

The IDEA's Procedural Safeguards: What Districts Need to Understand

by

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A. PROCEDURAL SAFEGUARDS UNDER THE IDEA 2004, 20 USC § 1415(a)

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

B. MODEL FORM: PROCEDURAL SAFEGUARDS NOTICE

The Individuals with Disabilities Education Act (IDEA), the Federal law concerning the education of students with disabilities, requires schools to provide parents of a child with a disability with a notice containing a full explanation of the procedural safeguards available under the IDEA and U.S. Department of Education regulations. The U.S. Department of Education provides a model form for the procedural safeguards notice *ED 2009 IDEA Part B Regulations Model Form: Procedural Safeguards Notice*, U.S. Dept. of Educ. (2009); http://idea.ed.gov/download/modelform_Procedural_Safeguards_June_2009.pdf.

C. DEFINITION FOR PROCEDURAL SAFEGUARDS UNDER § 300.500

Each SEA must ensure that each public agency establishes, maintains, and implements procedural safeguards that meet the requirements of §§ 300.500 through 300.536.

D. LIST OF PROCEDURAL SAFEGUARDS IN REQUIRED NOTICE UNDER § 300.504

Procedural safeguards notice requirements are found in the regulations at 34 CFR § 300.504. The procedural safeguards notice must be in understandable language to the general public; provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so. (§ 300.503(c)).

A copy of this notice must be given to parents only one time a school year, except that a copy must be given to the parents: (1) upon initial referral or parent request for evaluation; (2) upon receipt of the first State complaint under §§300.151 through 300.153 and upon receipt of the first due process complaint

¹ Special thanks and credit to LRP Publications for providing significant material and case cites from Special Ed Connection (www.specialedconnection.com).

under §300.507 in a school year; (3) when a decision is made to take a disciplinary action that constitutes a change of placement; and (4) upon parent request. [§300.504(a)]

If the native language or other mode of communication of the parent is not a written language, the public agency must take steps to ensure – (i) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication; (ii) That the parent understands the content of the notice. § 300.503(c). The district may place a current copy of its procedural safeguards notice on its website. § 300.504(b). A parent can choose to receive procedural safeguard notices by electronic mail if the district makes that option available. § 300.505

The procedural safeguards notice must include a full explanation of all of the procedural safeguards available under §300.148 (unilateral placement at private school at public expense), §§300.151 through 300.153 (State complaint procedures), §300.300 (consent), §§300.502 through 300.503, §§300.505 through 300.518, and §§300.530 through 300.536 (procedural safeguards in Subpart E of the Part B regulations), and §§300.610 through 300.625 (confidentiality of information provisions in Subpart F).

Key procedural safeguards include:

- Independent educational evaluations
- Prior written notice
- Parental consent
- Access to educational records
- Opportunity to present complaints to initiate due process hearings
- Child’s placement during pendency of due process proceedings
- Procedures for students who are subject to placement in an interim alternative educational setting²
- Requirements for unilateral placement by parents of children in private schools at public expense
- Mediation
- Resolution meetings
- Due process hearings, including requirements for disclosure of evaluation results and recommendations
- State-level appeals (if applicable in the state)
- Civil actions

² Please note that this outline will not address the procedural safeguards related to student discipline.

- Attorney's fees

E. INDEPENDENT EDUCATIONAL EVALUATION (IEE)

An independent educational evaluation, also referred to as a private evaluation, provides parents with the opportunity to obtain their own evaluation of their child to counteract the evaluation obtained by a district. It is a procedural safeguard guaranteed by the IDEA. IDEA 2004 made a significant change by limiting parents to public payment for only one IEE for each evaluation with which the parent disagrees. *See generally* § 300.502.

PURPOSE OF THE IEE

Because a student's educational program and placement are premised upon the results of the evaluation(s), the IEE serves as a mechanism for parents who suspect that the district's evaluation has not discerned the true identification or nature of a student's disabilities and resulting needs.

CONDUCTING THE IEE

An IEE means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question. § 300.503(a)(3)(i).

Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent.

RIGHT TO AN IEE

Under § 300.503(b)(2), if a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either (i) file a due process complaint to request a hearing to show that its evaluation is appropriate; or (ii) ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing pursuant to §§ 300.507 through 300.513 that the evaluation obtained by the parent did not meet agency criteria.

If the public agency files a due process complaint notice to request a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an IEE, but not at public expense. § 300.502(b)(3).

If a parent requests an IEE, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the public agency may not require the parent to provide an explanation and may not unreasonably delay either providing the IEE at public expense or filing a due process complaint to request a due process hearing to defend the public evaluation. § 300.502(b)(4).

A parent is entitled to only one IEE at public expense each time the public agency conducts an evaluation with which the parent disagrees. § 300.502(b)(5).

See Nicole L. v. Brownsville Indep. Sch. Dist., 42 IDELR 134 (SEA TX 2004). A Texas hearing officer determined a district violated the procedural rights of the parents of a 6-year-old student diagnosed with a speech impairment when, following their request for an independent educational evaluation, it neither scheduled an IEE nor requested a hearing regarding its refusal to provide an IEE.

See, Los Angeles Unified Sch. Dist., 48 IDELR 293 (SEA CA 2007). The ALJ ordered the District it to fund two independent evaluations of a kindergartner with autism when the District never requested a due

process hearing. Instead, the District waited for the parents to request a due process hearing and sought to assert the appropriateness of its own evaluations as a defense to the parents' request for an IEE. "[The District] was not justified in relying upon [the parents'] filing, because the applicable [Part B] regulation and its own special education manual do not recognize any exception to its duty to file," the ALJ wrote, explaining that the district's defensive maneuver did not satisfy the district's obligation to request a due process hearing; see also, *Pajaro Valley Unified Sch. Dist. v. J.S.*, 47 IDELR 12 (N.D. Cal. 2006) (three-month delay in request for hearing obligates district to pay for IEE) .

CONSIDERATION OF IEE

Pursuant to § 300.502(c), if the parent obtains an IEE at public expense or shares with the public agency an evaluation obtained at private expense, the results of the evaluation:

- (1) Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and
- (2) May be presented by any party as evidence at a hearing on a due process complaint under subpart E of this part regarding that child.

If a hearing officer requests an IEE as part of a hearing on a due process complaint, the cost of the evaluation must be at public expense. § 300.502(d).

