OFFICE FOR DISPUTE RESOLUTION

Understanding Special Education Due Process Hearings

A Guide for Parents

2017 Version

OFFICE FOR DISPUTE RESOLUTION
6340 Flank Drive
Harrisburg, PA 17112-2764
(800) 222-3353 (717) 901-2145
TTY USERS: PA Relay 711
www.odr-pa.org

pennsylvania
DEPARTMENT OF EDUCATION

Through the Office for Dispute Resolution, the Pennsylvania Department of Education (PDE) fulfills its statutory mandate to maintain a special education due process system. PDE contracts with the Central Susquehanna Intermediate Unit to provide fiscal and certain management support for that office, without becoming involved in substantive operations. The hearing officers and mediators are free from interference or influence on any matters affecting the outcome of individual mediations and due process hearings. This includes, without limitation, interference or influence from any entity, individual, or group, such as parents, advocacy groups, school districts, intermediate units including CSIU, ODR staff, and PDE. At the same time, those hearing officers and mediators are provided with administrative support, as well as training delivered in a manner preserving their impartiality through ODR, which itself is also free of such interference or influence.

The Central Susquehanna Intermediate Unit will not discriminate in educational programs, activities or employment practices based on race, color, national origin, gender, disability, marital status, age, religion, sexual orientation, ancestry, union membership or other legally protected classifications. Announcement of this policy is in accord with Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990. Employees and program participants who have an inquiry or complaint of harassment or discrimination or who need information about accommodations for people with disabilities, should contact Director of Human Resources, CSIU, 90 Lawton Lane, Milton, PA, 17847, 570-523-1155.

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Part One: Resolving Special Education Disagreements

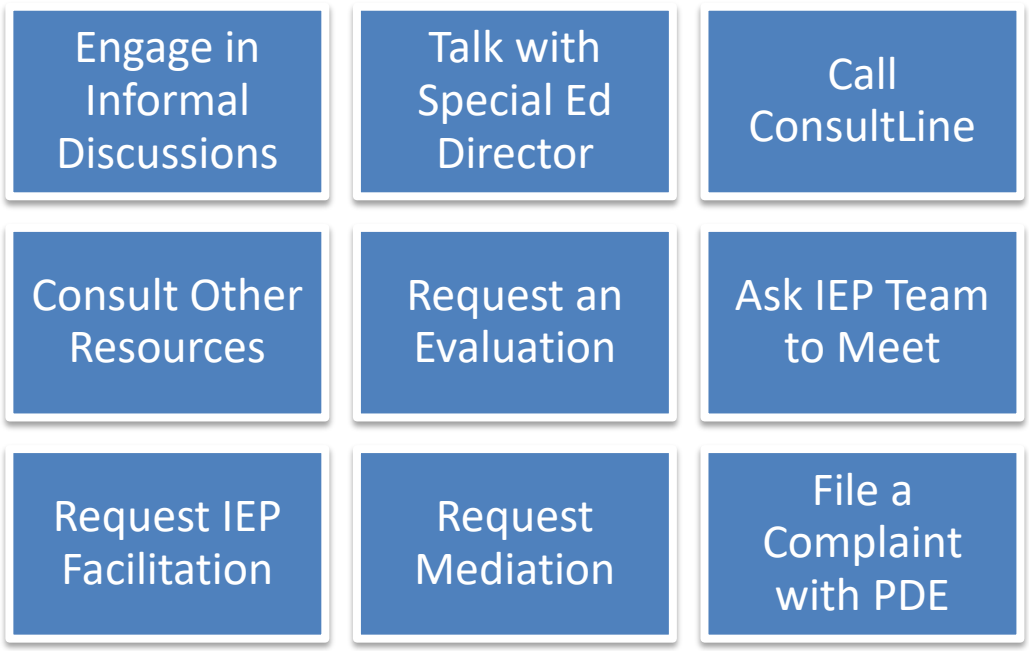
Every day in schools across Pennsylvania, IEP Teams work together to write an IEP for a child.

Many times, you and the school will agree on the educational program for your child.

Sometimes, though, despite everyone's best efforts and intentions, there will be a disagreement about your child's education.

A due process hearing (litigation) is not the only way to resolve these disagreements.

Ways to Resolve Special Education Disputes



A. Start with Informal Discussions

Sometimes just talking to your child's teacher or school administrators may resolve the problem. The school may not be aware of your concerns. Open communication between parents and schools benefits everyone, particularly the student.

Begin by talking to your child's teacher. Contact him or her to schedule a time to meet or talk over the phone. This way you can be sure that the teacher has time to talk with you. Before the meeting, it might be helpful to send a list of your questions or concerns so the teacher can prepare. At the meeting, share your concerns, but be willing to listen to the teacher's thoughts as well. Often times, you will be able to resolve the problem together.

There may be other people you will want to talk to as well. Regardless of whom you talk to, if something is not clear to you, ask for an explanation. If you are unable to resolve the matter with your child's teacher, you may wish to consider one or more of the following.

It can be helpful to keep a journal or log of your communications with the school. After you speak to someone, you might want to send an email or letter to the school, summarizing what was discussed. This will give you a record of your discussions. This will also give school staff the chance to revisit an issue with you if they understood your discussion to be different than how you summarized it. Communication problems can be avoided this way.

The **Pennsylvania Training & Technical Assistance Network** (PaTTAN) has prepared a "Considerations Worksheet". This worksheet may be helpful in assisting you in organizing your concerns. See Appendix A.

B. Meet with the Director of Special Education

You may want to meet with the **Special Education Director** to talk about your concerns. If you want to, you can send a letter to him or her before the meeting, so that he or she has an idea of what you want to talk about. If there is a document which you think is important to the discussion, you can include it in your letter. Be willing to listen to what the Special Education Director has to say. Many times you can resolve the problem together.

There are many abbreviations, or acronyms, for terms used in the special education field. For example, the Individualized Education Program is referred to as the IEP, and free appropriate public education is referred to as FAPE (rhymes with the word "cape"). It can be helpful to become familiar with some of these frequently used abbreviations/acronyms as you prepare for the hearing. A list appears in Appendix B.

C. Contact the Bureau of Special Education's ConsultLine (In PA – 800-879-2301; outside of PA – 717-901-2146; TTY Users – PA Relay 711)

Consultline is a helpline for parents and advocates of children with disabilities ages 5-21. ConsultLine staff can do the following:

- Explain special education laws
- Explain the Procedural Safeguards Notice
- Describe options for parents when they disagree with their child's school
- Make referrals to other agencies

ConsultLine is listed on the Procedural Safeguards Notice.

Note: If your child is an infant or up to the age of 5, the following resources are available to you:

CONNECT Information Service for Early Intervention: 800-692-7288

Office of Child Development and Early Learning (OCDEL): 717-346-9320

D. Consult Other Resources

The Procedural Safeguards Notice lists many resources available to parents including:

THE ARC OF PENNSYLVANIA
301 Chestnut Street
Suite 403
Harrisburg, PA 17101
800-692-7258 (Toll-Free Voice)
717-234-2621 (Voice)
www.thearcpa.org

BUREAU OF SPECIAL EDUCATION'S CONSULTLINE
(In PA – 800-879-2301; outside of PA – 717-901-2146;
TTY Users – PA Relay 711)
ConsultLine personnel are available to parents and advocates of children with disabilities or children thought to be disabled to explain federal and state laws relating to special education; describe the options that are available to parents; inform the parents of procedural safeguards; identify other agencies and support services; and describe available remedies and how the parents can proceed.
http://odr-pa.org/parents/consultline

DISABILITIES RIGHTS PENNSYLVANIA
www.disabilityrightspa.org

Harrisburg Office
301 Chestnut Street
Suite 300
Harrisburg, PA 17101
800-692-7443 (Toll-Free Voice)
877-375-7139 (TDD)
717-236-8110 (Voice)
717-236-0192 (Fax)

Philadelphia Office
The Philadelphia Building
1315 Walnut St., Suite 500
Philadelphia, PA 19107–4798
(215) 238-8070 (Voice)
(215) 772-3126 (Fax)

Pittsburgh Office
429 Fourth Avenue, Suite 701
Pittsburgh, PA 15219-1505
(412) 391-5225 (Voice)
(412) 467-8940 (Fax)

HISPANICS UNITED FOR EXCEPTIONAL CHILDREN (PHILADELPHIA HUNE, INC.)
2215 North American Street
Philadelphia, PA 19133
215-425-6203 (Voice)
215-425-6204 (Fax)
www.huneinc.org

MISSION EMPOWER
1611 Peach Street
Suite 120
Erie, PA 16501
844-370-1529 (Toll-Free Voice)
814-825-0788 (Voice)
www.missionempower.org

OFFICE FOR DISPUTE RESOLUTION
The Office for Dispute Resolution administers the mediation and due process systems statewide, and provides training and services regarding alternative dispute resolution methods.
6340 Flank Drive
Harrisburg, PA 17112-2764
800-222-3353 (Toll Free Voice in PA only)

717-901-2145 (Voice)
TTY Users: PA Relay 711
717-657-5983 (Fax)
www.odr-pa.org

PARENT EDUCATION AND ADVOCACY LEADERSHIP CENTER (PEAL)
1119 Penn Avenue
Suite 400
Pittsburgh, PA 15222
866-950-1040 (Toll-Free Voice)
412-281-4404 (Voice - Pittsburgh)
215-567-6143 (Voice – Philadelphia)
412-281-4409 (TTY)
412-281-4408 (Fax)
www.pealcenter.org

PENNSYLVANIA BAR ASSOCIATION
100 South Street
Harrisburg, PA 17101
800-932-0311 (Voice)
www.pabar.org

THE PENNSYLVANIA TRAINING AND TECHNICAL ASSISTANCE NETWORK (PaTTAN)
www.pattan.net

6340 Flank Drive
Harrisburg, PA 17112
800-360-7282 (Toll-Free Voice in PA only)
717-541-4960 (Voice)
717-255-0869 (Video Phone – VP)

333 Technology Drive
Malvern, PA 19355
800-441-3215 (Toll-Free Voice)
610-265-7321 (Voice)
610-572-3430 (Video Phone – VP)

3190 William Pitt Way
Pittsburgh, PA 15238
800-446-5607 (Toll-Free Voice in PA only)
412-826-2336 (Voice)
412-265-1002 (Video Phone – VP)

PUBLIC INTEREST LAW CENTER OF PHILADELPHIA (PILCOP)
United Way Building, 2nd Floor
1709 Benjamin Franklin Parkway
Philadelphia, PA 19103
215-627-7100 (Voice)
215-627-3183 (Fax)
www.pilcop.org

STATE TASK FORCE ON THE RIGHT TO EDUCATION
800-360-7282, Option 5 (Toll-Free Voice) or
717-541-4960, Option 5 (Voice)
http://tinyurl.com/statetaskforce

LOCAL TASK FORCE ON THE RIGHT TO EDUCATION (LTF)
There are 29 LTFs in Pennsylvania and they are organized by Intermediate Unit regions. The LTF advocates on behalf of students who receive special education services and makes recommendations necessary for the improvement of special education in the region they represent. To learn more about the LTF in your area, contact the State Task Force Office at 800-360-7282, Option 5 (Toll-Free Voice) or 717-541-4960, Option 5 (Voice).

E. Request An Evaluation

You may want to ask that your child be evaluated or re-evaluated. The results of an **evaluation** or **reevaluation** may help both you and the school decide what the next steps should be. There are limits to the number of evaluations that will be performed on your child. To learn more about evaluations, you can speak to a ConsultLine Specialist at 800-879-2301, TTY Users: PA Relay 711.

PaTTAN has developed an Annotated Evaluation Report, which describes the contents of Pennsylvania's Evaluation Report Form. This form is available on the PaTTAN website, www.pattan.net, or on the ODR Parent Library webpage at http://odr-pa.org/parents/parent-resource-library/.

F. Request that the IEP Team Meet

You can ask that the **IEP Team** schedule a meeting to discuss your concerns. To request this meeting, write a letter to the principal, with a copy to the Director of Special Education. Keep a copy of the letter for your records.

The next two services, facilitation and mediation, are free to you and the school. However, both you and the school must agree to use them. If only one of you wants the service, ODR cannot schedule it. Facilitation is available for the IEP meeting. Mediation is available for special education disagreements.

G. Request IEP Facilitation

(In PA – 800-222-3353; outside of PA – 717-901-2145; TTY Users: PA Relay 711)

You may want to ask that a facilitator attend your child's IEP meeting to assist the Team. ODR offers free **IEP Facilitation** for IDEA claims to parents and schools. Facilitation is not needed for all IEP meetings. Facilitation is usually requested when the parent and the school believe that communication problems are preventing the IEP Team from agreeing on an IEP. The facilitator does not become a member of the IEP Team. The facilitator is not at the

meeting to give advice or to tell the Team what to do. Instead, the facilitator's role is to make sure that everyone is given the opportunity to speak and work together to try to reach agreement. The goal of IEP Facilitation is an agreed-upon IEP.

If you believe that a facilitator might assist the IEP Team in better communication, contact ODR. You can let the school know you have made this request, but you are not required to. ODR staff will contact the school to see if it agrees with your request for facilitation. (The school can also request that you agree to the presence of a facilitator at the IEP meeting.)

ODR has prepared a short video on IEP Facilitation, which is available on the ODR website (http://odr-pa.org/alternative-dispute-resolution/iep-facilitation/

ODR has prepared a short IEP Facilitation video which provides multiple perspectives on the value of IEP Facilitation as an early conflict resolution tool.
http://odr-pa.org/alternative-dispute-resolution/iep-facilitation

ODR has prepared a publication entitled Preparing for Your Facilitated IEP at http://odr-pa.org/wp-content/uploads/pdf/Prep-your-IEP.pdf

Written materials on IEP Facilitation are in Appendix C.

The ODR Early Dispute Resolution Case Manager, as well as ConsultLine Specialists, are available to speak with you about these services.
ConsultLine: 800-879-2301, TTY Users: PA Relay 711
ODR: 800-222-3353, TTY Users: PA Relay 711

H. Request Mediation
(In PA – 800-222-3353; outside of PA – 717-901-2145; TTY Users: PA Relay 711)

You may request **mediation** from ODR. Like the IEP facilitator, mediators are not decision makers. The mediator will facilitate communication between you and the school. The goal of mediation is for you and the school to resolve the problem and to put your agreement in writing. This is called the mediation agreement. Attorneys do not participate in mediation, but you may bring an advocate or other supportive person with you.

You may request mediation and due process at the same time. Your due process hearing will not be delayed because you requested mediation. Because mediation is usually easier to schedule, and usually takes only one day to complete, you may find that you have resolved your concern and do not need the due process hearing any more.

Written materials on mediation are in Appendix D.

The ODR Mediation Case Manager, as well as ConsultLine Specialists, are available to speak with you about these services.

ConsultLine: 800-879-2301, TTY Users: PA Relay 711
ODR: 800-222-3353, TTY Users: PA Relay 711

I. File a Complaint with the PA Department of Education: Office of Child Development and Early Learning (OCDEL) or Bureau of Special Education (BSE)

You can file a complaint with the Department of Education if you believe that your child is not receiving the services listed on the **Individualized Family Services Plan (IFSP)**/Individualized Education Program (IEP). You may also file a complaint with the Department of Education if you believe that technical requirements, like a timeline, are not being followed. Where you file a complaint depends on the age of your child. This type of complaint is different from a due process hearing complaint/request for a hearing discussed later on, and is handled differently.

If your child is an infant/toddler or of preschool age:

You may file a complaint with the Office of Child Development and Early Learning (OCDEL) at 717-346-9320.

If your child is of school age:

You may file a complaint (http://odr-pa.org/parents/state-complaint-process) with the Pennsylvania Department of Education's Bureau of Special Education- Division of Compliance (DOC) at 717-783-6913.

Generally you are required to file a complaint of this type within one year of the violation.

To learn more about the complaint process for children ages infant to age 5, you can call CONNECT at 800-692-7288 or the Office of Child Development and Early Learning (OCDEL) at 717-346-9320.

To learn more about the Complaint process for children ages 5-21, you can call ConsultLine at 800-879-2301, TTY Users: PA Relay 711.

Checking In…

- If you have tried some or all of these suggestions, and you still have concerns about your child's education, then it may be time to consider whether you want to request a due process hearing.
- This is an important decision to make. Due process hearings are not something to be entered into lightly.
- The federal government (U.S. Department of Education's Office of Special Education Programs or OSEP), recommends that parents and schools use due process hearings *only when everything else has failed to resolve the problem.*
- Due process hearings are formal, complicated procedures.
- A due process hearing can be financially, physically, and emotionally draining for parents. It is difficult for school staff as well.
- But you have the right to request a due process hearing, and sometimes that may be what is needed to resolve a problem.
- It is recommended that you be certain that you cannot resolve the problem in other ways first, before you request a hearing.
- And, even before you request a hearing, you will need to figure out whether you have a strong case. In other words, you need to figure out if you can win your case before a hearing officer. The first step is to gather as much information as possible, so that you can make an informed decision.

Part Two: Assessing the Strength of Your Position

You do not want to spend the time, energy and money participating in a due process hearing if you are not likely to win. In other words, will the hearing officer agree with you, or will he or she agree with the school's position?

The next step is to figure out whether you have a case:

What is the likelihood that a hearing officer would agree with you?

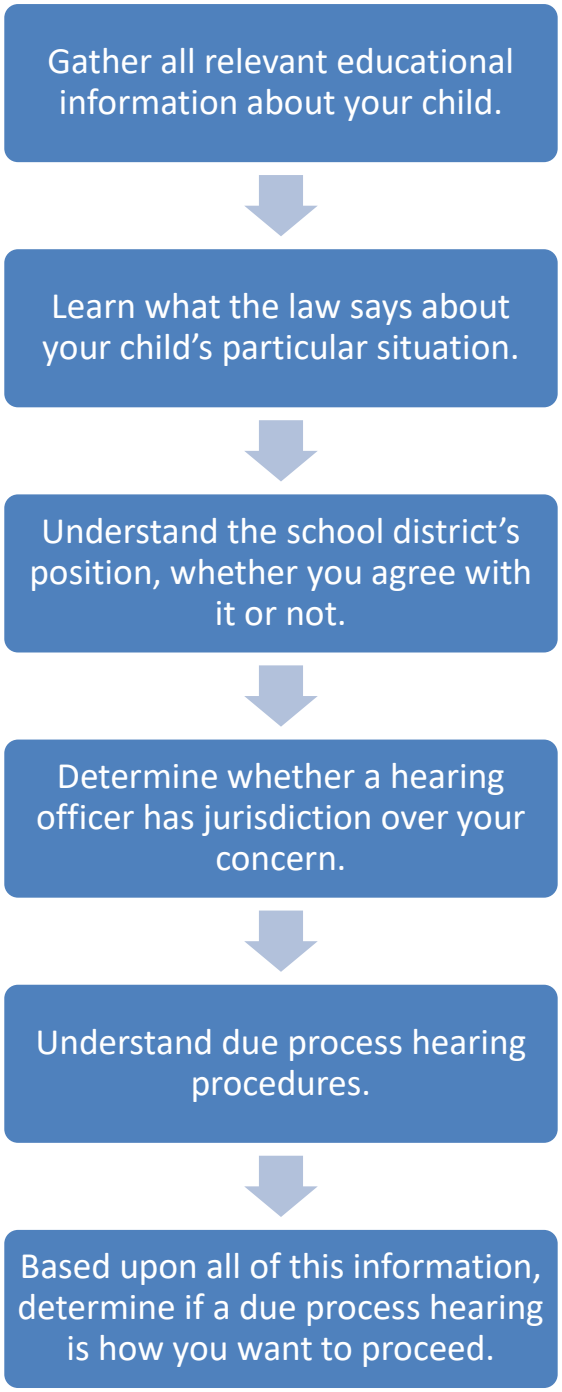
What does the law say?

What documents and witnesses do you need to prove your case?

How do due process hearings work?

These may seem like overwhelming questions, so take it step by step.

Here is an outline of steps, discussed in greater detail below, you may want to take to help you decide whether you want to request a due process hearing:



Step 1:
Gather All Relevant Educational Information About Your Child

You need to have a complete understanding of your child's needs and educational program. Here are some things you can do to become prepared.

> As you go about gathering this information, do not stop talking to and working with the school. Sharing information as you get it may help both you and the school understand your child's situation better. Sharing information may result in the problem being resolved, or prevent future problems. Most due process cases are settled (resolved) before they get to the actual hearing.

Organize Your Records

Start by organizing your records. Here is a list of documents that might be helpful to you. If you do not have copies, now is the time to get them and review them carefully:

Report Cards - Does the report card show that your child is doing well in school? Struggling in school or even failing? What do the teacher comments say?

Homework and Tests - Homework and tests help to show two things: 1) what your child is being taught in school; and 2) how well your child is doing in school. Standardized tests, such as the PSSA, Keystone Exam and others, may also be important information.

Written Communication with School Staff - Your child's school record includes notes and emails to you or other staff regarding your child. What do those communications show? Have you identified concerns to the school, or

has the school identified concerns to you? How have the school or you responded? Has there been progress?

Generally Distributed School Information - This refers to the information that a school sends home with many (or all) students or puts on its website. This may be pamphlets, notices, calendars, or policies. Consider whether any of this information is important to the concern you have about your child's program.

Some or all of these documents may be used as exhibits at a due process hearing, so the earlier you can get them together, the better prepared you will be.

There are three documents that are almost **always important** in any due process hearing:

1) Evaluation Report;

2) Notice of Recommended Educational Placement (called the "NOREP"); and

3) the Individualized Education Program (called the "IEP").

The **Evaluation Report**, **NOREP** and **IEP** all work together to establish the program your child needs.

Evaluations - Your child's evaluation(s) are often times an important part of a due process hearing. Make sure you have copies of **all** evaluations completed on your child whether by the school or private evaluators.

Notice of Recommended Educational Placement (NOREP) - In many cases this is an important document, because it indicates what the IEP team concludes is the educational program your child needs.

Individualized Education Program (IEP) - This is the blueprint (or map) for the education and services your child will receive. Make sure you have copies of every IEP that pertains to your concern. Review each one of them carefully.

Classroom Visit - You may want to visit your child's classroom. Your school district will have a policy about parents visiting the classroom. Check with the school district about its policies for such visits. Follow all school rules about the visits.

Inspect Records at School - The school maintains **educational records** on your child. You have the right to review those records. Once you ask to review them, the school is required to respond to your request in a timely way. At the most, the school must make those records available to you no more than 45 calendar days after you make the request. There may be a small per page charge by the school district for any documents that you request to be copied.

Consider Independent Educational Evaluations (IEE) - If you disagree with the evaluation of your child completed by the school, you may ask for an independent evaluation. An **independent educational evaluation**, or IEE, is an evaluation conducted by a qualified examiner who is not employed by the school.

If you ask for an IEE, the school will give you this information:

- information about where to get an IEE;
- the requirements for the IEE; and
- the qualifications of the IEE examiner.

The school may ask you for the reasons why you disagree with the school's evaluation. You are not required to give a reason, but if you do, it may result in you and the school discussing your concerns, and even resolving them.

After you ask for an IEE, the school will do one of two things:

- The school will request a due process hearing to show that its evaluation was appropriate; or

- The school will make sure that an IEE is done at the school's expense (not yours), and provide you with guidelines that must be followed about such things as the qualifications of the examiner.

If the hearing officer agrees with the school that its evaluation was appropriate, you still have the right to an IEE, but the school will not pay for it.

> You are entitled to only one Independent Educational Evaluation (IEE) at the school's expense each time the school conducts an evaluation which you disagree with.

If you get an IEE at the school's expense or you share with the school an evaluation you obtained and paid for yourself, the results of the evaluation:

- Must be considered by the school in determining your child's educational program, unless the evaluation did not meet the school's requirements; and

- May be used by you, the school, or both, as evidence at the due process hearing.

Checking In…

You have now gathered all of the information you need about your child's educational program. Now the Step Two question is *"How strong of a case do I have based upon all of this information?"*

Here are some questions you will need to ask:

- What does the law say?
- What timelines must I follow?
- How have other similar cases been decided?
- What witnesses and exhibits will help to prove my case?
- What is the school district's position?

Step 2:
Learn the Law

Special Education Regulations and Law

You will need to have at least a basic understanding of special education law and how those laws apply to your child's educational program.

There are many websites about special education law. Some are more respected than others. One well-known and well-respected national website, Wright's law, (http://www.wrightslaw.com), is geared towards parents.

The Parent Resources Library on ODR's website has information for parents about special education regulations, rights and procedures. http://odr-pa.org/parents/parent-resource-library. The websites of the Resources listed on the Procedural Safeguards Notice, and repeated on Page 5-8, are also good resources for you.

The organizations listed on the Procedural Safeguards Notice (and in Part I, Section D of this Guide) also have helpful materials available to assist you.

ConsultLine Specialists are also available to you to review special education laws and regulations at 800-879-2301, TTY Users: PA Relay 711.

The two main federal laws (statutes) that apply to due process hearings are the following:

- The **Individuals with Disabilities Education Act** (referred to as "IDEA"); and
- **Section 504 of Rehabilitation Act of 1973** (referred to as "Section 504")

The IDEA **statute** and **regulations** list all of the requirements educational agencies must follow in order to receive federal funding for special education.

Section 504 is an anti-discrimination statute/regulation. Section 504 prohibits discrimination on the basis of disability in programs or activities that receive federal financial assistance from the U.S. Department of Education.

The federal regulations are found in Appendix E (IDEA) and Appendix F (Section 504).

There are a lot of similarities between IDEA and Section 504. For more information on the differences between these two statutes, see the U.S. Department of Education's website at http://www.ed.gov, or you may wish to call ConsultLine at 800-879-2301, TTY Users: PA Relay 711.

Statutes and Regulations

Each federal statute has regulations, which implement the statute. The regulations give more specific information about how the statute is to be followed.

It is less important that you read the statutes. It is very important that you read the regulations.

There are also state statutes and regulations regarding special education. The state counterpart to the IDEA law is found in the **Pennsylvania Code**, at **Chapter 14**. You will hear people refer to the state regulations as "Chapter 14". Chapter 14 does not apply to students who attend a charter school. Charter schools adhere to separate state special education regulations which are also found in the Pennsylvania Code, at **Chapter 711**.

When you compare the state and federal regulations, you will see that in most instances, they are the same. There are several sections where Pennsylvania regulations differ from the federal regulations. Important differences are:

- State regulations require that students with an intellectual disability be re-evaluated at least once every two years, while the federal regulations only require at least once every three years.
- State regulations define any removal from school to be a change of placement for students who are identified as having an intellectual disability. This is different from the federal regulations, which do not make this distinction.
- Pennsylvania regulations require certain procedures and restrictions to be followed when restraining a student. The federal regulations do not address restraints.
- Pennsylvania regulations require students who are 14 years of age or older to have a transition plan as part of their IEP. The federal regulations do not require a transition plan to be in effect until the student turns 16 years of age.

The state counterpart to Section 504 is also found in the Pennsylvania Code, at **Chapter 15**. You will hear people refer to the state regulations as "Chapter 15". Chapter 15 does not apply to students who attend a charter school; however, charter schools are required to adhere to Section 504.

The state regulations are found in Appendix G (Chapter 14), Appendix H (Chapter 711) and Appendix I (Chapter 15).

The state regulations can also be found online at the Pennsylvania Code.
http://www.pacode.com/secure/data/022/022toc.html

The Pennsylvania Bureau of Special Education has developed a list of Questions and Answers about Chapter 14. They can be found on the Legal Resources section of the PaTTAN website.
http://www.pattan.net/

It is important to understand that just because you disagree with your child's educational program, this does not mean that you have met the legal standards for establishing a violation of state or federal law.

Proving Your Case Under the IDEA Statute

Special education law can be complicated. But there is a basic concept that is important: a school is not required to provide the best program to a student, but instead, must provide an appropriate program.

The phrase you will often hear is that the school must provide an appropriate program, reasonably calculated to enable the child to receive meaningful educational benefit. In order to be successful at a due process hearing, you must prove that the school did not provide such a program.

Due process hearings often center on a disagreement as to what is "appropriate" and/or what is "meaningful educational benefit".

Two of the cases you will likely hear about are Board of Education v. Rowley, 458 U.S. 176 (1982) (Appendix J) and, Polk v. Central Susquehanna Intermediate Unit, 853 F. 2d 171 (3d Cir. 1988) (Appendix K). There are many other cases that address these same issues. These two cases are starting points for you.

You will see many other cases cited in hearing officer decisions available on the ODR website: http://odr-pa.org/due-process/hearing-officer-decision/

You may want to sign up for the ODR listserv, http://odr-pa.org/subscribe-to-odr/ to stay current on recently issued hearing officer decisions, and other dispute resolution information.

Proving Your Case Under Section 504

In order to prove a Section 504 violation, you must prove all of the following:

1. the student is disabled as defined in the regulations;
2. the student is otherwise qualified to participate in school activities;
3. the school or the board of education receives federal financial assistance; and
4. the student was excluded from participation in, denied the benefits of, or subject to discrimination at the school.

One of the cases you may hear cited in this regard—in addition to many others—is Ridgewood Board of Education v. N.E., 172 F. 3d 238 (3d Cir. 1999), found at Appendix L.

Just because you are not happy with your child's program, or even how the school treated your child, does not automatically mean that your school has discriminated against you and your child. You must meet all four legal requirements listed above.

It can be helpful to read and understand legal decisions in previous cases with issues similar to yours. They might assist you in understanding the legal aspects of your own case better. The ODR website contains copies of recent **hearing officer decisions** and older decisions from the **Appeals Panel**. The Appeals Panel was discontinued in 2008, but those decisions may still be helpful to you in understanding the law and its application to your case. Court decisions are not available on the ODR website, and may require an individual with legal knowledge to access and interpret them for you.

IDEA requires *individualized* educational programs for children with disabilities. What may be an appropriate education for one child is not necessarily an appropriate program for your child. Read hearing officer decisions. Feel free to talk to other parents, but remember that your child's IEP Team, which includes you, determines what is needed for your child, based upon his or her unique, individual needs, not based upon what another child may be receiving.

Timelines

You do not have unlimited time to decide whether to request due process.

Here is what the law says:

IDEA §300.511
(e) *Timeline for requesting a hearing.* A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law.

This limitation or timeline is referred to as the **statute of limitations**.

There are two exceptions to this two-year rule:

IDEA §300.511
(d) *Exceptions to the timeline.* The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to-
(1) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or
(2) The LEA's withholding of information from the parent that was required under this part to be provided to the parent.

If you believe either of these circumstances has occurred, you must be prepared to prove it. Merely saying this occurred is not enough.

If the school raises the statute of limitations as an issue (which you will see in the school's answer to your complaint notice or in a motion), the **hearing officer** may do one or more of the following:

1. Ask you to explain before the hearing why you believe that you have requested a hearing in a timely way (referred to as an **offer of proof**, see Page 138); and/or

2. At a hearing take evidence from you and the school regarding when you knew *or should have known* (that there was a problem with your child's program and whether or not you failed to file a due process complaint within two years after that; and/or

3. At a hearing take evidence regarding the two exceptions listed above.

The hearing officer will determine whether your request was timely or not.

There are three possible outcomes:

1. You requested the hearing too late, and your complaint will be dismissed. You have the right to appeal that decision to state or federal court.

2. You requested the hearing in a timely fashion, and the hearing will proceed.

3. You did not request the hearing in a timely fashion for some, *but not all,* of the issues in your complaint. The hearing will proceed on the issues that you raised in a timely fashion. At the end of the hearing process, you have the right to appeal any aspect of the hearing officer's decision

to state or federal court including the hearing officer's ruling regarding which issues were/were not timely.

The Procedural Safeguards Notice is available online at http://odr-pa.org/parents/procedural-safeguard-notice/. An audio version is also available on this site.

ConsultLine Specialists are also available to you to review special education laws and regulations regarding due process hearings at 800-879-2301, TTY Users: PA Relay 711.

Exhaustion of remedies

The concept of exhaustion of remedies essentially means that a party must go through the due process hearing procedures **first,** before filing a lawsuit in state or federal court. In other words, in most instances, you will be required to utilize the due process system to attempt to resolve your concern. IDEA requires a party to exhaust administrative remedies for claims raised under the Constitution, the Americans with Disabilities Act (ADA), Section 504, or other federal law if the party is seeking relief (a remedy or solution) under IDEA.

State law is different in some respects. Chapter 15 of the Pennsylvania Code states that for discrimination claims, a party *may* use the due process system to raise claims regarding denial of access, equal treatment or discrimination based on handicap, and then go to court thereafter, if need be, but the party is

not *required* to start with the due process system.

Sources: 20 USC §1415 (l); 34 CFR §300.516(e) (federal)
22 Pa. Code §15.8(a) (state)

Step 3:
Consider the School District's Position

Part of understanding *your* case is understanding the *school's* case. Ask yourself these questions:

- What is the school's position? How does its position differ from mine? Why?
- (If you know), what witnesses will the school present at the hearing? What will they say?
- (If you know), what documents (exhibits) will the school use at the hearing? Do those documents support what the school is saying, or what I am saying?
- Do the laws support my position or the position of the school?

Step 4:
The Hearing Officer's Jurisdiction

You will also need to be certain that the issue you have with your child's educational program is an issue that a due process hearing officer can decide. In other words, is your concern something that a hearing officer has the authority (**jurisdiction**) to hear and make a decision about?

A hearing officer's authority typically covers the following broad categories:

1. Determining the appropriateness of a program or placement, which may include:

   - The quality and extent of the educational program;
   - Whether the child is receiving meaningful educational benefit from the program;
   - Whether the child should receive discipline for certain behaviors.

2. Determining whether a child has been properly identified for services, which may include:

   - Determining whether a child should have been identified as exceptional, but was not;
   - Whether the disability classification of the child is accurate;
   - Whether extended school year services are needed;
   - Whether special education services are no longer needed.

3. With respect to any failures under 1 or 2, ordering or denying any relief, such as **tuition reimbursement** and/or **compensatory education** services, or an IEE.

You should ask yourself if your issue falls into one of the broad categories above. This question may be difficult to answer without the help of an attorney or **advocate**. It is important to understand that, while a hearing officer's jurisdiction is pretty broad, a hearing officer does not have jurisdiction over *all* areas of your child's education.

For example, to determine the appropriateness of a program or placement, hearing officers can make decisions on very specific programmatic issues such as the content and scope of an IEP; the type of therapy a child should be receiving; whether transportation will be required as a related service, etc. However, a hearing officer could not conduct a hearing about a parent's concern with a parent-teacher personality conflict.

Utilize all of the resources available to you to assist you in your analysis. In the end, you are the only one who can decide whether or not you will move forward with a request for a due process hearing.

Step 5:
Understand Due Process Hearing Procedures

A **due process hearing** is a legal proceeding before a hearing officer. In Pennsylvania, hearing officers are either attorneys or psychologists with a doctoral degree. Each hearing officer has extensive background in special education law and hearing procedures.

A list of current Pennsylvania hearing officers is always available on the ODR website at http://odr-pa.org/due-process/hearing-officers/. You and the school do not get to choose your hearing officer; ODR makes impartial assignments.

At a hearing, you and the school (referred together as "the **parties**") are each given the opportunity to present witnesses and documents which support your position. Like any court proceeding, you will be required to prove your case. To do so, you will:

- Outline the issues to the hearing through your "**Opening Statement**";
- Present **exhibits** to the hearing officer which prove your position in the matter;
- Question both your **witnesses** and the school's witnesses; and
- Probably want to testify yourself. (If both parents are involved and would be testifying to the same facts, pick one of you to be the witness.)

A court reporter (or **stenographer**) attends every hearing, taking down everything that is said "on the record". The document that the court reporter produces is called the **transcript.** The parent (or their representative) are given one free copy of the transcript. LEAs are responsible for payment of their copy of the transcript.

Most of what occurs at a hearing will be taken down ("transcribed") by the court reporter. At times, however, the hearing officer will tell the court reporter to "go off the record". The hearing officer will go off the record when it isn't necessary for the court reporter to record the discussion (such as discussions about scheduling). The hearing officer determines whether discussions are on or off the record.

The hearing officer writes his or her decision by applying the law to the evidence presented at the hearing. Either you or the school, or both, can appeal the hearing officer's decision to either state or federal court. It is recommended that you consult with an attorney to help you decide whether to appeal and which court to appeal to, as well as to assist you in meeting any court-imposed timelines and procedural requirements. The hearing officer will give you appeal information when he or she sends out the hearing officer decision.

To learn more about due process hearings, you might want to do some or all of the following things:

Review Generally Applicable Pre-Hearing Directions in Appendix T.

Review ODR's website section on due process hearings. http://odr-pa.org/due-process/overview/

Read over the Procedural Safeguards Notice again and watch ODR's video on Frequently Asked Questions about the Procedural Safeguards Notice. http://odr-pa.org/parents/procedural-safeguard-notice/

Watch ODR's videos on Motion Practice and Due Process Hearing Procedures: http://odr-pa.org/due-process/hearing-procedures/

Call ConsultLine for general information on due process hearings at 800-879-2301, TTY Users: PA Relay 711.

Checking In…

You have now done the following things:

- ✔ Gathered information about your child
- ✔ Learned what the law says about your particular concern
- ✔ Determined what the school's position is on the matter
- ✔ Considered whether the hearing officer has jurisdiction over your concern
- ✔ Learned some basic information about due process hearings

The next section will give you detailed information on hearings, including how to request one.

Part Three: Due Process Procedures

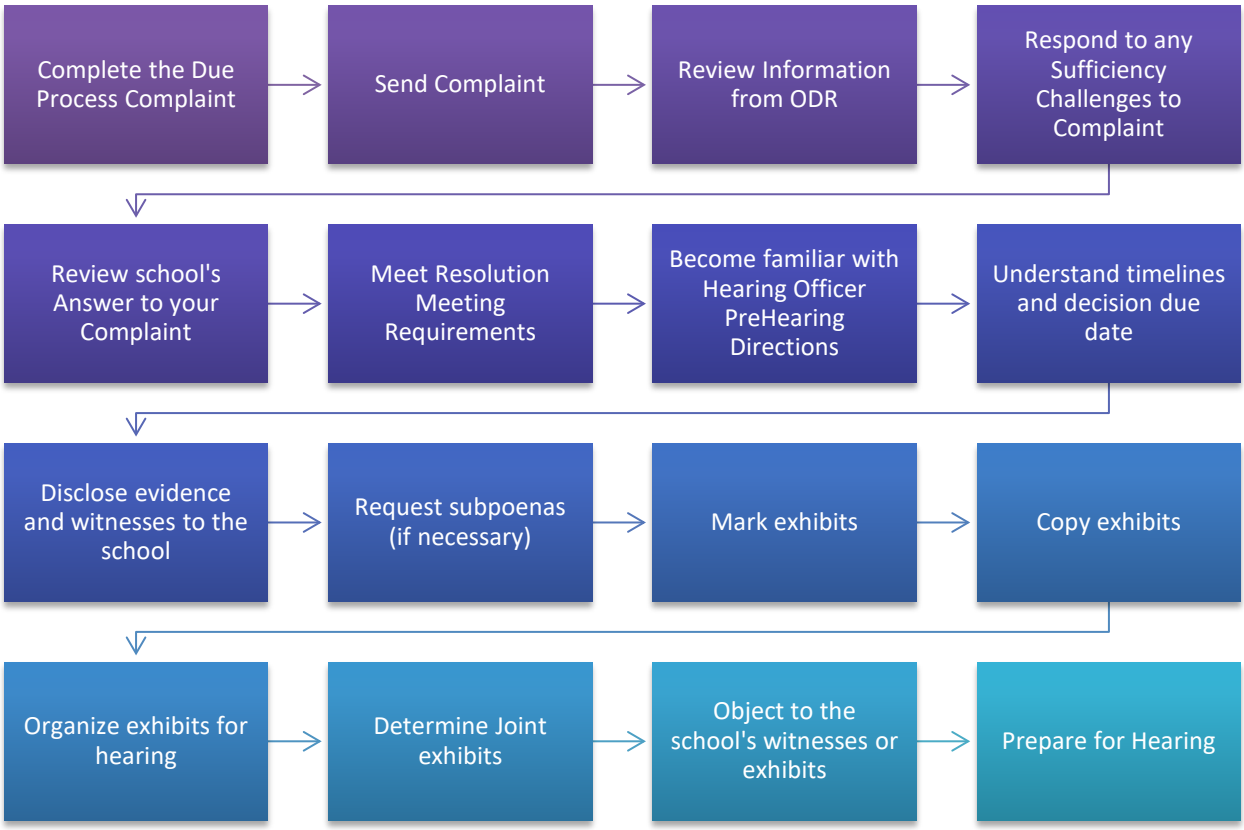
This section provides detailed information on due process procedures.

