The Process of Due Process 101:
What to Expect When You're Expecting...a Lawsuit

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A Brief Review/Overview: What is a Due Process Complaint?
A complaint which is filed at the administrative level, with the Pennsylvania Office for Dispute Resolution, to enforce rights and seek remedies under the Individuals With Disabilities Education Act (IDEA.)

A due process complaint can be initiated by either a school district or parents to address issues related to delivery of FAPE, in the areas identification, evaluation, placement, and/or implementation.

Our focus: Due process complaint as initiated by parents

What kind of relief can a district expect to be ordered to (or to settle upon) providing?
Expect one or more of the following:

• Prospective/equitable relief:
  – change of placement
  – continuation of current placement
  – related services
  – assistive technology
  – new evaluation and/or FBA
  – new or amended IEP or PBSP
  – compliance with IDEA procedural requirements

• Reimbursement
  – reimbursement to parents for cost of IEE
  – tuition reimbursement for cost of private school
Compensatory education - What is it?
• A remedy based on looking back at a deprivation of FAPE and ordering a specific amount of education as needed to remedy the deprivation and make a student whole.
• Compensatory education can be issued independently or in conjunction with one or more of the other types of relief listed above.

Compensatory Education – What is it?
• Not a check that is written
• Could be used for tutoring services by District personnel
• Fund or services are to be used to compensate for the specific type of deprivation at issue

Compensatory Education – What is it?
• Whether ordered by a hearing officer or agreed upon by the parties in a settlement, compensatory education (“comp ed”) is a fund, based on hours of the alleged deprivation of FAPE, converted to a dollar amount or hours of services, upon which the student/family can draw to compensate for the denial of FAPE.
Examples of deprivations of FAPE to be remedied by compensatory education:

- Failure to provide/revise appropriate goals or SDI
- Failure to identify/timely perform an appropriate evaluation
- Failure to provide an appropriate placement (in or outside of district)
- Failure to properly implement any element(s) of an IEP and/or PBSP

Uses of Compensatory Education: Examples

- Job training skills for a student who was denied an appropriate transition plan
- Reading tutoring for a student who was not provided with appropriate reading goals or SDI
- Math tutoring for a student whose math goals, while appropriate, were not properly implemented
- A talk to text device/program for a student with related services needs

The extent to which any proposed use of comp ed may be related to the alleged deprivation of FAPE is a subject for discussion during preparation of a settlement agreement, and may be a subject of debate again when the family submits requests for specific uses of the fund.

Expect a wide variety of amounts of possible monetary exposure associated with the comp ed fund

- Expect to be relieved if you see:
  - A complaint alleging deficiencies in the IEP as written and/or implemented in one limited subject area, such as math
- Expect to be a bit more concerned if you see:
  - A complaint alleging any deficiencies related to reading. Why? Arguably, deprivation of FAPE as related to reading is a more pervasive problem, requiring a more pervasive resolution.
Expect a wide variety of amounts of possible monetary exposure associated with the comp ed fund

- Expect not to be surprised, but to initially be more concerned, if you see:
  - Multiple claims involving multiple academic subject areas; challenges to evaluations or lack thereof; behavioral and/or functional issues; essentially a more complex combination of potential remedies from the menu.

- Expect to be initially, and possibly significantly more concerned if you see:
  - Claims alleging other violations of federal law beyond denial of FAPE under the IDEA. These claims can result in a hearing officer's finding on the record, which will then be at issue when the claim is litigated (likely for monetary damages not available at the due process level) in federal court.

One major area of concern:

Discrimination under the IDEA, ADA, and/or Section 504 of the Rehabilitation Act.

- If a discrimination claim is arguably very attenuated in its relation to denial of FAPE, expect that counsel may propose the strategy of seeking to have the claim dismissed from the hearing officer's jurisdiction. If they wish to pursue further, parents would then need to bring the matter before the Office of Civil Rights. However, the end result of parents exhausting their administrative remedy and ending up in federal court seeking monetary damages remains the same potential outcome.
  - Likely that hearing officer will retain jurisdiction.