If parents initiate an IEE that meets agency criteria under § 300.502(a), the results of that evaluation must be "considered" by the district in any decision made with respect to the provision of FAPE to the student. § 300.502(c); *T.S. ex rel. S.S. v. Board of Educ. of the Town of Ridgefield*, 20 IDELR 889 (2d Cir. 1993). The district's obligation to consider the IEE does not translate into a corresponding obligation to accept the IEE or its recommendations.

DOCUMENTING IEP TEAM'S CONSIDERATION OF THE IEE

The district should document its consideration of an IEE at the IEP team meeting, including:

- How the report was made available to MDT/IEP team members.
- The forum in which the report was reviewed and discussed by the MDT.
- To the extent the District disagrees with the IEE, the reasons why the findings and recommendations of the IEE are not accepted. *T.S. ex rel. S.S. v. Board of Educ. of the Town of Ridgefield*, 20 IDELR 889 (2d Cir. 1993).

CRITERIA FOR IEE

Pursuant to § 300.502(e):

- (1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.
- (2) Except for the criteria described in § 300.502(e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an IEE at public expense.

(Authority: 20 USC 1415(b)(1) and (d)(2)(A)).

Districts have not been permitted to establish criteria relating to advance notice required for public funding of IEEs. A state may not condition payment for the IEE on the parents' provision of prior written notice of intent to obtain an IEE. Nor may a state make the parents' receipt of the state's response to their request a precondition for payment. *Letter to Imber*, 21 IDELR 677 (OSEP 1994).

TIMELINES FOR RESPONSE TO AN IEE REQUEST

There is no specific time limit within which a district must respond to a parent's request for an IEE. However, a district may not "unreasonably delay" either agreeing to fund the IEE or requesting a due process hearing to show that its own evaluation was appropriate. § 300.502(b)(4). A district cannot simply ignore a request for an IEE. *In re Baldwin County Bd. of Educ.*, 21 IDELR 311 (SEA AL 1994).

RESTRICTIONS ON LOCATION OF THE IEE AND EVALUATOR QUALIFICATIONS

IEEs must meet certain "agency criteria." Specifically, the location of the evaluation and the qualifications of the examiner must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an IEE. § 300.502(e)(1). These limitations generally are upheld, as long as they are reasonable. However, parents must always have an opportunity to demonstrate that unique circumstances justify a waiver of the criteria, although this is difficult to do in practice. *Letter to Anonymous*, 20 IDELR 1219 (OSEP 1993).

RESTRICTIONS ON FEES CHARGED FOR IEE

The IDEA defines "public expense" as requiring the district to either pay for the full cost of the evaluation or ensure that the evaluation is otherwise provided at no cost to the parent. § 300.502(a)(3)(ii). Nor is partial public funding of an IEE, limited to disputed matters, permitted.

ADVANCING FUNDS FOR PAYMENT OF IEE

Since the manner of funding IEEs, either as reimbursement or advance funding, is not addressed in Part B, it is within the discretion of the district whether to advance funds to a parent. Nonetheless, if the denial of advance funding effectively denies the right to an IEE, a parent is entitled to relief. *Edna Indep. Sch. Dist.*, 21 IDELR 419 (SEA TX 1994). However, if the need for the IEE itself is disputed, IDEA does not require public funding of IEEs based on the parent's inability to privately fund one.

Pursuant to § 300.103(a), each state may use whatever state, local, federal, and private sources of support are available in the state to meet the requirements of this part. For example, if it is necessary to place a child with a disability in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.

RECOVERY OF OUT-OF-POCKET COSTS INCURRED IN CONJUNCTION WITH OUT-OF-TOWN EVALUATIONS

When an out-of-district IEE is publicly funded, the parents' related travel, meal and lodging expenses must be funded as well, even if the parents are financially able to bear these costs, subject to reasonableness for costs incurred. *Letter to Heldman*, 20 IDELR 621 (OSEP 1993).

CLASSROOM OBSERVATIONS BY EVALUATORS

If a district includes or permits in-class observation as part of a publicly funded evaluation, it must afford the same opportunity for observation for a person performing a privately funded IEE. *Letter to Wessels*, 16 IDELR 735 (OSEP 1990).

F. WRITTEN NOTICE UNDER § 300.503, § 300.504 AND § 300.503

A district must provide parents with “prior written notice” whenever it proposes or refuses “to initiate or change, the identification, evaluation or educational placement of the child, or the provision of a free appropriate public education.” § 300.503(a)(1); 20 USC 1415(b)(3). IDEA 2004 modified the minimum content requirements of the prior written notice. Under § 300.503(b)(1)-(7), the notice must include:

- A description of the action proposed or refused by the district.
- An explanation of why the district proposes or refuses to take the action.
- A description of each evaluation procedure, assessment, record, or report the district used as a basis for the proposed or refused action.
- A statement that the parents have protection under Part B’s procedural safeguards.
- If the prior written notice is not an initial referral for an evaluation, the means by which a copy of a description of the procedural safeguards can be obtained.
- Sources for parents to contact to obtain assistance in understanding the provisions of Part B.
- A description of other options considered by the IEP team and the reasons why those options were rejected.
- A description of the factors relevant to the district’s proposal or refusal.

ADDITIONAL CONTENTS OF THE NOTICE REQUIREMENT

In addition to the minimum requirements to be included in the notice to parents set forth at § 300.503(b), a district also could include any additional information it deems to be pertinent. For example, a district could elect to have its notice to parents include an explanation of the requirements surrounding privacy rights (§ 300.570). *Letter to Barnett*, 20 IDELR 1164 (OSEP 1993).

In *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities*, 47 IDELR 195 (OSERS 2007), OSERS observed that the 2006 Part B regulations do not specifically address an SEA’s responsibilities when it receives a complaint that does not include the required content. OSERS noted that the comments to the regulations permit an SEA to dismiss complaints that are unsigned or do not contain the parent’s contact information. However, OSERS indicated that the better practice might be to notify parents of the defects in their complaints. It suggested a notice indicating that the complaint will be dismissed for not meeting content requirements or that the complaint will not be investigated and timelines not commenced until the missing content is provided.

COMPLIANCE WITH THE NOTICE REQUIREMENT

The district may place a current copy of its procedural safeguards notice on its website, if it has one. § 300.504 (b).

Districts can also provide the notice by electronic mail, if the parent verbally requests it. § 300.505.

NOTICE OF PLACEMENT

A district must provide enough information in its placement notice for parents to understand why the placement team has concluded that the proposed placement option is the LRE in which the student can receive FAPE. The explanation must contain, at the least, identification of the setting selected and alternative settings that were considered, as well as an explanation of why the proposed option, as opposed to the alternatives, was selected. § 300.503(b).

