

Chapter 10

Nasty, Brutish . . . and Often Not Very Short: The Attorney Perspective on Due Process

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Introduction

This paper presents an attorney perspective regarding certain effects of impartial due process hearings on the larger special education system and the persons who populate that system. Views and conclusions expressed in this paper are based primarily on the particular experiences of Hogan & Hartson attorneys¹ in representing parties on both sides of special education disputes, rather than on empirical analyses of broader data. (Indeed, for the most part, few data are collected on a nationwide basis regarding many of the interesting issues addressed here.) The authors' experience in this field derives mostly from work in large urban school districts that face a high volume of special education disputes; this experience is not necessarily representative of due process proceedings nationally. Nevertheless, our experience—gained in school districts across the country—has been extensive and substantial and warrants this reflection upon our “lessons learned.”

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We begin with a digression on the law.

Historical Background

One of the most visible and unique features of the U.S. system for providing special education and related services to students with disabilities is the federally mandated due process hearing. Although the federal government provides substantial aid to state and local school systems in a variety of areas other than special education, apparently nowhere else in K-12 education does the federal government tie its aid (in part) to the provision by state and local authorities of an administrative procedure conducted by an independent third party for resolving individual grievances.²

The federal government has not always mandated impartial due process hearings in special education; in fact, the mandate did not exist at all in the early years of Congress' intervention in the field. In 1970, Title VI of the Elementary, Secondary, and Other Education Amendments of

1969, Pub. L. No. 91-230, 84 Stat. 121 (1970), created the Education of the Handicapped Act (EHA), the true progenitor of the current Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, *et seq.*, through which Congress consolidated and expanded upon several earlier discrete initiatives relating to the education of children with disabilities. One stated purpose of the EHA was to relieve the growing financial burden on local school districts (via supplemental federal funding) of providing educational services to students with disabilities, an obligation that state and federal courts were imposing on constitutional grounds even in the absence of federal legislation. At first, and through its early years, the EHA said nothing about impartial due process hearings.

When Congress first imposed the special education due process mandate in 1974, and for a decade thereafter, federal law was silent on the issue of attorneys' fees.

Four years after enactment of the EHA, however, at the behest of the U.S. Senate, the impartial due process hearing became a feature of the nation's special education system. It was Title VI of the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (1974), that for the first time required states accepting federal special education funds to provide:

procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation and educational placement of handicapped children including, but not limited to (A) ... (ii) an opportunity for the parents or guardians to obtain an impartial due process hearing..., and (iv) provision to insure that the decisions rendered in the impartial due process hearing required by this paragraph shall be binding on all parties subject only to appropriate administrative or judicial appeal....

Id., Sec. 614 (b).³

Starting from this highly general mandate, Congress added increasing specificity to its due process requirement. Current law now contains a "procedural safeguards" section substantially devoted to laying out the IDEA's specific requirements regarding impartial due process hearings (see 20 U.S.C. § 1415), a section so long and detailed that simply setting it forth here—not to mention its extensive fabric of implementing regulations⁴—would fill half of this chapter.

Yet establishing the impartial due process hearing is really only part of the story. Also critical to creating the current due process environment was Congress' decision a decade later that prevailing *parents* in these cases—but *not* prevailing school districts—would be entitled to an award of attorneys' fees and expenses from a losing school district (and/or state).

When Congress first imposed the special education due process mandate in 1974, and for a decade thereafter, federal law was silent on the issue of attorneys' fees. Many attorneys for prevailing parents nevertheless argued—with mixed results in the courtroom—that their clients were entitled to attorneys' fee awards under *other* federal statutes. In 1984, the Supreme Court,

in *Smith v. Robinson*, 468 U.S. 992 (1984), resolved this debate among the lower federal courts. Characterizing the EHA as a “comprehensive scheme set up by Congress to aid the States in complying with their constitutional obligations to provide public education for handicapped children[,]” *id.* at 1009; finding that Congress had “intended handicapped children with constitutional claims to a free appropriate public education to pursue those claims through the carefully tailored administrative and judicial mechanism set out in” the EHA, *id.*; noting that, under the so-called “American Rule,” attorneys’ fees are awarded by courts to prevailing parties “only when statutory authority so provides[,]” *id.* at 1002 (emphasis added); and further noting that the EHA “does not provide for the payment of attorneys’ fees,” *id.* at 995 (emphasis added),⁵ the Supreme Court held that parents who prevail in special education litigation over denial of their children’s right to a “free and appropriate public education” were not entitled to an award of attorneys’ fees and expenses. *Id.* at 1021.

One year later in 1985, Congress effectively overruled the Court’s decision in *Smith v. Robinson* by enacting the “Handicapped Children’s Protection Act,” amending the EHA to provide (for the first time) an award of attorneys’ fees and expenses to prevailing parents in special education cases. As a result, it has been clear since 1985 “that under this section, parents and guardians will select their own attorneys and that to the extent the parents or guardians prevail, the attorneys’ fees and other expenses of the litigation may be awarded by the court.” H.R. Rep. No. 99-296, at 6 (1985).

Under the IDEA, states—and, indirectly, school districts—that accept federal funds for serving children with disabilities must, in return, provide all disabled children with a “free appropriate public education.”

The Statutory and Regulatory Framework of the Impartial Due Process Hearing

Let us now examine how current law is designed to work.

Under the IDEA, states—and, indirectly, school districts—that accept federal funds for serving children with disabilities must, in return, provide all disabled children with a “free appropriate public education” (FAPE). The regulations define

FAPE as “special education and related services that—(a) Are provided at public expense, under public supervision and direction, and without charge; (b) Meet the standards of the [state education agency] . . . ; (c) Include preschool, elementary school, or secondary school education in the State; and (d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of §§ 300.340-300.350.” 34 C.F.R. § 300.13 (2000).

To ensure that a FAPE is provided, Congress established what the Supreme Court has termed “elaborate and highly specific procedural safeguards.”⁶ Additional procedural and substantive requirements are found in state laws and federal and state-level regulations. Overall, such safeguards require school districts to keep parents informed about their child’s education, involve them in decisionmaking about special education evaluations and placements, and then guarantee an impartial due process hearing in a neutral forum in which parents may challenge school district actions (or seek reimbursement if they unilaterally place their child in a private

setting). The IDEA also requires schools to tell parents how to initiate impartial due process hearings and of their right to recover attorneys' fees if they prevail.

