



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

David B. Hodgins
Thompson & Horton LLP
dhodgins@thompsonhorton.com
713-554-6745

§1415. Procedural Safeguards

- (a) Establishment of procedures
 - 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.



34 CFR § 300.500 Procedural Safeguards

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



Model Form: Procedural Safeguards Notice

- The U.S. Department of Education provides a model form for the procedural safeguards notice.
- See *http://idea.ed.gov/download/modelformProcedural_Safeguards_June_2009.pdf*



List of Procedural Safeguards in Required Notice Under 34 CFR § 300.504

- 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 setting



List of Procedural Safeguards (cont'd)

- 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
- Attorney's fees



Procedural Safeguards Notice

- 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))



When Do You Provide?

- 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:
 - Upon initial referral or parent request for evaluation;
 - Upon receipt of the first State complaint and upon receipt of the first due process complaint in a school year;
 - When a decision is made to take a disciplinary action that constitutes a change of placement; and
 - Upon parent request.



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.
- 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.



IEE

- Purpose of the IEE
 - 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. An independent educational evaluation provides parents with the opportunity to obtain their own evaluation of their child to counteract the evaluation obtained by a district.



IEE

- **Conducting the IEE**
 - A qualified examiner who is not employed by the public agency
 - 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.



IEE

- **Right to an IEE**
 - If a parent requests an IEE, the public agency must, without unnecessary delay, either:
 - File a due process complaint to request a hearing to show that its evaluation is appropriate; or
 - Ensure that an IEE is provided at public expense
 - The public agency may ask for the parent's reason why he objects to the public evaluation. However, the public agency may not require the parent to answer.



Key Cases

- *Nicole L. v. Brownsville Indep. Sch. Dist.*, 42 IDELR 134 (SEA TX 2004). District neither scheduled an IEE nor requested a due process hearing.
- *Los Angeles Unified Sch. Dist.*, 48 IDELR 293 (SEA CA 2007). District waited for parents to bring due process hearing and then attempted to defend District assessments.



IEE

- Consideration of IEE
 - Results of the evaluation:*
 - 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
 - May be presented by any party as evidence at a hearing.
- Criteria for IEE
 - Same as the criteria that the public agency uses.



IEE

- Timelines for response to an IEE request
 - No specific time limit within which a district must respond.
 - May not unreasonably delay.
 - Cannot simply ignore a request for an IEE.
- Restrictions on location of the IEE and evaluator qualifications
 - Must be the same as the criteria that the public agency uses.
 - Limitations generally are upheld, as long as they are reasonable.



IEE

- 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.
- 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.



Written Notice Under § 300.503, § 300.504

- Must provide parents with “prior written notice” whenever district proposes or refuses “to initiate or change”:
 - The identification, evaluation, or educational placement of the child.
 - The provision of a free appropriate public education.



Written Notice Under § 300.503, § 300.504

- 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.



Written Notice Under § 300.503, § 300.504

- 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 decision of the factors relevant to the district's proposal or refusal.



Written Notice

- 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.
- 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).



Written Notice

- Failure to provide notice
 - Not all procedural errors, including the failure to give notice, automatically result in a denial of FAPE.
 - According to 20 USC § 1415(f)(3)(E)(ii), a denial of FAPE may be found only if the district's procedural inadequacies:
 - Impeded the child's right to FAPE;
 - Significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a FAPE to the parents' child; or
 - Caused a deprivation of educational benefit.



Parental Consent Under § 300.300

- IDEA requires parental consent for district actions in conjunction with the following educational events:
 - Pre-placement evaluations and reevaluations
 - Initial placements



Parental Consent Under § 300.300

- Requirement that consent be informed
 - Consent must be “fully informed” to be valid. In order to be informed, the consent must meet the following requirements:
 - 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.
 - 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
 - The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.
 - (Authority: 20 USC § 1414(a)(1)(D)); (§ 300.9).



Parental Consent Under § 300.300

- Parental consent prior to reevaluations
 - 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 § 1313(c)(3).



Parental Consent Under § 300.300

- Revocation of parental consent for evaluation
 - A parent may revoke consent at any time. §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.



Parental Consent Under § 300.300

- District challenges to parents' refusal to consent to initial evaluation (formal methods)
 - 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.



Parental Consent Under § 300.300

- Initial evaluations without parental consent
 - § 300.300(a)(3) clarifies 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.” 71 Fed. Reg. 46632 (August 14, 2006).
- Inability to obtain consent for reevaluations
 - The public agency may, but is not required to, pursue the reevaluation by using the consent override procedures.



Parental Consent Under § 300.300

- “Screenings” are not evaluations; do not require consent
 - An evaluation refers to an individual assessment to determine eligibility for special education and related services. “Screening” refers to a process that a teacher or specialist uses to determine appropriate instructional strategies.



Parental Consent Under § 300.300

- Revocation of parental consent for Special Education Services
 - A parent may revoke consent for the receipt of special education services at any time. §300.300 (b)(4).
 - The district must honor the request but only after giving prior written notice.



Parental Consent Under § 300.300

- Revocation of parental consent for special education services
 - 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.



Opportunity to Examine Records - §300.501

Opportunity to examine records

- The parents of a child with a disability must be afforded 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.



Parental Participation - § 300.501

- 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.



Placement During Pendency of Due Process Proceedings – § 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.



Placement During Pendency of Due Process Proceedings – § 300.518

- 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.



Unilateral Placement 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.”



