

IDEA at 40+ Part Two: Due Process, Exhaustion, and Mediation: The Expansion of Litigiousness and a Proposal for a Reset

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**IDEA AT 40+ PART TWO: DUE PROCESS, EXHAUSTION,
AND MEDIATION: THE EXPANSION OF LITIGIOUSNESS
AND A PROPOSAL FOR A RESET**

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I. Introduction

Over the last forty years, IDEA litigation has evolved from the original vision of short, simple, administrative hearings to full-fledged and highly tactical litigation on multiple fronts. While the number of litigated cases may have decreased in the last few years, associated costs have increased and the reality of litigation gives parents and school districts good reason to look for resolution outside the courts.

II. A Brief History of IDEA Due Process Hearings

A. The Beginning

Since its first incarnation, the *Education for All Handicapped Children Act* (Public Law 94-142), in 1975, included the right for a parent or educational agency to a full hearing before an impartial hearing officer. At the hearing, either or both parties were permitted to be represented by counsel, present evidence and cross-examine witnesses. In addition to the right to present evidence, both parties had the right to prevent the introduction of evidence which had not been disclosed at least 5 days prior to hearing. Each party was given the right to compel the attendance of witnesses. Parties had the right to obtain a record of the hearings, receive a written copy of the decision, and the findings of fact upon which the hearing officer based the decision. The decision rendered by the hearing officer was final and binding unless appealed. 20 U.S.C. § 1415 (1982); 34 C.F.R. § 300.507-510 (1984).

In 1986, Congress, after hearing testimony about parents' lack of resources to challenge school districts, amended the IDEA to allow courts to order schools to reimburse parents for their legal fees.

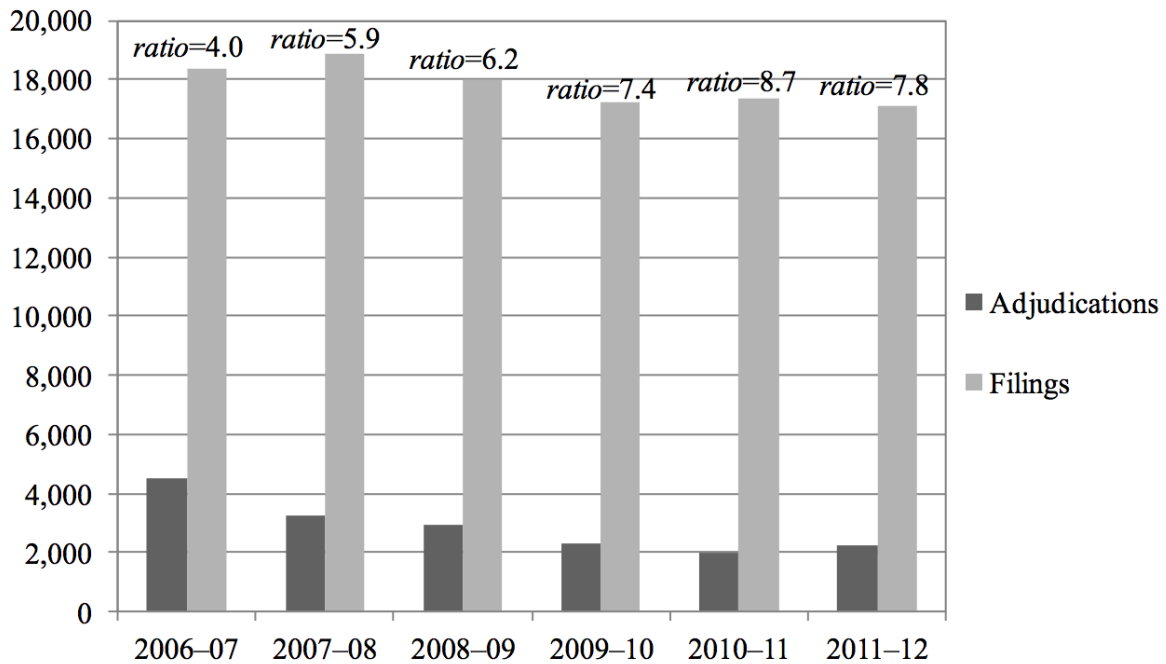
In 2004, Congress amended IDEA to allow a prevailing school district to recover attorney’s fees if it can demonstrate that the parent’s case is frivolous, unreasonable, or without foundation. 20 U.S.C. § 1415(i)(B)(3)(i).

B. Numbers and Trends

Perry Zirkel has led the study of longitudinal trends in IDEA litigation. Decade-by-decade, from the 1970s through 2009–10, Zirkel identified a steady, marked increase with a “relatively high, albeit uneven, plateau” from 1997 to 2005. *An Analysis of Judicial Outcomes of Special Education Cases*, by Perry A. Zirkel & James Newcomer, 65 EXCEPTIONAL CHILD. 469 (1999). The top five states in overall frequency during that time period, accounting for more than 80% of the total, were: 1. New York (43%); 2. New Jersey (13%); 3. Pennsylvania (7%); 4. California (5%); and 5. Maryland (4%). *The “Explosion” in Education Litigation: An Updated Analysis*, by Perry A. Zirkel & Brent L. Johnson, 265 EDUC. L. REP. 1 (2011); *Special Education Case Law: An Empirical Trends Analysis*, by Perry A. Zirkel & Anastasia D’Angelo, 161 EDUC. L. REP. 731 (2002); *An Analysis of Judicial Outcomes of Special Education Cases*, by Perry A. Zirkel & James Newcomer, 65 EXCEPTIONAL CHILD. 469 (1999) (finding a marked increase from 1975 and 1995).

