

Overview of Current IDEA Dispute Resolution Procedures

GIRARD
EDWARDS
STEVENS &
TUCKER LLP

Presented by:
Heather M. Edwards
Attorney at Law

Pre-IDEA Cases

- Prior to 1975, **20%** of children with disabilities were educated in public schools, and when they were, the programs were not appropriate to meet their needs.
- *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania*, 343 Fed. Supp. 279 (1972)
- *Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866 (1972)
- Children with disabilities had equal protection under the law without discrimination.
- Established framework for due process procedures



Six Principles of IDEA

- Zero Reject
- Nondiscriminatory Evaluation
- Appropriate Education
- Least Restrictive Environment
- Due Process Safeguards
- Student/Parent Participation and Shared-Decision Making

Current State of Special Education


- In 2013, **95%** of 6- to 21-year-old students with disabilities were served in regular schools;
- **3%** were served in a separate school for students with disabilities;
- **1%** were placed in regular private schools by their parents; and
- **Less than 1%** were served in a separate residential facility, homebound or in a hospital, or in a correctional facility.

Current State of Special Education

- California parents and school districts request dispute resolution at a higher rate than almost any other state.
- Parents initiate **86%** of all dispute resolution requests in California.
- Data suggests concentration of requests for dispute resolution in wealthier areas, and in less than one third of California school districts.
- School districts across the U.S. spend over **\$150 million** per year in conflict resolution.


Statistics on OAH Filings for 2016-17

- 4,694 due process filings with OAH
- May/June/July highest number of filings
- Of student-filed cases, **93%** are represented by an attorney
- Average length of hearing is 4 days
- Average number of witnesses called by each side is 5-6



Statistics on OAH Filings 2016-17

- Most Common Eligibility Categories:
 - Autism (31%)
 - Not Identified (21%)
 - Other Health Impaired (18%)
 - Specific Learning Disability (17%)
 - Speech or Language Impairment (14%)
 - Intellectual Disability (8%)
 - Emotional Disturbance (6%)



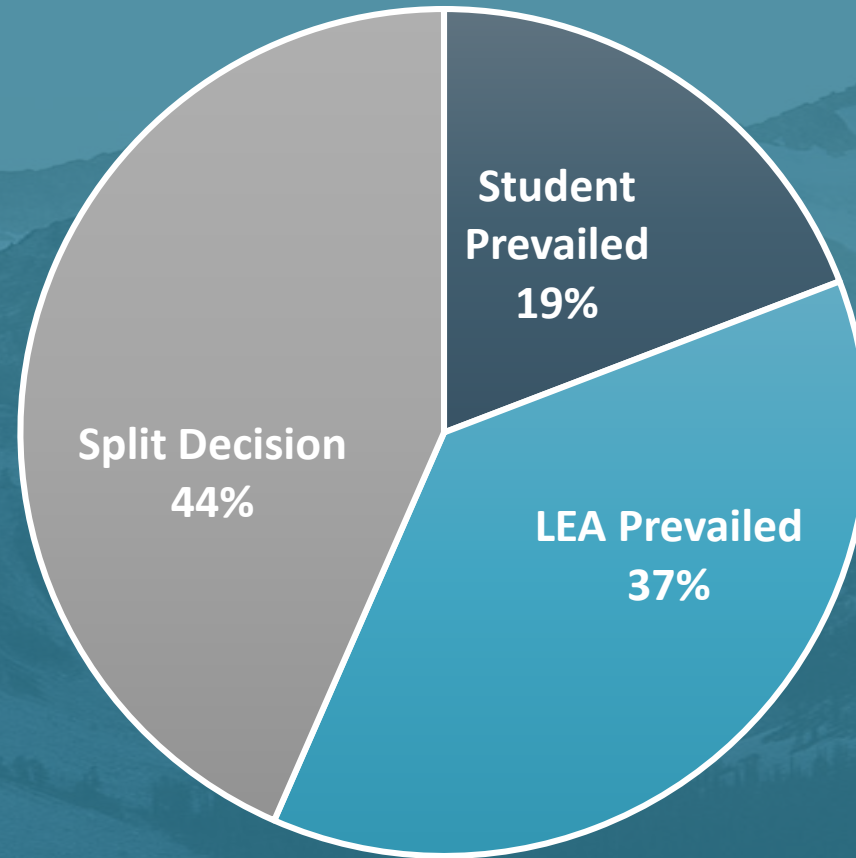
Statistics on OAH Filings 2016-17

- Most Common Issues/Remedies Raised:
 - Designated Instruction & Services
 - Placement
 - Compensatory Education
 - Assessment
 - Reimbursement
 - Speech and Language
 - Occupational Therapy
 - One-to-One Aides

Statistics on OAH Filings for 2016-17

- **97%** of cases resolved without a hearing
- Why?

Hearing Prevailing Parties



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Office of Administrative Hearings

- Contract with the California Department of Education to handle the special education due process hearing and mediation program.
- www.oah.dgs.ca.gov
- List of free or reduced price attorneys and advocates

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Office of Administrative Hearings

- Decision/order search
- E-mail list serve
- Guide to Understanding Special Education Due Process Hearings
- Advisory Committee
- Regional offices (Sacramento, Oakland, Van Nuys, San Diego)

Who are the mediators/ hearing officers?

- Knowledge and ability to understand special education law, to conduct hearings, and render and write decisions.
- Mediators
 - 20 hours of initial training mediation theory, techniques, and practices
 - 20 hours of training in special education disputes
- Hearing Officers
 - 80 hours of initial training in adjudication of administrative matters
 - Must include 20 hours on special education disputes
- 20 hours of continuing education each fiscal year

5 C.C.R. §§ 3098.1, 3098.2


Mediation “Only”

- Parent or LEA may file request
 - Forms available on OAH website
- Free
- Confidential
- Voluntary
- No attorneys allowed



Mediation “Only”

- Attendees: parent(s), LEA representative(s) with authority to make decisions, mediator
- OAH provides interpreter if necessary
- Held within 15 days of filing request
- Reasonably convenient location (typically, LEA office unless parties request other location)
- Not a prerequisite for requesting a due process hearing
- Pros/Cons



Due Process Hearing

- Parent(s) or LEA may file
- About any matter relating to the identification, evaluation, or educational placement of a child, or provision of a free appropriate public education (FAPE) to a child
- Fair and impartial hearing

Request for Due Process Hearing

- Name, address of student's residence, name of school student attends.
- Description of problem(s) to be resolved, including facts relating to each problem.
- Description of proposed resolution to problem.
- Copy must be provided to other party at same time request is filed with OAH.

