

LEADERSHIP Insider

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PRACTICAL PERSPECTIVES ON SCHOOL LAW & POLICY

A Membership Benefit of NSBA National Affiliates

Containing Special Education Costs

By James Keith, Partner, Adams & Reese LLP, Jackson, Miss., and Sonja H. Trainor, Senior Staff Attorney, National School Boards Association

When will the Individuals with Disabilities Education Act (IDEA) be reauthorized? The short answer: It's too early to tell. The cost of special education litigation is an enormous issue for school districts, and it surely will be a topic of discussion when the federal legislation is finally reauthorized sometime in the next few years. This issue of *Leadership Insider* explores the actual costs faced by school districts embroiled in such litigation, and offers cost-saving measures that may help avoid them.

IDEA provides the framework by which public schools serve students with disabilities. Through its various permutations, including the most recent reauthorization in 2004, IDEA and its companion regulations, promulgated and enforced by the U.S. Department of Education, has evolved into a giant regulatory scheme.

During the last reauthorization, NSBA and its member state associations gave Congress meaningful recommendations for changes that would shift the law's focus from an adversarial relationship between parents and school officials to one directed at student outcomes. School boards and

administrators gained some flexibility in certain areas, including the placement of students subject to disciplinary proceedings.

IDEA is scheduled to be reauthorized in 2011, though no one who watches Congress expects that to happen until after the sure-to-be-difficult reauthorization of the Elementary and Secondary Education Act, aka No Child Left Behind. But even if Congress will not get down to business on reauthorizing IDEA for another year or more, now is the time for school boards, their state associations, school attorneys, and NSBA to begin framing the issues of importance to schools.

NSBA's Office of Federal Advocacy and Public Policy already has summarized key issues gaining prominence in its feedback from school boards. Among them: parental revocation of consent for special education services, representation of parents by non-attorneys, allocation of federal funds, due process, discipline, and teacher effectiveness.

Similarly, school attorneys are beginning conversations about key issues for reauthorization, with an eye to reducing adversarial postures and associated litigation costs. They see such costs draining away scarce resources needed to educate children. So school attorneys in the trenches would like to expand efforts to ensure more cooperative systems that will strengthen education programs for children served under IDEA. The goal would be to retain parental

involvement in the special education process and provide educators some deference as the experts they are.

In this issue of *Leadership Insider*, we look closely at the costs of special education litigation, and how public school districts can think attempt to contain them. Mitchell Yell of University of Southern California and Antonis Katsiyannis and Mickey Losinski of Clemson University examine the costs of special education due process hearings and less costly alternatives. Kathleen Mehfoud and Jason Ballum, of Reed Smith LLP, members of NSBA's Council of School Attorneys, provide a list of money saving tips that can help school districts avoid unnecessarily high special education costs.

We hope that as you read this issue, you will consider the topics of greatest importance to your district in the area of special education. Through its grassroots Federal Relations Network working closely with state school boards associations, its Office of Federal Advocacy and Public Policy, and its Office of General Counsel and Council of School Attorneys, NSBA will be the national voice for school boards when IDEA is reauthorized.

For more resources go to Advocacy's Web page on special education, which includes its IDEA reauthorization *Issues Brief*: www.nsba.org/Advocacy/Key-Issues/SpecialEducation.

GO ONLINE FOR ADDITIONAL RESOURCES

More materials and references on IDEA and the issues raised in this issue are available at www.nsba.org/Board-Leadership/Governance/Policies/Newsletters/default.aspx.

For recent court rulings on special education matters including tuition reimbursement, check out Legal Clips at <http://legalclips.nsba.org>. Click on Special Education & Disabilities in the issues cloud. You will have access to summaries on the cases

and news stories including:

- *E.D. v. Newburyport Pub. Sch.* (1st Cir. Aug. 19, 2011): The U.S. Court of Appeals for the First Circuit (ME, MA, NS, PR, RI) ruled that the parents' IDEA claim seeking reimbursement for the previous year's private school tuition was not moot simply because the parents moved out of the school district after filing suit.
- *Jefferson County Sch. Dist. R-1* (D.

Colo. Jun. 29, 2011): A federal district court in Colorado ruled that the parents of a student with psychiatric and emotional disorders, who unilaterally placed the student in a private residential treatment facility, are entitled to tuition reimbursement under IDEA. NSBA filed an amicus brief in support of the school district's appeal to the U.S. Court of Appeals for the 10th Circuit. Stay tuned to Legal Clips for further coverage.

