

SPECIAL EDUCATION



Hinkle Prior & Fischer
Attorneys at Law

Representing people with disabilities and their families since 1974

The Law: The Individuals with Disabilities Education Act (“IDEA”)

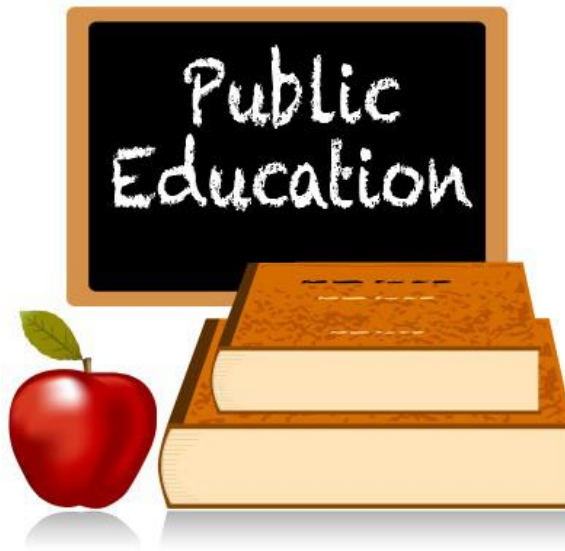
- Primary federal law governing special education
- States implement IDEA by adopting rules and regulations that carry out federal law
- Where to find the law and where not to:
 - The federal statute: DON’T BOTHER
 - Federal Regulations (34 C.F.R. Part 300) – HIGHLY WORTHWHILE
 - New Jersey Regulations (N.J.A.C. 6A:14) – MUST READ
 - PRISE Booklet: USE CAUTION
- Other sources of rights:
 - Section 504 of the Rehabilitation Act of 1973
 - The Americans with Disabilities Act
 - The New Jersey Law Against Discrimination

COMMON AREAS OF EDUCATIONAL NEED

- Academics
- Behavior
- Social Skills
- Emotional Functioning
- Self Care Skills
- Physical Skills (fine and gross motor)
- Sensory Skills

IDEA'S GUARANTEE

All students will receive a **Free
Appropriate Public Education
(FAPE)** in the **Least Restrictive
Environment (LRE)**



IDEA'S GOAL

Prepare students for success after graduation in:

- Employment
- Further Education
- Independent Living



WHAT IS APPROPRIATE?

“APPROPRIATE” MEANS:

- IEP is designed to confer SIGNIFICANT and MEANINGFUL BENEFIT in ALL AREAS impacted by the student’s disabilities
- Goal is to allow student to PROGRESS in significant and meaningful ways to overcome limitations of disabilities
- Must take into account student’s POTENTIAL

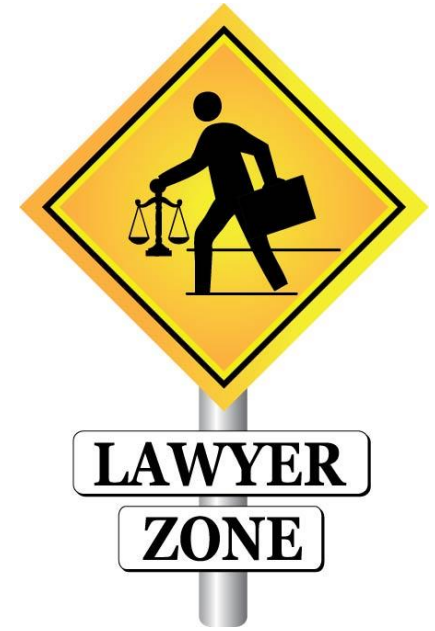


GENERALIZATION TO HOME AND COMMUNITY

- Some disabilities interfere with ability to generalize skills
- Different types of generalization
 - Places
 - People
 - Materials
- In order to achieve significant and meaningful progress, generalization of skills is required

IDEA Dispute Resolution Procedures

- State Complaints
- Federal Complaints
- Mediation
- The Due Process Hearing System
 - Resolution Sessions
 - Settlement Conferences
 - Due Process Hearings
- Emergent Relief
- Appeals to State or Federal Court