Discrimination claims often involve harassment or bullying. Parents can seek three forms of relief at the due process level:

1. compensatory education (the discrimination/harassment was a denial of FAPE)
2. equitable relief (ex., change of placement or new IEP supports to make the discrimination/harassment stop)
3. a finding of deliberate indifference
Discrimination under the IDEA, ADA, and/or Section 504 of the Rehabilitation Act.

• Expect counsel to be particularly concerned about #3, at least early in the process. Should the case eventually proceed to federal court, a finding of deliberate indifference will be unhelpful, at best, to the district. The district is not, however, out of the woods simply because no finding of deliberate indifference has been made.

Any due process complaint that is litigated to completion before a hearing officer can be brought in federal court!

• This is done either:
  – on appeal
  – de novo by the prevailing party to seek additional relief not available at the due process hearing level, such as monetary damages and attorney's fees

At the federal court level, there is the potential that the Court:

• will uphold any comp ed award or other relief issued at the due process level, and/or
• will award additional relief of the type available at the due process level, and/or
• will award monetary damages for liability on other claims, such as a finding of deliberate indifference under Section 504; and/or
• will award attorney’s fees
Deliberate Indifference

- The deliberate indifference standard was adopted by the Third Circuit in S.H. ex rel. Durrel v. Lower Merion School District, 729 F.3d 248 (3d. Cir. 2013). There, the Court held that, where compensatory damages are sought under §504 of the Rehabilitation Act, a claimant must establish "evidence that shows both:
  1) knowledge that a federally protected right is substantially likely to be violated...and
  2) failure to act despite that knowledge." Id. at 265 (emphasis in original). Deliberate indifference must be a deliberate choice, rather than negligence or bureaucratic inaction." Id. at 263.

Deliberate Indifference

Expect me to work hard to prevent a finding of deliberate indifference, or any finding that would be unhelpful at the federal court level, from being made on the record at the due process hearing level.

- DON'T expect to panic....these issues may be more my problem than yours!

So, you have been served with a demand

Expect that there is no one size fits all roadmap.
- Parents' attorneys vary in the amount of time they will take, and willingness to work with the district, before actually filing a due process complaint.
- Disclaimer: All of the following are based on my own experience
  - The "Put it out there then let it sit" approach
  - Date-specific deadlines are rare
  - Time and negotiation room may be extended depending on past relationships among parents' counsel, district's counsel and the district
So, you have been served with a demand

**It's your** call:
- How much time and money to expend in order to investigate at this stage
- Full investigation, analysis and offer based on comprehensive understanding of the case’s strengths and weaknesses

Vs.
- Waiting it out (“playing chicken”)
- A middle ground approach

*The Board may want to give input as to expenditure of time and resources. The Board will definitely have to give authorization for a settlement.

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So, you have been served with a due process complaint

**• WHAT TO EXPECT NOW THAT YOU HAVE A LAWSUIT**

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#1 And You’re Off!

**Expect things to move quickly.**

- First things first: put the district’s insurance carrier on notice
- Ask about assignment of counsel
  - Solicitor could be assigned to defend in capacity of solicitor
  - Solicitor could be assigned to defend in capacity of insurance defense counsel
  - Attorney other than solicitor, from insurance defense panel, could be assigned to defend

Inquire into coverage and discuss billing arrangements with counsel.
So, you have been served with a due process complaint

- You may need to speak directly with insurance company about coverage.
- Discuss coverage for attorney's fees (deductible, post-deductible split).
- I have never seen coverage for compensatory education
- Counsel and district may need to directly keep track of billing/approaching deductible if billing through Solicitor's office and not insurance company.

So, you have been served with a due process complaint

- Unless parents waive this requirement, counsel must file an Answer to Due Process Complaint within ten (10) days of District's receipt of Complaint. 34 C.F.R. 300 Section 508
- This could kick investigation into high gear (if the district and counsel have not already done so)

What do we mean by "investigation?"

- Counsel reviews student's entire file, at least for time period at issue in complaint. This can involve most if not all of the following:
  - IEPs
  - progress monitoring
  - grades
  - behavior records
  - attendance
  - correspondence between parents and district
What do we mean by "investigation?"