Not surprisingly, many parents do file complaints and seek due process hearings, often represented by attorneys who specialize in such cases. Ultimately, special education litigation under the IDEA boils down to two questions: Did the school district comply with procedural safeguards? And did it provide a FAPE?

Triggers to Due Process Hearings

The IDEA and its implementing regulations contain many provisions that trigger—and perhaps encourage—litigation.

Much special education litigation revolves around alleged deficiencies in a child's Individualized Education Program ("IEP"), or in the meetings at which the IEP was developed. Every child with a disability must have an IEP in effect at the beginning of the school year, and the IEP must be reviewed at least annually. 20 U.S.C. § 1414(d)(4); 34 C.F.R. §§ 300.342, 300.343. The IDEA specifies several categories of information that must be included in the IEP, such as the child's current level of educational performance and measurable annual goals for that child's progress. 20 U.S.C. § 1414(d)(1)(A).

Ultimately, special education litigation under the IDEA boils down to two questions: Did the school district comply with procedural safeguards? And did it provide a FAPE?

The school district is responsible for initiating and conducting meetings to draw up an IEP. For example, an initial IEP meeting must be convened within 30 days of a determination that a child needs special education services. 34 C.F.R. § 300.343. Generally, the district must take steps "to ensure that one or both of the parents of a child with a disability are present at each IEP meeting or are afforded the opportunity to participate." *Id.* at § 300.345(a). Thus, the parent must be adequately notified in advance of IEP meetings (with the notice satisfying regulatory requirements), and meetings must be scheduled at mutually convenient times and places. *Id.* at §300.345(a). If the school district is unable to get the parent to attend, it may go forward with an IEP meeting, but it must keep a detailed record of the steps taken to obtain the parent's attendance. *Id.* at § 300.345(d).

Because the IDEA specifies who must be included in the "IEP team," 20 U.S.C. §1414(d)(1)(B); 34 C.F.R. §300.344, an IEP meeting often includes six or more people—typically the parent, a special education teacher, a regular education teacher, the IEP chair, a psychologist or counselor, as well as the parent's attorney, whose presence may, in turn, prompt the presence of an attorney for the school district. (This latter dynamic also can work in the opposite direction, but in our experience rarely does.) With attorneys present, the meeting can come to be dominated by strategic positioning for expected litigation to come, with one or both sides seeking advantages, making a record, or perhaps obtaining some early discovery, as well as (hopefully) devising a reasonable solution to the child's special education needs.

The IDEA also dictates a detailed battery of procedures for discipline of special education students. 20 U.S.C. § 1415(k). If suspension or a change of placement is contemplated, parents

must be notified and informed of procedural safeguards. An IEP meeting must be convened for some types of discipline and to determine whether the behavior prompting the discipline was “a manifestation of such child’s disability.” *Id.* at § 1415(k)(4). (Expedited due process hearings are required for some disciplinary actions.)

Schools must provide parents with “written prior notice” not only of IEP meetings, but also whenever the school proposes (or refuses) to start or change a special education identification, evaluation, or placement. *Id.* at § 1415(b)(3). This “written prior notice” must explain the school’s proposed action or inaction; describe other options; explain any other relevant factors; and—very important for purposes of impartial due process hearings—tell parents that they have procedural rights and provide either a “Procedural Safeguards Notice” or information on how to obtain that detailed notice. *Id.* at § 1415(c). The “Procedural Safeguards Notice” must give “a full explanation of the procedural safeguards” under the IDEA, written “in an easily understandable manner.” *Id.* at § 1415(d)(2); see also 34 C.F.R. § 300.504(b). The notice must inform parents of their rights regarding independent educational evaluations, parental consent, due process hearings, civil actions, attorneys’ fees, and more. And this Procedural Safeguards Notice must be provided repeatedly—when a child is referred for evaluation, upon reevaluation, when notifying parents of an IEP meeting, and when a complaint is registered. 20 U.S.C. at § 1415(d).

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Two important aspects of the current IDEA scheme make it economically feasible—and sometimes even economically *beneficial*—for parents to file due process claims.

First, a court, at its discretion, may award attorneys’ fees to a parent who is the “prevailing party.” *Id.* at § 1415(i)(3)(B). There is *no* provision, on the other hand, for a prevailing school district to recover fees.

Parents’ counsel may be awarded fees for work in the due process administrative proceeding and in any civil action. Pursuant to relatively recent amendments, no attorneys’ fees are to be awarded for an attorney’s IEP meeting attendance (unless a hearing officer or court ordered the meeting). *Id.* at § 1415(i)(3)(D)(ii). In awarding attorneys’ fees, the court must consider the parties’ conduct. For example, the school district may avoid (or reduce) liability for attorneys’ fees if parents reject a settlement offer without substantial justification. *Id.* at § 1415(i)(3)(D) and (E). An attorneys’ fees award may also be reduced if parents “unreasonably protracted” proceedings or failed to provide adequate information in the initial complaint—unless the district itself is deemed to have delayed resolution or violated some procedural requirement. *Id.* at § 1415(i)(3)(F) and (G). These provisions create incentives for much finger-pointing regarding responsibility for delays.

A second important feature of IDEA economics is the so-called “stay-put” provision. During any due process proceeding, the child must remain in “the then-current educational placement” unless parents and district agree to some other placement or certain disciplinary exceptions apply. *Id.* at §§ 1415(j), (k). If application is being made for initial admission to public school,

then the child is to be placed in that school until proceedings are complete. *Id.*; 34 C.F.R. § 300.514(b). If the parent succeeds in convincing the administrative hearing officer, or subsequent state reviewing officers or courts, that a change in placement is appropriate, then *that* placement—including a private school placement—becomes entitled to “stay put” protection through the remainder of the administrative proceedings and civil appeals. *Id.* at § 300.514(c).

The Impartial Due Process Hearing

A due process hearing is initiated when a parent makes a complaint about his or her child’s education (or, more rarely, when the school does so because, for example, a parent refuses to consent to a special education evaluation). Many kinds of school actions (or inactions) may be the subject of due process hearings. The IDEA guarantees “an opportunity to present complaints with respect to *any* matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.” 20 U.S.C. § 1415(b)(6) (emphasis added). When parents make a complaint, the IDEA guarantees them the right to an “impartial due process hearing.” *Id.* at § 1415(f). The IDEA requires that parents or their attorney specify the nature of the problem and propose a resolution when they file a complaint.

