interim period, districts may adapt their current MDR forms to conform to the new questions required under IDEA 2004.

All other procedural protections pertaining to discipline of students with disabilities that are set forth under our current version of the School Code and Administrative Code should continue to be followed by the district.

As a final note, we do not believe that the new procedures pertaining to resolution sessions, dismissals or written responses by non-requesting parties will apply to expedited hearing requests in connection with disciplinary matters. Parties are encouraged to continue to follow the procedures outlined in Section 14-8.02b of the School Code and 23 Ill.Admin.Code Sec. 226.655 when seeking an expedited hearing.

As a further illustration of the discussion contained in this Memorandum, we have attached a step-by-step chart of the due process procedures, including a summary of the past procedures and a summary of the new, interim procedures. Please find this document at APPENDIX C.

In the coming weeks and months, this agency will provide further guidance on these and other matters as more information becomes available. In the interim, please do not hesitate to contact our due process coordinator, Andrew Eulass, at 217-782-5589 if you have further questions or concerns.

Thank you again for your ongoing work on behalf of students with disabilities in Illinois.
INTENT TO USE STATE-SPONSORED MEDIATION

Student Name: ______________________________

Parent/Guardian: ______________________________

School District: ______________________________

Due Process Case No (if known) __________

By the parties' signatures below, the parties hereby agree to utilize state-sponsored mediation for the purpose of resolving the above-captioned due process hearing request. By the School District's signature below, the School District represents that it has informed the Parent or Guardian:

(a) of his/her right to pursue a resolution session in place of mediation prior to proceeding to hearing;
(b) that all agreements reached during the resolution session will be set forth in a written agreement, signed by both parties, that is enforceable in a State Circuit Court or the United States District Court;
(c) that in the event a written agreement is reached at the resolution session only, either party shall have three business days from the date of the agreement to void the agreement in its entirety with signed, written notice to the other party; and
(d) that upon completion of the mediation, the parties will proceed to hearing to decide any issues left unresolved following the completion of the mediation.

The Parties further agree that they shall contact the Hearing Officer assigned to the above-captioned case by telephone or via e-mail (if permitted by the Hearing Officer) within two business following the date of this agreement to mediate and simultaneously transmit a copy to this agreement to the Hearing Officer's attention. In the event the Hearing Officer is not yet known to either party, the parties may forward this agreement to the attention of the Due Process Coordinator of the Illinois State Board of Education, 100 N. 1st Street, Springfield, IL 62777 (telephone: 217-782-5589; fax: 217-782-0372).

Parent/Guardian: ______________________________

Name: ______________________________

Title: ______________________________

Date: ______________________________

School District: ______________________________

Name: ______________________________

Date: ______________________________
APPENDIX A1

Special Education Mediation

Principles of Mediation

Illinois’ mediation service is designed as an alternative to the Due Process Hearing, as a means of resolving disagreements regarding the appropriateness of the provision of special education and related services to children enrolled in Illinois public schools. This service is administered and supervised by the Illinois State Board of Education and is provided at no cost to the parties.

In mediation, neither party is asked to abandon basic beliefs about the student’s ability but rather the parties are asked to consider alternatives which could be incorporated into the student’s program, to be aware of the concerns and problems expressed by the other party and to be realistic about both the student’s capabilities and the local district’s obligations and resources.

The mediator will:

1) establish an understanding of the nature of the disagreement(s);
2) determine points of agreement;
3) offer suggestions/proposals for resolution of the disagreement(s);
4) if the disagreement(s) cannot be resolved, provide technical assistance to both parties regarding the procedures for initiation of a Due Process Hearing.