Questions to Ask Yourself When You Receive a Due Process Complaint



Questions to Ask Yourself When You Receive a Due Process Complaint

- Why did they file a complaint instead of just talking to me about it?
- Where is the file – the entire file?
- Did we meet all procedural requirements:
 - Child find
 - Evaluation
 - Eligibility
 - Prior written notice
 - Timelines
 - Procedural safeguards notice
- IEP Contents and Development
 - FAPE?

Questions to Ask Yourself When You Receive a Due Process Complaint

- Is the evaluation sound?
- Should I be the point person on this?
- Who is the person most knowledgeable about this case?
- What other agencies are involved and what are their positions?
- How is the child performing?

Statute of Limitations

- 2 years from date party knew or had reason to know of facts underlying request
- Exception: If parent was prevented from requesting due process due to:
 - Specific misrepresentations by LEA that it solved the problem
 - LEA withheld information from parents that was required under special education laws
 - E.g. failure to provide notice of procedural safeguards

Mandatory Resolution Session

- LEA must convene within 15 days of receiving parent's request for due process hearing
- Purpose: Parent to discuss issues and give LEA opportunity to resolve
- Parents, relevant members of IEP team who have specific knowledge of facts in due process request, representative with decision-making authority
- LEA may not bring attorney unless parent brings attorney

Mandatory Resolution Session

- Parents and LEA may agree in writing to waive
- Due process hearing may not occur until 30-day “resolution window” has passed.
 - Not required for LEA-filed cases
- LEA may request dismissal of case if parent refuses to participate
 - Note: Must document reasonable efforts to obtain participation
- Legally binding agreement may be voided by either party within 3 business days.
- Pros/Cons

Notice of Insufficiency

- Deemed sufficient unless other party submits Notice of Insufficiency within 15 days.
 - E.g. Insufficient facts
 - “The district did not assess student in all areas of suspected disability.”
 - Does not identify areas of suspected disability, assessment(s) that LEA needed to conduct, and when this occurred.
- If granted, all dates vacated and party has 14 days to amend complaint.
- Note: Consider possible motion to dismiss
 - E.g. lack of jurisdiction (504 claims)

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Response to Due Process Complaint

- Within **10 days** of receiving request
- Specifically addresses issues raised in due process hearing request

Scheduling Order

- Generally issued within 48 hours of receipt of complaint
- Important dates
 - Last date to schedule mediation
 - Prehearing Conference
 - Hearing (generally, 55 days out)
- OAH Calendar Clerk
- Continuances

Expedited Hearings

- Generally, disciplinary matters
- Timelines much stricter
- Resolution session within **7 calendar days**
- Hearing occur within **20 school days**
- Decision issued within **10 school days** after the hearing
- No continuances
- Dual cases

Joint Request to Set Mediation

- Must be made in writing
- Best chance of getting date if request filed at least 10 business days before date
- Generally held on Tuesdays, Wednesdays, or Thursdays
- 9:30 a.m. – 4:30 p.m.
- Exception: LAUSD (9:00 a.m. or 1:30 p.m.)

What happens at a mediation?

- Neutral third party
 - Would not be same administrative law judge that would hear the case
- Facilitates communication between parties
 - Not there to make findings of fact or conclusions of law
- Caucus process
- Everyone involved in decision making
- Confidential
- Settlement agreement
 - Interim agreements
- Attorneys may attend (when in conjunction with due process hearing request)

Mock Mediation

- Parent on behalf of Student v. LEA



Prehearing Conference

- Conference call with administrative law judge
 - If represented by legal counsel, typically just attorneys participate
- Discuss logistics of hearing
 - Witnesses
 - Exchanging documents
 - Hearing room
 - Closed or open hearing

A teal-colored background featuring a stylized mountain range with evergreen trees. The mountains are rendered in various shades of teal, creating a sense of depth and texture. The overall aesthetic is clean and professional.

Prehearing Conference

- Prehearing conference statement due **3 business days** prior to prehearing conference
 - Number of days for hearing
 - Issues for hearing
 - Witnesses to called (including experts)
 - Exhibits to be introduced
 - Special requests: telephonic testimony, interpreters
- Order following Prehearing Conference



Before the Hearing

- Exchange List of Witnesses – 5 business days
- Copy of exhibits – 5 business days
- Witness preparation
- Secure experts
- Witness scheduling
 - Generally, parties ordered to make employees available without need for subpoena
- Subpoena non-party witnesses/documents
 - E.g., student's private therapist who made recommendations regarding services; nonpublic agency/school staff

Other Common Motions

- Motion to Amend Due Process Request
 - If granted, restarts all timelines
- Motion for “Stay Put”
- Motion for Joinder of Party
- Motion to Bifurcate Issues
- Motion to Consolidate Cases
- Peremptory Challenge of Hearing Officer
 - Each side gets 1
- Motion to Disqualify Hearing Officer for Cause

Burden and Standard of Proof

- Burden of proof is on person who filed for due process

Schaffer v. Weast (2005) 546 U.S. 49

- “Preponderance of the evidence” standard
 - More likely than not that the party that filed is entitled to relief

The background of the slide is a teal-colored image of a mountain range. The mountains are layered, with some in the foreground and others in the distance, creating a sense of depth. The color is a consistent teal or blue-green.

Hearing

- Typically held at LEA offices
- Set up like courtroom
- Closed to public unless student request open hearing
- Witnesses under oath
- Audio recorded by OAH
- Opening statements
- Party that filed presents case first

The background of the slide features a teal-colored mountain range with snow-capped peaks and forested slopes. The word "Hearing" is written in a large, white, sans-serif font, centered horizontally over the mountain scene.

Hearing

- Witness testimony
 - Cross examination
 - Re-direct
 - Re-cross examination
 - Judge may ask questions
- Admit exhibits
- Technical rules of evidence do not apply

After the Hearing

- Closing briefs
- Decision
 - Parent filed case: written decision issued, within 45 days after the end of the 30-day resolution period.
 - LEA filed case: written decision issued within 45 days after the request for due process hearing received (no resolution period).
 - Sent to parties once finalized and posted on its Web site with personal information redacted.
 - Will state who prevailed on each issue.
 - May also include an “order” which directs one of the parties to do something (lots of discretion to provide equitable remedies).
- **90 days** for either party to appeal to state/federal court

Guidance for Witness Testimony

- Testimony provided at hearings is very different from everyday, conversational speech.
- Everything being said is tape-recorded, under oath, and subject to the penalty of perjury.
- It is important that witnesses giving testimony exercise greater care than is ordinarily necessary in day-to-day conversations.
- The attorneys for both parties will ask you questions and you will have to give oral answers.

