A Short Guide to Special Education Due Process

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by
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Introduction

Every school staff person who has contact with special education students likely will be involved in a due process hearing at some point. From 1991 to 2000, the number of reported due process hearings in the United States doubled from 1,574 to 3,020 (Ahearn 2002). With more than 12% of the school population receiving special education services, it is understandable that differences of opinion arise between school decision makers and parents; and many of these conflicts are settled by informal meetings, effective communication, and reasonable compromise. Unfortunately, there also are legal interventions that must take place, including due process hearings. Most school employees are not prepared for these hearings.

Among the mandates of the Individuals with Disabilities Education Act (IDEA) is the provision of due process for special education students and their parents. IDEA extends due process to the procedures by which children are determined to be eligible for special education and related services, placed in a school setting within the continuum of placement options, and provided with an individualized educational program. This
law firmly establishes education as a property right that government cannot deny without procedural and substantive due process (Murdick, Gartin, and Crabtree 2002).

Educators need a basic understanding of the principles behind the due process hearing system if they are to inform parents of their rights under IDEA, comply with legal requirements, and participate in hearings.
Due Process

Due process is a constitutional right guaranteed by the Fourteenth Amendment. Individuals may not be deprived of fundamental rights without due process of law. There are two aspects of due process, procedural and substantive.

Procedural due process encompasses the regulations governing eligibility, programs and services, placement, and progress evaluation. This aspect of due process is following the "letter of the law" — fulfilling federal or state regulations. These detailed requirements make it clear to all parties what must be done, by whom, and when. School administrators usually are knowledgeable about such due process procedures and make every effort to comply with them.

Substantive due process encompasses efforts to inform parents of their rights, ensuring their meaningful participation. This aspect of due process is promoting the "spirit of the law," or ensuring that parents are involved in their child's education. Because the law and its accompanying regulations do not provide detailed guidelines about substantive due process, educators vary in their attention to providing opportunities for meaningful parent participation.
Violations of substantive due process are more likely to result in requests for hearings than are violations of procedural due process. However, procedural violations can contribute to or exacerbate substantive violations, so school systems would be wise to not only attend to the details but also respond to the key issues. Hearing officers, representatives of the state education agency who decide due process cases, and courts generally do not rule against school systems for procedural violations alone, instead regarding substantive due process as more important (Osborne and Russo 2003). In addition, because neither hearing officers nor judges have expertise in education, they are not permitted to substitute their judgment for that of qualified school personnel who have followed best practice (Yell 1998).

Schools also have the right to request a due process hearing (Guernsey and Klare 1993). Such requests usually are made when parents refuse to consent to a request for evaluation, placement, or programming. Some legal experts advise schools to request hearings to protect themselves from damages if the parents themselves request a hearing at a later time (Gorn 1996). Though rare, in cases where a school believes that the family has coerced them into providing programs and services that are not in the best interests of the child, school officials may request a due process hearing if they cannot address the problem through other means.

Due process hearings have become a mechanism for extending the provisions of IDEA over the years. Although the findings of a hearing are applicable only in that specific case, several hearings with similar outcomes
may prompt a local or state education agency to revise its policies. Hearing decisions that are later contested in the courts can result in broader application at the state, regional, or even national level.

Because IDEA is a federal statute, any party not satisfied with the decision of the hearing officer may request review by a federal district court (Turnbull and Turnbull 2000). A decision made at this level usually is applicable to all schools in the judicial district. A district court’s ruling may be appealed to one of 13 federal judicial circuits, whose decisions then apply to all schools within that region (involving multiple states). Because circuit courts can issue conflicting rulings, different standards for practice have been established in different areas of the country, such as the two-prong or four-prong test for inclusion or the varying interpretations of compensatory education. Finally, a circuit court decision may be appealed to the U.S. Supreme Court. If the Supreme Court justices believe there are constitutional issues or national implications, they may agree to hear the case. Supreme Court decisions have the force of law and immediately become binding across the entire country.

There have been only a handful of Supreme Court decisions related to special education. The early cases focused on defining the programs and services for which schools are now responsible by law. In 1982 in the case Board of Education of the Hendrik Hudson Central School District v. Rowley, (458 U.S. 176) the Court defined an appropriate education as services planned in accordance with legal requirements for the IEP and sufficient
to allow the student “some educational benefit” (but not necessarily designed to promote maximum progress). This two-prong test has affected the outcomes of many due process hearings.

**Due Process Procedures**

School administrators, teachers, and other school personnel are often called or subpoenaed as witnesses for hearings. Records of interaction with the student in question should be saved and presented if requested.