The following rules apply to this mediation service:

1) The mediator is an impartial third party;
2) The mediator has no authority to compel any action by either party;
3) Mediation requires the full participation of both parties and can only begin or continue as parties may agree;
4) The only record that will be kept of the mediation is a Mediation Agreement which includes a listing of participants, the date(s), time(s), and location of the mediation session(s) and a summary of the outcome; a record of the discussions will not be maintained;
5) Efforts to mediate the disagreement will not be admissible as evidence at any subsequent administrative or civil proceeding except for the purpose of noting the mediation which did occur and the terms of any written agreement(s) which were reached as a result of mediation;
6) When, in the opinion of the mediator or either party to the mediation, no resolution of the disagreement(s) is forthcoming, the mediator shall terminate the mediation;
7) The number of participants for each party shall generally be limited to three persons;
8) Mediation participants for both parties must include persons who have the authority to act on behalf of the student and local district respectively;
9) The mediator will chair all mediation conferences and assure that they are convened in a timely fashion and with due regard to the rights and responsibilities of all parties to the mediation.
WAIVER OF RESOLUTION SESSION

Student Name: __________________________

Parent/Guardian: ______________________

School District: ________________________

Due Process Case No (if known) _______

By the parties’ signatures below, the parties hereby agree to waive the right to convene a resolution session for the purpose of resolving the above-captioned due process hearing request. By the School District’s signature below, the School District represents that it has informed the Parent or Guardian:

(e) of his/her right to pursue either a resolution session or state-sponsored mediation prior to proceeding to hearing;

(f) that all agreements reached during the resolution session or mediation will be set forth in a written agreement, signed by both parties, that is enforceable in a State Circuit Court or the United States District Court;

(g) that in the event a written agreement is reached during the resolution session ONLY, either party shall have three business days from the date of the agreement to void the agreement in its entirety with signed, written notice to the other party; and

(h) that during the period up to the convening of the due process hearing, the Parent or Guardian may still request state-sponsored mediation, but that this request may not delay the convening of the due process hearing.

The Parties further agree that they shall contact the Hearing Officer assigned to the above-captioned case by telephone or via e-mail (if permitted by the Hearing Officer) within two business following the date of this waiver and simultaneously transmit a copy of this waiver to the Hearing Officer’s attention. In the event the Hearing Officer is not yet known to either party, the parties may forward this waiver to the attention of the Due Process Coordinator of the Illinois State Board of Education, 100 N. 1st Street, Springfield, IL 62777 (telephone: 217-782-5589; fax: 217-782-0372).

Parent/Guardian: __________________________

School District: ________________________

Name: __________________________

Name: __________________________

Title: __________________________

Date: __________________________

Date: __________________________
APPENDIX B

TIMELINE (RESOLUTION SESSION)

Day 1: Request received by district

Day 5: District forwards request to ISBE

Day 10: District transmits “prior written notice” and/or written response to request

Day 15: Initial resolution session must be convened by district

Day 15: District files notice to seek dismissal of request (optional)

Day 30: Cut off date for resolution session – hearing timelines to proceed on Day 31

Day 31-65: Pre-Hearing and Hearing procedures per requirements of 14-8.02a and 23 IAC Sec. 226

Day 75: Latest Date for Issuance of Decision by Hearing Officer absent extension of time

“Day” denotes CALENDAR day.

TIMELINE (MEDIATION)

Day 1: Request received by district

Day 5: District forwards request to ISBE

Day 10: District transmits “prior written notice” and/or written response to request

Day 15: Deadline to submit intent to use mediation or waive use of mediation and resolution session

Day 15: District files notice to seek dismissal of request (optional)

Day X: Close of mediation

Day X+1: First day of hearing timeline

Day X+45: Latest Date for Issuance of Decision by Hearing Officer absent extension of time

“Day” denotes CALENDAR DAY
# BRIEF SUMMARY OF INTERIM CHANGES TO STANDARD DUE PROCESS AND STUDENT DISCIPLINE RESULTING FROM IDEA 2004