“Rules of Demeanor” for Effective Testimony.

- Listen carefully to the question asked and pause for a moment before you answer.
 - This allows you to be sure the attorney has finished asking his/her question before you start answering, and gives the other attorney an opportunity to object to the question where appropriate.
- If you do not hear or do not understand any part of the question, say so (e.g., “would you repeat the question?” or “I don’t know what you mean”).
- Do not volunteer information. Try to avoid the normal temptation to tell “your story”. It is human nature to want to explain things so that your listener understands. Resist the impulse. Your sole responsibility is to answer only the questions that you are asked.
- If you are asked a “Yes” or “No” questions, simply answer “Yes” or “No”. Explain your answer when appropriate. If you can't answer with a "yes" or "no", don't feel forced to

“Rules of Demeanor” for Effective Testimony.

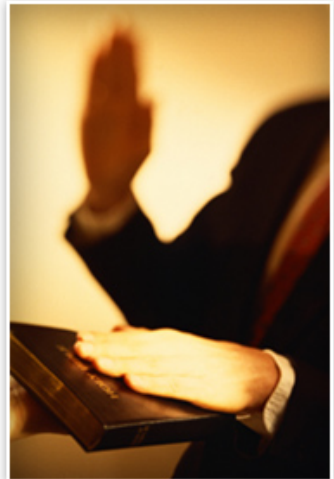
- “I don’t know” or “I don’t remember” are perfectly acceptable answers. You do not want to guess or speculate if you do not know the answer. Attorney is entitled to your best recollection.
- Do not refer to any particular documents unless instructed to do so by the attorney asking questions.
- Speak slowly and clearly. Don’t use “uh-huh”, or nod or shake your head to answer.

“Rules of Demeanor” for Effective Testimony.

- Neat appearance and proper dress are important.
- Always be courteous, even if the lawyer questioning you isn't.
- Give positive, definitive answers when possible. Avoid saying, "I think" or looking unsure about your responses.
- Don't look to the lawyers for cues. You must answer what you know.

Mock Hearing

- Parent, on behalf of Student, has filed a due process complaint against LEA alleging a denial of FAPE
- Director of Special Education to testify on behalf of LEA



Attorneys' Fees

- Court may award attorney fees to **prevailing parent**
 - Not OAH
- Court may award attorney fees to prevailing LEA in limited circumstances:
 - Frivolous, unreasonable, without foundation
 - Improper purpose (to harass, cause undue delay, increase cost of litigation)

Statutory Settlement Offers

- Cuts off an award of attorney fees
- LEA sends written settlement offer to parent
- More than 10 days before hearing
- Not accepted by parent
- Relief obtain at hearing is not more favorable than offer of settlement

Settle or Go to Hearing? Factors to Consider

- Cost
- Potential for unsuccessful litigation
- Procedural problems
- Best interest of the child
- Emotional burden of engaging in due process hearing
- Settlement is more flexible way to resolve disagreements
- Parties control the outcome

Settle or Go to Due Process: Factors to Consider

- “Opening the floodgates”
- Fair to other students
- Protecting/supporting staff
- Preserves relationships with parents
- Loss of instructional time
- Avoidance of negative publicity

Daily News

September 26, 2014

Issue No. 001

SPECIAL EDUCATION CASE COSTS APPROACH \$1 MILLION

Solano Beach District Denied Request for Private Tuition of \$6,100

About Solana Beach School District

- North coast of San Diego
- Approximately 3,000 students in grades Pre K-6.
- Serves communities in the City of Solana Beach, Carmel Valley, Fairbanks Ranch, and Rancho Santa Fe.
- Approx. \$23 million budget
- The District has seven elementary schools and a Child Development Center with programs for toddler, preschool, before and after school support and services.

Case timeline

March 2006: Initial IEP making Student eligible for special education under category of autism. Placement offered at a District school.



Parents rejected placement. Parties entered into settlement agreement wherein Student would receive services from an educational therapy provider and a private preschool for 2006-07.



IEP team met to develop IEP for 2007-08. District offered placement in SDC and Gen. Ed. classroom

Case timeline

Parent unilaterally placed student in private general education preschool and filed for a due process hearing which took place in October 2007 over 11 days.

7 Issues Identified



January 2008, OAH issued decision. Student prevailed on 2 of 7 issues. Ordered District to reimburse Parents \$6,100 for private preschool placement during 2007-08, and 1:1 aide for remainder of 2007-08.



August 2008, Parents filed appeal in federal court. District filed a counter-claim.

Case timeline

July 2010- Federal court upheld OAH decision



Both parties appealed to 9th Circuit



April 2012 – 9th Circuit Affirmed

Case timeline

November 2012 –
U.S. Supreme Court
denied writ of
certiorari



Then Parties
argued over legal
bills...

9TH Circuit Order – August 2014

Parents' Fee Demand

- OAH: \$329,539
- District Court: \$146,340
- Court of Appeals: \$284,302
- Supreme Court: \$26,847
- **TOTAL: \$787,029**

Issues

- Parents' rejection of District's pre-hearing settlement offer
- Reasonable hourly rates
- Description of time entries
- Degree of success
- Duplication of effort