Starting with a general overview of a hearing, and then moving into requesting due process, this section provides a step-by-step guide on due process hearing procedures.

Although objections and motions are part of due process procedures, they are addressed in separate sections: Parts IV (Objections) and V (Motions).

Due Process Procedures

Here is a flowchart that lists each step of the process. Each section will be explained in full below.



Representation in a Due Process Hearing

You have two choices when deciding who will represent you and your child at a due process hearing.

1. You can choose to represent yourself in the hearing. When a parent participates in a due process hearing without legal counsel, this is called appearing **pro se**.

2. You can decide to use an attorney to represent you. If you choose to use an attorney, you will be responsible for the cost of the attorney. If you prevail in the hearing, you can seek to recover your attorney's fees in court after the due process hearing has concluded.

You can be accompanied and advised by individuals with special knowledge or training in the area of special education, such as an advocate. It is important to note, however, that an advocate cannot represent you in the hearing unless he or she is an attorney.

The school, as well as any of its administrators or other employees appearing at the hearing, must be represented by an attorney.

Expedited Hearings

A special type of hearing you should be aware of is the **expedited hearing**. Expedited hearings are special education hearings that take place within a much shorter timeline, from the filing of a complaint/hearing request to the completion of the hearing officer's decision.

Here are examples of expedited hearings:

Discipline Issues

A parent requests a due process hearing to resolve these circumstances:

- The child has misbehaved in some way. The school wants to discipline the child for this misbehavior. The disciplinary action would result in a change of the child's educational placement, meaning the child would be excluded from school for either 1) longer than 10 consecutive school days, or 2) more than 15 school days in one school year, or 3) a period of time that forms a pattern of removals. The parent believes that the child's behavior was a manifestation of his or her disability and the child should not be disciplined like any other student. The school disagrees, and wants the child to be disciplined like any other student.

- The parent disagrees with the **interim alternative educational placement** (of no more than 45 school days).

- The school/educational provider requests a hearing to establish that it is dangerous for the child to remain in the current educational placement.

Note: If the child has an intellectual disability (previously referred to as "mental retardation"), any removal from school is considered to be a change in educational placement.

For all other children, these protections do not apply if the removal is for a period that is less than 10 consecutive school days, or less than 15 school days in one school year, or where a pattern of removals has not been formed.

Extended School Year Services (ESY)

A parent requests a due process hearing to resolve these circumstances:

- The parent disagrees with the school's determination that the child is not entitled to **extended school year** services.

- The parent disagrees with the school's determination of the specific types of extended school year services to be provided to the child.

A case is not considered to be expedited simply because the parties want it to be held quickly. In other words, the common definition of "expedited" doesn't apply in due process hearings. Expedited hearings are for discipline and ESY cases only. See Step 8, Page 70, for timelines.

Step 1:
Completing the Due Process Complaint

In order to request a due process hearing, you must first either

1. Fill out a **due process complaint notice** ("due process complaint" or "complaint"), or

2. Put all of the required information into a letter.

> The actual due process complaint form is not required, but is available to help make sure you are including all of the required information. If you are more comfortable writing a letter, rather than completing a form, you can do so. Just be certain that you include all of the required information asked for on the form.

The complaint is an important document:

1. It is a formal notification to the school of your concerns; and

2. It starts the timeline for completing the hearing.

> There is also a separate "complaint" process with the Bureau of Special Education. See Pages 12-13.

A Sample Due Process Complaint form is in Appendix M.

A blank Due Process Complaint form is in Appendix N.

A blank Due Process Complaint form is also available on the ODR website, http://odr-pa.org/odr-request-forms/,
or by calling ODR at 800-222-3353, TTY Users: PA Relay 711.

The law is very specific as to what information must be included in the complaint. The complaint form (or a letter) must include:

1. **The child's full name, first, middle and last.**

2. **The address where the child lives.**

   If you share custody with another person, list the primary residence for your child. If you believe it is important to explain any residency issues, you may do so in your request for a hearing.

3. **The name of the school the child attends. Include both the school district and the actual name of your child's school building.**

   Particularly in large school districts, with several elementary, middle and high schools, it is important to identify your child's school building:

   Example: "My child attends Hamilton Elementary School within the School District of America."

If your disagreement is with a school district other than with the school district where your child currently goes to school, list the name of the school which should be involved in the due process hearing.

Example: "My child currently attends the American Academy, but my complaint is against the USA School District."

4. **Contact information.** Both ODR and the hearing officer will need to have a reliable contact telephone number in order to get in touch with you, and your email address if you have one. Most correspondence to and from the hearing officer is sent through email; if you do not have email, correspondence will be sent by US mail but will take longer to get to you.

5. **A description of the nature of the problem, including facts relating to the problem.**

   *It is **not** enough to say in your complaint notice that your child did not receive a **free appropriate public education** or FAPE.* This does not tell either the school or the hearing officer what your concern is. You can say that your child did not receive FAPE, but then give specific facts to demonstrate why you believe your child did not receive FAPE. Explain what you think your child needs in order to receive FAPE. If you believe that your child was discriminated against, give the specific facts that make you believe this. Regardless of what your issue may be, you need to provide enough information so that the school and hearing officer can fully understand your concerns.

It is extremely important that your complaint includes enough information so that the school can understand your concern. If the school does not have enough information from you, it may challenge the complaint as being insufficient. A hearing officer may dismiss your request for a hearing if insufficient information is provided. Be as specific as possible, including the remedy (or result) that you want to occur. More information about sufficiency challenges can be found on Pages 53-54.

6. **Your proposed solution to the problem** (if you know of a possible solution at the time you fill out the complaint).

> The hearing officer can only decide issues that are identified in the complaint. Make sure that you have included in the complaint all issues and concerns you want to bring before the hearing officer. If you later discover that you forgot to include something, let the hearing officer know. You might be allowed to file another complaint containing those issues and have those issues also decided by the hearing officer. On the other hand, the hearing officer may tell you that it is too late. It is always best to include everything in the first complaint to avoid any delay.

Step 2:
Sending the Due Process Complaint

Once you have completed the complaint form, or your letter, you must do this:

1. Send a copy of your complaint to the school, and, at the same time,

2. Mail a copy to ODR at:

   Office for Dispute Resolution
   6340 Flank Drive
   Harrisburg, PA 17112-2764

   Or

3. Complete online form and email a copy to ODR at: odr@odr-pa.org

   Or

4. Fax a copy to ODR at 717-657-5983

Instructions on how to email the complaint are found on ODR's website. http://odr-pa.org/odr-request-forms/

It is essential that you send a copy of your due process request to both ODR and your school. If you do not provide a copy of your complaint to the school, there may be a delay in the resolution process and due process hearing timelines.

Step 3:
Review Information from ODR

Once you have sent your due process complaint to the school and ODR, ODR will send you the following information:

- A Letter from the ODR Case Manager giving you the name and contact information for the hearing officer; and
- A **Notice of Hearing** listing the date and time for the first hearing.

You will also be given general information by the Case Manager:

- Resolution Meeting Options Sheet (see Appendix O)
- Due Process Fact Sheet (See Appendix P)
- Guide to Mediation (See Appendix Q)

Note: If the school requested the hearing, a resolution meeting options sheet will not be sent to you, because resolution meetings are only required when the parent requests a hearing.

If your hearing is considered an expedited hearing (see Pages 42-43), you will receive:

- A Notice of Hearing, listing the hearing officer's name and contact information, as well as the date and time for the first hearing
- Expedited Fact Sheet (See Appendix R)
- Guide to Mediation (See Appendix Q)

If you have any questions about the information, you can contact the ODR Case Manager assigned to your case. While the hearing officer decides all aspects of the case (scheduling, motions, etc.), the ODR Case Manager is available to answer general questions you may have about the process.

You will also receive information from the hearing officer. This will include:

- Pre-Hearing Directions
- An explanation of due process timelines from complaint to decision
- A letter explaining hearing procedures to parents representing themselves

If you are represented by an attorney, the hearing officer will send the first two items to your attorney rather than to you.

Copies of the forms that you will receive from ODR are found in the Appendix.

Resolution Meeting Options Sheet- Appendix O

Due Process Fact Sheet- Appendix P

Guide to Mediation- Appendix Q

Expedited Fact Sheet- Appendix R

Step 4:
Respond to any Sufficiency Challenges to the Complaint

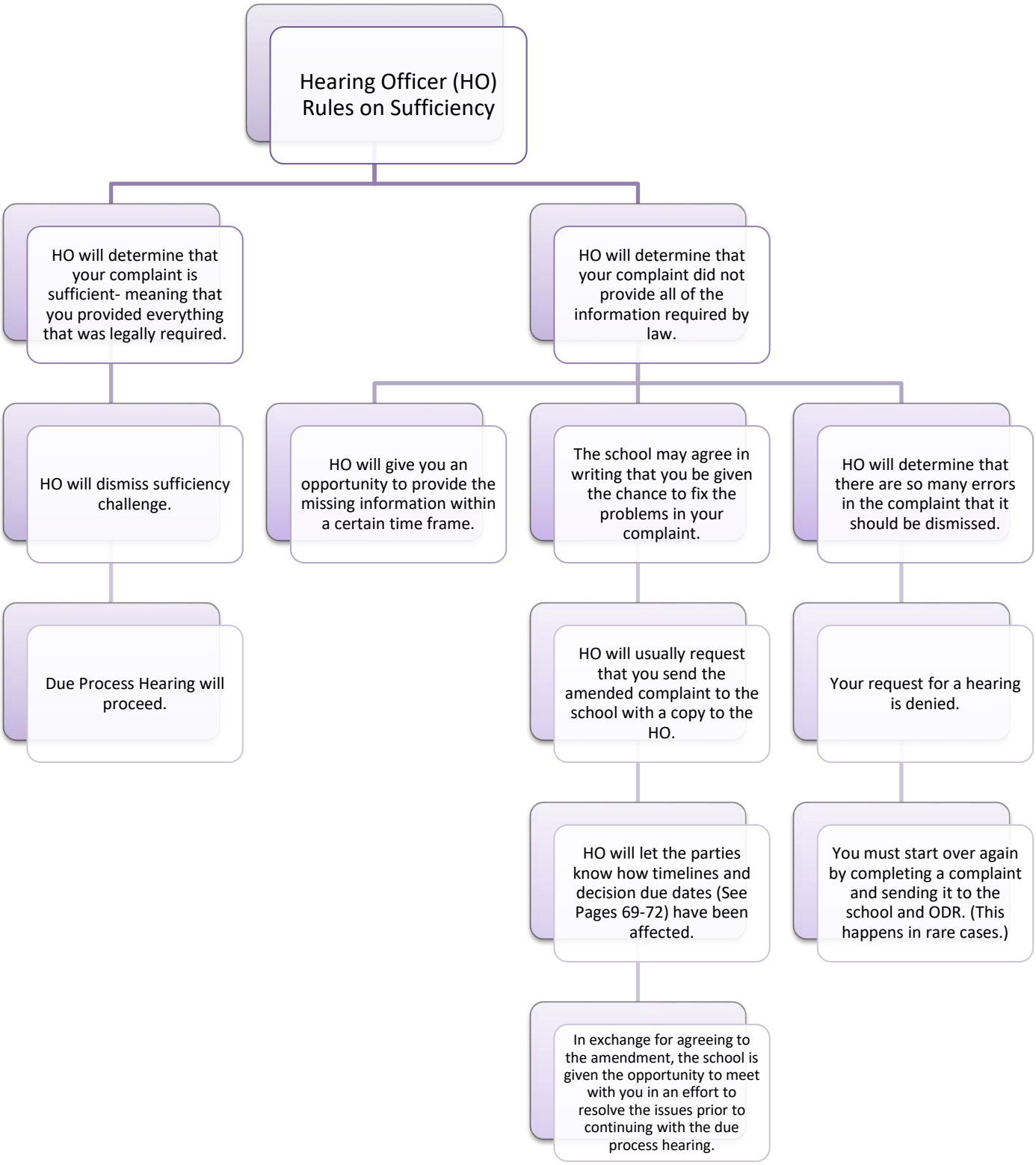
Once you file a complaint with the school and ODR, the school has 15 days from the date it received the complaint to contact the hearing officer and you to challenge its sufficiency (referred to as a "**sufficiency challenge**"). The school will only file a sufficiency challenge if it believes that you have not supplied enough information in your due process complaint for the school to understand what your concerns are.

This is why it is so important that your complaint list as much information as possible to minimize the chance that the school will file a sufficiency challenge.

> If the school files for due process, you have the same right to challenge the sufficiency of the school's complaint. The same procedures will apply if you are the one filing the sufficiency challenge.

The hearing officer must decide within 5 days of receiving the sufficiency challenge whether the complaint meets the legal requirements. The hearing officer must notify the parties in writing of that decision.

> The hearing officer's decision about the sufficiency challenge will give you a good idea about what is missing from your complaint. Make sure you have clearly identified your issue(s) so that the school can understand the problem. The due process hearing will not move forward until the complaint has been completed properly.


Hearing Officer (HO) Rules on Sufficiency
HO will determine that your complaint is sufficient- meaning that you provided everything that was legally required.
HO will dismiss sufficiency challenge.
Due Process Hearing will proceed.
HO will determine that your complaint did not provide all of the information required by law.
HO will give you an opportunity to provide the missing information within a certain time frame.
The school may agree in writing that you be given the chance to fix the problems in your complaint.
HO will usually request that you send the amended complaint to the school with a copy to the HO.
HO will let the parties know how timelines and decision due dates (See Pages 69-72) have been affected.
In exchange for agreeing to the amendment, the school is given the opportunity to meet with you in an effort to resolve the issues prior to continuing with the due process hearing.
HO will determine that there are so many errors in the complaint that it should be dismissed.
Your request for a hearing is denied.
You must start over again by completing a complaint and sending it to the school and ODR. (This happens in rare cases.)

Step 5:
Review the School's Answer to your Complaint

Once the sufficiency challenge (if any) is decided, the school district will file an Answer to your complaint if it has not previously issued a **Prior Written Notice**/Notice of Recommended Educational Placement. The school's response will include the following:

- an explanation of why the school proposed or refused to take the action raised in the due process complaint;
- a description of other options that the IEP Team considered and the reasons why those options were rejected;
- a description of each evaluation procedure, assessment, record, or report the school used as the basis for the proposed or refused action; and
- a description of the other factors that are relevant to the school's proposed or refused action.

If the school filed the complaint, you must file an Answer within 10 days of receiving the complaint. Your response should specifically address the issues raised in the due process complaint.

Here are the requirements for filing an Answer:

- There are no forms to follow when filing an Answer. A letter response is fine.
- The party filing an Answer must do so, in writing, within 10 days of receiving a copy of the complaint.

- In the Answer, the school (or you, if the school filed the complaint notice) must set forth its position. In other words, the Answer must address the information in the complaint.

  Example: If your complaint indicates that you believe your child did not receive FAPE, the District's Answer will indicate why it believes that your child did, in fact, receive FAPE.

  Example: If the school requests a hearing to demonstrate that its evaluation of your child was done properly, in your Answer, you should indicate all the reasons why you believe it was not an appropriate evaluation.

- The Answer should be sent to the hearing officer and the other side. A copy should also be sent to ODR.

Carefully read the District's Answer to your complaint. The Answer will help you to understand the District's position (or beliefs) about the information in your complaint notice. This will give you a better idea of how the District's view of your child's situation differs from yours, and what the District intends to prove at the due process hearing.

Step 6:
Resolution Meeting Requirements

Before a due process hearing will be scheduled, you and the school must follow the requirements for **resolution meetings** (or **resolution sessions**). The purpose of this meeting is for you to discuss your complaint so that the school has an opportunity to resolve your issues without the need for a hearing.

> Resolution Meetings only pertain to due process hearings requested by the parent under IDEA. If the school requests due process, the parties are not required to have a resolution meeting.

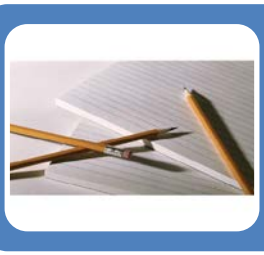
You and the school may agree to settle the case at any time during the proceedings, not just at the resolution meeting. Most of the time, the parties do settle, and the hearing officer does not write a hearing officer decision.

If you want to waive the meeting, but the school does not, you must participate in the resolution meeting.

If the school wants to waive the meeting, but you do not, the meeting must take place. It is only when both you and the school, together, agree to waive the meeting that you will not be required to participate in the resolution meeting. Waiving the meeting will affect the timelines and the hearing date may have to be changed.

After you request a hearing, one of the following three things will occur:

The school will expect you to participate in the resolution meeting.



Both you and the school will agree that a resolution meeting isn't needed. You and the school will agree to "waive" this requirement. The waiver must be in writing.

You and the school will agree to use mediation instead of the resolution meeting process. In that case, you and/or the school will contact ODR to request mediation.

If the resolution meeting takes place, here are the requirements:

1. **Timelines for Scheduling**

   IDEA Cases

   There is a 30-day **resolution period** in non-expedited IDEA cases.

   Within 15 days of receipt of the complaint, the school must hold a meeting with you, and the relevant member or members of the IEP team who have specific knowledge of the facts identified in the complaint. If the school does not hold the meeting as it is required to do, or if you and the school waive the meeting, you should let the hearing officer know. The hearing officer may then change the date of your due process hearing.

Expedited Cases

There is a 15-day resolution period in expedited IDEA cases.

Within 7 days of receipt of the complaint, the school must hold a meeting with you, and the relevant member or members of the IEP team who have specific knowledge of the facts identified in the complaint.

Section 504 cases

If your case pertains to both IDEA and Section 504 issues, the rules about resolution meetings will apply.

> The school will hold the resolution meeting even if it has filed a sufficiency challenge to your due process complaint.

District Files the Complaint

The law does not require a resolution meeting when the school is the one requesting the hearing.

> There may be rare occasions when you are not available to participate in a resolution meeting at any time during the initial 15-day period. If this happens, the school is not required to schedule the meeting during those 15 days. The school will schedule the meeting at a time during the 30-day resolution period when you are available. It is best, however, to try to make yourself available as soon as possible during the first 15-day period.

2. Who Must Attend

a. You, the parent; and

b. The relevant member or members of the IEP Team who have specific knowledge of the facts listed in your complaint. You and the school determine who the relevant member(s) of the IEP Team is/are; and

c. A representative of the school who has decision-making authority. In other words, there must be someone at the meeting who has the authority to resolve the case on behalf of the school.

3. Attorneys at Resolution Meetings

If you are not bringing an attorney to the resolution meeting, the school cannot bring its attorney to the meeting either. If you are bringing an attorney, then the school can bring its attorney.

> If you bring an attorney to the resolution meeting but do not tell the school in advance, the meeting may be postponed so that the school can arrange to have its attorney present too. To avoid this delay, be sure to let the school know ahead of time that you are bringing an attorney.

4. Your Participation in the Resolution Meeting

Unless you and the school agree, in writing, to waive the meeting or to pursue mediation (See Page 11), you are required to attend the meeting. If you do not, the due process hearing will not proceed and your request for a hearing may even be dismissed. Therefore, it is very important that you attend the meeting and make a good faith effort to try to resolve the problem with the school. (And, of course, the school personnel should also make a good faith effort to try to resolve the problem with you.)

Although you and the school may have tried on prior occasions to resolve the dispute, do not assume that the resolution meeting will be unproductive or a waste of time. It is the rare person who truly wants to go to a due process hearing. This resolution meeting may be the time when you and the school can reach agreement.

There are three possible outcomes to the resolution meeting:

You and the school cannot reach agreement. You will move forward with the due process hearing. The hearing officer should be notified. Usually the school attorney notifies the hearing officer of this result, but you may also contact the hearing officer yourself. (See Part Three, Step 7 - Communicating with the Hearing Officer)

You and the school reach agreement on some, but not all of the issues at the resolution meeting. A due process hearing is needed to resolve these remaining issues. Usually the school attorney notifies the hearing officer of this result, but you may also contact the hearing officer yourself. (See Part Three, Step 7 - Communicating with the Hearing Officer)

You and the school reach complete agreement on all issues at the resolution meeting. A due process hearing is no longer needed. You must contact the hearing officer so that the hearing can be cancelled. (See Part Three, Step 7 - Communicating with the Hearing Officer)

1. Written Resolution Meeting Agreement

If a **resolution meeting agreement** is reached at the resolution meeting, the terms of the agreement should be put in writing. This protects both you and the school so that both understand exactly what has been agreed upon. This written agreement is considered to be legally enforceable. This

means that if either you or the school believes that the other has failed to live up to the terms of the agreement, either has the right to bring a lawsuit in state or federal court.

School districts are frequently required by law to have certain legal agreements, such as the resolution meeting agreement, approved by the School Board. This means that your issues may not be considered completely resolved until school board approval. Check with your school or its attorney if you have questions about this.

Both you and the school each have 3 business days after the agreement is signed to change your respective minds about what has been agreed to. If you do change your mind, you should advise the school immediately.

You cannot request a due process hearing to complain that the school did not abide by the resolution meeting settlement agreement. It is necessary to file a lawsuit in state or federal court to pursue such a claim.

2. Resolution Meeting Data Form

The U.S. Department of Education, Office of Special Education Programs, referred to as OSEP, requires all states to report resolution meeting information and outcomes to the federal government every year. Pennsylvania accomplishes this by requiring schools to complete a form called "**Resolution Meeting Data Form**". The school will complete the form, and

send a copy to you (or your attorney, if you have one), the ODR case manager and the hearing officer. Forms can be completed and submitted to ODR in form version or electronically via a web-based password protected program in which BSE staff can access when needed.

A copy of the Resolution Meeting Data Form is in Appendix S.

ODR has prepared a short video on Resolution Meetings, which is available on the ODR website: http://odr-pa.org/alternative-dispute-resolution/resolution-meeting-facilitation/

3. Withdrawal of the Hearing Request

Withdrawal of the hearing request occurs in these situations:

a. You and the school have resolved the matter, either at the resolution meeting, at mediation, or at some other point, and so a due process hearing is not needed. Notify the hearing officer immediately that you are withdrawing your complaint notice for one of these reasons. The hearing officer will ordinarily grant your request to withdraw.

b. If, for other reasons, you decide that you do not want to pursue a due process hearing, whether or not the complaint can be withdrawn is up to the hearing officer. You should notify the hearing officer that you wish to withdraw your complaint. The hearing officer will decide whether or not to allow the complaint to be withdrawn. Some of the

factors a hearing officer might consider when deciding whether to allow you to withdraw your complaint are:

- The stage of the proceedings. If the hearing is almost completed, the hearing officer might be less likely to grant the request;
- Whether the school (or you, if it is the school attempting to withdraw its complaint notice) agrees to the withdrawal;
- If the school does not agree to the withdrawal, the extent of any harm the withdrawal may cause the school (or you, if it is the school attempting to withdraw its complaint);
- The likelihood of another hearing having to be held later on the same issues.

Step 7:
Become Familiar with the Prehearing Directions: Plain Writing Act Version[1]

The hearing officers have prepared a document called Prehearing Directions – Uniform and Plain Writing Act versions.

The Prehearing Directions can be found in Appendix T.

One of the issues the Directions addresses is how to communicate with the hearing officer. (See Appendix T at #1).

A. Communication with the Hearing Officer

Throughout the course of the proceedings, there will be times when you need to communicate with the hearing officer. The hearing officers have specific rules about such communications.

Here are the hearing officers' rules about communicating with them:

- **Email.** An attorney or parent representative the family without an attorney (this is called being "*pro se*") who has an email account must use email as the only way of corresponding with the hearing officer. All emails to the hearing officer must be copied to the opposing party's attorney, or to a *pro se* parent. Unless told otherwise by the hearing officer, printed hard copies of any document that was emailed to the hearing officer are not necessary and should not be

[1] Plain Writing Act of 2010, 111 P.L. 274, 124 Stat. 2861 (2010) (requiring that government communications to the public by federal agencies be clearly understandable). Although ODR is not a federal agency, it recognizes the importance of accessible and understandable language to parties involved in special education dispute resolution.

sent. All emails must contain the ODR file number in the subject line. Embedded graphics and electronic "stationery" are not appropriate for correspondence about the hearing.

- **Mail and Fax.** In the event that any attorney or *pro se* parent does not have an email account, correspondence and other documents will have to be sent by U.S. mail, or by fax if the hearing officer has a fax machine available. However, if email is impossible, it is the hearing officers' strong preference that the parties use regular U.S. mail.

- **Conference calls.** Either party, or the hearing officer, may request a conference call. Conference calls must include the attorneys for both parties, or the attorney and the *pro se* parent.

The hearing officer does not work a typical 9 a.m. to 5 p.m. schedule. Therefore, do not be surprised if you receive email communications from the assigned hearing officer at night or on weekends. Check your mail or email regularly to see if you have received any communications from the hearing officer or the school's attorney.

B. Decorum at the Hearing

The hearing officers' Prehearing Directions address decorum (See Appendix T at #12), or how everyone is expected to act at the hearing. The directions state:

> Parties, attorneys, participants and observers at the due process hearing are advised that hearing officers will prohibit the reading of newspapers, magazines, or books, the use of mobile devices, and performance of work unrelated to the hearing, in the hearing room while the hearing is in session. Hearing officers will not limit the use of a laptop or other electronic device where such technology is necessary for

access to exhibits or for the accommodation of a disability. Hearing officers will address attendees, as necessary, regarding decorum during the hearing.

C. Reduction of Unnecessary/Repetitive Evidence

The hearing officers' Prehearing Directions address the reduction of unnecessary and repetitive evidence (See Appendix T at #11). The Directions say:

> The timely completion of due process hearings is not only required by the law, but in practical terms is best for the student, family and educators. Therefore, every attempt will be made to conclude hearings within two full days. It is the intent of the hearing officers that hearings will extend no longer than four full days. Additionally, specific time allotments for various categories of witnesses may be applied to promote efficiency in testimony.
>
> A hearing officer, in his or her discretion or at the request of a party, may hold a pre-hearing conference in advance of the first session of a hearing.
>
> Regardless of whether or not a pre-hearing conference is held, in the parties' opening statements on the record, the parties will state the exact issue(s) to be decided by the hearing officer. After the opening statements, the hearing officer will re-state the issues precisely on the record, seeking confirmation from the parties of issues(s) to be decided at the hearing. The hearing officer's re-statement of the issues on the record will govern the scope of the hearing and the evidence to be presented and will shape the hearing officer's written decision.

D. Notifying the Hearing Officer of Settlement

The Prehearing Directions address **settlement** (See Appendix T at #7). As soon as the parties have settled the case, or believe that they are in a position to request a conditional-dismissal order, the party who filed the complaint shall immediately notify the assigned hearing officer.

Step 8:
Understand Timelines and the Decision Due Date

Timelines differ depending on the type of due process hearing:

IDEA cases - Parent requests due process

The IDEA law states that parent-initiated due process cases will be resolved completely no later than 75 days after the complaint is filed. There is an exception to this, however. Either you or the school may ask that the hearing officer extend this 75-day timeline.

The 75-day calculation is figured this way:

30 days for the resolution period
+
45 days for the hearing to take place and the decision written
=
75 days

The **decision due date** is the date the hearing officer will distribute his or her decision, and the due process case will be closed.

IDEA cases - School requests due process

The IDEA law states that school-initiated due process cases will be resolved completely no later than 45 days after the complaint notice is filed. There is an exception to this, however. Either you or the school may ask the hearing officer to extend this 45-day timeline.

Because school-initiated requests do not have a 30-day resolution period, a shorter time is given to complete the actual hearing and allow the hearing officer time to write his or her decision.

The decision due date is the date the hearing officer will distribute his or her decision, and the due process case will be closed.

Expedited IDEA discipline cases

For due process hearings based on disciplinary placement, an expedited hearing must occur within 20 school days of the date the complaint was filed.

The decision due date is the date the hearing officer will distribute his or her decision. In expedited disciplinary placement cases, that must be within 10 school days after the hearing. There are no exceptions to this timeline.

Expedited IDEA extended school year (ESY) cases

For due process requests regarding ESY, an expedited hearing must be held and the hearing officer's written decision must be sent to the parties no later than 30 days after the complaint was filed. The hearing is typically held within 15 calendar days of the request, but is not a requirement. No exceptions to the timeline are permitted.

Section 504 cases

Section 504 does not have strict timelines; however, ODR hearing officers usually follow IDEA procedures for these cases.

Notifying parties of the decision due date

The law requires the decision due date to be given to the parties at the beginning of the case.

In the initial letter from ODR, you will be given the decision due date based upon a simple calculation.

The decision due date may change for various reasons, including:

- An Amended Complaint is filed, restarting timelines.

- You and the school agree in writing to waive the resolution period.
- After either mediation or the resolution meeting starts, but before the end of the 30-day period, you and the school agree in writing that no agreement is possible.
- If you and the school agree in writing to continue the mediation at the end of the 30-day resolution period, but later, either you or the school withdraws from the mediation process.
- Either you or the school asks for, and are granted, an extension of the decision due date.
- Either party may request a hearing date change, known as a continuance, if unforeseen circumstances prevent attendance on the scheduled date. The officer will rule on all continuance requests. A continuance request differs from a request to extend timelines (usually referred to as an extension of the decision due date). The decision due date is calculated when the hearing request is made. Changes to the decision due date may be needed due to continuances; the number of sessions needed to complete the case; time needed to complete written closing arguments, or other reasons. Any request that the decision due date be extended must be directed to the hearing officer. Decision due dates can only be changed if a party explicitly asks the hearing officer to change them. If the hearing officer agrees to extend the decision due date, a new decision due date will be set at the time of the hearing officer's ruling. See 34 C.F.R. 300.510 and 300.515.

It is very common for the decision due date to change throughout the course of the hearing, based upon requests by the parties to extend the decision due date.

It can be confusing to have the decision due date changed throughout the course of the proceedings, but the federal government requires this process. The hearing officer will let you know if the decision due date has changed. You can always contact the hearing officer with questions about the decision due date. (See Part Three, Step 7 – Communicating with the Hearing Officer)

Step 9: Disclose Your Evidence and Witnesses to the School

This step is critically important and has timelines that you must follow.

There are three types of **evidence** that are usually presented to the hearing officer at a due process hearing:

1. your testimony;

2. the testimony of the witnesses for you and for the school, including any experts; and

3. documents (referred to as "exhibits" at the hearing)

You must let the school know who your witnesses are, and what documents you plan on using, prior to the hearing taking place. The school is required to give this same information to you.

You must disclose all witnesses and all exhibits before the hearing begins. Here is what the Generally Applicable Pre-Hearing Directions say about exhibits:

> So that the parties have the entire scope of evidence before a hearing begins, parties shall disclose all potential witnesses and exhibits that may be used over the course of the entire proceeding at least five business days (*two business days prior to expedited*

hearings) prior to the initial hearing session of any matter. After the hearing begins, if parties discover evidence that should have been disclosed under the evidence-disclosure rule in the preceding paragraph, hearing officers retain the discretion to make exceptions to this rule. Such exceptions, however, will be made only after strict offers of proof as to the materiality and relevance of the evidence and the reasons(s) that it was not discovered and/or disclosed, affording the opposing party an opportunity to examine it.

IDEA cases

Five business days before the hearing date, you must send to the school's attorney:

1. A list of your witnesses

2. A list of your exhibits, and a copy of any exhibit that the school does not have already, for example, a private evaluation.

You do not need to use a particular form. A letter is fine. See Appendix U for a sample **2/5-day disclosure letter**.

You may email it, mail it, deliver it, or even fax it, but you should use a method that will enable you to prove that you disclosed your witnesses and exhibits in a timely manner. This is typically referred to as the "5-day disclosure".

Expedited IDEA cases

Two business days before the hearing date, you must send to the school's attorney:

1. A list of your witnesses

2. A list of your exhibits and a copy of any exhibit that the school does not have already, for example, a private evaluation.

You do not need to use a particular form. A letter is fine.

See Appendix U for a sample disclosure letter.

You may email it, mail it, deliver it, or even fax it, but you should use a method that will enable you to prove that you disclosed your witnesses and exhibits in a timely manner. This is typically referred to as the "2-day disclosure".

Section 504

Section 504 does not have strict disclosure rules; however, ODR hearing officers usually follow IDEA procedures for these cases.

Both you and the school must abide by the disclosure rules. If either of you do not, the other side can ask the hearing officer to prevent those witnesses from testifying and prevent the party from using the exhibits. If this happens to you, it might prevent you from proving your case to the hearing officer. Do not take the chance of having the hearing officer say that you cannot present all of your witnesses and evidence because you did not follow the disclosure rules. Give this information to the school attorney in the time frame required. Be able to prove that you provided the information within the timeline, just in case there is a question.

To decide what to list in your disclosure document, consider what you are attempting to prove to the hearing officer. What witnesses will help to prove your case? What exhibits will help to prove your case?

Your witnesses should meet all of these requirements:

- They have information about your child and the situation which is concerning you;
- They can give relevant information about the concern;
- Their testimony will assist the hearing officer in making a decision.

Do not call numbers of witnesses who will be testifying to the same facts; choose the witness you believe will be the most effective and if absolutely necessary a few others who will briefly support that testimony without repeating it. If you present a long list of witnesses, the hearing officer may ask you to tell him or her what you expect each witness to testify about. This is called giving "an offer of proof". The hearing officer may prohibit you from presenting witnesses he or she believes may be redundant.

You have the right to have your child attend the hearing and testify. This does not happen frequently. However, you know best whether it is a good idea to have your child participate in this way. If you decide that your child has relevant information to provide, make sure you list him or her on your disclosure.

> If you want your child to testify, but not be present for the entire hearing, make sure you discuss this in advance with the hearing officer and the school attorney. Arrangements can be made to have your child testify at a certain time and not have to stay for the entire hearing.

The school can object to any witness you list (just like you can object to any witness the school lists on its disclosure). The hearing officer will ultimately decide whether a particular witness can testify or not. Here are some circumstances that may cause the school to object:

> *Example*: Your neighbor may be able to give testimony about your child's behavior at home, but if the issue is your child's behavior at school, then it is not likely that your neighbor can provide relevant testimony. The school could object on the basis of "relevance", and the hearing officer might prevent you from having your neighbor testify.
>
> *Example:* Your neighbor's child received a particular reading program and it worked well for that child. You are interested in the same reading

program. The IDEA law requires individualized education programs. This means that what worked for one child is not necessarily what is needed for another child. Your neighbor's testimony is probably not relevant.

You will also need to determine what documents (exhibits) you intend to use at the hearing. Many of your exhibits will be the documents you gathered as you were determining whether you had a case or not (See Page 73).

Step 10:
Request Subpoenas (if necessary)

You have listed your witnesses in your 2/5-day disclosure letter to the school. It is your responsibility to notify your witnesses of the date and time of the hearing. The hearing officer may set specific hearing sessions for particular witnesses, based upon schedules and availability.

> As soon as you have a hearing date, notify your witnesses of the date, time, and location of the hearing. If there are scheduling problems, notify the hearing officer immediately.

A **subpoena** is a legal order by the hearing officer telling a person that they must attend the due process hearing. (A subpoena may also be used to force someone to turn over documents.)

Usually the witnesses are known to the parties and will testify willingly. If you have listed a witness on your 2/5-day disclosure, but you are not sure whether they will voluntarily attend the hearing, you can ask the hearing officer to issue a subpoena. This takes some time, so make sure you request a subpoena well in advance of the hearing date.

In your letter to the hearing officer asking for a subpoena, you should provide the following information:

- The name of the person you wish to subpoena;
- Why it is important to your case that this person attend and testify;
- It is also helpful to provide your efforts to get the person to attend the hearing without the need for a subpoena.

Send a copy of this letter to the school's attorney.

Follow the same general process if you need a subpoena to get records for the hearing that have not been provided. Send a letter to the hearing officer asking for a subpoena, and include this information:

- The document(s) you are trying to get
- Why it is important to your case to have this document(s)
- It is also helpful to provide your efforts to get the document(s) without the need for a subpoena

Send a copy of this letter to the school's attorney.

The hearing officer will determine if the presence of the witness or document is necessary or not.

You will be responsible for delivering the subpoena to the individual. The hearing officer will not send the subpoena directly to the individual. It will be sent to you.

If you are having trouble getting copies of your child's educational records from the school, you do not have to request a subpoena. Contact the school's attorney and the hearing officer and explain the difficulties you are having in getting your child's records.

Step 11:
Marking Exhibits

The Office for Dispute Resolution is strictly enforcing guidelines for marking exhibits in light of the need to prepare records properly for appeals of hearing officers' decisions in accordance with court directives.

Exhibits shall be prepared according to the requirements set forth in Prehearing Directions. All exhibit markings must be placed on the page so that they are clearly legible.

Exhibits not prepared according to these requirements will be returned to the party for re-marking. No exhibit that is improperly prepared and marked will be admitted.

Now that you have decided what exhibits to use at the hearing, this is a good time for you to organize your exhibits and mark (identify) them in preparation for the hearing. The hearing officers have strict rules about the way that exhibits are to be marked: 1) to prevent confusion and allow for easy and accurate identification at hearing; and 2) to meet the requirements of state and federal court regarding exhibits in the event of an appeal. This is standard procedure for legal proceedings.

The information below explains exactly how to mark exhibits as required by the hearing officers' Prehearing Directions (Appendix T at #3.).

1. Start by putting the exhibits in the order that makes sense to you. If your first witness will be addressing the IEP, for example, then it might make sense to make the IEP your first exhibit. There are no right or wrong ways to order your exhibits. The order of exhibits depends on what makes sense to you and is comfortable for you.

2. Now that you have organized your exhibits, it is time to mark them. All of your exhibits must be marked P for Parent. (The school will mark its

exhibits S for School District or Charter School; IU for Intermediate Unit; or C for County).

3. On **every page** of **every exhibit**, the page should include the exhibit number and the page number as part of the overall number of pages in the exhibit. So, for example, parents' first exhibit, with four pages, would be numbered P-1 page 1 of 4, P-1 pages 2 of 4, P-1 page 3 of 4, and P-2 page 4 of 4, with each page marked separately and completely. The same would apply for the pagination of each of the LEA's exhibits with the appropriate abbreviation from #2 above.

4. Exhibit numbers and page numbers must be in the lower right corner and not obscured by other print on the page. So that exhibit numbers and page numbers are not cut off when being copied, exhibit numbers and page numbers must be a minimum of ½ inch from the bottom of the page and ½ inch from the right side of the page.

    - When exhibits are in landscape format, the exhibits should be oriented so that, when place in portrait format, the type faces away from the left side of the page. In effect, type on an exhibit in landscape format, when the page is held in portrait format, would be read from the bottom of the page to the top.

If the exhibits are not numbered properly, they will be returned to the party for re-numbering. The record will not be closed until the exhibits are marked and numbered properly.

See Appendix V for examples of marked exhibits.

Step 12: Copying Exhibits

The parties shall exchange a complete set of their respective exhibits and, at the initial hearing, shall provide a complete set of their exhibits to the hearing officer. In cases with electronic exhibits, the hearing officer will provide instructions to the parties.

Now that you have marked your exhibits, you need to make copies of them. You are required to have four complete sets of your exhibits at the hearing.

The four copies will be used as follows:

1. One copy of exhibits will be for you.

2. One copy of exhibits will be given to the hearing officer at the first hearing session.

3. One copy of exhibits will be given to the school's attorney at or before the first hearing session.

4. One copy of exhibits will be available for a witness to refer to while testifying.

Here are the rules for copying exhibits (from the hearing officers prehearing directions).