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About NSBA

The National School Boards Association is the nationwide advocacy organization for public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education in the United States through local school board leadership. Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards and the school boards of the District of Columbia, Hawai'i, and the U.S. Virgin Islands. For more information, visit www.nsba.org/na.

About the National Affiliate Program

The National Affiliate Program extends NSBA's services directly to local school districts. School districts are eligible to join, provided they are members in good standing of their state school boards associations.

About the Council of School Attorneys

The Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for the exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

The Costs of Due Process Hearings

By *Mitchell Yell, University of South Carolina, and Antonis Katsiyannis and Mickey Losinski, Clemson University*

When it was enacted in 1975, the first version of IDEA ensured that all eligible students with disabilities would be provided with a free appropriate public education (FAPE). In its current form, the law requires that public school districts identify and evaluate children suspected of having a disability and provide individualized special education services to eligible students.

IDEA provides students and their parents with procedural protections to ensure that they are meaningfully involved in the planning and implementation of their child's special education program. According to the U.S. Supreme Court in *Honig v. Doe* 1988, Congress established this elaborate system of safeguards to "guarantee parents both an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate."

When parents and school personnel cannot agree on a child's evaluation, programming, or placement, parents can request an impartial due process hearing and even file a suit in federal or state court to resolve the problem. The due process hearing allows an impartial third party, the hearing officer, to examine the issues and settle the dispute.

The prevalence of hearings

The United States General Accounting Office (GAO) in 2003 issued a report on the costs of formal special education disputes brought by either parents or school districts. The report estimated that, in 2000, there were five due process hearings for every 10,000 students. More than three-quarters of those 3,020 hearings were held in five states: California, Maryland, New Jersey, New York, and Pennsylvania, and the District of Columbia. The report also noted that the number of due process hearings held annually between 1996 and 2000 had declined or remained relatively constant, while the number of hearing requests increased each year.

Hearings costs

The GAO report recounted that, in 1999-2000, districts spent more than \$90 million resolving disputes related to IDEA. Determining the actual costs of due process

hearings, however, is difficult because they vary with the length and location of the hearings.

To estimate the expense, you must take into account the fees of hearing officers or administrative law judges, court reporters, the district's attorney (and possibly the parent's attorney), and expert witnesses. You also must consider related costs and expenses, such as materials, copying, and substitute teachers' pay.

Unlike most states, the West Virginia Department of Education keeps detailed records of hearing costs. In 2009, it reported that hearing officers received \$125 an hour. The actual costs for the hearing officers ranged from \$768 to \$17,138 per hearing. Court reporters or stenographers ranged from \$700 to \$5,367. The total cost for West Virginia districts for the 20 hearings that year was \$83,104.25, with an average cost of \$4,155.22. Similar expense rates were reported by Oregon, Wisconsin, and Illinois. These costs do not include attorney's fees.

Additionally, if a parent prevails in a hearing, the district may have to pay for the parent's attorney. Under the IDEA, attorney's fees must be based on prevailing community rates. With this system, fees charged in a predominately rural setting would typically be lower than those in a major metropolitan area. In Los Angeles, for example, these fees can range from \$200 to \$500 per hour.

Both parties will often use expert witnesses. Their hourly rates vary widely but can be between \$100 and \$500 per hour plus expenses. They charge for time spent conducting evaluations, observing students, reviewing evidence, interviewing involved parties, and testimony. An informal survey sent to a small group of school attorneys revealed that school districts paid anywhere from \$2,000 to \$15,000 for expert witnesses at due process hearings.

Although reimbursement of parents' attorney's fees is available under IDEA, parents' expert witness fees currently are not, under the U.S. Supreme Court's 2006 ruling in *Arlington Central School District Board of Education v. Murphy*. However, a bill in Congress, the IDEA Fairness Restoration Act, seeks to overturn this ruling.

District expenses for a five-day hearing could easily be from \$20,000 to \$40,000, and possibly considerably more if you have to include parent attorney fees. Additionally, if the hearing officer awards tuition reimbursement or orders a student placed in a

residential setting, the costs also could increase dramatically.

Consider the alternative

In IDEA's 1997 reauthorization, Congress sought to reduce the contentious nature of the due process hearing practice, and to reduce costs by requiring state educational agencies to establish mediation procedures.

In mediation, parties are brought together with the help of an impartial mediator to help the participants communicate their concerns and resolve their disagreements, according to *Special Education Mediation: A Guide for Parents*, by the Consortium for Appropriate Dispute Resolution in Special Education (CADRE). The mediation process is strictly voluntary, and discussions held within the mediations cannot be used in future hearings. The cost of mediation is substantially lower, and often assumed by the state department of education.

