

**SCHOOLS AND PARENTS BEHAVING BADLY: WHO'S BEING UNREASONABLE
AND DOES IT MATTER?**

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I. INTRODUCTION

The area of special education can be emotionally charged and challenging for both parents and educators. Sometimes, the behaviors of school personnel and/or parents may get to the point of being so unreasonable that the other party begins to act unreasonable as well. Recently, courts have been willing to look to the nature of the behaviors on the part of both parties as an important factor relevant to whether FAPE has been provided to a student or in fashioning relief. In this session, relevant recent court and agency decisions will be explored and “real life” examples will be studied regarding unreasonable behaviors on the part of parents and/or school personnel and their impact on the provision of FAPE to the student.

II. THE EFFECT OF PARENTS BEHAVING BADLY

A. Failure to Cooperate with the IEP Process

In Schaffer v. Weast, 546 U.S. 49, 53 (2005), the U.S. Supreme Court noted that the IDEA assumes that parents, as well as districts, will cooperate in the IEP process, noting that “[t]he core of the [IDEA]...is the cooperative process that it establishes between parents and schools.” The Court also noted that parents and guardians play a “significant role” in the IEP process. Based upon this premise, courts have found that where parents/their attorneys do not cooperate in the process, they are entitled to no relief under the IDEA.

1. Scot S. v. Department of Educ., 58 IDELR 123, 2012 WL 668874 (D. Haw. 2012). Although the student’s IEP would have been more accurate had it included details about his progress in a private autism clinic, an IEP developed prior to the start of the clinic program was appropriate. Here, the parents’ repeated failure to provide records of the student’s progress prevented the Department from being able to update its IEP. In this situation, five days after developing an IEP that proposed the student’s gradual transition to a public school setting, the Department agreed to fund the student’s placement in the private autism clinic through the end of December. In exchange, the parents agreed that they would supply updated information about the student’s progress, but failed to do so. Thus, the parents cannot seek to hold the Department responsible for the lack of an

updated IEP, where they hindered, and ultimately prevented, the Department from effectively updating the March 2009 IEP to reflect the student's development at the autism clinic. Though the parents' lack of cooperation with the IEP process would not excuse the Department's failure to offer FAPE, the March 2009 IEP, which offered intensive instruction and services, as well as opportunities for mainstreaming, was appropriate.

2. French v. New York State Dept. of Educ., 57 IDELR 241 (2d Cir. 2011) (unpublished). Father of autistic student did not show that district's procedural violations were either gross violations of the IDEA or denied the student FAPE. Rather, it was the father's ongoing lack of cooperation that caused the student to go without an IEP for several years, not the district's conduct. Thus, the parent's conduct caused the denial of FAPE, not the district's, where he repeatedly rescheduled meetings and refused to allow teachers to meet with the student, thus delaying the development of IEPs. In addition, he refused to participate in meetings or recognize IEPs drafted throughout 1998 and 1999 because he insisted on a comprehensive evaluation which he then impeded. For these reasons, the student is not entitled to compensatory education.
3. James M. v. Department of Educ., 56 IDELR 100, 2011 WL 1750718 (D. Haw. 2011). Parent's argument that the ED excluded her from the IEP decision-making process is rejected. Here, the ED had informed the parent that it needed to develop the student's IEP by the annual review date and notified her that it would reschedule the IEP meeting if she submitted a written waiver of the annual review requirement. Because the ED did not receive the parent's written consent until after the scheduled IEP meeting, the ED did not act unreasonably in holding the meeting without her.
4. J.J. v. District of Columbia, 56 IDELR 93, 768 F. Supp.2d 214 (D. D.C. 2011). Hearing officer correctly dismissed complaint that district denied FAPE by failing to comply with a previous order where the parent's counsel appeared to engage in "troubling conduct" of avoiding the IEP process in favor of litigation and in detriment to the child's educational interests. Lack of response to the district's efforts to schedule a meeting or lack of availability of the parent or the attorney delayed the process. By not responding to the district's invitations, the parent interfered with the district's attempt, even though the district was technically late in trying to schedule the meetings.
5. A.R. v. Department of Educ., 56 IDELR 202 (D. Haw. 2011). Because the parent of a teenager with a severe intellectual disability was responsible for the delay in developing the 2009-10 IEP, she cannot use the IDEA's stay-put provision to recover the cost of the student's placement in a private school. The parent did not challenge the substance of the IEP, which was developed two weeks into the school year, but alleged that the ED's failure to have an IEP in place on the first day of school entitled her to reimbursement under the IDEA's stay-put provisions. Where the parent rejected the ED's numerous attempts to schedule an IEP meeting before the start of the school year, her argument is rejected. Although the student had attended the private school the previous year, the parent may not transform what was essentially a unilateral private placement into the student's stay-put placement by obstructing the ED's efforts to timely develop an IEP.