LIMITED DISCLOSURE ABOUT PLACEMENT DECISIONS

Because the placement notice is intended only to give parents sufficient information to make an informed decision about whether to challenge the district's decision, the district does not have to provide the same detailed explanation of the reasoning supporting its placement decision as it would be required to provide in a due process hearing. *Kroot v. District of Columbia*, 19 IDELR 378 (D.D.C. 1992).

INFORMATION ABOUT PLACEMENT OPTIONS ON CONTINUUM OF PLACEMENTS

There is no explicit requirement in § 300.503(b) or otherwise in IDEA that parents be notified of all placement options on the continuum of alternative placements. However, OSEP has taken the position that the notice concerning the initial identification of a student as having a disability must inform parents of the continuum of alternative placements available in the district. *Letter to New*, 211 IDELR 383 (OSEP 1986).

DISCLOSURE OF TESTS TO BE ADMINISTERED IN EVALUATION/RE-EVALUATION

Every evaluation procedure and test that a district considers in a placement or program decision must be disclosed in the placement notice to parents. § 300.503(b)(4). In contrast, the regulations do not address the specific information that must be provided in a notice informing parents that the district proposes to evaluate or reevaluate a student, although the regulations do not appear to require identification of specific tests. According to OSEP, Part B does not specifically require that the notice include a description of every test to be administered or the qualifications of the evaluators. *Letter to Sutler*, 18 IDELR 307 (OSEP 1991).

ACKNOWLEDGEMENT OF NOTICE

IDEA does not require a district to have parents acknowledge in writing that they received the written notices required to be provided to them under this law. Nevertheless, because a district's failure to provide required notice could result in a determination that it has failed to provide FAPE to a student, the issue of how to document the fact that required notices have been sent is important for administrators to consider.

FAILURE TO PROVIDE NOTICE

Not all procedural errors, including the failure to give notice, automatically result in a denial of FAPE. If the parents have not been denied the opportunity for meaningful participation and the student has not suffered any loss of educational opportunity, then the student may have received FAPE, notwithstanding any procedural errors. *See, e.g., Tennessee Dept of Mental Health & Mental Retardation v. Paul B.*, 24 IDELR 452 (6th Cir. 1996); *Myles S. v. Montgomery County Bd. of Educ.*, 20 IDELR 237 (M.D. Ala. 1993). Contrast with *Max M. v. Thompson*, 556 IDELR 227 (N.D. Ill. 1984).

Note that IDEA 2004 codified the circumstances in which a hearing officer, in matters alleging a procedural violation, may find that a child did not receive FAPE. While a hearing officer may still order a district to comply with procedural requirements, according to 20 USC 1415(f)(3)(E)(ii) a denial of FAPE may be found only if the district's procedural inadequacies:

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

G. PARENTAL CONSENT UNDER § 300.300

EVENTS REQUIRING PARENTAL CONSENT UNDER FEDERAL LAW

IDEA requires parental consent for district actions in conjunction with the following educational events:

1. Preplacement evaluations and reevaluations.
2. Initial placements.

See generally § 300.300.

REQUIREMENT THAT CONSENT BE INFORMED

When consent is required under IDEA, it must be "fully informed" to be valid. § 300.9. In order to be informed, the consent must meet the following requirements:

- A. The parent has been fully informed of all information relevant to the activity for which consent is sought, in his or her native language, or other mode of communication;
- B. The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) that will be released and to whom; and
- C. (1) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at anytime.

(2) If a parent revokes consent, that revocation is not retroactive (i.e., it does not negate an action that has occurred after the consent was given and before the consent was revoked).

(Authority: 20 U.S.C. 1414 (a)(1)(D)).

PARENTAL CONSENT PRIOR TO REEVALUATIONS

Informed parental consent is required prior to conducting both initial evaluations and reevaluations. However, when reevaluation is at issue, such consent need not be obtained if the district can demonstrate that it took “reasonable measures to obtain such consent and the child’s parent failed to respond. 20 USC 1414(c)(3).

REVOCAION OF PARENTAL CONSENT FOR EVALUATION

A parent may revoke consent at anytime. § 300.9(c)(1). Nevertheless, any revocation is prospective only and does not negate an action that has occurred after the consent was given and before the consent was revoked. For example, a parent’s right to consent to a preplacement evaluation will end once the evaluation is completed; his right to revoke consent to an initial placement ends when the student is placed. *See Letter to Williams*, 18 IDELR 534 (OSEP 1991).

PARENTAL CONSENT PRIOR TO REEVALUATION

Informed parental consent is required prior to conducting both initial evaluations and reevaluations. However, when reevaluation is at issue, such consent need not be obtained if the district can demonstrate that it took “reasonable measures to obtain such consent and the child’s parent failed to respond. 20 USC 1414 (c)(3).

DISTRICT CHALLENGES TO PARENTS’ REFUSAL TO CONSENT TO INITIAL EVALUATION (FORMAL METHODS)

IDEA 2004 states that, except to the extent inconsistent with state law, a district may pursue the initial evaluation using the procedures described in 20 USC 1415, i.e., mediation, resolution meeting, and due process hearing when the parents do not provide consent or if they fail to respond to a request for consent. 20 USC 1414(a)(1)(D)(ii)(I).

If the child is a ward of the state and is not residing with his parents, the district is required to make reasonable efforts to obtain informed consent from the child’s “parent,” as defined in 20 USC 1402 (23), for an initial evaluation to determine whether the child is a child with a disability. 20 USC 1414(a)(1)(D)(iii)(I). However, it is not required to get such consent from the parent if: (a) despite reasonable efforts, it cannot discover the parent’s whereabouts; (b) the parent’s rights have been terminated under state law; or (c) the parent’s rights to make educational decisions were subrogated by a judge in accordance with state law and a consent for an initial evaluation has been obtained by an individual appointed by the judge to represent the child. 20 USC 1414(a)(1)(D)(iii)(II).

INITIAL EVALUATIONS WITHOUT PARENTAL CONSENT

Consistent with the ED’s position that public agencies should use their consent override procedures only in rare circumstances, § 300.300(a)(3) clarifies in the final regulations that a public agency is not required to pursue an initial evaluation of a child suspected of having a disability if the parent does not provide consent for the initial evaluation. “State and local educational agency authorities are in the best position to determine whether, in a particular case, an initial evaluation should be pursued.” Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46632 (August 14, 2006).