1. The copy of your exhibits for the hearing officer must be one-sided.

2. The copy of your exhibits for the school's attorney and any witness may be either one-sided or two-sided.

Your exhibits will be distributed as follows:

1. You may provide a copy of your exhibits to the school's attorney either prior to the first hearing or at the first hearing. The school's attorney will do the same.

2. You will provide a copy of your exhibits to the hearing officer at the first hearing.

If a document is in a binder but is not used in the hearing, the hearing officer will most likely not consider it accepted into the record and will most likely not use it in making his or her decision. If you want an exhibit to be considered, you should be sure to use it or reference it in the course of the hearing.

Step 13:
Organizing Your Exhibits for the Hearing

It is recommended that you put your four sets of (marked) exhibits into four individual binders (notebooks), and tab each exhibit so that you can find it easily. The first page of the binder will list all of the exhibits with their associated tab number. It is very common for all participants at a due process hearing to be nervous, and you will likely be nervous as well. This organizational system has been found to be the best way to manage the many (often multi-page) exhibits that are commonly used at a hearing.

See Appendix W for an example of a cover sheet for the exhibit notebook.

Step 14:
Determine Joint Exhibits

Once you have exchanged exhibit lists with the school, it is likely that you will see that the school attorney intends to use some or all of the same exhibits that you do. IEPs, NOREPs, report cards, etc. are frequently listed by both parents and schools as hearing exhibits. Eliminating duplicative exhibits creates a much clearer and more concise hearing record.

When both parties are represented by counsel, the hearing officers strongly encourage the attorneys to work together to identify exhibits that both the parent and the school will want to use at the hearing (marked as a "joint" exhibit, as opposed to either a parent exhibit or a school exhibit). This reduces or eliminates the number of identical exhibits appearing in both the parents' exhibit book as well as the school's exhibit book (when only one copy is needed). As a pro se parent, you are not required to work with the school to assemble exhibits that both you and the school want to use at hearing, but you are welcome to do so. Contact the school's attorney if you are interested in doing so.

The Prehearing Directions address the issue of **joint exhibits:**

Eliminating identical exhibits that each party wants to offer creates a much clearer and more concise hearing record.

Prior to the hearing, the parties should confer and choose one copy of the following documents to serve as the exhibit of record:

Exhibits of record:

- Permissions to Evaluate or Reevaluate
- Any Report Offered
- Invitations to Any Meeting

- IEPs, **Gifted IEPs** (GIEP), IFSPs, Section 504 Plans and
- NOREPs

The documents above may be marked as an exhibit of either party or as a joint exhibit. In addition, the parties are encouraged to confer and designate a single copy of any other document that may be duplicative to serve as the document of record.

Please note that these directions are intended to apply to duplicates of the same document. If the parties feel that there is a material difference in the documents that is important to fact-finding, then each party's copy of the exhibit may be presented at the hearing.
Any exhibit may be marked as a parent exhibit, a school exhibit, or a joint exhibit of both, but these markings should not be of concern since only the content of the exhibit matters. The marking process simply keeps exhibits organized and identifiable for those who must work with them, and has no effect on who prevails in the case. The school attorney will work through this process with you and it is entirely possible you will both agree on every exhibit to be used, in which case the school will provide copies for the hearing.

Example: In your 5-day disclosure, you indicate that the September 2011 IEP will be an exhibit. When you marked your exhibits (Step 11), you marked this IEP P-1. In its 5-day disclosure, the school attorney indicated that the September 2011 IEP would be an exhibit, and marked it S-1. At the hearing, there will only be one copy of the September 2011 IEP used. You and the school attorney will decide whether it is marked with a P for parent, an S for school, or a J for joint, but, regardless, only one copy will be used.

> The hearing officers encourage you and the school to talk about any other exhibits which are listed on both of the 2/5-day disclosure lists and choose one copy to use at the hearing. But the hearing officers may *require* the parties to designate one copy of the exhibits of record.

These directions are intended to apply to duplicates of the same document. If you and/or the school attorney believe that there is a material (significant) difference in any of the exhibits of record that is important for the hearing officer to know about, then you and the school may use your own (duplicative) copy of the exhibit at the hearing.

Step 15:
Objecting to the School's Witnesses or Exhibits

The school's 2/5-day disclosure document will list the witnesses it intends to present at the hearing, and the exhibits it intends to use. Review this information carefully. Determine whether you have any objections to the witnesses and exhibits listed. (If the school objects to any of your witnesses or exhibits, be prepared to explain to the hearing officer why you believe that those witnesses and exhibits are properly included in your 2/5-day disclosure.)

Remember that the school attorney is likely very experienced in special education due process hearings, and will know what witnesses and exhibits are properly listed on the 2/5-day disclosure. In other words, it is the exception rather than the norm that a parent will object to the school's 2/5-day disclosure, and the hearing officer will agree with the parent, and forbid the witness to testify or prevent an exhibit from being used at the hearing. However, there is the possibility that you have a legitimate objection to either, so review the school's 2/5-day disclosures carefully.

> A witness or a document is not considered to be objectionable simply because you disagree with what you believe the witness will say at the hearing, or are in disagreement with what is listed on the exhibit. If you agreed with the school's witnesses and exhibits, you would not be going to a due process hearing.

While it is impossible to list all of the possible reasons the school might object, here are some possibilities:

- The witness you have listed is not an appropriate person to testify at the hearing.

Example: You have listed the Superintendent of your child's school or School Board members as witnesses for the due process hearing. While there may be a rare instance where the Superintendent or Board member truly is needed to establish a fact at the hearing, most often it is the principal, director of special education, the teachers or other school personnel who have direct knowledge of your child and therefore are appropriate witnesses at the hearing.

- You have listed multiple witnesses to establish the same point through repetitive identical or nearly identical testimony.

  Example: If one teacher can establish an important fact at the hearing, it is not necessary to present the testimony of five other teachers to say the exact same thing. Remember that it is not the quantity (number) of witnesses and exhibits, but the quality of the witness' testimony and exhibits that is important.

- You have listed as your exhibits every IEP your child has ever had.

  Example: Before the due process hearing begins, the hearing officer will very carefully and deliberately identify the issues to be addressed at the hearing. If your child's 5th grade IEP is at issue at the hearing, it is probably irrelevant what your child's IEP in kindergarten said. This is not a hard and fast rule; every case is different and you may be able to establish the relevance of the earlier IEP. But be prepared to explain to the hearing officer why this document is truly relevant to the issues.

See Part Four on Objections. It will give you much more information on objections.

If you believe that you have a legitimate objection to the school's exhibit(s) or witness(es), you can do one of two things:

1. You can send a letter to the hearing officer, with a copy to the school attorney, explaining, in very precise terms, why you believe the school should be prohibited from presenting a certain witness, or using a certain exhibit. The hearing officer may respond in several different ways:

    - The hearing officer may respond to your letter, ruling on your objection (telling you whether or not he or she agrees with you);

    - The hearing officer may ask the school attorney to respond to your objection(s) before the hearing officer rules;

    - The hearing officer may decide to handle your objection(s) in a conference call;

    - The hearing officer may decide to handle your objection(s) at the first hearing.

2. Your other option is to make a note for yourself so that at the hearing you can raise your concerns (objections) at that time, and ask the hearing officer to make a decision.

Checking In…

So far, the following things have occurred:

- A complaint was filed by either you or the school.
- A sufficiency challenge was filed, if needed.
- The hearing officer has ruled on the sufficiency challenge.
- Whoever did not file the complaint, has filed an Answer to the complaint.
- A resolution meeting was held (or waived, or mediation used instead of the resolution meeting) if you, as parent, filed the complaint.
- You and the school have exchanged your 2/5-day disclosure lists.
- You have marked and copied the four copies of your exhibits.
- You have talked with the school attorney about joint exhibits.
- You have gathered your four copies of your exhibits and considered putting them in individual binders.
- You have reviewed the school's 2/5-day disclosure lists to see if you have any objections to its witnesses and/or exhibits.
- You and the school's attorney have either exchanged copies of your exhibits, or will do so at the first hearing.

Now it is time for you to do your final hearing preparation. Everyone prepares for a hearing differently, and in different order, but here is a checklist of commonly done activities to prepare.

Step 16:
Prepare for Hearing

Opening Statement

At the first hearing session, you will be asked by the hearing officer to give an Opening Statement.

An opening statement is not evidence. The hearing officer will not decide the case based upon what you do or do not say in your opening statement. But the opening statement helps the hearing officer determine exactly what the issues are (the things you and the school disagree about). The opening statement also gives the hearing officer an overview of your case. You can explain the basic facts of the situation, and what you would like the hearing officer to do.

Remember, up to this point, all the hearing officer knows about your case is what you put in the complaint, and what the school has put in its Answer. The opening statement is your opportunity to explain in your own words what the case is all about.

Be aware that the hearing officer expects the side that asked for the hearing to state exactly what the issues in the hearing are. The hearing officer will only listen to testimony and consider documents that are related to the issues identified in the opening statements.

If an issue is not raised in the opening statement it will not be addressed in the hearing officer's decision, with some very rare exceptions.

After you finish giving your opening statement, the school attorney will give his or her opening statement. Listen carefully, as it will give you a good idea of where the school intends to challenge your views about your child's educational program.

After both sides have given their opening statements, the hearing officer will typically state the issues precisely on the record. The hearing officer will ask each side if he or she has correctly summarized the issues and will work with the parties until the issues are complete and clear. If there is something that is not included in the final hearing officer summary of the issues, it will not be addressed in the hearing and it will not be included in the hearing officer's decision.

As you begin to prepare for the upcoming hearing, you might want to start by writing out your opening statement to organize your thinking. Other people prefer to write out the opening statement after all hearing preparation is completed. There is no set time to write the opening statement. Whatever works best for you is fine. However, you should write out your opening statement before the hearing and you can simply read it at the hearing or use it as a guide as you speak. Typically, an opening statement is about 5 minutes long.

Here are some tips when planning your opening statement:

- State the facts as you believe them to be.
- Be clear.
- Be assertive, yet positive. Now is not the time to be argumentative.
- Do not overstate your case.

- Explain the theory of your case (what you believe the situation is, and what you believe the situation should be).

- End by explaining the remedy or outcome you seek.

(Mauet, 1980)

Example Format for Opening Statements

Here is one format you may want to follow. You are not required to use it, but this gives you an idea of how to structure your opening statement:

- Introduction:

  "Hearing Officer *[Name]:* My name is Beth Jones, and I am the parent of Connor Jones, a 5th grade student in [school district]."

- Short description of the relevant facts about your child and why you requested due process:

  "I requested a due process hearing because I have concerns about my son's reading program. Connor has been identified as having a specific learning disability in reading. He has been doing very well in school until this year…."

- Explain what you believe has occurred.

- Explain what you believe the evidence will show:

  "The November 2007 IEP indicates that….. "

- What you are seeking:

  "What I am asking you to do is to……"

  "Thank you."

Order of Witnesses at Hearing

Look at your list of witnesses in your 2/5-day disclosure letter. You will need to decide in what order you want to present your case.

- What makes logical sense?
- What witness should testify first?
- Are there any scheduling problems with any witness? If so, witnesses may have to go out of the order you would have preferred. However, this should not be of concern since hearing officers routinely deal with such scheduling challenges and the resulting need to change the order of witness. Therefore, the hearing officer will be able to understand your evidence even if witnesses are out of the order you would have preferred.
- What do you want each witness to establish?
- Are there certain exhibits that you want a witness to testify about? Include that in your notes so that you do not forget.

Your Testimony at Hearing

You may want to be a witness at the hearing. Normally witnesses have to be asked questions, which they answer. Because you do not have your own attorney to ask you questions, you are permitted to give a statement instead. You will be sworn in by the court reporter, like every other witness, asked to swear or affirm that you will tell the truth. You will then be given the opportunity to testify. You will then be asked questions by the school's attorney and maybe by the hearing officer.

You may write out your testimony and refer to it, or even read it, if that makes you more comfortable.

Preparing Questions for Witnesses

Witnesses (other than you**;** see Page 97) cannot simply make a series of statements. Instead, the attorney or the parent must ask questions of that witness. The way you prepare for witness questioning will depend on you and your style and preferences. You may want to write out specific questions to be asked of each witness. You may want to write out a list of topics you would like to address with each witness, rather than the actual questions. But regardless of how you choose to do it, you should spend time figuring out what you want to ask all of the witnesses (both yours and the school's) at the hearing.

Remember, the questions you ask your witnesses and the answers you expect to get from them are intended to prove your case, that is, what you believe to be the facts. Keep this in mind when writing out questions, but know that you can never know with 100% certainty what any witness will say.

Guidelines for Questioning Witnesses

There are rules about questioning witnesses. A due process hearing is an administrative proceeding, rather than a court proceeding, so the hearing officer is not obligated to follow the strict rules that apply in a court proceeding. However, it is important that you be familiar with some of these rules because the hearing officer will expect both you and the school's attorney to follow them in some manner.

One of the fundamental rules to remember is that you cannot testify for your witnesses. You present or call a witness at the hearing because you believe that this witness will testify to important facts that the hearing officer needs to hear. You do not call your witness and then essentially give them the answers you are looking for in your question, or suggest the answers in your questions. This is called **leading the witness.**

So when you are questioning your own witnesses, referred to as **direct examination,** you will usually not be allowed to ask leading questions, which are questions that suggest or contain their answer.

Here is an example of a leading question, which is inappropriate:

Parent: "So my child did not receive speech therapy during the months of January through March, three times a week like his IEP required, right?"

School District Counsel: "Objection. [Parent's Name] is leading the witness."

Instead, questioning should proceed this way:

Parent (non-leading question): "How often did my child receive speech therapy during the months of January through March?"

[witness answers]

"How often did the IEP say my child was to receive speech therapy during that time frame? "

[witness answers]

"What effect, if any, did this reduction in speech therapy have on my child?"

[witness answers]

It is very easy to ask leading questions; even experienced attorneys may do so at times. It might be helpful to start your questions to your witnesses with words like who, what, where, when, why, how, to reduce the possibility of asking leading questions.

You may not ask leading questions of your own witnesses. But you *may* ask leading questions of the school's witnesses. Questioning the school's witnesses occurs during **cross examination.**

The classic way to conduct cross examination is to start with

"Isn't it true that…."

Or

"Would you agree with me that…"

When you are deciding what questions you want to ask witnesses, keep straight in your mind that you should not ask leading questions of your witnesses, but you can ask leading questions of the school's witnesses. If it is not clear whether a witness is considered to be a parent witness or a school witness, talk to the hearing officer about it.

Facts versus Opinion

Normally, a witness may only testify as to facts within his or her knowledge, and not their opinion. An exception is for an **expert witness**, who may testify as to their opinions; however, you must prove that your witness is an expert by asking a few questions that show him or her to be knowledgeable in the area they will be testifying about. The expert is usually a professional in the area on which the testimony is sought. Examples would be a psychologist, therapist or other professional who works with your child. The school may also present its experts to testify at the hearing.

To qualify a witness as an expert, the usual questions ask about the person's educational background, degrees, and work experience. Their answers demonstrate that they are knowledgeable about the subject they are being asked to testify about, such as psychological testing, physical therapy, etc.

Here is an example of questions that are asked of experts:

Parent: "Dr. Smith, will you please describe your educational background?"

[witness answers]

"Please describe your work experience."

[witness answers]

If the expert has published books or papers on the topic, or has done anything else of importance, you can ask him or her about that. You will get ideas for questions by reviewing the expert's resume.

You conclude your questioning with, "I offer Dr. Smith as an expert in the field of [specialty area]".

Note: You may not be required to qualify your expert. If the expert is already known to the school attorney and hearing officer, you may not be required to go through this process. Sometimes the parties can stipulate, or agree, to an expert's qualifications.

> Always have a current copy of your expert's resume to submit to the hearing officer (with a copy for the school attorney).

If you are presenting an expert who requires a fee to attend the hearing, you will be responsible for that fee. Talk with your expert as early as possible to determine what he or she will charge to attend a hearing. If you have an outside report or evaluation completed by a doctor, it is usually best to have them there to testify about the report. However, because the cost can be substantial, you will have to make a determination whether to have the expert appear at the hearing, ask the hearing officer to allow him or her to testify by telephone (which may save some money), or submit the expert report only into the record. See Pages 139-141 for information on using expert reports at the hearing.

> Before you write out your questions, read Part Four about Objections. Understanding common objections will increase the likelihood that your questions are "not objectionable". Then, return to this section, and begin preparing questions or areas of inquiry for each witness.

Final Hearing Preparation

Double-check the date, time, and location of the hearing.

Confirm with your witnesses that they know the date, time, and location of the hearing.

Make sure your witnesses will be available all day for the hearing. If they are not, work out the time they will be available with the hearing officer and the school attorney so the hearing will run smoothly and your witness will be able to testify.

Let your witness know what to expect. Explain to them that they will be under oath and will need to answer questions truthfully. Make them aware that the district will be allowed to ask them questions when you are done questioning them. Let them know that the hearing officer may ask them questions too.

If it is important to you, confirm in advance arrangements for beverages/water during the hearing, the arrangements for lunch or dinner depending on the hearing time, and anything of a special nature you or anyone attending on your behalf may require.

Pack items that will make you more comfortable (coffee, water, snacks for breaks, lunch). Either bring your lunch or have cash available for lunch. There may not be refrigeration available for your lunch, so take that into consideration.

Arrange for time off from work.

Arrange for child care or transportation, if needed.

There is no dress code for hearings, but because it is a legal proceeding, it is not recommended that you dress too casually (shorts, flip flops, etc.).

A mock due process hearing is available on the ODR website. It might be helpful to watch the video before your hearing.
http://odr-pa.org/due-process/overview/

Step 17: Miscellaneous Information: Requesting that a Hearing be Rescheduled

When a hearing officer is assigned a case, he or she will schedule the first hearing.

There will be times when you simply cannot attend a scheduled hearing. Realize that there are no particular facts that will always result in a hearing being rescheduled. Instead, the hearing officer has to consider each individual case. The only person with the authority to decide, the hearing officer, must balance numerous and frequently competing factors.

There are a number of common reasons that a parent may ask that a hearing be rescheduled. Whether the hearing officer agrees to reschedule the hearing or not should not be interpreted as reflecting on the strength or weakness of your case, or a hearing officer's preference for one party over another.

Keep in mind that every case is different, and the hearing officer has many factors to consider when deciding whether a hearing should be rescheduled.

The hearing officers have rules about requesting that a hearing be rescheduled, set forth in the Generally Applicable Pre-Hearing Directions. (See Appendix T at #2.) When requesting that a hearing be rescheduled, you will need to follow this procedure:

1. Check with the school attorney to see if he or she objects to the hearing being rescheduled.

2. Immediately notify the hearing officer of the need for a hearing to be rescheduled as soon as that need becomes known to the party.

3. State the **exact reason** for the request.

4. Let the hearing officer know whether the school is in agreement with your request that the hearing be rescheduled.

Understand that in the case of an expedited hearing, and the strict timelines for completion of the hearing, a request to have an expedited hearing rescheduled is not likely to be granted.

Examples of reasons for requesting a rescheduled hearing may include:

1. "My boss won't let me off work that day."

   To the extent possible, try to clear your upcoming absence with your employer as soon as possible.

2. "I am currently seeking counsel."

   If you are trying to find an attorney, let the hearing officer know that this is why a rescheduled hearing is being requested. Do not delay your efforts to locate an attorney, because at some point the hearing officer will insist that the hearing proceed even if you cannot find an attorney.

3. "I can't get childcare on that date."

   Try to anticipate and make arrangements for childcare prior to the date of the hearing.

4. "I have a special child or family event to attend on the date of the hearing."

   If you know of scheduled special events at the beginning of the hearing process, notify the hearing officer of your unavailability on that particular day. The hearing officer may allow for this depending on the event and status of the hearing.

5. "I have an evaluation pending and the results will not be in before the hearing date."

   When this is the situation, the hearing officer may respond in one of two ways:

- Reschedule the hearing to allow the evaluation to be completed;

  Or

- Direct the party who requested due process to withdraw the request, and re-file the complaint notice when the evaluation is complete and they are prepared to go to a hearing.

It is more likely that the hearing officer will grant the request to have a hearing rescheduled when the evaluation is already underway and will be completed very soon.

6. "I have another matter in court the same date and time."

   Give the hearing officer as much information as possible regarding the other matter. The hearing officer may request proof of this scheduling conflict (such as a hearing notice or court order). Remember, the due process hearing is a legal proceeding as well, and usually just as important as any other legal matter.

7. "I will be away on vacation during this time."

   If you know of scheduled vacations at the beginning of the hearing process, notify the hearing officer of the dates of your vacation as soon as possible. It is best to alert the hearing officer to pre-planned vacations as soon as you are given the assigned hearing officer's name.

8. "I am having trouble obtaining school records and need more time."

   If you are having trouble getting your child's educational records, you should make a request to the school in writing for those records and copy the hearing officer. The hearing officer may allow the hearing date to be rescheduled and order the school to provide access to the records.

9. "My witnesses are not available on the day of the hearing."

When this is the situation, the hearing officer may respond in several different ways:

- The hearing officer may reschedule the hearing to a time when your witnesses are available.

- The hearing officer may permit telephone testimony at the hearing instead of having your witness actually attend the hearing.

- The hearing officer may direct that a deposition of your witness take place instead of having your witness actually attend the hearing. Although this is an exception in due process hearings, at deposition, witnesses may testify before a court reporter and representatives from both sides, with the transcript then submitted to the hearing officer. (See Step 18)

- It may also be possible in the case of an expert witness to submit his or her expert report into the record, rather than having the expert testify in person at the hearing. See Page 133-134.

10. "I had a sudden emergency (illness, accident, etc.)."

    Contact the hearing officer and the school as soon as possible after an emergency occurs so that everyone is notified in a timely way that you cannot attend the hearing.

11. "The school and I are trying to resolve (settle) the case, but we need a little more time to talk."

    If you and the school are trying to resolve the case without going to a hearing, but need a little more time in which to talk, alert the hearing officer to this. The hearing officer may be willing to grant a short delay of the proceedings to allow time to see if agreement can be reached and the hearing request withdrawn.

12. "I didn't receive notice of the hearing until right before it was scheduled to occur."

    If you received notice shortly before the date of the hearing and do not have sufficient time to prepare, you should let the hearing officer know and request that the hearing be rescheduled. It is rare, however, that parties receive late notice of a hearing, and even if they do, preparation for the hearing should have begun before the complaint notice was filed, or as soon as the other party's complaint notice is received. In the case of an expedited hearing, you will receive a notice very close to the actual hearing date because of the timelines set for expedited hearings.

Basics About Rescheduled Hearings

The following should be remembered about rescheduled hearings:

1. It is more likely, but not guaranteed, that the hearing officer will grant a joint request (both you and the school want the hearing to be rescheduled).

2. Either party has the right to object to the other side's request for a rescheduled hearing. If you think the hearing officer should not grant the school district's request for a rescheduled hearing, an email message or letter should be sent to the hearing officer without delay (with a copy sent to the school), explaining why you feel that way.

3. Remember, hearing officers are the only people who can decide whether a case should be rescheduled or not. Things that a hearing officer might consider include:

    - The number of times the hearing has already been postponed and rescheduled;

    - whether the case is expedited because of a disciplinary issue or involves ESY;

- the amount of available time you have had to find an attorney to represent you;

- the amount of time either you or the school has had to prepare for the hearing;

- your child's status. If your child is without an educational placement, for example, the hearing officer will likely be reluctant to postpone the proceedings except for the most compelling reasons.

The federal Department of Education, Office of Special Education Programs (OSEP), now requires that states report the length of time it takes to resolve a case, from the time a due process hearing is requested, until the hearing officer issues his or her decision. OSEP wants cases to be resolved in a timely fashion, which means hearing officers have to balance a host of factors when deciding whether to grant an extension or not. Therefore, do not take it personally if the hearing officer does not grant your request.

A due process hearing is more like a court proceeding than a personal appointment. Because the daily schedules of the numerous individuals required to be there will almost always be in conflict, only very critical reasons are good cause for rescheduling requests. This applies to requests that you make for rescheduling, as well as requests the school makes for rescheduling. If the rescheduling request is denied, it is important that you still attend the hearing, and do your best to present the case for the program or services you believe your child needs. If you fail to attend the hearing, it may proceed without you and decisions made without your input.

Step 18: Miscellaneous Information: Depositions

A **deposition** is the process of taking a witness' testimony outside the scheduled hearing process. A deposition is used when it is impossible for the witness to attend the hearing. Taking a deposition follows much of the same procedures as a hearing: a court reporter is present; the witness swears or affirms to tell the truth; all discussion is taken down by the court reporter, etc. The major difference, of course, is that the hearing officer is not present. If objections are raised, they are noted on the record for the hearing officer to rule on at a later date. The transcript of the deposition is submitted to the hearing officer as evidence. Depositions are not frequently used in due process hearings, but they are a possible solution to scheduling problems. If you believe that you may need to take a deposition, let the hearing officer know as soon as possible.

Checking In…

You have now done the following items to get ready for the hearing:

- ✔ Prepared for the hearing by planning:
  - Your opening statement
  - The order of your witnesses
  - Your testimony
  - The questions for the witnesses
- ✔ Reviewed the due process hearing videos on ODR's website to get a better idea of what might happen during the hearing. http://odr-pa.org/odr-training-videos/
- ✔ Confirmed the date, time, and location of the hearing and reviewed this information with your witnesses.
- ✔ Became familiar with the rules the hearing officer has about rescheduling hearings, in case a scheduling conflict arises. These rules are found in the Pre-Hearing Directions on ODR's website.
- ✔ Talked to the hearing officer to see if a deposition would be appropriate. This is only necessary if you have found out that a witness is not able to attend the hearing.

- The next section will further prepare you for the hearing by explaining objections.

Part Four: Objections

Objections are oral or written challenges to witnesses and evidence presented by a party. Either the parent or the school may object to the other's evidence. This section lists the most common objections and provides a brief explanation of each.

A due process hearing is an administrative proceeding, as opposed to a court hearing. This means that hearing officers do not have to follow the strict rules about evidence and witnesses that a judge does. **http://www.pacode.com/secure/data/225/225toc.html**

Nonetheless, it is likely that the school's attorney may raise **objections** during the course of the hearing; this is standard procedure. You may want to raise your own objections as well. In either event, it would be helpful for you to have a general understanding about common objections made during a hearing. Both the hearing officer and the school attorney will understand that you are not an attorney and are not going to be as familiar and comfortable with objections as they are.

> You will probably not agree with some of the testimony that is given. This alone does not mean you should object. Save your objections for questions and answers that truly are "objectionable". Remember that you will have the opportunity to question every witness too. If you believe that school witnesses are not taking into consideration an important fact, for example, you can point that out during your cross examination.

Relevance

The questions asked of witnesses, and the exhibits used at the hearing, must be relevant to the issues addressed at the hearing. In other words, the documents and witnesses must assist the hearing officer in deciding the case.

> *Example*: The issues at the hearing pertain to your child's speech therapy in 5th grade. Questions about your child's math class in 2nd grade are probably not relevant to the issues of the hearing. The school attorney may object to those questions on the basis of relevance.

When thinking about the questions to ask of witnesses, ask yourself whether a particular question or series of questions helps to establish what you are trying to prove to the hearing officer.

Repetitive (asked and answered)

If a witness is asked, and answers, the same question repeatedly, this can be the basis for an objection.

> *Example*: If a witness is asked the same question repeatedly, you may hear this objection from school counsel: "Objection. Asked and answered. This witness has already stated several times that….[whatever the witness answer is]….These questions are repetitive."

Remember that the hearing officer is listening to the testimony at the hearing, and will review the transcript before writing a decision. Repeating testimony is not going to increase the odds of one party winning. If the witness has clearly stated his or her answer, it is not necessary to have them repeat it over again.

Hearsay

Hearsay statements are:

- Statements made by a person at some point other than at the hearing;
- Presented at the hearing to prove the truth of the statement made.

The problem with hearsay statements is that the person is not present at the hearing to question them on what they did or did not say.

Example: Mrs. Jones has relevant information for the hearing. Mrs. Jones is not at the hearing. You ask the witness, "What did Mrs. Jones say about…?" You may hear this statement from school counsel: "Objection. The question calls for a hearsay answer."

There are numerous exceptions to the hearsay rule. However, there are three important things to remember regarding hearsay:

1. A due process hearing officer does not have to follow the hearsay rule exactly, as a court does. Your hearing officer *may* allow some hearsay evidence.

2. A hearing officer cannot base his or her decision solely on hearsay evidence.

3. If the statement made by a person at some point other than at the hearing is crucially important, you should present that person as a witness at the hearing.

Calls for an Opinion

As indicated on Pages 100-101, only experts can testify as to their opinions. Non-expert witnesses can only testify about facts, even though they may have an opinion about the issues in the due process case.

Example: Your neighbor testifies at the hearing. You ask her this question: "Do you think the lack of a classroom aide impacted my child's education?" You may hear this objection from school counsel: "Objection. That question calls for an expert opinion. This witness is not qualified to give that information." The hearing officer will likely agree.

> Because experts can render opinions, you have more latitude when you are questioning your expert.

Make sure you are asking your non-expert witnesses questions about the facts of your child's situation. Do not ask non-expert witnesses their opinions about your child's situation.

> To organize your evidence, list your expert witnesses separate from your non-expert witnesses in your hearing preparation materials and make sure that the questions you are asking your non-expert witnesses do not call for an opinion.

Misstates Evidence/Misquotes Witnesses

This objection is exactly what it sounds like. The question to the witness misstates the evidence that has been presented in some way.

> *Example:* School district witness testifies that it is too early to determine whether a particular reading program is working with your child. In your question to the school district person, you say "You have testified that the reading program does not work with my child, right?" You may hear this objection from school counsel: "Objection. This question misrepresents what the witness said in her testimony."

Confusing/Misleading/Ambiguous/Vague/Unintelligible

It is a skill to ask appropriate questions at a hearing. This is why there are law schools to teach these skills! For your purposes, know that questions must be asked in a reasonably clear and straightforward manner. The point is not to trick a witness with a poorly-worded question. The point is to ask questions that will get from each witness information for the hearing officer to consider.

The same thing applies for the answers witnesses give. If a witness gives an answer that is difficult to understand, an objection may be raised. The witness will be asked to clarify his or her statement.

Example: "I didn't hear (or understand) the last part of the witness' answer. Can she please repeat it?"

Speculative Questions

Any question that asks the witness to guess about something may be considered improper.

Example: Questions like this are generally considered to be calling for a guess:

"So what do you think would have happened if…"

"Isn't it possible that…"

Try to ask questions that will allow witnesses to talk about what actually happened, not guess about what could have happened.

Compound Questions

A compound question is one that brings up two separate facts within a single question. The problem with compound questions is that they can lead to confusing answers. The witness may have a "yes" answer to the first part of the question, but a "no" answer to the second, for example.

Example: This is a compound question: "Did you provide speech therapy on Monday and then there was no speech therapy on Wednesday?" Instead, you would ask:

"Did you provide speech therapy on Monday?"

[witness answers]

"Was there speech therapy on Wednesday?"

Break out compound questions into two questions, and allow the witness to answer the first question before you ask the second.

Question is Argumentative

Your question should not be an argument to the hearing officer. To figure out if your question is argumentative, ask yourself these questions:

- Will the witness' answer to my question bring forth new information?

  Or

- Am I stating a conclusion in my question and asking the witness to debate it with me?

  Example: You may believe that because your child did not get a certain reading program that he or she did not receive FAPE. You need to prove with facts and perhaps expert opinion that this is, in fact, the case. Simply asking a witness whether or not they agree with your position is not likely to add much to the hearing. The following question may draw an objection from the school attorney:

  "Since my child didn't receive reading program X, then she did not receive FAPE, and is entitled to compensatory education, correct?"

  "Objection; question is argumentative."

An objection may also be raised if the questioner literally starts arguing with the witness. This can happen when the questioner disagrees with the witness' answer. Remember that you are not going to agree with everything every witness says. You can point out problems you see in a witnesses' testimony, and introduce your own evidence (exhibits, witnesses) which demonstrate your position, but you cannot argue with a witness with whom you disagree.

Example: "How can you say that my child missing speech therapy sessions is ok?"

You may hear this objection from school counsel: "Objection. Ms. Smith is arguing with the witness" or simply "Objection. Argumentative."

Answer is Unresponsive

Make sure the witness answers the question! Witnesses do not always answer the exact question that has been asked. This is why you have to listen carefully to each answer before you ask your next question. If the witness does not answer the question, an objection may be raised:

Example: Question: "How often did the student receive speech therapy?"

Answer: "The student got all the speech therapy that was needed."

You may hear this objection from school counsel: "Objection. The witness didn't answer the question."

> Make sure that your witnesses answer the questions they are asked. Listen to the answer that is given and *then* turn to your next question. Do not be so concerned about asking the next question that you fail to realize that the witness did not answer your previous question.

Questioning is Cumulative

The hearing officer will not allow multiple witnesses to testify to the exact same thing. Therefore, if one witness can establish a fact, the hearing officer may not allow you to present five other witnesses to say the exact same thing. Remember it is not the *quantity* of evidence that decides a case, it is the quality of evidence.

Example: You may hear the school attorney say this: "I object to this evidence. It's already been covered by the previous witnesses."

When putting together your list of witnesses and exhibits to disclose to the school, consider whether you can establish the same facts with one witness or exhibit, rather than through multiple witnesses and exhibits. Remember, it is the quality of the evidence submitted to the hearing officer, not the quantity of evidence that is important.

Lack of Foundation

"Laying a foundation" for a witness to testify or for an exhibit to be used at the hearing means putting it in context. In other words, why does the witness or exhibit matter to the hearing?

Example: You have listed your neighbor on your 2/5-day disclosure. It may not be apparent to the school why your neighbor is relevant to a due process hearing and your child's educational program. The school attorney may ask that a foundation be laid to establish why your neighbor has relevant information. The school attorney may instead ask for an "offer of proof". An offer of proof explains to the hearing officer why the particular witness or exhibit is important to the issues.

Exhibits must have the necessary foundation established before they are entered into evidence. So, for example, you can't just hand to the hearing officer a paper with writing on it and say that you want it to be an exhibit. You must first establish who prepared the document, when, and what it pertains to.

Checking In…

- See the tips for witnesses in the appendix of this Guide. Share this information with the witnesses you have selected.
- Watch the Mock Due Process hearing on the ODR website.
- Make a list of questions you would like to ask each witness to take with you to the hearing. This will help you to organize your thoughts and make sure you don't miss or forget anything on the day of the hearing.
- List any evidence you would like to review with a witness or submit during the time a witness is questioned next to the witness' name on your list.
- You can't object to a document or a witness' testimony simply because you disagree with it. (You establish your disagreement by producing other evidence (witnesses and documents) which supports your viewpoint, as well as through cross examination of the witness.)
- You can object to a document becoming an exhibit, or a witness testifying at hearing, if you believe that there is a basis for it or them to be excluded. You must be prepared to explain why you believe this.
- Objections are raised most often at the hearing, to the questions being asked of the witnesses by either the parent or the school attorney or to the answer of the witness. But remember, just because a witness gives an answer that you don't like, that doesn't make it worthy of an objection.

- Regardless of whether an objection is written or oral, made before the hearing or at the hearing, you must be prepared to outline the legal and/or factual basis for your objection.

Part Five: Motions

Motions are written or oral requests to the hearing officer asking that certain actions occur. This section discusses the most common types of motions, and the procedures to follow.

General Information on Motions

Motions may be filed by either party.

A copy of a written motion must be provided to the other side at the same time it is sent to or otherwise provided to the hearing officer.

Motions may be directed to the hearing officer at any time during the process.

The hearing officer will decide (or rule on) the motion.

Not all motions are written; some motions are oral. The complexity of the subject matter of the motion usually determines whether it makes more sense to put the motion in writing, or to present it to the hearing officer orally. Personal preference can also determine whether the motion is written or oral. If the motion addresses complicated legal issues, a written motion is probably a good idea to be certain that all of the points you want to make are listed. If the motion is fairly straightforward, then an oral motion may be more appropriate. Also, an unexpected issue may arise at the hearing, so that it is impossible to know that a motion needs to be prepared. There are two possible solutions:

1. An oral motion is made at the hearing; or

2. Depending on whether this works time-wise and the hearing officer allows it, a request can be made to be given time to prepare a written motion. This is usually only necessary when the issues are complex.

There are no hard and fast rules about whether a motion should be in writing or presented orally.

Types of Motions

Motion to Limit Issues: The hearing officer will hear evidence on two types of issues:

1. The issues the hearing officer identifies at the beginning of the hearing after listening to the opening statements;

2. The issues which are within the hearing officer's jurisdiction.

If either you or the school attempts to address issues other than these two, a motion to limit issues might be made. (Or, instead, an objection may be raised; see Part Four on Objections.)

Example: At the first hearing, it is agreed that the only issue will be your child's math program. If you ask questions about your child's reading program, which has no connection to the math program issue, the school attorney may ask the hearing officer to prevent you from doing that.

Example: The complaint raises child custody issues. Hearing officers do not decide custody issues. A motion may be filed by the school to ensure that this issue is not part of the case.

When preparing your complaint, make sure that 1) the issues you raise can be decided by the hearing officer; and 2) that you raise all of your issues at that time, to be certain that they will be heard together.

Motion for Reconsideration: A motion for reconsideration is exactly what it sounds like. The hearing officer has ruled on (made a decision on) a motion during the hearing. One of the parties, usually the one who filed the motion, disagrees with the hearing officer's decision and asks that he or she reconsider the decision. A motion for reconsideration should only be filed if you believe that the hearing officer missed a critical fact or point of law. A motion for reconsideration should not be filed simply because you disagree with the hearing officer's decision on the motion. However, motions for reconsideration of final hearing officer decisions at the conclusion of the case will not be considered.

Motion to Dismiss: There are many reasons why a motion to dismiss the complaint might be filed.

1. Lack of Jurisdiction (authority). If the only issue in the complaint is about something the hearing officer cannot decide, the school will likely file a motion to dismiss.

2. Res Judicata. This Latin term means that the issue has already been decided in a previous due process hearing. This means that due process hearings cannot be requested over and over again to address the exact same issue.

3. Lack of Participation in Resolution Meeting. The law requires parents to participate in a resolution meeting/session unless the parties agree to waive it or use mediation instead (See Page 57) If you do not participate in the resolution meeting, the school can ask the hearing officer to dismiss your complaint.

4. Insufficient Complaint. See Pages 53-54 regarding sufficiency challenges. If your complaint does not contain all of the required information, the school may file a sufficiency challenge and ask the hearing officer to dismiss your case.

5. Recusal. A Motion for Recusal is a request to a hearing officer that he or she step down from hearing the case. A Motion for Recusal should be filed in only the most serious of cases, when you believe the evidence is clear that the hearing officer cannot serve in an impartial way. The regulations list those instances where the hearing officer would be required to remove him or herself from a case. If any one of these circumstances exists, the hearing officer must relinquish the case back to ODR for assignment.

   The Pennsylvania Standards of Conduct for ODR Special Education Hearing Officers (previously titled Hearing Officer Code of Ethics),

available on the ODR website, http://odr-pa.org/wp-content/uploads/pdf/PA-Standards-of-Conduct-for-Hearing-Officers.pdf describes the circumstances when a hearing officer must recuse himself or herself, and the procedures that will be followed.

The requirements for an impartial hearing officer are:

- He or she must not be an employee of the state educational association or the local educational agency that is involved in the education or care of the child; and
- He or she cannot have a personal or professional interest that conflicts with the hearing officer's objectivity in the hearing.

See IDEA 300 CFR §300.511 (Appendix X) to read the federal regulations that govern due process hearings, including the requirements for a hearing officer.

The hearing officer decides all motions for recusal. If you or the school disagree with the hearing officer's decision, you need to appeal this issue to state or federal court. No one, other than a state or federal judge, can overturn a hearing officer's decision on a request for recusal.