- Counsel interviews all relevant personnel. This could include:
  - special education director
  - teachers covering multiple years and subjects
  - school psychologist
  - providers of related services
  - some of these individuals could be Intermediate Unit personnel

Alternative: File a perfunctory answer

- Why take that approach?
  - District is comfortable with estimating a settlement offer without a full picture of liability
  - Short on time
- Otherwise, facts need to be developed at some point, so you might as well start now!

The Mediation Option

- 34 C.F.R. §300.506 Mediation.
- Voluntary: Parents and District must agree
- General Rule: 30 day resolution period continues to run during this time.
- Is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.
- Each session in the mediation process must be scheduled in a timely manner and must be held in a location that is convenient to the parties to the dispute.
The Mediation Option

- If the parties resolve a dispute through the mediation process, the parties must execute a legally binding agreement that sets forth that resolution and that:
  - states that all discussions that occurred during the mediation process will remain confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding; and
  - is signed by both the parent and a representative of the district who has the authority to bind the district.
- A written, signed mediation agreement is enforceable in any state court of competent jurisdiction or in a district court of the United States.

No Resolution at Mediation?

- No resolution: continue on path to due process hearing.
- TIMEFRAME IS VERY COMPRESSED AND QUICK!
  - 34 C.F.R. Section 300.515 Hearing Officer must issue a decision within 45 days following the conclusion of the 30 day resolution period. Resolution period begins the day the school district receives the complaint.
  - So, 75 days from the date that the complaint is received, the case must be investigated, tried, and decision ordered!

Time Parameters

- Exceptions: Hearing Officers can grant extensions in their discretion. Often the amount of information and witnesses to be presented precludes handling the matter in just one hearing session, effectively extending the deadlines. Other exceptions listed in a later slide.
  - 34 C.F.R. Section 300.510 Resolution process.
  - Within 15 days of receiving notice of the parent's due process complaint, and prior to the initiation of a due process hearing, the district must convene (offer to hold) a meeting (Resolution Session) with the parent and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the due process complaint.
Mediation is voluntary; *offering* to hold Resolution Session is not.

- Who, specifically, must attend Resolution Session?
  - a representative of the district who has decision-making authority on its behalf
  - not an attorney of the district unless the parent is also accompanied by an attorney
  - other relevant members of the IEP Team as identified by the parents and district
- The purpose of the Session 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 district has the opportunity to resolve the dispute.

The Resolution Session need not be held if:

- The parent and the district agree in writing to waive it; or
- The parent and the district agree to use the mediation process (If this has not been decided upon this within 15 days of receiving complaint, Resolution Session must be offered!)
- The Resolution Session could result in:
  - a tentative settlement, pending Board approval
  - impasse: proceed to hearing
  - possible on-going negotiations
- The resolution period under IDEA is thirty (30) days of the district’s receipt of the due process complaint
- This *does not mean* that the parties cannot continue to attempt to settle the matter up to the date of the hearing.

Time Parameters

- This simply means that, as a general matter and subject to some exceptions, the 45 day timeframe in which the due process hearing must be held, concluded, and the Hearing Officer's decision issued begins as of the expiration of this 30-day period.
- This underscores how quickly investigation and hearing preparation must occur after the filing of a due process complaint. A productive Resolution Session requires as much investigation as possible, unless the District remains interested in extending a "best estimated offer."
Adjustments to the time parameters:
The 45-day timeline for the due process hearing may be adjusted to the
day after one of the following events:

1) Both parties agree in writing to waive the Resolution Session;
2) After either the mediation or Resolution Session starts but before
   the end of the 30-day period, the parties agree in writing that no
   agreement is possible;
3) 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.
4) Parents’ failure to participate: Except where the parties have
   jointly agreed to waive the resolution process or to use mediation,
   the failure of the parent filing a due process complaint to
   participate in the resolution meeting will delay the timelines for the
   resolution process and due process hearing until the meeting is
   held.

