Knowing When to Negotiate or Stand Your Ground

by
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Incentives to Avoid Special Education Litigation

Litigation between parents of disabled students and their public schools is unlike traditional forms of personal injury litigation. Public schools' first priority is to fulfill their mandate to provide appropriate educational services to their students. Aggressively defending legal claims, however meritoriously, can distract a public school's energies away from that priority. Moreover, the substantial costs involved in litigation, when weighed against the limited economic resources available to schools, merge to create a unique framework for reaching executive decisions regarding resolution of legal disputes. In general, these factors have militated toward exploration of alternative means to resolve legal disputes. More specifically, special education disputes implicate the following considerations, which are crucial to the decision-making process:

1. ***Litigation Costs*** — The economic reality of the high costs of administrative and court litigation has befallen equally on disputes involving special education. From an attorney's standpoint, IDEA due process hearings typically require extensive review of records, on-site investigations and interviews, witness preparation, legal research, preparation of motions and briefs, correspondence, document notebooks, logistical and travel details, presentation of cases at hearing, and handling of miscellaneous post-hearing matters. Appeals to federal courts involve reviews of hearing transcripts, additional research, more extensive motion and brief practice, pre-hearing preparation, and hearings to receive additional evidence. Records may be quite extensive, making the production of disclosure and evidence notebooks time-consuming, voluminous, and costly. These efforts translate into significant amounts of attorney and paralegal billable hours and other costs. Special education litigation, despite its uniqueness, is at least on par with other forms of civil litigation in terms of overall cost, and it seems to be increasing in "size," if not in frequency. There simply is no escaping

the fact that the costs of special education litigation negatively impact school programs.

2. ***Staff time*** — Pre-hearing preparation and case investigation divert significant amounts of school administrative and staff person hours, attention, and focus. While staff wait in conference rooms

3. ***Parent-school relationships*** — Since parents are also taxpayers and voters, the quality and stability of the relationship between a school and a community's parents is a precious commodity to school systems eager to devote its full attentions to instructional and student performance objectives. Special education disputes may affect more than one set of parents' relations with a school. These issues can polarize school policy-makers and communities and have long-term effects on attitudes and policy. For the particular parents and child involved in a serious dispute, the level of trust and communication crucial to achieving best results may be irretrievably altered.

4. ***Litigation "inertia"*** – Legal disputes, often the offspring of unrealistic or inflexible positions on either side, can take a life of their own, far removed from their humble origins. Parents, school officials, and their attorneys may fall subject to a hardening litigation mentality, where conflict resolution is seen purely from an adversarial context, and the seeking of mutual agreement is viewed as retreat with dishonor. After substantial resources are committed, it may be exceedingly difficult to impart objective rationality to a client's decision-making stance. Parents who retain attorneys on a contingency fee arrangement and incur no personal costs may be particularly subject to taking extremist and expansive positions, unfettered by cost-benefit considerations.

5. ***Potential responsibility for hearing officer and hearing costs*** — In many states, public schools must not only bear their own defense costs, but also pay for the hearing officers' time and court-reporting costs.

6. ***Potential liability for opposing attorneys' fees and costs*** — The worst-case litigation scenarios for school systems are cases where parents prevail on some or all claims, and thus, become entitled to attorneys' fees and costs under the IDEA fee-shifting provision. 20 U.S.C. §1415(i)(3). This can effectively double the cost of the litigation, aside from any additional expenses to be incurred in actually implementing a hearing officer's decision.

7. ***Loss of control over outcome*** — Parties should always remind themselves that embarking on a litigation course means losing control over the ultimate outcome of the dispute. In many cases, neither party is satisfied with the results of hearings and court appeals. In litigation, one entrusts decision-making to a

third-party—a hearing officer or judge—without any guaranteed outcome. The conflict resolution process, however, allows parties to retain joint autonomy over the dispute.

