Special Education Due Process Hearings

by

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Prior to the enactment of the precursor to the IDEA in 1975, children with disabilities had no right to an education and their parents had no specific rights to insist on input about their child's education. Twenty-five yers later, "due process" has come to mean an amazing myriad of procedural safeguards which parents must successfully navigate to assist their children. This article will examine the basics of special education due process. It is not designed to be legal advice specific to any child's particular situation. Parents are encouraged to learn about their rights through publications, websites, and parent groups and to consult attorneys about their individual child.

What is Due Process?

The term "due process" comes from a long body of constitutional law in our country. The United States constitution requires that individuals may not lose certain "rights" without an ability to protest through a system of litigation. The "right" which children with disabilities have which is entitled to the protection of due process is the right to an education.

The right to an education for students with disabilities came to the forefront through two court cases that addressed the question of what constitutional rights applied. These cases were *Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania* and *Mills v. Board of Education of the District of Columbia*. These two cases recognized constitutional principles that have since been embodied in the Individuals with Disabilities Education Act. In PARC, mentally retarded children sued the state, claiming that they were denied the right to a public education. The suit was based upon three claims: (1) a violation of due process because there was no notice or hearing provided before retarded children were excluded from public education or their educational assignments were changed; (2) a violation of equal protection due to the lack of a rational basis for assuming that mentally retarded children were uneducable and untrainable; and (3) a violation of due process because it was arbitrary and capricious to deny mentally retarded children a right to the education guaranteed by state law.

The parties in PARC reached an agreement that basically provided that no child who was disabled could be assigned initially (or re-assigned) to either a regular or special educational status, or excluded from a public education without a prior recorded hearing before a special hearing officer. The PARC agreement defined the essence of the hearing process that we recognize still today: parents have the right to representation by counsel, to examine their child's records, to compel the attendance of school officials who may have relevant evidence to offer, to cross-examine witnesses testifying on behalf of school officials and to introduce evidence of their own.

The significance of *Mills* must and its relationship to the present system which prohibits outright exclusion of children with disabilities, despite behavioral problems, cannot be overstated. In *Mills*, parents of seven children of school age objected to their exclusion, suspension, expulsion, and reassignment without due process. Keep in mind the children in this case:

> Peter: Age 12, completely excluded as a "behavior problem."
>
> Duane: Age 13, completely excluded as a "behavior problem" beginning in third grade.
>
> George: Age 8, allegedly mentally handicapped and excluded because he required a special class.
>
> Steven: Age 8, slightly brain-damaged and hyperactive; exclusded because he wandered around the classroom.
>
> Michael: Age 16, has epilepsy and is allegedly slightly mentally handicapped and
> was excluded from school because of health problems and school absences.
>
> Janice: Age 13, has right hemiplegia, and mental handicaps and was excluded from school because no appropriate program existed for her.
>
> Jerome: Age 12, mentally handicapped and excluded from school totally.

The *Mills* decree provided that no child was to be excluded unless the child was provided an adequate alternative educational service suited to the child's needs, and that each child was entitled to a free appropriate public education "regardless of the degree of the child's mental, physical or emotional disability or impairment." Further, under *Mills*, no child was to be excluded on the basis of "insufficient resources." Finally, *Mills* directly addressed disciplinary issues:

- No child was to be suspended for more than two days without a hearing and education
  during the time of suspension.
- Defendants were not to, on the grounds of discipline, cause the exclusion, suspension,
  expulsion, postponement, interschool transfer or any other denial of access to regular instruction in the public schools to any child for more than two days without notification to the parent and the right to due process.

Mills serves as a foundation, even today, for the basic concept that disciplinary reasons cannot be used as an excuse to deny a child a free appropriate public education.

Thus, from the *PARC* and *Mills* case, Congress created the basics of the due process system which we use today.
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Defining the Right: The Essence - Procedures and Substance Equal Meaningful Access

Children with disabilities have the right to an education. What is this right? Congress originally sought "to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, [and] to assure that the rights of handicapped children and their parents or guardians are protected." 20 U.S.C. Sec. 1400(c). In the first case brought to the U.S. Supreme Court about special education, the Court explained that this right rests on asking two questions:

> First, has the state complied with all of the procedures that are required under the law? Second, is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefit?

Board of Education v. Rowley, 458 U.S. at 206-07, 102 S.Ct. at 3050-51
As the U.S. Supreme Court explained in 1988:

The Act confers upon disabled students an "enforceable substantive right to public education in participating States . . . and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act." *Honig v. Doe*, 108 S.Ct. 592, 597 (1988)."