Time Parameters:
• If the district is unable to obtain the participation of the
  parent in the Resolution Session after reasonable efforts
  have been made (and documented using the procedures
  in §300.322(d)), the district may, at the conclusion of the
  30-day period, request that a hearing officer dismiss the
  parent’s due process complaint.

5) District’s failure to schedule the Resolution Session:
   If the district fails to hold the Resolution Session within 15
   days of receiving notice of a parent’s due process complaint
   (other than due to the failure of parents to participate), or
   fails to participate in the Resolution Session, the parent may
   seek the intervention of the Hearing Officer to begin the due
   process hearing timeline.

Time Parameters:
• Also:
  – Hearing Officer extensions upon request
  – Extensions due to the need for multiple hearing
dates
• If the matter is not resolved and the
  district proceeds toward the due process
  hearing...
  – Remember that the matter can still be settled,
    including a tentative settlement requiring Board
    approval, up to the day of the hearing.
10 Day Offer: A Useful Tool

34 C.F.R. Section 300.517(c)(2)(i) Award of fees.

- Attorneys’ fees may not be awarded and related costs may not be reimbursed in any action or proceeding for services performed subsequent to the time of a written offer of settlement to a parent if:
  a) the offer is made at any time more than 10 days before the due process hearing 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.

- Notwithstanding paragraph (c)(2) of this section, an award of attorneys’ fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

- So, if you expect to make a last, best offer, do it more than 10 days before the hearing begins! (And yes, this requires the most comprehensive understanding possible of the case’s strengths and weaknesses.)

Another alternative: Early Complaint Resolution

- Case Processing Manual, Article II: EARLY COMPLAINT RESOLUTION (ECR)

- The Early Complaint Resolution (ECR) process facilitates the voluntary resolution of complaints by providing an early opportunity for the parties involved to resolve the allegations.

(a) OCR’s Role

- To serve as facilitator, upon request of both parties;
- To inform the parties of the procedures, establish a constructive tone, and encourage the parties to work in good faith toward a mutually acceptable resolution;
- To maintain an impartial approach and inform the parties that OCR will not insist on particular terms or any specific resolution;
- To review the allegations and make sure the parties understand the issues that OCR has accepted for investigation, and, as appropriate, facilitating an understanding of pertinent legal standards and possible remedies;
- To facilitate a discussion between the parties regarding possible actions that the parties may consider in working toward a resolution; and
- To offer assistance, as appropriate, with regard to reducing any resolution to writing. If an agreement is reached, the parties are informed that OCR will issue a closure letter reflecting the voluntary resolution of the complaint by agreement of the parties.
(b) Role of the Participants

- To participate in the discussions in good faith;
- To consider offers or suggestions with an open mind and to work constructively toward a mutually acceptable resolution; and
- To implement any agreement in good faith.
- Although encouraged early, ECR may take place at any time during the investigative process. OCR does not sign, approve, or endorse any agreement reached between the parties. However, OCR will assist both parties in understanding pertinent legal standards and possible remedies.
- Taken from the Office for Civil Rights "Case Processing Manual," Article II, Section 201, "Early Complaint Resolution."

#2 Getting down to business:

- Expect investigation and hearing preparation to be time-consuming:
  - At a minimum, district staff will need to gather and copy entire student file
    - IEPs
    - progress monitoring
    - grades
    - behavior records
    - attendance
    - correspondence between parents and district
  - Counsel interviews all relevant personnel. This could include:
    - special education director
    - teachers covering multiple years and subjects
    - school psychologist
    - providers of related services
    - some of these individuals could be Intermediate Unit personnel

The questions:

- Evaluations
  - Why was an initial evaluation not initiated/what signs of a "thought-to-be eligible student" did the district miss?
  - Why was an FBA not initiated?
  - Why was the student evaluated for a Section 504 Plan and not an IEP?
The questions:

• Program-Related
  (When relief in the form of prospective programming AND/OR compensatory education is at issue)
  – What do you recall from discussions in IEP meetings?
  – Why were these accommodations/services/goals/this placement recommended by the district? Were they appropriate based on testing, performance in the curriculum, behavior and/or progress monitoring data?
  – What were the reasons for denying any particular placement/service/accommodation/goal requested by parents?
  – What was the reason for including or rejecting, in whole or in part, recommendations from an outside evaluation?
  – How did the student perform (academically and/or behaviorally) in your class, and how did this affect the programming recommendations?