“Absent her actions, the substantively unchallenged IEP would have been in place before the school year began [at the local high school], and [the parent] would have had no basis to challenge the IEP or to seek private school tuition from [the ED] for the 2009-10 school year....”

6. Tracy N. v. Department of Educ., 54 IDELR 216, 2010 WL 2076938 (D. Haw. 2010). While districts must generally have an IEP in place by the beginning of the school year, in determining whether a district must reimburse parents for a unilateral private placement while evaluations are being conducted by the district, courts must look to the reasonableness of the district’s actions. Here, “any delay in Student’s placement for the 2008-09 school year was due to the re-assessment being conducted at Mother’s request and also due to Mother’s cancellation of three scheduled IEP meetings.” Further, the parent did not show that the temporary day treatment program offered by the district was inappropriate, where testimony indicated that the placement would have facilitated the student’s transition to a less restrictive setting.
7. C.H. v. Cape Henlopen Sch. Dist., 54 IDELR 212, 606 F.3d 59 (3d Cir. 2010). While the district’s failure to have an IEP in place by the first day of school is not condoned, the failure did not amount to a denial of FAPE. “Absent any evidence that [the student] would have suffered an educational loss, we are left only to determine whether the failure to have an IEP in place on the first day of school is, itself, the loss of an educational benefit.” Because the parents failed to establish substantive harm, they were not entitled to tuition reimbursement. In addition, the parents declined to participate in additional IEP meetings over the summer because of their travel schedule and they did not notify the district of their placement of the student in a residential facility.
8. B.H. v. Joliet Sch. Dist. No. 86, 54 IDELR 121 (N.D. Ill. 2010). Although it may have been more convenient for the parent of a teenager with ADD to attend an evening IEP meeting, the district’s refusal to convene after school hours was no basis for a discrimination claim under Section 504. Clearly, there was no allegation that the student was excluded from any program because of her disability; nor was there evidence that the district acted in bad faith or with gross misjudgment. Thus, the parent failed to establish a valid 504 discrimination claim because she did not allege the student was wrongfully excluded from any educational programs. Although the district conceded that it refused to schedule an after-hours IEP meeting, “this refusal simply does not fall within the bounds of acts prohibited by Section 504, even if it may have been unfair or inconvenient to Plaintiffs in some sense.”
9. T.S. v. Weast, 54 IDELR 249 (D. Md. 2010). District’s decision to hold an IEP meeting without the parents in attendance did not deny their child FAPE. After the district made several unsuccessful attempts to include the parents, the district was entitled to convene the IEP team. The parents left meetings, refused to attend or postponed several meetings during the summer for various reasons and, because the school year was about to begin, the team met in mid-August. A district may meet without a parent if it is unable to convince the parents that they should attend. Here, the parents had the opportunity to participate but chose not to do so and acted unreasonably by declining to attend any of

the summer meetings. “While the Parents may have been continuing to gather information and evaluations about their son’s disorder, the IEP team meetings could not simply be pushed back over and over again, because an IEP needed to be created...before the beginning of the school year....”