The Due Process Hearing System: Overview

- Due process hearings are most powerful tool to address concerns
- Procedures typically involve:
 - Resolution session or mediation
 - Settlement conference with Administrative Law Judge (“ALJ”)
 - Hearing before a different ALJ
- Decisions can be appealed to State or Federal Court

DUE PROCESS HEARINGS

- Evidentiary hearing before ALJ – Like “Law and Order” but without all the flourish
- Begins roughly two to eight months after settlement conference
- Usually lasts multiple non-contiguous days, can stretch over a long period of time (several months)
- Expedited hearings are available in disciplinary cases (*but beware*)
- Both parties can:
 - Present witnesses
 - Cross-examine adverse witnesses
 - Introduce documents into evidence
 - Present arguments as to why he/she/it should prevail
- No formal “discovery” like interrogatories or depositions
- Parent entitled to review student’s complete records before hearing
- Must disclose evidence 5 business days before hearing
- Burden of proof is on school district in NJ (may be different elsewhere)
- ALJ issues comprehensive written decision including findings of fact and conclusions of law
- Federal law requires that decision be issued within **45 days** of complaint being filed (excluding 30-day “cooling off” period)
 - Time can be and almost always is extended by ALJ
 - Timelines in New Jersey are a mess

Due Process Hearings: Pro's and Con's

- Pro's
 - *If followed through to completion*, receive binding result that school district must follow
 - Gives greatest control over how case is presented
 - Gives greatest control over outcome - The more you put in, the more you get out
 - Positive change is afoot due to efforts of a few ALJ's
 - In some cases, ***only game in town***
 - Possibility of Recovering Attorneys' fees
- Con's
 - Games
 - Complicated for layperson to do without attorney
 - Sometimes burdensome in terms of time and cost (if attorney is used)
 - *Exhausting*
 - *Frustrating*
 - Some ALJ's are harder to convince that violations occurred
 - Compensatory education is not taken seriously as a remedy -- *yet*

Due Process Complaint Details

- Can be filed regarding any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child
- Statute of limitations
 - Complaint must be filed within two years of date parent knew or should have known about alleged violations
 - KOSHK sometimes subject of hearing of its own
 - If filed in time, complaint can address violations occurring more than two years before filing date
 - Example: Parent does not become aware that speech/language therapist who has worked with child for past 5 years is not certified
 - If filed within two years of when parent KOSHK this, can seek relief for all five years
 - Is going to be complicated to figure this out going forward
 - This rule is only binding in NJ, PA, and DE
- School district can file “sufficiency challenge” if it believes complaint does not give it enough information to understand and defend against allegations
 - If granted, parent may be allowed to amend complaint or it can be dismissed
 - If dismissed it can be refiled with additional information
- Once complaint is filed, mandatory 30 day “cooling off” period unless school district fails to convene resolution session in 15 days

Due Process Hearings: Legal Issues

- School district has burden of proof
- Evidence and procedural rules not strictly followed, but they do come into play from time to time
- ALJ's credibility determinations given great weight on appeal
- Can win solely on procedural violations only if can show that:
 - Violations resulted in educational harm to student, or
 - Parent not given meaningful role in decision-making process

RESOLUTION SESSIONS

- Required when due process hearing is requested unless both parties agree to waive
- Purpose is to provide opportunity for school district to discuss and resolve the dispute that is the basis of due process complaint
- Must be held within 15 days of filing of due process complaint
- Must be attended by “relevant members of the IEP Team who have specific knowledge of the facts identified in the due process complaint”
- Must include a representative of the school district who has decision-making authority on behalf of the Board of Education
- Attorneys not permitted unless parent brings attorney

MEDIATION

- Often substitutes for resolution session
- Must be held within 15 days of filing of due process complaint
- Mediator provided by NJ Dept of Education
- Usually held in school district
- Mediator is to be neutral, objective, and impartial
- Mediator has no authority to make decision, make findings of fact, or binding recommendations
- Entire process is confidential
- Not much opportunity for either side to present information