8. ***Effect of "stay-put" provision***—Initiation of litigation implicates IDEA's "stay-put" provision, which requires maintenance of the student's pre-dispute placement while a final litigation result is pending (with the exception of discipline challenges). 20 U.S.C. §§1415(i), 1415(k)(7). A sort of automatic injunction, IDEA's "stay-put" provision can force a school to maintain a placement it does not agree to, even if the placement will impose high monetary costs, as in the case of disputes over residential placement. In other cases, operation of "stay-put" mean that a child must remain in a placement that the parents feel is not currently appropriate.

It bears mentioning that the above considerations are not the only ones present in a special education dispute. Ever evolving fact situations and legal interpretations complicate accurate analysis of cases and add uncertainty to the process. Against this backdrop, it is not surprising that schools and parents have turned to alternative means to resolve their differences. The remainder of this article sets out ten effective strategies to help parties achieve reasonable and mutually dignified resolutions to special education disputes without the need for litigation and its attendant disadvantages.

Dispute resolution with parents represented by counsel

Assessing a case quickly and contacting parents' attorney to indicate a willingness to explore informal resolution

As soon as school staff are informed that the parents have retained an attorney, the school's attorney should be contacted, and a copy of the file made for his or her review. As school attorneys review the file, they can being to assess whether the case contains any problem areas. The file review is coupled with interviews with staff to answer remaining questions about the student and the file, as well as to begin to determine the issues potentially in dispute. The school attorney should contact opposing counsel quickly thereafter, to ascertain the nature of the parent attorney's involvement. Is litigation being threatened? Is a due process hearing request about to be filed? Is the attorney merely assisting the parents informally with the dispute? In any case, the school attorney should indicate to opposing counsel that the school is willing to explore informal means in an effort to resolve the dispute without litigation. The initial conversation can also help identify the specific issues in dispute (if the parent attorney has already reviewed the file and is familiar with the case at this time). This is *not* the time for

argument on the merits of the case. At this stage, a school attorney can be much more effective by listening carefully than by talking.

It is key at this stage to redirect the parents' attorney toward the most informal possible means for resolving the dispute first. If litigation has not yet been filed, a statement indicating that the school will seriously address the dispute and make honest efforts at informal resolution may avoid, at least temporarily, the initiation of litigation. This gives the school time to investigate the case and develop proposals and options for resolution. In many cases, a school's invitation to attempt to resolve the case informally is welcome by the parents, many of whom may be nervous and apprehensive about the possibility of having to go to a hearing to accomplish a resolution of the dispute.

This is also the time to begin discussing a possible forum for resolving the complaint. In some cases, the attorneys can reach an agreement to assist their clients from outside the IEP team process to allow the parties, with legal guidance, a second chance to address the dispute. In other cases, as discussed below, the attorneys may want to participate in an IEP team meeting to personally help the parties reach consensus. Even if a due process request has already been filed, the parties can agree to the preceding methods, or explore the drafting of a settlement agreement (without meeting or mediation) or a formal mediation session through the state education agency's IDEA-mandated mediation procedure.

At this stage, the school can learn whether the opposing attorney is experienced in special education or a relative newcomer to these disputes. Attorneys experienced in special education cases will likely have personal preferences for a forum to resolve a dispute, while a beginner will have to be walked through the various options available to attempt resolution. A common question asked by school staff is whether it is easier to deal with an attorney inexperienced in special education matters. The answer is yes and no. An inexperienced attorney may not identify potential problem areas in the file, but may also have deep misconceptions about the law and its requirements. Moreover, although attorneys new to the special education dispute process may be willing to explore a variety of conflict resolution avenues, they may also be less capable of recognizing a good deal when presented with one. Lack of knowledge breeds mistrust, which can render resolution more complicated. To summarize, however, it is crucial that the school's attorney become involved early in a parent-school dispute, assess the relative merits of the case, contact opposing counsel, and begin an early discussion of potential avenues for resolving the disputed issues, hopefully before litigation is initiated.

Reaching a settlement agreement without meetings or mediation

If litigation has already been initiated, there are still various ways to employ alternatives to administrative hearings and court appeals. A highly preferable means for resolving special education hearing requests consists of school attorneys and parent attorneys hashing out a written settlement agreement addressing and disposing of the issues in dispute. This occurs, of course, after careful discussion and deliberation with the respective clients. Generally, a good format is for the school attorney to directly ask the parent attorney what kind of terms might be agreed to by the parent to resolve the litigation without going to hearing. That initiates an offer/counteroffer discussion, which also serves to redirect the dispute away from initial adversarial posturing toward problem-solving—a key to accomplishing mutually agreeable settlement. Moreover, this format has the benefit of avoiding face-to-face discussions between the parties, which accentuate personality disputes and promote emotional and inflexible face-saving positions.

