Thoughts on Due Process



Ways to Prevent and Survive Due Process Successfully

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Due Process Defined

Due process establishes a formal way to resolve disputes in special education. The regulations are a formal set of policies and procedures related to special education programs within schools and districts. These mandates are specified within the Individuals with Disabilities Education Act §§300.507 through 300.518 (IDEA) (Subpart E — Procedural Safeguards Due Process Procedures for Parents and Children, n.d.). This process is intended to ensure that children receive a Free Appropriate Public Education (FAPE). A due process claim can become an administrator's or special education director's worst nightmare. What can be done to prevent it?

Preventing Due Process

Obviously, the best way to prevent due process claims are to resolve the disputes with the parents or responsible parties before they escalate.

How do you do that?

1. Engage in informal discussions – Keep open lines of communication between parents, teachers, and administration. Trust and meaningful communication are foundational to prevent due process. (Wiener)
2. Differences in opinion of teaches and other professionals should be discussed and resolved before an IEP meeting so that all sides feel comfortable with suggested recommendations. (Wiener)
3. Know and become very familiar with possible conflicts between the school and the student's parents.
4. Offer reasonable additional resources.
5. Offer reevaluation with alternate tests and/or assessors.
6. Offer an addition IEP resolution meeting.
7. Document, document, document! Keep track of all notices, emails, phone calls, meetings, assessments, IEP meetings, missed services, etc. (If it isn't written down, it didn't happen.)
8. Consider mediation even before a due process complaint is filed. – The decisions made by a mediator are legally binding. (Sec. 300.506 Mediation, 2007)
9. Consult district attorneys.



If all these methods fail and you're unable to come to an equitable resolution, parents may decide to file a due process claim.



Timeline For Due Process

The timeline for a due process hearing contains the following steps:

1. Within 2 years of the disagreement, a parent or adult child must file a due process hearing request with the Department of Education.
2. The school then has 10 days to respond to the issues raised in the request.
3. If the school believes the request does not have all the information required, they will have 15 days to let the hearing officer know.
4. The hearing officer then has 5 days to decide if the complaint meets all requirements. The school can agree to let the parent add more information, if the hearing officer allows for more information to be included. This must be done at least 5 calendar days before the scheduled hearing.
5. Within 15 days of receiving the due process hearing request, the school has to schedule a dispute resolution session.
6. The school has 30 calendar days to implement any changes should a resolution be reached.
7. A pre-hearing conference and hearing will be held within 30 calendar days if no resolution is reached.
8. Both sides must give all evaluations to the other at least 5 days before the hearing. This includes any recommendations provided.
9. The hearing officer will then have 15 days to give a written decision, upon completion of the hearing. (Special Education Timelines, n.d.)
10. If the due process decision is disputed either party has 90 days to file a lawsuit in state or federal court.

> "Due process is one of the most complex areas of special education law. Knowing what to expect at a hearing is important for understanding how to resolve a dispute…" (Lee, n.d.)

Burden Of Proof
A Special Note

In disputes between parents and school districts, IDEA does not state who has the Burden of Proof (BOP). Yet BOP is a crucial issue in lawsuits. BOP simply clarifies who has to prove their case and how strong the proof has to be. With criminal cases, most people know that the prosecution has to prove the defendant's guilt "beyond a reasonable doubt." Civil cases are different. The standard of proof is not as high and is typically "by a preponderance of evidence."



What has the Supreme Court said about this issue?

The 2005 case Schaffer v. Weast says that parents have the burden to prove the IEP is not appropriate for the child with a disability. The parent has to put together a strong case to convince the administrative hearing officer that the IEP is either being improperly implemented or was poorly designed.

There are exceptions to this rule.

"As a result of the Schaffer v. Weast case, most people in the special education legal arena assume that the parents always have the BOP, probably because it is usually the parents challenging an IEP. But the BOP is not always on the parents and recently this has become a very important issue.

Again, we look to the Supreme Court in what they actually said in Schaffer v. Weast. The Court said "[t]he burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief." 546 U.S. at 62. That isn't necessarily always the parents. Indeed, the Court acknowledged that there are cases that 'will be in evidentiary equipoise' where the burden should be on school districts. 546 U.S. at 58. Justice Stevens in his concurring opinion agreed, writing "a court, taking into account 'policy considerations, convenience, and fairness,' . . . could conclude that the purpose of a statute is best effectuated by placing the burden of persuasion on the [school district]." 546 U.S. at 62. In other words, there will be situations where the school should bear the burden of proof." (Beast of Burden, 2017)

In other words, be careful, burden of proof does not always fall to the parents. It is important in all cases for your district to consider using legal counsel. This paper is not meant to be a substitute for or be presented as legal advice.

Other Factors To Consider

1. Contact Legal Counsel ASAP
    a. Schools have the right alongside the parents to retain legal counsel for a due process hearing.
    b. Should a parent or guardian bring legal counsel to an IEP meeting without notice, the school has the right to reschedule the meeting so they may also be appropriately represented. (Wiener)
2. Make sure the complaint is legally sufficient according to IDEA guidelines.
3. Follow proper IEP procedures! Procedural mistakes have led to large settlements for parents. (Wiener)
4. Identify, collect, and organize ALL relevant documents. These may include but are not limited to –
    a. *Relevant Individualized Education Plans*
    b. *Assessments*
    c. *Correspondence*
    d. *Assessment Plans*
    e. *Student's Cumulative File*
    f. *Discipline History – if any*
5. A Mandatory Resolution Meeting must take place with 15 days of receiving notice of the parent's due process complaint. "The purpose of the meeting is for the parent of the child to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the LEA(Local Education Agency) has the opportunity to resolve the dispute that is the basis for the due process complaint." (Sec. 300.510 (a) (2), n.d.)
6. Identify and notify any witnesses that may be called to testify during the due process hearing. Their availability and credibility as possible witnesses and the subject matter of their testimony need to be addressed by counsel prior to the hearing. Having a comprehensive list of professionals with current names, emails, and contact phone numbers will significantly aid in this process.



7. 10-day Offer of Settlement

The school can make a settlement offer to the parents at least ten (10) days prior to the hearing and in doing so can limit the parent's recovery of attorney fees. If at the hearing the parent's relief is less in value that the settlement offer provided by the school, the court will likely prevent the collection of attorney's fees from the date of the settlement offer through the date of the hearing. (The Survival Guide to Special Education Due Process Complaints) (Sec. 300.517 Attorneys' fees)

8. If your district does lose the due process hearing, the school has a right to appeal this decision. Either way this is a costly and emotionally draining endeavor for all parties involved.

Don’t let lack of appropriate therapy services be a part of this equation.

Nobody wants to experience a due process hearing. We went into this field to help students be successful. Keeping students first is the primary goal. But it would be foolish to be unprepared when recommendations don’t meet the parents’ expectations, however unreasonable they may be.

Lighthouse Therapy understands the stress of due process hearings conceivably caused by therapist shortages.

If you want to prevent a potential lawsuit, schedule a consultation with us today.

Schedule a Consultation Today!

You will be able to provide your students with their therapy needs, greatly reducing your risk of lawsuits.

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