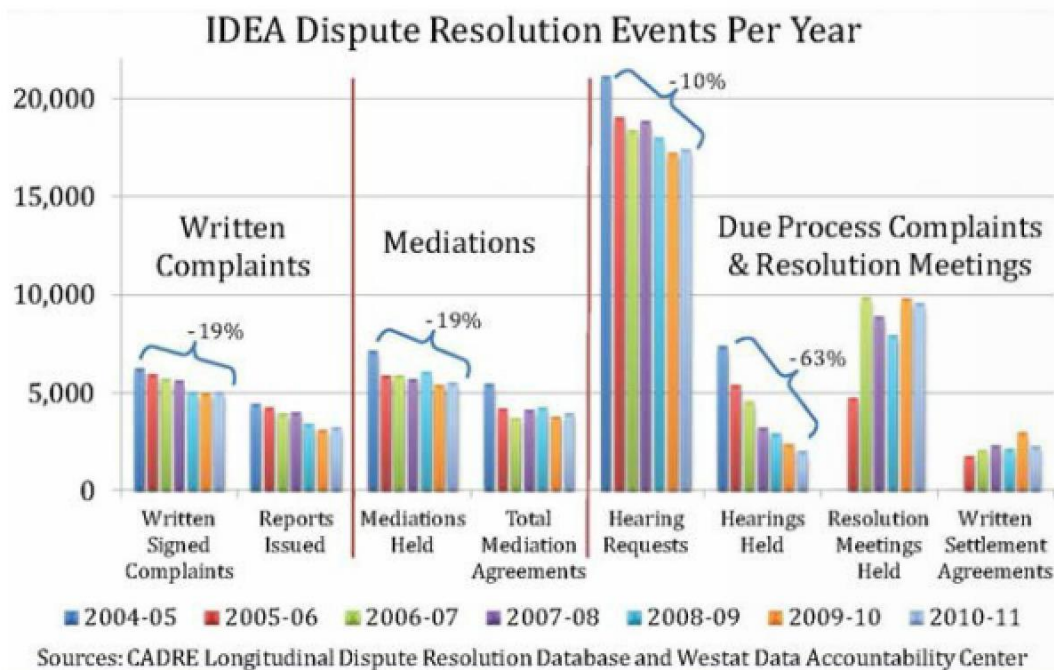
After a dramatic rise in the 70s and 80s, then leveling off during 1991–2005, IDEA adjudicated hearings trended downward between 2008 and 2014. *Longitudinal Trends in Impartial Hearings Under the IDEA*, by Perry Zirkel, West’s Education Law Reporter, (2014).

Figure 1. Longitudinal Trend of DPH Filings and Adjudications



According to the Center for Appropriate Dispute Resolution (CADRE), in 1992 there were only 1,574 adjudicated hearings. During the 2005-2006 school year, over 19,000 due process hearings

were requested, and nearly 5,400 went to a fully adjudicated hearing. Recent years have seen a decline in overall hearing requests and in hearings adjudicated.



Despite the downward trend, IDEA, Section 504, and the ADA remain some of the most litigated federal statutes in existence. *The Litigious Mess of Special Education*, by Chris Borreca in The Atlantic, (May 2012)(<http://www.theatlantic.com/national/archive/2012/05/the-litigious-mess-of-special-education/256541/>).

C. Costs and Fees

The amount of money at stake in hearings can also be intimidating for administrators and pose a threat to school district budgets. The exposure can arise from high costs incurred by parents for educational expenses in a private placement when there has been a denial of a free appropriate public education and from the costs of the parents' attorneys' fees. 20 U.S.C. § 1415(i)(3)(B)(i). In the *L.M.P.* case involving triplets, the parents were seeking \$792,945 in reimbursement. See *L.M.P. ex rel. E.P., D.P., and K.P., id.* In other cases seeking attorneys' fees, significant awards have been made. A \$600 hourly rate was approved for a parents' attorney with 28 years of experience. See, *I.W. ex rel. N.W.*, 67 IDELR 14 (E.D. Pa. 2016). The total fees awarded were \$150,190 (reduced from \$267,139). In that case, there was no challenge to the hourly rate charged by the attorney. This same attorney was later awarded a lower hourly rate of \$450 per hour when her rate was challenged. According to the evidence presented in the second case, experienced special education attorneys in Philadelphia were paid between \$400 and \$500 per

hour. *Sch. Dist. of Philadelphia v. Williams, ex rel. C.H.*, 116 LRP 9497 (E.D. Pa. 2016). In a third case, a school district had to pay approximately \$315,000 in legal fees and costs when parents prevailed in their request for one year's tuition reimbursement of approximately \$33,000. See *J.P., ex rel. Petterson v. Cnty. Sch. Bd. of Hanover Cnty., VA.*, 641 F. Supp. 2d 499, 52 IDELR 294 (E.D. Va. 2009). One court did find, however, that a request to reimburse for the work performed by seven attorneys and three paralegals in connection with a dispute over a free appropriate public education was excessive. See *B.B., ex rel. Beard v. Catahoula Parish School District*, 66 IDELR 103, 115 LRP 43230 (D. La. 2015). The request for \$170,875 was reduced to \$58,041 by the court. See also *Gibson ex rel. Gibson v. Forest Hills Local Sch. Dist. Bd. of Educ.*, 68 IDELR 33 (6th Cir. 2016) (Fee award of \$327,641 was vacated and remanded to the district court for further justification and consideration).

Districts nationwide spend over \$90 million per year in conflict resolution, and most of that money is spent on special education cases. However, there is no evidence that students who go through court proceedings perform better academically after the costly hearings. *Attorneys advise how parents and schools districts can work together to serve students*, by Alison DeNisco, District Administration, (October 2013). Costs for the average due process hearings in 1999 to 2000 were around \$95,000, with reported due process cases reaching \$212,000. See *Litigation and Special Education: The Past, Present, and Future Direction for Resolving Conflicts Between Parents and School Districts*, by Tracy Gershwin Mueller, PhD, BCBA-D, *Journal of Disability Policy Studies*, Vol 26, Issue 3, pp. 135 – 143 (August 2014).

Electronic discovery can increase the costs of a hearing. The IDEA requires the disclosure only of any evaluations and recommendations to the opposing party at least five business days prior to the hearing. 34 C.F.R. § 300.512(b). Availability of discovery is dependent on state law, with some states permitting at least limited discovery beyond this disclosure requirement. See Colo.R.C.P. 34 and 1 CCR 104-1, Rule 9 (permitting requests for production and interrogatories); Va. Code Ann. § 22.1-214.1. (permitting the issuance of subpoenas for documents and for witnesses, but not permitting depositions). The advent of electronic discovery and the associated time involved in locating, reviewing and redacting electronic information, including email, has made compliance with the condensed IDEA timelines even more difficult.