If the school attorney can get opposing counsel to discuss a list of potential settlement terms that would be agreeable to the parent, that list is then discussed with school staff. An analysis of the listed terms will likely lead to acceptance of various terms and counteroffers on others. That, in turn, will lead to revised terms after additional negotiation. Many special education disputes are capable of settlement in this fashion. Aside from the benefits described above, a significant advantage of this process is cost-effectiveness. By avoiding formal mediation sessions or IEP team meetings with attorneys involved, the cost of defending the complaint is reduced, as well as the opposing attorney's fee demand, since there will be no costs for preparing for mediations and meetings. In fact, most of the negotiations can take place over the telephone or by e-mail.

IEP team meeting with attorneys

If, for some reason, the matter is not susceptible to resolution by the informal settlement process described above, an alternative is for the parties to meet in the context of an IEP team meeting to make an effort to resolve the issues by reaching an agreement on a revised IEP. Although less formal than a full mediation session, this option has the disadvantages of requiring a greater degree of preparation and face-to-face confrontation. The relative advantages are that the rules of mediation need not be followed and the IEP team members can function in the more familiar environment of the IEP team meeting. Moreover, there is no limitation on the number of participants in an IEP team meeting, so the school can involve all staff with knowledge of the child and specialized expertise to assist in reaching a consensus.

The strategies outlined below for mediation sessions are also applicable to IEP team meeting "pre-mediations." Of course, there will not be the assistance of a trained mediator, so the success of the process depends purely on the willingness of the parties to cooperate and collaborate in an effort to resolve the dispute. In this context, attorneys can play the role of mediators by ensuring the discussion stays on topic, redirecting discussion back to agenda items, proposing options for consideration of the parties, and helping their respective clients in remaining calm, professional, and focused on problem-solving.

The possibilities of success in this strategy are increased if the attorneys have discussions, prior to the IEP team meeting, regarding the agenda for the meeting, a timeline for the meeting, the goals of the meeting, and an agreement to make reasonable efforts to minimize clients' emotionality and adversarial posturing. These discussions serve to set informal "ground rules" for the IEP team meeting and can be crucial to the success of the process. If the attorneys do not develop some sort of a positive working relationship prior to the IEP team meeting, the chances of reaching consensus will be minimized.

In What Situations Could Dispute Avoidance Represent a Danger?

While there are a variety of factors that create a dynamic where schools have an interest in preventing disputes with parents of students with disabilities, there can be painful situations where acquiescing fully to parental wishes can result in a failure to address students' needs and a denial of a FAPE. This is why the structure of the law, from its inception, has made decision-making by educational professionals a key priority, with parental participation in the decision-making process. While the law is built upon a foundation of collaborative decision-making, ensuring that the child receives a FAPE is the ultimate priority of the Act.

LRE Dispute Scenarios

Sample background:

Parent advocates a full-mainstream placement for second-grader with moderate MR, life-skills needs, and some problem behaviors (frustration, distractibility, aggression, elopement). First-grade was difficult, even with trained one-to-one assistant, inclusion consultant, parent input, BIP, speech therapy, OT, PT, teacher training, social skills training, assistive technology, and many classroom accommodations. Student did not perform work at grade-level, and content had to be modified. She also has significant life skills/self-help deficits, but parent refuses to have them incorporated into IEP and states she will work on those skills at home. Likewise, the parent is unwilling to discuss even part-time

placement in a special education classroom to address critical skill areas in academics and self-help skills. Staff is concerned that the problem will worsen in second grade, as the self-help skills deficits persist, while the academic, social, and behavioral demands increase.

Concerns:

- Failure to address life skills/self-help area could represent a denial of FAPE, as a significant area of educational need is unaddressed in the IEP.