10. Stevens v. New York City Dept. of Educ., 54 IDELR 84 (S.D. N.Y. 2010). Despite district’s denial of FAPE for failing to convene an IEP meeting, district is not required to reimburse parent for the cost of his private school program where the private placement was not appropriate. In the private program, the student attended general education classes and did not receive modifications or special services to address his disabilities. Even if the parent were successful in proving the private placement was appropriate, her failure to notify the district before unilaterally placing the student in the private school barred her recovery of tuition for equitable reasons.
11. Anchorage Sch. Dist. v. D.K., 54 IDELR 28 (D. Alaska 2009). Despite denying FAPE to a child with ADHD, the district is only required to reimburse the parent for 75% of the student’s private school tuition. While the child made no progress in the district’s Montessori program and the private school was a good fit, the parent’s actions justify a denial of full reimbursement. First, the parent unilaterally placed the student in the private program without first notifying the district in writing. At the same time, she enrolled the student in the district’s program, later explaining that she wanted to maintain her son’s spot in the Montessori program in case the private school did not work out. The parent was “manipulat[ing] the school district” by simultaneously enrolling the child in both programs and having the child attend the first day of the district’s program to maintain one of the limited spots. “[The parent’s] conduct in this matter was unreasonable and not only calculated to deprive [the district] of a chance to find a conforming FAPE program, but did so by keeping [the student] in a program that is limited in availability.”
12. Horen v. Board of Educ. of City of Toledo Pub. Sch. Dist., 53 IDELR 79 (N.D. Ohio 2009). Parents’ claim that they were entitled to tape record their daughter’s IEP sessions is rejected. As OSEP has indicated, if a public agency has a policy that prohibits or limits the use of recording devices at IEP meetings, that policy must provide for exceptions only if they are necessary to ensure that the parent understands the IEP or the IEP process or to ensure other parental rights under the IDEA. Where these parents have not contended that they fall within an exception to the district’s no-recording rule, the district did not violate IDEA when it refused to proceed with an IEP meeting unless the parents agreed not to record the discussions.
13. C.G. v. Five Town Community Sch. Dist., 49 IDELR 93, 513 F.3d 279 (1st Cir. 2008). Where the parents made a unilateral choice to abandon the collaborative IEP process without allowing the process to run its course and for the school district to finalize a proposed IEP, they are precluded from obtaining reimbursement for the costs of the Chamberlain School placement. The district was continuing its efforts to develop an IEP when the parents filed their due process complaint. In addition, the IEP team was

continuing to work with an independent evaluator to develop a crisis plan and other positive behavioral supports for the student.

