



SPECIAL EDUCATION
GROUP

FAPE AND MONEY DAMAGES

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I. WHERE WE CAME FROM

A. IDEA 1993 Due Process Litigation

The early IDEA statute envisioned mediation as a successful resolution tool. In many cases where mediation was used, litigation was reduced and both parents and districts were able to resolve their differences amicably without the use of an attorney. With the use of mediation, formal due process and litigation were avoided, thereby reducing the costs for both parents and districts.

B. Overview of Laws That Govern Special Education

The Individuals with Disabilities Education Improvement Act (commonly referred to as the IDEA) - which was passed when Congress reauthorized the law in 2004 - traces its roots to an amendment of the Elementary and Secondary Education Act of 1965 (ESEA). The ESEA was passed as part of President Lyndon B. Johnson's "War on Poverty" - a political movement which took place in 1960s America. The ESEA is an extensive statute that funds primary and secondary education in the United States of America. The ESEA emphasized equal access to education and established standards which, at the time, were aimed to shorten the achievement gaps between different groups of students. The ESEA still exists in some form today. President George W. Bush signed the reauthorization of the ESEA in 2001, when it was known as the No Child Left Behind Act. On December 10, 2015, President Barack Obama signed the reauthorization of the ESEA and it became known as the Every Student Succeeds Act (ESSA). Although the ESSA technically applies to special education programs, it will not be discussed in depth in this written guidance because the ESSA largely concerns annual standardized testing requirements and federal accountability provisions regarding student performance on standardized tests.

After the passage of ESEA in 1965, Congress passed what is now known as Section 504 of the Rehabilitation Act of 1973. Section 504, as it is commonly known, guarantees that disabled students have access to programs operated by public entities – including public schools. Section 504 likewise includes an antidiscrimination provision that prevents disability-based harassment. But, perhaps the most significant change that Section 504 brought was the parent's ability to bring a lawsuit against public school districts in federal court if the parent believed that their student's rights had been violated under the law.

Following on the coattails of Section 504, Congress passed the Education for All Handicapped Children Act in 1975 (EHA). The EHA required all public schools that accepted federal funds to provide equal access to educational programs and to likewise provide one free

meal a day to children with physical and mental disabilities. Public schools were furthermore required to evaluate disabled children and to create an educational plan with parental input which would resemble as closely as possible the educational opportunities in programs that were made available to nondisabled students. The Act likewise required that school districts create administrative procedures so that parents of disabled students could dispute decisions by district administration made concerning student education. The EHA included an administrative exhaustion clause which required parents to use the administrative procedures created by school districts prior to bringing a lawsuit in federal court under Section 504. The administrative exhaustion requirement was specifically inserted into the Act in order to alleviate the financial burden carried by districts when Section 504 was passed and exposed public schools to federal litigation.

The EHA of 1975 was periodically updated and reauthorized by Congress until 1990, when it became known as the Individuals with Disabilities Education Act (IDEA). In the preamble to the law, Congress stated that the purpose of the IDEA is to guarantee that all children with qualifying disabilities have available to them a Free Appropriate Public Education (FAPE) which emphasizes special education and related services designed to meet the student's unique and individualized needs. The primary method of accomplishing this task is through the use of Individualized Education Programs (IEPs).

The IDEA is composed of four parts. The main two parts, Part A and Part B, cover the general provisions of the law and the assistance that public schools must provide in educating all children with disabilities. Part C covers infants and toddlers with disabilities, which includes children from birth to age 3. Part D concerns the national support programs administered at the federal level.

For the most part, public schools are concerned primarily with Part B of the Act. Part C services are usually provided by County Regional Centers either directly or through contracts with service providers. At times, disabled children, in the birth to age 3 category, may receive IDEA Part C services through County Offices of Special Education.

Part B is comprised of six main ideas which illuminate the purpose of the law. These six ideas are as follows:

1. The Individualized Education Program (IEP)

The IEP is the main element of the IDEA and is designed to create an educational program uniquely tailored to a student's individualized needs to provide that child with educational benefit. An IEP is a written document for each child that is developed, reviewed, and revised in accordance with 20 U.S.C. section 1414(d).

Pursuant to federal law the following items must be addressed in the IEP:

- i. The student's present levels of academic and functional performance;

- ii. Measurable annual goals, including academic and functional goals;
- iii. Student's measured progress towards meeting annual goals;
- iv. A description of the special education and related services, as well as supplementary aids, to be provided to the student;
- v. A schedule of the services to be provided including the frequency, duration and location for the provision of services;
- vi. Program modifications or supports provided to the child;
- vii. Least restrictive environment data which includes calculations of the amount of time to be spent each day by the student in a general education setting as opposed to the amount of time to be spent in a special education setting;
- viii. An explanation regarding time the child will not participate along with nondisabled peers;
- ix. A description of accommodations to be provided during state and district assessments which the IEP team believes are necessary to measuring the student's academic and functional performance; and
- x. If the student is 16 years of age, a statement of post-secondary goals and transition planning for providing the student with a successful transition into college, vocational training, employment, independent or assisted living.

IEP's are prepared pursuant to an IEP team meeting. Federal law requires that an IEP team meeting occur within 60 days of the date that a parent has signed a written consent for assessment initiating an initial special education evaluation. Federal law likewise requires that IEP teams revisit the student's IEP at least annually, and that the student be re-evaluated at least every three years.