From the earliest court cases to the most recent, the most concise explanation of the right to education is that a child with disabilities must have access to an education that is "meaningful." Cf., Education is "one of the most cherished and ardently protected of all rights. Indeed, 'education is perhaps the most important function of state and local governments.'" *Jackson v. Franklin County School Bd.*, 806 F.2d 623, 627 (5th Cir.1986) (quoting *Brown v. Board of Ed.*, 347 U.S. 483, 493, 74 S.Ct. 686, 691, 98 L.Ed. 873 (1954) with *Cedar Rapids Community School District v. Garret F.*, (526 U.S. 66,119 S.Ct. 992, 1000 [1999]), where the Court declared that "t]his case is about whether meaningful access to the public schools will be assured. . . . " In short, the right to an education must be more than trivial but is not always required to meet the standard of maximum benefit to the child.

How then can a parent access or insist that his or her child will receive a free appropriate public education?

Procedural Safeguards as the Key.

The IDEA contains a section of procedures that schools must follow when working with parents of children with disabilities. This section of procedures is often called "procedural safeguards." School districts have the responsibility to tell parents about these procedural safeguards.

The basic requirements of procedural safeguards are as follows:

> 1. Schools have a duty to "find" students who might be disabled and to evaluate them to see if the child needs special education. This is often called "child find."

2. Schools have a responsibility to evaluate the child for all suspected areas of disability at no cost to parents.

3. Schools have a responsibility to ensure that once the child is evaluated, that the child begins to receive special education and related services designed to meet the child's unique needs.

4. The process of designing the child's educational program is known as the IEP process. The fundamental guarantees of the IEP process are that the parents must be given the opportunity to be involved in the process. Once involved, the parents have the right to object to any facet of the identification, evaluation, program or placement of their child.

5. If parents receive an evaluation of their child with which they do not agree, they may request an independent educational evaluation at public expense. The district must either provide the IEE or be prepared to go to a hearing to defend the district's evaluation.

6. If parents receive an IEP for their child with which they do not agree, they may request a special education hearing to contest the program of education.

7. Parents always have the right to ask for a form of alternative dispute resolution, such as mediation or in some states a "resolution" or "conciliation" conference.

8. When a parent objects to an evaluation or a program, unless the district and the parent agree otherwise, the child remains in the last agreed upon program of education. This is called "stay put." If the child has not yet been admitted to school, the child cannot be denied the right to attend school if a dispute occurs.

9. Disciplinary reasons cannot be used as an excuse to deny a child a free appropriate public education; even a child suspended or expelled is entitled to some kind of educational program tailored to meet his or her individual needs and circumstances.

Time lines and requirements for a child's identification, evaluation, IEP development and placement vary slightly from state to state. If you are uncertain of your child's rights, ask the school district special education director or your child's special education teacher for a copy of your procedural safeguards.

What is a Due Process Hearing?

The purpose of a due process hearing is to resolve a dispute between the parents of a child with disabilities and the school district. No one should "win" a due process hearing except the child. Unlike traditional litigation, in most cases due process hearings do not involve suing a school district for damages. Reimbursement for privately paid educational services to provide what the child needs when the school

district will not provide such services is possible, however, and is not considered damages.

A due process hearing can be about any issue related to identification, evaluation, program or placement of a disabled child. Common examples for children with dyslexia would be: Should the child be identified as dyslexic? Must the district teach the child using a particular program of instruction such as Orton-Gillingham? Is the district responsible for the cost of private schooling that is specially designed to teach a child with dyslexia or other disabilities to read?

Due process hearings typically do not address whether a child has been discriminated against, if a child is entitled to monetary damages because of a physical injury suffered at school or whether a child has been the victim of a crime at school. This does not mean children do not have legal recourse in such instances but only that a different legal process is used.

What About Discipline and Due Process?

Children with disabilities have special rights in the situation of discipline in the school setting. Typical expulsion and suspension procedures apply but are modified in the manner in which they apply to students with disabilities. In 1997, Congress adopted a system known as "expedited hearings" to address exclusion or suspension of students with disabilities.

These "expedited hearings" are designed to address providing a child a free appropriate public education even when disciplinary matters are at issue. The specifics of expedited hearings vary by state. But, in its simplest form, expedited hearings decide three issues:

1. Is the misbehavior a result of or a manifestation of the child's disability?

2. Is the present IEP and program at school appropriate to meet the child's needs and was it in place to address the misbehavior? If not, what additional services
are needed? Is there a need for a functional behavioral assessment to help
determine the child's problems?

3. What program of education will the child have during the time that the child's
misbehavior is being addressed? School officials have some authority to decide
that a child needs an "alternative interim educational placement" but ONLY the
IEP team can decide where that placement should be.