6. Precluding Testimony. A motion may be filed to preclude (or prevent) testimony in these circumstances:
   - The testimony is irrelevant (has nothing to do with the issues at the hearing);
   - The testimony is repetitive (already testified to);

- The testimony is not permitted or allowed (for example, testimony about settlement discussions or mediation is not typically allowed);

- The witness was not properly disclosed on the 2/5-day disclosure document.

Sometimes objections will work just as effectively as a motion. So, for example, if a party tries to present three witnesses who will say the same thing, either an objection can be raised (see Part Four on Objections) or a motion can be made orally, or prepared in writing. Consider the following when deciding whether an objection is enough, or whether you want to make a formal motion:

- Is the issue so straightforward that an objection will probably be sufficient to alert the hearing officer to your concern?

- Is the issue complicated so that a written motion is needed to explain all of the complexities?

- Is the issue so critical to your case that it makes sense to prepare a formal motion, rather than simply raise an objection?

See Appendix Y for an example of a sample motion.

Checking In…

- Motions are sometimes needed during the course of a due process hearing.
- Motions can be filed by either party. They may be directed to the hearing officer at any time during the process.
- Motions can be written or oral. The complexity of the subject matter of the motion usually determines whether a motion should be in writing or presented to the hearing officer orally.
- There are different types of motions including:
  - motions to limit issues
  - motions for reconsideration
  - motions to dismiss
- Sometimes an objection will work just as effectively as a motion. Consider the complexity and critical nature of the issue when determining if you should use a motion or an objection.

Part Six: The Due Process Hearing

You probably have many questions about a due process hearing, from where to sit, how to address the hearing officer, to when you will receive the hearing officer's decision. This section of the Guide provides detailed information about the many aspects of a due process hearing.

Location of Hearing

The hearing is almost always held somewhere within the school district or Intermediate Unit. If the school is a charter school, the hearing officer may get involved in deciding where the hearing will be. The law requires that the hearing be at a location that is "reasonably convenient" for the parent, which is most often the school. A "virtual hearing" might also take place using computers and webcams if you and the school district and the hearing officer all agree to use this method. Like everything in the hearing, you should talk to the hearing officer about how and where the hearing will take place.

The hearing usually takes place in a conference room. Before the hearing begins, the hearing officer will have the room set up the way he or she wants it to be. The hearing officer will tell you and your witnesses where to sit.

Usually the hearing officer sits at one end of a table with the court reporter on one side and the "witness seat" on the other. This is to make sure that both the hearing officer and the court reporter, who is taking down all the testimony, can hear the witness. Usually the parents and witnesses sit on one side of the table together, and the school attorney and school staff sit on the other side of the table together.

Depending on how many witnesses there are, the witnesses may have to be in chairs along the walls, back from the table where you will be sitting. Keep in mind, however, the type of building, room, and furniture available, as well as individual hearing officer preference, may slightly or significantly change how the room is set up.

Those present at the hearing usually include the parties, attorneys, advocates, witnesses such as teachers or psychologists as well as others, occasional observers from ODR (for purposes of hearing officer evaluation or in-service training), and representatives of public agencies beyond your school district that may be involved. As a courtesy, you will be notified ahead of time if an ODR staff person will be attending.

- On the day of the hearing make sure you have all your exhibits with you as well as the notice of hearing (which lists all participants' names, numbers and the location address and phone number), as well as any of your own notes and proposed questions for witnesses.

- Check all messages before you leave for the hearing to make sure nothing has been cancelled or delayed.

- In case of bad weather, contact the location of the hearing (if the hearing officer has not given you other instructions) to make sure it has not been postponed.

- If you will be unavoidably late or unable to attend due to a last minute emergency the day of the hearing, contact the hearing officer immediately by whatever means he or she may have provided and someone at the location of the hearing (usually the school).

- A hearing session may be a few hours or last the entire day. The parties usually have an idea of hearing length in advance, but be prepared for the event. Feel free to bring coffee or another beverage to the hearing, and pack snacks and lunch for during breaks.

Addressing the Hearing Officer

Many of the hearing officers have name cards that they place on the table. You can assume that the name on the card is how the hearing officer would like to be addressed, such as "Dr. Jones" or "Hearing Officer Jones". If there is no name card or you aren't sure how to address the hearing officer, and/or school district counsel, ask at the beginning of the hearing how that should be done.

Due to large volume of cases and the relatively small number of hearing officers, it is entirely possible and likely that the hearing officer will already know one or more attorneys involved in the case. This does not mean the hearing officer is in violation of legal standards for impartiality. If you have concerns, however, you may ask the hearing officer about it.

Length of Hearings

Part Three, Step 8 of this Guide addresses the timelines for completing a hearing. The hearing officers' Generally Applicable Pre-Hearing Directions address the length of time a hearing should last:

The timely resolution of due process hearings is not only of concern to the federal government, but in practical terms is best for the student, family, and educators. Therefore, every attempt will be made to conclude hearings within two full days. It is the intent of the hearing officers that hearings will extend no longer than four full days.

There are limited exceptions to this general rule, based upon the needs of the parties.

> Some hearing officers assign a designated amount of time for each witness's testimony after conferring with the parties. The hearing officer will then monitor the time used during the hearing, and notify the parties when the time frame is almost up. This keeps the proceedings moving forward, and has worked successfully in many instances.

Pre-Hearing Conferences

Prior to the first hearing, the hearing officer may hold a **pre-hearing conference** by telephone with you and the school attorney if he or she deems it to be necessary. The purpose of the call is often times to clarify the issues. (See Appendix T at #11).

Hearing Officer's Opening Statement

The hearing will begin with the hearing officer's opening statement. The hearing officer will introduce him or herself, identify the parties, and state the

general purpose of the hearing. The hearing officer will make sure you understand your right to be represented by counsel. He or she will also explain the difference between an open (to the public) hearing and a closed (confidential) hearing, making sure you understand the difference. He or she will advise you that it will be closed unless you want it to be open. The hearing officer will also advise the parent (or their representative) of the right to a free transcript, and the different formats for transcripts. LEAs are responsible for payment of their copy of the transcript. The hearing officer will make sure the parties exchanged witness and exhibit lists.

Sometimes before the hearing begins, the hearing officer will ask the parties whether they want informal time to discuss possible settlement. This is simply an effort to be sure that the parties have had all the pre-hearing opportunities they wanted to explore settlement. Consider taking this final opportunity to talk to the school about resolving the case, but do not feel compelled to do so, or to settle.

Opening Statements of Parties

Once the hearing officer has completed those initial aspects, each party will be asked for an opening statement, and it is likely that you give yours first (because the parent is usually the one asking for a due process hearing). This is usually a 5 minute or less statement of the specific issues to be resolved at the hearing as well as how you want the hearing officer to rule, and is similar to what is contained in the Complaint Notice. You can bring a prepared statement and read from it, if you choose. See Page 94 on opening statements. After the opening statements, the hearing officer will typically re-state the issues precisely on the record, seeking confirmation from the parties of the issue(s). Thereafter, the hearing will address only those issues that have been identified, and the parties agreed to. (See Appendix T at #11)

Order of Witnesses and Progression of Testimony

Typically, the party who requested the due process hearing will be the first to present its evidence. (See Appendix T at #8) So, if you requested the hearing by filing the complaint notice, be prepared to start with an opening statement, and then call your first witness to the stand. You can discuss with the hearing officer and school district counsel prior to the start of the hearing about the order of witnesses. Sometimes both you and the school will have filed a complaint to handle multiple issues. If that occurs, contact the hearing officer (copy to school attorney), asking how the presentation of evidence will occur, that is, whether you will be expected to go first, or if the school will.

Questioning Witnesses

Questions that a party is asking of its own witnesses is referred to as direct examination or simply direct**.** Questions that a party is asking of the other side's witnesses is referred to as cross examination or simply cross**.** Thereafter, you may see questioning going back and forth (**Re-direct** and **re-cross**). **Re-direct examination** consists of questions about information provided by the witness during cross examination. **Re-cross examination** consists of questions about information provided by the witness during re-direct examination.

> The purpose of re-direct and re-cross examinations are not to repeat what has already been addressed by the witness' testimony. Instead, re-direct and re-cross are limited to the information provided by the witness during cross examination (in the case of re-direct) and limited to the information provided by the witness during re-direct examination (in the case of re-cross).

Example: Here is how the presentation of a witness' testimony may proceed:

- You call your witness. You ask him or her a series of questions,

referred to as direct examination.

- When you are through questioning your witness, the school's attorney is given the opportunity to cross examine this witness.

- When the school's attorney is through asking questions of your witness, you are given the opportunity to ask questions on re-direct examination based upon information the witness provided during cross examination.

- When you are through asking questions of your witness, the school's attorney may be given the opportunity to ask questions on re-cross examination based upon the information the witness provided in response to your questions on re-direct examination.

When all of this has concluded, the hearing officer may also ask questions. The hearing officer may also interrupt direct or cross- examination to ask questions.

Beyond the Scope of (Direct, Cross, Re-direct, or Re-cross)

Under strict rules of evidence, cross examination is supposed to be limited to facts and information addressed during direct examination. Likewise, re-direct examination (which follows cross examination) is supposed to be limited to facts and information addressed during cross examination. Otherwise, the same information is being covered again and again. It can be challenging for even the most experienced attorneys to keep track of what was covered on direct examination, as opposed to cross examination, for example. And there is often a disagreement as to whether a question is **beyond the scope of** what was covered in the prior questioning. Hearing officers are not required to follow strict rules of evidence, so you do not need to get too bogged down in this, but understand generally that the same types of questions cannot be asked of a witness over and over again.

When the hearing is proceeding, the hearing officer must have only one person speaking at a time. Otherwise, not only will it be difficult for the

hearing officer to follow the case, but the court reporter will not be able to record the proceedings if there is more than one person speaking at a time.

> This is more difficult than it seems! Do not be offended if the hearing officer tells you several times to wait until someone else has finished speaking before you begin. It is a very common for the hearing officer to have to remind people of this.

Notes and Other Memory Refreshers

Witnesses often times want to have notes in front of them when they testify to ensure that they remember everything they want to say. A witness may use notes or other items to refresh his or her memory for the purpose of testifying. This is acceptable, but be aware that the other side (and the hearing officer) is entitled to see the notes that the witness uses.

1. If a witness uses notes or other items to refresh his or her memory the opposing party may:
   - Request to review the notes or other items;
   - Cross examine the witness on the notes or other items;
   - Introduce the notes or other items as an exhibit.
2. If a witness refuses to produce the notes or other items, the other party may request that all the testimony based on those notes or other items be stricken from the record.

Offers of Proof (See also Part Four: Objections)

Prior to and throughout the presentation of your case, the school attorney may ask for an "offer of proof". This means that the school attorney is not clear

why you are presenting a witness or exhibit, or why you are asking particular questions of a witness. The request for an offer of proof alerts you to the fact that the attorney has a potential objection to that witness or exhibit or line of questioning. Explain to the hearing officer why you are proceeding the way you are. Likewise, an offer of proof may be asked for when a particular line of questioning seems objectionable to the other side.

> Example: "I would like an offer of proof for this line of questioning. The qualifications of the therapist are not an issue in this case; the frequency of the speech therapy is the issue."

You can also ask the hearing officer for an offer of proof from school counsel if you have concerns or objections to their witnesses or exhibits. Example: "I would like an offer of proof for this witness. I don't see how this witness can add anything new to what has already been covered thus far."

(Mauet, 1980)

Expert Reports

By the time you get to the hearing, you will have decided how you will be presenting your expert's testimony, if you have one:

1. Submit the expert's report into evidence as an exhibit;

2. Have the expert attend the hearing and present testimony;

3. Have the expert testify by telephone at the hearing.

The Generally Applicable Pre-Hearing Directions cover expert reports as evidence (See Appendix T at #10). The rules about **expert reports** were made specifically for the purpose of making hearings more efficient.

If your expert will not be attending the hearing, the Directions say this:

> *Where the Author Does Not Testify*. Any evaluation report, re-evaluation report, independent report, or other report, shall be offered as an exhibit. The report shall speak for itself. Each hearing officer will give the report the weight the hearing officer determines to be appropriate in the exercise of his or her sole discretion.

If your expert is not attending the hearing, you will submit his or her expert report to the hearing officer as an exhibit by referencing it in your testimony. This is the most cost effective way to handle expert testimony.

On the other hand, this prevents the hearing officer from hearing directly from the witness. It prevents the school district from challenging the expert's opinion through cross examination. It prevents the hearing officer from asking questions of the expert. Because of these limitations, the Generally Applicable Pre-Hearing Directions at #8 say: "Each hearing officer will give the report the weight the hearing officer determines to be appropriate in the exercise of his or her sole discretion".

If your expert will be attending the hearing or testifying by telephone, the Directions says this:

> *Where the Author Testifies*. Any evaluation report, re-evaluation report, independent report, or other report that is offered as an exhibit shall speak for itself, and shall serve as direct testimony of its author as to the *substantive contents of the report*. A hearing officer may permit, however, direct examination of the author on matters that, while not repeating the substantive contents of the report, are important to establishing its evidentiary weight and/or relevance, or to fostering understanding of the report. Upon admission of the report and direct examination of the author, the opposing party may commence cross examination of the author. Re-direct examination will be permitted.

Many times, during direct examination of an expert, the expert will just read what he or she has written in the report. Since the expert is not adding

anything beyond what is already in the report, it does not make sense to take this time to have him or her do so, when the hearing officer can read the expert report on their own. In other words, "the document speaks for itself". It is not acceptable to have an expert essentially read his or her report into the record.

Other times, however, the expert may need to explain certain portions of his or her report. In other words, the expert's testimony is going to go beyond simply reading what he or she has written in the report. This is acceptable.

So, your expert's testimony will be handled in one of two ways:

1. Your expert has nothing to add beyond what is already written down in his or her report. The report itself will serve as the expert's direct examination testimony. The school's attorney will be permitted to cross examine the expert. You will then have the opportunity to ask questions on re-direct examination. (See Pages 137-138) for information on direct/cross/re-direct examination). You will then tell the hearing officer that you want the expert report to be an exhibit.

   OR

2. There are areas of the report that your expert would like to explain or elaborate on. You will ask questions of your expert about these areas only. Therefore, the expert's direct testimony will consist of 1) what is written in the report; and 2) what he or she testifies to in response to your questioning. The school's attorney will be permitted to cross examine the expert. You will then have the opportunity to ask questions on re-direct examination. (See Pages 137-138) for information on direct/cross/re-direct examination). You will then tell the hearing officer that you want the expert report to be an exhibit.

Taking Breaks at the Hearing

The hearing officer will determine when breaks will occur and how often. If you need to take a break from the proceedings, for whatever reason, let the hearing officer know that you need to do so. Your request, if reasonable, will likely be granted. The hearing officer will also address prior to the hearing or before the hearing begins how meal time breaks will be handled. Lunch breaks are handled differently by each school and you may choose to participate, or not, in each instance:

- Some schools will order lunch for all due process participants, with no charge to participants.
- Some schools will pass around a menu, take orders, and collect money.
- Some schools will make their cafeterias available to the participants, with each participant paying for his or her lunch.
- The hearing officer may allow the participants to leave school grounds, and get lunch at any surrounding restaurants. This tends to take the most time, which cuts into valuable hearing time, so it is not the preference of some hearing officers.
- Regardless of any of the above, you may choose to bring your own lunch, if that is your preference. Do not count on having access to a refrigerator to store your lunch until lunchtime.

Closing Arguments

When all the evidence has been introduced, the hearing officer will ask for a closing statement from each party. Your closing should summarize the issues, the evidence presented, and the remedy you seek. At the hearing officer's discretion, it may be done verbally, in which event you may read from a pre-written paper; or you may be permitted to hand the hearing officer that paper;

or the hearing officer may ask that the parties submit written closing statements by a specific date.

The Decision Due Date

At the final hearing, the hearing officer will typically confirm for the parties when the decision due date is. This is the date by which the hearing officer will have written and distributed to the parties his or her decision. See Pages 69-72 on Decision Due Dates for more information.

The Decision

You will know at the beginning of the case when the decision due date will be. Throughout the proceedings, if there are any changes to the decision due date, you will be notified by the hearing officer. At the final hearing, the decision due date will again be addressed so that you know the (latest) date upon which you will receive the hearing officer's decision.

Appeals

If you are dissatisfied with the hearing officer's decision, and believe that legal errors have been made, you may **appeal** it to the state (Pennsylvania Commonwealth Court) or federal district court. The hearing officer will give you appeal procedures with the decision. Although sometimes a court clerk may be able or willing to provide you some assistance on how to file documents, there are complexities to doing this that make it preferable that you have an attorney do so on your behalf. At a minimum, you are encouraged to consult with any of the advocacy groups listed in the Appendix to assist you.

Final Comments

This Guide contains a lot of legal information. The hearing officer will understand that you are not an attorney, and, therefore, will not be as familiar with legal proceedings as is the school attorney. Throughout the course of the hearing, you may ask questions of the hearing officer regarding procedures. However, understand that the hearing officer is legally required to remain

impartial throughout the course of the proceedings. He or she cannot assist you in the presentation of your case, as an attorney (or advocate) would. His or her assistance will be limited to explaining the procedures that will be followed during the hearing. Hearing officers cannot give legal advice to a party on how to present their case.

Checking In…

- On the day of the hearing, make sure you have all of your exhibits, the notice of hearing, your own notes, and anything you might need during the day (beverages, snacks, etc.)
- Check your messages before leaving for the hearing to make sure nothing has been delayed or cancelled.
- Be prepared to give an opening statement that addresses the specific issues to be resolved and how you would like the hearing officer to rule.
- When questioning a witness, understand how the presentation of a witness' testimony usually proceeds. This includes direct examination, cross examination, re-direct examination, and usually re-cross examination.
- The school attorney may ask you for an offer of proof. If this happens, you will need to explain to the hearing officer why you are proceeding the way you are. You can also ask for an offer of proof if you have concerns about the opposing party's witnesses or exhibits.
- Determine how your expert's testimony will be presented.
- Have your closing arguments prepared so that you can provide them to the hearing officer in the manner he or she chooses.
- If you are dissatisfied with the hearing officer's decision, and believe that legal errors have been made, you may appeal the decision in court.

Conclusion

Clearly, proceeding to a due process hearing is not a decision to be taken lightly. Indeed, there are several avenues that can be pursued before that option. Nevertheless, if you decide that a due process hearing is the only alternative, this Guide supplemented by other resources provided in the Appendices should provide you with a good foundation for proceeding pro se.

References

Mauet, T. (1980) *Fundamentals of Trial Techniques.* Boston, MS: Little, Brown & Company

Glossary

2/5-day disclosure letter: a required letter from both parties (parent and school) listing witnesses and exhibits to be presented at a due process hearing

Advocate: a person who is knowledgeable about the special education process and requirements and can help a parent seek a specific service or program

Appeal: filing papers with state or federal court within a specified time frame, explaining why the hearing officer's decision is legally incorrect and asking that it be changed

Appeals Panel: No longer in existence, the Appeals Panel decided appeals of hearing officer decisions prior to the case being appealed to state or federal court. See "appeal"

Beyond the scope of: a legal term that means the parent or school attorney has gone beyond the subject area to be addressed

Chapter 14: the section of Pennsylvania's education law that provides special education regulations in compliance with federal education law, namely IDEA 2004

Chapter 15: the section of Pennsylvania's education law based on Section 504 of The Rehabilitation Act of 1973, which apply to students who have a disability but do not qualify for special education services under Chapter 14

Chapter 711: the section of Pennsylvania's education law that provides special education regulations in compliance with Federal education law, and specifically pertains to students with disabilities who are enrolled in charter, cyber charter, or regional charter schools.

Compensatory education: additional or supplemental educational services provided to a student who did not receive a free appropriate education to make up for the loss of not receiving FAPE

ConsultLine: (800-879-2301) the toll-free helpline provided by the Pennsylvania Department of Education's Bureau of Special Education to assist parents of children with disabilities who have questions concerning their children's special education programs

Cross examination: questions that a party asks of the other side's witnesses

Decision due date: the date by which the hearing officer will have written and distributed his or her decision to the parties

Deposition: the process of taking a witness' testimony outside the scheduled hearing process, used on the very rare occasion when there is no other way to get the witness' testimony

Direct examination: questions that a party asks of its own witnesses

Due process complaint notice: the written request for a due process hearing

Due process hearing: a legal proceeding similar to a court proceeding wherein a hearing officer is presented with evidence by disagreeing parties and writes a decision

Educational records: records that directly relate to a student and that are maintained by an educational agency or institution or by a party acting for the agency or institution

Evaluation: a series of tests and observations performed by a multidisciplinary team to find out if a child has a disability and needs special education services.

Evidence: exhibits and witnesses used at the due process hearing to support the party's case and your case

Exhibits: the documents used as evidence to support your case during the due process hearing

Expedited hearing: a special education hearing that takes place within a much shorter timeline due to a disagreement with a disciplinary or extended school year decision

Expert reports: a report written by an expert that includes the expert's opinion and is used as evidence in the due process hearing

Expert witness: a person with specialized knowledge about a subject who testifies about his or her opinion about a matter

Extended school year: the delivery of special education and related services during summer vacation or other extended periods when school is not in session

Free Appropriate Public Education (FAPE): a federal mandate that requires all children with disabilities to receive appropriate educational programs, tailored to their unique needs, from which they receive educational benefit at no cost to families

Generally Applicable Pre-Hearing Directions: a document prepared by the hearing officers which explains their generally accepted procedures to follow at a hearing

Gifted Individualized Education Program: a written statement of a gifted child's current level of educational performance and of the child's individualized plan of instruction

Hearing officer: a trained and impartial individual who conducts a due process hearing

Hearing officer decision: the document a hearing officer writes after the hearing is completed outlining the case and the hearing officer's legal conclusion

Hearsay: statements made by a person at some point other than at the hearing and presented at the hearing to prove the truth of the statement made

IEP Facilitation: a dispute resolution process offered by the Office for Dispute Resolution where a trained impartial facilitator attends an IEP meeting to assist the IEP team

IEP Team: the group of individuals, including the parents of the child, who develop the IEP

Individualized Education Program (IEP): a written statement of a child's current level of educational performance and of the child's individualized plan of instruction

Individualized Family Services Plan (IFSP): a written plan for infants and toddlers receiving early intervention that identifies services and supports so that family members and early education programs are actively engaged in promoting the child's learning and development.

Independent Educational Evaluation (IEE): an evaluation conducted by a qualified examiner who is not employed by the school

Individuals with Disabilities Education Act (IDEA): a federal law that provides the legal authority for early intervention and special education services for children from birth to age 21

Interim alternative educational placement: a disciplinary placement other than the student's current educational placement

Joint exhibits: documents that both parties intend to use in the hearing

Jurisdiction: the authority of the hearing officer to hear and make a decision about an issue

Leading the witness: asking a question in such a way that it suggests the answer to the witness

Mediation: voluntary process where an impartial mediator facilitates problem-solving discussions between parent and school personnel

Motions: written or oral requests to the hearing officer asking that certain actions occur

Notice of Hearing: a document from the Office for Dispute Resolution listing the time and date of the hearing

Notice of Recommended Educational Placement (NOREP): a document that summarizes for the parents the recommendations of the school for the child's educational program and other actions taken by the school

Objections: oral or written challenges to evidence and witnesses presented by a party

Offer of proof: explanation to a hearing officer as to why a party should be permitted to present a witness, use an exhibit, ask certain questions, etc.

Opening statement: the opportunity at the beginning of a due process hearing for each party to provide a brief summary of the case and explain exactly what issues the hearing officer is being asked to decide

Party/Parties: the generic name given to the parent and school district involved in a due process hearing

Pennsylvania Code: a publication of Pennsylvania that organizes all the rules and regulations from the state government; regulations about education are found under Title 22

Pennsylvania Training & Technical Assistance Network (PaTTAN): an initiative of the Bureau of Special Education (BSE), Pennsylvania Department of Education (PDE), PaTTAN works in partnership with families and local education agencies, to support programs and services to improve student learning and achievement

Pre-hearing conference: a telephone conference between the hearing officer and both parties to address any issues that need to be handled prior to a hearing

Prior Written Notice: Written notice to the parents by the school before it proposes to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child; usually called a NOREP in Pennsylvania

Pro se parent: a Latin term that means the parent is not represented by an attorney

Re-cross examination: questions about information provided by the witness during re-direct examination

Re-direct examination: questions about information provided by the witness during cross examination

Reevaluation: a series of tests and observations performed by a multidisciplinary team to find out if a child with a disability continues to require special education and related services

Regulations: interpretation of the state or federal statute which provides more specific information about how the statute is to be followed

Resolution meeting: (also called resolution session) a requirement when a due process hearing was initiated by parents (unless the parties waive this requirement or use mediation instead of the resolution meeting), this meeting occurs before a due process hearing can proceed and gives the school the opportunity to resolve the matter without the need for a hearing

Resolution Meeting Agreement: a legally enforceable document written when agreement is reached at a resolution meeting

Resolution Meeting Data Form: a document that is used to report resolution meeting information and outcomes to the Pennsylvania Department of Education, Bureau of Special Education

Resolution period: the first 30 days (or 15 days when the hearing is expedited) after the school has received the due process complaint form from the parent

Section 504 of Rehabilitation Act of 1973: a federal law that protects the civil rights of individuals with disabilities to ensure they are not discriminated against

Settlement: private agreement between the parent and school which resolves the dispute between them

Special Education Director: a general term for a special education administrator who oversees school district special education programs

Statute: a law

Statute of limitations: the period of time a party has to file for a due process hearing

Stenographer: also referred to as a "court reporter", this person records (types) everything that is said on the record at a hearing

Subpoena: a legal order by a hearing officer directing a person to attend a due process hearing or provide records

Sufficiency challenge: the process of alerting a hearing officer that a party does not believe that a due process complaint notice contains all of the information required by law

Transcript: the document prepared by the stenographer (court reporter) of everything that is said on the record at a due process hearing

Tuition reimbursement: payment made by a school for the cost of the student's education in a private program or private school

Witnesses: those people who testify at the due process hearing (including parent)

Appendix A: PaTTAN "Considerations Worksheet"

IDENTIFICATION

Describe your concerns regarding the identification determined through the evaluation process.

What are your concerns with the evaluation/reevaluation process?

If there is information or interpretations within the evaluation report that you disagree with, clarify what that is and what your interpretation is.

Does the evaluation clarify how the student is performing in relation to the regular education curriculum and regular education setting?

PLACEMENT

What are your concerns regarding the suggested location of services?

What are your concerns regarding the type of services suggested or offered through the IEP or Evaluation Report? What is the alternative you are recommending?

What are your concerns regarding the type of supports suggested or offered through the IEP or Evaluation Report? What is the alternative you are recommending?

SERVICES

Is there agreement on the services that are offered, the frequency at which they are offered and the duration for which they are offered? If not, what alternative are you suggesting? Clarify why you feel your alternative is more appropriate.

Do you feel the services meet the student's needs as determined through the assessment data collected? What do you feel needs changed and what are you basing that on?

Describe your concerns with the personnel involved in providing the services.

PROCEDURAL

Have timelines been honored throughout the process? Identify when they may not have been.

Did the appropriate people have an opportunity to participate in the process? Were parents, appropriate professionals, outside agency staff, private practitioners or others involved in the process?

Describe your concerns with the documentation. Has it been complete, received within timelines, thorough and accurate?

Appendix B: Educational ABCs

Educational ABCs

Appendix C: IEP Facilitation Information

IEP Facilitation Brochure

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IDEA Regulations

Appendix F: Section 504 Regulations

Section 504 Regulations

Appendix G: Chapter 14 State Regulations

Chapter 14 State Regulations

Appendix H: Chapter 711 State Regulations

Chapter 711 State Regulations

Appendix I: Chapter 15 State Regulations

Chapter 15 State Regulations

Appendix J: Board of Education v. Rowley, 458 U.S. 176 (1982)

102 S.Ct. 3034
458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690, 5 Ed. Law Rep. 34, 1 A.D.D. 85
(Cite as: 458 U.S. 176, 102 S.Ct. 3034)

Supreme Court of the United States
BOARD OF EDUCATION OF the HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY, et al., Petitioners
v.
Amy ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley etc.

No. 80-1002.
Argued March 23, 1982.
Decided June 28, 1982.

Petition for writ of certiorari was filed seeking review of a decision of the United States Court of Appeals for the Second Circuit, 632 F.2d 945, which affirmed a decision of the United States District Court for the Southern District of New York, Vincent L. Broderick, J., 483 F.Supp. 528, 483 F.Supp. 536, denying motion by Commissioner of Education of New York to dismiss for lack of jurisdiction and directing appellants to provide a sign-language interpreter in the classroom of appellee, an eight-year-old deaf child. The Supreme Court, Justice Rehnquist, held that: (1) Education for All Handicapped Children Act's requirement of a "free appropriate public education" is satisfied when state provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction; (2) Education for All Handicapped Children Act's requirement of a "free appropriate public education" did not require state to maximize potential of each handicapped child commensurate with opportunity provided nonhandicapped children; and (3) in light of finding that deaf child, who performed better than average child in her class and was advancing easily from grade to grade, was receiving personalized instruction and related services calculated by school administrators to meet her educational needs, Act did not require provision of a sign-language interpreter for the deaf child.

Reversed and remanded.

Justice Blackmun filed separate opinion concurring in the judgment.

Justice White filed dissenting opinion in which Justice Brennan and Justice Marshall joined.

*****3035 *176** *Syllabus* FN*

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The Education of the Handicapped Act (Act) provides federal money to assist state and local agencies in educating handicapped children. To qualify for federal assistance, a State must demonstrate, through a detailed plan submitted for federal approval, that it has in effect a policy that assures all handicapped children the right to a "free appropriate public education," which policy must be tailored to the unique needs of the handicapped child by means

of an "individualized educational program" (IEP). The IEP must be prepared (and reviewed at least annually) by school officials with participation by the child's parents or guardian. The Act also requires that a participating State provide specified administrative procedures by which the child's parents or guardian may challenge any change in the evaluation and education of the child. Any party aggrieved by the state administrative decisions is authorized to bring a civil action in either a state court or a federal district court. Respondents-a child with only minimal residual hearing who had been furnished by school authorities with a special hearing aid for use in the classroom and who was to receive additional instruction from tutors, and the child's parents-filed suit in Federal District Court to review New York administrative proceedings that had upheld the school administrators' denial of the parents' request that the child also be provided a qualified sign-language interpreter in all of her academic classes. Entering judgment for respondents, the District Court found that although the child performed better than the average child in her class and was advancing easily from grade to grade, she was not performing as well academically as she would without her handicap. Because of this disparity between the child's achievement and her potential, the court held that she was not receiving a "free appropriate public education," which the court defined as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children." The Court of Appeals affirmed.

***177** *Held:*

1. The Act's requirement of a "free appropriate public education" is satisfied ****3036** when the State provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate grade levels used in the State's regular education, and must comport with the child's IEP, as formulated in accordance with the Act's requirements. If the child is being educated in regular classrooms, as here, the IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. Pp. 3041-3049.

(a) This interpretation is supported by the definitions contained in the Act, as well as by other provisions imposing procedural requirements and setting forth statutory findings and priorities for States to follow in extending educational services to handicapped children. The Act's language contains no express substantive standard prescribing the level of education to be accorded handicapped children. Pp. 3041-3042.

(b) The Act's legislative history shows that Congress sought to make public education available to handicapped children, but did not intend to impose upon the States any greater substantive educational standard than is necessary to make such access to public education meaningful. The Act's intent was more to open the door of public education to handicapped children by means of specialized educational services than to guarantee any particular substantive level of education once inside. Pp. 3042-3046.

(c) While Congress sought to provide assistance to the States in carrying out their constitutional responsibilities to provide equal protection of the laws, it did not intend to achieve strict equality of opportunity or services for handicapped and nonhandicapped children, but rather sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education. The Act does not require a State to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Pp. 3046-3048.

2. In suits brought under the Act's judicial-review provisions, a court must first determine whether the State has complied with the statutory procedures, and must then determine whether the individualized program developed through such procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. Pp. 3050-3052.

***178** (a) Although the judicial-review provisions do not limit courts to ensuring that States have complied with the Act's procedural requirements, the Act's emphasis on procedural safeguards demonstrates the legislative conviction that adequate compliance with prescribed procedures will in most cases assure much, if not all, of what Congress wished in the way of substantive content in an IEP. Pp. 3050-3051.

(b) The courts must be careful to avoid imposing their view of preferable educational methods upon the States. Once a court determines that the Act's requirements have been met, questions of methodology are for resolution by the States. Pp. 3051-3052.

3. Entrusting a child's education to state and local agencies does not leave the child without protection. As demonstrated by this case, parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act. P. 3052.

4. The Act does not require the provision of a sign-language interpreter here. Neither of the courts below found that there had been a failure to comply with the Act's procedures, and the findings of neither court will support a conclusion that the child's educational program failed to comply with the substantive requirements of the Act. Pp. 3052-3053.

632 F.2d 945 (2d Cir.), reversed and remanded.

****3037** *Raymond G. Kuntz* argued the cause for petitioners. With him on the briefs were *Robert D. Stone, Jean M. Coon, Paul E. Sherman, Jr.,* and *Donald O. Meserve.*

Michael A. Chatoff argued the cause and filed a brief for respondents.

Elliott Schulder argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General Lee, Assistant Attorney General Reynolds, Walter W. Barnett,* and *Louise A. Lerner.**

* Briefs of *amici curiae* urging affirmance were filed by *Charles S. Sims* for the American Civil Liberties Union; by *Jane Bloom Yohalem, Norman S. Rosenberg, Daniel Yohalem,* and *Marian Wright Edelman* for the Association for Retarded Citizens of the United States et al.; by *Ralph J. Moore, Jr.,* and *Franklin D. Kramer* for the Maryland Advocacy Unit for the Developmentally Disabled, Inc., et al.; by *Marc Charmatz, Janet Stotland,* and *Joseph Blum* for the National Association of the Deaf et al; by *Minna J. Kotkin* and *Barry Felder* for the New York State Commission on the Quality of Care for the Mentally Disabled, Protection and Advocacy System; and by *Michael A. Rebell* for the United Cerebral Palsy Associations, Inc., et al.

Norman H. Gross, Gwendolyn H. Gregory, Thomas A. Shannon, and *August W. Steinhilber* filed a brief for the National School Boards Association et al. as *amici curiae.*

***179** Justice REHNQUIST delivered the opinion of the Court.

This case presents a question of statutory interpretation. Petitioners contend that the Court of Appeals and the District Court misconstrued the requirements imposed by Congress upon States which receive federal funds under the Education of the Handicapped Act. We agree and reverse the judgment of the Court of Appeals.

I

The Education of the Handicapped Act (Act), 84 Stat. 175, as amended, 20 U.S.C. § 1401 *et seq.* (1976 ed. and Supp.IV), provides federal money to assist state and local agencies in educating handicapped children, and conditions such funding upon a State's compliance with extensive goals and procedures. The Act represents an ambitious federal effort to promote the education of handicapped children, and was passed in response to Congress' perception that a majority of handicapped children in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.' " H.R.Rep.No. 94-332, p. 2 (1975) (H.R.Rep.). The Act's evolution and major provisions shed light on the question of statutory interpretation which is at the heart of this case.

Congress first addressed the problem of educating the handicapped in 1966 when it amended the Elementary and ***180** Secondary Education Act of 1965 to establish a grant program "for the purpose of assisting the States in the

initiation, expansion, and improvement of programs and projects ... for the education of handicapped children." Pub.L. 89-750, § 161, 80 Stat. 1204. That program was repealed in 1970 by the Education of the Handicapped Act, Pub.L. 91-230, 84 Stat. 175, Part B of which established a grant program similar in purpose to the repealed legislation. Neither the 1966 nor the 1970 legislation contained specific guidelines for state use of the grant money; both were aimed primarily at stimulating the States to develop educational resources and to train personnel for educating the handicapped.[FN1]

FN1. See S.Rep.No. 94-168, p. 5 (1975) (S.Rep.); H.R.Rep., at 2-3, U.S.Code Cong. & Admin.News 1975, p. 1425.

Dissatisfied with the progress being made under these earlier enactments, and spurred by two District Court decisions holding that handicapped children should be given access to a public education,[FN2] Congress in 1974 greatly increased federal funding for education of the handicapped and for the first time required recipient States to adopt "a goal of providing full educational opportunities to all handicapped children." Pub.L. 93-380, 88 Stat. 579, 583 (1974 statute). The 1974 statute was recognized as an interim measure only, adopted "in order to give the Congress an additional year in which to study what if any additional Federal assistance [was] required to enable the States to meet the needs of handicapped children." H.R.Rep., at 4. The ensuing year of study produced the Education for All Handicapped Children Act of 1975.

FN2. Two cases, *Mills v. Board of Education of District of Columbia*, 348 F.Supp. 866 (D.C.1972), and *Pennsylvania Assn. for Retarded Children v. Commonwealth*, 334 F.Supp. 1257 (ED Pa.1971) and 343 F.Supp. 279 (1972), were later identified as the most prominent of the cases contributing to Congress' enactment of the Act and the statutes which preceded it. H.R.Rep., at 3-4. Both decisions are discussed in Part III of this opinion.

In order to qualify for federal financial assistance under the Act, a State must demonstrate that it "has in effect a policy ***181** that assures all handicapped children the right to a free appropriate public education."****3038** 20 U.S.C. § 1412(1). That policy must be reflected in a state plan submitted to and approved by the Secretary of Education, [FN3] § 1413, which describes in detail the goals, programs, and timetables under which the State intends to educate handicapped children within its borders. §§ 1412, 1413. States receiving money under the Act must provide education to the handicapped by priority, first "to handicapped children who are not receiving an education" and second "to handicapped children ... with the most severe handicaps who are receiving an inadequate education," § 1412(3), and "to the maximum extent appropriate" must educate handicapped children "with children who are not handicapped." § 1412(5). [FN4] The Act broadly defines "handicapped children" to include "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, [and] other health impaired children, [and] children with specific learning disabilities." § 1401(1).[FN5]

FN3. All functions of the Commissioner of Education, formerly an officer in the Department of Health, Education, and Welfare, were transferred to the Secretary of Education in 1979 when Congress passed the Department of Education Organization Act, 20 U.S.C. § 3401 *et seq.* (1976 ed., Supp.IV). See 20 U.S.C. § 3441(a)(1) (1976 ed., Supp.IV).

FN4. Despite this preference for "mainstreaming" handicapped children-educating them with nonhandicapped children-Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children. The Act expressly acknowledges that "the nature or severity of the handicap [may be] such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." § 1412(5). The Act thus provides for the education of some handicapped children in separate classes or institutional settings. See *ibid.*; § 1413(a)(4).

FN5. In addition to covering a wide variety of handicapping conditions, the Act requires special educational services for children "regardless of the severity of their handicap." §§ 1412(2)(C), 1414(a)(1)(A).

The "free appropriate public education" required by the Act is tailored to the unique needs of the handicapped child by means of an "individualized educational program" (IEP). ***182** § 1401(18). The IEP, which is prepared at a meeting between a qualified representative of the local educational agency, the child's teacher, the child's parents or guardian, and, where appropriate, the child, consists of a written document containing

> "(A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved." § 1401(19).

Local or regional educational agencies must review, and where appropriate revise, each child's IEP at least annually. § 1414(a)(5). See also § 1413(a)(11).

In addition to the state plan and the IEP already described, the Act imposes extensive procedural requirements upon States receiving federal funds under its provisions. Parents or guardians of handicapped children must be notified of any proposed change in "the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child," and must be permitted to bring a complaint about "any matter relating to" such evaluation and education. §§ 1415(b)(1)(D) and (E). [FN6] ***183 **3039** Complaints brought by parents or guardians must be resolved at "an impartial due process hearing," and appeal to the state educational agency must be provided if the initial hearing is held at the local or regional level. §§ 1415(b)(2) and (c).[FN7] Thereafter, "[a]ny party aggrieved by the findings and decision" of the state administrative hearing has "the right to bring a civil action with respect to the complaint ... in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." § 1415(e)(2).