14. M.S. v. Mullica Township Bd. of Educ., 47 IDELR 251, 485 F. Supp. 2d 555 (D. N.J. 2007), aff'd, 9 IDELR 154 (3d Cir. 2008) (unpublished). Parent is not entitled to reimbursement for expenses incurred for placement of her developmentally delayed kindergartner in a private school. The parent's failure to consent to a reevaluation deprived the district of the opportunity to provide the child FAPE. A parent must permit an LEA to reevaluate her child if she wants the child to continue receiving special education services. "Nothing in the record indicates that any reevaluation conducted on behalf of [the district] would in any way harm [the child]." The court explained that because the IEP process was not yet complete when the child enrolled in the private kindergarten, it could not evaluate whether his kindergarten IEP would have offered FAPE. However, noting that the child made progress under his preschool IEP and that his parent failed to prove a need for additional occupational therapy, the court opined that the parent could not prove her case.
15. Hjortness v. Neenah Joint Sch. Dist., 48 IDELR 119, 498 F.3d 655 (7th Cir. 2007), amended, 507 F.3d 1060 (7th Cir. 2007), cert. denied, 128 S. Ct. 2962 (2008). Neither allegations that the district improperly added goals to the student's IEP after meeting with the student's parents nor charges that the district predetermined the child's placement in a public school amount to a denial of FAPE. Clearly, the parents participated in the development of the student's IEP, even though only two of the four annual goals contained in the student's IEP had been discussed by the IEP team. However, there was no fault in the district's decision to carry over two goals from the student's prior IEP, particularly where the IEP team attempted to discuss specific goals and objectives, but the parents sought to limit the discussion to reimbursement for the student's private placement. Though the school district arguably should have held a second IEP meeting to review the goals and objectives that were not discussed at the meeting, this procedural violation does not rise to the level of a denial of FAPE.
16. E.P. v. San Ramon Valley Unif. Sch. Dist., 48 IDELR 66, 2007 WL 1795747 (N.D. Cal. 2007). Where the district had the choice of finalizing the IEP without the parents present or violate its duty to have an IEP in effect for the child on the first day of school, district did not violate the IDEA by proceeding with the meeting, particularly after it was clear that the parents and their attorney would not cooperate in the process and agree to a meeting time.
17. Mr. G. v. Timberlane Regional Sch. Dist., 47 IDELR 5, 2007 WL 54819 (D. N.H. 2007). Although parents have a right to participate in the IEP process, a district may conduct IEP meetings without parental participation if it is unable to convince the parents to attend and has made reasonable attempts to gain parental participation. Where parents time after time neglected to attend team meetings of which they were informed and to which they were invited and, when they did attend, often made sweeping and unqualified declarations as to the student's needs, refused to engage in a dialogue with the district and withdrew from the meetings and threatened immediate due process, district made all

reasonable efforts to secure parents' participation and reasonably proceeded without the parents in the best interests of the student.

B. Withholding/Withdrawing Consent

Often, courts will find that because the parents withheld pertinent information or refused consent for an evaluation/services, the district was hamstrung and cannot be faulted for a denial of FAPE or refusal to provide different services.

1. G.J. v. Muscogee Co. Sch. Dist., 58 IDELR 61, 668 F.3d 1258 (11th Cir. 2012). Parents did not show a denial of FAPE to their child with autism and a brain injury based upon a failure to reevaluate his special education needs during his kindergarten year. Here, the parents effectively denied consent for the district's proposed reevaluation when they imposed significant conditions upon their consent for reevaluation. Rather than signing the consent form the district provided, the parents wrote a seven-point addendum which stated that the district would use the parents' chosen evaluator, that the parents would have the right to discuss the assessment with the evaluator prior to its consideration by the IEP team, and that the evaluation results would be confidential. The district court was correct when it held that the parents effectively withheld their consent for the reevaluation. Clearly, the parents' conditions "vitiating any rights the school district had under the IDEA for the reevaluation process, such as who is to conduct the interview, the presence of the parents during the evaluation, not permitting the evaluation to be used in litigation against [the parents] and whether the parents received the information prior to the school district." In addition, the lack of an underlying evaluation prevented the parents from obtaining an IEE at public expense.
2. N.F. v. Chariho Regional Sch. Dist., 58 IDELR 161 (D. R.I. 2012). Parents of student with ADHD and ODD will not prevail on their claim that the district denied FAPE by failing to include mental health services in his IEP. Clearly, the district would have provided those services had the parents consented to them, based upon notes taken by the student's IEP team during an IEP meeting. According to these notes, the student's mother indicated that she was not interested in receiving clinical services through a therapeutic day program, as she had outside providers and did not want to address these services at that time. Although the mother claims that the notes misstated what she said during the meeting, she did not produce any admissible evidence showing that the notes were not accurate. In addition, other evidence suggests that the mother's lack of consent to the mental health services did not result from the district's alleged failure to provide her with a consent form, as her own testimony at the due process hearing indicated that, even if she had been presented with the form, she was not sure she would have signed it. Thus, the omission of mental health services from the student's IEP did not entitle the parents to relief.
3. D.Z. v. Bethlehem Area Sch. Dist., 54 IDELR 323 (Pa. Comm. Ct. 2010). Parent's request for an IEE was premature where the parent's disagreement with the school district's findings pertained to a district evaluation that was not complete. The parent first agreed to the district's reevaluation but later revoked her consent to it because she

