The Top 10 Special Education Issues in School Districts
As Identified by Due Process Hearings in 2015 & 2016

With Mark Wey, Director & Dr. Karlyn Keller, Manager
TASB Special Education Solutions

This information is provided for educational purposes only to facilitate a general understanding of the law or other regulatory matter. This information is neither an exhaustive treatment on the subject nor is this intended to substitute for the advice of an attorney or other professional advisor. Consult with your attorney or professional advisor to apply these principles to specific fact situations.

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Agenda

I. Overview of Sources of Guidance
II. Due Process Hearing Data
III. Due Process Hearing Key Issues
IV. Top 10 Key Issues Review
V. Take Aways & Reminders
Sources of Guidance
Sources of Guidance

**Constitutional**
- federal
- state

**Statutes**
- federal
- state

**Case or Common Law**
- federal
- State

**Due Process Hearings**
Special Education Process

Child Find
- After entry of each preschool or kindergarten student and any student enrolling without records of screening, evaluation, or progress in school
- After notification by parents of concerns regarding developmental or educational progress of their child
- Transfer students' educational enrollment data and performance in the prior school must be reviewed
- A student with a history of special education who is not currently eligible shall be considered for referral for a full and individual evaluation or other services

Conduct Screening

Concerns Noted
(Parents must be notified of concerns within 10 school days)

No Concerns Noted
(No further action necessary)

Follow-Up of Concerns Noted
Conduct and document follow-up that may include but is not limited to pre-referral activities, screening, response to interventions strategies

Reevaluation
Provide Meeting Notice (if meeting is to take place)
Review existing data

No Additional Data Needed
Notify parents of right to request additional data
Determine eligibility
Summarize all information in an evaluation report provided to parent
Provide Prior Written Notice

Additional Data Needed
Provide Prior Written Notice
Obtain Parental Consent
Gather additional data
Provide Meeting Notice
Review new data
Determine eligibility
Summarize all information in an evaluation report provided to parent
Provide Prior Written Notice

IEP Development
Provide Meeting Notice
Develop IEP
Provide Prior Written Notice

IEP Development
Provide Meeting Notice and Procedural Safeguards if not provided to parent yet in current school year
Develop IEP
Provide Prior Written Notice
Due Process Hearing Data
Due Process Hearing Data

<table>
<thead>
<tr>
<th>Description</th>
<th>Count</th>
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</thead>
<tbody>
<tr>
<td>Hearings Finalized in 2015</td>
<td>29</td>
</tr>
<tr>
<td>Hearings Finalized in 2016 (ongoing)</td>
<td>5</td>
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<tr>
<td><strong>Total Hearings Reviewed</strong></td>
<td><strong>34</strong></td>
</tr>
<tr>
<td>Total Key Issues Addressed</td>
<td>123</td>
</tr>
<tr>
<td>Total Different Key Issues Addressed</td>
<td>26</td>
</tr>
<tr>
<td>Hearings Filed on behalf of Student</td>
<td>32</td>
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<tr>
<td>Hearings Filed on behalf of School</td>
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</table>
Due Process Hearing

Key Issues
<table>
<thead>
<tr>
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<th>Count</th>
</tr>
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<tbody>
<tr>
<td>Behavior</td>
<td>4</td>
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<tr>
<td>Related Services</td>
<td>4</td>
</tr>
<tr>
<td>Reimbursement</td>
<td>3</td>
</tr>
<tr>
<td>ARD</td>
<td>2</td>
</tr>
<tr>
<td>Prior Written Notice (PWN)</td>
<td>2</td>
</tr>
<tr>
<td>Residential Placement</td>
<td>2</td>
</tr>
<tr>
<td>Statute of Limitation</td>
<td>2</td>
</tr>
<tr>
<td>Accommodations</td>
<td>1</td>
</tr>
<tr>
<td>Bullying/Harassment</td>
<td>1</td>
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<tr>
<td>Compensatory Education</td>
<td>1</td>
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<tr>
<td>Consent</td>
<td>1</td>
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<tr>
<td>Discipline</td>
<td>1</td>
</tr>
<tr>
<td>Extended School Year (ESY)</td>
<td>1</td>
</tr>
<tr>
<td>Procedural Safeguards</td>
<td>1</td>
</tr>
<tr>
<td>Stay Put</td>
<td>1</td>
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<td>Transportation</td>
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Top 10 Key Issues Review