> FN6. The requirements that parents be permitted to file complaints regarding their child's education, and be present when the child's IEP is formulated, represent only two examples of Congress' effort to maximize parental involvement in the education of each handicapped child. In addition, the Act requires that parents be permitted "to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and ... to obtain an independent educational evaluation of the child." § 1415(b)(1)(A). See also §§ 1412(4), 1414(a)(4). State educational policies and the state plan submitted to the Secretary of Education must be formulated in "consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children." § 1412(7). See also § 1412(2)(E). Local agencies, which receive funds under the Act by applying to the state agency, must submit applications which assure that they have developed procedures for "the participation and consultation of the parents or guardian[s] of [handicapped] children" in local educational programs, § 1414(a)(1)(C)(iii), and the application itself, along with "all pertinent documents related to such application," must be made "available to parents, guardians, and other members of the general public." § 1414(a)(4).
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> FN7. "Any party" to a state or local administrative hearing must
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> > "be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions." § 1415(d).

Thus, although the Act leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, it imposes significant requirements to be followed in the discharge of that responsibility. Compliance is assured by provisions permitting the withholding of federal funds upon determination

that a participating state or local agency has failed to satisfy the requirements of the Act, §§ 1414(b)(2)(A), 1416, and by the provision for judicial review. At present, all States except New ***184** Mexico receive federal funds under the portions of the Act at issue today. Brief for United States as *Amicus Curiae* 2, n. 2.

II

This case arose in connection with the education of Amy Rowley, a deaf student at the Furnace Woods School in the Hendrick Hudson Central School District, Peekskill, N.Y. Amy has minimal residual hearing and is an excellent lipreader. During the year before she began attending Furnace Woods, a meeting between her parents and school administrators resulted in a decision to place her in a regular kindergarten class in order to determine what supplemental services would be necessary to her education. Several members of the school administration prepared for Amy's arrival by attending a course in sign-language interpretation, and a teletype machine was installed in the principal's office to facilitate communication with her parents who are also deaf. At the end of the trial period it was determined that Amy should remain in the kindergarten class, but that she should be provided with an FM hearing aid which would amplify words spoken into a wireless receiver by the teacher or fellow students during certain classroom activities. Amy successfully completed her kindergarten year.

As required by the Act, an IEP was prepared for Amy during the fall of her first-grade year. The IEP provided that Amy should be educated in a regular classroom at Furnace Woods, should continue to use the FM hearing aid, and should receive instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours each week. The Rowleys agreed with parts of the IEP, but insisted that Amy also be provided a qualified sign-language interpreter in all her academic classes in lieu of the assistance ****3040** proposed in other parts of the IEP. Such an interpreter had been placed in Amy's kindergarten class for a 2-week experimental period, but the interpreter had reported that Amy did not need his services at that time. The school administrators***185** likewise concluded that Amy did not need such an interpreter in her first-grade classroom. They reached this conclusion after consulting the school district's Committee on the Handicapped, which had received expert evidence from Amy's parents on the importance of a sign-language interpreter, received testimony from Amy's teacher and other persons familiar with her academic and social progress, and visited a class for the deaf.

When their request for an interpreter was denied, the Rowleys demanded and received a hearing before an independent examiner. After receiving evidence from both sides, the examiner agreed with the administrators' determination that an interpreter was not necessary because "Amy was achieving educationally, academically, and socially" without such assistance. App. to Pet. for Cert. F-22. The examiner's decision was affirmed on appeal by the New York Commissioner of Education on the basis of substantial evidence in the record. *Id.*, at E-4. Pursuant to the Act's provision for judicial review, the Rowleys then brought an action in the United States District Court for the Southern District of New York, claiming that the administrators' denial of the sign-language interpreter constituted a denial of the "free appropriate public education" guaranteed by the Act.

The District Court found that Amy "is a remarkably well-adjusted child" who interacts and communicates well with her classmates and has "developed an extraordinary rapport" with her teachers. 483 F.Supp. 528, 531 (1980). It also found that "she performs better than the average child in her class and is advancing easily from grade to grade," *id.*, at 534, but "that she understands considerably less of what goes on in class than she could if she were not deaf" and thus "is not learning as much, or performing as well academically, as she would without her handicap," *id.*, at 532. This disparity between Amy's achievement and her potential led the court to decide that she was not receiving a "free appropriate public***186** education," which the court defined as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children." *Id.*, at 534. According to the District Court, such a standard "requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or 'shortfall' be compared to the shortfall experienced by nonhandicapped children." *Ibid.* The District Court's definition arose from its assumption that the responsibility for "giv [ing] content to the requirement of an 'appropriate education' " had "been left entirely to the [federal] courts and the hearing officers." *Id.*, at 533. [FN8]

FN8. For reasons that are not revealed in the record, the District Court concluded that "[t]he Act itself does

not define 'appropriate education.' " 483 F.Supp., at 533. In fact, the Act expressly defines the phrase "free appropriate public education," see § 1401(18), to which the District Court was referring. See 483 F.Supp., at 533. After overlooking the statutory definition, the District Court sought guidance not from regulations interpreting the Act, but from regulations promulgated under § 504 of the Rehabilitation Act. See 483 F.Supp., at 533, citing 45 CFR § 84.33(b).

A divided panel of the United States Court of Appeals for the Second Circuit affirmed. The Court of Appeals "agree[d] with the [D]istrict [C]ourt's conclusions of law," and held that its "findings of fact [were] not clearly erroneous." 632 F.2d 945, 947 (1980).

We granted certiorari to review the lower courts' interpretation of the Act. 454 U.S. 961, 102 S.Ct. 500, 70 L.Ed.2d 376 (1981). Such review requires us to consider two questions: What is meant by the Act's requirement of a "free appropriate public education"? And what is the role of state and federal courts in exercising the **3041 review granted by 20 U.S.C. § 1415? We consider these questions separately.[FN9]

FN9. The IEP which respondents challenged in the District Court was created for the 1978-1979 school year. Petitioners contend that the District Court erred in reviewing that IEP after the school year had ended and before the school administrators were able to develop another IEP for subsequent years. We disagree. Judicial review invariably takes more than nine months to complete, not to mention the time consumed during the preceding state administrative hearings. The District Court thus correctly ruled that it retained jurisdiction to grant relief because the alleged deficiencies in the IEP were capable of repetition as to the parties before it yet evading review. 483 F.Supp. 536, 538 (1980). See *Murphy v. Hunt*, 455 U.S. 478, 482, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 (1982); *Weinstein v. Bradford*, 423 U.S. 147, 149, 96 S.Ct. 347, 348, 46 L.Ed.2d 350 (1975).

***187** III

A

[1][2] This is the first case in which this Court has been called upon to interpret any provision of the Act. As noted previously, the District Court and the Court of Appeals concluded that "[t]he Act itself does not define 'appropriate education,' " 483 F.Supp., at 533, but leaves "to the courts and the hearing officers" the responsibility of "giv[ing] content to the requirement of an 'appropriate education.' " *Ibid.* See also 632 F.2d, at 947. Petitioners contend that the definition of the phrase "free appropriate public education" used by the courts below overlooks the definition of that phrase actually found in the Act. Respondents agree that the Act defines "free appropriate public education," but contend that the statutory definition is not "functional" and thus "offers judges no guidance in their consideration of controversies involving 'the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education.' " Brief for Respondents 28. The United States, appearing as *amicus curiae* on behalf of respondents, states that "[a]lthough the Act includes definitions of a 'free appropriate public education' and other related terms, the statutory definitions do not adequately explain what is meant by 'appropriate.' " Brief for United States as *Amicus Curiae* 13.

We are loath to conclude that Congress failed to offer any assistance in defining the meaning of the principal substantive phrase used in the Act. It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define "free appropriate public education":

***188** "The term 'free appropriate public education' means *special education* and *related services* which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title." § 1401(18) (emphasis added).

"Special education," as referred to in this definition, means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical

education, home instruction, and instruction in hospitals and institutions." § 1401(16). "Related services" are defined as "transportation, and such developmental, corrective, and other supportive services ... as may be required to assist a handicapped child to benefit from special education." § 1401(17).[FN10]

> FN10. Examples of "related services" identified in the Act are "speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only." § 1401(17).

Like many statutory definitions, this one tends toward the cryptic rather than the comprehensive, but that is scarcely a reason for abandoning the quest for legislative intent. Whether or not the definition ****3042** is a "functional" one, as respondents contend it is not, it is the principal tool which Congress has given us for parsing the critical phrase of the Act. We think more must be made of it than either respondents or the United States seems willing to admit.

According to the definitions contained in the Act, a "free appropriate public education" consists of educational instruction specially designed to meet the unique needs of the handicapped***189** child, supported by such services as are necessary to permit the child "to benefit" from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.

Other portions of the statute also shed light upon congressional intent. Congress found that of the roughly eight million handicapped children in the United States at the time of enactment, one million were "excluded entirely from the public school system" and more than half were receiving an inappropriate education. 89 Stat. 774, note following § 1401. In addition, as mentioned in Part I, the Act requires States to extend educational services first to those children who are receiving no education and second to those children who are receiving an "inadequate education." § 1412(3). When these express statutory findings and priorities are read together with the Act's extensive procedural requirements and its definition of "free appropriate public education," the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each child.

Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children. Certainly the language of the statute contains no requirement like the one imposed by the lower courts-that States maximize the potential of handicapped children "commensurate with the opportunity ***190** provided to other children." 483 F.Supp., at 534. That standard was expounded by the District Court without reference to the statutory definitions or even to the legislative history of the Act. Although we find the statutory definition of "free appropriate public education" to be helpful in our interpretation of the Act, there remains the question of whether the legislative history indicates a congressional intent that such education meet some additional substantive standard. For an answer, we turn to that history.[FN11]

> FN11. The dissent, finding that "the standard of the courts below seems ... to reflect the congressional purpose" of the Act, *post*, at 3057, concludes that our answer to this question "is not a satisfactory one." *Post*, at 3056. Presumably, the dissent also agrees with the District Court's conclusion that "it has been left entirely to the courts and the hearing officers to give content to the requirement of an 'appropriate education.' " 483 F.Supp., at 533. It thus seems that the dissent would give the courts *carte blanche* to impose upon the States whatever burden their various judgments indicate should be imposed. Indeed, the dissent clearly characterizes the requirement of an "appropriate education" as open-ended, noting that "if there are limits not evident from the face of the statute on what may be considered an 'appropriate education,' they must be found in the purpose of the statute or its legislative history." *Post*, at 3054. Not only are we unable to find any suggestion from the face of the statute that the requirement of an "appropriate education" was to be limitless, but we also view the dissent's approach as contrary to the fundamental proposition that Congress, when exercising

its spending power, can impose no burden upon the States unless it does so unambiguously. See *infra*, at 3049, n. 26.

> No one can doubt that this would have been an easier case if Congress had seen fit to provide a more comprehensive statutory definition of the phrase "free appropriate public education." But Congress did not do so, and "our problem is to construe what Congress has written. After all, Congress expresses its purpose by words. It is for us to ascertain-neither to add nor to subtract, neither to delete nor to distort." *62 Cases of Jam v. United States*, 340 U.S. 593, 596, 71 S.Ct. 515, 518, 95 L.Ed. 566 (1951). We would be less than faithful to our obligation to construe what Congress has written if in this case we were to disregard the statutory language and legislative history of the Act by concluding that Congress had imposed upon the States a burden of unspecified proportions and weight, to be revealed only through case-by-case adjudication in the courts.

***191 **3043** B

(i)

As suggested in Part I, federal support for education of the handicapped is a fairly recent development. Before passage of the Act some States had passed laws to improve the educational services afforded handicapped children, [FN12] but many of these children were excluded completely from any form of public education or were left to fend for themselves in classrooms designed for education of their nonhandicapped peers. As previously noted, the House Report begins by emphasizing this exclusion and misplacement, noting that millions of handicapped children "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.' " H.R.Rep., at 2. See also S.Rep., at 8. One of the Act's two principal sponsors in the Senate urged its passage in similar terms:

> FN12. See H.R.Rep., at 10; Note, The Education of All Handicapped Children Act of 1975, 10 U.Mich.J.L.Ref. 110, 119 (1976).

> "While much progress has been made in the last few years, we can take no solace in that progress until all handicapped children are, in fact, receiving an education. The most recent statistics provided by the Bureau of Education for the Handicapped estimate that ... 1.75 million handicapped children do not receive any educational services, and 2.5 million handicapped children are not receiving an appropriate education." 121 Cong.Rec. 19486 (1975) (remarks of Sen. Williams).

This concern, stressed repeatedly throughout the legislative history, [FN13] confirms the impression conveyed by the language***192** of the statute: By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. Indeed, Congress expressly "recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome." S.Rep., at 11, U.S.Code Cong. & Admin.News 1975, p. 1435. Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

> FN13. See, *e.g.*, 121 Cong.Rec. 19494 (1975) (remarks of Sen. Javits) ("all too often, our handicapped citizens have been denied the opportunity to receive an adequate education"); *id.*, at 19502 (remarks of Sen. Cranston) (millions of handicapped "children ... are largely excluded from the educational opportunities that we give to our other children"); *id.*, at 23708 (remarks of Rep. Mink) ("handicapped children ... are denied access to public schools because of a lack of trained personnel").

Both the House and the Senate Reports attribute the impetus for the Act and its predecessors to two federal-court judgments rendered in 1971 and 1972. As the Senate Report states, passage of the Act "followed a series of landmark court cases establishing in law the right to education for all handicapped children." S.Rep., at 6, U.S.Code Cong. & Admin.News 1975, p. 1430. [FN14] The first case, ****3044***Pennsylvania Assn. for Retarded Children v. Commonwealth,*

334 F.Supp. 1257 (Ed Pa.1971) and 343 F.Supp. 279 (1972) (*PARC*), was a suit on behalf of retarded children challenging the constitutionality of a Pennsylvania statute which acted to exclude them from public education and training. The case ended in a consent decree which enjoined the State from "deny[ing] to any mentally retarded child *access* to a free public program of education and training." 334 F.Supp., at 1258 (emphasis added).

> FN14. Similarly, the Senate Report states that it was an "[i]ncreased awareness of the educational needs of handicapped children and landmark court decisions establishing the right to education for handicapped children [that] pointed to the necessity of an expanded federal fiscal role." S.Rep., at 5, U.S.Code Cong. & Admin.News 1975, p. 1429. See also H.R.Rep., at 2-3.

PARC was followed by *Mills v. Board of Education of District of Columbia*, 348 F.Supp. 866 (D.C.1972), a case in which the plaintiff handicapped children had been excluded ***193** from the District of Columbia public schools. The court's judgment, quoted in S.Rep., at 6, provided that

> "no [handicapped] child eligible for a publicly supported education in the District of Columbia public schools shall be *excluded* from a regular school assignment by a Rule, policy, or practice of the Board of Education of the District of Columbia or its agents unless such child is provided (a) *adequate* alternative educational services suited to the child's needs, which may include special education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the *adequacy* of any educational alternative." 348 F.Supp., at 878 (emphasis added).

Mills and *PARC* both held that handicapped children must be given *access* to an adequate, publicly supported education. Neither case purports to require any particular substantive level of education.[FN15] Rather, like the language of the Act, ***194** the cases set forth extensive procedures to be followed in formulating personalized educational programs for handicapped children. See 348 F.Supp., at 878-883; 334 F.Supp., at 1258-1267. [FN16] The fact that both *PARC* and *Mills* are discussed at length in the legislative Reports [FN17] suggests that the principles which they established are the principles which, to a significant extent, guided the drafters of the Act. Indeed, immediately after discussing these cases the Senate Report describes the 1974 statute as having "incorporated the major principles****3045** of the right to education cases." S.Rep., at 8, U.S.Code Cong. & Admin.News 1975, p. 1432. Those principles in turn became the basis of the Act, which itself was designed to effectuate the purposes of the 1974 statute. H.R.Rep., at 5.[FN18]

> FN15. The only substantive standard which can be implied from these cases comports with the standard implicit in the Act. *PARC* states that each child must receive "access to a free public program of education and training *appropriate to his learning capacities*," 334 F.Supp., at 1258 (emphasis added), and that further state action is required when it appears that "the needs of the mentally retarded child are not being *adequately* served," *id.*, at 1266. (Emphasis added.) *Mills* also speaks in terms of "adequate" educational services, 348 F.Supp., at 878, and sets a realistic standard of providing *some* educational services to each child when every need cannot be met.
>
> > "If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child." *Id.*, at 876.
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> FN16. Like the Act, *PARC* required the State to "identify, locate, [and] evaluate" handicapped children, 334 F.Supp., at 1267, to create for each child an individual educational program, *id.*, at 1265, and to hold a hearing "on any change in educational assignment," *id.*, at 1266. *Mills* also required the preparation of an individual educational program for each child. In addition, *Mills* permitted the child's parents to inspect records relevant to the child's education, to obtain an independent educational evaluation of the child, to object to the IEP and

receive a hearing before an independent hearing officer, to be represented by counsel at the hearing, and to have the right to confront and cross-examine adverse witnesses, all of which are also permitted by the Act. 348 F.Supp., at 879-881. Like the Act, *Mills* also required that the education of handicapped children be conducted pursuant to an overall plan prepared by the District of Columbia, and established a policy of educating handicapped children with nonhandicapped children whenever possible. *Ibid.*

FN17. See S.Rep., at 6-7; H.R.Rep., at 3-4.

FN18. The 1974 statute "incorporated the major principles of the right to education cases," by "add[ing] important new provisions to the Education of the Handicapped Act which require the States to: establish a goal of providing full educational opportunities to all handicapped children; 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; establish procedures to insure that, to the maximum extent appropriate, handicapped children ... are educated with children who are not handicapped; ... and, establish procedures to insure that testing and evaluation materials and procedures utilized for the purposes of classification and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory." S.Rep., at 8, U.S.Code Cong. & Admin.News 1975, p. 1432.

The House Report explains that the Act simply incorporated these purposes of the 1974 statute: the Act was intended "primarily to amend ... the Education of the Handicapped Act in order to provide permanent authorization and a comprehensive mechanism which will insure that those provisions enacted during the 93rd Congress [the 1974 statute] will result in maximum benefits for handicapped children and their families." H.R.Rep., at 5. Thus, the 1974 statute's purpose of providing handicapped children *access* to a public education became the purpose of the Act.

***195** That the Act imposes no clear obligation upon recipient States beyond the requirement that handicapped children receive some form of specialized education is perhaps best demonstrated by the fact that Congress, in explaining the need for the Act, equated an "appropriate education" to the receipt of some specialized educational services. The Senate Report states: "[T]he most recent statistics provided by the Bureau of Education for the Handicapped estimate that of the more than 8 million children ... with handicapping conditions requiring special education and related services, only 3.9 million such children are receiving an appropriate education." S.Rep., at 8, U.S.Code Cong. & Admin.News 1975, p. 1432.[FN19] This statement, which reveals Congress' view that 3.9 million handicapped children were "receiving an appropriate education" in 1975, is followed immediately in the Senate Report by a table showing that 3.9 million handicapped children were "served" in 1975 and a slightly larger number were "unserved." A similar statement and table appear in the House Report. H.R.Rep., at 11-12.

FN19. These statistics appear repeatedly throughout the legislative history of the Act, demonstrating a virtual consensus among legislators that 3.9 million handicapped children were receiving an appropriate education in 1975. See, *e.g.*, 121 Cong.Rec. 19486 (1975) (remarks of Sen. Williams); *id.*, at 19504 (remarks of Sen. Schweicker); *id.*, at 23702 (remarks of Rep. Madden); *ibid.* (remarks of Rep. Brademas); *id.*, at 23709) (remarks of Rep. Minish); *id.*, at 37024 (remarks of Rep. Brademas); *id.*, at 37027 (remarks of Rep. Gude); *id.*, at 37417 (remarks of Sen. Javits); *id.*, at 37420 (remarks of Sen. Hathaway).

***196** It is evident from the legislative history that the characterization of handicapped children as "served" referred to children who were receiving some form of specialized educational services from the States, and that the characterization of children as "unserved" referred to those who were receiving no specialized educational services. For example, a letter sent to the United States Commissioner of Education by the House Committee on Education and Labor, signed by two key sponsors of the Act in the House, asked the Commissioner to identify the number of handicapped "children served" in each State. The letter asked for statistics on the number of children "being served" in various types of "special education program[s]" and the number of children who were not "receiving educational services." Hearings on S. 6 before the Subcommittee on the Handicapped of the Senate Committee on Labor and

Public Welfare, 94th Cong., 1st Sess., 205-207 (1975). Similarly, Senator Randolph, one of the Act's principal sponsors in the Senate, ****3046** noted that roughly one-half of the handicapped children in the United States "are receiving special educational services." *Id.*, at 1.[FN20] By ***197** characterizing the 3.9 million handicapped children who were "served" as children who were "receiving an appropriate education," the Senate and House Reports unmistakably disclose Congress' perception of the type of education required by the Act: an "appropriate education" is provided when personalized educational services are provided.[FN21]

FN20. Senator Randolph stated: "[O]nly 55 percent of the school-aged handicapped children and 22 percent of the pre-school-aged handicapped children are receiving special educational services." Hearings on S. 6 before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 94th Cong., 1st Sess., 1 (1975). Although the figures differ slightly in various parts of the legislative history, the general thrust of congressional calculations was that roughly one-half of the handicapped children in the United States were not receiving specialized educational services, and thus were not "served." See, *e.g.*, 121 Cong.Rec. 19494 (1975) (remarks of Sen. Javits) ("only 50 percent of the Nation's handicapped children received proper education services"); *id.*, at 19504 (remarks of Sen. Humphrey) ("[a]lmost 3 million handicapped children, while in school, receive none of the special services that they require in order to make education a meaningful experience"); *id.*, at 23706 (remarks of Rep. Quie) ("only 55 percent [of handicapped children] were receiving a public education"); *id.*, at 23709 (remarks of Rep. Biaggi) ("[o]ver 3 million [handicapped] children in this country are receiving either below par education or none at all").

Statements similar to those appearing in the text, which equate "served" as it appears in the Senate Report to "receiving special educational services," appear throughout the legislative history. See, *e.g.*, *id.*, at 19492 (remarks of Sen. Williams); *id.*, at 19494 (remarks of Sen. Javits); *id.*, at 19496 (remarks of Sen. Stone); *id.*, at 19504-19505 (remarks of Sen. Humphrey); *id.*, at 23703 (remarks of Rep. Brademas); Hearings on H.R. 7217 before the Subcommittee on Select Education of the House Committee on Education and Labor, 94th Cong., 1st Sess., 91, 150, 153 (1975); Hearings on H.R. 4199 before the Select Subcommittee on Education of the House Committee on Education and Labor, 93d Cong., 1st Sess., 130, 139 (1973). See also 34 CFR § 300.343 (1981).

FN21. In seeking to read more into the Act than its language or legislative history will permit, the United States focuses upon the word "appropriate," arguing that "the statutory definitions do not adequately explain what [it means]." Brief for United States as *Amicus Curiae* 13. Whatever Congress meant by an "appropriate" education, it is clear that it did not mean a potential-maximizing education.

The term as used in reference to educating the handicapped appears to have originated in the *PARC* decision, where the District Court required that handicapped children be provided with "education and training appropriate to [their] learning capacities." 334 F.Supp., at 1258. The word appears again in the *Mills* decision, the District Court at one point referring to the need for "an appropriate educational program," 348 F.Supp., at 879, and at another point speaking of a "suitable publicly-supported education," *id.*, at 878. Both cases also refer to the need for an "adequate" education. See 334 F.Supp., at 1266; 348 F.Supp., at 878.

The use of "appropriate" in the language of the Act, although by no means definitive, suggests that Congress used the word as much to describe the settings in which handicapped children should be educated as to prescribe the substantive content or supportive services of their education. For example, § 1412(5) requires that handicapped children be educated in classrooms with nonhandicapped children "to the maximum extent appropriate." Similarly, § 1401(19) provides that, "whenever appropriate," handicapped children should attend and participate in the meeting at which their IEP is drafted. In addition, the definition of "free appropriate public education" itself states that instruction given handicapped children should be at an "appropriate preschool, elementary, or secondary school" level. § 1401(18)(C). The Act's use of the word "appropriate" thus seems to reflect Congress' recognition that some settings simply are not suitable environments for the participation of some handicapped children. At the very least, these statutory uses of

the word refute the contention that Congress used "appropriate" as a term of art which concisely expresses the standard found by the lower courts.

***198** (ii)

Respondents contend that "the goal of the Act is to provide each handicapped child with an equal educational opportunity." Brief for Respondents 35. We think, however, that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential "commensurate with the opportunity provided other children." Respondents****3047** and the United States correctly note that Congress sought "to provide assistance to the States in carrying out their responsibilities under ... the Constitution of the United States to provide equal protection of the laws." S.Rep., at 13, U.S.Code Cong. & Admin.News 1975, p. 1437. FN22 But we do not think that such statements imply a congressional intent to achieve strict equality of opportunity or services.

FN22. See also 121 Cong.Rec. 19492 (1975) (remarks of Sen. Williams); *id.*, at 19504 (remarks of Sen. Humphrey).

The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped***199** children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of "equal" services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services.

The legislative conception of the requirements of equal protection was undoubtedly informed by the two District Court decisions referred to above. But cases such as *Mills* and *PARC* held simply that handicapped children may not be excluded entirely from public education. In *Mills*, the District Court said:

"If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom." 348 F.Supp., at 876.

The *PARC* court used similar language, saying "[i]t is the commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity...." 334 F.Supp., at 1260. The right of access to free public education enunciated by these cases is significantly different from any notion of absolute equality of opportunity regardless of capacity. To the extent that Congress might have looked further than these cases which are mentioned in the legislative history, at the time of enactment of the Act this Court had held at least twice that the Equal Protection Clause of the Fourteenth ***200** Amendment does not require States to expend equal financial resources on the education of each child. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); *McInnis v. Shapiro*, 293 F.Supp. 327 (ND Ill.1968), aff'd *sub nom. McInnis v. Ogilvie*, 394 U.S. 322, 89 S.Ct. 1197, 22 L.Ed.2d 308 (1969).

In explaining the need for federal legislation, the House Report noted that "no congressional legislation has required a precise guarantee for handicapped children, i.e. a basic floor of opportunity that would bring into compliance all school districts with the constitutional right of equal protection with respect to handicapped children." H.R.Rep., at 14. Assuming that the Act was designed to fill the need identified in the House Report-that is, to provide a "basic floor of opportunity" consistent with equal protection-neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal ****3048** access. Therefore, Congress' desire to provide specialized educational services, even in furtherance of "equality," cannot be read as imposing any

particular substantive educational standard upon the States.

The District Court and the Court of Appeals thus erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Desirable though that goal might be, it is not the standard that Congress imposed upon States which receive funding under the Act. Rather, Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education.

(iii)

Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the ***201** handicapped child receive no benefit from that education. The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such ... supportive services ... as may be required to assist a handicapped child *to benefit* from special education." § 1401(17) (emphasis added). We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.[FN23]

> FN23. This view is supported by the congressional intention, frequently expressed in the legislative history, that handicapped children be enabled to achieve a reasonable degree of self-sufficiency. After referring to statistics showing that many handicapped children were excluded from public education, the Senate Report states:
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> > "The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society." S.Rep., at 9, U.S.Code Cong. & Admin.News 1975, p. 1433.
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> See also H.R.Rep., at 11. Similarly, one of the principal Senate sponsors of the Act stated that "providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds." 121 Cong.Rec. 19492 (1975) (remarks of Sen. Williams). See also *id.*, at 25541 (remarks of Rep. Harkin); *id.*, at 37024-37025 (remarks of Rep. Brademas); *id.*, at 37027 (remarks of Rep. Gude); *id.*, at 37410 (remarks of Sen. Randolph); *id.*, at 37416 (remarks of Sen. Williams).
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> The desire to provide handicapped children with an attainable degree of personal independence obviously anticipated that state educational programs would confer educational benefits upon such children. But at the same time, the goal of achieving some degree of self-sufficiency in most cases is a good deal more modest than the potential-maximizing goal adopted by the lower courts.
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> Despite its frequent mention, we cannot conclude, as did the dissent in the Court of Appeals, that self-sufficiency was itself the substantive standard which Congress imposed upon the States. Because many mildly handicapped children will achieve self-sufficiency without state assistance while personal independence for the severely handicapped may be an unreachable goal, "self-sufficiency" as a substantive standard is at once an inadequate protection and an overly demanding requirement. We thus view these references in the legislative history as evidence of Congress' intention that the services provided handicapped children be educationally beneficial, whatever the nature or severity of their handicap.

***202** The determination of when handicapped children are receiving sufficient educational benefits to satisfy the

requirements of the Act presents a more difficult problem. The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied.****3049** It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

The Act requires participating States to educate handicapped children with nonhandicapped children whenever possible.[FN24] When that "mainstreaming" preference of the Act ***203** has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors the educational progress of the child. Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit. Children who graduate from our public school systems are considered by our society to have been "educated" at least to the grade level they have completed, and access to an "education" for handicapped children is precisely what Congress sought to provide in the Act.[FN25]

FN24. Title 20 U.S.C. § 1412(5) requires that participating States establish "procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."

FN25. We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a "free appropriate public education." In this case, however, we find Amy's academic progress, when considered with the special services and professional consideration accorded by the Furnace Woods school administrators, to be dispositive.

C

When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of ***204** the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.[FN26]

FN26. In defending the decisions of the District Court and the Court of Appeals, respondents and the United States rely upon isolated statements in the legislative history concerning the achievement of maximum potential, see H.R.Rep., at 13, as support for their contention that Congress intended to impose greater substantive requirements than we have found. These statements, however, are too thin a reed on which to base an interpretation of the Act which disregards both its language and the balance of its legislative history. "Passing references and isolated phrases are not controlling when analyzing a legislative history." *Department of State v. Washington Post Co.*, 456 U.S. 595, 600, 102 S.Ct. 1957, 1960, 72 L.Ed.2d 358 (1982).

> Moreover, even were we to agree that these statements evince a congressional intent to maximize each child's potential, we could not hold that Congress had successfully imposed that burden upon the States.
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> "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' ... Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst State School v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 1539-40, 67 L.Ed.2d 694 (1981) (footnote omitted).
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> As already demonstrated, the Act and its history impose no requirements on the States like those imposed by the District Court and the Court of Appeals. *A fortiori* Congress has not done so unambiguously, as required in the valid exercise of its spending power.

****3050** IV

A

[3] As mentioned in Part I, the Act permits "[a]ny party aggrieved by the findings and decision" of the state administrative hearings "to bring a civil action" in "any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." § 1415(e)(2). The complaint, and therefore the civil action, may concern "any matter relating to the identification, evaluation, or educational placement of the child, or the provision***205** of a free appropriate public education to such child." § 1415(b)(1)(E). In reviewing the complaint, the Act provides that a court "shall receive the record of the [state] administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." § 1415(e)(2).

The parties disagree sharply over the meaning of these provisions, petitioners contending that courts are given only limited authority to review for state compliance with the Act's procedural requirements and no power to review the substance of the state program, and respondents contending that the Act requires courts to exercise *de novo* review over state educational decisions and policies. We find petitioners' contention unpersuasive, for Congress expressly rejected provisions that would have so severely restricted the role of reviewing courts. In substituting the current language of the statute for language that would have made state administrative findings conclusive if supported by substantial evidence, the Conference Committee explained that courts were to make "independent decision[s] based on a preponderance of the evidence." S.Conf.Rep.No.94-455, p. 50 (1975), U.S.Code Cong. & Admin.News 1975, p. 1503. See also 121 Cong.Rec. 37416 (1975) (remarks of Sen. Williams).

But although we find that this grant of authority is broader than claimed by petitioners, we think the fact that it is found in § 1415, which is entitled "Procedural safeguards," is not without significance. When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, *e.g.*, §§ 1415(a)-(d), as it did upon the measurement of the resulting***206** IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

****3051** Thus the provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought. The fact that § 1415(e) requires that the reviewing court "receive the records of the [state] administrative

proceedings" carries with it the implied requirement that due weight shall be given to these proceedings. And we find nothing in the Act to suggest that merely because Congress was rather sketchy in establishing substantive requirements, as opposed to procedural requirements for the preparation of an IEP, it intended that reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself. In short, the statutory authorization to grant "such relief as the court determines is appropriate" cannot be read without reference to the obligations, largely procedural in nature, which are imposed upon recipient States by Congress.

Therefore, a court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? FN27 And second, is the ***207** individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?FN28 If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

FN27. This inquiry will require a court not only to satisfy itself that the State has adopted the state plan, policies, and assurances required by the Act, but also to determine that the State has created an IEP for the child in question which conforms with the requirements of § 1401(19).

FN28. When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit. See Part III, *supra*.

B

[4] In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States.FN29 The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. The Act expressly charges States with the responsibility of "acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials." § 1413(a)(3). In the face of such a clear statutory directive, it seems highly unlikely that Congress intended***208** courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to § 1415(e)(2).FN30

FN29. In this case, for example, both the state hearing officer and the District Court were presented with evidence as to the best method for educating the deaf, a question long debated among scholars. See Large, Special Problems of the Deaf Under the Education for All Handicapped Children Act of 1975, 58 Wash.U.L.Q. 213, 229 (1980). The District Court accepted the testimony of respondents' experts that there was "a trend supported by studies showing the greater degree of success of students brought up in deaf households using [the method of communication used by the Rowleys]." 483 F.Supp., at 535.

FN30. It is clear that Congress was aware of the States' traditional role in the formulation and execution of educational policy. "Historically, the States have had the primary responsibility for the education of children at the elementary and secondary level." 121 Cong.Rec. 19498 (1975) (remarks of Sen. Dole). See also *Epperson v. Arkansas*, 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968) ("By and large, public education in our Nation is committed to the control of state and local authorities").

****3052** We previously have cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S., at 42, 93 S.Ct., at 1301. We think that Congress shared that view when it passed the Act. As already demonstrated, Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped. Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

V

Entrusting a child's education to state and local agencies does not leave the child without protection. Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies, *supra*, at 3038, and n. 6, and in the formulation of the child's individual educational program. As the Senate Report states:

> "The Committee recognizes that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome. By changing the language [of the provision relating to individualized educational programs] to emphasize the process of parent and child ***209** involvement and to provide a written record of reasonable expectations, the Committee intends to clarify that such individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child." S.Rep., at 11-12, U.S.Code Cong. & Admin.News 1975, p. 1435.

See also S.Conf.Rep.No.94-445, p. 30 (1975); 34 CFR § 300.345 (1981). As this very case demonstrates, parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act.[FN31]

> FN31. In addition to providing for extensive parental involvement in the formulation of state and local policies, as well as the preparation of individual educational programs, the Act ensures that States will receive the advice of experts in the field of educating handicapped children. As a condition for receiving federal funds under the Act, States must create "an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which (A) advises the State educational agency of unmet needs within the State in the education of handicapped children, [and] (B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children." § 1413(a)(12).

VI

[5] Applying these principles to the facts of this case, we conclude that the Court of Appeals erred in affirming the decision of the District Court. Neither the District Court nor the Court of Appeals found that petitioners had failed to comply with the procedures of the Act, and the findings of neither court would support a conclusion that Amy's educational program failed to comply with the substantive requirements of the Act. On the contrary, the District Court found that the "evidence firmly establishes that Amy is receiving an ***210** 'adequate' education, since she performs better than the average child in her class and is advancing easily from grade to grade." 483 F.Supp., at 534. In light of this finding, and of the fact that Amy was receiving personalized instruction and related services calculated by the Furnace Woods school administrators to meet her educational needs, the lower courts should not have concluded that the Act requires the provision of a sign-language interpreter. Accordingly, the decision of the Court of Appeals is reversed, and the case is ****3053** remanded for further proceedings consistent with this opinion.[FN32]

> FN32. Because the District Court declined to reach respondents' contention that petitioners had failed to comply with the Act's procedural requirements in developing Amy's IEP, 483 F.Supp., at 533, n. 8, the case must be remanded for further proceedings consistent with this opinion.

So ordered.

Justice BLACKMUN, concurring in the judgment.

Although I reach the same result as the Court does today, I read the legislative history and goals of the Education of the Handicapped Act differently. Congress unambiguously stated that it intended to "take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided *equal educational opportunity.* " S.Rep.No.94-168, p. 9 (1975), U.S.Code Cong. & Admin.News 1975, p. 1433 (emphasis

added). See also 20 U.S.C. § 1412(2)(A)(i) (requiring States to establish plans with the "goal of providing full educational opportunity to all handicapped children").

As I have observed before, "[i]t seems plain to me that Congress, in enacting [this statute], intended to do more than merely set out politically self-serving but essentially meaningless language about what the [handicapped] deserve at the hands of state ... authorities." *Pennhurst State School v. Halderman*, 451 U.S. 1, 32, 101 S.Ct. 1531, 1547, 67 L.Ed.2d 694 (1981) (opinion concurring in part and concurring in the judgment). The clarity of the legislative ***211** intent convinces me that the relevant question here is not, as the Court says, whether Amy Rowley's individualized education program was "reasonably calculated to enable [her] to receive educational benefits," *ante*, at 3051, measured in part by whether or not she "achieve[s] passing marks and advance[s] from grade to grade," *ante*, at 3049. Rather, the question is whether Amy's program, *viewed as a whole*, offered her an opportunity to understand and participate in the classroom that was substantially equal to that given her nonhandicapped classmates. This is a standard predicated on equal educational opportunity and equal access to the educational process, rather than upon Amy's achievement of any particular educational outcome.

In answering this question, I believe that the District Court and the Court of Appeals should have given greater deference than they did to the findings of the School District's impartial hearing officer and the State's Commissioner of Education, both of whom sustained petitioners' refusal to add a sign-language interpreter to Amy's individualized education program. Cf. 20 U.S.C. § 1415(e)(2) (requiring reviewing court to "receive the records of the administrative proceedings" before granting relief). I would suggest further that those courts focused too narrowly on the presence or absence of a particular service-a sign-language interpreter-rather than on the total package of services furnished to Amy by the School Board.

As the Court demonstrates, *ante*, at 3039-3040, petitioner Board has provided Amy Rowley considerably more than "a teacher with a loud voice." See *post*, at 3055 (dissenting opinion). By concentrating on whether Amy was "learning as much, or performing as well academically, as she would without her handicap," 483 F.Supp. 528, 532 (S.D.N.Y.1980), the District Court and the Court of Appeals paid too little attention to whether, on the entire record, respondent's individualized education program offered her an educational opportunity***212** substantially equal to that provided her nonhandicapped classmates. Because I believe that standard has been satisfied here, I agree that the judgment of the Court of Appeals should be reversed.

Justice WHITE, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

In order to reach its result in this case, the majority opinion contradicts itself, the ****3054** language of the statute, and the legislative history. Both the majority's standard for a "free appropriate education" and its standard for judicial review disregard congressional intent.

I

The majority first turns its attention to the meaning of a "free appropriate public education." The Act provides:

> "The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title." 20 U.S.C. § 1401(18).

The majority reads this statutory language as establishing a congressional intent limited to bringing "previously excluded handicapped children into the public education systems of the States and [requiring] the States to adopt *procedures* which would result in individualized consideration of and instruction for each child." *Ante*, at 3042. In its attempt to constrict the definition of "appropriate" and the thrust of the Act, the majority opinion states: "Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children. Certainly ***213** the language of the statute contains no requirement like the one imposed by the lower courts-that States maximize the potential of handicapped children 'commensurate with the opportunity provided

to other children.' " *Ante*, at 3042, quoting 483 F.Supp. 528, 534 (SDNY 1980).