did not agree with the scope of the testing proposed. She subsequently e-mailed the district, asking for an IEE. The district refused and sought a due process hearing seeking permission to proceed with the reevaluation. The hearing officer was correct in refusing to consider the parent's request for an IEE as part of the hearing, as the parent's right to request an IEE does not vest until there is an evaluation completed by the district with which the parent disagrees. [NOTE: The court also ruled in a separate decision that where this parent had requested 14 due process hearings for her two children between 2001 and 2009 and the district was the prevailing party each time, there is a reasonable likelihood that the parent brought the requests for an "improper purpose." Thus, the district could proceed with its attorney's fee action against the mother. See, Bethlehem Area Sch. Dist. v. Zhou, 54 IDELR 311, 2010 WL 2928005 (E.D. Pa. 2010)].

4. Shelby S. v. Conroe Indep. Sch. Dist., 45 IDELR 269, 454 F.3d 450 (5th Cir. 2006). School district had justifiable reasons for requesting an independent medical evaluation of a student with dysautonomia. The student, who had previously been homeschooled, was medically fragile and prone to sudden crises that could result in death. Her grandparent, who was also her guardian, limited the IEP team's access to the student's doctor and revised his responses to their written questions. She also insisted on accompanying the student to class each day, or in the alternative, to train an aide who could recognize the symptoms of the onset of an episode. The district found the guardian's presence in the classroom disruptive and prohibited her from attending further, at which point the guardian refused to allow the student to attend school. The district requested a medical evaluation of the student by a dysautonomia specialist, but the guardian insisted the evaluation was not warranted. Under these circumstances the district had the right to reevaluate the student, and a reevaluation is warranted when the school district requires evaluation materials that are essential to assessing a child's special education needs. Here, without more complete medical information about the student, the IEP team was not able to fashion an IEP that would allow the district to perform its IDEA-mandated duty. In response to the guardian's argument that allowing a medical evaluation without consent violated the student's right to privacy, the district's reevaluation is not constitutionally problematic, because the guardian is free to decline special education for the student, rather than submit to the district's medical evaluation.
5. San Jose (CA) Unif. Sch. Dist., 47 IDELR 79 (OCR 2006). Although the district was aware that a high school student was receiving treatment for manic depressive disorder, it did not discriminate against her when it suspended her without holding a manifestation determination. The parent's refusal to consent to the district's assessment plan prevented the district from determining the student's need for accommodations. Because the district could not evaluate the student without the parent's permission, it did not discriminate against the student by failing to conduct an assessment. Nor did the district violate Section 504 or the ADA when it suspended the student for five days and placed her on independent study after the suspension ended. If the student had been identified as a child with a disability, the decision to place the student on independent study would have amounted to a significant change in placement. "The record is clear, however, that the district did offer to conduct a comprehensive evaluation of the student at the time of the

suspension and again discussed the possibility of services under either IDEA or Section 504.”

C. Maintaining a Closed Mind/Denial of Opportunity to Try

Sometimes, parents may have “predetermined” what they are willing to accept regarding placement or the IEP, regardless of what the district may have to offer. In such cases, their “closed mind” approach may result in a denial of any relief under the IDEA, including reimbursement/funding for private schooling.