Reduction in Fee Award

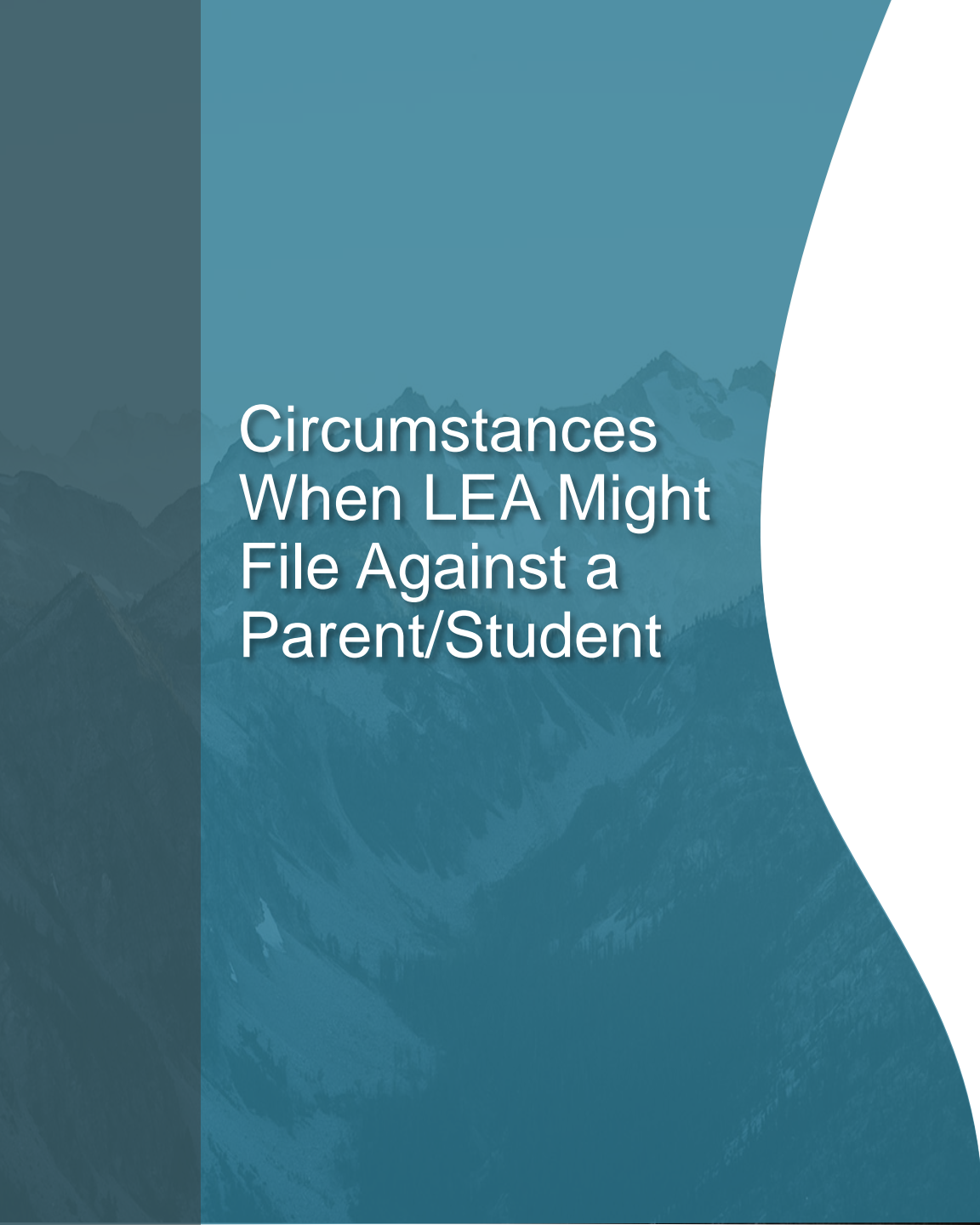
- OAH: \$264,847
- District Court: \$112,875
- Court of Appeals: \$175,022
- Supreme Court: 26,847
- **TOTAL: \$579,592**

After the dust settles...

- PR implications
- Newspaper reports District spent over \$300,000 on their own legal fees
- Student is now in 5th grade at a charter school in Utah
- Could this dispute have been avoided? If so, how?

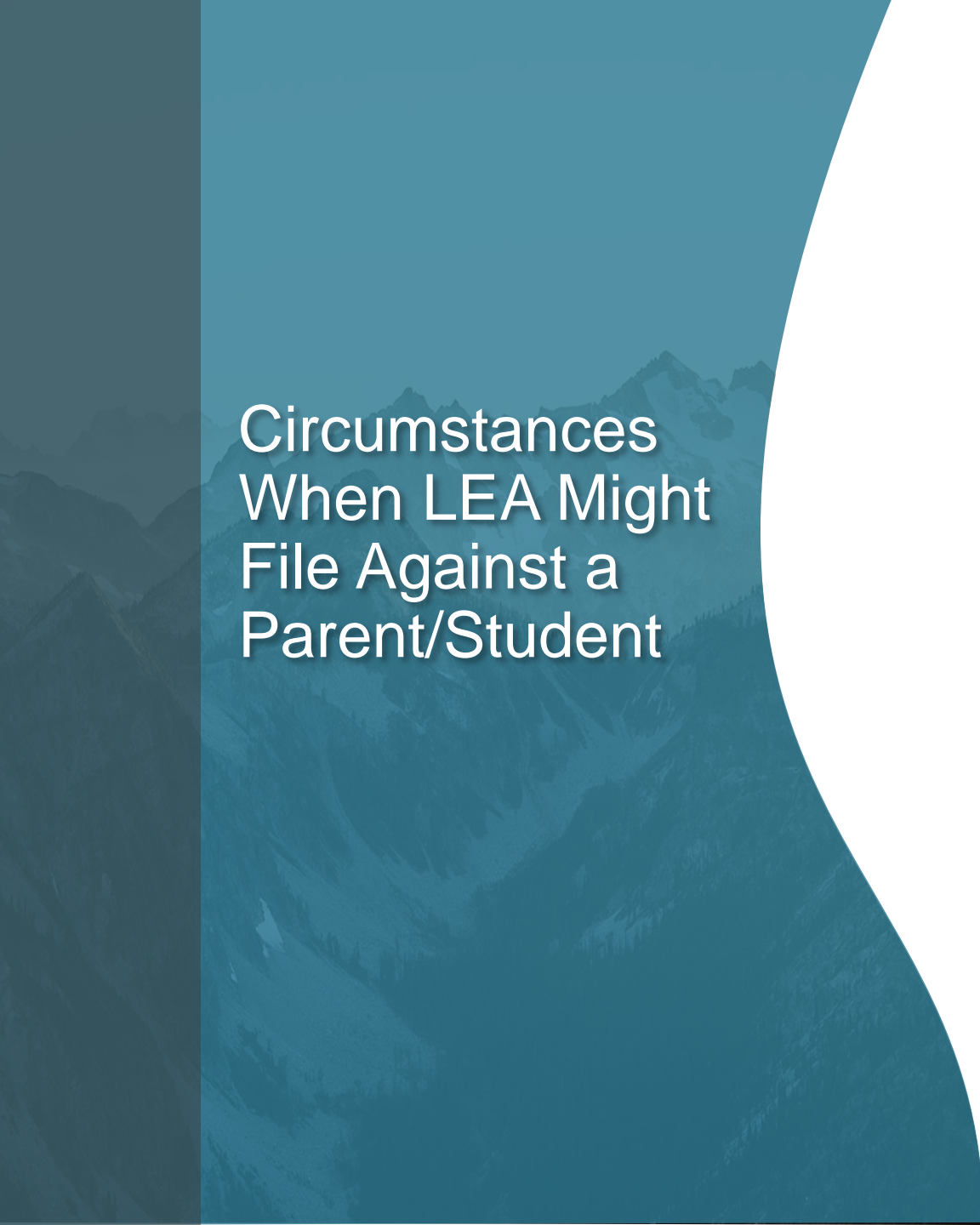


When and Why LEAs May Need to File a Request for Due Process.