Florida mediator Kelly J. Henderson reported in 2008 that states are using alternative dispute resolution with promising results. These procedures include conflict resolution skills training, a management or oversight council, parent-to-parent assistance, dispute resolution case managers, third-party opinion or consultation processes, early complaint resolution, and resolution meeting facilitation. The perceived neutrality of these procedures is a factor that "encourages parties to actively seek resolution," he wrote.

Using alternatives to due process hearings (whether mediation or alternative dispute resolution) can be a tremendous financial benefit. For example, in California, school districts have been working on alternative approaches to resolving disputes. If each of the state's 119 districts can stop one due process hearing, the savings will be in the millions of dollars. A hearing typically lasts five to six days, and attorney's fees are typically \$300 per hour, according to the California Department of Education's newsletter, *The Special Edge*.

Avoiding the hearings

The best way to deal with the emotional and financial costs of due process hearings is to avoid them in the first place. School board members, district-level administrators, principals, and teachers must understand that the IDEA requires parental involvement in all aspects of the special education process—identification, evaluation, IEP development, and placement. Failing to include parents as mean-

ingful partners in this process, therefore, is a violation of the law and could lead to a due process hearing.

Whatever school-level personnel can do to encourage parental involvement and create trusting relationships will help to avoid hearings. For example, principals could appoint staff members who are not directly engaged in the IEP process, such as school counselors, to act as liaisons with parents.

School boards can ensure that principals and teachers in their schools under-

stand the importance of parental involvement and that IEP team members and special education teachers develop educationally sound IEPs by providing relevant, researched-based, and meaningful professional development activities to district special education personnel.

A version of this article, with references and a table on IDEA's due process requirements, is available at: www.nsba.org/Board-Leadership/Governance/Policies/Newsletters/default.aspx

IDEA'S DUE PROCESS PROVISIONS

These are the requirements under federal law. State law may require additional procedures.

Timeline for filing a due process complaint. The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint. [20 U.S.C. §1415 (f)(3)(C)]

Due process notice. This must include:

- The child's name, address, and school;
- A description of the nature of the child's problem relating to the proposed or refused initiation or change; and
- A proposed resolution of the problem to the extent known and available. [34 CFR 300.508(b)]

Timelines for actions after due process complaint is received. The school district must, within 10 days of receiving the request, send to the parent a response that includes:

- An explanation of why the district proposed or refused to take the action raised in the complaint;
- A description of other options that the IEP team considered and why they were rejected;
- A description of each evaluation procedure, assessment, record, or report the district used as the basis for the proposed or refused action; and
- A description of the other factors that are relevant. [34 CFR 300.508(e)(1)]

Requirement for a resolution meeting. Within 15 days of receiving notice of the complaint, and before

the hearing, the district must hold a meeting to discuss the complaint, so that it has the opportunity to resolve the dispute. [34 CFR 300.510(a)]

Timelines for the resolution period. If the district has not resolved the complaint to the satisfaction of the parent within 30 days of the receipt of complaint, the hearing may occur. [34 CFR 300.510(b)(1)] If the district is unable to obtain the participation of the parent in the resolution meeting after reasonable efforts have been made, it may, at the end of the 30-day period, request that a hearing officer dismiss the parent's complaint. [34 CFR 300.510(b)(4)]

Decisions by the hearing officer. They must be made on substantive grounds based on a determination of whether the child received a free appropriate public education (FAPE). In matters alleging a procedural violation, a hearing officer may find that a child did not receive FAPE if the procedural inadequacies:

- Impeded the child's right to FAPE;
- Significantly impeded the parents' opportunity to participate in the decision making regarding the provision of FAPE for their child; or
- Caused a deprivation of educational benefits. [20 U.S.C. §1415 (f)(3)(E)]

Hearing safeguards. Parties have the right to be accompanied and advised by counsel and by individuals with special knowledge or training; to present evidence and confront, cross-examine, and compel the attendance of witnesses; to a written or electronic verbatim record of the hearing and the findings of fact and decisions. [20 U.S.C. §1415(h)]

Saving Money on Special Education

By Kathleen S. Mehfoud and
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Richmond, Va.

With the economic downturn, your district is probably taking a hard look at all of its operations with an eye toward cost savings.

Although special education is often considered untouchable, your district may contain some costs by reviewing your practices in the areas listed below. Of course, you should obtain legal advice and consult state laws in your jurisdiction as you conduct this review.