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<tr>
<td>1. Free and Appropriate Public Education</td>
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<tr>
<td>2. Individualized Education Plan</td>
</tr>
<tr>
<td>3. Evaluation/Reevaluation</td>
</tr>
<tr>
<td>4. Eligibility</td>
</tr>
<tr>
<td>5. Independent Educational Evaluation</td>
</tr>
<tr>
<td>6. Child Find</td>
</tr>
<tr>
<td>7. Parent Participation</td>
</tr>
<tr>
<td>8. Parental Placement</td>
</tr>
<tr>
<td>9. Placement</td>
</tr>
<tr>
<td>10. Least Restrictive Environment</td>
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Major Finding Areas

- Identification for Special Education
- Direct Documentation of Special Education Program
- Service Location
Identification for Special Education

- Child Find
- Evaluation/Reevaluation
- Independent Educational Evaluation
- Eligibility
Direct Documentation of Special Education Program

- Individualized Education Plan
- Free and Appropriate Public Education
- Least Restrictive Environment
- Parent Participation
Service Location

Placement  Parental Placement  Parent Participation
Finding by Finding

Q & A
Free and Appropriate Public Education (FAPE)
# Six Key Principles of IDEA

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From *The Law and Special Education, Second Edition* by Yell
PL 94-142: Education for all HC Children Act (EHA)

Purpose

- guarantee "free appropriate public education" to all children with handicaps
- assure rights of children with handicaps and their parent
Definition of **free appropriate education**: 
“...special education and related services which:
- are provided at the public expense under public supervision without charge
- meet the standards of the state educational agency
- include preschool, elementary, or secondary education in the state involved,
- are provided in conformity with an individualized program
Litigation Regarding “Appropriate”
1982 - Board of Education v. Rowley (458, U.S. 176)

- Child with hearing impairment did not need an interpreter because she was benefiting from her education
  - provide appropriate education - not best education
  - some states have higher standards (maximum)
“We hold that the state satisfies the FAPE requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction” (Rowley)
The Rowley Twofold Inquiry

- Has the state complied with the procedures in the act?
- Is the IEP reasonably calculated to enable the child to receive educational benefits?
Individualized Education Plan (IEPs)
Individualized Education Plan (ARD in Texas)

What is an appropriate IEP?

In 1982, the Supreme Court said the IEP must be reasonably calculated to confer educational benefit to the child. *Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). That means that the IEP is designed so that the child may reasonably make meaningful progress on appropriate goals and objectives. In summary, the IEP sets forth, on an individualized basis, what the child will be working on, where he will work, and what will be necessary to assist him in his work. The IEP does not have to maximize the child’s potential or guarantee any particular level of achievement. It must provide a basic “floor of opportunity,” in light of the child’s needs and disabilities.

From “Overview of Basic IDEA Issues: ARD Committees, Parents, LRE, IEPs, and Avoiding Due Process Hearings” by Jose L. Martin, Attorney at Law
Developing the IEP


• A statement of the child’s present levels of education and a statement of how the child’s disability affects his/her involvement and progress in the general curriculum.

• A statement of measurable annual goals;
Developing the IEP

- A statement of specially-designed instruction and related services and supplementary aids and services to be provided to the child and a statement of program modifications or supports for school personnel that is designed to enable the child to:
  - advance appropriately toward attaining the annual goals;
  - enable the child to be involved in and progress in the general curriculum;
  - enable the child to participate in extracurricular and other nonacademic activities.
- Related services including the frequency, duration, and grouping (individual or group) of those services.
Developing the IEP

• Modifications that will be provided for the child.
• An explanation of the extent, if any, to which the child will not participate with non-disabled children in the regular classroom.
• Modifications needed in the administration of State or district-wide assessments of achievement.
• Transition services beginning not later than the first IEP in effect when the child turns 16
• How the child’s progress will be measured and how this will be communicated to the parents.
Developing the IEP

It is very important that all people working with the child have access to the IEP and are knowledgeable about what is in it.