Consent override procedures are not available for children who are home schooled or placed by their parents in private school. Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46653 (August 14, 2006).

INABILITY TO OBTAIN CONSENT FOR REEVALUATIONS

§ 300.300 (c)(1), regarding parental consent for reevaluations, has been modified in the 2006 IDEA Part B regulations to clarify that if a parent refuses to consent to a reevaluation, the public agency may, but is not required to, pursue the reevaluation by using the consent override procedures in § 300.300(a)(3), and the public agency does not violate its obligation under § 300.111 and §§ 300.301 through 300.311 if it declines to pursue the evaluation or reevaluation.

When reevaluation is at issue, consent need not be obtained if the district can demonstrate that it took “reasonable measures to obtain such consent and the child’s parent failed to respond.” 20 USC 1414 (c)(3).

‘SCREENINGS’ ARE NOT EVALUATIONS; DO NOT REQUIRE CONSENT

An evaluation refers to an individual assessment to determine eligibility for special education and related services, consistent with the evaluation procedures in Sections 300.301 through 300.311. “Screening,” as used in Section 300.302 and 20 USC 1414(a)(1)(E), refers to a process that a teacher or specialist uses to determine appropriate instructional strategies.

Screening is “typically a relatively simple and quick process that can be used with groups of children. Because such screening is not considered an evaluation under §§ 300.301 through 300.311 to determine eligibility for special education services, parental consent is not required.” Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46639 (August 14, 2006).

REVOCAION OF PARENTAL CONSENT FOR SPECIAL EDUCATION SERVICES

The amended 2006 IDEA Part B regulations in § 300.300(b)(4), effective December 31, 2008, give parents of students with disabilities the unilateral right to revoke consent for the receipt of special education services at any time. After receipt of a written revocation of consent, the district must honor the request but only after giving prior written notice. The prior written notice should inform the parent, as plainly as possible, that the student will no longer receive special education services of any kind and no longer enjoy the protections of the disciplinary procedures in the event of a violation of the applicable student code of conduct. Districts may not invoke the due process or mediation mechanisms to challenge the parent’s decision. See Analysis of Comments and Changes to Amended 2006 IDEA Part B Regulations, 73 Fed. Reg. 73006 (December 1, 2008).

In *Letter to Cox*, 54 IDELR 60 (OSEP 2009), OSEP stated that where two parents authorized to make educational decisions on behalf of a child disagree on revoking consent, just one parent’s written revocation triggers a district’s duty to provide prior written notice and cease services. Further, a later evaluation request by either parent must be treated as a request for an initial evaluation under § 300.301, not a reevaluation.

H. OPPORTUNITY TO EXAMINE RECORDS AND PARENT PARTICIPATION IN MEETINGS UNDER 300.501

OPPORTUNITY TO EXAMINE RECORDS

The parents of a child with a disability must be afforded, in accordance with the procedures of §§ 300.613 through 300.621, an opportunity to inspect and review all education records with respect to:

- (1) The identification, evaluation, and educational placement of the child; and
- (2) The provision of FAPE to the child.

PARENT PARTICIPATION IN MEETINGS

The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to (i) the identification, evaluation, and educational placement of the child; and (ii) the provision of FAPE to the child. See *Drobnicki v. Poway Unified School District*, 53 IDELR 210 (9th Cir. 2009) (Court held that a school must include the parents in an IEP meeting “unless they affirmatively refuse to attend.”); *Letter to Richards*, 55 IDELR 107 (Jan. 7, 2010) (“The IEP Team meeting serves as a communication vehicle between parents and school personnel and enables them, as equal participants, to make joint informed decisions regarding the services that are necessary to meet the unique needs of the child.”)

I. CHILD’S PLACEMENT DURING PENDENCY OF DUE PROCESS PROCEEDINGS UNDER § 300.518

Except as provided in § 300.533 (discipline appeals), during the pendency of any administrative or judicial proceeding regarding a due process complaint notice requesting a due process hearing under § 300.507, unless the state or local agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her current educational placement.

Generally, courts have interpreted stay-put placement to mean the current education and related services and placement provided in accordance with the most recently approved IEP. The term “current educational placement” includes the setting in which the IEP is implemented, but is generally not considered to be location specific. See *AW by Wilson v. Fairfax County Sch. Bd.*, 41 IDELR 119 (4th Cir. 2004). In addition, a child with disabilities need not remain in a specific grade and class pending an appeal if he or she would be eligible to proceed to the next grade and corresponding classroom within the grade. *Drinker v. Colonial Sch. Dist.*, 23 IDELR 1112 (3rd Cir. 1996); *Thomas v. Cincinnati Bd. of Educ.*, 17 IDELR 113 (6th Cir. 1990).

Other cases: *C.P. v. Leon County Sch. Bd.*, 47 IDELR 212 (11th Cir. 2007) (Because the student invoked the IDEA’s stay-put provision in his request for administrative review, the district could not unilaterally change the student’s placement or revise his IEP.)

Plumbly v. Northeast Indep. Sch. Dist., 46 IDELR 126 (W.D. Tex. 2006) (Texas district could expel a high school student with ADHD whose behavior disrupted activities in his regular classes. Because the LEA lacked knowledge of the student’s disability before his recommended expulsion, the student’s parents could not take advantage of the IDEA’s stay-put provision.)

Great Meadows Reg’l Bd. of Educ., 47 IDELR 274 (SEA NJ 2006) (Despite claiming it no longer had space for a nonresident preschooler in its autism program, an LEA will have to continue providing special

education services pursuant to its contract with the child's New Jersey district. An ALJ concluded that the stay-put provision was binding.)

John M. by Christine M. and Michael M. v. Board of Educ. of Evanston Township High Sch. Dist. 202, 48 IDELR 177 (7th Cir. 2007), that the IDEA's stay-put provision only applies to special education services that are set forth in a student's IEP.

J. UNILATERAL PLACEMENT BY PARENTS OF CHILDREN IN PRIVATE SCHOOLS AT PUBLIC EXPENSE

Under § 300.148(a) "an LEA [is not required] to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility."

Disagreements between the parents and a public agency regarding the availability of a program appropriate for the child, and the question of financial reimbursement, are subject to the due process procedures in § 300.504 through 300.520. § 300.148(b).

"If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the SEA and LEAs." § 300.148(c).