• Discuss/defend progress monitoring and changes (or lack thereof) to goals

The questions:

• IEE Request
  (Due process initiated by District if it believes its evaluation is appropriate)
  – Why did the district reject a request for an IEE?
    – recent testing by district, IEE does not add to picture
    – requested evaluation/evaluator does not meet district's criteria
    – 34 C.F.R. Section 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.

The questions:

• Implementation
  (Looking back, for purposes of compensatory education)
  – How did you implement the IEP? (Goals, SDI, related services)
  – Describe your classroom structure/instructional delivery methods in general
  – How did you implement the PBSP?
  – How did you implement progress monitoring?

• As you all know by now, the mantra "document, document, document" is key
Documentation within the IEP/RR/ER of certain matters is best:

- "The team considered the report of Dr. X. The district recommended incorporation of Dr. X's recommendation of sensory breaks as needed, but rejected his recommendation for planners and assignment logs to be sent home with the student daily, because there is no record of the student having any issues with executive functioning skills (planning, organization, etc.).
- All data reviewed, assessments and input considered, etc. must be mentioned in the ER/RR, even if certain data do not support the conclusion(s) of the evaluator.
- Often, the same personnel must be interviewed multiple times to follow-up on items raised by other personnel/other facts developed.
- All personnel who have been interviewed during the investigation stage will need to meet with counsel again, possibly multiple times, to prep for hearing.

KOSHK proceedings

- Pleadings and/or hearings held to determine when parents "knew or should have known" (KOSHK) of the violation leading to the allegations of the due process complaint
- G.L. v. Ligonier Valley School District Authority, 802 F.3d 601 (3rd. Cir. 2015): Parents have two years in which to file the due process complaint, from the date on which they "knew or should have known" (KOSHK) of the violation leading to the allegations of the due process complaint.
- District will have to demonstrate by documentary evidence, testimony, etc. the KOSHK date.

Important:

- G.L. clarifies the two-year statute of limitations, but does not limit the look-back period for compensatory education to two years! Rather, the Third Circuit held that hearing officers "in the exercise of their broad discretion, may award [compensatory education] to whatever extent necessary to make up for the child's lost progress and to restore the child to the educational path he or she would have traveled but for the deprivation."
- A technical legal term....
  - Yikes! Expect to potentially have a bigger problem on your hands than initially thought.
#3 The (arguably) most painful part:

- Expect to be grilled; don't take it personally!
- I have met very few educators, particularly those working in special education, who do not:
  - take their jobs very seriously
  - take their reputations very seriously
  - do the right things for the right reasons, i.e., to help children
- The result: HIGH PERSONAL INVESTMENT
- This leads to: HIGH PERSONAL STRESS when one’s work is called into question.

Remember:

- It is VERY DIFFICULT to get a 100% win in a special education case.
- As the school's attorney, I will ask you tough questions, because:
  - I need to know all strengths and weaknesses to assess, and, if necessary, defend the case.
  - I need for you to be as prepared for the hearing as possible.
  - Better me than parents' counsel!
  - On that note...expect parents' counsel to generally be professional and appropriate, but remember...it's his/her job!

Remember:

- Expect me to be professional and fair.
- Expect me to be as kind as possible, and maybe to do more hand holding than I should!
- Expect me to spend 15% to 50% of my time acting as a counselor, sounding board, and confidante. It is good for you, and it is good for the case.
#4 What you don't want to hear:

- Expect that my "loyalty" to any specific district employee has its limits.
  - The district is my client (even if I am assigned through the insurance carrier.)
  - I represent my client in the "person" of the Board.
  - Boards want varying levels of input, updates and discussion of specific weaknesses, in procedures or personnel. There are some limits on what can be shared if an employee disciplinary matter may come before the Board, but in general, I have to be honest with my client.