See 34 C.F.R. § 300.507(c)(2)(iv) and (v). But while school districts at times complain that parents’ requests for hearings are vague, the regulations bar school officials from denying or delaying a due process hearing on such grounds. See *id.* at § 300.507(c)(4).

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Many school officials believe that the IDEA is one-sided in protecting parents and students on the one hand, while burdening schools on the other. To the extent that this is so, the basic rationale has been that it is school officials—and not parents or students—who have both primary responsibility for and greater expertise in developing and implementing special education programs.⁷

Since 1997, the IDEA has also included provisions to encourage mediation. When a complaint is filed, the district must provide an opportunity for voluntary, confidential, and free mediation “conducted by a qualified and impartial mediator who is trained in effective mediation techniques.” 20 U.S.C. § 1415(b)(5), 1415(e). The district may further require parents not choosing mediation to meet with a disinterested parent group or alternative dispute resolution group “to encourage the use, and explain the benefits, of the mediation process.” *Id.* at § 1415(e)(2)(B). However, the school district may not use mediation “to deny or delay a parent’s right to a due process hearing” or to other rights under the IDEA. *Id.* at § 1415(e)(2)(A).

The structure of due process hearings depends on a combination of the IDEA requirements and state-adopted procedures. States are authorized to establish either a “one-tier” or “two-tier” system for due process claims. *Id.* at § 1415(f). Under a one-tier system, a neutral hearing officer under the auspices of the state education agency conducts the due process hearing, with appeal to the courts available by filing a civil action. Under a two-tier system, the initial hearing is conducted by a hearing officer acting under the auspices of the local or intermediate education agency, with an “impartial review” available from a neutral reviewing officer of the

state agency, after which appeal is possible by filing a civil action in the courts. Under both the one- and two-tier systems, selection of the hearing officer is left to state procedures. The IDEA requires, however, that any hearing officer be “impartial,” and thus not an employee of the state education agency or the child’s school district. *Id.* at § 1415(f)(3).

IDEA-dictated deadlines drive a fairly quick pace for due process hearings, though in practice the deadlines often are not met. IDEA regulations require that, unless either party requests otherwise, the hearing officer’s final decision must be made and mailed to the parties within 45 days of the *request* for a hearing. See 34 C.F.R. § 300.511(a). In a two-tier process, the state-level review decision must be made and mailed within 30 days after receipt of the request for review. See *id.* at § 300.511(b).

The hearing officer usually communicates with the parties to set the time and place of the hearing and must satisfy the federal requirement that the hearing be held at a time and place “reasonably convenient” to the parent and child. See *id.* at § 300.511(d). (There is no

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corresponding requirement that the hearing be convenient for the school district.) The hearing officer may require—or the parties may request—a pre-hearing conference to consider any preliminary motions and to discuss hearing procedures and whether the issues can be narrowed by agreement. One important requirement is that exhibits and witness lists must be exchanged five *business* days in advance of the hearing; otherwise, the opposing party has the right to prohibit the introduction of evidence not so disclosed. See *id.* at § 300.509(a)(3).

Due process hearings have many of the trappings of, but usually less formality than, a court proceeding. The hearing may take place in a state agency hearing room or around a conference table at the school district. The IDEA permits parents to represent

themselves or be represented by an attorney or by “individuals with special knowledge or training” related to children with disabilities, see *id.* at § 300.509(a)(1), which means parents may be represented in the administrative proceeding either by an attorney or by a lay advocate. Although the full scope of the rules of evidence does not apply, the IDEA guarantees both sides the power to subpoena witnesses, present evidence, and cross-examine witnesses. See *id.* at § 300.509(a)(2). Even when counsel represents parents, the hearing officer often takes an active role in questioning witnesses. A verbatim record is usually made because parties have the right to a written transcript or (at the parents’ option) an electronic record of the hearing, provided at no cost to the parent. See 20 U.S.C. § 1415(h)(3); see also 34 C.F.R. § 300.509(a)(4) and (c)(2).

Once convened, due process hearings follow the general outline of a civil trial. The hearing officer usually states for the record how the hearing will proceed and summarizes any agreement on the hearing’s scope. The parties usually have an opportunity to make opening statements. Then the parties present their witnesses and other evidence, with the school district often going first because it has the burden of proving that it made a FAPE available to the child. At the close of the evidence, the parties may make oral closing argument or request a written briefing in its place. The hearing officer may make an oral ruling on the record or reserve judgment until he or she issues a written opinion.

The Civil Action

The hearing officer's decision (or, in a two-tier system, the state-level reviewing officer's decision) is final unless a party elects to file a civil action in state or federal court, which is essentially an appeal of the due process outcome. See 20 U.S.C. § 1415(i)(2). (The vast majority of IDEA civil actions are brought in federal court.) An important converse requirement normally applies:

Parents cannot bring a civil action under the IDEA unless they first have invoked the IDEA's administrative procedures in a timely manner and exhausted those procedures. The civil action must also be filed within the applicable statute of limitations, which is not established by the IDEA but borrowed from state limitations periods for similar claims.

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the Supreme Court held that a court's focus in an IDEA case consists of two inquiries. "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Id.* at 206-07. If these questions are answered affirmatively, the Court stated, then the school district has satisfied its obligations. The IDEA directs the court reviewing a due process decision to hear "additional evidence" if requested by a party, to base its decision on the "preponderance of the evidence," and to grant "such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(B).

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The losing party in an IDEA civil action, whether parents or school officials, may appeal the decision of a federal or state trial court through normal appellate procedures.

Anatomy of a Case: How Due Process Hearings and Special Education Litigation Really Work

So much for theory. Now, for real life.

What ultimately would become the case of *Angela Jones v. Big School District*⁸ started with questions and informal expressions of concern. Beginning during the fall 1997 semester, Angela's mother, Ms. Jones, expresses to her daughter's teachers her dissatisfaction with various aspects of Big School District's placement of her 14-year-old daughter, who is mentally retarded and has behavioral problems. When she was younger, Angela spent some time "mainstreamed" with regular education children. But for several years—partly because of Angela's increased acting out and the greater difficulty in controlling tantrums that accompanied her physical growth—Big School District has paid her tuition at Special Kids School, a full-time, private special education day school.