I agree that the language of the Act does not contain a substantive standard beyond requiring that the education offered must be "appropriate." However, if there are limits not evident from the face of the statute on what may be considered an "appropriate education," they must be found in the purpose of the statute or its legislative history. The Act itself announces it will provide a "*full* educational opportunity to all handicapped children." 20 U.S.C. § 1412(2)(A) (emphasis added). This goal is repeated throughout the legislative history, in statements too frequent to be " 'passing references and isolated phrases.' " [FN1] *Ante*, at 3049, n. 26, quoting *Department of State v. Washington Post Co.*, 456 U.S. 596, 600, 102 S.Ct. 1957, 1960, 72 L.Ed.2d 358 (1982). These statements elucidate the meaning of "appropriate." According to the Senate Report, for example, the Act does "guarantee that handicapped children are provided *equal* educational opportunity." S.Rep.No.94-168, p. 9 (1975), U.S.Code Cong. & Admin.News 1975, p. 1433 (emphasis added). This promise appears throughout the legislative history. See 121 Cong.Rec. 19482-19483 (1975) (remarks of Sen. Randolph); *id.*, at 19504 (Sen. Humphrey); *id.*, at 19505 (Sen Beall); *id.*, at 23704 (Rep. Brademas); *id.*, at 25538 (Rep. Cornell); *id.*, at 25540 (Rep. Grassley); *id.*, at 37025 (Rep. Perkins); *id.*, at ***214** 37030 (Rep. Mink); *id.*, at 37412 (Sen. Taft); *id.*, at 37413 (Sen. Williams); *id.*, at 37418-37419 (Sen. Cranston); *id.*, at 37419-37420 (Sen. Beall). Indeed, at times the purpose of the Act was described as tailoring each handicapped child's educational plan to enable the child "to achieve his or her maximum potential." H.R.Rep.No.94-332, pp. 13, 19 (1975); see 121 Cong.Rec. 23709 (1975). ****3055** Senator Stafford, one of the sponsors of the Act, declared: "We can all agree that education [given a handicapped child] should be equivalent, at least, to the one those children who are not handicapped receive." *Id.*, at 19483. The legislative history thus directly supports the conclusion that the Act intends to give handicapped children an educational opportunity commensurate with that given other children.

> FN1. The Court's opinion relies heavily on the statement, which occurs throughout the legislative history, that, at the time of enactment, one million of the roughly eight million handicapped children in the United States were excluded entirely from the public school system and more than half were receiving an inappropriate education. See, *e.g.*, *ante*, at 3042, 3045, 3046, n. 20. But this statement was often linked to statements urging equal educational opportunity. See, *e.g.*, 121 Cong.Rec. 19502 (1975) (remarks of Sen. Cranston); *id.*, at 23702 (remarks of Rep. Brademas). That is, Congress wanted not only to bring handicapped children into the schoolhouse, but also to benefit them once they had entered.

The majority opinion announces a different substantive standard, that "Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful." *Ante*, at 3043. While "meaningful" is no more enlightening than "appropriate," the Court purports to clarify itself. Because Amy was provided with *some* specialized instruction from which she obtained *some* benefit and because she passed from grade to grade, she was receiving a meaningful and therefore appropriate education.[FN2]

> FN2. As further support for its conclusion, the majority opinion turns to *Pennsylvania Assn. for Retarded Children v. Commonwealth*, 334 F.Supp. 1257 (ED Pa.1971), 343 F.Supp. 279 (1972) (*PARC*), and *Mills v. Board of Education of District of Columbia*, 348 F.Supp. 866 (D.C.1972). That these decisions served as an impetus for the Act does not, however, establish them as the limits of the Act. In any case, the very language that the majority quotes from *Mills*, *ante*, at 3044, 3047, sets a standard not of *some* education, but of educational opportunity equal to that of non-handicapped children.
>
> Indeed, *Mills*, relying on decisions since called into question by this Court's opinion in *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), states:
>
> "In *Hobson v. Hansen*, [269 F.Supp. 401 (D.C.1967)] Judge Wright found that denying poor public school children educational opportunity equal to that available to more affluent public school children was violative of the Due Process Clause of the Fifth Amendment. *A fortiori*, the defendants' conduct here, denying plaintiffs and their class not just an equal publicly supported education but all publicly supported education while providing such education to other children, is violative of the Due Process Clause." 348 F.Supp., at 875.

> Whatever the effect of *Rodriguez* on the validity of this reasoning, the statement exposes the majority's mischaracterization of the opinion and thus of the assumptions of the legislature that passed the Act.

***215** This falls far short of what the Act intended. The Act details as specifically as possible the kind of specialized education each handicapped child must receive. It would apparently satisfy the Court's standard of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child," *ante*, at 3048, for a deaf child such as Amy to be given a teacher with a loud voice, for she would benefit from that service. The Act requires more. It defines "special education" to mean "specifically designed instruction, at no cost to parents or guardians, to *meet the unique needs* of a handicapped child...." § 1401(16) (emphasis added).[FN3] Providing a teacher with a loud voice would not meet Amy's needs and would not satisfy the Act. The basic floor of opportunity is instead, as the courts below recognized, intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible. Amy Rowley, without a sign-language interpreter, comprehends less than half of what is said in the classroom-less than half of what normal children comprehend. This is hardly an equal opportunity to learn, even if Amy makes passing grades.

> FN3. "Related services" are "transportation, and such developmental, corrective, and other supportive services ... as may be required to assist a handicapped child to benefit from special education." § 1401(17).

Despite its reliance on the use of "appropriate" in the definition of the Act, the majority opinion speculates that "Congress used the word as much to describe the settings in which ***216** handicapped children should be educated as to prescribe the substantive content or supportive services of their education." *Ante*, at 3046, n. 21. Of course, the word "appropriate" can be applied in many ways; at times in the Act, Congress used it to recommend mainstreaming****3056** handicapped children; at other points, it used the word to refer to the content of the individualized education. The issue before us is what standard the word "appropriate" incorporates when it is used to modify "education." The answer given by the Court is not a satisfactory one.

II

The Court's discussion of the standard for judicial review is as flawed as its discussion of a "free appropriate public education." According to the Court, a court can ask only whether the State has "complied with the procedures set forth in the Act" and whether the individualized education program is "reasonably calculated to enable the child to receive educational benefits." *Ante*, at 3051. Both the language of the Act and the legislative history, however, demonstrate that Congress intended the courts to conduct a far more searching inquiry.

The majority assigns major significance to the review provision's being found in a section entitled "Procedural safeguards." But where else would a provision for judicial review belong? The majority does acknowledge that the current language, specifying that a court "shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate," § 1415(e)(2), was substituted at Conference for language that would have restricted the role of the reviewing court much more sharply. It is clear enough to me that Congress decided to reduce substantially judicial deference to state administrative decisions.

The legislative history shows that judicial review is not limited to procedural matters and that the state educational agencies are given first, but not final, responsibility for the ***217** content of a handicapped child's education. The Conference Committee directs courts to make an "independent decision." S.Conf.Rep.No.94-455, p. 50 (1975). The deliberate change in the review provision is an unusually clear indication that Congress intended courts to undertake substantive review instead of relying on the conclusions of the state agency.

On the floor of the Senate, Senator Williams, the chief sponsor of the bill, Committee Chairman, and floor manager responsible for the legislation in the Senate, emphasized the breadth of the review provisions at both the administrative and judicial levels:

> "Any parent or guardian may present a complaint concerning *any matter* regarding the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child. In this regard, Mr. President, I would like to stress that the language referring to 'free appropriate education' has been adopted to make clear that a complaint may involve matters such as questions respecting a child's individualized education program, questions of whether special education and related services are being provided without charge to the parents or guardians, questions relating to whether the services provided a child meet the standards of the State education agency, or *any other question* within the scope of the definition of 'free appropriate public education.' In addition, it should be clear that a parent or guardian may present a complaint alleging that a State or local education agency has refused to provide services to which a child may be entitled or alleging that the State or local educational agency has erroneously classified a child as a handicapped child when, in fact, that child is not a handicapped child." 121 Cong.Rec. 37415 (1975) (emphasis added).

There is no doubt that the state agency itself must make substantive decisions. The legislative history reveals that the ***218** courts are to consider, *de novo*, the same ****3057** issues. Senator Williams explicitly stated that the civil action permitted under the Act encompasses all matters related to the original complaint. *Id.*, at 37416.

Thus, the Court's limitations on judicial review have no support in either the language of the Act or the legislative history. Congress did not envision that inquiry would end if a showing is made that the child is receiving passing marks and is advancing from grade to grade. Instead, it intended to permit a full and searching inquiry into any aspect of a handicapped child's education. The Court's standard, for example, would not permit a challenge to part of the IEP; the legislative history demonstrates beyond doubt that Congress intended such challenges to be possible, even if the plan as developed is reasonably calculated to give the child some benefits.

Parents can challenge the IEP for failing to supply the special education and related services needed by the individual handicapped child. That is what the Rowleys did. As the Government observes, "courts called upon to review the content of an IEP, in accordance with 20 U.S.C. [§] 1415(e) inevitably are required to make a judgment, on the basis of the evidence presented, concerning whether the educational methods proposed by the local school district are 'appropriate' for the handicapped child involved." Brief for United States as *Amicus Curiae* 13. The courts below, as they were required by the Act, did precisely that.

Under the judicial review provisions of the Act, neither the District Court nor the Court of Appeals was bound by the State's construction of what an "appropriate" education means in general or by what the state authorities considered to be an appropriate education for Amy Rowley. Because the standard of the courts below seems to me to reflect the congressional purpose and because their factual findings are not clearly erroneous, I respectfully dissent.

U.S.N.Y., 1982.
Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley
458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690, 5 Ed. Law Rep. 34, 1 A.D.D. 85

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Appendix K: Polk v. Central Susquehanna Intermediate Unit, 853 F. 2d 171 (3d Cir. 1988)

853 F.2d 171, 57 USLW 2092, 48 Ed. Law Rep. 336
(Cite as: 853 F.2d 171)

United States Court of Appeals,
Third Circuit.
POLK, Ronald and Polk, Cindy, parents and natural guardians of Christopher Polk, Appellants,
v.
CENTRAL SUSQUEHANNA INTERMEDIATE UNIT 16, Central Columbia Area School District and Bloomsburg Area School District, Appellees.

No. 87-5585.
Argued Jan. 19, 1988.
Decided July 26, 1988.
Rehearing and Rehearing In Banc Denied Aug. 19, 1988.

Parents of handicapped child brought action under Education of Handicapped Act claiming that school district and administrative district failed to provide child with adequate program of special education. The United States District Court for the Middle District of Pennsylvania, Malcolm Muir, J., granted summary judgment in favor of defendants, and parents appealed. The Court of Appeals, Becker, Circuit Judge, held that: (1) material issue of fact existed as to whether school district and administrative district, in violation of Education of Handicapped Act's procedural requirement for individualized educational programs for handicapped child, refused, as blanket rule, to consider providing handicapped students with physical therapy from licensed physical therapist; (2) Education of Handicapped Act requires that handicapped student receive more than just trivial educational benefits; and (3) material issue of fact existed as to whether handicapped child was receiving appropriate education rather than de minimis or trivial educational benefit.

Reversed and remanded.

***172** John A. Mihalik (argued), Hummel, James & Mihalik, Bloomsburg, Pa., for appellants.

Janet F. Stotland, Educ. Law Center, Inc., Philadelphia, Pa., for amicus curiae.

Audrey L. Jacobsen (argued), Charles W. Craven, Marshall, Dennehey, Warner, Coleman & Goggin, Philadelphia, Pa., for appellee, Central Susquehanna Intermediate Unit 16.

Gary E. Norton (argued), Derr, Pursel & Luschas, Bloomsburg, Pa., for appellee, Central Columbia School Dist.

Before HIGGINBOTHAM and BECKER, Circuit Judges, and HUYETT, District Judge [FN*] .

FN* Honorable Daniel H. Huyett, 3rd, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

OPINION OF THE COURT

BECKER, Circuit Judge.

This appeal requires that we examine the contours of the "free appropriate public education" requirement of the Education of the Handicapped Act, as amended, 20 U.S.C. §§ 1401-1461, (1982) (EHA), as it touches on the delivery of physical therapy, which is a "related service" under the EHA. Ronald and Cindy Polk are parents of Christopher Polk, a child with severe mental and physical impairments. They claim that defendants, the local school district and the larger administrative Intermediate Unit (which oversees special education for students in a five-county area) violated the EHA because they failed to provide Christopher with an adequate program of special education. Specifically, plaintiffs contend that defendants' failure to provide direct "hands-on" physical therapy from a licensed physical therapist once a week has hindered Christopher's progress in meeting his educational goals.

The district court granted summary judgment in favor of defendants. The court held that because Christopher derived "*some* educational benefit" from his educational program, the requirements of the EHA, as interpreted by the Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176, 206-07, 102 S.Ct. 3034, 3050-51, 73 L.Ed.2d 690 (1982), have been met, *see infra* at page 180-81.

We will reverse the district court's grant of summary judgment for two reasons. First, we discern a genuine issue of material fact as to whether the defendants, in violation of the EHA procedural requirement for *individualized* educational programs, have refused, as a blanket rule, to consider providing handicapped students with direct physical therapy from a licensed physical therapist. Second, we conclude that the district court applied the wrong standard in evaluating the appropriateness of the child's education. Although the district court relied upon language from a recent Supreme Court case, it took that language out of context and applied it beyond the narrow holding of the Supreme Court's opinion. More specifically, we believe that the district court erred in evaluating this severely handicapped child's educational program by a standard under which even trivial advancement satisfied the substantive provisions of the EHA's guarantee of a free and appropriate education. There is evidence in the record that would support a finding that the program prescribed for Christopher afforded no more than trivial progress. We will therefore reverse and remand for further proceedings consistent with this opinion.

I. STATUTORY BACKGROUND

The EHA requires that Pennsylvania, as a recipient of federal assistance thereunder, ensure that each disabled student in the state receive a "free appropriate public education." 20 U.S.C. § 1412(1) (1982). The EHA mandates that participating ***173** states provide such education for all children "regardless of the severity of their handicap." 20 U.S.C. § 1412(2)(C) (1982). In pertinent part, the Act defines a free appropriate public education as:

special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge,.... and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1401(18) (1982). The term "related services" includes "physical and occupational therapy ... as may be required to assist a handicapped child to benefit from special education." 20 U.S.C. § 1401(17) (1982). Such special education and related services must be tailored to the unique needs of the handicapped child by means of an Individualized Education Program (IEP). 20 U.S.C. § 1401(16).

An IEP is "more than a mere exercise in public relations," *Georgia Ass'n of Retarded Citizens v. McDaniel*, 716 F.2d 1565, 1570 (11th Cir.1983), *vacated in part on other grounds*, 468 U.S. 1213, 104 S.Ct. 3581, 82 L.Ed.2d 880 (1983), *reinstated in relevant part*, 740 F.2d 902 (1984), *cert. denied*, 469 U.S. 1228, 105 S.Ct. 1228, 84 L.Ed.2d 365 (1985); indeed, it is the "centerpiece of the statute's education delivery system for disabled children." *Honig v. Doe*, 484 U.S. 305, 108 S.Ct. 592, 598, 98 L.Ed.2d 686 (1988). The IEP consists of a detailed written statement arrived at by a multi-disciplinary team summarizing the child's abilities, outlining the goals for the child's education and specifying the services the child will receive. 20 U.S.C. §§ 1401(19) (defining IEP), § 1414(a)(5) (requiring an IEP). In practice the multi-disciplinary team will, as appropriate, consist of a teacher, psychologist, physician, physical

and/or vocational therapist and administrator. Input is also sought from parents.

Additionally, the EHA imposes extensive procedural due process requirements upon the participating states. Complaints brought by parents or guardians must be resolved at "an impartial due process hearing." 20 U.S.C. § 1415(b)(2). Any party dissatisfied with the state administrative hearing may bring a civil action in state or federal court. 20 U.S.C. § 1415(e). In such action, the district court must conduct an independent review based on the preponderance of the evidence but in doing so "due weight shall be given to [state administrative] proceedings." *Rowley*, 458 U.S. at 206, 102 S.Ct. at 3051.

II. FACTS & PROCEDURAL HISTORY

Christopher Polk is severely developmentally disabled. At the age of seven months he contracted encephalopathy, a disease of the brain similar to cerebral palsy. He is also mentally retarded. Although Christopher is fourteen years old, he has the functional and mental capacity of a toddler. All parties agree that he requires "related services" in order to learn. He receives special education from defendants, the Central Susquehanna Intermediate Unit ## 16 (the IU) and Central Columbia Area School District (the school district). Placed in a class for the mentally handicapped, Christopher has a full-time personal classroom aide. His education consists of learning basic life skills such as feeding himself, dressing himself, and using the toilet. He has mastered sitting and kneeling, is learning to stand independently, and is showing some potential for ambulation. Christopher is working on basic concepts such as "behind," "in," "on," and "under," and the identification of shapes, coins, and colors. Although he is cooperative, Christopher finds such learning difficult because he has a short attention span.

Although the record is not clear on this point, until 1980, the defendants apparently provided Christopher with direct physical therapy from a licensed physical therapist. Since that time, however, under a newer, so-called consultative model,[FN1] Christopher no longer receives direct physical therapy ***174** from a physical therapist. Instead, a physical therapist (one of two hired by the IU) comes once a month to train Christopher's teacher in how to integrate physical therapy with Christopher's education.[FN2] Although the therapist may lay hands on Christopher in demonstrating to the teacher the correct approach, he or she does not provide any therapy to Christopher directly, but uses such interaction to teach the teacher. Plaintiffs do not object to the consultative method per se, but argue that, to meet Christopher's individual needs, the consultative method must be supplemented by direct ("hands on") physical therapy.[FN3]

FN1. The parties seem to use the words "consultive," "consultative," and "consultation" interchangeably. We will use the term "consultative" in describing the services defendants currently provide.

FN2. The defendants provide the following definition of consultative therapy:

> In the consultation model, the therapist interacts with the classroom teacher and/or other educators who deal with the child on a regular and consistent basis and who are ultimately responsible for the child's educational performance. The therapist as a consultant increases the teacher's awareness of a handicapped child's need. The therapist instructs the teacher on appropriate methods and strategies to attain both physical therapy/occupational therapy goals and enhance the child's ability to benefit from classroom educational experiences.
>
> J.A. at 442. The district court made the following findings of fact:
>
> Under the Consultative Model no direct hands-on therapy is given to Christopher by licensed therapists. Instead, licensed therapists develop a program which is implemented by the classroom teacher and aide and the only contact the licensed therapists have with Christopher is a monthly monitoring of the delivery of the services by the classroom teacher and aide.
>
> J.A. at 532.

FN3. The parties engage in a semantic debate concerning the word “direct.” Defendants argue that, because the physical therapists provide their consultative services “directly” to Christopher, it is incorrect to claim that he receives no direct physical therapy. For clarity's sake we will distinguish assistance provided by a licensed physical therapist via the consultative method from direct “hands-on” physical therapy treatment provided to Christopher by a licensed physical therapist.

In support of this position, plaintiffs adduced evidence that direct physical therapy from a licensed physical therapist has significantly expanded Christopher's physical capacities. In the summer of 1985, Christopher received two weeks of intensive physical therapy from a licensed physical therapist at Shriner's Hospital in Philadelphia. According to Christopher's parents, this brief treatment produced dramatic improvements in Christopher's physical capabilities.[FN4] A doctor at Shriner's prescribed that Christopher receive at least one hour a week of direct physical therapy. Because the defendants were unwilling to provide direct physical therapy as part of Christopher's special education program, the Polks hired a licensed physical therapist, Nancy Brown, to work with Christopher at home. At the time of the hearing, she was seeing Christopher twice a week.

FN4. Mrs. Polk testified that after Christopher's 13-day intensive experience in Shriner's he was much better able to feed himself; that his weight bearing, control over his body, and use of a walker were improved; and that he began kneeling on his own.

Plaintiffs acknowledge that the school program has benefited Christopher to some degree, but argue that his educational program is not appropriate because it is not individually tailored to his specific needs, as the EHA requires. Moreover, throughout all of the administrative and judicial proceedings that we now describe, plaintiffs have maintained that to comply with the EHA the defendants must provide, as part of Christopher's “free appropriate public education,” one session a week with a licensed physical therapist.

Plaintiffs first challenged Christopher's IEP before a Commonwealth of Pennsylvania Department of Education Hearing Officer. At that hearing and in later depositions, the administrator of the IU, Christopher's teachers, the IU's physical therapy consultant, Christopher's current private physical therapist and his therapist from Shriner's all testified concerning Christopher's capabilities and educational needs. The Hearing Officer found that Christopher was benefiting from his education, and that his education was appropriate.[FN5] ***175** This finding was affirmed by the Pennsylvania Secretary of Education.[FN6]

FN5. The hearing officer had found that Christopher was “benefiting from the special program of education being provided for him by the district and that he is progressing toward the goals and objectives set forth in his IEP.” J.A. at 26. But as required by law the district court reviewed the facts independently. See 20 U.S.C. § 1415(e)(2); *Rowley*, 458 U.S. at 206, 102 S.Ct. at 3050.

FN6. This court recently held that the participation of the Pennsylvania Secretary of Education in this type of hearing process violated due process under the EHA because the Secretary of Education is a state employee (at least for the purposes of the EHA) and therefore cannot provide the “independent decision” based on an “impartial review” required by the EHA, 20 U.S.C. § 1415 (1982). *See* *Muth v. Central Bucks School Dist.*, 839 F.2d 113, 118, 120-126 (3d Cir.1988). Because the question is not before us, we do not rely on such deficiency in the procedural scheme in our decision.

After exhausting administrative remedies to their dissatisfaction, the Polks brought suit in the district court for the Middle District of Pennsylvania. The district court initially permitted plaintiffs to conduct discovery about whether any of the 65 students in the five county intermediate unit whose IEPs call for some sort of physical therapy had received individualized “hands-on” physical therapy. Concomitantly, the court rejected defendants' motion under Fed.R.Civ.P. 12(f) to strike from the complaint the allegations that no child in the IU received direct physical therapy. Defendants refused to respond to this discovery, and the district court granted plaintiffs' motion to compel. Plaintiffs then moved for additional discovery concerning the services provided to other handicapped students. However, before

the district court ruled on that request (and before the defendants provided any additional information), the district court granted summary judgment for the defendants. Relying on the Supreme Court's decision in *Rowley*, 458 U.S. at 206-07, 102 S.Ct. at 3050-51, the court held that the provisions of EHA had been met because Christopher had received *some* benefit from his education. This appeal followed.

Plaintiffs present two arguments on appeal. First, they submit that the defendants violated EHA's procedural requirements because Christopher's program is not truly individualized.[FN7] Plaintiffs rely, in this regard, on the defendants' failure to provide direct ("hands on") physical therapy from a licensed physical therapist to *any* of the children in the intermediate unit (a fact they learned during Christopher's due process hearing before the state examiner). This failure, they contend, is evidence that the defendants have an inflexible rule prohibiting direct therapy and that such a rigid rule conflicts with the EHA's mandate of providing *individualized* education. Plaintiffs argue that genuine questions of material fact exist as to the defendants' willingness to provide direct physical therapy under any circumstances, and that such disputes preclude summary judgment.

> FN7. Defendants claim that this procedural argument was not raised in the district court. Although we acknowledge that the references to the procedural argument were obscure, we disagree. Count ten of plaintiffs' complaint charges that: "not one of such students [in the Unit] received the delivery of either service directly from a licensed occupational or physical therapist but rather was afforded the related service through the consultive model." J.A. at 526. Then, in point 4 of plaintiffs' motion for taking of additional testimony, pursuant to 20 U.S.C. § 1415(e)(2) (allowing plaintiffs to present new evidence), plaintiffs set out their procedural theory of the case: "The Plaintiff contends that the application of the consultive model to all handicapped children deprives Christopher Polk of a unique educational program as required by the Education for the Handicapped Act." J.A. at 522. Additionally, in rejecting the defendants' 12(f) motion to strike, the district court took note of the plaintiffs' theory observing "that Paragraphs 9 and 10 set forth the factual basis for the assertion that not only is Christopher Polk's program not appropriate, but it is not individualized." J.A. at 527. Finally, Plaintiffs' Brief Contra Defendants' Motion for Summary Judgment, *Polk v. Central Susquehanna Intermediate Unit*, Civ. No. 86-1784 at 23, argued that summary judgment should be denied "because as a matter of law Christopher Polk's Individualized Educational Program is inherently not unique."

Second, plaintiffs assert that Christopher's education is inadequate to meet his unique needs. They claim that the district court found Christopher's education appropriate only because it applied an erroneous legal standard in judging the educational benefit of Christopher's program.

***176** III. ROLE OF PHYSICAL THERAPY IN PROVIDING A FREE APPROPRIATE PUBLIC EDUCATION UNDER THE EHA

For some handicapped children, the related services provided by the EHA serve as important facilitators of classroom learning. In *Irving Independent School District v. Tatro*, 468 U.S. 883, 104 S.Ct. 3371, 82 L.Ed.2d 664 (1984), the Supreme Court unanimously held that the EHA required the provision of in-school intermittent catheterization services to a child with spina bifida so that she could attend a regular public school class. The Court distinguished between the types of related services contemplated by the EHA and the medical care that requires a doctor. In so doing, the Court explicitly acknowledged the importance of related services to the scheme of the EHA: "Congress plainly required schools to hire various specially trained personnel to help handicapped children, such as 'trained occupational therapists.' " *Id.* at 893, 104 S.Ct. at 3377 (quoting S.Rep.No. 94-168, p. 38 (1975)).

For children like Christopher with severe disabilities, related services serve a dual purpose. First, because these children have extensive physical difficulties that often interfere with development in other areas, physical therapy is an essential prerequisite to education. For example, development of motor abilities is often the first step in overall educational development. *See* P.H. Pearson & C.E. Williams, eds., *Physical Therapy Services in the Developmental Disabilities* 173 (hereinafter *Physical Therapy*) (noting close relationship between speech and head, trunk, and arm control).[FN8] As we explained in *Battle v. Pennsylvania*, 629 F.2d 269, 275 (3d Cir.1980), *cert. denied*, 452 U.S. 968, 101 S.Ct. 3123, 69 L.Ed.2d 981 (1981), in discussing children with severe emotional disturbances:

FN8. Physical therapy is essential for a child like Christopher because, in order to learn basic skills, he must learn to use his muscles properly. A key function of physical therapy is to normalize tonic reflex patterns. For example, abnormal muscle tone is a distinguishing characteristic of cerebral palsy and related problems. *See Physical Therapy*, *supra*, at 76. Whereas low muscle tone is too flaccid to fix posture; high muscle tone interferes with mobility. *Id.* at 357. *See infra* Section V(C).

Where basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point. If the child masters these fundamentals, the education moves on to more difficult but still very basic language, social and arithmetic skills, such as counting, making change, and identifying simple words.
Id. at 275.

Second, the physical therapy itself may form the core of a severely disabled child's special education. This court has recognized that "[t]he educational program of a handicapped child, particularly a severely and profoundly handicapped child ... is very different from that of a non-handicapped child. The program may consist largely of 'related services' such as physical, occupational, or speech therapy." *DeLeon v. Susquehanna Community School Dist.*, 747 F.2d 149, 153 (3d Cir.1984). In Christopher's case, physical therapy is not merely a conduit to his education but constitutes, in and of itself, a major portion of his special education, teaching him basic skills such as toileting, feeding, ambulation, etc.

IV. THE PLAINTIFFS' PROCEDURAL CLAIM (THAT CHRISTOPHER'S EDUCATIONAL PLAN WAS NOT INDIVIDUALIZED)

As we noted above, the plaintiffs have offered to prove that the defendants never genuinely considered Christopher's unique needs because of a rigid policy of providing only consultative physical therapy. They adduced evidence during cross examination at the state administrative hearing that none of the 65 children in defendants' intermediate unit whose IEPs call for physical therapy actually receive direct physical therapy. The plaintiffs also contend that, since the adoption of the consultative model, this rigid policy has precluded the defendants from recognizing Christopher's individual ***177** needs in violation of the EHA.[FN9] Plaintiffs submit that the district court did not recognize the force of this procedural argument, and hence erred in granting summary judgment when a genuine issue of material fact existed as to the willingness of the defendants to provide direct physical therapy to any child.

FN9. Furthermore, plaintiffs assert that certain important goals for Christopher's education have been forsaken because those goals, such as increased muscle tone, are only attainable through direct physical therapy. As we see it, this argument goes more to the plaintiff's substantive than to their procedural claim. *See infra* Section V(C).

The defendants respond that it is, and always has been, their position that direct therapy would be provided, if needed. The therapist who consults monthly with Christopher's teacher testified before the Department of Education hearing examiner that she would provide therapy treatment directly if she determined that such therapy were appropriate. The previous physical therapy consultant and the administrator of the IU similarly claimed in testimony before the hearing examiner that direct physical therapy would be provided, if needed, but that such a case has never arisen for Christopher nor for any other student in the Unit.

Critical to resolution of this question are the Act's procedural protections. To repeat, the centerpiece of the procedural scheme is the IEP. *See supra* Section I. As the Supreme Court has noted, an essential protection of the EHA stems from the parental participation in the formulation of an IEP for the child's special education. *See Rowley*, 458 U.S. at 208, 102 S.Ct. at 3052 ("Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies, ... and in the formulation of the child's individual education program."). This system of procedural protection only works if the state devises an *individualized* program and is willing to address the handicapped child's "unique needs." 20 U.S.C. § 1401(16). *Accord Rowley*, 458 U.S. at 209,

102 S.Ct. at 3052.

In *Battle v. Pennsylvania*, 629 F.2d 269 (3d Cir.1980), *cert. denied*, 452 U.S. 968, 101 S.Ct. 3123, 69 L.Ed.2d 981 (1981), this court held that Pennsylvania's inflexible policy of limiting special education to 180 days per year, regardless of individual need, violated the EHA. We noted that:

At the core of the Act is a detailed procedure for determining the contours of the free appropriate public education to be delivered to each child. We believe that these procedural safeguards require individual attention to the needs of each handicapped child.

629 F.2d at 280 (citations omitted). We stated that Pennsylvania's 180-day policy conflicted "with the Act's emphasis on the individual." *Id.* at 280. Similarly, in *Georgia Association of Retarded Citizens v. McDaniel*, 716 F.2d 1565 (11th Cir.1983), *vacated in part on other grounds*, 468 U.S. 1213, 104 S.Ct. 3581, 82 L.Ed.2d 880 (1983), *reinstated in relevant part*, 740 F.2d 902 (1984), *cert. denied*, 469 U.S. 1228, 105 S.Ct. 1228, 84 L.Ed.2d 365 (1985), the Court of Appeals for the Eleventh Circuit held that the application of across-the-board findings to all profoundly retarded children in lieu of individual consideration of their unique needs was impermissible under the EHA.[FN10] As *Georgia Association* explained, the force of this conclusion, "by itself, does not impose a substantive standard on the state; it requires no more than that the state *consider* the need ... when developing a plan of education and related support services that will benefit a handicapped child." 716 F.2d at 1576.

> FN10. We note that in *Georgia Association* the Court of Appeals for the Eleventh Circuit, speaking through Judge Tuttle, refused to disturb a district court's finding that a local school district limited special education to a 180-day school year, even though defendants denied having such a policy. 716 F.2d at 1573-74.

[1] In our view, a rigid rule under which defendants refuse even to consider providing physical therapy, as did the rule struck down in *Battle*, would conflict with Christopher's procedural right to an individualized program. Drawing all reasonable inferences in favor of the non-moving ***178** party, see *Gans v. Mundy*, 762 F.2d 338, 340 (3d Cir.1985), we believe that a genuine dispute exists over whether the defendants would consider, under any circumstances, offering direct physical therapy, and that this dispute is over material facts, precluding summary judgment. Concomitantly, we believe that plaintiffs should be given an opportunity to continue their discovery into this question because the existence of a rigid rule prohibiting such therapy would violate the EHA. Therefore, we will reverse and remand the district court's decision for inquiry into whether defendants possess a rigid policy prohibiting the provision of direct physical therapy to children in the IU.

V. PLAINTIFFS' SUBSTANTIVE CLAIM (THAT THE COURT MISAPPLIED THE LEGAL STANDARD FOR EVALUATING APPROPRIATE EDUCATION)

A. *The Supreme Court's Opinion in* Rowley

We begin our discussion of the substantive protections of the EHA with the Supreme Court's opinion in *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), because the parties' arguments are so closely tied to that case; only in the context of *Rowley* can we intelligently present the parties' contentions and the district court's opinion.

Rowley concerned an eight year old deaf child, Amy Rowley, whose parents requested a full-time interpreter to assist her in school. The school district's refusal to provide this service under the EHA generated the dispute. Amy possessed some residual hearing and was an excellent lip reader. She was an above average student who performed at the level of her grade and was advancing from grade to grade in her regular public school classroom. Because of her hearing disability, she could only understand about 60% of what transpired in class. Nevertheless, she performed impressively in a "mainstreamed" classroom.

The school had made substantial efforts to assist Amy. Before her arrival at school, a number of administrators learned sign language to communicate with her. At the time of her request for a full time interpreter, the school was already providing Amy with a special FM hearing aid, speech therapy, and tutoring for the deaf. In addition, Amy's

parents, who also were deaf, could communicate with the school by a teletype machine specifically installed in the principal's office for that purpose.

The Supreme Court held that Amy was not entitled to a private interpreter as part of her IEP under the EHA even though she could not follow 100% of the class' activities without such extra assistance. The Court analyzed the EHA and held that "if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a 'free appropriate public education' as defined by the Act." 458 U.S. at 189, 102 S.Ct. 3042.[FN11] The Court thus explained that the purpose of the Act was to provide a basic level of educational opportunity, not to provide the best education money can buy. *See id.* ("certainly the language of the statute contains no requirement ... that states maximize the potential of handicapped children"); *id.* at 197 n. 21, 102 S.Ct. at 3046 n. 21 ("Whatever Congress meant by an 'appropriate' education, it is clear that it did not mean a potential-maximizing education."); *Muth v. Central Bucks Schools Dist.*, 839 F.2d 113, 119 (3d Cir.1988) (citing *Rowley*). However desirable the goal of maximizing each child's potential may be in terms of individuals, the Court obviously recognized that achieving such a goal would be beyond the fiscal ***179** capacity of state and local governments, and that Congress had realized that fact as well.

> FN11. At various points, the Court reiterated its holding that "the Act imposes no clear obligation upon recipient States beyond the requirement that handicapped children receive some form of specialized education...." *Rowley*, 458 U.S. at 195, 102 S.Ct. at 3045, *accord id.* at 203, 102 S.Ct. at 3049 ("Insofar as a State is required to provide a handicapped child with a 'free appropriate public education' we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction.")

Furthermore, the Court cautioned against too much judicial interference in the substance of the child's education. It concluded that, where a handicapped child is receiving an appropriate education, it is not the job of this court or any other to dictate educational methods to special education experts. *See Rowley*, 458 U.S. at 208, 102 S.Ct. at 3052 ("once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States") (citations and footnotes omitted); *Rettig v. Kent City School Dist.*, 720 F.2d 463, 465-66 (6th Cir.1983), *cert. denied*, 467 U.S. 1201, 104 S.Ct. 2379, 81 L.Ed.2d 339 (1984). Instead, the Court focused on *access* to special education rather than the content of that education. It quoted at length the legislative history of the EHA, holding that its sponsors emphasized receipt of educational services rather than any specific form or level of educational benefit. *Id.* 458 U.S. at 195-97, 102 S.Ct. at 3045-46; *see id.* at 200, 102 S.Ct. at 3047-48 ("neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal access"). Adverting to the legislative history, the Court concluded that "the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id.* at 192, 102 S.Ct. at 3043.

Although the tenor of the *Rowley* opinion reflects the Court's reluctance to involve the courts in substantive determinations of appropriate education and its emphasis on the *procedural* protection of the IEP process, it is clear that the Court was not espousing an entirely toothless standard of substantive review. Rather, the *Rowley* Court described the level of benefit conferred by the Act as "meaningful." 458 U.S. at 192, 102 S.Ct. at 3043. As the Court explained:

By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access *meaningful.*

Id. (emphasis added). After noting the deference due to states on questions of education and the theme of *access* rather than a guarantee of any particular standard of benefit, the Court acknowledged that:

Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public

education only to have the handicapped child receive no benefit from that education. The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such ... supportive services ... as may be required to assist a handicapped child *to benefit* from special education." § 1401(17). We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

Id. at 200-01, 102 S.Ct. at 3048 (emphasis in original).

The preceding quotation demonstrates that the Supreme Court in *Rowley* did not abdicate responsibility for monitoring the substantive quality of education under the EHA. Instead, it held that the education must "provide educational benefit." The Court thus recognized that the substantive, independent judicial review envisioned by the EHA was not a hollow gesture. Instead, courts must ensure "a basic floor of opportunity" that is defined by an *individualized* program that confers benefit.

Finally, it is important to note that, notwithstanding *Rowley* 's broad language, ***180** the Court indicated that its holding might not cover every case brought under the EHA. Indeed, *Rowley* was an avowedly narrow opinion that relied significantly on the fact that Amy Rowley progressed successfully from grade to grade in a "mainstreamed" classroom. The Court self-consciously limited its opinion to the facts before it:

We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

Id. at 202, 102 S.Ct. at 3049.[FN12]

> FN12. Indeed, in a footnote, the Court observed that the fact that a child was advancing from grade to grade would not necessarily suffice in every case to assure that the education would be deemed appropriate. *Rowley*, 458 U.S. at 203 n. 25, 102 S.Ct. at 3049 n. 25.

Although we do not argue that *Rowley* "contradicts itself," *id.* at 212, 102 S.Ct. at 3053 (White, J., dissenting), we nevertheless note the tension in the *Rowley* majority opinion between its emphasis on procedural protection (almost to the exclusion of substantive inquiry) and its substantive component quoted and discussed *supra* at 179.[FN13] This tension is unresolved in the *Rowley* case itself because the facts of the case (including Amy Rowley's quite substantial benefit from her education) did not force the Court to confront squarely the fact that Congress cared about the quality of special education. In the case *sub judice*, however, the question of how much benefit is sufficient to be "meaningful" is inescapable. Therefore we must examine the Act's notion of "benefit" and apply a standard that is faithful to congressional intent and consistent with *Rowley*.

> FN13. The *Rowley* dissenters argued that the EHA was designed to maximize the educational benefit of handicapped children and that Amy Rowley could not achieve equal educational opportunity without a full-time interpreter in her classroom.

B. *EHA Requires More than a De Minimis Benefit*

[2] We hold that the EHA calls for more than a trivial educational benefit. That holding rests on the Act and its legislative history as well as interpretation of *Rowley*.

1.

The opinion of the district court, anchored to the "some benefit" language of *Rowley*, 458 U.S. at 200, 102 S.Ct. at 3047, explained its holding as follows:

The fact that Christopher would advance more quickly with intensive therapy rather than the therapy he now receives does not make the School District's program for Christopher defective. Programs need only render some benefit; they need not maximize potential.... The Supreme Court has determined that the Act is primarily a procedural statute and does not impose a substantive duty on the state to provide a student with other than *some* educational benefits. Increased muscle tone may well fall outside of the scope of the requirement that Christopher receive some educational benefits from the program in which he is enrolled.

J.A. at 537-38 (citations omitted) (emphasis in original).

Plaintiffs argue on appeal that the district court applied the wrong standard in measuring the educational benefit of Christopher's program and that the case should be remanded for further proceedings consistent with the correct standard, one that requires more than a *de minimis* benefit. Defendants rejoin that *Rowley* 's announcement of a "some benefit" test precludes judicial inquiry into the substantive education conferred by the Act, so long as the handicapped child receives any benefit at all. Noting that Christopher's parents acknowledge that he derives some benefit from his education, defendants submit that the inquiry is over and that the district ***181** court's summary judgment must be affirmed.

Our review of the legal standard applied by the district court is plenary. *See* *Muth*, 839 F.2d at 120 (citing *Universal Mineral, Inc. v. C.A. Hughes & Co.*, 669 F.2d 98, 101-02 (3d Cir.1981); *Wexler v. Westfield Bd. of Educ.*, 784 F.2d 176, 181 (3d Cir.), *cert. denied*, 479 U.S. 825, 107 S.Ct. 99, 93 L.Ed.2d 49 (1986).

2.