A properly crafted IEP addresses a student's individual needs regardless of her/his eligibility category. (20 U.S.C. § 1412(a)(3)(B).) In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the child's education, the result of the most recent evaluation of the child, and the academic, developmental, and functional needs of the child. (20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. § 300.346(a).)

2. Free and Appropriate Public Education (FAPE)

The IDEA provides states with federal funds to help educate children with disabilities if the state provides every qualified child with a FAPE that meets the federal statutory requirements. Congress enacted the IDEA "to assure that all children with

disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs” (20 U.S.C. §§ 1400(c), 1412(a)(1)(A), Ed. Code §§ 56000, 56026.) FAPE is defined as special education and related services that are available to the pupil at no cost to the parent or guardian, that meet the state educational standards, and that conform to the pupil’s IEP. (20 U.S.C. § 1401(9), Ed. Code § 56031; Cal. Code Regs., tit. 5, § 3001, subd. (o).) “Special education” is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(a)(29).) A child’s unique educational needs are to be broadly construed to include the child’s academic, social, health, emotional, communicative, physical and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.* (9th Cir. 1996) 82 F.3d 1493, 1500, citing H.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106.) In addition, the educational needs include functional performance. (Ed. Code 56345, subd. (a)(1).)

3. Least Restrictive Environment (LRE)

School districts are required to provide each special education student with a program in the LRE, with removal from the regular education environment occurring only when the nature or severity of the student’s disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (20 U.S.C. § 1412(a)(5)(A), Ed. Code § 56031.) A placement must foster maximum interaction between disabled students and their nondisabled peers “in a manner that is appropriate to the needs of both.” (Ed. Code § 56000, subd. (b).) Mainstreaming in a general education setting is not required in every case for every student. However, to the maximum extent appropriate, special education students should have opportunities to interact with general education peers. (Ed. Code § 56040.1.)

4. Appropriate Evaluation of Students

Before an IEP is prepared for a student the school must first determine whether the child qualifies for special education services. (Ed. Code § 56320.) To qualify, a child’s disability must have an adverse effect on the child’s educational progress and the child must fit into one of 13 eligibility categories defined by federal law. The process of determining whether the child is a child who qualifies for special education services is known as the Evaluation Process.

No single procedure may be used as the sole criterion for determining whether the student has a disability or determining an appropriate educational program for the student. (20 U.S.C. § 1414(b)(2)(B), Ed. Code § 56320, subd. (e).)

Tests and assessment materials must be used for the purposes for which they are valid and reliable, and must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(b)(3)(A)(iii)-(v), Ed. Code § 56320, subd. (b)(2)(3).) Under federal law, an assessment tool must “provide relevant information that directly assists persons in determining the educational needs of the child.” (34 C.F.R. § 300.304(c)(7).) In

California, a test must be selected and administered to produce results “that accurately reflect the pupil’s aptitude, achievement level, or any other factors the test purports to measure ...” (Ed. Code § 56320, subd. (d).) A district must ensure that a child is assessed “in all areas related to” a suspected disability. (Ed. Code § 56320, subd. (c)(f).)

Assessments must be conducted by individuals who are both “knowledgeable of [the student’s] disability” and “competent to perform the assessment, as determined by the school district, county office, or special education local plan area.” (Ed. Code §§ 56320, subd. (g), 56322, see 20 U.S.C. § 1414(b)(3)(A)(iv).)

Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally, or sexually discriminatory; and must be provided and administered in the student’s primary language or other mode of communication unless this is clearly not feasible. (20 U.S.C. § 1414(b)(3)(A)(i)-(iii), Ed. Code § 56320, subd. (a).)

An assessor must produce a written report of each assessment that includes whether the student may need special education and related services and the basis for making that determination. (Ed. Code § 56327, subds. (a)(b).)

5. Parent and Teacher Participation in IEP Development

One or both of the student’s parents are considered necessary members of the IEP team. (34 C.F.R. § 300.321(a)(1), Ed. Code §§ 56341, subd. (b), 56342.5 [parents must be part of any group that makes placement decisions].) However, an IEP need not conform to a parent’s wishes in order to be sufficient or appropriate.

The parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a FAPE to the child. (34 C.F.R. § 300.501(a), Ed. Code § 56500.4) A parent has meaningfully participated in the development of an IEP when the parent is informed of the child’s problems, attends the IEP meeting, expresses disagreement with the IEP team’s conclusions, and requests revisions in the IEP. An IEP meeting may be conducted without a parent in attendance only if the school district is unable to convince the parents that they should attend, and the school district keeps records of its attempts to arrange a mutually agreeable time and place for the meeting. (34 C.F.R. § 300.322(d).)

6. Procedural Safeguards

The IDEA establishes procedural safeguards which are designed to allow parents of children with disabilities to have meaningful involvement in the education services provided to their children pursuant to the child’s IEP. The IDEA specifically requires:

- i. An opportunity for parents to examine student’s educational records, participate in meetings, and obtain an independent educational evaluation;

- ii. Procedures to protect the rights of the child when the parents are not known, cannot be located, or if the child is a ward of the state;
- iii. Prior written notice whenever the district proposes or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE;
- iv. Procedures designed to ensure that notices to parents are provided in the native language of the parents, unless it is not feasible to do so;
- v. An opportunity for mediation of disputes;
- vi. An opportunity for any party to present a complaint to the State Education Agency;
- vii. Procedures that require either party to file a due process complaint notice when initiating complaints; and
- viii. Procedures that require the State Education Agency to develop a model form to assist parents in filing a complaint and due process complaint notice.