Charging for locating electronic information has raised other issues, including retaliation claims. In *Pollack, et al. v. Regional Sch. Unit 75*, 116 LRP 4087 (D. Me. 2016), a 16-year-old student with autism and a language disorder wore an audio recording device during the school day. The school district offered an IEP meeting to consider the need for the device as an IEP service and suggested alternative ways to address the parent's concerns. The court held that the parent must exhaust her administrative remedies under the IDEA regarding the recording device. The parent also asked the district to provide B.P.'s education records, including emails. Hundreds of emails were provided without charge. When the parent requested a due process hearing, the parent continued to seek records. The school district, however, now asked the parent to pay \$2,600 for the production of the records that had previously been provided free of charge. The case was allowed to proceed to trial concerning the change in practice regarding the charging for copies and whether the charge was retaliatory as opposed to a decision regarding preserving resources.

With these costs, it is not surprising that most parents involved in due process are those with high incomes. See *Litigation and Special Education: The Past, Present, and Future Direction for*

Resolving Conflicts Between Parents and School Districts, by Tracy Gershwin Mueller, PhD, BCBA-D, *Journal of Disability Policy Studies*, Vol 26, Issue 3, pp. 135 – 143 (August 2014). Consequently, researchers argue that due process is an unrealistic option for many parents to exercise their rights given the costs, presumed knowledge, and skills that are needed to file for a hearing. *Id.*

D. Impact of Litigation

In addition to the financial costs, litigation has other impacts on school districts and families. Due process hearings can last a few days, up to several weeks, with reported cases reaching 27 days. *See Hamilton County Department of Education*, 103 LRP 28693 (Tenn. SEA 2001).

Teachers forced to participate in due process complaints, hearings or litigation were profoundly affected by these events. When asked to characterize the degree of stress experienced by special education teachers, related services professionals and special education administrators during a due process hearing or subsequent litigation, 95% of respondents classified the stress as high or very high. *Rethinking Special Education Due Process*, by Sasha Pudaleski, Report of the American Association of School Administrators (April 2016). https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASARethinkingSpecialEdDueProcess.pdf.

As early as 1997, researchers reported that due process hearings may add to the rapidly increasing attrition of special educators. Twelve percent of school administrators said that more than half of the time, district special education school personnel either left the district or requested a transfer out of special education after being involved in a due process hearing or subsequent litigation. Almost a quarter of school administrators stated that 10% to 25% of the time, teachers either left the district or requested a transfer out of special education after being engaged in due process hearings or similar proceedings. *Why Didst Thou Go? Predictors of Retention, Transfer, and Attrition of Special and General Education Teachers From a National Perspective*, by E.E. Boe et al., *Journal of Special Education* 30 (4): 390-411 (1997).

Dozens of papers and studies have found that the due process system is inequitable and unpopular. *See Litigation and Special Education: The Past, Present, and Future Direction for Resolving Conflicts Between Parents and School Districts*, by Tracy Gershwin Mueller, PhD, BCBA-D, *Journal of Disability Policy Studies*, Vol 26, Issue 3, pp. 135 – 143 (August 2014). Various studies have found that hearing officers rule in favor of school districts in 55.7%, 58.6%, to 60% to 80% of decisions. *Id.* (contains extensive references). Subjectively, parents regard due process as unfair. *Id.* (citing multiple studies across time).

In a survey of 200 randomly selected school superintendents from large and small, urban, suburban and rural school districts across the country, nearly a quarter of respondents indicated they consented to parental requests more than half the time in order to avoid a due process hearing or complaint. *Rethinking Special Education Due Process*, by Sasha Pudaleski, Report of the American Association of School Administrators (April 2016). https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASARethinkingSpecialEdDueProcess.pdf.

Predictably, school districts are more likely to acquiesce to lower cost requests and weigh that cost against the cost of litigation. Nearly 40% consented to “unreasonable, unnecessary or inappropriate requests by parents” if the cost to comply was less than 20% of the cost to move forward with due process; 80% acquiesced to an unreasonable request if the cost was less than 80% of the cost to move forward with a due process complaint or litigation. *Rethinking Special Education Due Process*, by Sasha Pudaleski, Report of the American Association of School Administrators (April 2016). https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASARethinkingSpecialEdDueProcess.pdf.

In 2002, the Commissioners of Education stated, “Disputes of all sorts divert parent and school time and money, and waste valuable energy that could otherwise be used to educate children with disabilities” U.S. Department of Education, 2002, p. 40.

III. On Your Mark, Get Set, Run—the Need to Handle Complex Cases in a Limited Timeframe

A. IDEA Hearings Proceed on the Fast Track.

An IDEA due process hearing is to be initiated, tried and decided within 45 calendar days, and the timeline may be extended to 75 calendar days if the 30-day resolution session is invoked. 20 U.S.C. § 1415f(1)(b)(ii); 34 C.F.R. § 300.510b(2) & -515a. The hearing timeframe may be even shorter if it is expedited. An expedited hearing can be requested when a manifestation determination decision or the student’s educational placement during discipline are contested. 34 C.F.R. § 300.500(c)(2). When expedited, the hearing must be held within 20 school days of the initiation of the hearing and a decision issued within ten school days of the hearing.¹ *Id.*

The condensed timeframe for any IDEA hearing, expedited or not, sets up an impossible situation for a school district to defend because the hearing is similar to a full judicial trial, but with few restrictions on the presentation of evidence. Often, the school district has no notice of the claim or opportunity to engage in preparation for a defense until the hearing is noticed. No attorney trying a case in court would ever agree to such a truncated timeframe; nor would a court agree to issue a decision according to this timeframe under ordinary circumstances.