- In light of behaviors and distractibility, the regular education setting may not be appropriate to address critical academic skill areas in a specialized manner.

- The school is reaching the limit of what supplementary aids and services can do to facilitate instruction and provision of a FAPE in the regular classroom setting.

- Continued implementation of existing IEP in current placement may mean a denial of FAPE.

Possible Course of Action:

- Propose partial day placement in a special education setting with similarly-disabled students in a low staff-to-student ratio environment, to minimize distraction and allow for direct special education instruction with highly specialized tasks and assignments.

- Propose continuation of mainstream placement for a significant portion of the school day, for modeling and socialization opportunities with typically-developing peers.

- Effect change in placement and defend legal action if necessary, showing extensive efforts to include student in mainstream setting.

Parental refusal of placements in specialized settings

Sample background:

Middle school student with multiple psychological diagnoses and SED has been escalating behaviorally over the past school year in the regular classroom, despite rigorous application of a complex BIP with positive behavior supports, cooling-off protocol, special education counseling, frequent behavioral reports to

the parents, administration of medication, and the involvement of a behavior specialist. Behaviors include leaving assigned areas, confrontations with peers and adults, work refusal, demands to call parents, manipulation of stakeholders, and threatening statements. The parents are subject to manipulation by the student, leading to a dynamic of consistent mistrust and dispute, but they refuse parent or family counseling. Specifically, they refuse to discuss placement in a specialized self-contained unit for students with behavior disorders, which would allow for a highly-structured environment with a low staff-to-student ratio and specially trained staff.

Concerns:

- Continued escalation of the behavioral issues can lead to determination that FAPE is not being provided.

- Academic deficits will worsen as behavior continues to escalate.

- As behavior escalates, more and more time will be spent outside of the classroom in cool-down, and work avoidance will increase.

- Eventually, a serious behavioral incident can lead to staff or other students making reports to law enforcement, escalating the parent-school dispute and leading to potential involvement with juvenile justice system.

Possible Course of Action:

- After a final attempt, with warnings, to implement a revised BIP protocol, school can propose placement in the specialized self-contained unit, with opportunities for mainstreaming as student shows cooperation with program.

- School can continue use of behavior specialist.

- School can re-propose family and/or parent counseling.

Parent refuses participation in a needed related service

Sample background:

Parent of a 10-year-old girl with an autism spectrum disorder gets into a dispute with the child's therapists, including the speech therapist, occupational therapist, and physical therapist over methodology issues. At a meeting to address the problems, the parent states that she will now refuse the provision of speech

therapy, OT, and PT. She states that if the therapists work with the child without her consent, she will file complaints with their respective licensing boards. As a result, the therapists do not want to continue working with the child, although this means that IEP goals and objectives in the area of speech-language, fine motor skills, and gross motor skills will not be implemented. The parent will agree to resume services only if the school agrees to private providers of her choice that will use the methodologies she prefers.

Concerns:

- Failure to address communication, fine motor, and gross motor areas will mean a denial of a FAPE.

- School therapists, however, cannot provide services without risk of problematic professional complaints.

- School has no legal duty to contract with private providers if it is capable of providing the service appropriately.

Possible course of action:

- School can file a request for due process hearing to seek an order overriding parent's refusal to provide services (or relieving the school of FAPE responsibility).

Parent refuses access to necessary information

Sample background:

Medically-fragile elementary-age student with multiple medical conditions requires a variety of nursing services at home, including monitoring of tube feeding, administration of medications, and implementation of medical emergency procedures. The campus nurse and staff have come into conflict with the parent over how to respond to medical crises. The parent began to limit the information that attending physician provides to the school, and refuses direct communication between the school and physician. The nurse asserts that she does not have sufficient information to address emerging situations, and she is concerned to continue serving the student under the limited-information situation.

Concerns:

- Without all the necessary information from the child's physician, the school may be unable to properly respond to medical emergencies, creating the danger of a serious medical event.

- Legally, if the school is not properly planning to address potential medical emergencies, it is failing to provide the necessary school health services, and thus denying a FAPE.

- The school nurse risks a problem with her state licensing agency for continuing to serve the student without the necessary information and participation from the attending physician.