Ms. Jones, however, wants more. Now, she has suggested to her Big School District placement specialist that Angela should be placed in a full-time *residential* facility at public expense. Angela can be difficult for her mother to control at home, destroying property and physically

threatening her family. Ms. Jones also says her daughter is not getting enough educational attention to prepare her for adulthood. But there is no formal dispute yet: Ms. Jones has not yet filed a complaint or requested a due process hearing; however, she has hired attorney Repeat Handler, who specializes in bringing special education actions against school districts in the area. The stakes are high because round-the-clock residential placements are expensive—anywhere from \$60,000 to twice that much per year, depending on the particular program—and, if found necessary to provide Angela with a FAPE, Big School District might need to provide such a placement for seven more years, until Angela is 21.

Attorney Handler also does not yet file a complaint requesting a due process hearing. Instead, he attends Angela's annual IEP review meeting with Ms. Jones, but only after the meeting is rescheduled several times around Mr. Handler's schedule. By the time they actually meet in May 1998—just as the school year is coming to a close, and months after Big School District *first* attempted to convene this meeting—the IEP chairperson has prepared for the meeting and Angela's teacher has had to arrange classroom coverage on three different dates. The IEP chairperson leads the group through discussion of Angela's current placement, educational

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progress, and proposed goals. Staff persons who work with or monitor Angela report that she recognizes a few more words, counts a little more accurately, and has been able to do simple chores in housekeeping; they recommend that the current placement continue.

Attorney Handler states that he is not surprised: he says he *knew* the IEP team would never recommend a residential placement. He spends the meeting apparently focused on cross-examining Angela's teachers and Big School District's special education staff on discipline incidents and shortcomings in Special Kids School—seemingly (at least to the Big School District IEP team) more interested in setting up

and preparing for a due process hearing that has not yet been requested than in attempting to work cooperatively toward an agreement on placement.

There appears to be a clear dispute here: Ms. Jones has refused to sign the IEP or agree to the placement, yet Attorney Handler still does not request a due process hearing. Big School District staff members suspect he is waiting for a more tactically advantageous time—such as when some incident at Special Kids School may make that placement seem less effective—as well as when a hearing would best fit into Attorney Handler's crowded calendar. (This is a real issue for Mr. Handler; his small, three-lawyer firm does not provide him with a lot of back-up when scheduling conflicts occur.)

The new school year begins, and Angela appears to be doing fine at Special Kids School (where Big School District is still paying her tuition, notwithstanding Ms. Jones' refusal to sign Angela's IEP). Then one day in the fall—nearly a year since Ms. Jones began talking about a residential placement—Angela acts out. Attorney Handler moves quickly, filing a request for a due process hearing to be held within the following two weeks. The complaint is completely generic, stating only that Big School District's placement of Angela, as shown in her May 1998 IEP, has denied Angela a FAPE.

Now the due process machinery—and more delays—kick in. Big School District forwards the complaint to the state Department of Administrative Hearings, which immediately assigns it a case number and hearing officer. Big School District proposes mediation, which Attorney Handler refuses. Counsel for Big School District—Outside Law Firm—files a response asking for a prehearing conference to clarify the issues and proposing several different hearing dates. (Outside Law Firm is a much larger firm than Mr. Handler’s; with more attorneys it is able to be more flexible when it comes to scheduling.) The hearing officer sets a date for the prehearing conference via telephone conference call, which (seemingly like everything else) ultimately is rescheduled several times to accommodate Attorney Handler’s schedule. During the prehearing conference, the hearing officer takes a “no nonsense” approach but also seems inclined to give parent’s counsel a lot of leeway. To preserve as many options as possible, Attorney Handler is very vague on what is deficient with Angela’s current placement. Is it lack of effective discipline? Is the teacher inadequate? Is Angela not making educational progress? No specific answers are forthcoming. By letter, the hearing officer sets the hearing for two weeks later—which will be a month after the complaint was filed.

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Outside Law Firm starts preparing for the hearing as soon as the complaint comes in, reviewing Angela’s educational file, interviewing her recent regular and special education teachers and members of her IEP teams for the last several years, and investigating whether any expert witnesses will be needed. All this is made much more difficult (and expensive) and must cover all conceivable subjects and persons with knowledge about Angela because Attorney Handler has managed to avoid specifically itemizing his complaints.

Nevertheless, and as required by the IDEA, five business days before the hearing (and just four days after the prehearing conference), Big School District faxes its “five-day disclosure” to Attorney Handler, including a list of potential witnesses and all the documents it may use at the hearing, including Angela’s IEPs, psychological and educational assessments, discipline reports, and more. All this work has required a lot of time by Outside Law Firm attorneys and has run up a significant bill for Big School District before the hearing has even started.

Instead of making his own five-day disclosure, however, Attorney Handler sends a letter to the hearing officer withdrawing the complaint, claiming he was unaware of the hearing date. Big School District staff members suspect, however, that other concerns actually prompted this withdrawal. This case may be conflicting with another of Handler’s many active special education cases, and the Big School District placement specialist who regularly deals with the particular residential program that Ms. Jones appears to prefer has heard that it lacks space right now for Angela. Outside Law Firm moves for the complaint to be dismissed with prejudice, but the hearing officer refuses.

Several weeks later, Attorney Handler files a second due process complaint, asking for a hearing on one of three dates over the succeeding three weeks. Again, Outside Law Firm requests a prehearing conference and prepares for the hearing by gathering recent information on Angela and re-interviewing witnesses. (This prehearing conference is just as unhelpful as the first one in terms of extracting any sort of “bill of particulars” from Attorney Handler.) The School

District again makes a timely five-day disclosure. And, once again, Attorney Handler withdraws the complaint, this time asserting in a letter that he is trying to settle the case with Big School District's counsel. That is news to Outside Law Firm; its attorneys have heard nothing from Attorney Handler. Again, Big School District staff suspects that tactical posturing is behind the most recent dismissal, especially when Mr. Handler fails ever to initiate settlement discussions. Outside Law Firm thus sends Mr. Handler a letter warning that it will seek to dismiss any new complaint based on his lack of good faith in filing and withdrawing complaints.