The short timeframe is of concern to school districts because this process can entail lengthy hearings, time-consuming preparation, extensive discovery (where permitted), retention of outside experts, complex issues and significant exposure for attorneys’ fees and reimbursement. For example, a case in the Fourth Circuit involving a nine-year old girl with autism and a request for tuition reimbursement at a private placement took 14 days of proceedings for the presentation of evidence. *E.L. ex rel. Lorsson v. Chapel Hill-Carrboro Bd. of Educ.*, No. 13-2330, 2014 U.S. App. Lexis 22796 (4th Cir. December 3, 2014). Separately, in a triple-threat case, the parents of triplets with autism disputed the denial of Applied Behavioral Analysis (“ABA”) services by the

¹ One court has suggested that a hearing challenging discipline issues does not have to be expedited unless the parents request an expedited hearing. The parents have the option to request an expedited or non-expedited hearing. *See Molina ex rel. D.M. v. Bd. of Educ. of Los Lunas Schs.*, 67 IDELR 18 (D. N. Mex. 2015).

school district under the IDEA and under Section 504 of the Rehabilitation Act. Following the administrative hearing, the case proceeded to a bench trial regarding the IDEA claims and to a jury trial for the Section 504 claim. The 504 claim was based on the parents' assertion that one of the school board's representatives had stated "that curriculum is not discussed with the parents during the IEP process, and that if a parent wants the team to consider a curriculum other than the one used by the School Board, it will not be considered." The court viewed this statement as potential deliberate indifference to the needs of the student under Section 504. *L.M.P. ex rel. E.P., D.P., and K.P., minors v. Sch. Bd. of Broward Cnty, Fla.*, 64 IDELR 66 (S.D. Fla. 2014). This conclusion upped the ante for the school district because such Section 504 claims can give rise to money damages, while money damages are not available under the IDEA. *See, e.g., Sellers ex rel. Sellers v. Sch. Bd. of City of Manassas, Va.*, 141 F.3d 524, 529 (4th Cir. 1998).

B. The Issues Litigated in Hearings are Complex.

1. The Provision of a Free Appropriate Public Education Remains a Major Area for Dispute between School Districts and Parents.

Disputes over the provision of a free, appropriate public education ("FAPE") have been litigated since the beginning of enactment of the IDEA. *Bd. of Educ. of Hendrick Hudson Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). Recent FAPE cases include *R.B. and M.L.B. ex rel. D.B. v. N.Y. City Dept. of Educ.*, 67 IDELR 241 (S.D. N.Y. 2016). In *R.B.*, the student with autism had never attended public school. His parents initiated hearings seeking reimbursement almost every year, but failed to prevail. In the latest dispute, the parents asserted 148 deficiencies in the two proposed public school IEPs. Their assertions were again rejected but, discouragingly, the parents can continue to dispute FAPE in future hearings each time an IEP is proposed.

Some parents think that FAPE is denied if their demanded provisions are not placed in the IEP. In *J.E. and C.E., ex rel. D.E. v. Chappaqua Cent. Sch. Dist.*, 116 LRP 27979 (S.D. N.Y. 2016), the court found, however, that a dispute over the content of the IEP does not give rise to relief under the IDEA. "A professional disagreement is not an IDEA violation." *Id.*

The *Rowley* standard for the conferring of educational benefit is currently under review by the Supreme Court of the United States. *See Andrew F. ex rel. Joseph F. v. Douglas Cnty. Sch. Dist. Re-1*, 798 F.3d 1329 (10th Cir. 2015), *cert. granted*, 195 L. Ed. 2d 901 (U.S. Sept. 29, 2016)(No. 15-827). The parents of Andrew, a student with autism, challenged the adequacy of their son's IEP. Specifically, the parents alleged that their son's IEP failed to provide their son with educational benefit as demonstrated by his lack of progress on his IEP goals and his escalating behavioral problems at school. In order to assess whether an IEP provides a student with FAPE, the parents argued that the court must determine whether the IEP provided "meaningful educational benefit." The Tenth Circuit Court of Appeals disagreed. Upholding its decision in *Thompson R2-J Sch. Dist. v. Luke P. ex rel. Jeff and Julie P, et al.*, 540 F.3d 1143 (10th Cir. 2009), *cert. denied*, 555 U.S. 1173 (2009), the Tenth Circuit held that an IEP provides a student with FAPE when the IEP confers "some educational benefit." Applying this standard to the parents' challenge, the court held that the student's IEP did confer some educational benefit. Although the court noted this was "a close case," it held that the student had received some educational benefit from his IEP as demonstrated by his progress towards his academic and functional goals. The court also noted that the student's IEP team had taken steps to try to

address the student's behavior in the school setting, but had not been given the opportunity to help the student make progress with his behaviors because the student was unenrolled from school by his parents. The parents filed a petition for a writ of certiorari to the United States Supreme Court which was granted on September 29, 2016. The Court heard oral argument on January 11, 2017. The question under review is: "What is the level of educational benefit that school districts must confer on children with disabilities to provide them with the free appropriate public education guaranteed by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*?"² NSBA has filed an *amicus* brief in this case.

2. Mental Health and Medical Issues Continue to be Among the Complex Issues Addressed in Hearings.

Two cases provide examples of situations in which school districts are called upon to provide services to children with significant physical and mental health needs. The first example arises in *Ricci and Karen C. ex rel. L.C. v. Beech Grove City Schs.*, 68 IDELR 67 (S.D. Ind. 2016). This student, L.C., has hydrocephalus, a shunt, CP, hemiparesis, gastrointestinal issues and a seizure disorder. He attended a private school and his mother wanted a very slow transition back to public school over the course of a semester. The school district asked for health care information, an emergency evacuation plan and progress reports from the private school. None were provided and the school district was allowed to provide a quick transition during which the student's health needs would be met by the school district. The court concluded that "...case law does not require a comparison between potential school placements in order to speculate whether detriment will result from removing a student from private school and placing him in public school." The question is whether the IEP offers educational benefit. The case does not question the need for the school district to meet the student's medical needs while at school. In a second case, *Fort Bend Indep. Sch. Dist. v. Douglas A.*, 601 F. App'x 250, 65 IDELR 1 (5th Cir. 2015), the student, Z.A., had been adopted by his parents from a Russian orphanage and was identified with ADHD shortly after arriving in the U.S. He had emotional problems, including attempts at suicide, depression and anxiety. He was placed by his parents in a residential program, but the school staff determined that he could make progress at school if he were provided accommodations such as special seating, breaks, behavior management, extended time and positive reinforcement. The court refused to grant tuition reimbursement because the primary reason for placing the student residentially was for treatment purposes. The "number one goal" at the treatment facility was to treat reactive attachment disorder. One major issue for school districts and the courts is the need to separate cases which seek medical treatment from those seeking educational services.