IDEA requires each state to have due process procedures in place. Hearings must be held at the state level before they are appealed to the federal courts. Some states have a two-tier system where a local hearing precedes a state hearing. The hearing officers are determined at the state level. States often require officers to be lawyers or professionals who are very knowledgeable in special education.

Most due process hearings begin at the local level. Most often the parents have an issue that cannot be resolved. For example, school personnel may feel a student is in need of special education services, and the parents challenge that decision. Another common source of disputes is the IDEA requirement that all students with special education needs be placed in the “least restrictive environment.” Some organizations feel this automatically means the regular classroom.

There are five issues that must be addressed in all due process situations: identification, evaluation, program, placement, and curriculum.
Identification. In order for a student to receive special education services, he or she must meet federal, state, and often local identification criteria. Each state and local school system must justify the programs they use for identifying children who need special education services. This includes communication with physicians, hospitals, family centers, public announcements, etc. While parents often recognize their child’s need for special education, perhaps the most important source for identification is the general classroom teacher.

A request for special education from either parents or school personnel requires a student evaluation. Some state school systems require school based assistance teams for the identification process. Identifying a potential disability requires appropriate assessments. Rarely are there due process hearings at this stage of the special education process, though disagreements do occur.

Evaluation. Identification must be separate from evaluation. Some children who have obvious physical handicaps may not need special education services. Others with learning disabilities or mild mental retardation may show no physical signs for special education needs. Formal and informal evaluations are needed. Each public agency must conduct a full and individual multidisciplinary evaluation of a student’s needs before any action is taken toward placement for special education services.

Teachers are equal members of multidisciplinary evaluation teams. They have great input into the evaluation process. They may be asked to comment on their observations of a student and offer recommendations for or against special education consideration.
Parents may seek an independent evaluation. Some parents may find it difficult to accept evaluations that do not meet their own criteria. If results of different evaluations differ, this could lead to a due process hearing. If the school personnel or parents feel additional specialized evaluations are needed to verify eligibility or are necessary for developing the most appropriate program, evaluations must be given with or without permission from either party. The student’s education is the critical factor.

**Program.** The Individual Education Program (IEP) is considered the heart of special education. It must detail the child’s current level of functioning, long-term goals, short-term objectives, program modifications, degree of inclusion, dates of service delivery, transition statement for students 14 and older, measurement strategies for annual goals, and objectives for the parents to complete in the home for infant and early childhood education. The 1997 amendments of IDEA require general education teachers and related service personnel, such as speech therapists, physical therapists, and school counselors, to be present and to contribute to the IEP development and revisions.

Parent involvement is very much encouraged, from serving on IEP development committees to assisting in teaching program objectives. Parents are required to sign the IEP before it can be implemented. The IEP is a legal document; and at any due process hearing, the IEP is paramount to a hearing officer’s decision.

General education teachers are expected to be prepared to modify the scope and sequence of their curriculum
when needed. This often involves allowing extra time, repeating instructions, providing advanced organizers, using peer tutors, and greater interaction with parents. Because issues arise when either the teacher or parent feels the program is not meeting the student’s needs, it is important for both parties to have documentation to support their positions. The documentation may be test scores, samples of the student’s work, written observations of the student’s and teacher’s efforts and behavior, and the effect the special education student has on the rest of the class.

Many states require all teachers to have preparation in teaching students with disabilities in general education classes. Five-year teacher preparation programs are becoming more common to meet this goal (Lombardi and Hunka 2000). Seasoned teachers may need to have continuous special education inservice training as new methods and strategies are developed (Lombardi 1999).

**Placement.** Studies indicate that placement is the number-one issue leading to a due process hearing. Placement decisions are determined by the student’s IEP, and a continuum of service configuration is required by law. Basically this means that students may receive special education services in a variety of environments, including general classes, resource rooms, special classrooms, private schools, residential schools, and hospital settings. Placement in the “least restrictive environment” has become an issue when parents and school personnel disagree on what that means.

Placement issues often are quite difficult to resolve without a due process hearing. During a due process
hearing, students should remain in their IEP placement until a final decision is reached and all court appeals are recognized. If a change of placement is being considered, the special education process needs to be reactivated, including developing another IEP.

Curriculum. It is possible, but often difficult, to have more than one curriculum in a classroom. To do so usually requires an extra teacher who is certified to teach special education. Curricula may give focus to a special student’s particular needs, such as social skills for behavioral problems or functional skills for moderate to severe mental retardation. These curricula are taught primarily in resource rooms or special classes or schools. Decisions often are based on the severity of the problem and the realistic resources of the school system. However, as more supportive services become available, particularly technology, eclectic curricula are becoming more common.