Recovery of Attorneys' Fees and Costs

- **Typically not given in settlement (but parent has final decision on whether to waive fees)**
 - Not required if no order is issued by ALJ
 - Most school districts insist that parents waive attorneys' fees in exchange for services student requires
 - *Parent is not required to agree to waive fees*
- If parent prevails, i.e., gets binding order from ALJ on one or more issues, parent should be entitled to recover some or all of the attorneys' fees required to secure favorable ruling
- If parent wins after due process hearing, claims for fees are usually settled by district unless it is appealing decision
- If District will not voluntarily pay fees after losing, parent has right to file in state or federal court to recover fees
 - If parent is successful in state or federal court, court can and usually does order that school district also pay the additional fees incurred in recovering attorneys' fees
- **Parents Cannot Be Made To Pay District's Attorney's Fees Unless:**
 - Complaint was frivolous, unreasonable, or without foundation, or
 - Complaint was filed for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

Appeals from Due Process Hearings

- Either party can appeal from ALJ decision
 - Appeals go to either Superior Court of New Jersey, Law Division, or United States District Court
- ***APPEALS MUST BE FILED WITHIN 90 DAYS OF DATE OF DECISION***
- Court receives record of due process hearing
- Court receives additional evidence *sometimes*
- One or more meetings with **U.S. Magistrate Judge**
 - By and large, experts at settling disputes, but sometimes heavy-handedly
- Usually no new hearing with witnesses, exhibits, etc.
- Parties typically simply submit legal briefs containing argument as to why ALJ's decision was wrong (or right)
- No timelines specified; can be lengthy process
- If dissatisfied with outcome, can file appeal to either NJ Superior Court, Appellate Division, or Third Circuit Court of Appeals
- Can appeal from there to NJ or US Supreme Court *but only if allowed, which is very rare*

Emergent Relief

- If case falls within one of following categories, emergent relief may be available:
 - Issues involving a break in the delivery of services;
 - Issues involving disciplinary action
 - Issues concerning placement pending the outcome of due process proceedings (i.e., “stay put”); and
 - Issues involving graduation or participation in graduation ceremonies
- *NOT* available for claims that student is suffering without appropriate services, unfortunately
- IF case falls within one or more of the above, hearing is convened before ALJ within ten business days
- Must be supported by one or more sworn statements (affidavit of parent, for example)
- In all cases EXCEPT STAY PUT, parent must meet four-part test to win:
 - Irreparable harm will result if relief not granted
 - Legal rights are settled
 - Parent is likely to prevail on claim at full hearing; i.e., parent will probably win
 - Harm to student if relief is not granted outweighs harm to district if it is (but monetary harm shouldn’t be considered)
- Stay put (if properly invoked) = **automatic** award of emergent relief unless dangerousness exception applies
- School districts can also request emergent relief subject to the above

“Stay Put”

- ***Critical component of IDEA and vital for parents to understand***
- “Stay put” means student remains in “then-current educational placement” throughout mediation/resolution session, settlement conference, due process, appeals after due process
 - this means district’s action can be delayed by several years
 - Not applicable to state or federal complaints
- Blocks school district from implementing proposed changes to student’s program or placement
 - Therefore, is only relevant to *changes initiated by school district*. NOT appropriate to seek change to status quo such as additional or different services or change in placement
- This is the ONLY time the 15-day clock matters- ***but it is critical to file within 15 days if “stay put” is desired***
 - “Backdoor stay put” – If parent expresses concern about IEP and school district takes action to resolve concerns, stay put *may* apply – but this is much riskier than meeting 15-day requirement
- School district can make change to placement or services only if it can convince judge that failing to do so is *substantially likely to result in serious bodily or emotional harm to student or others* – very hard standard to meet
- Special rules apply to disciplinary situations, particularly those involving drugs or weapons

SETTLEMENT CONFERENCES

- Held before due process hearing can begin
- Typically held within one to two weeks after mediation
- Presided over by Administrative Law Judge (“ALJ”)
- ALJ does not have authority to make decision, make findings of fact, or binding recommendations
- Session is to be confidential; ALJ is not to share information about session with hearing judge
- If dispute is not resolved, case is assigned to another ALJ for a hearing

When Do I Need An Attorney?

- Early involvement of legal counsel can help avoid disputes if possible, or position for success in litigation if necessary
- Consider when to inform District that you're working with an attorney



Thank you!

Questions?

- We offer free articles and information
- Free speaking events and workshops
- Locations in New Jersey and Pennsylvania

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Or call

609-896-4200



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