Months pass. Big School District begins to think that Ms. Jones has decided that Angela's placement at Special Kids School is acceptable after all. Then, in January 1999, Repeat Handler requests an "emergency" IEP meeting on grounds that Angela's performance has deteriorated and an emergency residential placement is necessary. The IEP team meets and finds no emergency exists and no change is warranted. A week later, a third due process complaint is filed, demanding a hearing the next week. Hearing preparations kick off yet again, but this time Outside Law Firm also files a motion to dismiss the complaint, arguing that Repeat Handler and

Big School District staff suspects that tactical posturing is behind the most recent dismissal, especially when Mr. Handler fails ever to initiate settlement discussions.

Ms. Jones have acted in bad faith by twice before filing and withdrawing the complaint and never pursuing settlement. Although the hearing officer chides Mr. Handler for claiming he intended to explore settlement and never did so, and finds that there is no factual support for Mr. Handler's claim that he did not receive notice of the first hearing date, she nevertheless allows the hearing to go forward. This due process complaint involves new facts, the hearing officer finds: the alleged recent deterioration in Angela's school performance. Moreover, the most important thing, she rules, is that Big School District must show it is providing Angela with a FAPE—and she won't deprive Angela of her due process rights solely because her attorney may have acted

disingenuously. The hearing is set for two weeks later, in March 1999, a month after the third complaint is filed, but more than ten months after the last full IEP meeting.

Big School District again makes its five-day disclosure; this time, Repeat Handler does too. As potential witnesses he lists Angela, Ms. Jones, a special education expert, all of Angela's teachers, and all IEP team members. He also produces a handful of discipline notes sent home by the school. It appears the hearing really is going forward.

The hearing convenes, as scheduled, in a conference room at Big School District. There is no court reporter present, but a tape recorder sits in the middle of the table, and throughout the hearing, the hearing officer is very careful about turning it on and off, stating the case number, the date and time, and who is present. The hearing officer announces the case and asks if there are any preliminary matters. Immediately, Repeat Handler announces (for the first time) that this case will take at least *four* days of testimony and that he has conflicting cases over the next several days. The hearing officer says she is tired of delays. She instructs everyone to pull out their calendars and then finds four available days over the next month and a half. Angela's case will be heard in fits and starts.

The parties outline their case in opening statements. Even though Big School District has the

ultimate burden of proof, the hearing officer decides that it will be most efficient for Angela's attorney to go first (and thus finally reveal specifically what he alleges is inappropriate about Angela's IEP and/or current placement at Special Kids School). Attorney Handler argues that the evidence will show that Angela needs round-the-clock attention to make educational progress and that her out-of-control behavior at home means she is not meeting the "social skill" goals in her IEP. Big School District counters that Angela is making some educational progress at school and that that is what the IDEA requires, not that the District *maximize* Angela's progress.

As the first witness, Angela's counsel calls the IEP chair to set the stage with information on Angela's disabilities, placements, and evaluations.

Then the witnesses begin, sprinkled over four hearing dates with only three to four hours devoted to the hearing each day, largely due to Attorney Handler's continuing schedule conflicts. As the first witness, Angela's counsel calls the IEP chair to set the stage with information on Angela's disabilities, placements, and evaluations. Then Ms. Jones testifies, with vivid details about Angela's difficult behavior and her desire for Angela to become self-sufficient.

More witnesses follow: Angela's current teacher, a prior teacher, her after-school provider, a counselor, Angela's Big School District caseworker, and dueling experts on appropriate expectations for educational progress of a child with Angela's disabilities.

Numerous sub-themes develop: Did the District improperly fail to provide summer school? Was an in-home assessment required? What exactly do Angela's IEP goals require? Is Angela taking her medications at home? Why were some IEP meetings delayed? Has Angela's mother adequately cooperated with her school? Is the residential placement proposed by Angela's mother well run? And is Angela actually so dangerous in the home that child welfare should get involved?

On the third hearing day, Repeat Handler angles for an immediate ruling and placement in a residential facility. An emergency has arisen, he asserts, and recalls Angela's mother to testify. The incident she describes—a thrown glass, a pinched social worker—sounds no more severe than others, and the hearing officer refuses to act precipitously.

On the final hearing date, just one witness is heard. Attorney Handler asks for the opportunity to submit written post-hearing briefs in lieu of offering closing oral argument then and there; Big School District does not object. This will delay the decision, but because it is requested by the parties, the hearing officer agrees and works out a schedule: Briefs are due in four weeks, and the parties will then respond to each other's opening briefs in simultaneous reply briefs to be filed three days later.

Four weeks after the reply briefs are filed (two days late, in Mr. Handler's case), in July 1999 the hearing officer issues her decision. As the first witness, Angela's counsel calls the IEP chair to set the stage with information on Angela's disabilities, placements, and evaluations. The decision carefully describes all the witnesses and exhibits entered into evidence. Big School District doesn't agree with all the characterizations of events but is generally satisfied with the result.

Over a year has passed since Angela's May 1998 IEP meeting that produced the IEP and placement decision that had been the subject of these proceedings. It now is approaching two years since Ms. Jones first began talking about a residential placement. While Repeat Handler and Outside Law Firm were completing the due process hearing, another annual IEP meeting occurred in May 1999, continuing Angela's placement at Special Kids School.

Big School District waits for the next shoe to drop. Will Ms. Jones appeal the hearing officer's decision to federal or state court? Will she file a new due process claim based on the May 1999 IEP meeting? Months go by with no action. Angela remains at Special Kids School. Eventually, Outside Law Firm boxes up the files on Angela's case and sends them off-site. As for Big School District, it is still busy with Angela's regular evaluations, IEP meetings, and providing her with special education.

Big School District has prevailed for now, but at huge cost. It has paid substantial attorneys' fees for multiple trial preparations and a lengthy hearing. Special education staff members have spent days away from classrooms and normal duties—for scheduled and rescheduled IEP meetings, interviews with the district's attorneys, and several trial days during which they waited to, and did, testify. Angela remains in her same placement and is living at home with her mother.

Impartial due process hearings are an imperfect tool to efficiently enforce the IDEA's mandate of a free appropriate public education for students with disabilities.

The Efficacy of Due Process and Litigation for Enforcing the IDEA

As the foregoing description of Angela's case suggests, impartial due process hearings are an imperfect tool to efficiently enforce the IDEA's mandate of a free appropriate public education for students with disabilities. Summarized below are several specific areas in which we believe due process has tended to work well, or not so well, in our experience.