In most instances, if your child is facing an expedited hearing situation, it is best to consult with an experienced advocate or attorney. But the heart of the expedited hearing process hearkens back to *Mills*; the child cannot be left without educational programming while the child's misbehavior is addressed if the misbehavior is related

to the child's disability. The child cannot simply be excluded from school without due process.

If a school district attempts to utilize a traditional expulsion approach with a disabled child, the parents should immediately seek information about their rights and their disabled child's rights under the IDEA. In many instances, expulsion cannot proceed in the typical fashion as it would for a non-disabled child.

The Mechanics of Traditional Due Process.

A parent or a school district can initiate a due process hearing by sending a letter. Parents send the letter to the school district. Districts must notify the parent. In the case of the parent, the federal law requires that a parent provide the district the following information:

> (i) the name of the child, the address of the residence of the child, and the name of the school the child is attending;
>
> (ii) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and
>
> (iii) a proposed resolution of the problem to the extent known and available to the parents at the same time.

Each state must have in place procedures about how due process hearings will be commenced, held and resolved in a timely and fair manner. These state procedures are guided by the following federal requirements:

> 3. The due process hearing must be conducted by **an "impartial" hearing officer**. Thus, the hearing officer may not be employed by the public agency involved in educating the child and may not have any other apparent conflict of interest with respect to the proceeding.
>
> 4. The parties to the hearing have **a right to counsel** at the hearing as well as to have other individuals knowledgeable about special education such as an advocate.
>
> 5. States vary on which party has **the "burden of proof"** and the "burden of production." The "burden of proof" means that the party has a higher responsibility to show that their version of the facts and the law is correct. In some states, this is the district and in other states, it is the parents. In still other states, it will vary depending on who is asking to change the IEP. The wise parent's counsel will always assume that the parent has the burden of proof and be over prepared, rather than caught without enough evidence. The "burden of production or persuasion" means which party proceeds first at the hearing. Again,
> this varies by states and even within states.

6. Each party at the hearing has **the right to present evidence**, and to confront and cross-examine witnesses (as well as to compel the attendance of witnesses). This is often quite similar to a "trial" as one would see on television. Witnesses are usually put under oath. Questioning is done by lawyers or advocates and in some cases, the hearing officer. Usually, the same types of rules that apply in court to questioning witnesses apply in due process hearing. There are some exceptions which vary according to the state. Each side must give notices of its witnesses, usually five *business* days before the hearing.

7. Each party has **the right to obtain a verbatim record** (written, or at parental election, electronic) of the hearing. This record must be free to the parent. There is no exception to this rule. Transcripts should be completed tin a timely manner and the production of the transcript should not be an easy excuse for delaying briefing and decisions. Some states do not require a record to be kept of prehearing conferences; it is best to request such a record to be kept.

8. Either party may **prohibit introduction of an evaluation** and related recommendation at a hearing if it was not disclosed by the other party at least five business days before the hearing. This is an important addition to the rights of parents. If a district expert takes the stand and has not provided any written recommendation, parents may be able to exclude the recommendation at hearing.

9. Either party may **prohibit the production of any evidence** that has not been disclosed to that party at least five days before the hearing. The hearing officer may, however, exercise his or her discretion to "grant an extension of time to satisfy **the 'five-day' rule** for the admission of evidence." Parents must understand that it is necessary to provide the hearing officer and the district's lawyer or representative with a copy of each document that the parent wants to introduce at the hearing and to do so five *business* days before the date of the hearing.

10. Because the IDEA is silent concerning any **rules of evidence**, each state is free to define its own rules in that regard. Generally, the hearing officers will be accorded deference to exercise their discretion in evidentiary matters. Evidentiary rules vary by state. Parents or their lawyers should ask for a copy of the evidentiary rule that will be applied.

11. The hearing officer's **decision and findings of fact must be in writing** and must include written findings of fact, unless the parents opt for an electronic format.

12. The hearing officer must reach a **final decision within 45 days** after receipt of the request for a hearing. Parents or their lawyers should diligently seek to ensure that decisions are issued with 45 days, unless there is a very good reason for postponement. Time matters to a child with a disability. Good reasons for delay might include: an agreement to have the child re-evaluated; a witness's schedule;
a parent's illness.

13. In those states that provide for a hearing at the local level, the losing party may **appeal to the state education agency (SEA)**. The SEA is the department of education in layperson's terms. Once a parent asks for a hearing review by the state, if such a stage is available, then the state is obligated to issue a decision within 30 days of receipt of a request for review.

14. The decision at the state level (either the hearing officer's decision in a one-tier administrative procedure or the appellate decision in a two-tier administrative procedure) may be appealed by commencement of a **civil action** in either state or federal court.

15. A court that receives a special education dispute must accept the administrative record but is not limited to the administrative record; it may receive additional evidence. However, in practice, many courts will not accept much additional evidence.

