



Practical Strategies for Avoiding Due Process

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How can you avoid due process?

1. Meet your child find obligations
2. Conduct a comprehensive educational evaluation
3. Follow procedural requirements
4. Address all of the student's needs related to his/her disability
5. Develop adequate IEP goals
6. Ensure placement is appropriate

How can you avoid due process?

- 7. Educate teachers/service providers
- 8. Document IEP implementation
- 9. Revise IEPs properly
- 10. Appropriately assess and address behavioral issues
- 11. Appropriate disciplinary procedures
- 12. Watch out for transportation-related issues

1. Meet Your Child Find Obligations

- Are there repeated behavioral issues resulting in discipline but never any referral to assess for ED?
- Is student experiencing retention, Rtl, other academic issues but no referral?
- Have there been repeated parent requests for assistance/testing that are not addressed?
- Has parent submitted an outside evaluation?
If so, it may be time to evaluate the student

1. Meet Your Child Find Obligations

- Evidence that a middle schooler with ADHD presented dangerous behaviors since the start of the 2014-15 school year undermined a California district's claims that it had no reason to suspect that the student required an evaluation. An ALJ determined that the 12-year-old was entitled to compensatory services, noting that the district failed to comply with the IDEA's child find requirements.

Panema-Buena Vista Union Sch. Dist., 115 LRP 30628 (CA SEA 6/11/15)

2. Conduct a comprehensive educational evaluation

- If student has never been evaluated, don't decline parent request to evaluate based on a records review
- Review social and developmental history and referral forms completed by parents and teachers to ensure all areas of concern are assessed
- Make certain that all components for eligibility in area of suspected disability have been completed

2. Conduct a comprehensive educational evaluation

Letter to Baus (OSERS 2/23/15)

- The issue was whether a parent could request an IEE in an area that was not previously assessed by a school district evaluation.
- Under 34 CFR §300.502(b)(1) of the IDEA (and 511 IAC 7-40-7), a parent of a child with a disability is entitled to an IEE at public expense if the parent disagrees with an evaluation obtained by the public agency.

2. Conduct a comprehensive educational evaluation

- 34 CFR §300.304(c)(4) requires the school to ensure that “[t]he child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.”

2. Conduct a comprehensive educational evaluation

- 34 CFR §300.304(c)(6) further requires the school to ensure that “In evaluating each child with a disability under §§ 300.304 through 300.306, the evaluation is sufficiently comprehensive to identify all of the child’s special education and related services needs, whether or not commonly linked to the disability category in which the child has been classified.”

2. Conduct a comprehensive educational evaluation

- OSERS stated that "when an evaluation is conducted in accordance with 34 CFR §§300.304 through 300.311 and a parent disagrees with the evaluation because a child was not assessed in a particular area, the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs."

2. Conduct a comprehensive educational evaluation

- What happens if you don't?
- You lack needed data/information to support your position
- In contrast, the parents have the needed data/information to support their position, and you have to pay for the IEE
- Next thing you can expect if you don't agree with the parents' position is a request for due process hearing

2. Conduct a comprehensive educational evaluation

- A side-by-side comparison of the diagnostic criteria for autism and the behaviors that a 3-year-old girl exhibited in her private preschool program helped convince a District Court that the child's initial placement in an integrated preschool program was inappropriate. Because the district would have identified the child's intensive needs had it evaluated her in all areas of suspected disability, the court held that the district denied the child FAPE.

Millburn Township Bd. of Educ. v. J.S.O. and K.S.O. ex rel. A.C.S.O., 63 IDELR 229 (D.N.J. 2014)

Other evaluation issues

- Not conducting an evaluation when the parent requests the school conduct a reevaluation even if the CCC determines no additional data is needed to plan for the student – 34 CFR 300.305(d)

Other evaluation issues

(d) Requirements if additional data are not needed.

(1) If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the public agency must notify the child's parents of—

(i) That determination and the reasons for the determination; and

(ii) The right of the parents to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs.

(2) The public agency is not required to conduct the assessment described in paragraph (d)(1)(ii) of this section **unless requested to do so by the child's parents.**

Other evaluation issues

- Not evaluating a student before determining s/he is no longer a student with a disability – 34 CFR 300.305(e)

Other evaluation issues

(e) Evaluations before change in eligibility.