– Includes general education teacher, special education teacher, related service providers, any other service provider who is responsible for the implementation of the IEP.
Evaluation (FIEs)/Reevaluation (REEDs)
New Timeline for the Special Education Process
(15-45-30)

Initial Request for Referral made by Parent
Parent makes a written request to school for an evaluation to determine special education eligibility

Within 15 School Days of written request

Consent and Notice of Evaluation or Prior Written Notice given to Parent
Schools must provide a parent with an opportunity to provide written consent for the evaluation or if the school refuses to conduct the evaluation, the school must provide parent a notice of their procedural safeguards that explain their rights under the law

Within 45 School Days of receipt of written signed consent (if a student is absent more than 3 days, a school district can make adjustments to the 45 school day timeline)

Full Initial Individual Evaluation (FIE) Completed
Assessing all areas of suspected disability

Within 30 Calendar Days

Notice of ARD Meeting
Provided to parent at least 5 days prior to ARD meeting

ARD Meeting and Consent for Initial Placement
To determine eligibility for special education, development of IEP and determine placement

NOTE: School day does not include any day a student is not in school including: student holidays (Thanksgiving, winter, spring and summer breaks), weekends, and staff development days.
Six Key Principles of IDEA

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From “The Law and Special Education, Second Edition” by Yell
EVALUATION

Reevaluation  34 C.F.R. §300.303

– May occur whenever parent or school requests it

– Unless both sides agree, may not be required to evaluate more than one time in a year

– Under the IDEA, re-evaluations must be conducted whenever conditions warrant it, but no less than once every three years, unless both sides agree it is not necessary. 34 C.F.R. §300.303(b)(2).
EVALUATION

Informed parental consent must be obtained prior to conducting an initial evaluation or re-evaluation. 20 U.S.C. § 1414(a)(1)(D); 20 U.S.C. § 1414(c)(3); 34 C.F.R. §300.300.

- Informed consent for a re-evaluation may not need to be provided if the local educational agency can show that it took reasonable measures to obtain consent and the parents failed to respond. 20 U.S.C. § 1414(c)(3).
Initial Evaluation Timeline

Timelines
The written request will trigger specific timelines that the school must follow. One way to remember these timelines is 15 – 45 – 30. (See pages 5 and 6 of this document for a flow chart that illustrates this timeline.)

- The school has 15 school days to provide parents with an opportunity to provide written consent for the evaluation. After receiving the written request or if the school refuses to conduct the evaluation, the school must provide parents a notice of their procedural safeguards that explains their rights under the law.
- The school district has 45 school days to conduct the evaluation after receiving a signed consent from a parent or guardian.
- The school has 30 calendar days after completing the evaluation to hold an ARD meeting to review the results of the evaluation determine eligibility and develop an IEP if a child is found eligible for services.

From “How to Request an Initial Evaluation for Special Education Eligibility” by Disability Rights Texas
Reevaluation is the **process** of examining existing data, and if determined necessary, gathering additional data in order to:

- Determine continuing eligibility for special education and related services;
- Assure that the continuing individual needs of a student are identified; and
- Assure appropriate educational programming (review and/or revision of the IEP).
Eligibility
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ELIGIBILITY

Determination of eligibility

– The District has an obligation to explore every area of suspected disability.

– A variety of assessment tools must be used to gather information, including information from the parents. 34 C.F.R. §§ 300.304, 300.305.

  • No single test or procedure should be used as the sole criterion to determine whether the child has a disability.
## Primary Disabilities

<table>
<thead>
<tr>
<th>ID= Intellectual Disability</th>
<th>HI= Hearing Impairment</th>
<th>SI= Speech and Language</th>
<th>VI= Visual Impairment</th>
<th>ED= Emotional Disturbance</th>
</tr>
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<tbody>
<tr>
<td>OHI= Other Health Impaired</td>
<td>SLD= Specific Learning Disability</td>
<td>OI= Orthopedic Impairment</td>
<td>Deaf-Blind</td>
<td>MD= Multiple Disabilities</td>
</tr>
<tr>
<td>AU= Autism Spectrum Disorder</td>
<td>TBI= Traumatic Brain Injury</td>
<td>DD= Develop-mental Delay</td>
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ELIGIBILITY

The team must determine:

– if the child has a disability or continues to have a disability;
– present levels of performance;
– present educational needs of the child;
– if the child needs or continues to need special education and related services;
– modifications needed to participate in and benefit from the general education curriculum
Independent Educational Evaluation (IEEs)
EVALUATION

Independent Educational Evaluations

– Parents have a right to obtain an independent educational evaluation at public expense if they disagree with an evaluation done by the school.

