

Recurring Issues in Due Process

PDE Conference 2014

Andrew Faust, Esquire
Sweet Stevens Katz & Williams
Kerry Smith, Esquire
Director, Office for Dispute Resolution



Why Parents Pursue Due Process

Parent Attorney Perspective

- Desperation- No one ever comes to a special education attorney for a “check-up”
- To “Improve the system for everyone”
- Retribution against school officials
- Money-for their child or themselves



From *Special Education Litigation-Causes and Effects*
McAndrews Law Offices, P.C.
Berwyn, PA

Bases for Due Process Requests

Parent Attorney Perspective

- Unqualified/uninspired teacher and/or an unresponsive Principal or Director of Special Education
- Expulsion, other serious disciplinary situation
- Lack of research-based instruction
- Limited, inaccurate or untimely evaluations or reevaluations
- Private school tuition



From *Special Education Litigation-Causes and Effects*
McAndrews Law Offices, P.C.
Berwyn, PA

Bases for Due Process Requests

Parent Attorney Perspective

- Least restrictive environment
- Transition planning and services
- Excessive movement, inappropriate structure, or segregated location of special education classroom
- Physical, verbal, sexual or mental abuse by school staff/peers
- Services to private school students



From *Special Education Litigation-Causes and Effects*
McAndrews Law Offices, P.C.
Berwyn, PA

Bases for Due Process Requests

Hearing Officer Perspective

- Parent engagement
- Progress monitoring
- Implementing research-based programs
- Underutilization of PTE
- Tuition reimbursement
- LRE/overgeneralizing
- Transition
- Child find - emotional disturbance v. socially maladjusted
- Bullying
- Charter schools



PARENT ENGAGEMENT

Fish (2008) Research

- 51 parents surveyed
- Most were middle to upper middle class
- 80% white
- Majority of participants reported overall positive IEP experiences
- Parents believed educators valued their input, treated them with respect, and considered them to be equal decision makers.



However...

- According to the Center for Appropriate Dispute Resolution in Special Education (CADRE), our national technical assistance center...

- "...the favorable findings from this study are the exception, not the norm."



Parents' Experiences with the IEP Process-Considerations for Improving Practice (CADRE, 2010)

Parent Engagement

- IEP Team meetings need to be overtly collaborative.
- Effectively precluding parents from participation is a common source of conflict.



(Lake & Billingsley, 2000)

Parent Engagement



- Districts need to train their personnel on how to express the fact that they have an opinion about where a child needs to be, but are willing and flexible enough to change their minds based upon cogent input from parents.



PROGRESS MONITORING

Progress Monitoring

- Hearing Officers are unanimous about progress monitoring as an ongoing issue at due process.
- Data sometimes unintelligible
 - Not taken consistently
 - Canned measures used
 - Goals are unintelligible



Progress Monitoring

- Can be an “incomprehensible mess”
- Data is confusing to parents
- Parents may allege denial of meaningful participation



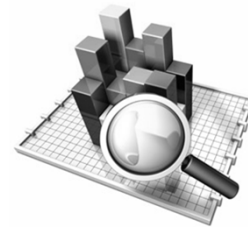
Progress Monitoring

- Data, well defined and reported, and taken with fidelity, is highly convincing.
- Some districts have caught on to the persuasive power of data, but others are “oblivious”.



Progress Monitoring

- Stay tuned for PaTTAN/ODR sponsored presentation--with *multiple perspectives*-- on progress monitoring this spring



IMPLEMENTATION OF RESEARCH-BASED PROGRAMS

Fidelity

- Issue is whether districts are implementing research-based programs, like Wilson, with fidelity.
- LEA: “We are giving parents the reading program they want and the student is still not making great progress.”



Fidelity

- LEA: “We don’t entirely follow the methods and provide the instruction for the time recommended...we deliver select pieces as part of an ‘eclectic’ reading program.”





PERMISSION TO EVALUATE

Permission to Evaluate

- Much of the issues that give rise to due process would be remedied by requesting permission to evaluate, according to the hearing officers.
- PTEs underutilized.



TUITION REIMBURSEMENT

Tuition Reimbursement

- Especially for students in the early to middle grade school years...
- Seems to center most often on reading methodologies



OVERGENERALIZATION - LRE

Over generalizing

- Biggest problem for districts is over-generalizing the legal standards.