- (1) Except as provided in paragraph (e)(2) of this section, a public agency must evaluate a child with a disability in accordance with §§300.304 through 300.311 before determining that the child is no longer a child with a disability.
- (2) The evaluation described in paragraph (e)(1) of this section is not required before the termination of a child's eligibility under this part due to graduation from secondary school with a regular diploma, or due to exceeding the age eligibility for FAPE under State law.
- (3) For a child whose eligibility terminates under circumstances described in paragraph (e)(2) of this section, a public agency must provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's postsecondary goals.

3. Follow Procedural Requirements

When do procedural violations result in a denial of FAPE?

- When they result in the student not receiving services s/he otherwise should have received (i.e., causes impediment to FAPE or deprivation of educational benefit to student)
 - Child find violations
 - Failing to timely evaluate student
- When it prevents the parents from being able to fully participate in the student's educational programming

3. Follow Procedural Requirements

- Meet timelines for evaluation/IEP review
- Obtain consent for evaluations/initial services/FBAs and other reevaluations/exchange of information
- Schedule CCC meetings at mutually agreeable date/time and place
 - Must contact parent before sending notice to assess if date/time is agreeable
- Provide adequate notice of CCC meeting, i.e., early enough to:
 - (A) allow a change in time or location;
 - (B) make arrangements to attend a meeting; or
 - (C) allow a response prior to the proposed action

3. Follow Procedural Requirements

- Provide procedural safeguards when required
 - At least one (1) time a school year
 - On initial referral or parental request for evaluation
 - Receipt of the first filing of a complaint in a school year
 - Receipt of the first due process hearing request in a school year
 - The date the school decides to make a removal that results in a disciplinary change of placement
 - At request of a parent

3. Follow Procedural Requirements

- Required participants attend case conferences
- Avoid claims of predetermining placement
 - May be evidenced by not including general education teacher in case conference
- Case conference notes document parent requests and denial of same
- Respond to parent requests for evaluation/IEE

3. Follow Procedural Requirements

- Provide records when requested by parent
- Provide a copy of the IEP in a timely manner
 - No later than 10 business days after the case conference
- Consider parent input
 - Consider parent concerns/requests for goals/services
 - Consider outside evaluations/providers
 - Provide adequate written notice
 - Provide progress reports

3. Follow Procedural Requirements

- A New York district's failure to respond to a series of inquiries about a second-grader's proposed placement ended up costing it \$92,100. The District Court held that the parents' exclusion from the placement process entitled them to reimbursement for their son's unilateral placement in a private special education school. The court explained that the right to meaningfully participate in the IEP process includes the right to obtain relevant and timely information about the proposed school; such information is necessary for parents to evaluate the placement offer and decide whether to accept it.

F.B. and E.B. ex rel. L.B. v. New York City Dep't of Educ., 66 IDELR 94 (S.D.N.Y. 2015)

4. Address All of Student's Needs Related to Disability

- Do the IEP goals address the weaknesses identified in evaluations/assessments?
- Do the IEP goals address parent/teacher concerns?
- Does the student have attendance issues? Is there a plan to provide compensatory services if absent due to disability?
- Is there a need for social skills development? Has this been addressed?

4. Address All of Student's Needs Related to Disability

- Does the student have behavioral issues? Has a FBA been completed? Is there a BIP? Behavior goals?
- Does the student need any related services? Counseling is a big one that often is requested in due process.
- Are there services to address the IEP goals?
- Is ESY required to provide a FAPE? If not, have you documented that a discussion about ESY occurred?

5. Adequate IEP Goals

- The IEP is the foundation of a student's special education program
- The IEP goals are the cornerstone of the IEP
- The IEP goals are derived from the student's present levels of performance
- You can't set goals unless you have accurate PLOP
- You can't measure progress unless you have measurable goals

5. Adequate IEP Goals

- Problem: no current assessment data
- Bigger Problem: no data and no CCC participant with knowledge of PLOP in area of curriculum that is problematic
- Biggest Problem: no data, no CCC participant with knowledge of PLOP, and parent has current assessment data in that subject area

5. Adequate IEP Goals

Look out for:

- Goals for which there are no PLOPs
- Goals that are not measurable
- Goals that never change
- Cookie cutter goals
- No goal in area of need
- No progress reports (or no progress on goal)

5. Adequate IEP Goals

- Each goal must include benchmarks if a student is taking ISTAR or other alternate assessment approved by IDOE
- A single benchmark is not appropriate; there should be at least two
- Benchmarks should relate to the goal
- Benchmarks are either specific skills that are part of the goal or steps in the process of meeting the goal

5. Adequate IEP Goals

- A district's decision to forego the use of any baseline data in a proposed IEP was key to a parent's successful tuition reimbursement claim. Although the district developed 14 goals for the student, the goals lacked any baseline data. The district argued that the student had been absent from the district for two years and would need to be reassessed upon her return to gauge sufficiently accurate baseline data.