LIMITATION ON REIMBURSEMENT — IDEA

Pursuant to § 300.148 (d), the cost of reimbursement may be reduced or denied—

(1) If—

(i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in §300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

EXCEPTIONS TO LIMITATION ON REIMBURSEMENT — IDEA

Pursuant to § 300.148(d), there are certain exceptions to the tuition limitation section:

Notwithstanding the notice requirement in paragraph (d)(1) of this section, the cost of reimbursement—

(1) Must not be reduced or denied for failure to provide the notice if—

(i) The school prevented the parents from providing the notice;

(ii) The parents had not received notice, pursuant to §300.504, of the notice requirement in paragraph (d)(1) of this section; or

(iii) Compliance with paragraph (d)(1) of this section would likely result in physical harm to the child; and

(2) May, in the discretion of the court or a hearing officer, not be reduced or denied for failure to provide this notice if—

(i) The parents are not literate or cannot write in English; or

(ii) Compliance with paragraph (d)(1) of this section would likely result in serious emotional harm to the child.

(Authority: 20 USC 1412 (a)(10)(C)).

Key Case: *Board of Educ. of the City Sch. Dist. of the City of New York v. Tom F. ex rel. Gilbert F.* 48 IDELR 239, 107 LRP 58890, U.S. S.Ct (2007).

A New York district could not avoid a parent's claim for private school expenses merely by pointing out that the student never received special education services through the public school system. In a brief 4-4 decision, the U.S. Supreme Court upheld a 2d Circuit ruling that vacated a decision in the district's favor in light of another recent 2d Circuit decision, *Frank G.* In *Frank G. and Dianne G. ex rel. Anthony G. v. Board of Educ. of Hyde Park*, 46 IDELR 33 (2d Cir. 2006), the Court held that parents of students with disabilities are entitled to reimbursement so long as they give the LEA reasonable notice that they reject the student's proposed IEP and that they plan to enroll their child in a private school at public expense. Now after the High Court's decision, the District Court in *Gilbert F.* must reconsider whether the district's procedural mistake entitles the parent to reimbursement. At least one Circuit Court has ruled that the plain language of the IDEA allows for tuition reimbursement only when a student has previously received special education services. *Greenland Sch. Dist. v. Amy N.*, 40 IDELR 203 (1st Cir. 2004). Because of the continued Circuit split, special education practitioners can expect to see further litigation regarding this issue

K. SPECIAL EDUCATION DISPUTES: DUE PROCESS COMPLAINTS, MEDIATION, RESOLUTION SESSIONS, STATE COMPLAINT PROCEDURES, AND CIVIL ACTIONS

DUE PROCESS COMPLAINTS

The most frequent and commonly used method for challenging special education provided to a student with a disability is through a due process proceeding. § 300.507.

A parent or a public agency can file a due process complaint on any matter relating to the identification, evaluation or educational placement of a child with a disability, or the provision of an appropriate education. As discussed above, filing a due process complaint triggers the resolution meeting process.

Parties to a due process hearing have the right to be accompanied and advised by counsel and by individuals with special knowledge or training. They can present evidence and confront, cross-examine, and compel the attendance of witnesses. A party can also move to prohibit any evidence at the hearing not disclosed at least five business days before the hearing. An impartial hearing officer then hears the evidence, makes rulings (including prevailing party determinations), and issues a written decision.

The law now prohibits the party who requested the hearing from raising issues not listed in the due process request notice, unless the other party agrees. Under previous regulations, there was no such prohibition. The Education Department stated: “By encouraging the party requesting the hearing to clearly identify and articulate issues sooner, the final regulations could generate actual savings by facilitating early resolution of disagreements through less costly means, such as mediation or resolution meetings.” *Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed. Reg. 46,747 (August 14, 2006). It is also concerned that “early identification of issues could come at the cost of more extensive involvement of attorneys earlier in the process.”

Under IDEA 2004, the due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process complaint.

STATUTE OF LIMITATIONS

There is now a two-year statute of limitations to file a due process complaint, unless state law provides another limit. § 300.507(a)(2).

There is nothing in the IDEA that would preclude a state from having a time limit for filing a complaint that is shorter or longer than two years. The Education Department believes that the IDEA leaves this decision to the states. *Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed. Reg. 46697 (August 14, 2006).

BURDEN OF PROOF: KEY DECISION: *Schaffer v. Weast*, 44 IDELR 150 (2005).

On November 14, 2005, the Supreme Court issued its decision in *Weast*. The Court held that the burden of persuasion in an IDEA due process hearing is upon the party challenging the IEP. The “burden of persuasion” involves which party loses if the evidence is closely balanced. In any civil legal proceeding, if the evidence for both sides is equal, the part with the burden of persuasion loses. The Court exempted from its decision, however, the burden of persuasion applicable in those states that have laws or regulations placing the burden upon the school district.

Concerning the IDEA due process hearing process, the Court noted that such hearings are deliberately informal. The Court went on to note that the IDEA due process hearing was set up by Congress with the intention of giving the hearing officers the flexibility they need to ensure that each side can fairly present its evidence.

RELIEF AVAILABLE AT DUE PROCESS

Due process hearing officers have authority to award most of the types of relief commonly recognized as an available remedy in special education law, including the following:

- Orders for a district to implement an educational program, conduct an evaluation, or effect a placement. See, e.g., *Diamond v. McKenzie*, 556 IDELR 326 (D.C. Cir. 1985); *Buger v. Murray County Sch. Dist.*, 556 IDELR 403 (N.D. Ga. 1984).
- Awards of reimbursement for private services and tuition.
- Awards of compensatory education. See, e.g., *East Penn Sch. Dist. v. Scott B.*, 29 IDELR 1058 (E.D. Pa. 1999); *Burr v. Ambach*, 441 IDELR 314 (2d Cir. 1988), reaff'd, 16 IDELR 151 (2d Cir. 1989).
- Relief pertaining to disciplinary sanctions.
- Ordering an LEA to comply with the procedural requirements under § 300.500 through 300.536.

TIMELINE FOR CONDUCTING DUE PROCESS HEARING

Pursuant to § 300.510(c), regarding adjustments to the 30-day resolution period, the 45-day timeline for the due process hearing in § 300.515(a) starts the day after one of the following events:

Both parties agree in writing to waive the resolution meeting;

After either the mediation or resolution meeting starts but before the end of the 30-day period, the parties agree in writing that no agreement is possible;

If both parties agree in writing to continue the mediation at the end of the 30-day resolution period, but later, the parent or public agency withdraws from the mediation process.