<table>
<thead>
<tr>
<th>TOPIC</th>
<th>OLD PROCEDURE</th>
<th>INTERIM CHANGE IN DUE PROCESS PROCEDURES?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parental Filing of DP Request</td>
<td>Parent files request with district – district forwards request to ISBE within 5 days of receipt</td>
<td>NO CHANGE</td>
</tr>
<tr>
<td>District Filing of DP Request</td>
<td>District sends request to both ISBE and parent</td>
<td>NO CHANGE</td>
</tr>
<tr>
<td>Appointment of Hearing Officer</td>
<td>ISBE appoints HO within 5 days of receipt of due process request – each party given right to request substitution HO without cause within 5 days of receiving notice of HO appointment</td>
<td>NO CHANGE</td>
</tr>
<tr>
<td>Motion to Dismiss DP Request for Lack of Sufficiency</td>
<td>NONE</td>
<td>Within 15 days of receipt of DP request, party may request in writing that Hearing Officer to dismiss the DP request for lack of sufficiency – Hearing Officer must decide within 5 days of receiving notice of request to dismiss. (Sec. 615(c)(2)(C))</td>
</tr>
<tr>
<td>District’s Written Response to Parent’s DP Request</td>
<td>NONE</td>
<td>Within 10 days district must provide Hearing Officer with either (a) copy of district’s “prior written notice” to parent outlining the district’s position pertaining to the subject matter of the DP request, or (b) a written response to the DP request outlining the district’s position regarding the subject matter of the DP request and the rationale for its position. (Sec. 615(c)(2)(B)(i))</td>
</tr>
<tr>
<td><strong>APPENDIX C</strong></td>
<td></td>
<td></td>
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<tr>
<td>----------------</td>
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<tr>
<td>**</td>
<td><strong>Parent’s Written Response to District’s DP Request</strong></td>
<td><strong>NONE</strong></td>
</tr>
<tr>
<td>**</td>
<td><strong>Resolution Session</strong></td>
<td><strong>NONE</strong></td>
</tr>
<tr>
<td>**</td>
<td><strong>Mediation</strong></td>
<td><strong>At any time prior to hearing, parties may request state-sponsored mediation to resolve the issues underlying the due process request.</strong></td>
</tr>
<tr>
<td>**</td>
<td><strong>Scheduling of Pre-Hearing Conference</strong></td>
<td><strong>Must be scheduled with at least ten days notice to parties. To be scheduled no less than 14 days prior to hearing.</strong></td>
</tr>
<tr>
<td><strong>APPENDIX C</strong></td>
<td></td>
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</tbody>
</table>

| **Content of Pre-Hearing Conference** | Hearing Officer shall determine issues to be heard, relevance and materiality of parties’ documents and witnesses and the date of hearing. | Hearing Officer responsibilities are the same. If additional issues are admitted for hearing (based upon agreement of the non-requesting party or whether requesting party knew or should have known the existence of issues at time of making initial due process request) that were not part of the initial DP request, parties must be permitted to reinitiate the resolution session in order to resolve the new issues. Pre-Hearing Conference must be re-convened after completion of new resolution session. |
| **Hearing Procedure** | Parties to submit documents and witness list five days in advance of hearing. Hearing Officer must determine whether school district has provided FAPE to student | Deadlines for parties remain the same. Hearing Officer still must determine whether school district has provided FAPE to student. Hearing Officer must find that school district procedural violations were of a nature to impact FAPE in order for Hearing Officer to find against school district based on procedural violations. (Sec. 615(f)(3)(E)(ii)) |
| **Hearing Decision** | To be mailed to the parties no more than 10 days following the close of the hearing. | NO CHANGE |
| **Extensions of Time** | Hearing Officer must grant extension of time at joint request of parties. May grant extension of time at discretion of Hearing Officer if requested by only one party. | NO CHANGE |
### INTERIM CHANGES TO STUDENT DISCIPLINE AND EXPEDITED HEARING REQUESTS UNDER IDEA 2004