Serve students in the general education setting when appropriate. By and large, students benefit from being in the general education setting, where they have access to the general curriculum and have the greatest chance of being successful on standardized tests administered under No Child Left Behind. Also, services provided to students with disabilities are generally more expensive than the services provided to other students. It is to the mutual advantage of students and school districts, therefore, to avoid overidentifying students for special education. If students are identified, the district should attempt to serve them in the general education setting with good teaching techniques, if the students can be appropriately served there.

A main reason parents insist on a special education referral and evaluation is their concern that agreed-upon accommodations in the general education setting do not create legal obligations and protections. School districts can allay these concerns by making sure that personnel consistently provide promised general education accommodations to students.

If a referral for an evaluation is appropriate, encourage parents and staff to make it before the end of the school year. Referrals made during the summer months frequently result in additional payments to staff because they are not under contract. While evaluations cannot be prohibited over the summer months, some advanced planning and encouragement may result in fewer summer referrals.

Limit evaluations to necessary areas. Extra staff time is needed as the number of evaluations for a child increases. Also, students and parents sometimes complain justifiably about overassessment. It may serve the interests of both parties, therefore, to refine your evaluation process by considering:

- The number and breadth of evaluations. Evaluations must be thorough but need only be sufficient to identify disabilities and their effect on the student and the content of the IEP. It may not be necessary, for example, to conduct assessments for related services unless the student potentially requires those services. Use school district staff to conduct the evaluations, when possible, to avoid the cost of private assessments.

- The need for a three-year evaluation. If a student's disability and needs have been thoroughly established in the past, it may not be necessary to conduct this. Remember, however, that the parents still have the right to insist that it be conducted.

- The need for a medical evaluation. One type of evaluation that is frequently overused is the medical evaluation. Often medical information is not necessary to identify an educational disability and its effect. For example, IDEA does not require a medical diagnosis to identify a child with ADD/ADHD. Unless a state law or regulation requires it, consider whether to incur the expense of obtaining the expensive medical diagnosis.

Be efficient in conducting eligibility and IEP meetings. Special education meetings are legally necessary and often collaborative and productive, but take time away from your staff's regular duties and require the employment of costly substitutes. It should be a goal to meet only when necessary and for a reasonable period of time. To be efficient, make copies of evaluations and drafts of IEPs available to parents and staff in advance. Create a meeting agenda so that it is clear what needs to be accomplished, and stick to it. Reduce the number of staff at meetings to the minimum required to comply with meeting procedures. It is intimidating to parents and costly to the district to have a large contingent of school staff present. Finally, train staff in the use of school district computerized IEP programs and make sure that computer systems are set up and functioning.

Do not write unnecessary services in the IEP. Provide IEP services that meet the student's individual needs and deliver a free appropriate public education (FAPE) but do not exceed these requirements. Providing unnecessary services unnecessarily requires the employment of additional personnel. IEP teams should be trained to develop programs that provide needed services required to provide FAPE, not those that may be beneficial.

There are many related services and

accommodations that may be beneficial for the student but are not required for FAPE. A "beneficial" standard may result in the overprovision of services, which interestingly, could violate the least restrictive environment standard of the IDEA.

Consider, for instance, whether a student truly requires a one-to-one assistant, which can create dependence in the student. Evaluate whether a student requires the latest technology device or whether some less costly device will meet the need.

Use dispute resolution procedures and informal discussions. Mediation is available only if the school district and the parents both agree to use it. The benefit to the district and to the parents is that they may come to a quick resolution of the dispute without the time and expense of a due process hearing. Also, consider whether an informal meeting with parents to listen to their concerns and define a solution may be productive. Sometimes parents simply want to feel that they have been heard. Gaining an understanding of concerns, either through mediation or an informal meeting, is a means of resolving disputes and avoiding the expense of litigation.

Train your staff thoroughly and often. A well-trained staff is not as likely to violate IDEA. It is a school district's best defense against costly mistakes. Staff errors can result in procedural or substantive violations. These mistakes can expose the school district to state complaints, due process hearings, compensatory education services, and private school tuition. Districts should take appropriate steps to provide ongoing staff training so legal exposure is reduced. Because there is a high turnover of special education staff, you should repeat this training frequently. Train your general education personnel as well; they are frequently involved in special education decision-making.

SUPREME COURT PREVIEW

Are school districts responsible for students' off-campus speech? With some recent appellate court rulings, this issue may be heard by the Supreme Court this term. NSBA Senior staff attorney Sonja Trainor will discuss these cases and the possible implication they will have on school board policies in "School Districts, off-campus speech, and the U.S. Supreme Court: A decision in the wings," a webinar to be held at 3 p.m., ET, Nov. 8. Register now at www.nsba.org/Services/NationalAffiliates/Webinars.