20 U.S.C. section 1415 (b)(1) through 20 U.S.C. section 1415 (b)(8).

Pursuant to federal law, school districts are required to provide parents of students with disabilities written notice of their parental rights and the procedural safeguards enumerated in the IDEA.

In addition to the IDEA of 1990, Congress also passed the Americans with Disabilities Act of 1990, followed by the ADA Amendments Act (ADAAA but usually referred to as simply the ADA) of 2008. Although the ADA contains provisions which apply to disabled students, the ADA primarily provides protection against disability based discrimination, bullying, or harassment and includes provisions regarding accessibility standards applicable to public facilities. Because Section 504 addresses most of the issues covered by the ADA, the ADA will not be discussed in detail in this portion of the written materials.

C. Sources of Law Related to Special Education

Federal and California state statutes and regulations provide the framework of the law which applies to special education. In addition to the statutes and regulations identified below, the Federal Department of Education contains an Office of Special Education Programs (OSEP) and an Office of Special Education and Rehabilitative Services (OSERS). Also part of the DOE is the Office for Civil Rights (OCR). OSEP, OSERS, and OCR may issues guidance concerning enforcement of the IDEA and Section 504.

The following list provides citations to sources of law should you wish to review them:

California State Sources of Authority

- California Education Code, Title 2 Elementary and Secondary Education, Division 4 Instruction and Services, Part 30 Special Education Programs, sections 56000-56865. (Citation Ed. Code §§ 56000, et seq.)
- California Code of Regulations, Title 5 Education, Division 1 California Department of Education, Chapter 3 Individuals with Exception Needs, Subchapter 1 Special Education, Articles 1-8, sections 3000-3100. (Citation 5 C.C.R. §§ 3000, et seq.)

Federal Sources of Authority

- IDEA - 20 United States Code sections 1400, et seq.
- Section 504 – Title 42 United States Code, Chapter 126 Equal Opportunity for Individuals with Disabilities, sections 12101, et seq. (Citation 42 U.S.C. §§ 12101, et seq.)
- Code of Federal Regulations, Title 34 Education, Subtitle B Regulations of the Offices of the Department of Education.
- Section 504 – Chapter I Office for Civil Rights, Department of Education, Parts 100-110, sections 100.1, et seq. (Citation 34 C.F.R. §§ 100.1, et seq.)
- IDEA - Chapter III Office of Special Education and Rehabilitative Services, Department of Education, sections 300, et seq. (Citation 34 C.F.R. §§ 300.1, et seq.)

Office for Civil Rights Dear Colleague Letters – Available through the OCR reading room online at:

<http://www2.ed.gov/about/offices/list/ocr/frontpage/faq/readingroom.html>

In *Wyner v. Manhattan Beach Unified Sch. Dist.*, 223 F.3d 1026 (9th Cir. 2000), the Ninth Circuit outlined OAH's jurisdiction. OAH has limited jurisdiction to hear due process claims arising under the IDEA. OAH does not include jurisdiction over claims alleging a school district's failure to comply with a settlement agreement or an OAH order. *Wyner* held that the proper avenue to enforce an administrative order was the California Department of Education's compliance complaint procedure.

However, within the past couple of years OAH has decided to hear matters concerning a denial of FAPE stemming from a failure to abide by a settlement agreement. Case authority supports that OAH has jurisdiction of issues involving the existence and breach of settlement agreements if the nature of petitioner's injuries can be redressed to any degree by the IDEA's administrative procedures and remedies, including when the alleged settlement agreement

was reached outside of the IDEA resolution session or mediation procedures established in Title 20 United States Code sections 1415(e) and (f)(B)(i). (*M.J. ex rel. G.J. v. Clovis Unified School Dist.* (E.D. CA, April 3, 2007, No. 1:05-CV-00927 OWWLJO) 2007 WL 1033444; *L.K. v. Burlingame School Dist.* (N.D. CA, June 23, 2008, No. C 08-02743 JSW) 2008 WL 2563155; *Pedraza v. Alameda Unified School Dist.* (N.D. CA, March 27, 2007, C 05-04977 VRW) 2007 WL 949603 [issue as to whether breach of settlement agreement deprived the student of a FAPE]; see also *S.L. v. Upland Unified School Dist., et al.* (9th Cir. 2013) 747 F.3d 1155, 1162 fn. 2 [noting that the District Court determined OAH had jurisdiction to review and enforce the settlement agreement in that matter.]

D. Attorney's Fees Under the IDEA

The IDEA provides that in any action or proceeding, the court, in its discretion, may award reasonable attorney's fees as part of the costs: (1) to a prevailing party who is the parent of a child with a disability; (2) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or (3) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation. (20 U.S.C.A. § 1415(i)(3)(B)(i); see also *Aguirre v. Los Angeles Unified Sch. Dist.*, 461 F.3d 1114, 1117 (9th Cir. 2006).)

The fee shifting provision of the IDEA allows for an award of reasonable attorney's fees. However, the IDEA does not define reasonable and provides little guidance on how to calculate a reasonable fee award. Rather, the IDEA states that the attorney's fee must be "based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished." In addition, courts may consider the difficulty or level of required effort into account when calculating awards of attorney's fees, but courts cannot use a bonus or multiplier when calculating a reasonable fee award under the IDEA. (34 C.F.R. § 300.517(c)(1).)