3. Discipline Remains a Hotly-Contested Area for Hearings; and Increasingly Violent Behaviors are Being Addressed at Schools.

Some recent rulings show that discipline disputes continue to form the basis for a number of due process hearings and that parents are sometimes successful in these challenges—and sometimes not so successful. These cases also show the degree of physical aggression and threats which face school districts. In *Bristol Twp. Sch. Dist. v. Z.B. ex rel. K.B. and R.B.*, 116 LRP 1736 (E.D.

² Because this case and the FAPE standard are the subject of another presentation during this seminar, this paper will not address the topic further.

of Pa. 2016), a court found that the Manifestation Determination Review (“MDR”) decision was not properly made when the team considered the issue as a “global” matter rather than applying the statutorily-required MDR criteria. The team discussed and concluded that the student could make proper behavior choices. The MDR team did not analyze the behavior in relation to the disability and considered only that he had engaged in aggressive behavior. The two items that were part of the MDR test had been filled out by the LEA representative prior to the MDR meeting. The court held that asking whether there was disagreement to this completed form did not allow sufficient input by the MDR team. Obviously, this case reveals the importance of strict compliance with the MDR procedures.

Other cases stress the concerns arising from violence in the schools and how a school district can respond if immediate relief is needed. In *Z.H. ex rel. P.H. and J.H. v. Lewisville Indep. Sch. Dist.*, 65 IDELR 147, 115 LRP 12653 (E.D. Tex. 2015), the student, Z.H., had ADHD and developed a list of students whom he wanted to shoot. Five days later, the student was diagnosed with PDD. The court found that the MDR team considered the existence of the PDD and offered an evaluation, but the parents refused. There was no link to the ADHD as the hit list was developed over several days and thus was not attributable to impulsivity.

The level of physical aggression by students remains a significant concern for school districts, such that some are seeking injunctions in connection with the due process hearing in to remove the student immediately. See *Seashore Charter Schools v. E.B. ex rel. G.B.*, 64 IDELR 44, 114 LRP 38513 (S.D. Tex. 2014). The student, E.B., was 15 years old and had autism and cognitive issues, as well as significant behavioral issues. His behaviors included assaulting one student and the student’s parent, his own teacher and the aide. He had bitten, scratched, grabbed and pulled out a chunk of hair. The school district employed a one-to one aide and hired a behavior specialist to assist in responding to the behaviors. E.B. caused one teacher to resign and the school district had not been able to find another teacher. The court granted an injunction to change placement during the administrative hearing, as the injury to the student was outweighed by the potential injury to the school district. In another case, it took four staff members to intervene with a student who was out of control. See *Wayne-Westland Cmty. Schs. v. V.S. ex rel. Y.S.*, 64 IDELR 139 (E.D. Mich. 2014). This high school student weighed 250 pounds and stood over six feet tall. He had a disability and engaged in behaviors such as physically attacking staff and students, using a pen as a weapon, punching the principal and threatening to rape a student. V.S. refused to leave the school building and tried to break into the building. It took four staff members to hold the door shut. The court found that the student posed an immediate threat and ordered that the parents appear to address whether the student should be barred from school and all school activities and participate in education through an online course. Clearly, over the course of the history of the IDEA, increasingly violent student behaviors are being dealt with by staff. See related decision *Wayne-Westland Cmty. Schs. v. V.S. ex rel. Y.S.*, 65 IDELR 13 (E.D. Mich. 2015).

4. Some Due Process Hearing Issues Have Been Settled by Rulings of the Supreme Court.

During the history of the IDEA, some procedural issues have been settled, such as who has the burden of proof in hearings. See *Schaffer v. Weast*, 546 U.S. 49 (2005)(burden of proof in an IDEA due process hearing rests with the party seeking relief). Some states have, following this

decision, voluntarily placed the burden on school districts in certain circumstances. *See e.g., Special Education and the Burdens of Proof: The Legacy of Schaffer ex rel. Schaffer v. Weast*, by Leslie R. Stelman, Virginia Commonwealth University, Commonwealth Policy Institute (Winter 2006) (www.cepi.vcu.edu/media/university-relations/cepi/pdfs/specialeducation.pdf)

Other issues that have been resolved include the denial of reimbursement to parents for the costs of their expert witnesses in a due process hearing. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 297 (2006)(IDEA does not authorize payment of expert fees to prevailing party). As a result, some parents may try to classify “experts” and “advocates” as paralegals. *See Anaheim Union High Sch. v. J.E.*, 116 LRP 6713 (9th Cir. 2016). A parent who prevailed tried to recover the costs of her educational consultant’s fees by calling her a paralegal. The Ninth Circuit refused the request noting that the advocate had been identified as an educational consultant in the hearing and had been listed on billing records as an advocate.

It is also settled that rejection of a parent’s requested IEP terms does not amount to predetermination or a failure to include parents in the IEP process. A New York court found that the fact that the school district staff disagreed with the opinions of the parents’ experts did not mean that there was insufficient participation by the parents in the preparation of the IEP or that there was a predetermination of placement. *T.F. and A.F. ex rel. M.F. v. New York City Dept. of Educ.*, 66 IDELR 136, 115 LRP 45578 (S.D. N.Y. 2015). In another case where an IEP was revised extensively at the request of the parents and their advocate, the decision of the IEP team to deny the private placement was not predetermination. The court held that the right of meaningful input does not include a right to “dictate” IEP content. *Rockwall Indep. Sch. Dist. v. M.C. ex rel. M.C.*, 116 LRP 9727 (5th Cir. 2016). Another court held that the parents’ refusal to participate in the IEP process unless the school district gave in to the parents’ demands provided a basis for a court to hold that the parents’ actions were the cause of the failure of the IEP process and their lack of cooperation was a bar to tuition reimbursement. In yet another case, *W.D. v. Watchung Hills Reg’l High Sch. Bd. of Educ.*, 602 F. App’x 563, 65 IDELR 63 (3d Cir. 2015), a child with SLD and ADHD was placed by his mother in a private school. The mother sought tuition reimbursement, claiming that the school district did not provide answers in the IEP meeting to her questions about the reading methodology that would be used and whether the teacher would be certified in the program. The school district had advised the parent that the teacher would be a certified teacher and that the reading program would be research-based, implemented by a trained teacher and based on phonics and comprehension. The reimbursement was denied because the parent did not give a 10-day notice of removal and had already committed to the private school by contract prior to the IEP meeting.