#4 What you don't want to hear:

- This is particularly important when the Board must assess possible settlement options.
- I may need to tell the Special Education Director, Superintendent or other Administrator about specific deficiencies of certain employees, so that matters can be corrected.
- If I am not acting as Solicitor, it is not up to me to advise on whether an employee should be disciplined. If I am acting as Solicitor, my role may cross into that area.
- Union representation will be involved if a matter rises to the level of a Loudermill hearing.
- If a matter of sufficient concern involves the Superintendent, I will need to inform the Board President and/or Board.

#5

a) Expect that the sprint may turn into a marathon, AND

b) Expect potentially more relief/damages at the next stage.
**Attorney's Fees:**

- If parents prevail on any aspect of the due process complaint, they have the right to file a petition in federal court for attorney's fees.
- Threshold question: Have parents prevailed?
- "the litigant must demonstrate:
  - that he obtained relief on a significant claim in the litigation;
  - that such relief effected a material alteration in his legal relationship with the defendant; and
  - that the alteration is not merely technical or de minimis in nature." Holmes v. Micreek Twp. Sch. Dist., 205 F.3d 563, 593 (3d Cir. 2000) (internal citations omitted)

**Attorneys Fees:**

- The change in relationship must be judicially sanctioned. This "judicial imprimatur" may take the form of a hearing officer's order or a stipulated settlement, signed and enforceable by the hearing officer. John T. v. Delaware County Intermediate Unit, 318 F.3d 545 (3d Cir. 2003); P.N. v. Clementon Bd. of Educ., 442 F.3d 848 (3d Cir. 2006) (internal citations omitted in both)
- Parents are not necessarily entitled to an hour-for-hour award of fees. To determine extent to which parents have prevailed, courts look at factors such as:
  - number of claims on which parents prevailed
  - relative priority placed by parents throughout litigation of the claim(s) on which parents prevailed
  - the substantive significance of the claim(s) on which parents prevailed
  - the amount of substantive relief recovered

**34 C.F.R. Section 300.517 Attorney's Fees:**

Statutory analysis for reasonableness of fees

- A court awards reasonable attorneys' fees consistent with the following:
  - (1) Fees awarded must be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this paragraph.
  - (2)(i) Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding for services performed subsequent to the time of a written offer of settlement to a parent if—
34 C.F.R. Section 300.517 Attorney's Fees: Statutory analysis for reasonableness of fees

- (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.

- (ii) Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless the 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 §300.506.
- (iii) A meeting conducted pursuant to §300.510 (Resolution Session) shall not be considered—

- (A) A meeting convened as a result of an administrative hearing or judicial action; or
- (B) An administrative hearing or judicial action for purposes of this section.
- (3) Notwithstanding paragraph (c)(2) of this section, an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.
34 C.F.R. Section 300.517 Attorney's Fees:
Statutory analysis for reasonableness of fees

• (4) Except as provided in paragraph (c)(5) of this section, the court reduces, accordingly, the amount of the attorneys' fees awarded, if the court finds that—
  • (i) The parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;
  • (ii) The amount of the attorneys' 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;

• (5) The provisions of paragraph (c)(4) of this section do not apply in any action or proceeding if the court finds that the State or local agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of section 615 of the Act.

“Can the school district recover attorney’s fees?”

• Yes, in some cases:
  – 34 C.F.R. Section 300.517
• A federal court may award attorney's fees to a school district:
  – 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; or
  – against the attorney of a parent, or against the parent, if the parent's request for a due process hearing 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.
Federal Court:

- After parents have exhausted their administrative remedies by trying the issue of a violation of federal law at the administrative hearing (due process) level, they may file either an appeal, or a new case, in federal court.
  - The record of the due process proceedings is very important, AND may not be the only basis for the federal court's decision.
- 34 C.F.R. Section 300.516

The federal court:

1) Receives the record of the administrative proceedings;
2) Hears additional evidence at the request of a party; and
3) Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.

What relief may be available?