Generally, courts awarding fees under the IDEA use the lodestar method to calculate reasonable attorney's fees. The lodestar method relies on: (1) the attorney's hourly rate and (2) the number of hours the attorney worked on the case. A court will consider the reasonableness of the attorney's hourly fee and the reasonableness of the hours devoted to the case in calculating a fee award. In some instances a student may be able to obtain an hourly rate for attorney's fees which is higher than the rate established in the community if the student is successful in demonstrating that there were no attorneys available to represent them.

Some courts have determined that the reasonableness of the hourly rate and the reasonableness of the hours worked are related. If an attorney is able to justify a higher fee award through his/her years of experience, he/she should not have to spend as many hours on a case as a less experienced attorney.

II. SECTION 504 CREATED LITIGATION LIABILITY FOR DISTRICTS

A. Review of Section 504

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in programs or activities receiving federal financial assistance. Practically all public schools are recipients of federal funds pursuant to Title II of the American with Disabilities Act and must, subject to withholding of funding, comply with the mandate of Section 504 and the ADA. The ADA and Section 504 are intertwined and borrow from one another key concepts concerning the definition of disability and what equal access to facilities and programs entails.

Specifically, the definition of disability is the same under both Title II of the ADA and Section 504. Under these laws, a person, including a student, with a disability is one who meets any of the following criteria:

1. Has a physical or mental impairment that substantially limits one or more major life activities;
2. Has a record of such an impairment; or
3. Is regarded as having such an impairment.

(29 U.S.C. § 705(20)(B), 34 C.F.R. § 104.3(j).)

In general, major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. (28 C.F.R. Part 35.108(c)(1)(i).)

A major life activity also includes the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions. (28 C.F.R. Part 35.108(c)(1)(ii).)

It is important to remember that an impairment that substantially limits any major life activity, not just a major life activity related to learning or school, is considered a disability under Section 504.

An individual meets the requirement of “being regarded as having such an impairment” if the individual establishes that he or she has been subjected to an action prohibited under Section 504 because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity. However, the definition of a person with a disability shall not apply to impairments that are transitory and minor. A transitory impairment is impairment with an actual or expected duration of six months or less.

Section 504 provides a broad spectrum of protections against discrimination on the basis of disability, including one key aspect on which this guidance focuses: the right to a FAPE.

All elementary and secondary school students who are individuals with disabilities as defined by Section 504 and need FAPE are entitled to FAPE.

Under Section 504, FAPE is the provision of regular or special education and related aides and services that are designed to meet the individual educational needs of students with disabilities as adequately as the needs of students without disabilities are met and that satisfy certain procedural requirements related to educational setting, evaluation and placement, and procedural safeguards. (34 C.F.R. § 104.33.)

Section 504 also requires that a student with a disability be educated with students without disabilities to the maximum extent appropriate to the needs of the student with the disability and that a student with a disability be educated in the regular education setting unless the district can demonstrate that the education of that student in the regular educational environment with the use of supplementary aids and services cannot be achieved satisfactorily. (34 C.F.R. § 104.34.)

Although not explicitly required by the Section 504 regulations, school districts often document the elements of an individual student's FAPE under Section 504 in a written document, typically referred to as a "Section 504 Plan." While there are no specific requirements for the contents of such a plan, a Section 504 Plan often includes the regular or special education and related aides and services a student needs, and the appropriate setting in which the student should receive those services, also called the student's "placement."

Section 504 requires that any placement decisions about a student with a disability be made by a group that includes persons knowledgeable about the student, the meaning of the evaluation data, and placement options. This group is referred to as a "Section 504 Team." Section 504 Teams may, and often do, include the parent of the student. (34 C.F.R. § 104.35(c)(3).) It is helpful if the Section 504 team includes a school district or agency representative who can ensure the district provides, or is able to provide, all services that are identified as necessary. The absence of such a representative on the Section 504 team could result in a denial of FAPE if the Section 504 Team determines certain services are necessary and the district is unable to provide them. (OCR Dear Colleague Letter, July 26 2016 and attached ADHD Guidance.)

B. Determining When an Evaluation is Necessary

Under Section 504, a school district must identify, locate, and conduct a free evaluation of any student who because of a disability "needs or is believed to need" special education or related services. (34 C.F.R. §§ 104.32, 104.35(a).) This obligation may be more commonly known as "Child Find." (20 U.S.C. § 1412(a)(3), 34 C.F.R. § 300.111.) "Child Find" is a concept which is derived from the IDEA.

A school district must conduct an individual evaluation under Section 504:

1. Before taking any action with respect to the student's initial placement; and
2. Before making any subsequent significant change in placement.

However, because the threshold of eligibility for Section 504 is intentionally low, school districts rarely find themselves in a situation where they must conduct an evaluation to determine whether a student qualifies as a person with a disability under the Act. In fact, certain medical diagnoses will typically qualify a student for a Section 504 plan without an evaluation.

For example, on July 26, 2016, OCR issued a Dear Colleague Letter that included an extensive attachment that provided guidance on Section 504 and students who are believed to have ADHD. In that guidance, OCR wrote “[f]urther, a diagnosis of ADHD is evidence that a student may have a disability. OCR will presume, unless there is evidence to the contrary, that a student with a diagnosis of ADHD is substantially limited in one or more major life activities.”

OCR is the federal agency charged with enforcing Section 504 and Title II of the ADA with response to public schools.