Because *Rowley* is a narrow decision, our decision must perforce also be informed by the text of the EHA and the legislative history of the 1975 amendments. Accordingly, we turn to a discussion thereof. Our interpretation of "educational benefit" is informed by the text of the EHA and by the legislative history concerning the passage of the 1975 amendments. The self-defined purpose of the EHA is to provide "*full* educational opportunity to all handicapped children." 20 U.S.C. § 1412(2)(A) (emphasis added). Similarly, the Senate Report on the 1975 amendments defined related services as "transportation, developmental, corrective, and supportive services (specifically including at least speech pathology and audiology, psychological services, counseling services, physical and occupational therapy, and recreation) necessary for a handicapped child to *fully benefit* from special education." Sen.R.No. 168, 94th Cong., 1st Sess. at 42 (emphasis added). The House Report echoes this language, citing the EHA's "goal of providing each handicapped child with a free, *full*, public education." H.Rep.No. 332, 94th Cong. at 11 (1975) (emphasis added). *See also* 121 Cong.Rec. 19482 (remarks of Senator Randolph, W. Virginia, Chair, Senate Subcommittee on the Handicapped) (discussing the goals of the EHA as "[a]chieving a goal of full educational opportunities"). Although the Supreme Court has instructed that Congress did not intend to provide optimal benefit, the Act's use of the phrase "full educational opportunity" and the EHA's legislative history indicate an intent to afford more than a trivial amount of educational benefit.

We note that the dissent in *Rowley* compiled a long list of statements made by Senators and Representatives sponsoring the 1975 amendments indicating that the purpose of the Act was to provide equal educational opportunity. *See* 458 U.S. at 213-14, 102 S.Ct. at 3054 (White, J., dissenting).[FN14] We do not reference this compendium for the broad proposition that the Act requires the states to maximize a handicapped child's education, as did the three dissenting Justices (Justices Brennan and Marshall joined in Justice White's dissent; Justice Blackmun wrote a separate opinion concurring in the majority opinion). Nevertheless, we may rely on these statements for the narrower proposition that the legislators who passed the EHA did not envision merely a trivial benefit to handicapped children.

> FN14. Indeed, the House Report to the 1975 Amendments explained that a "fundamental tenet[ ]" of the Act is that "each child requires an educational plan that is tailored to achieve his or her maximum potential." H.Rep.No. 332, 94th Cong. at 13 (1975).

Furthermore, we observe, as did the majority in *Rowley*, that a key concern of and primary justification for the

EHA lay in the important goal of fostering self-sufficiency in handicapped children. *See* H.Rep.No. 332, 94th Cong., 1st Sess. at 11 (1975) ("taxpayers will spend many billions of dollars over the lifetime of these handicapped individuals simply to maintain such persons as dependents on welfare and often in institutions"); *Rowley*, 458 U.S. at 201 n. 23, 102 S.Ct. at 3048 n. 23 (quoting extensively from the legislative history of the EHA concerning self-sufficiency). The EHA's sponsors stressed the importance of teaching skills that would foster personal independence for two reasons. First, they advocated dignity for handicapped children. Second, they stressed the long-term financial savings of early education and assistance for handicapped children. A chief selling point of the Act was that although it is penny dear, it is pound wise-the expensive individualized assistance early in life, geared toward teaching basic life skills and self-sufficiency, eventually redounds to the benefit of the public fisc as these children ***182** grow to become productive citizens. *See* H.Rep.No. 332, *supra,* at 11 ("with proper educational services many of these handicapped children would be able to become productive citizens contributing to society instead of being left to remain burdens on society"); 121 Cong.Rec. 19492 (1975) (remarks of Senator Williams); *id.* at 19505 (remarks of Senator Beall).

Implicit in the legislative history's emphasis on self-sufficiency is the notion that states must provide some sort of meaningful education-more than mere access to the schoolhouse door. We acknowledge that self-sufficiency cannot serve as a substantive standard by which to measure the appropriateness of a child's education under the Act. *See Rowley*, 458 U.S. at 201 n. 23, 102 S.Ct. at 3048 n. 23. Indeed, Christopher Polk is not likely ever to attain this coveted status, no matter how excellent his educational program. Instead, we infer that the emphasis on self-sufficiency indicates in some respect the quantum of benefits the legislators anticipated: they must have envisioned that significant learning would transpire in the special education classroom-enough so that citizens who would otherwise become burdens on the state would be transformed into productive members of society. Therefore, the heavy emphasis in the legislative history on self-sufficiency as one goal of education, where possible, suggests that the "benefit" conferred by the EHA and interpreted by *Rowley* must be more than *de minimis.*

We believe that the teaching of *Rowley* is not to the contrary. As discussed above, the *Rowley* Court described the education that must be provided under the EHA as "meaningful." The use of the term "meaningful" indicates that the Court expected more than *de minimis* benefit. We note in this regard that the facts of *Rowley* clearly indicate that the "benefit" Amy was receiving from her educational program was substantial, and that "some benefit," in the case of Amy, meant a great deal more than a negligible amount.

However, to the extent that dicta in *Rowley* might be read to imply that courts should not become involved in the substantive aspects of the EHA, we find *Rowley* distinguishable from the case *sub judice.* As discussed in Section V(A), *supra, Rowley* specifically limited itself to the facts before it, involving a hearing-impaired child advancing from grade to grade in a "mainstreamed" classroom. Because the Court so self-consciously restricted the scope of its holding, we may (as we did above) reexamine the policies and the legislative history of the EHA to inform our decision.

Additionally, *Rowley* is distinguishable from the case *sub judice* because of the type of services requested. Unlike the services of a full-time interpreter (which arguably may be deemed extraordinary assistance), physical therapy, as discussed above in Sections I and III, is an integral part of what Congress intended by "appropriate education" as defined in EHA, and it is an essential part of Christopher's education. For example, physical therapy is cited as an example of the type of related services available under the Act. *See* 20 U.S.C. § 1401(17). Moreover, federal regulations implementing EHA specifically define physical therapy as "services provided by a qualified physical therapist." 34 C.F.R. § 300.13 (1987). *Cf. T.G. v. Bd. of Educ. of Piscataway*, 576 F.Supp. 420, 423-24 (D.N.J.1983) (distinguishing "extraordinary sign language services" of *Rowley* from psychological services that are specifically set out in EHA and regulations), *aff'd,* 738 F.2d 425 (3d Cir.), *cert. denied,* 469 U.S. 1086, 105 S.Ct. 592, 83 L.Ed.2d 701 (1984).

Finally, because of the severity of Christopher's disabilities and their qualitative difference from those of Amy Rowley, it is difficult to apply *Rowley* here. Christopher's progress cannot be measured by advancement in grade or acquisition of academic skill. His needs are drastically different, but no less important. *See DeLeon v. Susquehanna Community School Dist.*, 747 F.2d 149, 153 (3d Cir.1984); *see also Rowley*, 458 U.S. at 202, 102 S.Ct. at 3049 ("It is

clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between."). Indeed, the needs of children like Christopher were paramount ***183** in the eyes of the EHA sponsors. The EHA provides that the most severely handicapped children be served first. *See* 20 U.S.C. § 1412(3). That Christopher may never achieve the goals set in a traditional classroom does not undermine the fact that his brand of education (training in basic life skills) is an essential part of EHA's mandate. Therefore, although we believe the holding in *Rowley* is compatible with our holding in this case, to the extent that dicta in the opinion tend to undermine our substantive standard, we find the *Rowley* case distinguishable.

3.

This court recently has had occasion to interpret and apply the *Rowley* standard in the context of a severely impaired child. In *Board of Education v. Diamond*, 808 F.2d 987, 991 (3d Cir.1986), we expressly rejected the argument that when the Supreme Court in *Rowley* referred to "some benefit," it meant any benefit at all, even if the child nevertheless regressed. The case involved a child, Andrew Diamond, with severe physical, neurological, and emotional handicaps. Despite evidence that Andrew's learning skills were deteriorating and his behavior was becoming counterproductive, the state resisted transferring Andrew from his placement in a day program to a placement in a residential program. As a result, Andrew's parents put him in a residential program and paid for it themselves.

After a due process hearing, the school board was ordered to place Andrew in an appropriate residential setting. The school board filed an action in federal court seeking a day placement for Andrew. The district court, however, endorsed the residential placement and ordered the school district to reimburse Andrew's parents for the expenses incurred when paying for his residential placement themselves.

In *Diamond*, we thus confronted and rejected the very argument that the defendants make here:

The School District's legal argument is that it is obliged by governing law to provide no more for Andrew Diamond than will be "of benefit" to him. The governing law, however, clearly imposes a higher standard.

Id. at 991. After observing that "the *Rowley* standard of enabling one to achieve passing marks and advance from grade to grade probably is not achievable for Andrew," *id.*, the court observed:

But *Rowley* makes it perfectly clear that the Act requires a plan of instruction under which educational *progress* is likely. The School District's "of benefit" test is offered in defense of an educational plan under which educational regression actually occurred. Literally the School Board's plan might be conceived as conferring some benefit to Andrew in that less regression might occur under it than if Andrew Diamond had simply been left to vegetate. The Act, however, requires a plan likely to produce progress, not regression or trivial educational advancement.

Id. (emphasis in original). The teaching of *Diamond* is that, when the Supreme Court said "some benefit" in *Rowley*, it did not mean "some" as opposed to "none." Rather, "some" connotes an amount of benefit greater than mere trivial advancement.[FN15]

> FN15. In *Wexler v. Westfield Bd. of Educ.*, 784 F.2d 176 (3d Cir.) *cert. denied*, 479 U.S. 825, 107 S.Ct. 99, 93 L.Ed.2d 49 (1986), the court rejected the reimbursement claim of parents of a neurologically impaired child. The parents unilaterally chose private placement instead of the educational program devised by the state. In concluding that the district court had correctly applied the legal standard derived from *Rowley*, the court inquired whether the special education was " 'reasonably calculated to enable the child to receive educational benefits.' " 784 F.2d at 181 (quoting *Rowley*, 458 U.S. at 207, 102 S.Ct. at 3051). However, the court's discussion was brief. The opinion provides no detail concerning the nature of the state's program or the differences between that program and the program that the parents requested, and the court did not elaborate upon the standard, or address the possibility of de minimis benefit. We are therefore unable to draw significant instruction from this case.

Defendants seek to distinguish *Diamond*, arguing that *Diamond* was a more egregious case, whereby regression

had occurred under the state's educational plan (there has been no regression here). Although ***184** we acknowledge that this distinction has some force, and that *Diamond* does indeed stand for the proposition that a child who is regressing (and whose regression can be reversed by reasonable means) is not receiving sufficient "benefit" under the Act, we believe that *Diamond* can and should be read more expansively.

Indeed, defendants' distinction of *Diamond,* if carried to its logical conclusion, would arguably render that case more expansive because progress for some severely handicapped children may require optimal benefit. As we noted in *Battle*, 629 F.2d at 269, severely handicapped children (unlike normal children) have a strong tendency to regress. A program calculated to lead to non-regression might actually, in the case of severely handicapped children, impose a greater burden on the state than one that requires a program designed to lead to more than trivial progress. The educational progress of a handicapped child (whether in life skills or in a more sophisticated program) can be understood as a continuum where the point of regression versus progress is less relevant than the conferral of benefit. We note that it is therefore possible to construe *Diamond* 's holding not solely as an issue of progress or regression but also as requiring that any educational benefit be more than *de minimis.*

Furthermore, serious problem with defendants' attempted distinction of *Diamond* lies in defendants' implicit suggestion that a child must first show regression before his parents may challenge the appropriateness of his education. But we do not believe that Congress intended that courts present parents with the Hobson's choice of allowing regression (hence proving their claim) or providing on their own what their child needs to make meaningful progress. Finally, to the extent that defendants may correctly argue that the central focus of *Diamond* is regression, and that any language concerning "trivial benefit" is dicta, for the reasons set forth above, we find that dicta to be absolutely correct and in line with our analysis of *Rowley* and the legislative history of the EHA.

4.

To summarize, in our view, the danger of the district court's formulation is that under its reading of *Rowley* the conferral of any benefit, no matter how small, could qualify as "appropriate education" under the EHA. Under the district court's approach, carried to its logical extreme, Christopher Polk would be entitled to no physical therapy because his occupational therapy offers him "some benefit." FN16 We do not believe that such a formulation reflects congressional intent in light of the importance of related services (particularly physical therapy) in the statutory and regulatory scheme. Just as Congress did not write a blank check, neither did it anticipate that states would engage in the idle gesture of providing special education designed to confer only trivial benefit. Put differently, and using *Rowley* 's own terminology, we hold that Congress intended to afford children with special needs an education that would confer meaningful benefit.

> FN16. According to the district court's approach, major areas of need (such as normalized muscle tone) could be omitted entirely from coverage. *See supra* at 180 (quoting district court's opinion).

We further conclude that *Rowley,* although it prescribes restraint and warns that Congress did not intend the Act to maximize a child's potential, does not militate against the standard we have announced. Because the test employed by the district court ostensibly could have allowed only a *de minimis* benefit, we must remand in light of our interpretation. Finally, we do not read the Supreme Court's salutary warnings against interference with educational methodology as an invitation to abdicate our obligation to enforce the statutory provisions that ensure a free and appropriate education to Christopher. *See Georgia Ass'n of Retarded Persons,* 716 F.2d at 1569 (noting the "central role states play in educating their citizens" but observing that "a state's responsibility for providing education is bounded by certain ***185** congressionally developed concerns once the state accepts federal financial assistance under the Act").

Obviously, this court is in no position to determine the factual question whether the treatment the defendants currently provide for Christopher is appropriate. We are, however, obligated to correct errors of law on appeal, and we hold that the district court applied the wrong standard in granting summary judgment for defendants when it allowed for the possibility of only *de minimis* benefit.

C. *Under the Correct Standard Must Summary Judgment Nevertheless be Affirmed?*

Although defendants acknowledge that direct hands-on therapy would be beneficial to Christopher, they argue it is not essential to the conferral of an appropriate education. Defendants submit that "in view of Christopher's exceptionality, ... Christopher's progress has been outstanding." Br. of School Dist. at 8. The defendants presented testimony from the licensed physical therapist who consults with Christopher's teachers that indicates that he is progressing as quickly as can be expected given his multiple handicaps, and that the consultative model serves his needs.

Plaintiffs, by virtue of the evidence they adduced concerning Christopher's remarkable improvements in a short period of time at Shriner's, have provided at least some indication that his education may be inappropriate. *See supra* n. 4 (outlining Christopher's dramatic improvements achieved at Shriner's). Furthermore, they claim that Christopher has been working on some of the same skills for years, and that even accounting for his exceptionalities, his progress has been *de minimis.* For instance, there is a factual dispute among the parties concerning Christopher's progress in self-dressing and self-feeding. Plaintiffs contend that significant improvements in these areas attributable to the program at Shriner's and the direct physical therapy Christopher receives at home contrast markedly with the trivial advancement in fine and gross motor control that Christopher experienced as a result of seven years of public education under the consultative model.

Two private therapists who worked with Christopher at the Shriner's Hospital in Philadelphia in July 1985 each testified that Christopher needs direct physical and occupational therapy in his school by licensed and trained professionals. As their attorney explained at oral argument, the plaintiffs contend that the physical therapy provided by Christopher's teacher is akin to a sophisticated gym class, where Christopher practices bouncing a ball and other physical activities. They assert that such guidance, though helpful to Christopher, cannot substitute for direct physical therapy by a licensed physical therapist, which involves professional monitoring of discrete muscle behavior and frequent adjustments in response to improvement by the student.

Most important to plaintiffs are their contentions that Christopher cannot improve muscle tone without the assistance of a licensed physical therapist and that the state has ignored whole categories of need. *See supra* at 184. They adduced testimony in support of their assertion that a teacher and a teacher's aide are not qualified to deliver certain essential services and that Christopher's IEP contains goals requiring the direct attention of licensed physical therapists beyond the capacity of the consultative model. *See* J.A. at 327-31 (to prepare a child for gross motor tasks, a physical therapist must first normalize muscle tone and breakdown the goals into a task analysis; evaluation of muscle tone requires a knowledge of neurophysiology).

[3] We recognize the difficulty of measuring levels of benefit in severely handicapped children. Obviously, the question whether benefit is *de minimis* must be gauged in relation to the child's potential. However, we believe that the extent of the factual dispute concerning the level of benefit Christopher received from his educational program precludes summary judgment under the standard that we announce today. The judgment of the district court will therefore be reversed and the case ***186** remanded for further proceedings consistent with this opinion.

C.A.3 (Pa.),1988.
Polk v. Central Susquehanna Intermediate Unit 16
853 F.2d 171, 57 USLW 2092, 48 Ed. Law Rep. 336
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Appendix L: Ridgewood Board of Education v. N. E., 172 F. 3d 238 (3d Cir. 1999)

172 F.3d 238, 133 Ed. Law Rep. 748
(Cite as: 172 F.3d 238)

United States Court of Appeals,
Third Circuit.
RIDGEWOOD BOARD OF EDUCATION
v.
N.E., as Guardian Ad Litem for M.E., an infant; Mary E., Individually and as Guardian Ad Litem for M.E., an infant, Defendants/Third-party Plaintiffs,
v.
Frederick Stokley, Superintendent; John Campion, Director of Special Programs; Charles Abate, Principal; William Ward, Principal; Lorraine Zak, Psychologist; Kathleen McNally, Social Worker; Caroline Janover, LDT-C; George Neville, Principal; Henry Hogue, Psychologist; June Ann Dibb, Dr., Psychiatrist; Joan Christian, LDT-C; Susan Lynaugh, Psychologist, Third-party Defendants,
N.E., as Guardian Ad Litem for M.E., an infant; Mary E., Individually and as Guardian Ad Litem for M.E., an infant, Appellants.

No. 98-6276.
Argued Nov. 4, 1998.
Decided March 30, 1999.

Board of education brought action under the Individuals with Disabilities Education Act (IDEA), appealing decision of administrative law judge (ALJ) requiring it to pay for private placement of disabled student, and student brought a counterclaim seeking compensatory education and the nontuition costs of attending private school, and also filed a third-party complaint against various administrators and child study team members, alleging violations of IDEA, the Rehabilitation Act, civil rights statutes, and state law. The United States District Court for the District of New Jersey, Nicholas H. Politan, J., reversed the ALJ and ruled against student on other claims, and student appealed. The Court of Appeals, Scirica, Circuit Judge, held that: (1) free appropriate public education required by the IDEA is not merely more than a trivial educational benefit; (2) student seeking private placement under the IDEA is not required to prove that all public placements are inappropriate; (3) IDEA does not require that a disabled student receive an inappropriate education in public schools and be denied a private placement because it is more restrictive than placement in a public school; (4) award of compensatory education under IDEA is not precluded for years in which a disabled student received an inappropriate education via means other than an individualized education program (IEP); (5) failure of disabled student's parents to object to his placement did not bar claim for compensatory education; and (6) there were material issues of fact, precluding summary judgment on claims under the Rehabilitation Act.

Affirmed in part and vacated and remanded in part.

***242** Rebecca K. Spar (Argued) Cole, Schotz, Meisel, Forman & Leonard, Hackensack, NJ, for Appellants.

Cherie L. Maxwell (Argued) Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, Newark, NJ, for Appellees.

Before: SCIRICA and ALITO, Circuit Judges, and GREEN, District Judge FN*.

FN* The Honorable Clifford Scott Green, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

***243 OPINION OF THE COURT**

SCIRICA, Circuit Judge.

I.

The issue on appeal is whether Ridgewood Board of Education provided its student M.E. with a "free appropriate public education" as required by the Individuals with Disabilities Education Act, 20 U.S.C.A. § 1400 *et seq.* (Supp.1998). The District Court found the board of education satisfied IDEA because it provided M.E. "more than a trivial educational benefit." Because we hold that IDEA imposes a higher standard, we will vacate and remand.

II.

A.

M.E.FN1 is a seventeen-year old high-school student whose learning disabilities qualify him as a "child[ ] with disabilities" under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. § 1400 *et seq.* (Supp.1998). M.E. has attended schools in Ridgewood Board of Education's school district since the fall of 1988, when he started second grade at the Orchard School. At the beginning of the second grade, his teacher noticed that his academic skills were far below those of his classmates and the school moved him to the first grade. At that time, the school told M.E.'s parents that he did not have a learning disability and was in fact very intelligent.

FN1. M.E.'s claims were brought by M.E.'s father as guardian ad litem and his mother as guardian ad litem and individually. To minimize confusion, we also refer to the family as "M.E."

M.E.'s difficulties continued in the first grade. On the recommendation of his teacher, his parents enrolled him in summer school. Despite this extra instruction, M.E.'s second grade teacher commented that his skills remained very weak. Standardized tests conducted during the second grade confirmed his teacher's assessment: M.E.'s scores ranged between the fourth and ninth percentiles. M.E. again attended summer classes on the school's recommendation.

Hoping that a new school might help their son, M.E.'s parents asked Ridgewood to transfer M.E. to Ridge School, another elementary school in the Ridgewood district, for the third grade. But M.E.'s difficulties continued at Ridge. As a result, Ridgewood and M.E.'s parents agreed that M.E. should receive Basic Skills Instruction twice a week and work with his teacher after school twice a week. M.E.'s parents also had M.E. examined by independent learning disabilities teacher consultant Howard Glaser. Glaser's October 1990 evaluation found that there was a great discrepancy between M.E.'s intellectual abilities and his academic performance: although M.E.'s intelligence was at the ninety-fifth percentile, his reading skills were at the second percentile. Glaser also found that M.E. was learning disabled and recommended that M.E.'s parents ask Ridgewood to evaluate M.E.

Ridgewood's Child Study Team (CST) evaluated M.E. in March, 1991. The Ridgewood CST agreed with Glaser's assessment that there was a great discrepancy between M.E.'s abilities and his performance in school. It also noted that the discrepancy was growing and that M.E. was becoming very anxious about his academic performance. But it refused to classify him as learning disabled because it concluded that he was not "perceptually impaired" within the meaning of New Jersey law.FN2 The Ridgewood CST recommended***244** that Ridgewood provide M.E. with "increased multi-sensory support" and that his parents obtain counseling for him.

FN2. N.J. Admin. Code tit. 28, § 6:28 (1991) defines "perceptually impaired" as "a specific learning disability manifested in a disorder in understanding and learning, which affects the ability to listen, think, speak, read, write, spell and/or compute to the extent that special education is necessary for achievement in an educational program." New Jersey uses the phrase "perceptually impaired" instead of IDEA's phrase "specific learning disabilities."

M.E.'s academic difficulties continued throughout the remainder of elementary school. In fifth grade, M.E.'s teacher and his parents asked Ridgewood to evaluate him again. Ridgewood refused to do so. In sixth grade, Ridgewood agreed to re-evaluate M.E. only after a learning disabilities teacher consultant hired by M.E.'s parents recommended it do so. The Ridgewood CST's May-June 1994 evaluations consisted of an educational assessment, a psychological assessment, a health appraisal and a psychiatric evaluation. The CST concluded that M.E. remained far behind his classmates and recommended that he and his parents seek counseling to explore his feelings of inadequacy and depression. But the CST maintained that M.E showed no signs of perceptual deficits, again refused to classify him as perceptually impaired and determined that he was not eligible for special education.

M.E.'s in-class troubles worsened during the seventh grade, where he consistently failed English and received incompletes in other classes. Concerned that Ridgewood's CST had erred in failing to classify M.E. as perceptually impaired, M.E.'s parents asked Ridgewood to provide an evaluation by an independent child study team. After the parents filed for an administrative hearing, Ridgewood agreed to the request and contracted with Bergen Independent Child Study Teams for the evaluation. Ridgewood Director of Special Programs John Campion ordered Bergen not to recommend whether M.E. should be classified as perceptually impaired or how he should be educated. M.E.'s parents strongly disagreed with these limitations and asked the Parent Information Center of New Jersey to intervene. After the Parent Information Center determined that Bergen could make classification and placement recommendations, Bergen agreed to make these recommendations in the final team report it would provide to Ridgewood but not in the preliminary evaluation reports individual team members would prepare.

Bergen's team staffing report diagnosed M.E. with a learning disability in reading and writing and recommended that Ridgewood classify him as perceptually impaired. M.E.'s parents allege that Ridgewood intentionally withheld this report from them despite their repeated requests and that Ridgewood gave them the team staffing report only after the New Jersey Department of Education ordered it to do so.

On March 17, 1995, Ridgewood agreed to classify M.E. as perceptually impaired. It recommended that he continue in the Basic Skills Instruction he had been receiving for six years and developed an individualized education program (IEP) for the 1995-96 school year. The IEP called for thirty minutes of individual Orton Gillingham[FN3] instruction in reading and spelling, resource center instruction in English and supplementary instruction in science and social studies. M.E.'s parents maintain they objected to the IEP and allege that Ridgewood coerced them to agree to it by threatening to break off all discussions concerning M.E.'s educational program unless they approved the IEP. The IEP proved ineffective. M.E. made minimal improvements and Ridgewood changed his grades to pass-fail in order to minimize the impact on his self-esteem.

> FN3. The Orton-Gillingham technique is a “linguistic-phonetic approach [towards reading] with an emphasis on teaching the student to learn how to decode words.” *Wall v. Mattituck-Cutchogue Sch. Dist.*, 945 F.Supp. 501, 505 n. 4 (E.D.N.Y.1996). It is designed to “enhance a dyslexic individual's capacity to read, write, and spell.” *Pascoe v. Washingtonville Cent. Sch. Dist.*, 1998 WL 684583, at *1 (S.D.N.Y. Sep.29, 1998).

At the end of the eighth grade, Ridgewood decided that M.E. should no longer be placed in regular classes. For the 1996-97 school year, it proposed an IEP that provided for resource center instruction in all academic classes, two daily periods***245** of supplementary instruction with a teacher trained in the Wilson reading program and speech/language therapy once a week. It also scheduled regular classroom instruction for physical education and electives. M.E.'s parents disagreed with the IEP, claiming it provided fewer services than his inadequate 1995-96 IEP and arguing it would stigmatize M.E., damaging his already-fragile self-esteem. On May 27, 1996, M.E.'s parents requested a due process hearing before the New Jersey Department of Education, contending that Ridgewood's proposed IEP for 1996-97 failed to provide a “free appropriate public education” within the meaning of IDEA and requesting that M.E. be placed in private school at Ridgewood's expense. Concerned that Ridgewood would not provide their son an adequate education, M.E.'s parents began to visit other schools and eventually asked Ridgewood to place M.E. at the Landmark School, a private school in Massachusetts that specializes in educating students with learning disabilities. After Ridgewood refused their request, M.E.'s parents then asked that Ridgewood pay for him to

attend Landmark's summer program. After Ridgewood refused, M.E. attended Landmark's summer program at his parents' expense and, according to his instructors there, made steady and considerable progress.

B.

While M.E. was at Landmark, an Administrative Law Judge conducted seven days of hearings on his parents' complaint. In the fall of 1996, M.E. returned to Ridgewood to begin ninth grade. On November 27, 1996, the ALJ held that Ridgewood's 1996-97 IEP failed to provide M.E. with a free appropriate public education. In arriving at this conclusion, she considered the testimony of M.E.'s parents, Howard Glaser, Dr. Mae Balaban of Bergen, M.E.'s classroom teachers and the Ridgewood CST. She also considered a letter written by Dr. Balaban on November 4, 1996, over a month after the last hearing. In that letter, Dr. Balaban criticized the 1996-97 IEP, stating that she was "convinced that [it] will not result in ... an adequate education." She strongly recommended that M.E. be placed at Landmark, where he would "be given the chance to develop at least average reading and writing skills so as to become a functional adult."

The ALJ then ordered Ridgewood to pay M.E.'s tuition at Landmark, holding such a placement is warranted when "it is shown that it is not appropriate to provide educational services for the pupil in a public setting." Concluding that M.E.'s Landmark placement would remain appropriate until Ridgewood "offers an appropriate program and placement", the ALJ nonetheless refused to order Ridgewood to pay for the non-tuition costs of the Landmark placement. The ALJ also denied M.E.'s request for compensatory education, finding that Ridgewood's failure to classify M.E. as disabled did not rise to the required level of bad faith or willful misconduct. Finally, the ALJ concluded that M.E. was entitled to reimbursement for the tuition costs of attending Landmark's summer program in 1996.

C.

On January 20, 1997, pursuant to the ALJ's decision, M.E. enrolled in Landmark at Ridgewood's expense. In April 1997, Ridgewood filed a complaint in federal court under 20 U.S.C.A. § 1415(i)(2) (1998), an action that had the effect of appealing the ALJ's decision. M.E. brought a counterclaim seeking compensatory education and the nontuition costs of attending Landmark. He also filed a third-party complaint against various Ridgewood administrators and child study team members, alleging violations of IDEA, the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.*, 42 U.S.C. § 1985(3), 42 U.S.C. § 1983, New Jersey state law and the United States Constitution and seeking compensatory and punitive damages under 42 U.S.C. § 1983.

On July 30, 1998, the District Court reversed the ALJ's decision that Ridgewood***246** had not provided M.E. a free appropriate education. The District Court also held that the ALJ should not have considered Dr. Balaban's November 4, 1996 letter because Ridgewood never consented to its admission and because Ridgewood had not been given a "full and fair opportunity" to cross-examine Dr. Balaban on the portions of the letter that contradicted her live testimony before the ALJ.

In finding that Ridgewood had provided M.E. a free appropriate public education, the District Court stated that IDEA requires only that an IEP provide a disabled student with "more than a trivial educational benefit" and, relying on the testimony of Ridgewood's witnesses and Dr. Balaban, concluded that Ridgewood's IEP had done so. The District Court found that Dr. Balaban never characterized M.E.'s IEP as "inappropriate" but testified that the IEP would provide M.E. with an educational benefit.

Because it reversed the ALJ's determination that Ridgewood had not provided M.E. a free appropriate public education, the District Court also reversed the ALJ's decision that Ridgewood pay M.E.'s tuition at Landmark, stating that even if M.E.'s IEP were inappropriate, no evidence suggested that he could not be educated in a public setting.

The District Court affirmed the ALJ's decision to deny M.E. compensatory education and reimbursement for tutoring expenses. It rejected the ALJ's conclusion that compensatory education requires bad faith, stating our opinion in *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3d Cir.1995) established the right to compensatory education once the school district knows or should have known its IEP has failed. But the District Court held M.E. had no right

to compensatory education because M.E.'s IEP had not been a failure. At the same time, the District Court dismissed M.E.'s request for expenses and costs in the administrative proceedings because M.E. was no longer the prevailing party.

The District Court also granted Ridgewood summary judgment on M.E.'s third-party complaint seeking compensatory and punitive damages under 42 U.S.C. § 1983. M.E.'s § 1983 claims asserted violations of § 504 of the Rehabilitation Act of 1973, the equal protection clause of the Fourteenth Amendment, 42 U.S.C. § 1985 and IDEA. The District Court dismissed M.E.'s § 504 claims because he had not demonstrated he was " 'excluded from participation in, denied the benefits of, or subject to discrimination at, the school' " and dismissed his § 1985 claim because he had not shown that the alleged violation of his rights was motivated by "racial or 'otherwise class-based' animus." It dismissed M.E.'s IDEA claims because it determined Ridgewood had fully complied with IDEA. In addition, the District Court held all of M.E.'s third-party claims failed "to overcome the qualified immunity enjoyed by municipal employees sued in their individual capacity."

M.E. appealed to this court on August 26, 1998. Before we heard argument, the District Court on September 1, 1998 enjoined implementation of its July 30 order, an act that kept M.E. enrolled in Landmark at Ridgewood's expense. On September 9, a motions panel of this court stayed the District Court's September 1 order, which effectively reinstated the District Court's July 30 order. But M.E. remained at Landmark pursuant to an agreement between his parents and the school. At oral argument on November 4, 1998, M.E. asked this panel to require Ridgewood to pay his Landmark expenses. After oral argument, we ordered Ridgewood to comply with the District Court's September 1 order and pay M.E.'s tuition, residential and transportation costs at Landmark. M.E. remains at Landmark at the present time.

III.

A.

[1] The initial question is whether the District Court erred in deciding that ***247** Ridgewood's 1996-97 IEP provided M.E. with a free appropriate education.[FN4] We review the grant of summary judgment under a plenary standard. *See In re Chambers Dev. Co.*, 148 F.3d 214, 229 n. 12 (3d Cir.1998).

> FN4. In his brief, M.E. contends the District Court applied an improper standard of review to the ALJ's decision that his 1996-97 IEP was inappropriate. Because we will vacate the District Court's judgment that the IEP was appropriate, we need not determine whether the District Court applied the proper standard of review to the ALJ's decision.

[2] Congress enacted the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. § 1400 *et seq.*, to assist states in educating disabled children. In order to receive funding under IDEA, a state must provide all disabled students with a "free appropriate public education." 20 U.S.C.A. § 1412(1) (Supp.1998).[FN5] This education must be tailored to the unique needs of the disabled student through an individualized educational program ("IEP"). *See Board of Educ. v. Rowley*, 458 U.S. 176, 181-82, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982).

> FN5. IDEA defines "children with disabilities" as children who need special education because of "mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities." 20 U.S.C.A. § 1401(a)(1)(A)(i) (Supp.1998).

[3] IDEA leaves to the courts the task of interpreting "free appropriate public education." *See Rowley*, 458 U.S. at 188-89, 102 S.Ct. 3034. The Supreme Court began this task in *Board of Education v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982), holding that while an IEP need not maximize the potential of a disabled student, it must provide "meaningful" access to education, *id.* at 192, 102 S.Ct. 3034, and confer "some educational benefit" upon the child for whom it is designed. *Id.* at 200, 102 S.Ct. 3034. In determining the quantum of educational benefit necessary to satisfy IDEA, the Court explicitly rejected a bright-line rule. Noting that children of different abilities are capable of greatly different achievements, the Court instead adopted an approach that requires a court to consider the

potential of the particular disabled student before it. *See* *id.* at 202, 102 S.Ct. 3034; *see also* *Hall v. Vance Cty. Bd. of Educ.*, 774 F.2d 629, 635 (4th Cir.1985) (stating that *Rowley* holds that "no single substantive standard can describe how much educational benefit is sufficient to satisfy [IDEA]").

[4] We first interpreted the phrase "free appropriate public education" in *Board of Education v. Diamond*, 808 F.2d 987 (3d Cir.1986), when we rejected the notion that the provision of any educational benefit satisfies IDEA, holding that IDEA "clearly imposes a higher standard." *Id.* at 991. Examining the quantum of benefit necessary for an IEP to satisfy IDEA, we held in *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3d Cir.1988), that IDEA "calls for more than a trivial educational benefit" and requires a satisfactory IEP to provide "significant learning," *id.* at 182, and confer "meaningful benefit." *Id.* at 184. We also rejected the notion that what was "appropriate" could be reduced to a single standard, *id.*, holding the benefit "must be gauged in relation to the child's potential." *Id.* at 185. When students display considerable intellectual potential, IDEA requires "a great deal more than a negligible [benefit]." *Id.* at 182.

As noted, the District Court held that an IEP need only provide "more than a trivial educational benefit" in order to be appropriate, equating this minimal amount of benefit with a "meaningful educational benefit." But the standard set forth in *Polk* requires "significant learning" and "meaningful benefit." The provision of merely "more than a trivial educational benefit" does not meet these standards.

***248** It appears also that the District Court may not have given adequate consideration to M.E.'s intellectual potential in arriving in its conclusion that Ridgewood's IEP was appropriate. Although its opinion discussed the IEP in considerable detail, it did not analyze the type and amount of learning of which M.E. is capable. As we have discussed, *Rowley* and *Polk* reject a bright-line rule on the amount of benefit required of an appropriate IEP in favor of an approach requiring a student-by-student analysis that carefully considers the student's individual abilities.

[5] Therefore we will vacate the judgment of the District Court on this issue and remand for proceedings consistent with this opinion.[FN6]

FN6. We see no error in the District Court's decision to strike Dr. Balaban's November 4, 1996 letter for the reasons stated by the District Court.

B.

Because we have vacated the District Court's judgment that Ridgewood provided M.E. with a free appropriate public education, we must review all the judgments that flow from it, specifically, that M.E. was not entitled to placement at Landmark, that he was not entitled to compensatory education, that he was not entitled to expenses and costs as the prevailing party at the administrative hearing and that he could assert no third-party claims under 42 U.S.C. § 1983.

1. Placement at Landmark

[6] The District Court held that Ridgewood was not required to pay M.E.'s tuition at Landmark for the 1996-1997 school year because his IEP had provided him a free appropriate public education. But even if M.E.'s IEP were inappropriate, the District Court said there was no "evidence in the record suggesting that it is not appropriate to provide educational services for [M.E.] in a public setting." M.E. contends the District Court's approach requires a student seeking private placement to show not only that private placement is appropriate but also that all public placements are inappropriate. This approach, he argues, places an impossible burden on the student. We are not convinced that M.E. correctly interpreted the District Court's holding. Nonetheless, we do not believe that IDEA requires the student to prove that all public placements are inappropriate.

[7][8] To determine when a disabled student is entitled to a private placement, we look to *Florence County School District Four v. Carter*, 510 U.S. 7, 114 S.Ct. 361, 126 L.Ed.2d 284 (1993), in which the Supreme Court held that a student may be entitled to reimbursement if "a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under [IDEA]." *Id.* at 15, 114 S.Ct. 361. Under *Florence County*, a

court may award a disabled student the cost of his private placement if (1) the court determines the student's IEP is inappropriate and (2) the student demonstrates that the private placement he seeks is proper. *See* *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119, 129 (2d Cir.1998).[FN7] A private placement may be proper if it is appropriate and provided in the least restrictive educational environment. *See* *Oberti v. Board of Educ.*, 995 F.2d 1204, 1213 (3d Cir.1993). To meet the *Florence County* standard, a disabled student is not required to demonstrate that he cannot be educated in a public setting. Under IDEA, the relevant question is not whether a student could in theory receive an appropriate education in a public setting ***249** but whether he will receive such an education. We note the ALJ concluded that Landmark would remain appropriate until Ridgewood offered an appropriate IEP.

> FN7. We note that the District Court has the discretion to determine the appropriate amount of reimbursement. *See* *Florence County*, 510 U.S. at 16, 114 S.Ct. 361 (stating that reimbursement is equitable relief to be awarded after consideration of all relevant factors). For example, the student cannot receive total reimbursement if the fees of the private school are unreasonable.

[9][10] Ridgewood contends that the "least restrictive educational environment" requirement bars M.E. from attending Landmark because Landmark's residential program is more restrictive than Ridgewood's. Under this approach, M.E. could receive an inappropriate education in Ridgewood's schools but be denied a private placement because it is more restrictive than placement in a Ridgewood public school. But IDEA requires that disabled students be educated in the least restrictive *appropriate* educational environment.[FN8] *See* *Oberti v. Board of Educ.*, 995 F.2d 1204, 1213 (3d Cir.1993) (stating that IDEA requires an education to be appropriate and provided in the least restrictive educational environment); *Kruelle v. New Castle Cty. Sch. Dist.*, 642 F.2d 687, 695 (3d Cir.1981) (stating that inappropriate educational environments are not relevant for "least restrictive environment" analysis); *see also* *Cleveland Heights-University Heights City Sch. Dist. v. Boss*, 144 F.3d 391, 400 (6th Cir.1998) (holding that private school's failure to satisfy least restrictive environment requirement does not bar parents' claim for reimbursement); *Board of Educ. of Murphysboro v. Illinois Bd. of Educ.*, 41 F.3d 1162, 1168 (7th Cir.1994) (stating that the least restrictive environment requirement "was not developed to promote integration with non-disabled peers at the expense of other IDEA educational requirements" and does not apply unless education is appropriate).

> FN8. We also note that the appropriateness of a private placement is evaluated by the same standard set forth in part III.A. of this opinion. In other words, parents of a disabled student need not seek out the perfect private placement in order to satisfy IDEA.

We are unable to determine if the District Court applied this standard in concluding M.E. was not entitled to placement at Landmark and therefore will remand this issue to the District Court for reconsideration.