Even after extensive modifications, the general curriculum may not be in the best interest of some students. A social, functional, or vocational curriculum may be needed even if it is offered in the general classroom. Both parents and school personnel should keep considerable records and documentation in case of disputes over curriculum issues.

School Perspectives on Due Process

School leaders want to ensure that the due process procedures are fair, the cost to schools in time and money is limited, and the adversarial nature of the proceedings are
minimal. They want the system to effectively and efficiently implement the mandates of IDEA.

Due process hearings are expensive and time consuming for schools. One study found that school staff spent eight hours in preparation for each hour of testimony (Havey 1999). Nevertheless, examinations of due process hearings in various states over the last 10 years have shown a significant trend toward more victories for schools (Archer 2002).

A school's case is more successful when the program they propose or provide is derived from research-based practices, when staff are well-qualified for their roles, and when administrators can present evidence of successful outcomes for students (Yell and Drasgow 2000).

In the last decade, the issues that led most frequently to hearings have been inclusion of students with more severe disabilities (Osborne and DiMattia 1994), functional analysis and behavior support (Drasgow et al. 1999), special programs for students with autism (Feinberg and Vacca 2000), especially discrete trial training (Yell and Drasgow 2000), and transition to post-school services (McAfee and Greenawalt 2001).

Many educators believe that adversarial procedures hinder future collaboration between schools and families, resulting in less than optimal outcomes for students with disabilities (Turnbull and Turnbull 2001). Emotions run high and personal and professional sensitivities can be hurt in hearings. In addition, the decision might not solve the problem, fostering ill will between the parties (Goldberg and Huefner 1995). These concerns have led education leaders to call for mediation.
as a dispute resolution mechanism (Dobbs, Primm, and Primm 1991).

Mediation takes less time and costs less, arrives at a solution agreeable to both parties, and promotes cooperation between schools and families (Goldberg and Huefner 1995). In the IDEA amendments in 1997, Congress mandated that each state develop procedures to enable schools and parents to agree to voluntary mediation instead of due process hearings. In its annual report to Congress, the U.S. Department of Education (2001) noted that the people most committed to the child were the IEP team (which includes the parents), and that more energy needed to be invested in solving problems at that level. A recent government survey of data from four states found that while the number of hearings requested increased between 1996 and 2001, the number of hearings held decreased, suggesting the success of such alternative processes as mediation (U.S. General Accounting Office 2003). However, another study of dispute resolution processes in 12 states found that there is little integration across the components of state complaints and mediation, so state and local education agencies may not be making the most effective use of mediation and other approaches.

Parent Perspectives on Due Process

Parents are most likely to instigate a hearing when they have come to distrust the intentions and actions of school personnel (Margolis 1998). Thus parents and their advocates see due process rights as essential to mean-
ingful participation and informed decision making in special education (Osborne 1995). In a controversial report, the National Council on Disability (2000) examined compliance with IDEA provisions in schools nationwide. They found that noncompliance “is widespread and persists over time.” The report concluded that state and federal monitoring alone cannot guarantee a child’s right to an education and that the threat of court action permitted under IDEA remains a critical tool to assist parents in ensuring a free, appropriate, public education. The group offered a series of recommendations emphasizing the need to educate families about their rights under IDEA and to support them in their self-advocacy efforts, including due process hearings.

Parents believe (with some justification) that schools are more likely to prevail than parents in due process hearings. Parents consistently regard the due process system as unfair because schools have the resources to prepare and present their case more effectively (Goldberg and Kuriloff 1991). A recent study of due process hearings held between 1997 and 2002 in Illinois found “substantial inequality” between parents and schools in the outcomes of those actions (Archer 2002). Schools were represented by attorneys in more than 90% of these cases, while parents were represented by attorneys in fewer than half. Overall, schools prevailed in more than 70% of hearings, but parents were almost three times as likely to win with an attorney, suggesting a relationship between access to legal assistance and the outcome of the case. The study also found a significant drop in the number of cases won by parents over the five-year pe-
riod, with certain hearing officers making all or nearly all decisions in favor of schools. In light of these data, parent and advocate groups are concerned about recent proposals to amend IDEA to include a provision to limit fees for attorneys and experts and to support binding arbitration agreements (DREDF 2003).
Roles and Responsibilities in Due Process Hearings

A due process hearing is a complicated process that demands a thorough knowledge of the law and administrative procedures. Each hearing involves people who represent the school's position or the parents' position and who present the evidence to the hearing officer. Hearing procedures not only may be unfamiliar to many educators and families, but they also can be intimidating. Hearings operate more smoothly and are less stressful when everyone involved understands their roles and responsibilities.