16. The court's decision to affirm or reverse the administrative decision will be based on a preponderance of the evidence.

17. Hearing officers cannot award **attorneys' fees and costs**. Only courts may award attorneys' fees and costs after a parent prevails in a due process hearing. Attorneys' fees can include the attorney's time, expert costs, and related costs. Parents cannot receive financial reimbursement for missing work to attend the hearing.

A Word About Hearing Officers.

School districts and state educational agencies must each keep a list of hearing officers who will serve as "judges" for a due process hearing. The hearing officer list must be a public list. In most states, parents can obtain this list from their state education department. The reason that it is critical to have this list is to ensure that hearing officers are selected through some fair process. In addition, hearing officers must be trained in special education law and some states update their list regularly to reflect which hearing officers have attended special training.

Hearing officers are not, in most cases, judges. Some states require hearing officers to be attorneys but there is no federal requirement that hearing officers be attorneys.

Hearing officers are paid to hear the case either by the state agency or the school district. The fact that a hearing officer is paid by the state agency or district does not

create a bias in favor of the school district. Hearing officers must, however, be impartial and certain standards apply through case law and state laws on what "impartial" means.

What Happens After Due Process?

After a due process hearing decision is rendered, the district must implement the decision unless a court permits the district not to do so. The IDEA does not set a specific time limit within which a due process hearing decision must be implemented or an appeal of a hearing decision must be filed. When parents prevail through the administrative process and the LEA (or appropriate government agency) does not intend to appeal, the public agency must implement the hearing decision "as soon as possible and, in any event, within a reasonable period of time." If the public agency fails to implement the hearing decision, parents may seek court enforcement of an administrative decision. If the hearing officer's decision is not appealed, it is in force.

Dispute Resolution.

In addition to the due process procedures required by the IDEA, LEAs may offer the use of mediation procedures as an alternative for resolving disputes concerning the identification, evaluation and educational placement of students with disabilities and the provision of a FAPE to those students. Mediation can be used to reach an agreement without the expense and stress of a due process hearing. If the LEA and parents reach a mediated agreement, that agreement becomes binding on both parties.

In some states, parents cannot bring an attorney or professional advocate to the mediation session. This does not preclude the parent from meeting with an attorney or advocate to prepare ahead of time for the mediation session and it is wise to do so. When parents choose not to use the mediation process, a district can establish procedures to require parents to meet with a contracted-for disinterested party, for the purpose of encouraging the use (and explaining the benefits) of the mediation process to the parents. But, participation in mediation or any other form of dispute resolution cannot be used to either "deny" or to "delay" a parent's right to a due process hearing. Even if mediation is initially selected, parents can terminate the mediation procedures at any time and proceed to a due process hearing. Any discussions during the mediation process are confidential and may not be used as evidence in a hearing or court. Parents should keep in mind that dispute resolution can be used after a due process hearing as well as before a due process hearing.

Why Use Due Process?

It is this author's opinion that due process is best used by parents frequently rather than infrequently. Requesting a due process hearing or mediation can often solve an immediate problem rather than allowing the tension and stress between the parties to build up over many years only to explode many years down the road. There is not a limit on the number of due process hearings or mediations a parent may request. While parents must be careful to ensure that they are requesting a hearing or mediation over an important issue for their child, parents should not be afraid to use due process.

Sometimes parents think that they must be in great dispute over the child's entire education in order to request due process or mediation. The wise parent brings a significant dispute about any part of the child's program through this process in a prompt fashion so that memories of the dispute are fresh and the possibility of resolution is greater.

Parents often are afraid to bring a request for a hearing or mediation because they feel that this will be seen in a negative light by the district and their child will suffer. If parents act professionally in the manner in which they address disputes, and expect the same of school personnel, the child will often benefit from resolution of a dispute using the due process system.

Remember, due process safeguards are there for a reason - use them!

Suggested Readings and Ideas.

Many times IEP meetings can be overwhelming for parents. Some good books to help you "learn the language" that might be used at an IEP meeting are: "Better IEPs" by Barbara Bateman; "Win-Win IEPs for Children with Autism," by Beth Fouse; and "The Treasure Chest" by Fouse (a wonderful book about what behavioral techniques really mean); The Dyslexic Scholar by Taylor.

One very important suggestion is to find out whether your state educational agency has a website and to read it. Many times you can learn what the "hot topics" are and avoid problems. Another good idea is to check out your district's website for information about special education.

Finally, and DO NOT UNDERESTIMATE THE IMPORTANCE OF THIS: READ AND RE-READ the Notice of Procedural Safeguards you are given. If you do not understand how it applies to the situation you are facing, ask the district and put that request in writing.