Circumstances When LEA Might File Against a Parent/Student

- To defend LEA's assessments to deny parent's request for independent educational evaluation at public expense;
- To obtain order authorizing reevaluation of student over objection of parent;
- To obtain a 45-day change in placement for a student who is substantially likely to injure himself/herself or others; and/or

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Circumstances When LEA Might File Against a Parent/Student

- To obtain order authorizing implementation of IEP over parent's objection.
 - This includes exiting a student from special education over the parent's objection

LEA Would Have Burden of Proof at Hearing

- The Supreme Court in Schaffer v. Weast, 44 IDELR 150 (2005), placed the burden of proof in a due process hearing on the party seeking relief.

To Deny Request for IEE

- Parents always have the right to obtain an IEE of their child at their own expense.

34 CFR 300.502 (a)(1); 34 CFR 300.502 (b)(3).

- Parents have the right to an IEE at public expense if they disagree with an evaluation obtained by the district, unless:
 - The district demonstrates in a due process hearing that its own evaluation of the child was appropriate; or
 - The district demonstrates in a due process hearing that the evaluation obtained by the parents did not meet district criteria.

34 CFR 300.502 (b)(1) through 34 CFR 300.502 (b)(2).

Timing of Response to Request for IEE

- Must act "**without unreasonable delay.**"

34 CFR 300.502 (b)(2).

- Turns on the facts of the case.
- Many California decisions address this issue.

Timing of Response to Request for IEE

- Santa Monica-Malibu Unified Sch. Dist., 62 IDELR 279 (SEA CA 2013)
 - A two-month delay in filing for due process was not unreasonable where the district sent parents prior written notice of its disagreement within 10 days of the IEE request;
- Los Angeles Unified Sch. Dist., 111 LRP 48178 (SEA CA 07/07/11)
 - A 90-day delay in denying parents' request for a publicly funded IEE was unreasonable given the district's failure to communicate with the parents during that time or explain the reason for the delay;
- Los Angeles Unified Sch. Dist., 57 IDELR 55 (SEA CA 2011)
 - Because parents requested IEEs just one week before the 24-day winter break, when few district employees were allowed to work, the district was entitled to take time after the break to review its assessments and determine whether to grant the parents' request.

Timing of Response to Request for IEE

- J.P. v. Ripon Unified School District, 52 IDELR 125 (E.D. Calif. 2009)
 - The due process request filed more than two months after the request for an IEE was timely, as the parties were communicating regarding the request for the IEE in the interim.
- Pajaro Valley Unified School District v. J.S., 47 IDELR 12 (N.D. Cal. 2006)
 - The school district offered no explanation as to why it delayed for 11 weeks in filing its complaint or why that delay was "necessary." It violated the IDEA.
- Capistrano Unified Sch. Dist., 12 ECLPR 42 (SEA CA 2014).
 - By taking no action on the parents' IEE request for more than five months upon the mistaken belief the child was no longer in special education, the district waived its right to contest the request.

Was District's Assessment Appropriate?

Oakland Unified School District v. Student (OAH NO. 2016061310)

- Spanish-speaking parents' requested a district-issued computer to assist student with written assignments.
- District proposed an assessment plan in the area of assistive technology to determine what accommodations, tools or supports student may need.
- District did not provide the assessment plan in Parents' native language, Spanish. Some of the assessment plan was orally translated to Parents at the meeting, Parents were not fully informed of all information relevant to the activity for which consent was sought.

Was District's Assessment Appropriate?

Oakland Unified School District v. Student (OAH NO. 2016061310)

- IEP developed as a result of the assistive technology assessment report was not developed in a timely manner – beyond 60 days.
- Evaluator did not receive direct input from the parents about their AT concerns. Instead of using an interpreter to directly communicate with the parents, the evaluator delegated the job to a case manager, who was not a credentialed teacher.
 - Highly questionable whether the feedback provided to the evaluator from the case manager regarding Parents' input was accurate, as the case manager admitted that she was often confused by Mother's comments.
- ALJ ordered the California district to fund an IEE.

Was District's Assessment Appropriate?

San Leandro Unified School District v. Student (OAH NO. 2017060144)

- District conducted an initial comprehensive evaluation of student and held an IEP meeting. Team determined student did not qualify for special education.
- Parents requested IEEs claiming that the assessors were biased in favor of finding that Student did not qualify for special education services; were incomplete due to the lack of parent input; teacher was not qualified to conduct Student's academic assessment and that the assessments painted an inaccurate picture of Student as successful at school which was not consistent with their perspective of Student's functioning in the home.
- Within three weeks, District sent Parents a detailed Prior Written Notice denying their request for an IEE stating that they believed the District's assessments were appropriate, and provided parents a copy of their procedural safeguards.
- A few days later, District filed a request for due process requesting an order that its assessments were appropriate, and that Student was not entitled to IEEs at public expense.

Was District's Assessment Appropriate?

San Leandro Unified School District v. Student (OAH NO. 2017060144)

- Hearing officer determined that District proved, psychoeducational, speech and language, academic, occupational therapy, and functional behavior assessments were legally appropriate in that they met all legal requirements.
- The assessors were qualified to conduct the assessments, and multiple assessment tools which were valid were used.
- The tests were not sexually, culturally, or racially discriminatory, and were not administered in that way.
- Each of the assessors who evaluated Student produced a written report with recommendations.

Was District's Assessment Appropriate?