Limitation on Reimbursement - IDEA

- Pursuant to § 300.148(d), the cost of reimbursement may be reduced or denied if:
 - At the most recent IEP team meeting that the parents attended prior to removal of the child, the parents did not inform the IEP Team that they were rejecting the placement provided by the public agency to provide FAPE to their child; or



Limitation on Reimbursement – IDEA (cont'd)

- At least ten (10) business days 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.
- The parents did not make the child available for the evaluation;
- Upon a judicial finding of unreasonableness with respect to actions taken by the parents.



Exceptions to Limitation on Reimbursement

- The school prevented the parents from providing the notice.
- The parents had not received notice.
- Compliance would likely result in physical harm to the child.
- The parents are not literate or cannot write in English.
- Compliance would likely result in serious emotional harm to the child.



Special Education Disputes

- Due Process Complaints
 - Most frequent and commonly used method for challenging special education provided to a student with a disability.
 - 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.



Special Education Disputes

- Parties to a due process hearing
 - Have the right to be accompanied and advised by counsel.
 - Can present evidence and confront, cross-examine, and compel the attendance of witnesses.
- 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.



Special Education Disputes

- **REPRESENTATION BY ADVOCATES AT A DUE PROCESS HEARING**
 - An advocate may accompany and advise a party at a hearing or judicial appeal.
 - Issue of whether an advocate can “represent” a parent is a matter left to each state to decide



Special Education Disputes

- Statute of limitations
 - The law sets a two-year statute of limitations to file a due process complaint, unless state law provides another limit.
- Burden of Proof - Key Decision: *Schaffer v. Weast*, 44 IDELR 150 (2005).
 - The court held that the burden of persuasion in an IDEA due process hearing is upon the party challenging the IEP.



Special Education Disputes

- 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.
 - Awards of reimbursement for private services and tuition.
 - Awards of compensatory education.
 - Relief pertaining to disciplinary sanctions.
 - Ordering an LEA to comply with the procedural requirements.



Special Education Disputes

- Timeline for conducting due process hearing
 - 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; or
 - 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.



Special Education Disputes

- 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.
 - 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.
 - 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.



Special Education Disputes

- Time to hold resolution meeting
 - Within 15 days of the district's receiving notice of the parent's complaint.
- Convening the meeting
 - It is the responsibility of the district to schedule and convene the resolution meeting.
- 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.



Special Education Disputes

- Due process complaint notice
 - The party initiating due process must file a “due process complaint notice” as a part of its complaint. The notice must include:
 - The name of the child, the address of the child’s residence, and the name of the school the child is attending.



Special Education Disputes

- Due process complaint notice (cont.)
 - 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, including facts relating to such problem.
 - A proposed resolution of the problem to the extent known and available to the party at the time.



Special Education Disputes

- Response to a Complaint
 - Must be sent within 10 days of receiving it. Such response must “specifically” address issues raised in the complaint.
 - A special rule applies when a district has not sent a prior written notice to the parent regarding the subject matter contained in the parent’s due process complaint. 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:



Special Education Disputes

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



Special Education Disputes

- Mediation
 - The law required states to create a mediation system, using trained neutral mediators, and encouraged parents and schools to voluntarily take part.
 - IDEA 2004 still requires public agencies to provide an opportunity for the parent who has filed a complaint to voluntarily engage in mediation.



Special Education Disputes

- State complaint procedures
 - 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.



Special Education Disputes

- 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.



Special Education Disputes

- 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).



Special Education Disputes

- Appeals of due process hearing decisions
 - Any party who is aggrieved by the findings and decision made in a hearing may appeal.
- Key case: Hearing procedures
 - *Winkelman by Winkelman v. Parma City Sch. Dist.*, 47 IDELR 281 (2007).
 - The U.S. Supreme Court ruled by a 7-2 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.



Attorney's Fees Under IDEA

- Basis for award
 - In any action or proceeding brought under [20 USC 1415], the court, in its discretion, may award reasonable attorney's fees as part of the costs to parents of a child with a disability who is the prevailing party.
- Reasonable awards
 - Parents are entitled to recover "reasonable awards" of attorney's fees.



Attorney's Fees Under IDEA

- 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." *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
 - Attorney's 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.



Attorney's Fees Under IDEA

- Resolution sessions
 - The resolution session is not to be considered as:
 - A meeting convened as a result of an administrative hearing or judicial action or
 - An administrative hearing or judicial action.
 - This would seem to effectively preclude an award of attorney's fees for counsel's participation at these sessions.



Attorney's Fees Under IDEA

- 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.



Attorney's Fees Under IDEA

- Attorney's fees subsequent to settlement offers
 - Attorney's fees may not be awarded and related costs may not be reimbursed for services performed subsequent to the time of a written offer of settlement to a parent if:
 - 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;
 - The offer is not accepted within 10 days; and
 - 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).



Attorney's Fees Under IDEA

- 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.
- The lodestar method
 - Courts awarding fees under the IDEA generally use the lodestar method to calculate reasonable fees. The court multiplies the number of hours reasonably expended on the case by the reasonable hourly rate to arrive at a reasonable fee.



Attorney's Fees Under IDEA

- The 2006 IDEA Part B regulations codify *Hensley* by adopting the lodestar method. § 300.517(c).
- Courts typically weigh a variety of criteria to determine the amount of the fee ultimately awarded, 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



Attorney's Fees Under IDEA

- 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.
- Reduction of Fees
 - A reduction in attorney's fees is authorized whenever the court finds 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;



Attorney's Fees Under IDEA

- 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; or
- The time spent and legal services furnished were excessive considering the nature of the action or proceeding.
- 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.



Thank you!