School Personnel

Schools inevitably will be involved in due process hearings, especially if they serve large numbers of students with disabilities. Schools are less likely to initiate a hearing and are much more likely to be forced to respond to hearings requested by parents. Consequently, they often find themselves defending a position, rather than arguing for one. All school staff should understand their roles and responsibilities in the process to ensure they present an effective case for their position, to
improve the chances of a favorable decision by the hearing officer, and to promote effective education programs for students with disabilities.

Administrative Staff. Administrative staff, especially the director or coordinator of special education, play key roles in any due process hearing. District staff may decide to negotiate with a family or to seek mediation before a hearing. They also decide what is the school's official position and how existing school policies will be affected by its outcome. The school administrator may be required to present documents that will be used as evidence or to give testimony about school policies and procedures. Administrators who are trained and licensed in special education also may be asked to testify as expert witnesses.

School Attorneys. Most schools retain or employ the services of an attorney who specializes in education law. School attorneys generally have experience with due process hearings, though the school might hire an additional attorney who specializes in due process hearings or disability law. The school attorney should be knowledgeable about IDEA provisions and regulations, as well as other laws that relate to disabilities in schools. The attorney is responsible for the school's legal strategies during hearings, for filing the required paperwork and summoning participants to represent the school, and for examining the school's witnesses and cross-examining the family's witnesses.

Special Educators. Special educators and related services specialists will be asked to provide such documents as IEPs, lesson plans, and progress records and to provide testimony during the hearing about their perceptions of
and interactions with the student and family. Other teachers and therapists also may be asked to observe and comment on the student, the program, or the documents to bolster the school’s case that its position is based on sound professional judgment.

General Educators. Elementary and secondary education teachers, or those who teach subjects such as art or music, physical education, or home economics and vocational education, also have a role to play in a due process hearing. In cases that involve inclusive placements, programs, or practices, general education staff may be asked to testify concerning their actual or potential instruction of a student with a specific disability. They may need to provide such documents as lesson plans, work products, or grade reports and to testify about their involvement with a student and family. Or they may be asked to review records and observe a student to comment on possibilities and problems in a proposed inclusive placement.

Paraprofessionals. Paraprofessionals who are extensively involved in the education of children with disabilities may be called on to testify. Their interactions with a student and their impressions of his or her performance can be important for supporting the school’s position. However, paraprofessionals do not have the same training and qualifications as professionals, so their testimony may be given less weight.

**Family Representatives**

Most families of students with disabilities will never be involved in a due process hearing. Many families are
satisfied with the programs and services their school offers, and even those who are not satisfied often choose not to contest them. However, some families will feel compelled to request a hearing in circumstances where they believe their child’s rights have been denied. Families usually need to secure assistance from relatives, friends, advocates, and attorneys to prepare a strong case and to present compelling evidence if they want to convince the hearing officer to support their position.

*Parents.* Parents have multiple roles in any due process hearing. Their role can be as simple as providing information or as complex as overseeing the presentation of their case. Regardless of their level of participation, parents must make every effort to understand the issues and legal principles involved and to discuss them with their attorney or others working on their case. Parents must represent their child’s abilities and performance accurately and must provide access to all relevant records so that the professionals assisting them can present the best arguments for the family’s position.

*Parents’ Attorneys.* Each state is required to staff a Protection and Advocacy Agency to assist people with disabilities and their families in securing their legal rights, and these agencies often have a staff or contract attorney who may agree to take on a specific case at no charge to the parents. If this is not possible, parents will need to seek out a private attorney who will request only minimal payment or will agree to participate as part of the professional duty to provide *pro bono* services. In larger towns and cities, parents may be able to find an attorney who has experience with due process hearings.
The parents' attorney is required to file the request for a due process hearing, ask school personnel to provide specific documents and secure other evidence, select and summon appropriate witnesses, and examine and cross-examine witnesses during the hearing.

*Lay Advocates.* In some states, lay advocates are permitted to serve as attorneys in due process hearings; many of them have advanced training, and some charge fees for their services. Lay advocates also can be helpful in providing parents with information and support throughout the process. Parents can obtain referrals to advocates in their area by contacting the Protection and Advocacy Agency or the Parent Training and Information Center for their state. When the parents' attorney has little knowledge about IDEA or prior experience with hearings, the lay advocate can play a critical role in determining the legal strategy, identifying expert witnesses, and recommending documents to be presented as evidence.