From the Perspective of School Districts

One clear benefit to school districts from the due process system is identification of special education problem areas, including service gaps. Due process hearings can be a source of valuable information in this respect; responsible districts closely monitor the outcomes of due process hearings and special education litigation and move quickly to correct any deficiencies that may be contributing to adverse outcomes. This, in turn, enhances the overall quality of the districts' special education program and their ability to meet the needs of the children they serve.

At the same time, due process hearings cost money and consume other resources that are thus unavailable to educate children. In 1984, the Supreme Court concluded that this was the reason Congress had not previously provided for an award of attorneys' fees to prevailing parents in the EHA,⁹ the next year, Congress "corrected" that omission.

Of course, it is not merely the prospect of having to pay attorneys' fees to prevailing parents that districts must assess in determining how to handle a parent request for due process—it is the

district's own attorneys' fees as well because it has no prospect of reimbursement, even if the parent complaint is completely frivolous. In our experience, districts have at times agreed to parental demands, asserted through due process complaints, for changes to IEPs and placements simply because its own costs in attorneys' fees to defend the cases would likely be greater than the costs of the requested changes. Those enhanced resources are not free. It is unlikely that such skewing of resources toward the "squeaky wheels" is what Congress intended.

Finally, although this wasn't illustrated by Angela's case, the IDEA's "stay-put" provision is subject to serious abuse. Once a child has been placed in a private placement—either directly by a school district or indirectly by order of a hearing officer or judge after a parent's unilateral placement—any effort by a district to move the child back into a public placement (including designing and implementing a new and entirely appropriate program) can be frustrated *for years* by many of the same kinds of delays that took place in Angela's case. College basketball long ago implemented a 40-second clock to put some reasonable limits on versions of "stall ball." There is no comparable mechanism in the IDEA; running out the clock is a strategy that remains alive and well in special education due process proceedings.

The current due process regime is very complex and technical, and thus difficult (if not nearly impossible) for parents to navigate successfully without legal representation or well-trained parent advocates.

From the Perspective of Parents and Students

Having counseled and represented parents as well as school districts in special education litigation, we can attest that one definite benefit of due process hearings is to ensure, as a last resort, the provision of appropriate IEPs and placements. There are indeed children with disabilities in this country who have received a FAPE only due to the intervention of due process hearing officers and judges.

Moreover, although we have not seen comprehensive data on the issue, it is undoubtedly true that many parents have obtained legal representation in special education due process proceedings and litigation only because of the attorneys' fees provision enacted in 1985. although it often appears to district staff that affluent parents are more likely to take advantage of the due process procedure, this trend undoubtedly would increase in the absence of the IDEA's fees provision.

Still, the current due process regime is very complex and technical, and thus difficult (if not nearly impossible) for parents to navigate successfully without legal representation or well-trained parent advocates. This is particularly true for less sophisticated parents. That is likely not what Congress intended. Indeed, it may well be that the recent (1997) requirement that states and districts offer mediation as an alternative to due process was the result of Congress' recognition of the increasing complexity and expense, as well as the time-consuming nature of due process.

Breakdowns in the System Common to (and Unhealthy for) Both Sides

In our experience, due process has proven in two additional respects to be imperfect for efficiently enforcing the IDEA's FAPE mandate.

First, such proceedings tend to foster mutual perceptions of dishonesty between the parties and often result in deep suspicion and hostility between parents and school officials. While litigation is inherently adversarial, the level of antipathy in post-due process relationships appears to us generally to be much higher than in relationships between parties in other areas of our education practice. Perhaps this is due, in part, to the relative absence of mechanisms in the statute and regulations that would inhibit much “gaming” of the system, some of which was described above in Angela’s story.

Second, due process does not lend itself to quick resolution of any dispute, unless both parties genuinely desire such a resolution. This is unfortunate (and can have tragic consequences) when a child is being denied adequate services while the dispute remains unresolved. The IDEA’s relatively new mediation mechanism, to the extent it is used and actually resolves disputes, may fill the need for a quick, informal dispute resolution process that does not require attorneys—which due process itself probably was initially intended to provide.

Recommendations—and Tradeoffs

Due process does not lend itself to quick resolution of any dispute, unless both parties genuinely desire such a resolution.

In a perfect world, all these problems would be fixed. Any fix, however, will bring with it unintended (as well as intended) consequences. Moreover, we recognize that features of the system that we have described as problems based on our experience actually may not be problems on a national scale.

More Data Are Needed

Our ability to prescribe improvements in the system is limited by the absence of comprehensive data on many of its key features. Much research has been published regarding some aspects of the IDEA and other federal special education directives,¹⁰ such as trends in the rate and category of placements of students with disabilities¹¹ and qualitative studies of factors affecting such trends.¹² Furthermore, some districts and states collect certain due process data such as numbers and percentages of due process claims filed, mediated, settled, and decided by a hearing, the final disposition of such claims, and the schools from which they arise.¹³ However, we are unaware of recent national data on many of the questions raised in this paper.¹⁴

Specifically, data regarding three broad issues would be useful to policy makers and advocates as Congress moves toward the 2002 IDEA reauthorization:

- **Which students and parents make use of the process?** Data regarding the profiles of students and parents most and least likely to file due process claims and to prevail in such claims (including, for example, those seeking private placements) would help policy makers assess not only the extent to which the procedural aspects of the IDEA are being implemented equitably, but also how specific provisions—such as the fee-shifting provision—might contribute to outcomes.¹⁵
- **What are the costs of due process litigation—and who bears them?** School districts that receive many due process requests from sophisticated parents represented by experienced

counsel spend substantial resources, including administrative and instructional staff time and attorneys' fees, in processing and responding to these requests and litigating the claims. On the other hand, districts that receive few claims, of which many are resolved informally, commit relatively fewer resources. Research quantifying the costs of due process litigation under the IDEA would be useful in determining whether the system is working efficiently and in assessing the costs of alternatives. Such research could also be used, for example, to determine whether and to what extent school districts are diverting resources from other programs to respond to due process claims and in what proportions the costs of litigation are borne by parents, districts, and states.