San Leandro Unified School District v. Student (OAH NO. 2017060144)

- All of the testing was administered according to the test publisher's directions to the extent necessary to produce valid results.
- All assessors were trained and qualified to assess Student.
- All standardized assessments administered to Student pursuant to the assessment plan were administered in her native language of English.
- All assessors interviewed Student's teachers and counselor.
- The assessment team conducted classroom observations in formal and informal settings.
- All assessors were aware of Parents' concerns underlying their request for assessment.

Factors to Consider When Deciding Whether to File to Defend District's Assessments

- Analyze the assessments for legal compliance
 - Collect and review the test protocols
 - Review the assessment reports
 - Consult others in the district with experience conducting assessments and writing assessment reports.
 - Sufficiently comprehensive?
- Review procedural elements (e.g., timelines, etc.)

Factors to Consider When Deciding Whether to File to Defend District's Assessments

- Initial or reevaluation?
- Will assessors make good witnesses at hearing?
- Stress of engaging in due process hearing
- Cost of hearing
- Relationship with parent
- Potential for unsuccessful litigation – parent attorney fees
- Procedural problems
- Best interest of the child

To Authorize Reevaluation Over Parent's Objection

- The law differentiates between an initial evaluation and a reevaluation (such as a “triennial”).
- And for reevaluations, the law also differentiates between a parent’s refusal to consent and failure to respond.

To Authorize Reevaluation Over Parent's Objection

Initial Evaluations

- If a parent of a child enrolled in public school does not consent to an initial evaluation or fails to respond to the request for consent, the decision whether to use applicable consent override procedures is optional on the part of the LEA.
- These consent override procedures refer to the procedural safeguards (including mediation or due process procedures).
- The LEA does not violate its obligation to identify, locate, and evaluate a child suspected of having a disability and needing special education and related services if it declines to pursue an initial evaluation using consent override procedures.

To Authorize Reevaluation Over Parent's Objection

Reevaluations – Failure to Respond

- An LEA may conduct a reevaluation of a child with a disability without using the consent override procedures if:
 - The LEA can demonstrate that it made reasonable efforts to obtain parental consent for the reevaluation, and
 - The child's parent has failed to respond to the request for consent.
- In order to meet the reasonable efforts requirement, the LEA must document its attempts to obtain parental consent including detailed records of telephone calls made or attempted and the results of those calls, copies of correspondence sent to the parents and any responses received, and detailed records of visits made to the parent's home or place of employment and the results of those visits.

34 CFR §300.300(c)(2),

To Authorize Reevaluation Over Parent's Objection

Reevaluations – Refusal to Consent

- If a parent refuses to consent to a reevaluation, but requests that the LEA continue the provision of special education and related services to their child, the LEA has the following options:
 - The LEA and the parent may agree that the reevaluation is unnecessary; or
 - If the LEA believes that the reevaluation is necessary, and the parent refuses to consent to the reevaluation, the LEA may, but is not required to, pursue the reevaluation by using the consent override procedures (mediation/due process).
- The LEA is still required to provide the student FAPE.

Circumstances When Reevaluations are Required

Examples of conditions warranting more frequent reevaluation than every three years:

- A substantial change in the student's academic performance or disabling condition.

Corona-Norco Unified Sch. Dist., 22 IDELR 469 (SEA CA 1995); Reserve Indep. Schs., 112 LRP 6241 (SEA NM 2012); and Board of Educ. of City of White Plains, 20 IDELR 1475 (SEA NY 1994).

- A change in placement generally will often trigger a reevaluation, particularly when the new placement is a more restrictive environment. While a reevaluation is suggested under these circumstances, it is not expressly required by the IDEA.

Board of Educ. of City of White Plains, 20 IDELR 1475 (SEA NY 1994); and Brimmer v. Traverse City Area Pub. Sch., 22 IDELR 5 (W.D. Mich. 1994).

Circumstances When Reevaluations are Required

- If a district believes that a student no longer requires special education or related services, it must reevaluate the student in all areas of suspected disability. The district may exit the child from special education if, after a comprehensive evaluation, it determines that the student does not need IDEA services to obtain a meaningful educational benefit.

34 CFR 300.305 (e). See *South Pasadena Unified Sch. Dist.*, 58 IDELR 120 (SEA CA 2011); *Connecticut Technical High Sch. Sys.*, 112 LRP 49055 (SEA CT 05/0212); and *Victor Elem. Sch. Dist.*, 50 IDELR 204 (SEA CA 2008).

What's Required?

- To proceed with a reassessment over a parent's objection, an LEA must demonstrate at a due process hearing that:
 - The parent has been provided an appropriate written reassessment plan to which the parent has not consented, and
 - The student's triennial reassessment is due, that conditions warrant reassessment, or that the student's parent or teacher has requested reassessment.

Ed. Code § 56381(a).

What's Required?

- The required notice of assessment consists of the proposed assessment plan, and a copy of parental procedural rights under the IDEA and related state laws.
- The assessment plan must be in a language easily understood by the public and the native language of the student; explain the types of assessments to be conducted; and notify parents that no IEP will result from the assessment without the consent of the parent.
- The district must give the parent at least 15 days to review, sign, and return the proposed assessment plan.

Ed. Code § 56321.

Conditions on Assessments?

- Parental consent with conditions is not consent at all.
- A parent who wishes that his or her child receive special education services must allow the school district to reassess if conditions warrant it.
- Selection of particular testing or evaluation instruments is left to the discretion of the district.
- Parents have no right to insist on outside assessors.
- Parents have no right to insist on being present during the evaluation.
- If Parents disagree with an assessment conducted by a school district, they have the right, under certain circumstances, to obtain an independent educational evaluation at public expense.

Is LEA Allowed to Reevaluate Over Parent's Objection?

Manteca Unified School District v. Student (OAH No. 2016030014)

- The causes of the significant worsening of Student's behaviors in his fifth grade year were unknown and disputed by the parties; further information on his social, emotional and behavioral status will assist them in resolving those disputes and deciding on future programs for Student.
- Health and educationally related mental health assessments may focus, or even resolve, the parties' dispute over whether Student should be primarily eligible for special education as emotionally disturbed, which is important to his proper educational programming and placement.
- District allowed to proceed with those assessments in the absence of parental consent.

Is LEA Allowed to Reevaluate Over Parent's Objection?

