

Trending, Hip, Recurring and Popular Due Process Issues Coming to an IU Near You

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Exhaustion



The question is whether the ADA, Section 504 and some IDEA issues must first go to a due process hearing before going to court.

Prior Written Notice

PRIOR WRITTEN NOTICE CONTENTS

Prior written notice must include:

A description of the action proposed or refused by the district.

An explanation of why the district proposes or refuses to take the action.

A description of each evaluation procedure, assessment, record, or report the district used as a basis for the proposed or refused action.

A statement that the parents have protection under Part B's procedural safeguards and, if the notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained. Sources for parents to contact to obtain assistance in understanding the provisions of Part B.

A description of other options that the IEP team considered and the reasons why those options were rejected.

A description of other factors relevant to the district's proposal or refusal.

[34 CFR 300.503](#) (b)

Procedural Safeguards Notice

Districts must provide the parents of a child with a disability with notice of the procedural safeguards that the IDEA establishes. 34 CFR § 300.504(a)

This procedural safeguards notice must be provided once every year, except that a copy must also be provided:

Upon initial referral or parental request for evaluation.

Upon receipt of the first state complaint in the school year.

Upon receipt of the first due process complaint in the school year.

In accordance with disciplinary procedures.

Upon parental request.

Compensatory Education Calculations

Two different methods:

1. How much time should the child receive? Or
2. What does it take to make the student whole?
3. Courts tend to prefer the 'make whole' method.
4. Historically, H.O.s have rarely used 'make whole' due to lack of evidence.

Cost of Compensatory Education

Appeals Panel and H.O.s (historically): Dollar-per-hour cap on compensatory education.

More recently, many H.O.s have uncapped the dollar value.

In *S.D. of Philadelphia v. Williams* (E.D. Pa. 2015) the court reversed an H.O.'s dollar cap because:

Any cap is inconsistent with the “make whole” remedy.

Cost of services is not a factor to make a student whole.

Compensatory Education and College Tuition

In *Stapleton v. Penns Valley Area School District*, [67 IDELR 268](#) (M.D. Pa. 2016), the court held compensatory education may be used for postsecondary expenses.

24 P.S. 1306(1)-(2).

According to a PDE issued Basic Educational Circular (BEC) the “host district” is responsible for making decisions regarding goals, programming, and educational placement for students placed in residential treatment facilities by third-parties. This means that the “host district” is responsible for developing and implementing the student's IEP while the student attends the mental health program. While the “host district” is responsible for the student's IEP while in treatment, the “resident district” is responsible for paying the child’s Section 1306 educational costs. In addition, the “host district” must also seek "advice from the resident school district with respect to the student, and keep the resident school district informed of its plans to educate the student."

24 P.S. 1306(1)-(2).

Recently in *L.T. v. N. Penn Sch. Dist.*, No. 18-3347, 2018 U.S. Dist. LEXIS 211781 (E.D. Pa. Dec. 14, 2018) applying Section 1306 the court held the child's district of residence, while not the child's then current local education agency, was obligated to provide the child with a "contingent IEP" in anticipation of the child's discharged from the mental health 1306 placement.

KOSHK(Knew or Should Have Known)

The KOSHK date is the day that begins the timeline; *e.g.*, how to figure out if a due process complaint was timely filed. Absent an exception, the complaint must be filed within two years of the KOSHK date.

- The Third Circuit told us what to do after we find the KOSHK date.
- Debate is raging about how to find the KOSHK date.
- H.O.s look for knowledge of the action that forms the basis of the complaint.

FAPE Standard

Recently, in September 2018, the Third Circuit in *Dunn v. Downingtown Area Sch. Dist.*, 904 F.3d 248 (3d Cir. 2018) concluded that the language in *Endrew* mirrored the Third Circuit's longstanding pronouncement that a student's educational program "must be reasonably calculated to enable the child to receive meaningful educational benefits in light of the student's intellectual potential and individual abilities."

IEE Requests

Parents have the right to an IEE at public expense if they disagree with an evaluation obtained by the district. If an IEE is requested and denied, the district must demonstrate in a due process hearing that its own evaluation of the child was appropriate; or the district demonstrates in a due process hearing that the evaluation obtained by the parents did not meet district criteria. 34 CFR 300.502 (b)(1) through 34 CFR 300.502 (b)(2).

RTI and Comprehensive Evaluations

Periodically the issue comes up about how long a district may continue to implement an RTI or MTSS strategy prior to referring an evaluation. *Letter to Ferrara*, [60 IDELR 46](#) (OSEP 2012); *Letter to Combs*, [52 IDELR 46](#) (OSEP 2008). Districts should continue to systematically monitor the intervention data, to ensure students do not remain in RTI/MTSS interventions for inappropriately extended periods..

Progress Monitoring

District should not rely on a student's passing marks to prove that he/she made appropriate academic progress. *Pocono Mountain Sch. Dist. v. J.W.*, [70 IDELR 200](#) (M.D. Pa. 2017) and *T.M. v. Quakertown Cmty. Sch. Dist.*, [69 IDELR 276](#) (E.D. Pa. 2017). See also, Academic Progress Monitoring Tools Chart <https://charts.intensiveintervention.org/chart/progress-monitoring>; What Is Scientifically-Based Research on Progress Monitoring? <https://files.eric.ed.gov/fulltext/ED502460.pdf>

The end.

Thank you!