Where an evaluation is called for, however, a school district must evaluate students who are suspected of having a disability in all related or all specific areas of educational need. Under Section 504, an evaluation must: consist of more than mere intelligence quotient (IQ) tests; and measure specific areas of educational need, such as speech processing issues, inability to concentrate, and behavioral concerns. Also, as part of the evaluation, Section 504 requires that tests are selected and administered to the student in a manner that best ensures that the test results accurately reflect the student’s aptitude or achievement or other factor being measured, rather than reflect the student’s disability, except where those are the factors being measured; that tests and other evaluation materials are validated for the specific purpose for which they are used; and that tests are appropriately administered by trained personnel. (34 C.F.R. § 104.35(b)(2)-(3).)

The fact that a student is performing well academically is not alone a basis for refusing to evaluate a student who is suspected of having a disability. In passing the ADA Amendments Act of 2008, some members of Congress emphasized that “it is critical to reject the assumption that an individual who has performed well academically cannot be substantially limited in activities such as learning, reading, writing, thinking, or speaking.” (154 Cong. Rec. S8342, 8346 (daily ed. Sept. 11, 2008) (statement of the Managers to Accompany S. 3406, The Americans with Disabilities Act Amendments Act of 2008).)

Parents can also request that the school district conduct an evaluation to determine if their child needs special education or related services. (34 C.F.R. Part 104, app. A.)¹ If a parent requests an evaluation to address a student’s academic or behavioral difficulty that is the result of a suspected disability, then a district must either conduct an evaluation to determine whether the student has a disability and, because of the disability, needs special education or related services, or explain its refusal to evaluate the student to the requesting parent and

¹ OCR interprets Section 504 to require parental consent for the initial evaluation. OCR also urges schools to allow for parental participation when considering any change in the student’s Section 504 provision of FAPE, including location of services. OCR, Protecting Students With Disabilities: Frequently Asked Questions About Section 504 and the Education of Children with Disabilities, Q&As 27, 41-43, <http://www2.ed.gov/ocr/504faq.html#evaluation>.

notify parents of their right to dispute that decision through the due process procedures that must be made available under Section 504's implementing regulation. (34 C.F.R. § 104.36.)

If a school district believes a student has a disability and because of the disability needs special education or related aides and services, then Section 504 requires the school district to conduct a preplacement evaluation of that student. (34 C.F.R. § 104.35(a).) School districts may violate this Section 504 obligation when they deny or delay conducting an evaluation of a student when a disability, and the resulting need for special education or related services, is suspected.

Neither Section 504 nor federal regulations identify specific assessment tests that a district must use to evaluate a student's need for special education or related services under the statute. However, federal regulations do identify some standards for evaluations. According to the regulations, the district must establish standards and procedures to ensure that:

1. Tests and other evaluation materials have been validated for the specific purpose for which they are used and are administered by trained personnel in conformance with the instructions provided by their producer;
2. Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient; and
3. Tests are selected and administered so as best to ensure that, when a test is administered to a student with impaired sensory, manual, or speaking skills, the test results accurately reflect the student's aptitude or achievement level or whatever other factor the test purports to measure, rather than reflecting the student's impaired sensory, manual, or speaking skills (except where those skills are the factors that the test purports to measure). (34 CFR 104.35 (b).)

The development of neutral policies – meaning policies that do not mention race, color, national origin, or sex – that specify when a Section 504 evaluation is needed, and careful evaluations that aim for objectivity, may help a school district avoid operating on the basis of making generalizations, assumptions, prejudices, or stereotypes about disability generally.

C. Information Required To Document A Disability

There are no specific requirements under either statute or federal regulation which spell out specifically what documentation a school district is required to have to document that a student has a disability. Whether a student is a student who is eligible for a Section 504 Plan is a decision made pursuant to a Section 504 team, although a district may determine based on a doctor's diagnosis that a student qualifies. Usually, the only document that is retained by a school is the Section 504 Plan itself along with attached reports.

Typically parents will provide doctors notes and diagnoses, the results of state testing or academic performance, private evaluations or opinions from the student's medical providers or service providers working with the student through the Regional Center. Documentation that proves that a student is a student with a disability may be as simple and as sparse as a single doctor's diagnosis of a medical condition impacting a major life activity. Documentation may also include results of evaluations conducted by the school, parental input, historical or current academic performance, and teacher input amongst other sources of information about the student.

Often times a student will be found eligible for a Section 504 Plan after an initial evaluation has been performed pursuant to the IDEA but the student was not found eligible for special education under the IDEA and was not provided an IEP. However, this is not the only way that a student may qualify as a student under Section 504.

All of the information gathered by the school as a result of a Section 504 team meeting should be retained and kept along with the student's Section 504 Plan. The information and sources described above are typically reviewed by the entire Section 504 team at a team meeting, and notes of what was discussed at the meeting are kept. Documentation concerning eligibility may be attached to the Section 504 Plan that the team prepares. The Section 504 Plan will travel with the student should the student change schools or move to a different area.

III. ATTORNEY FEES UNDER SECTION 504

With regard to actions brought under Section 504, reasonable attorney's fees are available to prevailing parents. (29 U.S.C. § 794a(b), see *J.C. v. Regional Sch. Dist. 10, Bd. of Educ.*, 36 IDELR 31 (2d Cir. 2002) (although the lower court based its fee award only on the IDEA claim, the 2d Circuit extended its ruling to cover the parents' suit under Section 504; *M.G. v. Eastern Reg'l High Sch. Dist.*, 54 IDELR 308 (3d Cir. 2010, unpublished), and *Elliott v. Board of Educ. of the Rochester City Sch. Dist.*, 40 IDELR 151 (W.D.N.Y. 2003).)