*School Staff.* Parents may choose to call school staff who are sympathetic to their position to testify on their behalf. This places the staff member in an awkward position with the school administrators, who may not approve of this testimony even though they are powerless to prevent it. Educators as professionals have an ethical responsibility to act in the best interests of the students they serve, so they must decide whether they will testify for parents with that in mind. Fortunately, most school districts recognize that their staff have a right to express their own opinion and a responsibility to tell the truth in any legal proceedings.
Students. It is not unheard of to involve the student in the due process hearing. Older students with minimal disabilities may be directly involved in their own case, assisting their parents and the attorney in planning and conducting the hearing. Students with appropriate communication skills may be asked to testify, to relate facts about incidents that occurred in school or at home, or to express their preferences about programs and services. Even students with minimal communication skills may be brought to the hearing to allow the hearing officer to gain a better appreciation of the student's abilities.

The Hearing Officer

The hearing officer is charged with determining whether a hearing is needed, conducting the hearing itself, and rendering a decision in the case. Many hearing officers are attorneys who have been selected for their legal expertise and prepared by the state education agency for their involvement in the due process system. To serve as the hearing officer in a particular case, they must not have any current or prior involvement with either party, which could represent a conflict of interest.

Witness Preparation

Educators may be called to participate as witnesses in a due process hearing. Typically, the attorney representing the party that has called for an educator's participation will contact the educator to discuss his or her role in the case and to assist in preparing for the hearing. Most
educators will be called as factual witnesses in a hearing to report on actual events they participated in or witnessed. Factual witnesses are responsible for relating as clearly as possible any events they participated in or witnessed to the extent that they are able to recall them. Factual witnesses who do not provide accurate information commit an act of perjury and may be liable for prosecution. Educators who are factual witnesses should avoid introducing elaborations, opinions, or second-hand facts (hearsay evidence). If telling the truth will create some personal jeopardy, the witness should consult with an attorney beforehand.

In rare instances, witnesses may wish to consult a private attorney if they believe that either party in a case may be trying to put them in a position to bear some liability for improper actions. It is possible that a teacher could admit to actions for which he or she could later face criminal charges. It is helpful if the teacher is represented by an attorney during any prehearing discussions, as well as during testimony.

Schools usually rely on the combined expertise of their own staff, but they may resort to calling an expert witness in sensitive or complicated cases. An expert witness is an individual who has little or no prior contact with the student or family or direct knowledge of the facts of the case, but who does have extensive knowledge and experience related to the key issues. Expert witnesses have a special status in that they are not limited to presenting facts but may be asked to share their opinion or professional judgment based on their training, experience, and expertise. Because expert witnesses do not
have factual knowledge related to the case and must agree to offer their testimony, neither side can compel them to testify in a specific case. In addition, they may request compensation for their efforts (both prior to and during the hearing) in the form of fees for service or honoraria or reimbursement for any expenses.

Experts are generally professionals with advanced or terminal degrees (especially doctorates) and substantial experience related to the facts and principles at issue. Expert witnesses can be any professional whose experiences are relevant to the issues of the case, such as researchers who have published work on inclusion, school psychologists who have worked with testing disabled students, or university professors who teach courses on behavioral management.

Expert witnesses usually do not need to consult an attorney for activities related to their participation in a due process hearing. However, professional educators who plan to serve as expert witnesses are advised to ensure that their liability insurance covers such testimony. If the school or parents believe that an expert’s testimony was not based on sound professional judgment or violated the law in some way, they could pursue legal action against the expert in an effort to establish grounds to reverse the ruling.
Preventing Due Process Hearings

Good communication between parents and schools is the most important deterrent to litigation. Parents, teachers, and administrators should inform each other of behavior and academic problems as soon as they appear, rather than waiting for referral to special education.

The first step is to establish home-school meetings. These meetings should be informal but with guided questions to focus on the child's problem. Meetings may be held at either the home or the school. If home and school arrangements cannot be met, communication should take place through phone calls, letters, and e-mail. By the end of the meeting, both teachers and parents need to develop and agree on a realistic plan. These meetings need to end with a summary, and both parties should agree on a date for the next meeting.

It is very important to establish a concerned relationship without blaming the home or school for the problem. Once parents realize the teacher cares as much as they do, their trust and respect will build. Educators also need to listen intently to the parents' concerns and suggestions. And educators should be particularly careful not
to use jargon when meeting with parents. According to Margolis, teachers' use of jargon "confuses most parents, causes misunderstanding, and decreases the ability of parents to remember what was said" (1998, p. 248). One method for avoiding misunderstandings is to have both parents and educators paraphrase the others' comments and suggestions.

Both parents and school personnel need to monitor and assess the intervention strategies. Working as a team, this early intervention can prevent home-school conflicts before they arise.