- Petition for attorney's fees may be filed as part of the appeal/filing de novo
- Federal courts, through their equitable powers set forth under the IDEA, have the right to grant (not an exhaustive list of all claims):
  - compensatory education
  - non-monetary equitable relief (ex., directing the district to fund an IEE, change a student's placement, provide related services, etc.) Ferren C. v. Sch. Dist. of Philadelphia, 612 F.3d 712, 717 (3d Cir. 2010)
  - monetary damages in a discrimination claim, claim for violation of Constitutional rights (ex., Fourteenth Amendment state created danger claim),
What relief may be available?

- equitable relief against school district officials in claims under Section 1983 of the Civil Rights Act, when officials are sued in their "official capacity," if parents can establish that:
  1) an official school policy or custom, or the absence thereof, caused the discrimination to occur; and
  2) that the defendant's actions shocked the conscience Monell v. Dept. of Soc. Serv., 436 U.S. 658 (1978)
- monetary damages against school district officials, when it can be demonstrated that the official, acting under color of state law, caused the deprivation of an individual's federal right Hafer v. Melo, 520 U.S. 21, 24 (1991)[internal citations omitted]
- The potential for relief in federal court is another reason why settlement, rather than a due process hearing, may be ideal.

#6 Expect the hearing process to be mentally and physically tiring

- Hearings can last for several days.
- Hearings can last even longer when KOSHK proceedings are involved.
- Counsel and witnesses have to think on their feet and remain attentive for sustained periods of time.
- At least one district representative (Superintendent, Special Education Director, Director of Pupil Personnel Services, etc.) should sit in on all hearings.
- Do not underestimate the amount of time consumed by logistics (scheduling investigations, witness prep, hearing attendance, sub coverage.)

#6 Expect the hearing process to be mentally and physically tiring

- Expect to possibly be physically uncomfortable (different Hearing Officers have different practices with respect to breaks, especially food breaks.)
- If you have special physical needs, expect to communicate those as far in advance as possible. I can't tell you what to expect in terms of hearing officer response.
- Expect to possibly re-arrange your commitments to accommodate the hearings.
- Expect to be drained at the end of the day, and then have to do it all over again.
#7 DON'T expect perfection, ideal outcomes or miracles.

- Just as it is difficult to get everything 100% correct, procedurally and substantively over the life of a student’s time in the district, so too will it be difficult to get a 100% win in a due process hearing.
- Procedural errors can rise to the level of substantive deprivations:
  - 34 C.F.R. Section 300.513 Hearing decisions.
  - (a) Subject to paragraph (a)(2) of this section, a hearing officer’s determination of whether a child received FAPE must be based on substantive grounds.
  - (2) In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies—
    - (i) Impeded the child’s right to a FAPE;
    - (ii) Significantly impeded the parent’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent’s child; or
    - (iii) Caused a deprivation of educational benefit.

Examples:

- A poorly written goal or progress monitoring piece results in poor implementation.
- A failure to timely complete an evaluation results in a delay of services.
- The district may be able to mitigate liability (but possibly not totally avoid it) if services delivered in actual fact were appropriate, despite the procedural violations.
- At times, the realistic strategy is to mitigate the amount of damages on any one claim, try to eliminate or greatly mitigate as many “lesser” claims as possible, and avoid potentially more detrimental results, like a finding on the record of deliberate indifference.

#8 DO expect your attorney and all district personnel to pull his or her weight through the proceedings.

- The "process of due process" can be long, intellectually taxing, physically exhausting, and emotionally fraught. All school districts should expect and require:
  - from legal counsel: diligence, support, and a healthy dose of good temperament and good humor
  - from district personnel: cooperation, respect for the process, and good efforts to not "make it about me"/take it personally
#9 Expect to live through it

• The positives:
  – In a number of cases, the family does not use the entire compensatory education fund.
  – The process, like all things pleasant and unpleasant, will eventually come to an end.
  – No matter how seriously you take your job, this is part of your life...not your whole life.
  – We are here to get you through it!!!!!!!!!!

Questions?

Thank you!

22nd Annual Dr. Samuel Francis School Law Symposium and Special Education Workshop
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