The Third Circuit adopted the view that a court may deny attorney's fees under Section 504 when the request is grossly exaggerated, absurd, or shocks the conscience. (*M.G. v. Eastern Reg'l High Sch. Dist.*, 54 IDELR 308 (3d Cir. 2010, unpublished) (accepting a lower court's findings that the hours the attorney billed were "not only excessive, but also either grossly negligent or fraudulent."))

A. IDEA Was Viewed As a Way to Avoid Federal Litigation Costs

Because IDEA violations are litigated in a due process hearing and not federal court, the IDEA was viewed as a way to avoid federal litigation costs.

B. Money to Be Made Was/Is Limited

Unlike Section 504, IDEA only provides for damages after administrative due process and only for substantive as opposed to procedural violations. Courts are authorized to use broad discretion in granting appropriate relief. (*Burlington Sch. Comm. v. Massachusetts Dep't of Educ.*, 556 IDELR 389 (U.S. 1985) (citing 34 C.F.R. § 300.516 (c)(3).) However, under the IDEA,

remedies are unlikely to include compensatory or punitive damages for two reasons: (1) the purpose of the IDEA (assist states in educating students with disabilities) is not furthered by awarding money to parents, and (2) if districts were at risk for civil liability, districts would be inhibited in designing programs to better educate students with a disability *Anderson v. Thompson*, 553 IDELR 105 (7th Cir. 1981).

C. Review Private Enforcement of Public Law

IDEA and Section 504 are based on private enforcement of public law – there is no agency that is individually responsible for ferreting out violations. The private enforcement of IDEA creates a great deal of stress on school staff as it essentially allows parents to question the job performance of teachers and other school staff.

Most due process hearings are the result of a disagreement between the district and parents regarding particular services for a student.

The IDEA is similar to other federal laws which rely on private enforcement by granting a successful plaintiff attorney's fees. Several environmental statutes, as well as anti-discrimination laws, rely on private attorneys to bring suit to enforce public rights.

D. Settlements Typically Fairly Low

Historically, IDEA settlements were typically low. This was because the matter being settled was a due process/fair hearing as opposed to a lawsuit. Matters were typically shorter than jury trials, required less evidence, and required less preparation. Parents and districts also at times represented themselves without the aid of attorneys and some continue to do so.

IV. WHAT IS HAPPENING NOW?

A. Attorneys Are Combining Claims

The fundamental purpose of the IDEA is to provide educational services, not to provide compensation for personal injury and a damages remedy. The IDEA's carefully structured procedure for administrative remedies encourages parents to seek relief at the time of a deficiency and it allows the District to use its expertise in correcting mistakes.

Nonetheless, a parent may bring multiple claims with their special education due process hearing request that may not be within the jurisdiction of OAH including tort claims, violations under the Unruh Civil Rights Act, and violations of Section 504 of the Rehabilitation Act of 1973. Despite OAH's lack of jurisdiction with regard to these claims, the bundling of claims does not eliminate potential attorney's fees.

FAPE denial claims may be brought under the ADA and Section 504. Parents requesting relief under Section 504 or Title II must prove intentional discrimination. To prove intentional discrimination, parents may show bad faith or gross misjudgment on the part of the district. (See, e.g., *Mark H. v. Lemahieu*, 49 IDELR 91 (9th Cir. 2008), *Sellers v. School Bd. of the City of Manassas*, 27 IDELR 1060 (4th Cir. 1998).) However, some courts have held that bad faith or discriminatory intent may not be necessary.

In *Diaz-Fonseca v. Commonwealth of Puerto Rico*, 45 IDELR 268 (1st Cir. 2006), the court found that if a case turns entirely on rights created by the IDEA, the party has no viable claim under Section 504 or Title II. Nonetheless, parents may bring a non-IDEA claim alongside an IDEA claim, even if there is some overlap in those claims. (*D.B. v. Esposito*, 58 IDELR 181 (1st Cir. 2012).)

B. Review of Other Statutes Allowing Fees

The IDEA is not the exclusive remedy for claims alleging violations of federal rights of children with disabilities. Under 34 CFR 300.516 (e), the IDEA states: “[n]othing in this part restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities”

C. Americans with Disabilities Act

The ADA prohibits discrimination on the basis of disability in state and local government programs/services, public accommodations, employment, commercial facilities, telecommunications, and transportation.

The ADA does not specifically name all of the impairments that are protected. Rather, to be protected by the ADA, one must have a disability which is defined by the ADA as a physical or mental impairment that substantially limits one or more major life activities, a person who has a history or record of such impairment, or a person who is perceived by others as having such impairment.

D. Section 504 of the Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in programs or activities receiving federal financial assistance. Practically all public schools are recipients of federal funds pursuant to Title II of the American with Disabilities Act and must, subject to withholding of funding, comply with the mandate of Section 504 and the ADA. The ADA and Section 504 are intertwined and borrow from one another key concepts concerning the definition of disability and what equal access to facilities and programs entails.

Under Section 504, punitive damages are not available. Intentional, rather than merely negligent violations of the Rehabilitation Act may expose a district to money damages. However, the degree of intentional conduct needed to make a claim for money damages is not high. Recently, Congress has taken an expansive view of those entitled to Section 504 relief with the increased availability of fee-shifting of attorney's fees and expert witness cost reimbursement to successful plaintiffs.

E. Unruh Civil Rights Act

The Unruh Civil Rights Act (California Civil Code section 51) provides a protection from discrimination to anyone denied the full and equal accommodations, advantages, facilities, services, or privileges in all business establishments because of age, ancestry, color, disability, national origin, race, religion, sex and sexual orientation.