• **Is mediation serving its stated purpose?** Pursuant to the 1997 amendments, the IDEA now requires states to make mediation available to parents who file due process requests. Some school districts with which we are familiar have seen as many as one-half of all disputed placements resolved through mediation. Such cases tend to involve disputes over issues entailing relatively low financial stakes, such as the amount of time that certain related services are to be provided to a student. Higher-stakes issues, such as whether the school district will fund an expensive private placement, appear *not* to be resolved by mediation. Data regarding the extent to which, and the kinds of cases in which, mediation is used, and the results that follow, also would be useful to policy makers in assessing whether the mediation provision has served its intended purpose of providing a streamlined, inexpensive, and fair alternative to due process hearings.¹⁶

Congress' attention will be focused on amending the IDEA when the Act comes due for reauthorization in 2002.

Possible Amendments to the IDEA

Congress' attention will be focused on amending the IDEA when it comes due for reauthorization in 2002. Notwithstanding the current dearth of national data on many of the questions we have raised, several amendments that have been proposed in the past, or are currently being discussed among advocates, commentators, and key congressional staff, are of interest.

Limiting attorneys' fees. One possible reform, presented in a bill introduced in Congress several years ago, would bar the award of attorneys' fees for due process hearings by limiting such awards to actions brought in state or federal court.¹⁷ This proposal apparently reflects the view that due process hearings can be made less formal and thus less expensive and time-consuming by limiting the participation of parents' attorneys. This proposal would have a disproportionate impact on low-income families who cannot afford to retain an attorney.

Establishing an IDEA statute of limitations. Another proposal, establishing a relatively short period within which due process claims under the IDEA must be filed, would likely reduce the number of claims filed. It is not clear, however, that such a measure would bar frivolous claims.

Trained judges as hearing officers. The IDEA gives states broad discretion to design their own systems for reviewing due process claims by parents of students with disabilities, including, for example, the selection of hearing officers. In Maryland, district officials report that an

amendment to state law requiring that hearing officers be administrative law judges¹⁸ has produced more consistent application of legal standards, and therefore more predictable outcomes and overall fairer hearings. Based on these officials' and our own experience, we believe inclusion of a similar requirement in an amended IDEA or the adoption by other states of a law similar to Maryland's, with the added requirement that hearing officers receive training in special education, could produce significantly more equitable, consistent and efficient due process systems.

Due process is a blunt, costly, time-consuming, and otherwise imperfect instrument to accomplish its assigned task.

Limiting the duration and scope of the process.

Other proposals designed to reduce the duration, expense, and "legalization" of due process under the IDEA have included limiting (a) the length of hearings (e.g., to not more than a single trial day), (b) the types of issues from which an appeal may be taken (e.g., to "purely legal" issues), or (c) state and federal courts' ability to hear additional evidence not presented in the hearing.¹⁹

Amendments of this kind would likely reduce the cost of due process hearings and litigation. They also—if applied inflexibly—would result in a real sacrifice of due process rights for litigants in some cases. This is an area in which additional data would shed needed light on the proper balance between seeking to ensure fairness for the parties and managing the cost and efficiency of the process.

Conclusion

As attorneys who have represented both sides in these cases, we can vouch for the following:

- Special education staff members in the public schools devote their professional lives to educating children with disabilities, are truly dedicated to the endeavor, and genuinely want to provide appropriate special education and related services to the students they are charged with educating. Yet school resources are not unlimited, budget pressures are real, and the IDEA allows districts to take program costs into account *only* so long as they still are meeting the FAPE requirement. This is the fundamental source of school district conflict with parents.
- Parents (and other guardians) who devote their lives to raising children with disabilities genuinely want to make sure that their children receive *at least* appropriate special education and related services. In truth, however, what these parents *really* want—indeed what *all* parents want—is an education that will allow their children to maximize their potential. The IDEA does not require this. This is the fundamental source of parents' conflict with school officials.

In its wisdom, Congress has decided that when conflicts occur (and—now—cannot be resolved through mediation), they must be resolved through due process. Due process is a blunt, costly, time-consuming, and otherwise imperfect instrument to accomplish its assigned task. The IDEA's 2002 reauthorization may well provide our best opportunity to improve it.

- ¹ The authors are attorneys at Hogan & Hartson L.L.P., one of the few “national” law firms representing education institutions as a focus of its practice. The firm represents school districts; colleges, universities, and other post-secondary institutions; national education associations; and corporations and foundations with an interest in education. Hogan & Hartson’s work for elementary and secondary education clients has addressed the gamut of issues faced by school districts, including not only special education, but also other civil rights issues; employment issues, such as affirmative action, employment discrimination, and sexual harassment; federal contract and grant programs; First Amendment issues, such as aid to non-public schools, prayer in school, and freedom of speech; and various Washington-based activities, including representing school districts and their associations before Congress and federal agencies such as the Departments of Education and Justice, the Environmental Protection Agency, and the Federal Communications Commission. The firm has represented school districts in numerous special education due process hearings, as well as in appeals to the federal courts, and firm attorneys also have represented parents and students in similar proceedings against school districts. The firm regularly advises school districts regarding obligations under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400, *et seq.*, Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*
- ² The federal Family Educational Rights and Privacy Act (“FERPA”), 20 U.S.C. § 1232g, also known as the “Buckley Amendment,” does require school districts to provide a due process hearing of sorts when parents believe their children’s educational records should be changed in some way and school officials disagree. Although FERPA itself does not provide federal funds to states or local school districts, the statute’s enforcement mechanism provides for a cut-off of all other federal funding if FERPA’s mandates (including provision of this hearing) are not met. This hearing, however, need not be “impartial” in the same sense as a special education due process hearing, in that (among many other things) a FERPA hearing may be conducted by an employee of the same school district where the child attends school. See generally 34 C.F.R. § 99.22(c).
- ³ This first impartial due process hearing provision apparently was the product of an amendment offered by Senator Robert T. Stafford of Vermont and passed on the floor of the Senate, advancing procedural protections then under consideration as part of more comprehensive legislation (Senate Bill 6), which ultimately was enacted the following year as Public Law 94-142, the Education for All Handicapped Children Act (EAHCA). See 93 Cong. Rec. 15266-77 (1974).
- ⁴ See 34 C.F.R. Parts 300 and 303.
- ⁵ Upon an examination of the EHA’s legislative history, the Supreme Court concluded (in the majority opinion authored by Justice Blackmun) that the absence of an attorneys’ fee provision in the statute was no oversight: Congress did not explain the absence of a provision for a damages remedy and attorneys’ fees in the EHA. Several references in the statute itself and in its legislative history, however, indicate that the omissions were in response to Congress’ awareness of the financial burden already imposed on States by the responsibility of providing education for handicapped children. As noted above, one of the stated purposes of the statute was to relieve this financial burden. See 20 U.S.C. §§ 1400(b)(8) and (9). Discussions of the EHA by its proponents reflect Congress’ intent to “make every resource, or as much as possible, available to the direct activities and the direct programs that are going to benefit the handicapped.” 121 Cong. Rec. 19501 (1975) (remarks of Sen. Dole). See also *Id.*, at 37025 (procedural safeguards designed to further the congressional goal of ensuring full educational opportunity without overburdening the local school districts and state educational agencies) (remarks of Rep. Perkins); S. Rep. No. 94-168, at 81 (minority views cognizant of financial burdens on localities). The Act appears to represent Congress’ judgment that the best way to ensure a free appropriate public education for handicapped children is to clarify and make enforceable the rights of those children while at the same time endeavoring to relieve the financial burden imposed on the agencies responsible to guarantee those rights.”
- Smith v. Robinson*, 468 U.S. at 1020-21.
- ⁶ *Board of Education v. Rowley*, 458 U.S. 176, 205-06 (1982).
- ⁷ See, e.g., *Tatro v. Texas*, 703 F.2d 823, 830 (5th Cir. 1983).
- ⁸ To protect privacy, we have altered names and some facts of a real case handled by Hogan & Hartson.
- ⁹ See note 6.
- ¹⁰ See, e.g., David M. Engel, “Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference,” 1991 *Duke L.J.* 166 (1991) (describing a study of the effectiveness of the IDEA in