A more formal basis for prereferral intervention is through teams established at schools to solve problems. Many states have incorporated these teams into their special education regulations (Buck et al. 2003). Survey studies (Carter and Sugai 1989; Buck et al. 2003) conclude that the basic principles for such teams are:

1. Provide intervention before referral to special education.
2. Assess data, develop hypotheses, and use strategies to remediate difficulties.
3. Respond to the referring teacher with assistance and evaluation in terms of effectiveness.
4. Use the intervention process in the general classroom and the general curriculum.

The intervention time for the team can vary, but rarely should it exceed one year. Naturally, the kind of assistance needed depends on the problem. It may involve modified teaching strategies, assistance in implementing a behavior modification program, developing curricu-
lum-based assessment procedures, peer tutoring, etc. Frequent evaluations and reporting are necessary so that progress can be documented.

Many schools have established school-based assistance teams (SBAT). They attempt to prevent the need for special education referral. Though more formal than the home-school intervention approach, all the recommendations about keeping parents informed and involved are still applicable. Parents need to hear about positive performance, and educators need to hear about generalizations that occur when the student is not in school. When the parents have input into the assistance team plan, they are more likely to agree to a next step should referral to special education become necessary. At that point, the special education process begins and parents are now legally required by federal and state law to be equal partners in making further decisions, including assessment, eligibility, curriculum, and placement.

There are a number of practices that should be followed to avoid home-school conflicts. They include:

- Making sure the parents' concerns regarding their child are addressed at every meeting.
- Developing an Individual Education Program (IEP) with parents' input, rather than presenting one that is ready for their signatures.
- Establishing realistic, personalized IEP goals and objectives that are agreed on and are measurable.
- Presenting documented data and observations so that parents are kept aware of their child's progress, as well as any problems.
• Allowing flexibility so that modifications are possible.
• Recognizing that parents know their child best and can provide such information as interests, after-school activities, functional and emotional behavior, etc.
• Ending each parent-school meeting by summarizing and seeking agreement to any plan that is developed.

There is little doubt that considerable time, talent, and skills are needed to make special education effective for eligible students. Developing and maintaining a respectful, cooperative, and empathetic relationship with parents is necessary to avoid conflicts.

Even when all the above methods are followed faithfully, problems will arise. In those cases, the parents and school should attempt mediation before engaging in a due process hearing.

IDEA requires states to use mediation procedures before entering a due process hearing. State departments of education provide impartial, trained mediators. However, IDEA requires only that mediation be made available; parents can refuse to use it.

In the past eight years the Texas Education Agency received a total of 3,637 referrals for special education mediation and conducted 1,108 mediation sessions. According to Susan Sellars, program administrator for Texas Division of Complaints Management, the amount of estimated savings were $50 million dollars in due process attorney fees and related expenses (Sellars 2001). The Texas Education Agency paid $1,000 for me-
diation costs, compared to $10,000 for each due process hearing. The results of a two-year survey (Sellars 2001) found that 91% of those who participated in mediation were satisfied with the mediation process. Regardless of the savings, mediation also protects the healthy relationship between parents and school personnel.
Outcomes of Due Process Hearings

After a due process hearing has been conducted, the hearing officer is required to make a formal decision and to submit it in writing to both parties, as well as to the state education agency. Because these hearings are considered to be administrative, rather than legal, proceedings, the hearing officer makes the decision based on the facts of the case and on all applicable laws and regulations, both federal and state. IDEA requires that a decision must be handed out no later than 45 days after the hearing is held, and it is not uncommon for cases with many complicating factors to need all of that time. Usually the decision is written in a specific format, presenting the facts of the case, followed by the legal principles on which the decision is based, and closing with the decision itself and the order specifying what, if any, action the school is required to take.

The hearing officer’s decision usually falls into one or more of several categories: placement, delivery of specific services, IEP revision, tuition reimbursement, and compensatory education.

Placement. In cases involving disagreement about the most appropriate placement for a student, the hearing
officer can order a specific placement to be made if he or she believes that either the school or the parents have demonstrated convincing evidence that the placement is needed. For example, numerous cases focus on inclusion of students in neighborhood schools or in general education classrooms, which the parents prefer but the school feels is inappropriate. After consideration of the student’s abilities and needs, the hearing officer can decide to require that the student be placed in a more inclusive setting or program or to deny the change in placement requested by the parents.

*Delivery of Specific Services.* Some hearings concern the nature and amount of education and related services provided to students with special needs. Quite a few cases have addressed the provision of special services, such as nursing care for students with health impairments, therapies for students with physical disabilities or communication disorders, or such support services as assistive technology or transportation. It is within the hearing officer’s purview to order that such services be provided or that the frequency of their delivery should be changed.