Individuals denied a service by a business establishment are entitled to recover treble damages and may also receive punitive damages in some circumstances.

In order to have a valid claim under the Unruh Civil Rights Act:

1. An individual must prove that he/she was denied full and equal services by a business;
2. A substantial motivating reason for the denial must have been the business' perception of the person's protected status.

If these two elements are met, a person is entitled to a minimum statutory recovery of \$4,000 for each violation.

F. Government Tort Claims Act

Government Code section 945.4 provides that no suit for money or damages may be brought against a public entity on a cause of action for which a claim is required to be presented until a written claim therefore has been presented to the public entity and has been acted upon.

If an individual is unaware of the reason for filing the claim at the time of injury the six month time period begins at the point when the individual became aware, or should have become aware, of the reason. (See, for example, *Whitfield v. Roth* (1974) 10 C.3d 874, 112 Cal. Rptr 540.)

V. CURRENT LITIGATION CHALLENGES

A. Remember the Purpose of Due Process

Under the IDEA, the Due Process Hearing is the primary procedure used to challenge and resolve special education disputes. A Due Process Hearing is appropriate for matters concerning the identification, evaluation, placement, or provision of FAPE to a student with a disability. (34 CFR § 300.507(a).)

The purpose of the Due Process Hearing is to allow all parties to present evidence supporting their positions and to explain to the Administrative Law Judge why they believe they should prevail on the issues being heard. Formal rules of procedure or evidence do not govern due process hearings. Although due process hearings are less formal than a court trial, it proceeds in an organized fashion that is similar to a trial. At the beginning of the due process hearing, the Administrative Law Judge turns on a recorder to make a record of the hearing and, after identifying the case and the parties for the record, briefly explains how the hearing will proceed. The Administrative Law Judge may only speak with a party about the case in presence of the other parties. It is important to have any substantive discussions about the case on the record.

Once preliminary matters are completed, each party is given an opportunity to make an opening statement, which should provide the Administrative Law Judge with a brief summary of the party's position on the issues being heard.

Then evidence is presented. The party who requested the hearing is usually the party who presents evidence first. All witnesses are sworn to tell the truth. After one party has presented its witnesses and evidence, the other parties will call their witnesses. Each party will be given an opportunity to ask questions of the other parties' witnesses, and the Administrative Law Judge may also ask questions of the witnesses. The Administrative Law Judge may ask the parties to be flexible as to when witnesses are called to ensure that all relevant testimony is presented. At the end of the hearing, each party is allowed to make a closing argument.

In some cases the Administrative Law Judge may ask the parties to make oral closing arguments. In others, closing statements will be submitted in writing after the hearing. After closing statements are received, the hearing record is closed. The Administrative Law Judge will then prepare a written decision, which will be sent to the parties.

B. Issues at Hearing

State and federal law prohibit the consideration at a due process hearing of any issue that is not raised in the request for due process hearing, unless the other party consents, or unless, not later than five days before the hearing, an Administrative Law Judge grants permission to a party to add an issue under Education Code section 56502, subdivision (e). A party that wishes to add issues to a case must file a motion for leave to amend the complaint. If a complaint is amended, the timelines for resolution sessions, mediations, and hearings start over again.

C. Rights of the Parties During the Hearing

All of the parties have the following rights during the hearing:

- Right to representation. All parties have the right to be accompanied, advised, and assisted by counsel and by persons.
- Right to request the exclusion of witnesses. Any party may ask the Administrative Law Judge to order prospective witnesses to remain outside the hearing room while other witnesses are testifying. This practice allows the Administrative Law Judge to compare the testimony of witnesses who have not heard each other testify.
- Right to present evidence and argument. All parties have the right to call witnesses and present evidence that will help them prove their cases. They will also be given the opportunity to argue the merits of their cases.
- Right to confront and cross-examine adverse witnesses. All parties have the right to be present when witnesses testify against their positions and to ask them questions concerning their testimony.

- Right to written findings of fact and decision. The Administrative Law Judge must prepare a written decision setting forth his or her factual findings, analysis of the applicable law and final decision.

D. Settlement Demands Are Getting Higher

The Federal Rules of Civil Procedure provide that “[u]nless a federal statute, these rules, or a court order provides otherwise, costs—other than attorney’s fees—should be allowed to the prevailing party.” (Fed. R. Civ. P. 54(d)(1).) Prior to awarding costs under Rule 54(d), courts must determine the prevailing party. Generally, a party prevails for purposes of Rule 54(d) when a final judgment awards it “substantial relief.” (*Smart v. Local 702 Int’l Bhd. of Elec. Workers*, 573 F.3d 523, 525 (7th Cir. 2009).) A party that gets substantial relief prevails “even if it doesn’t win on every claim.” (*Slane v. Mariah Boats, Inc.*, 164 F.3d 1065, 1068 (7th Cir.), cert. denied, 527 U.S. 1005 (1999).)

Some fee shifting civil rights statutes in which Districts defend claims include Title VII, section 504, the ADA, the ADEA, Title VI, Title IX, and section 1983 provide that prevailing plaintiffs may recover their reasonable attorney’s fees from the defendant(s).

As originally enacted in 1975, the IDEA did not include fee shifting language. In 1984, in *Smith v. Robinson*, 468 U.S. 992, 1021 (1984), the Supreme Court even held that the IDEA was not a fee shifting statute.

