

## Due Process Decision Blasts District 65

As a member of the community of parents with children with special needs in District 65 (“the District”), you should be aware of a recent lawsuit in which the parents of a child with a disability won an important and decisive victory against the District. The parents filed a Due Process complaint against the District alleging that their child had been denied a Free Appropriate Public Education (“FAPE”) due to a number of substantive and procedural violations on the part of the District – most of which related to the District’s failure to re-evaluate their child in a timely manner, to conduct an appropriate re-evaluation, to draft an appropriate Individual Educational Plan (“IEP”) and to offer an appropriate educational placement. The case was tried before an independent hearing officer (the “IHO”). The IHO found that the District had, indeed, denied the child a FAPE. Parents were granted the lion’s share of the relief they sought, including reimbursement for a year of tuition at a therapeutic school in which they had unilaterally enrolled their child when it appeared that the District would not offer a suitable placement.

Because the case was decided by an IHO (not a federal district or appeals court) it has limited precedential value. That said, the decision is instructive as it highlights District practices that were deemed to violate the Individuals with Disabilities Improvement Act (IDEA). Below are the top six “take-aways” from the decision:

1. District Policies and Programs Can’t Dictate IEP Services/Placement – The IHO stated that the District’s Inclusion Plan inappropriately shortened the continuum of placement options available to this child with complex needs. The IHO refers to the push toward inclusion as a “one size fits all” approach that required students to adapt to a program. Instead, the District should develop programs and services that adapt to students’ needs.

*The District has a history of introducing policies/programs that then dictate the terms of IEP’s. This very phenomenon is occurring now as the Special Services department makes a paradigm shift toward “integrated services” (push-in, rather than pull-out therapies). Before acquiescing to modifications of the service delivery model for your child, you should require your child’s IEP team to show that this new service modality is a response to your child’s individual needs.*

2. When Districts Put Policy Above Need, They May Illegally “Pre-Determine” IEP’s – The IHO found that the District maintained a singular focus on the child’s need to be with typically developing peers (per the inclusion initiative) while ignoring the considerable evidence supporting the complex and varied needs of the child. The IHO also criticized the District for informing the parents of the child’s placement

before the assessment and for being ill prepared to discuss any options other than the general education classroom in which the District ultimately placed the child. The IHO found that these facts compelled the conclusion that the District had unlawfully “pre-determined” the child’s IEP.

*As in #1 above, if the District policy/program foreordains the terms of your child’s IEP and the District refuses to consider evidence that supports another result, the District may have unlawfully “pre-determined” your child’s IEP.*

3. Districts Must Promptly Obtain Consent for Evaluation – In this case, the District special education administrator “deflected” the parents’ request for an evaluation and IEP for approximately 6 months before obtaining parental permission for the evaluation. The IHO held that since the District should have obtained parental consent when the parents first requested an evaluation, the 60-school-day period began when the parents asked for the evaluation – not when the District obtained consent.

*If the District delays requesting your consent for evaluation, the 60-school-day clock may be deemed to have begun ticking when you first requested the evaluation.*

4. IEP Teams Must Consider the Reports of Independent Experts – The IHO criticized the IEP team for ignoring the mountain of evidence submitted by the parents’ experts (psychologist, therapists, etc.) indicating that the child needed a small, structured educational setting. The IHO remarked that the IEP team accepted and relied upon the information these experts generated for purposes of determining eligibility for special education, but then ignored their recommendations and strategies.

*Absent some evidence that your independent experts’ recommendations are inappropriate, inaccurate or unnecessary, the team should incorporate them in your child’s IEP.*

5. A Record of Behavioral Issues Requires an FBA/BIP – The child in this case had a history of behavioral problems. The District maintained that it did not have to conduct a Functional Behavioral Assessment (FBA) because the team had not seen how the child fared in a District 65 classroom. Noting the considerable evidence that the child’s behaviors impeded the child’s learning in other settings, the IHO rejected this wait-and-see approach.

*If your child has a record of behavioral challenges that impede his/her learning, it is not necessary that your child attend a District school and bottom-out (behaviorally) before you can make the case that an FBA and Behavioral Intervention Plan (BIP) are required as part of your child's initial IEP.*

6. Caring, Cooperative Parents Win the Day – The attorney for the District argued that the parents' decision to enroll their child in private school for several years prior to re-enrolling the child in the District precluded their recovery. In his view, the private placement was inappropriate and the District was being made to pay for the errors of this placement. The attorney also suggested that because the parents filled their 10-day notice that they intended to enroll their child in a private therapeutic school before the IEP meeting was held, they were trying to "game the system". The IHO rejected all this, finding that the parents were cooperative, diligent and caring throughout the entire process.

*Taking a case to Due Process exacts an emotional toll. The District will likely try every means possible to discredit you. Keeping your cool, communicating calmly and cooperating with reasonable requests will put you in the best position to deflect these attacks.*

District 65 recently appealed the decision. We keep you informed concerning the outcome of the appeal.