*IEP Revision.* In cases where the hearing officer believes that the current placement or services are not appropriate, he or she may choose to order that the IEP team be reconvened to revise the student’s individual program plan, including placement and services. This decision usually is reserved for instances where the school failed to follow procedural due process (by missing deadlines or omitting steps) or substantive due process (by failing to ensure that parents are encouraged to participate in a
meaningful way and helped to understand all options. If the hearing officer believes the appropriate program for a student lies somewhere between the extremes of what the school and the parents want, the officer might order the team to add the parents' goals and to develop a different program.

_Tuition Reimbursement_. IDEA allows parents to be reimbursed for tuition payments when the placement is determined to be appropriate (Osborne and Russo 2003). When parents unilaterally place their child in private or residential schools, they often request the public school to reimburse tuition costs. If the hearing officer decides that the placement was appropriate, the parents were justified in acting on their own, and the school should have provided the program or service, the school can be ordered to reimburse the parents for the tuition they have paid. However, if the hearing officer determines that the parents acted without giving the school the opportunity to agree to the private or residential placement through the standard referral and placement process, tuition reimbursement may be denied to the parents, even though the school is ordered to pay for the placement after the hearing.

_Compensatory Education_. Compensatory education is the award of additional services beyond what is required by law (Gorn 1996). If schools fail to provide programs and services needed by a student, the hearing officer may order compensatory education in addition to provision of the required programs and services in the future. Compensatory education can include services provided outside of the school day, extended school year services,
and even programming to young adults over the age of 21 (Zirkel and Osborne 2001; Yell 1998). Compensatory education is most commonly ordered in cases that involve a substantial violation of rights or less than minimal benefit (Turnbull and Turnbull 2000). Compensatory education may not be appropriate unless the additional programs or services can be shown to provide an educational benefit for the student. In addition, families and their advocates should remember that more time in the same inadequate program or with the same ineffective teacher is not likely to provide much benefit at all.

**Types of Appeals**

IDEA requires each state education agency to establish an appeals process to review the decisions of hearing officers and to determine whether they are consistent with law and policy. When the hearing officer hands down a decision, the school and parents must abide by that decision unless either party decides to contest it. Regulations generally require schools to implement the decision within a minimum number of days following its publication.

Both parties have the right to challenge the hearing officer's decision by following a prescribed process that involves two levels of appeal, administrative review by personnel designated by the state education agency and legal review by civil courts in the federal judicial system. Either the school or the parents may pursue these appeals, though in practice it is uncommon for either party to appeal a decision. Schools typically appeal a decision when the order requires significant expense or
sets an undesirable precedent, while parents are most likely to appeal when they believe the case addresses a serious issue. In either case, no party may seek intervention by the courts until all available administrative remedies have been exhausted or it is determined that administrative appeals would be futile (Osborne and Russo 2003).

Administrative Appeals Process. In states that use a two-tier due process system, the first level of appeal for a hearing officer’s decision is an administrative appeal. This review usually involves sending the written decision, the transcripts, and documentation to a third party for review.

Judicial Appeals Process. In states that use a one-tier due process system or in other states following an administrative review, parties can appeal a hearing officer’s decision through the civil court system. The initial judicial appeal is made to the federal court, whose decision may then be appealed to the circuit court, with the final appeal being made to the Supreme Court when appropriate. Each appeals court does not re-hear the case but reviews the record to determine if an error has been made in reaching the decision (Yell 1998). The court may choose to accept or reject additional documentation or testimony presented by either party (Osborne and Russo 2003).

Outcomes of Judicial Appeals

When a due process decision is appealed in the judicial system, the courts may choose from a variety of solutions. Each court may reinforce the initial decision
(or the lower court’s ruling) and order its implementa-
tion, reverse the decision and order a different action to
be taken, or remand the case for re-consideration by the
hearing officer (or lower court). Courts have the au-
thority to order several remedies that are beyond the
scope of the hearing officer’s authority. Actions courts
can take include:

*Injunctions.* A court may issue a temporary or per-
manent injunction preventing either party in the case
from engaging in some action. Either the family or the
school can request an injunction, but they must con-
vince the court that their case is sufficiently strong or
that the harm to the student would be significant
(Mattison and Hakola 1992).

*Attorney Fees.* Courts also have the power to decide
whether schools must pay attorney fees incurred by par-
teys during due process hearings. Schools see attorney
fees as a drain on limited financial resources and an in-
centive for families to initiate complaints, while parents
and their advocates see attorney fees as critical to en-
suring IDEA rights and fairness in due process hearings.