– The school may initiate a due process hearing to show the school's evaluation is appropriate.

– If the school evaluation is found to be appropriate, the parents may still present the private evaluation, but at their own expense.
Independent Educational Evaluation

The federal regulations direct school districts to inform parents of their right to obtain an IEE, 34 C.F.R. §300.502(a), where they may obtain an IEE, id., and conditions for obtaining an IEE at public expense. 34 C.F.R. §300.502(b).

Several sections of the federal regulations direct local school systems to ensure that such information provided by parents is properly considered. See 34 C.F.R. §§300.343(c)(2)(iii), 300.503(c), 300.533(a)(1)(i). The federal regulations even envision instances where the independent evaluation may be given greater weight than the school system’s evaluation. 34 C.F.R. §300.502(b).

Consideration of parentally obtained evaluations by the IEP team is not discretionary, it is mandatory. 34 C.F.R. 300.503(c) (“If the parent obtains an independent educational evaluation at private expense, the results of the evaluation (1) Must be considered by the public agency in any decision made with respect to the provision of a free appropriate public education to the child.”). (Emphasis added).

When a parent presents an independent evaluation to the school district, the IEP team is required to consider the evaluation. This does not mean that the school district must accept the findings or recommendations in the IEE. It does mean that the IEP team must review and discuss the evaluation. In this regard, the requirements placed on school districts are fairly minimal.

From “How to Request an Initial Evaluation for Special Education Eligibility ” by Disability Rights Texas
Child Find
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CHILD FIND

IDEA

– School districts have an affirmative duty to locate and identify children in need of special education services. 20 U.S.C. § 1412(3)(A).

  • Includes the duty to locate children who do not attend public schools.
Parent Participation
## Six Key Principles of IDEA

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### Parental Participation

Collaborate with parents in the development and delivery of their child’s special education program.

From “The Law and Special Education, Second Edition” by Yell
Parents have the right to be involved in meetings about the identification, evaluation and educational placement of their children.

Parents must be given an opportunity for meaningful participation in such meetings.

Parents have a right to prior written notice of any proposals to, or refusal to, make changes relating to their children’s special education and related services.

Parents must be given an opportunity for meaningful participation in such meetings.

Parents have the right to disagree with the school and to use mediation, due process hearings or state complaints to resolve their disagreements.

Parents have the right to: (a) Inspect and review any education records relating to their children. (b) Request amendment of their children’s educational records if they believe the information is inaccurate or misleading, or violates the privacy or other rights of their children. (c) A hearing to challenge information in their children’s records.

Parents hold the educational rights of their children until they reach age 18.

Parents’ consent to any proposed action must be informed consent.
Parental Placement
As of 2004, private schools served, at public expense, a total of 88,156 students with disabilities of the 5,963,129 students with disabilities nationally, which amounts to 1.48 percent. And these privately placed students amounted to 0.18 percent of the 47,917,774 students enrolled in public education. Nor has the percentage of students who are privately placed substantially increased in recent years. According to the Digest of Education Statistics, a similar proportion, about 1.6 percent, of students receiving services under IDEA were educated in a private school setting in 1989. The percentage of all students who were privately placed has increased slightly since then, due to an increase in the percentage of students diagnosed as disabled, but there has been no surge in the proportion of special education students in private settings.
The *Burlington* Decision

The Supreme Court answered the question of whether reimbursement was possible for a parent-initiated unilateral placement in its opinion in *School Committee of Burlington v. Dept. of Education of Massachusetts, 471 U.S. 359 (1985)*. The *Burlington* opinion held that a school would have to reimburse the costs of a parent’s unilateral private placement for their disabled child if the following findings were made:

1. the school’s IEP is found inappropriate (i.e. not reasonably calculated to confer meaningful educational benefit to the child), *and*.