Possible course of action:

- The school could seek mediation to attempt to convince the parent to allow free communication with the physician, as needed by the school nurse.

- File a due process hearing request to seek an order requiring the doctor to provide the school with the necessary information.

When Attempts to Resolve a Dispute Fail

If all informal and formal measures fail, defending parties should consider an Offer of Judgment

In some cases, even the best efforts at resolving the complaint informally or formally, may fail to result in a mutually agreeable compromise. If the school feels it has made meaningful and substantial offerings to address a parent's concerns and claims, but the parents have rejected all offers and options, the next step is to issue an Offer of Judgment under 20 U.S.C. §1415(i)(3)(D)(i) and FED. R. CIV. P. 68. An offer of judgment, if issued at least ten days before the date of a scheduled due process hearing, can be a useful device to pressure an unreasonable party into reconsidering settlement.

It works in the following way. If a school makes an offer of settlement containing all proposed offers previously refused by the parent, and the parents reject the offer and proceeds to hearing, the parents will not be entitled to attorneys' fees incurred after the offer was made unless they ultimately obtain a greater degree of relief from the hearing process than was offered in the offer of judgment. Thus, if parents unreasonably reject a valid and substantial offer of judgment, their attorney stands to lose a significant portion of his or her attorney's fee entitlement if they do not prevail to a greater degree in litigation.

This dynamic forces the parents' attorney to readdress the matter with the parents, and in many cases serves to put pressure on an unreasonable party to "see the light." Depending on the agreement between the parents and their attorney, the parents themselves may be responsible for their attorney's fees if they reject a reasonable offer and they eventually receive less from the hearing officer than the school originally offered. All school attorneys should mark on their calendars the deadline for issuing an offer of judgment to the parents, just in case all efforts at alternative resolution fail to resolve the case.

When all else fails, explore creative options

Some cases are not easily susceptible to regular dispute resolution strategies, either because of the complexity of the case, the depth of disagreement between the parties, the fundamental nature of the dispute, or the presence of particularly difficult personalities on either side. This does not mean, however, that the case is doomed to litigation. At this juncture, parties should investigate the possibility of unique and creative options that may at least temporarily resolve even deeply entrenched disputes.

An interesting creative approach for use in cases where there are longstanding conflicts and mistrust among the parties involves the appointment of an agreed-to ombudsman. This is a person with specialized expertise in special education who will review the records in the case, interview parents and staff (and perhaps the student), and render final binding decisions on disputed issues. The term of the ombudsman's position is set forth in an agreement, and during that term, there can be no requests for due process hearings, SEA complaints, or requests for independent evaluations. On any issue where the parties cannot achieve consensus, the ombudsman simply renders a final decision, to which the parties must agree to abide, at least during the period of ombudsmanship. The parent, however, cannot be prevented from reinitiating the litigation once the ombudsman's term has expired. But, at least the device accomplishes a moratorium on legal proceedings, complaints, and requests for independent evaluations. In cases where there are serial complaints and repeated due process hearings, the school may well feel that the ombudsman strategy at least affords school staff a respite from the litigation and dispute process. The school, moreover, must generally pay for the ombudsman's services, and must also be prepared for the possibility that the ombudsman will not support the school's positions on particular issues. In addition, the school cannot limit the ombudsman's access to records and information regarding the student, which is instrumental to the ombudsman reaching decisions on disputed issues.

In a twist on the ombudsman device, parties that have been unable to agree on an IEP can submit their respective versions of an IEP to an agreed third-

party expert. The parties must also agree to abide by the expert's final decision on an appropriate IEP. The strategy is different from the ombudsman device in that the ombudsman merely rules on disputed issues (i.e. the parent is right, the school is wrong, or vice-versa) and in the third-party expert device the expert may come up with an IEP independent of the parties' proposals.

These strategies are extraordinary and unique strategies, and they are, however, not without legal risks. In either of the above scenarios, the school is stuck with the decisions of the ombudsman and third-party expert, even if the decision results in an inappropriate program. If the experts come up with an inappropriate IEP, the school still bears the ultimate liability.