5. Adequate IEP Goals

- But the IHO pointed out that the district didn't request the student's private school records or documentation of her academic programming as preliminary data. The district could amend the student's baseline data and goals after her return to the district, but a complete lack of data was a "fatal flaw." The IHO ordered the district to reimburse the parent and pay any outstanding tuition balance for the 2014-15 school year.

Methacton Sch. Dist., 114 LRP 53679 (PA SEA 11/25/14)

5. Adequate IEP Goals

- The sixth-grader's IEP and BIP contained a single identical goal: appropriate school behaviors 80 percent of the time. The BIP's goal wasn't clearly defined as it contained a non-exhaustive list of examples of "appropriate school behaviors" instead of separately addressing each problem behavior. Rather than creating specific, objective goals and teaching the student to meet each goal with behavior management skills, the school simply decreased the performance criterion of the student's goal from 80 to 70 percent, highlighting the student's lack of progress.

5. Adequate IEP Goals

- The IHO concluded that the charter school's IEP and BIP weren't reasonably calculated to allow the child to make progress in the LRE, and the student was entitled to compensatory education.

Tidioute Cmty. Charter School, 114 LRP 46986
(PA SEA 9/19/14)

6. Placement

- Discuss more than a single placement option
- Availability of options on the continuum, e.g.
 - Separate classroom in a general education school building (self-contained ED classrooms)
 - Separate public or nonpublic nonresidential school or facility (day treatment)
- Inform parents of placement options
- Must consider placement options that require application for funding of excess costs if needed to provide a FAPE
- Determine the LRE for the student individually

6. Placement

- The fact that a kindergartner with an intellectual disability and epilepsy could make progress in a life skills support program didn't justify his exclusion from a regular kindergarten class, a Pennsylvania IHO determined. The record indicated that the IEP team never considered placing the student in a regular education kindergarten class with supplementary aids and services.

6. Placement

- Although the parent believed that the student could succeed in a general education setting with a personal care assistant and a BIP, the IHO observed that "there was little if any actual discussion of [that option]." Moreover, the "district team members appear to have omitted consideration of ... the unique benefits of an inclusive environment, such as the development of social and communication skills, ... [and] increased independence."

Penn-Trafford Sch. Dist., 115 LRP 7580 (PA SEA 1/31/15)

6. Placement

- Include students at all possible opportunities
 - General education curriculum
 - Extracurricular activities
- Beware of these placements:
 - Reduced school day
 - Homebound Instruction
- Residential facility may be the LRE for some students

6. Placement

- Evidence that a New Hampshire student had to be physically restrained to enter the school building and ultimately refused to go to school demonstrated that a district's placement was inappropriate. The child, who was suspected to have ED, reportedly begged her parents not to make her go to school. When she got to school, she would run away.

6. Placement

- Noting that the district hadn't offered sufficient information about its other proposed placements to indicate whether they were appropriate, an IHO determined that the school wasn't an appropriate placement.
- *Milford Sch. Dist.*, 114 LRP 50067 (NH SEA 5/28/14)

6. Placement

- Because a third-grader's misconduct substantially interfered with his learning, an IHO concluded that the student was entitled to compensatory services and tuition reimbursement for his unilateral private placement. Districts have a duty to ensure that a student's IEP, including his educational placement, is reasonably calculated to provide him with an educational benefit. The student's behaviors prevented the student from meeting his annual IEP goals and caused him to regress in reading, math, and listening comprehension.

6. Placement

- Testimony indicated that the student's teachers were unable to reduce or control his behaviors with positive interventions. Despite this, the charter school failed to convene the student's IEP team to "seek a solution, including new intervention strategies, or a change of placement."