The IDEA itself addresses the significance of a procedural violation, specifically stating that not all procedural violations will result in a denial of FAPE. 20 U.S.C. § 1415(f)(3)(E)(ii). Only those procedural deficiencies which deprive the parent involvement in decision-making, deny the student FAPE or deprive the student of educational benefits will result in a finding that FAPE has been denied. *Id.*

C. When is Exhaustion of Administrative Remedies Required Under the IDEA?

An amendment to the IDEA, known as the Handicapped Children’s Protection Act (“HCPA”), was enacted in 1986 in response to the decision of the Supreme Court of the United States in

Smith v. Robinson, 468 U.S. 992 (1984). The Supreme Court decided in *Smith* that the IDEA was the sole avenue for resolution of claims brought under Section 504. *Id.* at 1009-21. The IDEA was then amended to provide:

“Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C. 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.” 20 U.S.C. § 1415(l).

Courts of appeals have addressed the HCPA and have reached differing conclusions about exhaustion, particularly if the claims are seeking money damages, a remedy not available under the IDEA. For example, the Tenth Circuit in 2015 held that exhaustion was required when money damages were sought by a student whose teacher allegedly gave her a “wedgie” and placed her in a dark closet. The claim also asserted that the student had become afraid to attend school and had a lack of educational progress. See *Carroll and Carroll ex rel. AKC v. Lawton Indep. Sch. Dist. No. 8, et al.*, 66 IDELR 210, 115 LRP 53032 (10th Cir. 2015). The court held that, while money damages are not available under the IDEA, the parties would have to first exhaust administrative remedies because of their allegations of adverse educational consequences. See also, *J.A. ex rel T.L. and C.A., v. Moorhead Pub. Schs., ISD No. 152*, 65 IDELR 47, 115 LRP 7888 (D. Minn. 2015) (Allegations of denial of FAPE required exhaustion of remedies under the IDEA before pursuing ADA and Section 504 claims).

In contrast, the Ninth Circuit held in *Payne ex rel. D.P., v. Peninsula Sch. Dist.*, 653 F.3d 863, 57 IDELR 31 (9th Cir. 2011) that a five-year-old student with autism did not have to exhaust administrative remedies in order to pursue a claim about being improperly confined to a closet at school. The court observed in *Payne* that the Fourth Circuit (*MM ex rel DM and EM v. Sch Dist. of Greenville Cnty.*, 303 F.3d 523, 536 (4th Cir. 2002)) and Tenth Circuit (*Urban ex rel. Urban v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d 720, 725 (10th Cir. 1996)) found the exhaustion requirements jurisdictional. Other circuits, as the *Payne* case noted, had held differently. The Seventh Circuit (*Mosely v. Bd. of Educ.*, 434 F.3d 527, 533 (7th Cir. 2006)) and Eleventh Circuit (*N.B. ex rel. D.G. v. Alachua Cnty. Sch. Bd.*, 84 F.3d 1376, 1379 (11th Cir. 1996)) had found exhaustion requirements to be an affirmative defense. The court concluded in *Payne* that the exhaustion provision of the IDEA was not jurisdictional and that the obligation to exhaust depended on the relief being sought rather than the injury being alleged. The case was remanded so that the district court could determine “which claims require IDEA exhaustion and which do not.” *Payne* at 881.

Recently, the Eighth Circuit held that, consistent with *Payne*, there was no need to exhaust administrative remedies under the IDEA where the parents were seeking money damages for the alleged rape at school of their daughter and that they were not seeking any relief under the IDEA. See *Moore ex rel. D.S. v. Kansas City Pub. Schs.*, 68 IDELR 1 (8th Cir. 2016).

This disagreement among the circuits over the exhaustion issue is before the Supreme Court of the United States for resolution. See *Fry ex rel. E.F. v. Napoleon Cmty. Schs.*, 788 F.3d 622 (6th Cir. 2015), *cert. granted*, 136 S. Ct. 2540 (U.S. Jun. 28, 2016)(No. 15-497). The *Fry* case concerns a student with cerebral palsy who was denied the ability to bring the student's service dog, a goldendoodle named Wonder, to school. Napoleon Community Schools rejected the parents' request on the grounds that the service dog was not needed at school because the student's IEP already provided the student with a personal aide who could assist the student with tasks at school. The parents challenged the schools' decision and requested monetary damages by filing a lawsuit in federal court under the Americans with Disabilities Act, Section 504 of the Rehabilitation Act, and state disability laws. The parents have enrolled the student in a different school which has welcomed the student and the dog. The parents' lawsuit was dismissed by both a federal district court and the Sixth Circuit Court of Appeals on the ground that the parents had failed to exhaust their administrative remedies under the IDEA before filing their lawsuit in federal court. The Sixth Circuit held that, while monetary damages are not available under the IDEA, the family should have first exhausted their administrative remedies because "the suit turns on the same questions that would have determined the outcome of IDEA procedures, had they been used to resolve the dispute; notably, whether the decision to not allow the service animal at school denied the student FAPE." In June of 2016, the U.S. Supreme Court granted the parents' petition for certiorari and oral arguments were held on October 31, 2016. The question presented to the court is whether "the HCPA commands exhaustion in a suit, brought under the Americans with Disabilities Act and the Rehabilitation Act, that seeks damages--a remedy that is not available under the IDEA." NSBA has filed an amicus brief in the case and the decision is being awaited.