2. Compensatory Education

[11] Under IDEA, a disabled student is entitled to a free appropriate public education until the student reaches age twenty-one. *See* 20 U.S.C.A. § 1412(2)(B). An award of compensatory education allows a disabled student to continue beyond age twenty-one in order to make up for the earlier deprivation of a free appropriate public education. *See* *M.C. v. Central Reg. Sch. Dist.*, 81 F.3d 389, 395 (3d Cir.1996). In *Carlisle Area School District v. Scott P.*, 62 F.3d 520 (3d Cir.1995), we declined to state a precise standard for the award of compensatory education, but noted that most of our cases awarding compensatory education involve egregious circumstances or the flagrant failure to comply with IDEA. *Id.* at 536-37. One year later, in *M.C. v. Central Regional School District*, we "flesh[ed] out the standard left sparse by *Carlisle* " and held that the right to compensatory education accrues when the school knows or should know that its IEP is not providing an appropriate education. *See* *M.C.*, 81 F.3d at 396. We specifically rejected a bad faith or egregious circumstances standard, stating that "a child's entitlement to special education should not ... be abridged because the [school] district's behavior did not rise to the level of slothfulness or bad faith." *Id.* at 397.

[12] Applied narrowly, *M.C.*'s "inappropriate IEP" requirement might prohibit the award of compensatory education for years in which a disabled student received an inappropriate education via means other than an IEP. [FN9] But we do not think the ***250** *M.C.* court intended such an application because it held the denial of an appropriate education-and not merely the denial of an appropriate IEP-creates the right to compensatory education. *See* *M.C.*, 81

F.3d at 391-92 ("A school district that knows or should know that a child has an inappropriate [IEP] or is not receiving more than a de minimis benefit must, of course, correct the situation. We hold that ... a disabled child is entitled to compensatory education for a period equal to the deprivation."); *id.* at 395 (citation omitted) ("Under IDEA, a disabled student is entitled to free, appropriate education until he or she reaches age twenty-one. A court award of compensatory education requires a school district to ... make up for any earlier deprivation."). IDEA's central goal is that disabled students receive an appropriate education, not merely an appropriate IEP. Therefore, a disabled student's right to compensatory education accrues when the school knows or should know that the student is receiving an inappropriate education.

> FN9. In *M.C.*, we stated that "the right to compensatory education should accrue from the point that the school district knows or should know of the IEP's failure," *M.C.*, 81 F.3d at 396, and that an "award of compensatory education require[s] a finding that an IEP was inappropriate." *Id.* at n. 6. The *M.C.* court did not have to consider whether compensatory education was awardable for years in which a disabled student had no IEP because the plaintiff did not ask for compensatory education for such years.

The District Court rejected M.E.'s request for compensatory education and reimbursement for tutoring because it believed those remedies were available only when an IEP was inappropriate. As noted, it concluded that M.E.'s 1996-97 IEP was appropriate. M.E. maintains that he never received a free appropriate public education from Ridgewood and that he presented substantial evidence that Ridgewood knew or should have known he was disabled shortly after he enrolled at the Orchard School in 1988. He contends that the District Court erred as a matter of law when it dismissed his claim for compensatory education from 1988 to 1997 after a finding that M.E. had received a free appropriate education during the 1996-97 school year. He also contends his parents are entitled to reimbursement for $6,400 in tutoring expenses incurred from 1989 to 1992.

Ridgewood responds that M.E. cannot recover compensatory education because he received a free appropriate public education. It also contends there is no evidence of culpable conduct or egregious circumstances, asserting it provided M.E. with extensive assistance. Further, Ridgewood argues M.E.'s parents' failure to object to his programs and placements from 1988 to 1996 created "presumptively a free and appropriate education" during those years and bars claims for compensatory education. Finally, Ridgewood asserts that all compensatory education claims involving events that occurred more than two years ago are barred by a two-year statute of limitations adopted by this court in *Jeremy H. v. Mount Lebanon School District*, 95 F.3d 272 (3d Cir.1996).

[13][14][15] Whether Ridgewood's 1996-97 IEP provided M.E. with an appropriate education will be decided by the District Court on remand. As we stated in *M.C.*, an award of compensatory education does not require a finding of bad faith or egregious circumstances. *See* *M.C.*, 81 F.3d at 397. Furthermore, failure to object to M.E.'s placement does not deprive him of the right to an appropriate education. In *M.C.*, we held that "a child's entitlement to special education should not depend upon the vigilance of the parents." *See* *M.C.*, 81 F.3d at 396. Finally, Ridgewood's statute of limitations argument lacks merit and its reliance on *Jeremy H.* is misplaced. In *Jeremy H.* we expressly declined to choose a statute of limitations for IDEA actions, *see* *Jeremy H.*, 95 F.3d at 280 n. 15 ("We ... need not, and do not, decide between a two-year and a six-year limitations period."), but decided the limitations period begins to run "once the state administrative process has run its course." *Id.* at 280. Also, *Jeremy H.* considered the appropriate statute of limitations for IDEA claims brought in Pennsylvania, not New Jersey. *See* *Wilson v. Garcia*, 471 U.S. 261, 266-67, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985) (stating that if a federal statute ***251** does not specify a statute of limitations, courts apply the relevant statute of limitations of the forum state); *Beauty Time, Inc. v. Vu Skin Sys. Inc.*, 118 F.3d 140, 144 (3d Cir.1997) (same); *Tokarcik v. Forest Hills Sch. Dist.*, 665 F.2d 443, 448 (3d Cir.1981) (same).

In assessing the statute of limitations governing a compensatory education claim brought in New Jersey, we must determine the most analogous cause of action under New Jersey law. An analogous cause of action is a "claim [ ] against [a] public entity" alleging "injury or damage to person," N.J. Stat. Ann. § 59:8-8, under the New Jersey Tort Claims Act, in which the statute of limitations is two years.[FN10] We have previously held that IDEA claims closely resemble actions to recover damages for injuries caused by another. *See* *Tokarcik*, 665 F.2d at 454. Another analogous cause of action might be a basic personal injury claim, which also carries a two-year statute of limitations. *See* N.J.

Stat. Ann. § 2A:14-2.

FN10. Such a claim must be brought against a "public entity", which includes "any county, municipality, district, public authority, public agency and any other ... public body in the State." N.J. Stat. Ann. § 59:1-3. Ridgewood meets this definition.

[16] Because M.E. brought his claim for compensatory education within either statute of limitations, we need not decide whether his claim is more analogous to a Tort Claims Act claim or a basic personal injury claim. Under either cause of action, the statute begins to run once plaintiff 's cause of action accrues. *See* N.J. Stat. Ann. § 59:8-8; N.J. Stat. Ann. § 2A:14-2. As noted, *Jeremy H.* held that a federal IDEA claim accrues at the conclusion of the state administrative process. *See Jeremy H.*, 95 F.3d at 280. The limitations period for M.E.'s claim began to run on November 27, 1996, when the ALJ issued her ruling, and M.E. filed his complaint on July 3, 1997.

[17] Therefore we conclude the District Court erred when it dismissed M.E.'s claim for compensatory education for the years 1988-1996 on a finding that his 1996-1997 IEP was appropriate. The appropriateness of M.E.'s 1996-1997 education is irrelevant to the appropriateness of his education from 1988 to 1996.[FN11] In addition, our decision to vacate the judgment that M.E.'s 1996-1997 IEP was appropriate compels us to vacate the grant of summary judgment on M.E.'s claim for compensatory education for the 1996-1997 school year. On remand, the District Court should determine whether M.E. received an appropriate education in each school year and, if it concludes he did not, determine when Ridgewood knew or should have known of that fact.

FN11. Because the dismissal of M.E.'s claim for 1989-1992 tutoring expenses was also based on the conclusion that the 1996-97 IEP was appropriate, we will vacate the dismissal of tutoring expenses claim and remand it to the District Court.

3. Costs and Fees at the Administrative Hearing

[18] A plaintiff may obtain fees and costs when he "prevails," or obtains merits-based relief that " 'materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.' " *D.R. v. East Brunswick Bd. of Educ.*, 109 F.3d 896, 902 (3d Cir.1997) (quoting *Farrar v. Hobby*, 506 U.S. 103, 112, 113 S.Ct. 566, 121 L.Ed.2d 494 (1992)). The District Court denied M.E.'s request for costs and fees because its reversal of the ALJ's decision meant that M.E. was no longer a prevailing party. Our decision to vacate the District Court's reversal requires that we vacate and remand the denial of fees and costs.

4. Third-Party Claims Under 42 U.S.C. § 1983

[19] 42 U.S.C. § 1983 does not confer substantive rights but "merely redresses the deprivation of ... rights ... created by the Constitution or federal statute." ***252** *W.B. v. Matula*, 67 F.3d 484, 493 (3d Cir.1995). In other words, a § 1983 suit must allege the violation of a federal right provided elsewhere. The District Court granted Ridgewood summary judgment on all of M.E.'s third-party claims because it concluded the third-party complaint asserted individual capacity claims against which the third-party defendants enjoyed qualified immunity. It also held that many of the claims were subject to dismissal on other grounds.

[20] In reviewing the grant of summary judgment, we apply the same standards as does a District Court. We will affirm the grant of summary judgment only if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *See Newport Associates Development Co. v. Travelers Indemnity Co.*, 162 F.3d 789 (3d Cir.1998). Once the moving party points to evidence demonstrating no issue of material fact exists, the non-moving party has the duty to set forth specific facts showing that a genuine issue of material fact exists and that a reasonable factfinder could rule in its favor. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); *Groman v. Township of Manalapan*, 47 F.3d 628, 633 (3d Cir.1995). Speculation and conclusory allegations do not satisfy this duty. *Groman*, 47 F.3d at 637.

a. Nature of Third-Party Complaint

In order to prevail on a § 1983 suit brought against defendants in their official capacity, the plaintiff must establish

that the deprivation of his rights was the result of an official policy or custom. *See* *Board of Cty. Com'rs v. Brown*, 520 U.S. 397, 400, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997); *Monell v. New York City Dept. of Soc. Servs.*, 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

[21] The District Court held that M.E. provided no evidence that third-party defendants acted pursuant to a municipal policy. M.E. contends his third-party complaint was "clearly brought against third-party defendants in both their individual and official capacities" and that the third-party defendants acted pursuant to "some policy or custom" of Ridgewood. We disagree. M.E. has provided no evidence that Ridgewood's policy is to ignore the responsibilities imposed by IDEA. Rather the evidence presented was that Ridgewood failed to fulfill its responsibilities. Therefore we will affirm the order of the District Court granting summary judgment on this issue.

b. IDEA Claims

[22] Initially we note that the Court of Appeals for the Fourth Circuit recently held that a plaintiff may not sue under 42 U.S.C. § 1983 for IDEA violations because "IDEA provides a comprehensive remedial scheme for violations of its own requirements." *Sellers v. School Board*, 141 F.3d 524, 529 (4th Cir.1998). But we must follow our decision in *W.B. v. Matula*, 67 F.3d 484 (3d Cir.1995), which held that IDEA claims may be actionable under § 1983. The District Court entered summary judgment on M.E.'s § 1983 claims alleging IDEA violations because it held Ridgewood had "fully complied" with IDEA. M.E. contends the District Court erred when it entered summary judgment on his IDEA claims alleging violations from 1988 to September 1996 on a finding that his 1996-97 IEP was appropriate. He claims that from 1988 to 1996 Ridgewood failed in its obligation to timely evaluate him, to inform his parents of their rights and to provide him with special education.

Because the District Court discussed only the 1996-97 school year, it would appear that the grant of summary judgment on M.E.'s IDEA claims was based solely on a finding that the 1996-97 IEP was appropriate. Because a satisfactory 1996-97 IEP has no bearing on whether Ridgewood complied with IDEA before the 1996 school year, we will vacate the grant ***253** of summary judgment on M.E.'s IDEA claims.

c. Section 504 Claims

[23] The Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq.* (Supp.19 98), prohibits discrimination on the basis of disability in federally funded programs. In order to establish a violation of § 504 of the Rehabilitation Act, a plaintiff must prove that (1) he is "disabled" as defined by the Act; (2) he is "otherwise qualified" to participate in school activities; (3) the school or the board of education receives federal financial assistance; and (4) he was excluded from participation in, denied the benefits of, or subject to discrimination at, the school. *W.B. v. Matula*, 67 F.3d 484, 492 (3d Cir.1995) (quoting *Nathanson v. Medical College of Pennsylvania*, 926 F.2d 1368, 1380 (3d Cir.1991)). In addition, the plaintiff must demonstrate that defendants know or should be reasonably expected to know of his disability. *See id.* But a plaintiff need not prove that defendants' discrimination was intentional. *See id.* We have held that there are few differences, if any, between IDEA's affirmative duty and § 504's negative prohibition and have noted that the regulations implementing § 504 require that school districts "provide a free appropriate education to each qualified handicapped person in [its] jurisdiction." *Id.* at 492-93.

[24] The District Court granted Ridgewood summary judgment on M.E.'s § 504 claim[s] because it found "no evidence ... that M.E. 'was excluded from participation in, denied the benefits of, or subject to discrimination' " at Ridgewood schools. M.E. argues that Ridgewood violated § 504 when it failed to identify him as learning disabled, when it failed to inform his parents of Ridgewood's IDEA responsibilities and when it failed to provide him a free appropriate public education.

[25][26] We believe M.E. has presented evidence demonstrating that a genuine issue of fact exists. In *W.B. v. Matula*, we held that a school's failure to notify parents of its IDEA duties could violate § 504, *see* *Matula*, 67 F.3d at 501 n. 13, and also held that § 504 imposes a "child find" duty, or the duty to identify a disabled child "within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability." *Id.* at 500-01. In addition, the failure to provide a free appropriate public education violates IDEA and therefore could violate § 504. *See* *id.* at 492-93 (stating that IDEA and § 504 impose nearly identical duties and noting that § 504's implementing

regulations require that schools provide a “free appropriate public education”). Therefore we will vacate the District Court's grant of summary judgment on M.E.'s § 504 claims and remand for proceedings consistent with this opinion.[FN12]

FN12. M.E.'s § 504 claims assert both procedural and substantive violations. In a footnote, the District Court stated “[t]he ALJ determined that [Ridgewood] had complied with IDEA's procedural requirements. This Court finds that the ALJ's conclusion is supported by a preponderance of the evidence in the record.” We do not read the ALJ's opinion as finding that Ridgewood complied with IDEA's procedural requirements. The ALJ merely concluded that any procedural violations did not involve bad faith. We do not think this conclusion supports a finding that Ridgewood complied with IDEA's procedural requirements.

d. Section 1985 Conspiracy Claim

[27] 42 U.S.C. § 1985(3) prohibits conspiracies predicated on “racial, or perhaps otherwise class-based, invidiously discriminatory animus.” *Griffin v. Breckenridge*, 403 U.S. 88, 102, 91 S.Ct. 1790, 29 L.Ed.2d 338 (1971). In order to state a claim under 42 U.S.C. § 1985(3), the plaintiff must allege “(1) a conspiracy; (2) motivated by a racial or class based discriminatory animus designed to deprive, directly or indirectly, any person or class of persons ... [of] the equal protection of the laws; (3) an act in furtherance of the conspiracy; and (4) an injury to person or property or the deprivation***254** of any right or privilege of a citizen of the United States.” *Lake v. Arnold*, 112 F.3d 682, 685 (3d Cir.1997). In *Lake*, we held that the mentally retarded are a class protected by § 1985(3), but we expressly declined to make this determination with respect to handicapped persons. *See id.* at 685-86 & n. 5.

[28] The District Court granted summary judgment on M.E.'s § 1985 claim because it found no evidence that suggested the alleged violation of M.E.'s rights was motivated by racial or “otherwise class-based” animus. We agree. Even were we to decide that § 1985 protects the disabled in general, there is no evidence that Ridgewood's alleged actions were motivated by discriminatory animus towards the disabled.

e. Section 1983 Conspiracy Claim

[29] Count Seven of M.E.'s complaint also alleges a § 1983-only conspiracy. In order to prevail on a conspiracy claim under § 1983, a plaintiff must prove that persons acting under color of state law conspired to deprive him of a federally protected right. *See Dennis v. Sparks*, 449 U.S. 24, 29, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980); *Lake v. Arnold*, 112 F.3d 682, 689 (3d Cir.1997). Unlike § 1985(3), a § 1983 conspiracy claim does not require that the conspiracy be motivated by invidious discrimination.

[30] We will affirm the grant of summary judgment on this claim. M.E. has not demonstrated that a genuine issue of material fact exists. At most he has supplied ambiguous allegations and vague inferences that cannot defeat summary judgment. *See Groman*, 47 F.3d at 633.

f. Qualified Immunity

[31][32][33] A municipal official sued in his individual capacity enjoys qualified immunity if his conduct “does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” *W.B. v. Matula*, 67 F.3d 484, 499 (3d Cir.1995) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). To defeat qualified immunity in an IDEA action, the plaintiff must show that “ ‘the particular actions taken by defendants were impermissible under law established at that time.’ ” *Matula*, 67 F.3d at 500 (quoting *P.C. v. McLaughlin*, 913 F.2d 1033, 1040 (2d Cir.1990)). We review the grant of qualified immunity *de novo. See Torres v. McLaughlin*, 163 F.3d 169, 170 (3d Cir.1998).

The District Court held that the third-party defendants could assert qualified immunity because there was not “even a scintilla of evidence from which a reasonable factfinder could infer that the third-party defendants violated M.E.'s clearly established federal rights”. Because we addressed qualified immunity in IDEA claims in *W.B. v. Matula*, 67 F.3d 484 (3d Cir.1995), we will vacate and remand so that the District Court may reconsider its decision in light of *Matula.*

g. State Law Claims

The District Court dismissed M.E.'s state law claims alleging violations of the New Jersey Law Against Discrimination and the New Jersey Constitution's guarantee of a thorough and efficient education because it determined third-party defendants enjoyed qualified immunity. Because we have vacated the decision that third-party defendants enjoy qualified immunity, we will vacate the dismissal of M.E.'s state law claims.

IV.

For these reasons, the judgment is affirmed in part and vacated and remanded in part.

C.A.3 (N.J.),1999.
Ridgewood Bd. of Educ. v. N.E. ex rel. M.E.
172 F.3d 238, 133 Ed. Law Rep. 748

END OF DOCUMENT

Appendix M: Sample Due Process Complaint Notice

OUTLINE OF A "DUE PROCESS COMPLAINT NOTICE"

Date

Method of Correspondence (Example: *"Via e-mail and first class mail")*

Name of School District's Attorney or Special Education Director
Address

Re: Student Name / School District Name – Due Process Complaint Notice

Dear [School District's Attorney or Special Education Director],

Paragraph 1: Introduce yourself and your child. Let the reader know that this is a Due Process Complaint, and provide the basic information required in the complaint.
Example: My name is [name of parent]. This is a Due Process Complaint filed on behalf of my [son or daughter, first and last name,] against the [name of school district]. We reside at [address].

Paragraph 2: Provide relevant information about your child's diagnoses and identification as a special education student. Write a brief statement (one or two sentences) about why you are filing the complaint.
You may want to use the following questions as a guide for this paragraph:

- Is the student identified as a special education student? If yes, when were they identified?
  - What is the date on the first Evaluation Report and your child's first IEP?
- What is the disability category under which they have been identified by the school district?
- What type of special education services do they currently receive from the school district?
- Why are you filing this complaint at this time? What made you decide to file it at this time?

Nature of the Problem

This section should describe the problem that led you to file a Due Process Complaint. It should describe the problem in enough detail that the school district will understand why you are filing the complaint and what issues you will be asking the Hearing Officer to decide. In this section, you may want to describe why you believe the school district is violating the law, or why your

position is legally correct. You may need to educate yourself on the law in order to write this section of the complaint. You will find resources on how to learn about the law in this manual, as well as phone numbers for organizations you can call for assistance in understanding the law.

Proposed Resolution

This section should describe what you are asking the District to do in order to resolve your complaint.

For example, depending on the issues involved in your complaint, you may be asking the District to do one or more of the following in order to resolve your complaint:

- Provide an evaluation for your child
- Provide an appropriate placement for your child
- Provide the services necessary for your child to receive an appropriate education in the least restrictive environment
- Provide educational services to make up for services they have failed to provide in the past
- Conclude that your child's behaviors are a manifestation of his or her disability and that they cannot change your child's placement for disciplinary reasons

Note: Your proposed resolution may not include any of the examples listed above. Your proposed resolution should be specific to your complaint, and should describe what you want the District to do to resolve your complaint.

Sincerely,

Your Name

cc: Office for Dispute Resolution (via e-mail)

IMPORTANT INFORMATION:

You have the option of filling out the "Due Process Complaint Form" that is available through the Office for Dispute Resolution. You may also choose to write your Due Process Complaint Notice in the form a letter to the School District or the School District's Attorney (a sample of this format is included above). To file the complaint, you must send a copy to either the District or their Attorney. You must also send a copy of your complaint to the Office for Dispute Resolution (ODR). To file your complaint with ODR, attach it to an e-mail addressed to odr@odr-pa.org.

It is important for you to understand that your complaint must provide enough information to allow the District to understand why you are filing the complaint and what you are asking them to do to resolve it. If you do not, your complaint may be deemed insufficient. If your complaint is deemed insufficient, you may ask the Hearing Officer for an opportunity to amend it. It is also important for you to understand that your complaint must include every issue that you would like the Hearing Officer to decide. If you fail to raise an issue in your complaint, the Hearing Officer will not permit you to raise that issue at your Due Process Hearing.

This document provides an example of one way to write a Due Process Complaint Notice. You do not have to follow this format, but you MUST include the following information in your complaint:

1. Name of Child
2. Child's Address
3. Name of School Child Attends
4. A description of the nature of the problem, including facts related to the problem.
5. A proposed resolution to the problem, to the extent that you know of one and can offer one.

SAMPLE "DUE PROCESS COMPLAINT NOTICE"

May 20, 2015

Via e-mail and first class mail

Mr. Joseph Smith, Esquire
Smith & Lucas
555 Main St.
Hometown, PA 15155

Re: Jane Doe / Hometown School District – Due Process Complaint Notice

Dear Mr. Smith,

My name is Joanna Doe. This is a Due Process Complaint filed on behalf of my daughter, Jane Doe, against the Hometown School District. We reside at 123 Main Street Hometown, PA 15155, an address located within the Hometown School District.

Jane is an 18-year-old student with Down Syndrome. She currently attends 12th grade at Hometown High School. The District has identified Jane as a student in need of special education, with a primary disability of Intellectual Disability and a secondary disability of Speech and Language Impairment. Through her IEP, Jane receives learning support, physical therapy, occupational therapy, and speech-language therapy.

Nature of the Problem

At Jane's most recent IEP meeting, on May 1, 2015, the school district recommended that Jane graduate at the end of this school year. We disagree with the District's proposal for graduation and file this Due Process Complaint seeking an order to prevent the District from graduating Jane at the end of this school year.

We agree with Jane's learning support teacher that Jane can still make progress on her transition goals, and can benefit from continuing on in school past this school year. Jane has also expressed an interest in continuing her training through the school's transition to work program. Her job coach reports that Jane's skills have improved and she would benefit from continuing in this program.

After receiving the NOREP at Jane's most recent IEP meeting, we requested mediation with the District. We participated in mediation on May 15, 2015, but were unable to resolve our

disagreement. Following that meeting, the District again issued a NOREP recommending that Jane graduate at the end of this school year. We again disagreed and now file this Due Process Complaint Notice

The Individuals with Disabilities Education Act (IDEA) requires public schools to provide students with IEPs a free appropriate public education (FAPE) through the age of 21. Jane is not yet 21 years old. She does not want to graduate. Her learning support teacher and job coach believe she would benefit from continuing in school and say she can still make progress on her IEP goals. She is legally entitled to continue in school beyond this year and should not graduate.

Proposed Resolution

To resolve this complaint, we seek an order that the school district:

1) Continue to provide appropriate education to Jane until she turns 21 or until her IEP team determines that she has satisfactorily completed her IEP.

Please feel free to contact me if you have any questions or would like to discuss this with me.

Sincerely,

Joanna Doe

Joanna Doe
(Parent of Jane Doe)

cc: Office for Dispute Resolution (via e-mail)

Appendix N: Blank Complaint Notice

Blank Complaint Notice

Appendix O: Resolution Meeting Options Sheet

Resolution Meeting Options

When a parent requests a due process hearing, the Individuals with Disabilities Education Act (IDEA) requires the parent and local education agency (LEA) to participate in a "resolution meeting". The only exceptions to this rule are when both parties agree in writing to waive the resolution meeting, or both parties agree to use mediation instead of the resolution meeting. The purpose of the meeting is to attempt to resolve the dispute so that a hearing isn't needed.

If the parties participate in a resolution meeting, there are several choices:

- The parent and LEA may attend the resolution meeting and attempt to resolve the dispute; or
- The parent and LEA may agree to have an ODR Facilitator attend the resolution meeting to assist the parties in reaching agreement; or
- The parent and LEA may agree to participate in Mediation instead of the Resolution Meeting.

Both Mediation and Resolution Meeting Facilitation are available at no cost to the parties. Both Mediation and Resolution Meeting Facilitation are voluntary and therefore both sides must agree in order to move forward.

To initiate either Mediation or Resolution Meeting Facilitation, please complete and sign the appropriate form(s), and submit to ODR. The form(s) can be found on the ODR website, at www.odr-pa.org along with more information about both Mediation and Resolution Meeting Facilitation.

You may also contact the following ODR staff for assistance with Mediation or Resolution Meeting Facilitation:

Lori Shafer - 800-222-3353 Option 5 (mediation assistance) or Jenny Snyder - 800-222-3353 Option 9 (resolution meeting facilitation)

Appendix P: Due Process Fact Sheet

Due Process Fact Sheet

Appendix Q: Guide to Mediation

Guide to Mediation

Appendix R: Expedited Fact Sheet

Expedited Fact Sheet

Appendix S: Resolution Meeting Data Form

Resolution Meeting Data Sheet

Instructions:

The Bureau of Special Education (BSE) and the Bureau of Early Intervention Services (BEIS) have general supervisory authority for enforcement of the Individuals with Disabilities Education Act (IDEA), including the Act's resolution meeting requirements. As part of that responsibility, these Bureaus monitor the Preschool Early Intervention Program/LEA's compliance with all statutory requirements pertaining to the resolution meeting process through review of the information provided on this form.

In addition to the Bureau's use of this data for compliance purposes, The Office for Dispute Resolution (ODR) requires the information for federally-mandated statistical compilation, and the hearing officer requires the information for timeline purposes. Therefore, for all three reasons, it is essential that the LEA complete and return this form in accordance with timeframes set forth within the document. Late submission of the form may result in the Preschool Early Intervention Program/LEA being contacted by BSE or BEIS. After the form is completed, please email it to the Office for Dispute Resolution; the hearing officer; and the parent or counsel.

The *Resolution Meeting Data Sheet* applies only to parent-initiated due process hearings under IDEA. LEA-initiated hearings and hearings pertaining solely to Chapters 15 and 16 of the regulations do not have resolution meeting requirements.

***

Child/Student Name:

LEA or Preschool Early Intervention Program:

LEA Intermediate Unit Number:

ODR File No. :

Date LEA or Preschool Early Intervention Program received notice of parent's due process complaint:

I. Resolution Period Data

1. Please answer these questions if a Resolution Meeting was scheduled and held. If not, skip this question and proceed to question 2.

   a. Date of resolution meeting*

   * In order to be in compliance with the regulation, the date in (a) must be within 15 days of the LEA or Preschool Early Intervention Program receipt date of the due process complaint notice.

   If not, please explain:

   b. The LEA or Preschool Early Intervention Program makes the following assurances:

   - Relevant members of the student's IEP team were present at the meeting in accordance with 34 C.F.R. §300.510(a)(1).

     Yes ☐ No ☐

     If no, please explain:

- The meeting included "a representative of the (LEA/Preschool Early Intervention Program) who has decision-making authority on behalf of (the LEA)" in accordance with 34 C.F.R. §300.510(a)(1)(i).
  Yes ☐ No ☐

  If no, please explain:

- Regarding attorneys at the resolution session, 34 C.F.R. §300.510(a)(1)(ii):

  ☐ Attorneys participated at the request of both parties; OR

  ☐ Parents did not request participation of an attorney, and therefore LEA or Preschool Early Intervention Counsel was not present; OR

  ☐ Parent attorney participated but LEA or Preschool Early Intervention Program Counsel did not.

c. **What was the result of the resolution meeting? (Select one)**

☐ **Full resolution** reached at the meeting.

You have completed the form. Please sign and return the form to ODR, the hearing officer, and the parent or counsel within three (3) business days of the resolution meeting.

☐ **Partial resolution** reached at the meeting.

You have completed the form. Please sign and return the form to ODR, the hearing officer, and the parent or counsel within three (3) business days of the resolution meeting.

☐ **Preliminary agreement** reached at the resolution meeting, or the parties are continuing settlement discussions during the resolution period. The parties will finalize the agreement in its entirety during the 30-day resolution period.

You have completed the form. Please sign and return the form to ODR, the hearing officer, and the parent or counsel within three (3) business days of the resolution meeting.

OR

☐ **Preliminary agreement** reached at the resolution meeting, but parties cannot finalize the agreement in its entirety during the 30-day resolution period.

Note: When the parties are unable to resolve the matter in its entirety during the 30-day resolution period, due process proceedings will commence at the expiration of the resolution period unless the due process hearing request is withdrawn. Any settlement agreement occurring or finalized after the expiration of the 30-day resolution period does not constitute a resolution meeting agreement, but rather a private settlement agreement between the parent and the LEA or Preschool Early Intervention Program.

You have completed the form. Please sign and return the form to ODR, the hearing officer, and the parent or counsel within three (3) business days of the resolution meeting.

☐ **No resolution agreement** was reached.

You have completed the form. Please sign and return the form to ODR, the hearing officer, and the parent or counsel within three (3) business days of the resolution meeting.

☐ **After the resolution meeting started**, but before the end of the 30-day resolution period, the parties agreed in writing that no agreement was possible.

The date of the written agreement was _____

You have completed the form. Please sign and return the form to ODR, the hearing officer, and the parent or counsel within three (3) business days of the date upon which the non-agreement document was signed by both parties, but in no event will the form be returned later than three (3) business days following the expiration of the 30-day resolution period.

2. **Please answer these questions if the resolution meeting was not held.**

The resolution meeting was not held for this reason:

☐ Both parties agreed in writing to **waive** the resolution meeting on _____

You have completed the form. Please sign and return the form to ODR, the hearing officer, and parent or counsel within three (3) business days of the waiver date.

☐ Parent **withdrew** the request for due process.

You have completed the form. Please sign and return the form to ODR, the hearing officer, and parent or counsel within three (3) business days of the parent's withdrawal.

☐ The case **settled** prior to the expiration of the 15-day time period.

You have completed the form. Please sign and return the form to ODR,the hearing officer, and the parent or counsel within three (3) business days of the settlement date.

☐ The 30-day resolution period has ended; **parent(s) has declined to participate** in the resolution meeting after reasonable efforts have been made and documented in accordance with 34 CFR § 300.322 (d).

You have completed the form. Please sign and return the form to ODR, the hearing officer, and the parent or counsel within three (3) business days following the expiration of the 30-day resolution period.

☐ The parties **chose mediation** in lieu of the resolution meeting.

Proceed to question 3.

3. **For parties who chose mediation in lieu of a resolution session, what was the outcome?**

☐ **Agreement reached** on all issues.

You have completed the form. Please sign and return the form to ODR, the hearing officer, and the parent or counsel within three (3) business days of the mediation, but in no event more than three (3) business days following the expiration of the 30-day resolution period.

☐ **Partial agreement** reached at mediation.

You have completed the form. Please sign and return the form to ODR, the hearing officer, and the parent or counsel within three (3) business days of the mediation, but in no event more than three (3) business days following the expiration of the 30-day resolution period.

☐ After the mediation started, but before the end of the 30-day period, the **parties agreed in writing that no agreement was possible**. The date of the written agreement was _____

You have completed the form. Please sign and return the form to ODR, the hearing officer, and the parent or counsel within three (3) business days of the date upon which the non-agreement document was signed by both parties, but in no event more than three (3) business days after the expiration of the 30-day resolution period.

☐ **Preliminary agreement** was reached at the mediation session, or the parties are continuing settlement discussions during the resolution period. The parties will finalize the agreement in its entirety during the 30-day resolution period.

You have completed the form. Please sign and return the form to ODR, the hearing officer, and the parent or counsel within three (3) business days of complete resolution of this matter, but in no event more than

three (3) business days after the expiration of the 30-day resolution period.

OR

☐ **Preliminary agreement** reached at mediation, but parties cannot finalize the agreement in its entirety during the 30-day resolution period.

Note: When the parties are unable to resolve the matter in its entirety during the 30-day resolution period, due process proceedings will commence at the expiration of the resolution period unless the due process hearing request is withdrawn. Any settlement agreement occurring or finalized after the expiration of the 30-day resolution period does not constitute a resolution meeting agreement, but rather a private settlement agreement between the parent and the LEA or Preschool Early Intervention Program.

You have completed the form. Please sign and return the form to ODR, the hearing officer, and the parent or counsel within three (3) business days of the mediation, but in no event more than three (3) business days after the expiration of the 30-day resolution period.

☐ The parties agreed in writing to continue the mediation at the end of the 30-day resolution period.

Note: If later the parent or public agency withdraws from the mediation process, the 45-day timeline begins the next day.

Date of written agreement: _____

You have completed the form. Please sign and return the form to ODR, the hearing officer and the parent or counsel within three (3) business days of the signed agreement, but in no event more than three (3) business days after the expiration of the 30-day resolution period.

☐ **No agreement** was reached at mediation.

You have completed the form. Please sign and return the form to ODR, the hearing officer and the parent or counsel within three (3) business days of the mediation, but in no event more than three (3) business days after the expiration of the 30-day resolution period.

4. **Comments:**
[If there is pertinent information about this case not otherwise captured on this form, please provide it here]:

[Print name of person completing form]

[Title of person completing form]

[Phone number of person completing form]

[Email address of person completing form]

_____
[Signature of person completing form]
[Electronic signature acceptable]

_____
[Date]

For ODR Internal Purposes Only

Initials/Date

Received by ODR:	
Excel entry:	
Database Entry:	
Forward to Case Manager:	
To BSE:	

Appendix T: Generally Applicable Prehearing Directions

Prehearing Directions – Uniform

Prehearing Directions - Plain Writing Act Version

Appendix U: Example of 2/5-Day Disclosure Letter

Date:
Student Last Name/School District
ODR File No.:
Re: 5-Day Disclosures

Dear [School attorney's name]:

I intend to call the following witnesses and use the following exhibits at the hearing:

1. Jane Marks (parent)
2. Joe Marks (parent)
3. Mrs. Smith (teacher)
4. Dr. Jones (psychologist)

Exhibits

1. Letter from [teacher's name] to [parent's name] dated 10/21/2006
2. Report card dated 11/21/06
3. Evaluation by [expert's name] dated 12/30/06
4. Homework samples August 2006-December 2006
5. Letter from [parent's name] to School dated January 2, 2007
6. NOREP dated January 2007
7. IEP developed January 2007
8. Homework samples January 2007-June 2007
9. Letter from [teacher's name] to [parent's name] dated 3/10/07
10. Final report card June 2007

[Your Signature]

Appendix V: Examples of Marked Exhibits

Sample

Exhibit

in

Portrait

Format

P-1 page 1 of 1

Sample Exhibit in Landscape Format

Appendix W: Example of Cover Sheet for Exhibit Notebook

Parent Exhibits
Student Last Name/School District

Tab	Exhibit #	Exhibit Name
1	P-1	Letter from [teacher's name] to [parent's name] dated 10/21/2006
2	P-2	Report card dated 11/21/06
3	P-3	Evaluation by [expert's name] dated 12/30/06
4	P-4	Homework samples August 2006-December 2006
5	P-5	Letter from [parent's name] to School dated January, 2, 2007
6	P-6	NOREP dated January 2007
7	P-7	IEP developed January 2007
8	P-8	Homework samples January 2007-June 2007
9	P-9	Letter from [teacher's name] to [parent's name] dated 3/10/07
10	P-10	Final report card June 2007

Appendix X: 300 CFR §300.511

§ 300.511 Impartial due process hearing.

(a) *General.* Whenever a due process complaint is received under § 300.507 or § 300.532, the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing, consistent with the procedures in §§ 300.507, 300.508, and 300.510.

(b) *Agency responsible for conducting the due process hearing.* The hearing described in paragraph (a) of this section must be conducted by the SEA or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the SEA.

(c) *Impartial hearing officer.* (1) At a minimum, a hearing officer—
(i) Must not be—
(A) An employee of the SEA or the LEA that is involved in the education or care of the child; or
(B) A person having a personal or professional interest that conflicts with the person's objectivity in the hearing;
(ii) Must possess knowledge of, and the ability to understand, the provisions of the Act, Federal and State regulations pertaining to the Act, and legal interpretations of the Act by Federal and State courts;
(iii) Must possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and
(iv) Must possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.
(2) A person who otherwise qualifies to conduct a hearing under paragraph (c)(1) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.
(3) Each public agency must keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(d) *Subject matter of due process hearings.* The party requesting the due process hearing may not raise issues at the due process hearing that were not raised in the due process complaint filed under § 300.508(b), unless the other party agrees otherwise.

(e) *Timeline for requesting a hearing.* A parent or agency must request an impartial hearing on their due process complaint within two years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the due process complaint, or if the State has an explicit time limitation for requesting such a due process hearing under this part, in the time allowed by that State law.

(f) *Exceptions to the timeline.* The timeline described in paragraph (e) of this section does not apply to a parent if the parent was prevented from filing a due process complaint due to—
(1) Specific misrepresentations by the LEA that it had resolved the problem forming the basis of the due process complaint; or
(2) The LEA's withholding of information from the parent that was required under this part to be provided to the parent.

(Approved by the Office of Management and Budget under control number 1820–0600)
(Authority: 20 U.S.C. 1415(f)(1)(A),1415(f)(3)(A)–(D))

Appendix Y: Sample Motion

Jones Law Firm
P. O. Box 388
Center City, PA 99999

August 1, 2011

Via Electronic Mail and First Class Mail
Hearing Officer
P. O. Box 91
Pittsburgh, PA 10000

Re: Student vs. Pennsylvania School District, ODR File No. 12345-1112
Motion to Dismiss

Dear Hearing Officer:

This office represents the Pennsylvania School District in this matter. Following our review of the Parents' due process complaint, we believe the Parents have attempted to raise one or more issues which do not set forth a valid claim. Therefore, please accept this Motion to Dismiss on behalf of the District or, in the alternative, a challenge to the sufficiency of the Parents' complaint.

There are specific requirements for a due process complaint. 34 C.F.R. §§ 300.508(a), (b), and (c). In their complaint, the Parents fail to provide a "description of the nature of the problem" as required by 34 C.F.R. § 300.508(b)(5). The Parents also fail to state a "proposed resolution of the problem to the extent known and available" as required by 34 C.F.R. § 300.508(b)(6). The District suggests that this information is necessary so that it can understand what issues the Parents are raising so that it can propose a solution. Without this information, the District is not able to conduct the required resolution meeting or properly prepare for the hearing scheduled for August 29, 2011.

The District respectfully requests that the hearing officer conclude that the due process complaint fails to state a proper claim and dismiss the complaint.

Should the hearing officer decline to dismiss the complaint, the District requests that the Parents be required to amend their complaint in conformity with 34 C.F.R. § 300.508, and that the hearing scheduled for August 29, 2011 be rescheduled according to the adjusted timelines set forth in 34 C.F.R. § 300.508(d)(4).

Very truly yours,
Allison Jones, Esquire

Additional Resources

There are a number of excellent resources for tips and suggestions on effective communications between parents and schools:

The Pennsylvania Training & Technical Assistance Network (PaTTAN) has prepared *Communicating with Your School.*

CADRE, The Center for Appropriate Dispute Resolution in Special Education, has a wealth of resources for parents on their website, http://www.directionservice.org/cadre/

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