Green Woods Charter Sch., 115 LRP 22902 (PA SEA 4/18/15)

7. Inform/Educate Teachers/Providers

- Students with unusual disorders
- Staff unfamiliar with working with students with disabilities or refusing to work with them
- Education can address
 - The type of disability
 - Its impact on the student
 - Inclusion

7. Inform/Educate Teachers/Providers

- Education can address:
 - IEP goals/BIP/Accommodations
 - Implementation of IEP/BIP and who's responsible
 - Data collection
 - Documenting provision of services/accommodations
 - What to say/what not to say in case conferences

7. Inform/Educate Teachers/Providers

- An Arkansas district's reliance on outside professionals who did not have a strong handle on how autism, an anxiety disorder, a sensory procession disorder, deficits in adaptive functioning, and deficits in visuomotor integration skills affected a fifth grader led to a denial of FAPE. According to the IHO, the district, by relying on "both educational and noneducational professionals" made decisions based on a lack of understanding of the student's disability.

Paris Sch. Dist., 66 IDELR 204 (Ark. SEA 5/26/15)

7. Inform/Educate Teachers/Providers

- The ALJ noted that the child had undergone surgery that affected balance and coordination. Physical injuries would increase the risk of damage to the child's surgical implant, which in turn could have serious medical consequences. The IEP team thus determined that the child required one-to-one assistance at all times. Nonetheless, the child was observed unaccompanied on school grounds on several occasions during the first few weeks of school. Although the child had an emergency action plan in place to assist school staff in treating injuries, the evidence showed that staff members did not follow it.

7. Inform/Educate Teachers/Providers

- Moreover, neither the child's teacher nor the educational assistant attended a mandatory in-service training session about the child's medical condition. Finding that the ED denied the child FAPE, the ALJ ordered the district to hold a training session about the student's disability and look into the possibility of a private placement.

Department of Educ., State of Hawaii, 50 IDELR 179 (HI SEA 4/28/08)

8. Document IEP Implementation

- If it isn't written, it didn't happen (a/k/a IDOE's statute of frauds)
- Records of related services providers
 - Dates and times services provided (including year)
 - Description of services and relationship to goals
 - Progress monitoring
 - Assessments

8. Document IEP Implementation

- Records demonstrating provision of accommodations
 - General education teachers – how are they documenting provision of accommodations?
 - Maintaining copies of modified classwork and exams
 - Documenting extra time provided
 - Documenting when student takes exam in other location

8. Document IEP Implementation

Questions to ask when assessing adequacy of documentation:

- Is data kept on progress on IEP goals?
- Are reports of IEP progress meaningful?
- Are progress reports regularly sent to the parents? Is this documented?

8. Document IEP Implementation

- A Michigan district might have avoided an investigation by the state Department of Education if it had been more thorough in documenting each time it provided the modifications and accommodations listed in a student's IEP. In the IEP of the student with an undisclosed disability, the district was to provide five accommodations/modifications. To track the provision of these modifications, several teachers used a grid sheet. Some of the grid sheets did not "address the total time span required," no grid sheet was kept for science, and the grid sheet for physical education referred to a modification/accommodation that the student's IEP did not mention.

8. Document IEP Implementation

- Under 34 CFR 76.731 of the federal Education Department General Accounting Rules, districts must document their implementation of the IDEA and the state's special education administrative rules. By not sufficiently documenting its provision of these modifications and accommodations, the ED held, the district did not implement the student's IEP, which violated state and federal law.

Redford Union Schs., Dist. No. 1, 115 LRP 24861 (MI SEA 4/30/15)

8. Document IEP Implementation

- A district's efforts to document the implementation of IEP accommodations after the fact didn't satisfy the Michigan ED. The ED explained that state law requires districts to implement students' IEPs, and a federal regulation at 34 CFR 76.731 requires that districts document their compliance with the IDEA and state law. Statements or emails prepared in hindsight do not constitute documentation that staff actually implemented accommodations, the ED opined.

Wayne Westland Cmty. Sch. Dist., 115 LRP 17837 (MI SEA 3/18/15)

9. IEP Revision

- Is the proper procedure followed to revise the IEP?
- Is the CCC meeting at least once every 12 months?
- Have the goals changed? If not, beware!
- If the IEP is revised without a meeting, do you have the parent's written agreement to revise the IEP without a meeting?
- Have you advised all teachers/service providers regarding the revised IEP?