Manteca Unified School District v. Student (OAH No. 2016030014)

- The causes of the significant worsening of Student's behaviors in his fifth grade year were unknown and disputed by the parties; further information on his social, emotional and behavioral status will assist them in resolving those disputes and deciding on future programs for Student.
- Health and educationally related mental health assessments may focus, or even resolve, the parties' dispute over whether Student should be primarily eligible for special education as emotionally disturbed, which is important to his proper educational programming and placement.
- District allowed to proceed with those assessments in the absence of parental consent.

Is LEA Allowed to Reevaluate Over Parent's Objection?

El Rancho Unified School District v. Student (OAH No. 2016090403)

- District established that the assessments were necessary for several reasons. District had no assessment data in its records. Although Parent provided a copy of the previous district's assessment to the school's registrar when she first enrolled, no evidence that the assessment was known by or given to the IEP team. That assessment was over a year old and Parent and District staff were concerned that Student's needs were not being met by District's IEP or that his behavior may have changed.
- District's assessment plan complied with the procedural requirement of the IDEA. It identified several types of measures to assess Student. A credentialed special education teacher would conduct the academic assessment. A credentialed school psychologist would conduct the assessment of Student's intellectual development, motor development, and social/emotional status.

Is LEA Allowed to Reevaluate Over Parent's Objection?

El Rancho Unified School District v. Student (OAH No. 2016090403)

- However, the assessment plan was generated on or about June 6, 2016. The due process case was filed on September 7, 2016. The law requires that Parent have at least 15 days to review, sign, and return the assessment plan before a district may file to conduct the assessment without parental consent. Fifteen calendar days before that date is August 23, 2016.
- District sent the notice to Parent by regular and certified mail. The letter sent by certified mail was returned to District. Although the letter sent regular mail was not returned, Parent testified that she did not receive the assessment plan until it was given to her as a proposed exhibit in this matter in October 2016.
- No evidence was presented that the assessment plan was received by Parent prior to that date.
- While Student needs to be reassessed so that an IEP team may determine his proper level of support and services, District did not establish that it properly notified Parent prior to filing this action. District may not assess Student pursuant to the June 6, 2016 assessment plan without parental consent.
- As of the date of the decision District may again request a hearing to conduct an assessment of Student pursuant to that plan.

To Obtain 45-Day Placement

- An LEA can file a due process complaint to request a change in placement if it believes that **maintaining a student's current placement is substantially likely to result in injury to the student or others.**
- The expedited due process hearing must occur within **20 school days** of the date the complaint requesting the hearing is filed. The hearing officer must make a determination within **10 school days** after the hearing.

34 CFR 300.532.

To Obtain 45-Day Placement

- If a hearing officer determines that maintaining the student's current placement is substantially likely to result in injury, either to the student or to others, he/she can order that the student be placed in an interim alternative educational setting (IAES) for **up to 45 school days**.
- The LEA can repeat this process if it believes that returning the student to the original placement is substantially likely to result in injury to the student or to others.

Is Student's Continued Placement Substantially Likely to Result in Injury?

- Highly fact dependent.
- Hearing officers will likely consider the nature, extent, and frequency of the student's conduct.
- Verbal threats, without any physical injury, are generally not sufficient to create a substantial likelihood of future dangerous conduct.

Honig Injunctions

- In *Honig v. Doe*, 559 IDELR 231 (U.S. 1988), the Supreme Court held that school officials can, in some instances, ask the courts to modify the placement of a dangerous child.
- The U.S. Department of Education has indicated that the IDEA provisions governing a student's removal to an IAES do not restrict a district's flexibility in dealing with dangerous students or bar districts from seeking court-ordered removals.
- These procedures for removal by a hearing officer are considered to be in addition to, rather than instead of, the long-settled discretion to apply to a court for a Honig injunction.

Interim Alternative Educational Setting

- The student's IEP team determines the student's interim alternative educational setting.
34 CFR 300.531.
- What constitutes an appropriate IAES will depend on the circumstances of each individual case. 71 Fed. Reg. 46,722 (2006).
- While the IDEA does not specify the alternative setting in which educational services must be provided, the alternative educational setting must be selected so as
 - To enable the child to continue to participate in the general education curriculum, although in another setting, and
 - To progress toward meeting the goals set out in the child's IEP.34 CFR 300.530 (d)(1).

Is Student's Continued Placement Substantially Likely to Result in Injury?

Capistrano Unified School District v. Student (OAH No. 2015120782)

- 5 year old student engaged in extended episodes of climbing, eloping, hitting, kicking, biting, and running. Incidents sometimes lasted an hour or two, and sometimes resulted in staff members seeking medical treatment.
- The district requested an expedited due process hearing seeking an order to move the child to an IAES.
- Both staff members and the student had already sustained injuries as a result of the child's behavior.
- The episodes were increasing in duration and intensity and other students were likely to suffer injury as well.

Is Student's Continued Placement Substantially Likely to Result in Injury?

Capistrano Unified School District v. Student (OAH No. 2015120782)

- Hearing officer rejected the parent's claim that the student could remain in his current setting if the district provided an aide as required by the IEP. But the district took numerous steps to address the behavior, including providing a BIP and trained intensive behavior intervention aides.
- None of the district's efforts helped reduce or eliminate Student's aggressive or eloping behaviors.
- The highly structured private school selected by the district was an appropriate IAES.
- The hearing officer granted the district's request to place the student in an IAES for up to 45 school days.

Is Student's Continued Placement Substantially Likely to Result in Injury?

Sacramento City Unified School District v. Student (OAH No. 2015090559/2015090053)

- The District sought to remove Student from Kennedy High School because it discovered him attempting to order a crossbow, a ninja star, and two knives from the internet, using his school computer account.
- Further investigation found that Student had inappropriate, possibly pornographic, images on the school account.
- However, Student's continuing presence as a pupil on the campus of Kennedy, in a special day class for emotionally disturbed students, and one or two general education classes, was not substantially likely to result in injury to Student or others, in relation to the attempt to order various items via computer.

Is Student's Continued Placement Substantially Likely to Result in Injury?

Sacramento City Unified School District v. Student (OAH No. 2015090559/2015090053)

- Although the images found on his computer account were disturbing, and raised possible issues of a sexual disorder, the District did not meet its burden of proof that the facts establish a substantial likelihood of injury to either Student himself, or others on the Kennedy campus, based on this activity.
- Because the District did not meet its burden of proof in regards to the issue of possible injury to Student or others, there was no need to determine whether Northern California Prep was an appropriate interim alternative educational setting for Student.