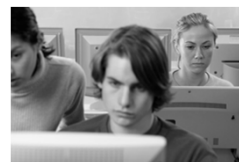
No One Size Fits All

- “Some people just don’t get the notion that for some or most eligible kids, there is no formula that consistently works. Districts really need to have that message hammered home.”



Least Restrictive Environment

- Overgeneralization most often occurs with LRE issues.
- Legal obligation is not met simply by putting child in regular education classroom!



Least Restrictive Environment

- “Placement in general and LRE issues seem to be back in play more often these days, often entangled with parent participation issues.”
- Parent doesn’t always want the LRE, and this leads to requests for tuition reimbursement.
- Districts need to be able to analyze this conundrum in a systematic, defensible and transparent way, demonstrating collaboration with parents.



TRANSITION

Post-Secondary Transition Planning

- Frequent issues at hearing
- Training opportunity
- Transition planning needs to be elevated from an afterthought to an integral part of the planning process.



Emotional disturbance v. socially maladjusted

CHILD FIND

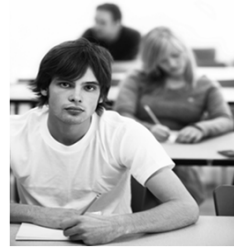
Child Find - Emotional Problems

- Trend seen of failure to identify students with emotional problems
 - Detentions
 - Suspensions
 - Truancy prevention plans
 - Truancy court
 - Psychosomatic symptoms
 - Grades slipping
 - Failed subjects
 - Not turning in work
 - Truancy
 - Eating disorders
 - Cutting behaviors



Emotionally Disordered/Socially Maladjusted

- Challenges in distinguishing between emotionally-disordered students and socially-maladjusted students
- Convincing evidence may be missing
- Educators going on hunches



BULLYING

Bullying

- Hearing Officers are unanimous on the prevalence of bullying allegations at due process.
- Bullying issues often heard on ConsultLine (Parent helpline).



Bullying

- Schools must have aggressive programs in place to combat bullying. The hearing officers know that districts can't prevent it altogether, but if there is a lack of credible response by the district, "sorry, it's now your problem".



Bullying

- Is there a process in place to handle the bullying "artifact" (writing, text, internet posting, etc.)?
 - Who should be involved in a response?
 - How should the artifact be handled, etc.?



But...

- There is also a concern that every incident of conflict will be categorized as bullying.



CHARTER SCHOOLS

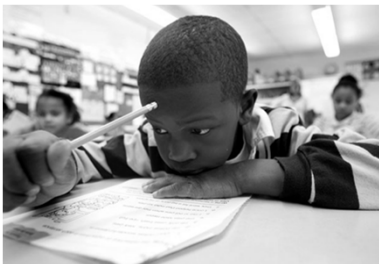
Charter Schools

- Uptick in litigation against charter/cyber charter schools
- It seems like a year ago parents were choosing charters as stopgaps when things got bad (e.g. put the kid into cyber while trying to get a private placement)...
- "Now, charters and cybers are the target."



Charter Schools

- Get a lawyer who knows special education law and listen to his/her advice on how to structure special education in your school.
- Proactive advice is needed, not after the fact advice.
- Sometimes the most child-centered efforts of a charter school are undermined by procedural violations.



MISCELLANEOUS

Document Production

- LEA apparent refusal to produce documents when requested is becoming the subject of more and more (costly) litigation.
- One firm routinely files for due process to get an order to compel document production - and wins.



Document Production

- Teach your staff that when an attorney or parent asks for “everything”, they really mean “everything”. It is not up to a teacher or therapist or other staff to determine what should be turned over.
- Give “everything”---mails, notes, personal files---to your attorney and let him/her determine what should be disclosed.



Candor with Counsel

Some Advice

- “Counsel can’t waive a magic wand and make it all better; they don’t have mystical powers...They have to play the hand they are dealt, in terms of exhibits and witnesses.”
- “In that regard, being open and honest with counsel about the strengths and weaknesses of their case is critical.”
- “Effective case evaluation makes the system work better for everyone involved.”

Questions