western New York).

- ¹¹ See, e.g., James McLeskey, Daniel Heary and Michael I. Axelrod, "Inclusion of Students with Learning Disabilities: An Examination of Data from Reports to Congress," 66 *Exceptional Children* 55 (1999). The U.S. Department of Education presents annual Reports to Congress regarding implementation of the IDEA, which also include data on the identification and placement of students with disabilities.
- ¹² See, e.g., S. Hasazi, et al., "A Qualitative Policy Study of the Least Restrictive Environment Provision of the Individuals with Disabilities Education Act," 60 *Exceptional Children* 491 (1994).
- ¹³ Project FORUM of the National Association of State Directors of Special Education (NASDSE) has published several papers funded by federal grants that summarize state-by-state data on the number of due process claims filed and how many hearings (first-tier and second-tier) were held. See NASDSE, "Due Process Hearings, 1999 Update" (Dec. 1999) (data for all states for 1996 through 1998); Eileen M. Ahearn, "Due Process Hearings: An Update" (NASDSE, Jan. 8, 1997) (data for 1992 through 1994); NASDSE, "Mediation and Due Process Procedures in Special Education: An Analysis of State Policies" (1994) (data for 1991 through 1993). This macro-level data showed a steady increase in the number of due process requests filed across the country (from 4,125 in 1991 to 9,827 in 1998), and an overall but less consistent increase in the number of hearings held (from 1,232 in 1991 to 3,315 in 1998). The studies cite an "acute need" for better and more detailed information on due process proceedings and costs. NASDSE also surveyed several states' use of mediation prior to the 1997 IDEA amendments encouraging use of mediation. See Gloria T. Symington, "Mediation as an Option in Special Education" (NASDSE, Jan. 13, 1995).
- ¹⁴ Cf. Joel F. Handler, *The Conditions of Discretion: Autonomy, Community, Bureaucracy* (1986), 69-72 (citing studies of due process hearings in the 1970s and 1980s). Some studies have examined win-loss records of parents vs. school districts and some characteristics of due process cases such as severity of disability, student gender, central issue in dispute, and occupation of the hearing officer. See, e.g., James R. Newcomer, Perry A. Zirkel and Ralph J. Tarola, "Characteristics and Outcomes of Special Education Hearing and Review Officer Cases," 123 *Educ. L. Rep.* 449 (1998) (also citing additional earlier studies). However, these studies have not analyzed data addressing the principal questions raised in this paper regarding which claims end up in litigation, costs, and outcomes. Some studies do provide limited or anecdotal cost information. For example, one author reported that due process proceedings for a particular child in Pennsylvania consumed 19 sessions over two years, \$27,000 for transcript fees and \$20,000 for hearing officer costs, but other expenses (such as attorneys' fees for parents and district, expert witness fees, staff time, and more) were unavailable. This author also reported that the first-tier hearing stage in Pennsylvania averaged 110 days as of 1992, while second-tier reviews averaged 35 days. See Perry A. Zirkel, "Over-Due Process Revisions for the Individuals with Disabilities Education Act," 55 *Mont. L. Rev.* 403, 404-06 & n.12 (1994).
- ¹⁵ For example, in our experience, and perhaps not surprisingly, parents who file and aggressively press due process claims tend to be relatively affluent. One obvious reason for this is the relatively high cost of legal representation. As previously noted, since the web of IDEA regulations has become increasingly complex, the assistance of experienced counsel has become more important. This is true even in the early stages of a dispute, including IEP meetings and other contacts with the school district, which may be characterized by posturing and tactical gamesmanship. Although the IDEA fee-shifting provision gives lawyers some incentive to represent low-income parents, many plaintiff's lawyers seek a healthy proportion of paying clients to supplement the court-ordered fees they are able to collect when they "win" a case. We have observed that attorneys who litigate due process claims primarily against school districts with track records of litigating and declining to settle such claims are less willing to take on clients who cannot afford to pay their fees; plaintiff's lawyers in such districts cannot count on a steady flow of court-awarded fees in connection with settlements favorable to their clients. Conversely, we would expect that counsel practicing in areas where the school district has been more willing to settle claims would be able to rely more on winning court-ordered fees and thus might take on a greater proportion of low-income clients.
- ¹⁶ See H.R. Rep. No. 105-95, at 106 (1997).
- ¹⁷ See Zirkel, *Over-Due Process Revisions*, at 408.
- ¹⁸ See Md. Code Ann., Educ. § 8-413(a)(2).
- ¹⁹ See Zirkel, *Over-Due Process Revisions*, at 409-412.