RESOLUTION MEETINGS

Under 20 USC 1415(f)(1)(B) and § 300.510, before a due process hearing can take place, the district is required to convene a meeting with the parents and the relevant members of the IEP team who have specific knowledge of the facts identified in the complaint. This is called a “resolution meeting.” However, there is no corresponding provision requiring a resolution meeting when a district is the complaining party.

Parties can make discussions confidential as part of any resulting written agreement, but they are not automatically confidential. Nor can districts require that parents enter into a confidentiality pledge as a precondition to the meeting.

The meeting’s purpose is for the parent to discuss the complaint and the underlying facts, giving the district an early opportunity to negotiate with parents. The parties can also agree to waive the meeting or elect to mediate instead. Districts cannot bring an attorney to a resolution meeting unless the parents bring one.

If parents fail to participate in a resolution meeting (and a district can show it made reasonable efforts to ensure their participation), then districts can move to dismiss the complaint.

If a district fails to timely hold or participate in the resolution meeting, parents can ask a hearing officer to immediately begin the due process timeline.

TIME TO HOLD RESOLUTION MEETING

The district must convene the resolution meeting which must take place within 15 days of the district's receiving notice of the parent's complaint. § 300.510(a)(1). See *Spencer v. District of Columbia*, 45 IDELR 11 (D.D.C. 2006), where a court rejected a parent's petition to compel her son's district to hold a due process hearing. The court found it was appropriate for the district to schedule a resolution meeting after receiving the parent's hearing request.

CONVENING THE MEETING

It is the responsibility of the district to schedule and convene the resolution meeting. § 300.510(a)(1).

The LEA must attempt to convene the meeting within the 15-day timeline (§ 300.510(a)(1), but if the parent does not attend it must continue its efforts to hold the meeting beyond the 15 days and up through the 30th day. § 300.510(b)(4). See *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities*, 47 IDELR 195 (OSERS 2007).

There is no provision in the final 2006 regulations for a resolution meeting if the district is the complaining party. 71 Fed. Reg. 46700 (2006). See *Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities*, 47 IDELR 195 (OSERS 2007).

The resolution meeting is not required where both the parents and the district agree in writing to waive it, or agree to use the mediation process instead. § 300.510(a)(3)(ii).

CONSEQUENCES FOR FAILURE TO CONDUCT MEETING

If the LEA fails to hold the resolution meeting specified in § 300.510(a) within 15 days of receiving notice of a parent's due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of a hearing officer to begin the due process hearing timeline. § 300.510(b)(5). In other words, the due process hearing timelines are sidestepped and the school district loses out on its 30-day resolution period. See *Massey v. District of Columbia*, 44 IDELR 163 (D.D.C. 2005), where a court decided that the district violated the IDEA by not holding a resolution session within the required time frame.

AMENDED DUE PROCESS COMPLAINT

If a party files an amended due process hearing complaint, both the timelines for the resolution meeting and the 30-day resolution period begin again. § 300.508(d)(4).

DUE PROCESS COMPLAINT NOTICE

Under 20 USC 1415(b)(7)(A) of IDEA 2004 (§ 300.508), the party initiating due process must file a "due process complaint notice" as a part of its complaint. This written notice must be provided to the other party, with a copy forwarded to the SEA. It must include the following:

The name of the child, the address of the child's residence (or available contact information in the case of a homeless child), and the name of the school the child is attending.

In the case of a homeless child or youth, available contact information for the child and the name of the school the child is attending.

A description of the nature of the problem of the child relating to such proposed initiation or change (concerning the identification, evaluation, or educational placement of the child or the provision of FAPE), including facts relating to such problem.

A proposed resolution of the problem to the extent known and available to the party at the time.

A due process hearing cannot take place until the party, or the attorney representing the party, files a notice that meets the above requirements. 20 USC 1415(b)(7)(B).

The due process complaint notice shall be deemed sufficient unless the party receiving it notifies the hearing officer and the other party, in writing, that the receiving party believes the notice has not met the requirements listed above. 20 USC 1415(c)(2)(A). The party providing the hearing officer with such notification must do so within 15 days of receiving the complaint. 20 USC 1415(c)(2)(C).

Within five days of receipt of the notification of insufficiency, the hearing officer must make a determination on the face of the due process complaint notice as to whether it meets those requirements and must immediately notify the parties in writing of such determination. 20 USC 1415(c)(2)(D).

IDEA 2004 at 20 USC 1415(c)(2)(E)(i) allows a party to amend its due process complaint notice only upon either of the following two circumstances: (1) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a resolution session; or (2) the hearing officer grants permission (except that the IHO may only give such permission not later than five days before a due process hearing occurs).

The applicable timeline for a due process hearing and resolution session recommences at the time the party files the amended notice. 20 USC 1415(c)(2)(E)(ii). And the party requesting the due process hearing is not allowed to raise issues at that hearing that were not raised in the due process complaint notice, unless the other party agrees. 20 USC 1415(f)(3)(B).

The response to a complaint must be sent within 10 days of receiving it. Such response must “specifically” address issues raised in the complaint. 20 USC 1415(c)(2)(B)(ii).

A special rule applies to circumstances in which a district has not sent a prior written notice to the parent regarding the subject matter contained in the parent’s due process complaint. 20 USC 1415(c)(2)(B)(i). If that is the case, the district must, within 10 days of receiving the complaint, send its response to the parent containing all of the following information:

- (1) an explanation of why the district proposed or refused to take the action raised in the complaint;
- (2) a description of other options that the IEP team considered and the reasons why those options were rejected;
- (3) a description of each evaluation procedure, assessment, record or report that the district used as the basis for the proposed or refused action; and
- (4) a description of the factors relevant to the district’s proposal or refusal.

MEDIATION

IDEA 1997 highlighted mediation as a major strategy for resolving parent-district conflicts. The law required states to create a mediation system, using trained neutral mediators, and encourage parents and

schools to voluntarily take part. With a skilled mediator, the process is highly effective. The oft-touted advantages are that it is faster, less expensive, less adversarial, and more likely to heal rifts in parent-district relationships.

IDEA 2004 still requires public agencies to provide an opportunity for the parent who has filed a complaint to voluntarily engage in mediation. § 300.506. It is viewed as “an appropriate minimum requirement to resolve disputes.” *Analysis of Comments and Changes to 2006 IDEA Part B Regulations*, 71 Fed. Reg. 46,604 (August 14, 2006). Procedures must also be established to allow parties to resolve matters arising prior to the filing of a due process hearing request.