The IDEA provides that “the court in its discretion may award reasonable attorney’s fees to prevailing parents. However, courts deciding fee requests have held that there is an entitlement to a fee award if prevailing status is established. Under the IDEA, fee awards are provided to prevailing parents not to prevailing schools. Win or lose, a District defending an IDEA claim may also end up paying a student’s attorney.

D. Claims Being Made Often Lack Evidence

Under the IDEA, hearing officers may interpret any state or federal laws that are involved in a parent’s due process complaint. (*Yolanda Cano-Angeles v. Commonwealth of Puerto Rico* (Dep’t of Educ.), 66 IDELR 154 (D.P.R. 2015) (holding that the Puerto Rico Department of Education had to defend a due process complaint in which the mother of a child with a disability sought transportation reimbursement based on the rates set forth by the Public Service Commission).)

Generally, hearing officers have the authority to determine procedural matters not specifically outlined in the IDEA if they are consistent with the party’s IDEA rights.

VI. WHERE ARE WE HEADED?

A. Due Process Cases Just Became More Complex

Since IDEA was enacted, due process hearings have become increasingly more complex and costly. Due process claims can take years to resolve and can cost as much as six figures to litigate or even settle. Unlike other areas of civil litigation, IDEA due process and other

education related litigation usually involves a long-term ongoing relationship between the parties involved as the student remains enrolled in the school after the due process hearing is complete.

Under the IDEA, there is a two-year statute of limitations for filing a due process complaint. Accordingly, the complaint must allege a violation that occurred not more than two years before the date that the plaintiff knew or should have known about the alleged violation that is the basis of the complaint. The decision of whether a Parent's request for a due process hearing is granted or denied is made by an independent hearing officer. The District cannot make the determination. As a result, claims can be made by Parents that may not be within the realm of OAH jurisdiction.

B. Lax Evidence Standard Potentially Exposes Districts

Although due process hearings are adversarial, there are relaxed procedural requirements and evidentiary standards compared to traditional court settings. Due process hearings are quasi-judicial, but incorporate many elements of a trial including an opening statement, presentation of evidence, and a closing statement. The burden of proof is on the party seeking relief and can either be the parent or the District. Even though formal rules of evidence do not apply, hearing officers will rule on any specific objections to questions and witnesses. Evidence may be admitted or denied at the discretion of a hearing officer if it is not material or relevant to the issue at hand.

Apart from the five day disclosures and the right to examine educational records, there is no express right to discovery in a special education due process hearing. As a result, the hearing officer may allow discovery in limited circumstances and only when necessary for proper presentation or preparation of a party's case subject to limitations in the event of privileges or harassment. (See *No. 90-51, Hudson Sch. Dist.*, 16 IDELR 1340 and 1392, and *Letter to Stadler*, 24 IDELR 973 (OSEP 1996).)

C. Now Need to Assess Liability Much Earlier

A case may be worth settling if the cost of litigation exceeds the expense of settlement. Additionally, it is important to compare the cost of settlement against the likelihood of a favorable decision.

It is also important to keep in mind that litigation expenses can escalate quickly and money for the District may be saved in the long run by settling early. Substantial time and resources must be devoted to litigation. Employees may lose a significant amount of time that could otherwise be spent working to locating, collecting, reviewing, and producing records for a Due Process Hearing. Constant litigation within a District may also take an emotional and physical toll on employees.

Remember, there is no such thing as a guaranteed victory in the hearing process. Often, Parents and Districts will not necessarily be happy with the results of a settlement.

2015-2016 OAH Case Filings

| Case Type | First Quarter | Second Quarter | Third Quarter | Fourth Quarter | Year to Date |
|-----------------------------------|---------------|----------------|---------------|----------------|--------------|
| District Due Process Hearing | 79 | 85 | 127 | 129 | 420 |
| District Due Process Hearing Only | 0 | 1 | 0 | 1 | 2 |
| District Dual | 0 | 1 | 0 | 1 | 2 |
| District Expedited | 3 | 2 | 2 | 1 | 8 |
| District Mediation Only | 20 | 31 | 32 | 43 | 126 |
| Total District Filings | 102 | 120 | 161 | 175 | 558 |
| Student Due Process Hearing | 1,011 | 797 | 808 | 974 | 3,590 |
| Student Due Process Hearing Only | 2 | 3 | 5 | 7 | 17 |
| Student Dual | 9 | 22 | 16 | 26 | 73 |
| Student Expedited | 2 | 4 | 5 | 2 | 13 |
| Student Mediation Only | 34 | 29 | 19 | 31 | 113 |
| Total Student Filings | 1,058 | 855 | 853 | 1,040 | 3,806 |
| Total Filings | 1,060 | 975 | 1,014 | 1,215 | 4,364 |

2015-2016 OAH Averages

| | First Quarter | Second Quarter | Third Quarter | Fourth Quarter | Year to Date |
|--|---------------|----------------|---------------|----------------|--------------|
| Average length of hearing in days | 4 | 4 | 4 | 4 | 4 |
| Average hearing time used by Students (%) | 55 | 55 | 52 | 53 | 54 |
| Average hearing time used by Districts (%) | 44 | 44 | 47 | 46 | 45 |
| Number of Parent-filed hearing requests | 1,024 | 826 | 834 | 1,009 | 3,693 |
| Number of District-filed hearing requests | 82 | 89 | 129 | 132 | 432 |
| Average number of witnesses Districts called | 6 | 6 | 5 | 6 | 6 |
| Average number of witnesses Students called | 7 | 6 | 6 | 7 | 7 |

2015-2016 Total Due Process Hearings