*Damage Awards.* Courts sometimes consider the ques-
tion of whether the school should pay punitive damages
when an intentional deprivation of rights has occurred
(Murdick, Gartin, and Crabtree 2002). Damage awards
are unlikely to be considered in a case unless there is con-
vincing evidence that the school has acted knowingly
and deliberately to violate IDEA provisions in provid-
ing services to a child.

*Contempt Citations.* If either party in a case fails to fol-
low the court’s ruling, the court may issue a citation for
contempt. Individuals held in contempt may be fined or imprisoned until they comply with the court order (Osborne and Russo 2003). In practice, it is rare for families or school officials to delay compliance to such an extent as to provoke a contempt citation.

Other Responses After Hearings

When schools do not agree with the hearing officer's decision, they typically do not choose to appeal it; but they may take alternative actions to avoid having to operationalize it. Schools usually appeal hearing decisions only when they will lead to significant costs, such as purchasing expensive equipment, or when they set a precedent that will lead to more hearings by other dissatisfied parents. Instead, school staff may try to rewrite the IEP at the next annual meeting or revisit the placement at the next major review to ensure that their preferred placement or programs will be approved over parental disagreement or to position themselves for a successful outcome in a subsequent hearing. Unfortunately, some disgruntled staff may attempt to thwart a hearing officer's decision by failing to implement the placement or services as ordered. A few will even treat the parents or the child in negative ways to provoke the parent into removing the child from school or even moving out of the district. When schools do not comply fully with the hearing officer's decision or when they retaliate against the child or parents, collaborative efforts are impaired and the child's educational progress is threatened.
Parents who do not agree with the hearing officer’s decision but decide not to appeal it, or whose appeal is unsuccessful, also have other recourse. Sometimes families remove the student from the school to attend a private school nearby or for home schooling. Some families move out of the area in order to place the child in another school system where they believe they will get the placement or services they desire. This practice is especially common near state borders or in regions where some school systems have more inclusive philosophies or better resources. When dissatisfied parents move a child from school to school (or home) multiple times in a short period, it disrupts the quality and continuity of the educational experience and delays acquisition of key knowledge and skills. Such parents may become distrustful of all educators, making it difficult to build home-school partnerships and to secure the best program for their child.
Conclusion

Due process hearings are an integral component of providing special education and related services for students with disabilities in elementary and secondary schools. Since the passage of the Education of All Handicapped Children Act more than 25 years ago, there has been a shift from an emphasis on equal access to public education for children with disabilities to a renewed focus on equal outcomes and school accountability for those outcomes (Katsyannis, Yell, and Bradley 2001). This shift, coupled with changes to IDEA and the newer mandates of No Child Left Behind, suggests that the incidence of due process hearings is likely to increase. With greater numbers of students with disabilities participating in inclusive schooling activities, it is more important than ever before that all school personnel understand what due process hearings are, why they are needed, how they work, and what their own roles might be.

Too often, educators resent or fear the due process hearing system, believing it represents a lack of trust in their expertise or an attack on their judgment. Unfortunately, the adversarial nature of most state systems and
the involvement of attorneys representing both sides often heightens this sense of the hearing as a contest. Since American culture values winning and despises losing, educators and family members involved in a due process hearing often feel an antagonism toward one another that can damage their working relationship long after the hearing. To counteract this tendency, educators and families must view hearings as a useful mechanism for resolving disputes.

As educators come to appreciate the importance of the due process hearing in safeguarding the rights of individuals with disabilities and their families, they will be empowered to offer parents better information about and more meaningful opportunities to participate in their child’s education. They also will be better prepared to interact with families and professionals in a professional manner before, during, and after hearings.
References


Drasgow, E.; Yell, M.L.; Bradley, R.; and Shrinir, J.G. "The IDEA Amendments of 1997: A School-Wide Model for Conducting Functional Behavioral Assessments and De-


Lombardi, T.P., and Burke, D. “To Test or Not to Test.” *Exceptional Children* 32 (September/October 1999): 26-29.


**Internet Resources**

Association for Conflict Resolution
www.acresolution.org

Council of Parent Attorneys and Advocates
www.copaa.net

Disability Rights Education and Defense Fund
www.dredf.org

National Association of Protection and Advocacy Systems
www.napas.org
National Association of State Directors in Special Education
www.nasdse.org/home.htm

National Council on Disability
www.ncd.gov

Parent Training and Information Centers
www.taalliance.org/Centers/PTIs.htm

Wrightslaw Law Library
www.wrightslaw.com
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Trade paperback. $17.95 (PDK members, $13.95)

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