Like a resolution meeting agreement, mediation agreements are legally binding. Unlike resolution meetings, however, all discussions in mediation sessions are automatically confidential and cannot be used as evidence in any subsequent due process hearing or civil proceeding.

ED has long discouraged the use of attorneys for either side in mediation on the ground it “may have the potential for creating an adversarial atmosphere that may not necessarily be in the best interests of the child.” *Letter to Chief State School Officers*, 33 IDELR 247 (OSEP 2000). Some states have laws that either exclude or discourage attorneys from some mediation proceedings.

STATE COMPLAINT PROCEDURES

Though not as popular as a due process hearing, a party may elect to go through an alternative resolution process known as state complaint procedures, where a parent files an administrative complaint directly with the state educational agency, which investigates and rules on the claim. 20 USC 1415(f)(3)(F); § 300.151-153.

The state complaint procedures can be used to resolve any complaint concerning the identification, evaluation, education program, or educational placement of a child. Parties can file simultaneous claims with the state and in due process, though the state must set aside any part of the complaint that is being addressed in the due process hearing until it concludes.

One of the advantages of the state complaint system is that it has the potential for providing parents with a less costly and more efficient mechanism for reducing disputes than impartial due process hearings. *OSEP Memorandum 94-16*, 21 IDELR 85 (OSEP 1994).

CIVIL ACTIONS/EXHAUSTION OF ADMINISTRATIVE REMEDIES

Following due process, an aggrieved party can file a civil action in any federal or state court of competent jurisdiction. However, the doctrine of exhaustion of administrative remedies is an essential predicate to a civil action. Courts will dismiss a case as soon as they find an appealing party has tried to bypass the due process system, subject to certain narrow exceptions such as futility, lack of appropriate remedy, or where an agency has adopted a policy or practice contrary to law. See, e.g., *Christopher S. by Rita S. v. Stanislaus County Office of Educ.*, 384 F.3d 1205 (9th Cir. 2004) (exhaustion excused where the district decided to shorten school day for autistic students, on grounds it would not further the general purposes of exhaustion and the congressional intent behind the administrative scheme).

Note that exhaustion is still required even when the complaint does not allege an IDEA violation but it could have included such a claim. *Fraser by Fraser v. Tamalpais Union High Sch. Dist.*, 45 IDELR 241 (N.D. Cal. 2006) (“the dispositive question generally is whether the plaintiff has alleged injuries that could be redressed to any degree by the IDEA’s administrative procedures and remedies”). This includes

claims seeking money damages, as well as those asking for relief under Section 504 and/or the Americans with Disabilities Act.

TIMELINE FOR APPEALING A DUE PROCESS DECISION

IDEA 2004 requires that a party appealing a due process decision must do so within 90 days of the date of the decision (or within such time as the state allows if it has an explicit law setting a time limitation for such appeal.) 20 USC 1415(i)(2), § 300.516(b).

APPEALS OF DUE PROCESS HEARING DECISIONS

Any party who is aggrieved by the findings and decision made in a hearing may appeal. The method of appeal for any particular party will depend upon the state's due process system. *Aiello by Aiello v. Grasmick*, 28 IDELR 450 (4th Cir. 1998).

In a two-tier due process system with an initial level of review at the district level, a party must appeal the initial decision to the state educational agency for review by a review officer. § 300.514(b)(1). Thereafter, further appeals are taken by filing a civil action in a court of law. § 300.516.

In a state in which there is just one level of review conducted by the state educational agency, a losing party may bring a civil action without further state administrative review. § 300.516. This is the case when a hearing officer appointed under the aegis of the state educational agency makes the initial determination. *Burr v. Ambach*, 441 IDELR 314 (2d Cir. 1988), reaff'd, 16 IDELR 151 (2d Cir. 1989).

KEY CASE: HEARING PROCEDURES

Winkelman by Winkelman v. Parma City Sch. Dist., 47 IDELR 281 (May 2007).

The Supreme Court ruled by a 7 to 2 margin that the IDEA grants independent enforceable rights to parents as well as students. Accordingly, the court concluded that parents may pursue IDEA appeals in federal court without being represented by an attorney. NOTE: The decision applies only to federal court appeals of due process decisions. All parties agreed that a parent may already appear at a due process hearing without counsel.

REPRESENTATION BY ADVOCATES AT A DUE PROCESS HEARING

An advocate may accompany and advise a party at a hearing or judicial appeal. However, neither the IDEA nor the regulations implementing Part B of the act address the issue of whether individuals who are not attorneys, but have "special knowledge or training with respect to the problems of children with disabilities" can "represent" parties at due process hearings. In comments to the revised Part B regulations, the Education Department explained that issue is left to each state to decide. See, Analysis of Comments and Changes to Amended 2006 IDEA Part B Regulations, 73 Fed. Reg. 73,017 (December 1, 2008).

L. ATTORNEY'S FEES UNDER THE IDEA 2004

BASIS FOR AWARD

The term "attorney's fees," when used in connection with the IDEA, generally refers to the relief available to parents and guardians: "[I]n any action or proceeding brought under [20 USC 1415], the

court, in its discretion, may award reasonable attorneys' fees as part of the costs to parents of a child with a disability who is the prevailing party." § 300.517 (a).

Courts, in their discretion, can award reasonable attorney's fees "to a prevailing party who is a state educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable or without foundation." 20 USC 1415 (i)(3)(B)(i)(II).

Courts can grant fees to prevailing SEAs or LEAs against the parent or the parents' attorney if the parent's complaint or subsequent cause of action "was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation." 20 USC 1415 (i)(3)(B)(i)(III).

REASONABLE AWARDS

Parents are entitled to recover "reasonable awards" of attorney's fees. The IDEA does not define "reasonable," although it does set forth some criteria that courts must use in calculating fees awards. See generally § 300.517.

The hourly fee calculation for civil actions is "based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." 20 USC 1415 (i)(3)(c); *S.A. v. Riverside-Delanco Sch. Dist. Bd. of Educ.*, 45 IDELR 215 (D.N.J. 2006).

PREVAILING PARTY DETERMINATIONS

The Supreme Court clarified the test for determining a plaintiff's prevailing party status in 2001, requiring at the very least some "judicially sanctioned change in the legal relationship of the parties" such as a judgment on the merits or a court-ordered consent decree in favor of the prevailing plaintiff. *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 35 IDELR 160 , 532 U.S. 598 (2001).