The arguments of the parents to the Supreme Court include an unusual agreement between the parties that FAPE has been provided to the student by the school district and that no IDEA violation is being asserted. The parents seek money damages under the ADA and Section 504 for the school district's failure to allow the student to bring the dog to school which would allow the student to develop a bond with the dog and develop her independence further. They argue, with the support of the Department of Justice and the USDOE in an amicus brief, that there is no exhaustion requirement where the relief sought is not available under the IDEA and that this result is clearly expressed in the HCPA. They also argue that it makes no sense to require exhaustion when there is no relief that is being sought which can be awarded by an IDEA hearing officer. In essence, exhaustion is "futile" when the relief requested cannot be obtained in that proceeding.

The respondent school district and the NSBA point out in their briefs that a finding that exhaustion is not required will fundamentally alter the due process hearing procedures and the IEP process. It will encourage expensive litigation as a first resort without an effort to resolve the dispute through the administrative process set up for that purpose. A concern was expressed that the ability to avoid exhaustion by seeking money damages would promote form over substance. A parent could engage in artful pleading in order to avoid the exhaustion requirement.

The justices appeared concerned in the oral argument about the ability to tailor pleadings in a way that the exhaustion requirement of the IDEA could be undermined. On the other hand, the justices appeared interested in the position of the parties that there was no contention in this case of a violation of the IDEA and the effect that such a concession might have on the need to exhaust.

This case will be decided this term and guidance provided on the subject of exhaustion when money damages are being sought.

IV. The Rising Importance of Alternative Dispute Resolution

The discussion in this paper has already established the difficulty in current due process hearing procedures arising from the quickness with which these complex cases are tried, the high cost in the event of a loss, and the stress caused to school personnel who have to testify in a highly-charged hearing to defend their decisions. It is not a surprise that alternatives to a due process hearing are being explored. Among the existing options are mediation (20 U.S.C. § 1415(e)) and the resolution session (20 U.S.C. § 1415(f)(1)(B)).

A. Mediation Should Be Considered to Avoid Costly Litigation.

The IDEA requires state educational agencies to make available mediation to allow parties to special education disputes to resolve their disputes. 20 U.S.C. § 1415(e)(1). The cost factor is favorable as the state educational agency bears the cost of mediation. 34 C.F.R. § 300.506(b)(4); *OSEP MEMO 13-08* (July 23, 2013). Matters appropriate for mediation include any matter under 34 C.F.R. § Part 300 such as the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to a child with a disability, as well as any other matters arising under 34 C.F.R. § Part 300 that may not be the subject of a due process complaint.

B. Mediation has Appealing Features.

Mediation is voluntary and must be agreed to by the parents and the school district. 20 U.S.C. § 1415(e)(2)(A)(i). No one can be forced into mediation and no one can be forced into an agreement. Mediation must be conducted by a qualified and impartial mediator who is trained in effective mediation techniques. 20 U.S.C. § 1415(e)(2)(A)(iii). Mediation cannot be used to deny or delay the parent's right to a due process hearing. 20 U.S.C. § 1415(e)(2)(A)(ii). The parties to a due process hearing can agree to use mediation in place of a resolution session and suspend timelines for the hearings. 34 C.F.R. §§ 300.510(a)(3)(ii). This approach may be advantageous and allows time to reach a resolution without incurring the cost of a hearing. Mediation sometimes has allowed the parties to reach a creative solution that was not clear to them through the formal IDEA procedures. For example, mediation can be used to repair breakdowns in communications or allow an opportunity to understand the parents' concerns which were not clearly expressed previously. Mediation can result in a legally-enforceable mediation agreement even when the IEP process was not successful. 34 C.F.R. § 300.506(b)(6).

Mediation is confidential and the discussions may not be used as evidence in a subsequent due process hearing or civil proceeding. 34 C.F.R. §§ 300.506(b)(6)(i). The offer of a settlement may protect against attorneys' fees. Note, however, one Court of Appeals determined that a rejected settlement offer is not admissible if reference is made in the offer to the mediation. This result protects the confidential nature of mediation. *J.D. ex rel. Mark Davis and Tammy Davis v. Kanawha Cnty. Bd. of Educ.*, 571 F.3d 381, 386, 52 IDELR 182 (4th Cir. 2009). To protect

against this result, reoffer any rejected settlement that was made in mediation after the mediation concludes and do not mention the mediation.

OSEP has noted the benefit of mediation in contrast to proceeding to a hearing. “Mediation can be a less expensive and less time-consuming method of dispute resolution between parents and local educational agencies (LEAs), or, as appropriate, State educational agencies (SEAs) or other public agencies. Mediation may result in lower financial and emotional costs compared to due process hearings.” *OSEP MEMO 13-08* (July 23, 2013).

Three important factors to deal with in mediation, or any agreement, are a stay-put provision, attorneys’ fees and a release. A school district does not want to litigate whether it must continue to pay for a private placement as the stay-put placement following the end of the agreement. In *L.L. ex rel. X.L. v. New York City Dept. of Educ.*, 68 IDELR 129 (S.D. N.Y. 2016), a school district settled a claim for a private school placement by paying for reimbursement for one year, but provided in the agreement that there was no entitlement to future years’ payments. The school district offered a placement for the next year on June 27, 2013, one day before the start of the private school’s 12-month school year. The court found the offer of placement to be timely and that the one-year payment did not establish a stay-put placement at the private school where the placement was limited to a particular school year. It is important in these situations to continue to develop annual IEPs.

C. The Resolution Session Should be Taken Seriously.

The IDEA permits a resolution session to be held within 15 calendar days of the notice of the due process hearing complaint. 20 U.S.C. § 1415(f)(1)(B)(i)(I). The individuals present at this resolution meeting must include the parents, relevant members of the IEP team as agreed upon by the parents and the school district, and someone from the LEA who has decision-making authority. 20 U.S.C. § 1415(f)(1)(B)(i) & (i)(II). The meeting cannot include the school district’s attorney unless the parents elect to bring an attorney. 20 U.S.C. § 1415(f)(1)(B)(i)(III). It is not clear whether the situation where one of the parents is an attorney would allow the school district attorney to attend. The meeting is intended to allow an opportunity to discuss the dispute and reach a resolution.