10. Appropriately Assess and Address Behavioral Issues

Look out for:

- Student repeatedly referred for discipline but no FBA/BIP (511 IAC 7-32-10; 511 IAC 7-32-41)
- BIP in IEP; no FBA conducted
- Poorly conducted FBA
- BIP in IEP but not followed
- BIP in IEP – ineffective but not revised
 - Not addressing the root of the behavioral issues

10. Appropriately Assess and Address Behavioral Issues

- Adequate BIP
 - BIP based on appropriate FBA
 - BIP addresses current behaviors
 - BIP is not too cumbersome to implement
 - BIP includes positive behavioral interventions
- Consider need for change of placement if behavior doesn't improve with BIP

10. Appropriately Assess and Address Behavioral Issues

- A parent who disagrees with an FBA that is conducted in order to develop an appropriate IEP is entitled to request an IEE at public expense.

Questions and Answers on Discipline Procedures,
52 IDELR 231 (OSERS 2009)

10. Appropriately Assess and Address Behavioral Issues

- Dangerous behavior and non-dangerous violations of the school's disciplinary code are not the only triggers for a BIP. A 5-year-old with autism required a BIP because she was unable to access her education due to self-stimulatory behaviors, inappropriate vocalizations, and inability to focus.

R.K. v. New York City Department of Education, 56 IDELR 212 (E.D.N.Y. 2011), *aff'd* 59 IDELR 241 (2d Cir. 2012)

10. Appropriately Assess and Address Behavioral Issues

- A New York district's failure to conduct an FBA of a 6-year-old boy with autism snowballed into liability for the child's private school tuition. Explaining that the lack of an FBA led to the development of an inappropriate BIP and caused the district to offer an inappropriate placement, the 2d Circuit held that the district procedurally and substantively violated the IDEA.

C.F., by his parents R.F. and G.F. v. NEW YORK CITY DEPARTMENT OF EDUCATION, 746 F.3d 68 (2d Cir. 2014)

11. Appropriate Disciplinary Procedures

- Count all days of suspension
 - Removal from class for part of the day
 - ISS that doesn't meet the criteria for exclusion
 - Bus suspension if transportation is a related service
- Determine if a change of placement has occurred
 - Multiple suspensions of less than 10 instructional days that cumulate to more than 10 instructional days
 - Retain records of removals
 - Retain records of decision-making process

11. Appropriate Disciplinary Procedures

- Provide services on the 11th day of suspension and thereafter
- Provide Notice of Procedural Safeguards when a disciplinary change of placement occurs
- BIP not followed = manifestation
- Do not change placement when the behavior is a manifestation of the student's disability
- Proper utilization of 45-instructional day IAES
- Proper use of seclusion or restraint

11. Appropriate Disciplinary Procedures

- Proceed to offer expulsion meeting even if parent agrees to placement proposed at manifestation determination case conference unless doing a Form 16 waiver
- Form 16 Waiver
 - Waives only the expulsion rights of all students under the Indiana Code
 - Does not waive rights of special education students to procedures under IDEA and Article 7

11. Appropriate Disciplinary Procedures

- Florida SEA determined that the Orange County School District violated the IDEA by failing to conduct an MDR for two students whose suspensions from the bus resulted in a change of placement. *Orange County Sch. Dist.*, 114 LRP 22531 (SEA FL 8/20/13)

11. Appropriate Disciplinary Procedures

- A student whose IEP didn't include transportation as a related service was nonetheless entitled to transportation after being placed at an IAES. Because the IAES was a greater distance from her home, the student's parent couldn't consistently provide transportation, resulting in a denial of FAPE. *Celina Indep. Sch. Dist.*, 59 IDELR 26 (SEA TX 2012)

12. Transportation Issues

- Determine if it's required as a related service
- Determine if it impacts the length of the student's day – cannot reduce
- Assess whether the student has any behavior issues on the bus that need to be addressed
- If the CCC determines that a student needs door-to-door transportation, be sure to document what is meant by door-to-door transportation

12. Transportation Issues

- OCR saw no need for an MDR when a student's out-of-school suspensions and absences from school due to bus suspensions totaled more than 10 days in a school year. However, OCR expressed concern that the student was denied FAPE because the district failed to timely amend her **BIP** to address her continuing behavior problems on the bus.
Nash-Rocky Mount (NC) Pub. Schs., 110 LRP 20210 (OCR 8/20/09)

Don't cater to the parent's wishes instead of the student's needs

- NO GOOD DEED GOES UNPUNISHED
- While it may temporarily avoid due process, in the long run, it will hurt you
- If you continually offer services/programming with which you do not agree simply to appease the parent, and then the parent decides eventually to challenge the previous IEPs, then what?
- Even if the parent signed consent, they can later challenge the IEPs
- If you are testifying at hearing, how do you defend an IEP that you don't support?



QUESTIONS?

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