<table>
<thead>
<tr>
<th>TOPIC</th>
<th>OLD PROCEDURE</th>
<th>INTERIM CHANGE TO PROCEDURE?</th>
</tr>
</thead>
<tbody>
<tr>
<td>Unilateral 45-Day Removals</td>
<td>Permits school district unilaterally to remove student for 45 calendar days if student conduct involves a weapon or drug</td>
<td>Now allows school district to remove student for 45 SCHOOL days for conduct involving a weapon, drug, or conduct resulting in “serious bodily injury” to another person. (Sec. 615(k)(1)(G)(iii))</td>
</tr>
<tr>
<td>45-Day Removal for Dangerousness</td>
<td>Permits school district to request an expedited hearing to seek a hearing order authorizing removal of student for 45 calendar days for conduct that constitutes a danger to the student or others</td>
<td>NO CHANGE</td>
</tr>
<tr>
<td>Petition for extension of 45-day removal</td>
<td>Permits school district to petition a hearing officer for an extension of time beyond the 45-days of removal for students removed due to drugs, weapons or “dangerous” conduct.</td>
<td>NO CHANGE. Note additional 45-day removal due to “serious bodily injury” (see above)</td>
</tr>
<tr>
<td>IEP Conferences and Functional Behavioral Analyses/Behavior Intervention Plans (FBA/BIP)</td>
<td>Requires district to convene an IEP conference no more than 10 business days after the date of removal resulting in more than 10 cumulative school days of suspension and for any subsequent removal that is not a “change in placement”. District must review and revise the student’s FBA/BIP or develop one if none existed previously. 23 IAC 226.400.</td>
<td>NO CHANGE.</td>
</tr>
<tr>
<td>Convening Manifestation Determination Reviews (MDRs)</td>
<td>Requires district to convene an MDR whenever a student has violated the district’s code of conduct and the disciplinary action required will result in a change in placement for that student. MDR must be conducted by the IEP team. 23 IAC 226.410.</td>
<td>NO CHANGE.</td>
</tr>
<tr>
<td>Subject Matter of MDR</td>
<td>IEP team must determine whether student’s behavior was a manifestation of the student’s disability based upon an affirmative answer to all three of the following inquiries: (1) whether the IEP and placement were appropriate and being implemented, and behavior intervention strategies consistent with IEP were being used (2) Student’s disability did not impair his or her ability to understand the impact and consequences of the behavior (3) Student’s disability did not impair his or her ability to control the behavior 23 IAC 226.410</td>
<td>Districts will now be permitted to administer appropriate disciplinary measures unless an affirmative finding is made to EITHER of the following inquiries: (1) whether the conduct in question was caused by, or had a direct and substantial relationship to, the child’s disability; or (2) whether the conduct in question was the direct result of the school district’s failure to implement the IEP. (Sec. 615(k)(1)(E)).</td>
</tr>
</tbody>
</table>

| Request for Expedited Hearing | Allows for an expedited hearing whenever the parent disagrees with the conclusion of the MDR or disagrees with the Interim Alternative Educational Setting (IAES) for the student. 23 IAC 226.655 | NO CHANGE |

| Timelines for Expedited Hearing | If district requests, district must “promptly” mail the request to the ISBE and to the parent. If parent requests, district must forward the request to ISBE within one day of receipt. Hearing must be conducted within 4 days after Hearing Officer has contacted the parties. Hearing shall not last for more than 2 days. Decision to be rendered within two days after the close of the hearing. 105 ILCS 5/14-8.02b | NO CHANGE

PLEASE NOTE DETAILS ON FILING REQUIREMENTS AND OTHER TIMELINES AS SET FORTH IN 105 ILCS 5/14-8.02b |
<table>
<thead>
<tr>
<th>Factors Considered by Hearing Officer in Expedited Hearing</th>
<th>Hearing Officer shall consider the following when deciding whether the student shall be placed in an Interim Alternative Educational Setting (IAES): (1) whether the district has demonstrated by “substantial evidence” that maintaining the student in the current (non-IAES) setting is substantially likely to result in injury to the student or others; (2) whether the student’s placement is appropriate; (3) whether the district has made reasonable efforts to minimize the risk of harm in the student’s current placement; and (4) whether the IAES will permit full implementation of the IEP and includes services and modifications designed to prevent the undesired behavior from recurring.</th>
<th>23 IAC 226.655</th>
<th>NO CHANGE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stay-Put During Expedited Hearing</td>
<td>Student’s “stay-put” placement shall be the IAES determined to be appropriate by the IEP team.</td>
<td>23 IAC 226.655</td>
<td>NO CHANGE</td>
</tr>
</tbody>
</table>