A teal-colored background featuring a stylized mountain range with snow-capped peaks and a valley. The mountains are rendered in various shades of blue and green, creating a sense of depth and texture. The overall aesthetic is clean and professional.

Factors to Consider

- Provide detailed documentation of past behavioral incidents and resulting injuries.
- Provide evidence that the district adequately attempted to address the child's behavior in his current setting.
- Ensure proposed IAES is appropriate.

To Authorize Implementation of IEP Over Parent's Objection

- Must balance parents' right to consent (or not consent) to services v. LEA's duty to provide FAPE
- The law is different
 - Parents' Refusal to Consent for Initial Services
 - Parents' Refusal to Consent After Services Have Been Provided to a Child Who Remains Eligible

Initial IEPs

- LEAs **May Not**:
 - Provide services to child if parent fails to respond OR refuses to consent to initiation of services
 - Use due process/mediation to obtain ruling or agreement that services may be provided

34 C.F.R. §300.300(b)

Initial IEPs

- LEAs are required to:
 - Seek to obtain informed consent from parent before providing services
 - Document “**reasonable efforts**” to obtain informed consent from parent for initial provision of services

34 C.F.R. §300.300(b).

- Reasonable efforts include:
 - Detailed records of phone calls made/attempted and results of calls
 - Copies of correspondence sent to parents and responses received
 - Detailed records of visits made to parent’s home or place of employment and results of those visits

34 C.F.R. §300.322.

Initial IEPs

- **Should the LEA file for due process when parents refuse to sign the initial IEP?**
- NO. If a parent refuses to consent to the initiation of special education services, the LEA is not permitted to utilize due process to override the lack of consent.
- If the parent refuses to consent to the initiation of services or fails to respond to a request for consent, services must not be provided.
- The LEA will not be considered in violation of the requirement to make FAPE available, and the LEA will not be required to convene an IEP team meeting or develop an IEP.

(Ed. Code, § 56345(b) and (c)(1)(12).)

Unsigned Continuing IEPs

- LEA is **required** to initiate a due process hearing to override parent's refusal to consent when:
 - Parent has consented to special education services in the past
 - LEA determines that the program is necessary to provide FAPE
 - Parent refuses to provide consent to all or any part of services in an IEP(Ed. Code 56346(d), (f)).
- This is different than where a parent submits a written revocation of consent to all special education services.

Continuing IEPs

- **Can parents keep the last IEP in effect by refusing to sign the new IEP and by refusing to file for due process?**
- YES, because parent consent is required to implement a new IEP.
- Normally in such a situation the LEA should file for due process and is obligated to do so.
- The "stay put" provision of both federal and state law dictate that the student remain in the "then current educational placement" during the dependency of the administrative proceeding. In this case, the last agreed upon IEP would remain in effect while the matter was being adjudicated.

Unsigned Exit IEPs

- **Must an LEA continue services to a child if the parent refuses to sign an exit IEP? If the parent never files for due process what happens?**
- The LEA should continue to provide services to a child if the parent refuses to sign the exit IEP.
- If parent does not file for due process, the LEA should do so. The issue will be whether the student continues to be eligible for special education and the key evidence will be the district's last evaluation.

Timing Matters

I.R. v. Los Angeles Unified School District, 66 IDELR 208 (9th Cir. 2015)

- The Ninth Circuit Court of Appeals determined that a year and a half was too long to wait to file against a parent.
- The Education Code provides that “as soon as possible following development” of the IEP, “special education and related services shall be made available...”. (emphasis added).

Timing Matters

I.R. v. Los Angeles
Unified School District,
66 IDELR 208 (9th Cir.
2015)

- Thus, once the LEA determines that the component is necessary, and that the parents will not agree to it, the district cannot opt to hold additional IEP meetings or continue the IEP process in lieu of initiating a due process hearing.

I.R. v. Los Angeles Unified School District

- LEAs must have some flexibility to allow for due consideration of the parents' reasons for withholding consent to the component.
 - But, continuing to try to work with parents through the IEP process for a year and a half is not justification for delaying or initiating a due process hearing.

I.R. v. Los Angeles Unified School District

- LEAs must act with reasonable promptness.
- An offer of a FAPE is not enough to immunize an LEA from liability.
- An LEA's ability to file a due process complaint is foreclosed and it is relieved of its duty to provide a FAPE only "[i]f the parent of a child fails to respond to a request for, or refuses to consent to, an initial provision of special education and related services."

Is District's IEP Appropriate?

Dublin Unified School District v. Student (OAH No. 2016080413)

- District filed due process complaint seeking an order to transition Student from aide and behavior services provided by a nonpublic agency to aide and behavior services provided by the District as offered in its IEP over parent's objection.
- Hearing officer determined that in order to prove that its offer to transition Student from nonpublic agency provided aide and behavior services to District-provided aide and behavior services constituted FAPE, District was required to prove that the entire IEP offer constituted a FAPE.
- OAH does not have the authority to order that just that portion of the IEP be implemented without the consent of Parents.

Other Options to Consider Before Filing Due Process

- Ensure documentation of reasonable efforts to obtain consent
- Conduct a facilitated IEP or mediation with neutral party (Alternative Dispute Resolution)
- File for “Mediation Only” with Office of Administrative Hearings

Steps to Take Before Filing for Due Process

- Review student's file
 - When was student last assessed?
 - Are the assessments sound?
 - Was student assessed in all areas of suspected disability?
 - Is a reassessment warranted?
 - Are there any procedural problems?
 - Has the LEA provided parents notice of procedural safeguards?

Steps to Take Before Filing for Due Process

- Is the IEP substantively appropriate?
 - At the time of the IEP, what were student's identified areas of need?
 - Are all areas of need addressed in IEP?
 - Are goals measurable?
 - Are services appropriate?
 - Is placement appropriate?
 - Is placement in least restrictive environment?
- Consider hiring outside expert to review IEP for appropriateness.

Don't File Against a Parent When...

- You don't have a completed IEP.
- The IEP lacks clarity.
- Student is not participating in services.
- Student is truant.

ANY
QUESTIONS
?

Thank You!

Heather Edwards

edwards@girardedwards.com

GIRARD, EDWARDS, STEVENS & TUCKER LLP

8801 Folsom Blvd., Ste. 285

Sacramento, CA 95826

Tel: (916) 706-1255

Fax: (916) 706-2672

www.girardedwards.com