2. the private program is found to be appropriate under the IDEA.

From “Modern Issues in Cases of Reimbursement for Unilateral Private Placements Under the IDEA” by Jose L. Martin, Attorney at Law
Placement
What does special education service delivery include?

Specially Designed Instruction
  – Anticipated frequency, duration and location

Related Services
  – Anticipated frequency, duration and location

Nonacademic Services and Activities
  – Anticipated frequency, duration and location
Frequency

- Frequency refers to the number of sessions in which services will be delivered.
- The IEP Team should choose intervals that will sufficiently allow the student to make progress toward the annual goals.
- Frequency of sessions must not be assigned based on administrative convenience, providers’ schedules, or the master schedule of the school.
- It must be based on the individual needs of the student.
Duration

- Duration refers to the amount of time per service session.
- Session length must be specific. “As needed” is not an acceptable session length.
- Related Services Support Descriptions do not require a session length; just indicate that a support description is being used.
- Session duration must not be assigned based on administrative convenience, providers’ schedules, or the master schedule of the school.
- It must be based on the individual needs of the student.
Location

- Location is the physical setting in which the service will be delivered.
- The discussion and determination of location by the IEP Team is critical as it ultimately determines the continuum of educational placement.
- The key to the location of services as it relates to continuum of education placement is the composition of the student group in that location.
- Location of services must not be assigned based on administrative convenience, providers’ schedules, or the master schedule of the school.
- It must be based on the individual needs of the student.
Least Restrictive Environment (LRE)
Six Key Principles of IDEA

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Definition of Least Restrictive Environment

"... to the maximum extent appropriate, children with disabilities...are educated with children without disabilities, and that special classes, separate schooling, or other removal of children with disabilities from regular educational environments occur only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."
"...a continuum of alternative placements is available to meet the needs of children with disabilities...including instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions."

"...placing children in the LRE does not mean mainstreaming or placing all children into regular classes...placed in most normal environment in which they can potentially succeed...The LRE will be different for each child."
Least Restrictive
- Full time general education classroom
- General education class support
  - Consult
  - Supported facilitation
  - Accommodations
  - Special Materials

More Restrictive
- Resource Class
- Self Contained with integrated in select areas
- Self Contained

Most Restrictive
- Special Class/ Special Center/ Separate Campus
- Homebound instruction
- Non-public day school
- Residential placement (full time)
Take Aways & Reminders
These are just the tip of the iceberg. Special Education includes 1,000s of nuisances and lots of grey areas.
Take Aways

- Knowledgeable staff is Essential
- Training in Best Practices & Updates
- Communication at All Levels
- Support for Staff to Meet Needs of Students
- Expertise Available to Consult
What should I do if I receive a request for due process hearing (a.k.a. complaint), from the Texas Education Agency?

You should contact your school attorney, immediately.

The response to a hearing request must be sent within ten days of receiving the request, and must specifically address the issues raised in the request. The school district is not required to provide a response if the district already provided the parent with written prior notice that addresses the issues raised in the hearing request. If the school district is the party responding to the hearing request and has not already sent the parent prior written notice addressing the issues raised in the hearing request, then it must send the parent a response that includes the following:

- An explanation of why the school district proposed or refused to take the action raised in the hearing request;
- A description of other options that the ARD committee considered and the reasons why those options were rejected;
- A description of each evaluation procedure, assessment, record, or report the school district used as the reason for the proposed or refused action; and
- A description of any other relevant factors.

See Texas Education Agency Special Education Dispute Resolution Handbook.

The District’s response may also raise certain preliminary legal challenges to the complaint, including a motion to dismiss non-IDEA related claims, and/or certain issues outside the statute of limitations period.

From “Demystifying the Dispute Process” by Michael Clark, Attorney at Law
Questions/Comments
Contact Information

Mark Wey, Director
512.467.3692 direct • mark.wey@tasb.org

Dr. Karlyn Keller, Lead Account Executive - Manager
512.505.2896 direct • karlyn.keller@tasb.org

Special Education Solutions
Texas Association of School Boards
12007 Research Blvd. • Austin, Texas 78759-2439
tasb.org/specialeducation • 800.580.8272

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