The resolution session may be waived by written agreement of the parties. 20 U.S.C. § 1415(f)(1)(B)(i). Also, the parties have the option of using the mediation process in lieu of the resolution session. *Id.* Any agreement that is reached must be placed in writing and signed by the parties. 20 U.S.C. § 1415(f)(1)(B)(iii). It is also enforceable in court. *Id.* In contrast to a mediation agreement, a resolution agreement may be voided by a party within three business days of the date of execution of the agreement. 20 U.S.C. § 1415(f)(1)(B)(iv).

Some difficulties with the resolution session are that it is held so quickly with little time to strategize and it excludes the school district attorney, who is often the best negotiator and the individual who can find creative solutions. Also, because the hearing has already been initiated, the resolution may give rise to an entitlement to attorneys’ fees for the parent as a prevailing party. Mediation entered into prior to the filing of a due process hearing, in contrast, does not raise this entitlement although it would still be prudent to address attorneys’ fees in any agreement.

D. Offer a Written Settlement 10 days Prior to Hearing to Mitigate Attorneys' Fees and Pursue Reimbursement when Appropriate.

The possibility of large attorney fee awards should prompt school districts to take advantage of the statutory provision of offering written settlements ten days prior to a hearing. 20 U.S.C. § 1415(i)(3)(D)(1) (attorney's fees may not be awarded for work done after a written offer of settlement made within the time prescribed by Rule 68 of the FRCP or, in the case of an administrative proceedings, at any time more than 10 days before it begins, if the offer is not accepted within 10 days and the court or hearing officer finds that the relief finally obtained by the parents is not more favorable than the offer of settlement). This approach benefited a school district when the award of attorneys' fees was reduced to \$7,780 (less than 12% of the amount requested) because the relief won in the hearing was less than the relief offered by the school district in settlement. The school district had offered 80 hours of individual tutoring by a special education teacher, reimbursement for a private evaluation, reasonable attorneys' fees and 20 hours of counseling. The hearing officer only awarded six hours of counseling and reimbursement for the evaluation. *Beauchamp v. Anaheim Union H.S. Dist.*, 67 IDELR 107 (9th Cir. 2016).

School districts have secured awards under IDEA's 2004 amendment permitting recovery of attorneys' fees for frivolous litigation. A parent's attorney filed for a due process hearing alleging that the student was denied FAPE due to the school's delay in providing a residential placement, and claiming that three IEPs' transition plans were inappropriate. *Capital City Pub. Charter Sch. v. Gambale, et al.*, No. 13-cv-253, 2014 U.S. Dist. LEXIS 36629 (D.D.C. Mar. 20, 2014). The court determined that the attorney who filed the due process hearing was well aware of the school's documented attempts to convene the IEP team and complete necessary paperwork for placement. Moreover, the attorney was well aware of the parent's role in delaying each of these events. The court determined that any delay in placing the student in a residential facility was attributable to the parent and the parent's attorney. The court determined that the due process hearing filed by the parent's attorney was frivolous, unreasonable, and without foundation, and awarded the school the \$11,767 attorney's fees it incurred in defending the case.

In another case, the school district attorneys were named in the suit, but ultimately won attorneys' fees. See *Turton v. Virginia Dep't of Educ.*, No. 3:14CV446, 2015 WL 236699 (E.D. Va. Jan. 16, 2015). 28 plaintiffs in the case generally alleged various incidents of discrimination against special education students in a number of local school divisions and included both federal and state law claims. Two school board attorneys were named as defendants. The court found the "shotgun pleading" in the amended complaint to be inadequate and made it "virtually impossible to ascertain what claims are asserted against which defendants and on what legal basis the respective claims are founded..." The matter was dismissed, but one of the school board attorneys filed a motion for Rule 11 sanctions. The court found that the plaintiffs' counsel failed to engage in a pre-filing inquiry into the applicable law and did not conduct adequate factual investigation into the factual basis for the allegations. Therefore, the court held that sanctions were appropriate.

V. A Proposal for Consideration

The COSA IDEA group has been studying the reauthorization of the IDEA for a few years and pursuing options to clearly define disputes in order to avoid hearings. Among the group's suggested changes to the IDEA in the area of due process hearings are the following proposals:

Any issue to be considered in a hearing must first be considered in an IEP meeting;

All hearing requests must be specific in setting forth the allegations, the issues and the relief;

The timeline for responding to a due process hearing should be ten business days after initiation or after a ruling on a notice of insufficiency;

The resolution session should occur within 15 business days rather than 15 calendar days;

Mediators should meet qualifications so that mediation will have a higher likelihood of success;

School district attorneys should participate in the resolution session if an advocate or attorney accompanies the parents;

The SEA should pay for the hearing officer and the court reporter;

The statute of limitations should be limited to one year;

The disclosure of witnesses, as well as documentary evidence, should be required;

Evidence regarding the student's progress in private schools should be excluded;

Deference to the decisions of the IEP team should be afforded; and

The statute should require that the burden of proof is on the party moving to change the status quo.

VI. Practical Considerations and Tips

- A. School Districts should try to anticipate cases which may end up in a due process hearing and strategize with their attorneys about steps to take in order to be in the best defensive position.
- B. When the parent retains an attorney or advocate or gives notice of placing the student in a private school, it is likely that he/she is planning to initiate a due process complaint.
- C. Offer mediation to try to resolve disputes and be creative in forming solutions.

- D. Staff should seek the assistance of an attorney as soon as a hearing is requested or threatened. The best use of an attorney can be in the provision of a strategy for handling of the case.
- E. Staff should gather the student's educational records in one place so that they can be shared with the parents or the school district attorney without taking time away from preparation for the hearing.
- F. Discuss whether an outside expert is needed.
- G. Use the resolution session to try to resolve the complaint prior to hearing and to avoid incurring additional fees.
- H. Develop a realistic projection of what is at stake in the hearing—both educationally and financially. Figure the cost of appeals in the analysis of the case.
- I. Make an offer of settlement, as appropriate, ten business days prior to the hearing.
- J. Remember that cases may continue in appeals even if the school district wins the administrative hearing.
- K. Be prepared for negative publicity.