IEP MEETINGS

"Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e)." 20 USC 1415 (i)(3)(D)(ii). See also *J.C. v. Regional Sch. Dist. 10*, 36 IDELR 31, 278 F.3d 119 (2d Cir. 2002) (holding that IEP team meeting granting parents all of the relief sought in due process hearing still lacked sufficient judicial sanction to warrant a grant of fees under the prevailing party analysis).

RESOLUTION SESSIONS

IDEA 2004 at 20 USC 1415 (f)(1)(B)(i) requires parties to attend a pre-hearing resolution session after a due process hearing has been requested. A new statutory provision states that, for purposes of entitlement to attorney's fees, the resolution session is not to be considered as (a) a meeting convened as a result of an administrative hearing or judicial action; or (b) an administrative hearing or judicial action. 20 USC 1415 (i)(3)(D)(iii). This would seem to effectively preclude an award of attorney's fees for counsel's participation at these sessions.

MEDIATION SESSIONS

The award of attorney's fees for representation at mediation session described under § 300.506 is a matter of state discretion. § 300.517 (c)(2)(ii).

SETTLEMENTS IN ADVANCE OF DUE PROCESS REQUEST

Parents who prevail through settlement agreements can recover attorney's fees, so long as they meet the "judicial imprimatur" requirements of *Buckhannon*. There must be some "judicially sanctioned change" in the legal relationship of the parties, such as a consent decree or order approving the settlement.

A settlement agreement without judicial sanction or approval cannot, by itself, confer prevailing party status. *Nathan F. by Harry F. and Amy F. v. Parkland Sch. Dist.* 43 IDELR 185 (3d Cir. 2005) (*unpublished*).

Private parties have no authority to create judicial imprimatur by agreement. *Id.*

ATTORNEY'S FEES SUBSEQUENT TO SETTLEMENT OFFERS

Attorney's fees may not be awarded and related costs may not be reimbursed in any action or proceeding under section 20 USC 1415 for services performed subsequent to the time of a written offer of settlement to a parent if:

- A. The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than 10 days before the proceeding begins;
- B. The offer is not accepted within 10 days; and
- C. The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement. § 300.517 (c)(2)(i).

The 3d Circuit ruled that a settlement agreement without judicial sanction or approval cannot by itself confer prevailing-party status. *Nathan F. by Harry F. and Amy F. v. Parkland Sch. Dist.* 43 IDELR 185 (3d Cir. 2005) (*unpublished*). The agreement stated that it "shall have the effect of [a] judicial consent decree for purposes of [the fee-shifting statute] entitling the parents to seek reimbursement for attorney's fees and costs in an appropriate forum." Putting the brakes on the parties' creativity, it emphasized that private parties have no authority to create judicial imprimatur by agreement.

AUTHORITY TO AWARD FEES

Only courts are specifically authorized to award attorney's fees under the IDEA to prevailing parents. § 300.517 (a).

State hearing officers lack jurisdiction to award fees. See *Zipperer v. School Bd. of Seminole County*, 23 IDELR 19 (M.D. Fla. 1995); *New Haven Bd. of Educ.*, 20 IDELR 42 (SEA CT 1993). According to OSEP's interpretation of the pre-IDEA 1997 statute, the law neither authorized nor prohibited the awarding of such relief by hearing officers. *Letter to Anonymous*, 19 IDELR 277 (OSEP 1992). But neither IDEA 1997 nor IDEA 2004 incorporated that interpretation into the statutory or regulatory language.

THE LODESTAR METHOD

Courts awarding fees under the IDEA generally use the lodestar method to calculate reasonable fees, a method by which the court multiplies the number of hours reasonably expended on the case by the reasonable hourly rate to arrive at a reasonable fee. Courts add to that fee amount any allowed attorney's out-of-pocket expenses to arrive at the total amount of the award. *Hensley v. Eckerhart*, 461 U.S. 424 (1983); *A.R. v. New York City Dept. of Educ.* 43 IDELR 108 (2d Cir. 2005).

The 2006 IDEA Part B regulations codify *Hensley* by adopting the lodestar method. § 300.517 (c).

A review of the case law indicates that courts typically weigh a variety of criteria to determine the amount of the fee ultimately awarded to a prevailing party, including the following factors:

- The prevailing rate in the community.
- The number of billable hours expended.
- The extent to which the parent prevailed.
- The complexity of the litigation and the adequacy of the representation.

See *T.D. v. La Grange Sch. Dist. No. 102*, 37 IDELR 249 (N.D. Ill. 2002).

PARTIAL SUCCESS ON CLAIMS

Most courts awarding IDEA fees have reduced awards to exclude fees for unsuccessful claims when the parents prevailed on some, but not all, of their claims. *Hensley v. Eckerhart*, 461 U.S. 424 (1983).

REDUCTION OF FEES

Reduction of fees is warranted under certain circumstances. Largely tracking the prior statute and regulations, IDEA 2004 at 20 USC 1415 (I)(3)(F) authorizes a reduction in attorney's fees whenever the court finds that any of the following apply:

- The parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy.
- The amount of the attorney's fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation and experience.
- The time spent and legal services furnished were excessive considering the nature of the action or proceeding.
- The attorney representing the parent did not provide the district with the appropriate information in the notice of complaint required in 20 USC 1415 (b)(7)(A).

However, the reduction provisions above do not apply if the court finds that the state or district unreasonably protracted the final resolution of the action or proceeding or otherwise violated 20 USC 1415. 20 USC 1415 (I)(3)(G); § 300.517 (c)(2)(iii)(4).

PARENT PROTRACTION OF DISPUTE

A court can reduce attorney's fees if it finds that "The parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy." § 300.517 (c)(4)(i). See *Neosho R-V Sch. Dist. v. Clark ex rel. Clark*, 38 IDELR 61 (8th Cir. 2003); *Jason D W by Mr. Douglas W v. Houston Indep. Sch. Dist.*, 158 F.3d 205 (5th Cir. 1998); 29 IDELR 27 (5th Cir. 1998). Parents' minimal attempts at negotiation and withholding the full extent of their concerns from the school district in the initial stages of the dispute have been held to unreasonably protract the litigation. *Johnson v. Bismark Pub. Sch. Dist.*, 18 IDELR 571 (8th Cir. 1991); Parents do not unreasonably protract litigation merely because they proceed to a final decision rather than accept a proposal they reasonably find unsatisfactory. *Phelan v. Bell*, 20 IDELR 528 (6th Cir. 1993).