1. J.G. v. Briarcliff Manor Union Free Sch. Dist., 54 IDELR 20 (S.D. N.Y. 2010). Parents were not denied the opportunity to participate in August IEP meeting when the district contacted the parents to schedule an IEP meeting as soon as it learned that they were dissatisfied with an IEP developed earlier in the summer. Although the parents indicated that they were available, they later asked that the meeting be postponed until after Labor Day and the parents declined to participate by phone. Because the district was required to have an IEP in place by the beginning of the school year, it was not unreasonable for the district to proceed with the meeting in the parents’ absence. In addition, the parents committed to a private placement before the August 9th meeting. In fact, the father had told the special education director that he did not “see any sense in being there” because “his daughter is not coming.” District’s IEP made FAPE available.
2. K.G. v. Sheehan, 56 IDELR 17 (D. R.I. 2010). Had the parent given the district’s proposed IEP a chance, it would have been appropriate. On that basis, the magistrate recommended denying the parent tuition reimbursement for a private placement. Here, the parent was “predetermined” to place her daughter in private school even before the IEP team convened and impeded the IEP process. The parent impeded the development of a “promising IEP” by cancelling IEP meetings, attempting to manipulate the IEP process, and declining to consider the district’s offer. The evidence showed that her mind was clearly made up long before the IEP team convened. In addition, the parent “stacked” the IEP meeting by inviting several private school staff members and urging the team to vote on a placement.
3. Letter to Irby, 55 IDELR 264 (OSEP 2010). Although a parent’s closed mind at a resolution meeting will not invalidate their due process complaint, it could help the district eventually collect attorney’s fees against the parents or limit its own liability for fees. There is nothing to stop a parent’s legal counsel from insisting on proceeding to a due process hearing while the parent attends a resolution session and a hearing officer may not dismiss a due process complaint on the basis that a parent enters a resolution meeting with the intent not to agree to anything. The purpose of a resolution meeting is to give the district a chance to better understand and possibly resolve the dispute without the expense of litigation. “While 34 C.F.R. 300.510 requires that the parent participate in the resolution meeting, nothing in the IDEA or its implementing regulations requires that the parent agree to a specific resolution proposed by the LEA.” However, the parent’s actions may ultimately reduce a district’s liability for the parent’s legal expenses and may entitle it to collect fees from the parent’s attorney or from the parent. For example, a parent

cannot collect fees for work done after rejecting a settlement offer, where the parent ultimately obtains the same or lesser relief. In addition, if the district prevails, it may collect fees from the parent or his lawyer if the due process complaint was filed for an improper purpose, such as to unnecessarily prolong the case or increase the cost of litigation.

4. G.B. v. Bridgewater-Raritan Regional Bd. of Educ., 52 IDELR 39 (D. N.J. 2009). School district's IEP offers FAPE to preschooler with autism; therefore, the district is not required to fund private placement. "The Court notes that Plaintiffs enrolled J.B. at Somerset Hills before the proposed IEP for J.B. for 2005-06 was considered as an option or tested out, for that matter. Therefore, the District's program for J.B. never had a chance to be fine-tuned even further to fit his needs that become apparent after an initial period in the classroom...."
5. Systema v. Academy Sch. Dist. No. 20, 50 IDELR 213, 538 F.3d 1306 (10th Cir. 2008). A parents' refusal to participate in the IEP process effectively excuses any procedural defects in the IEP's development, including the failure to have a final IEP in place by the beginning of the school year. The parents had withdrawn from the IEP process when they learned that the district intended to propose services in an integrated preschool environment in spite of the fact that the district had not yet formalized its offer. Case remanded to consider whether the district's proposed draft IEP was appropriate but no verbal offers are to be considered.
6. M.M. v. School Dist. of Greenville County, 37 IDELR 183, 303 F.3d 523 (4th Cir. 2002). The district's failure to have an IEP in place at the beginning of the school year was harmless, in part because there was "no evidence that [student's] parents would have accepted any FAPE offered by the District that did not include reimbursement for [parents' preferred] program."

D. Threatening/Intimidating Behavior

1. Rodriguez v. Clinton, 109 LRP 8413 (N.D. N.Y. 2009). School district did not retaliate against a parent of a student with a disability who spoke against the district at a board meeting and wrote a letter to the editor on institutional racism in school elections when it filed an "educational neglect" report against him. Prior to the student's withdrawal from school, he was found eligible for special education and the special education coordinator attempted to work with his parents to arrange for home tutoring or residential placement. The student's psychiatrist had recommended a residential placement for the student because he was at risk for self harm and drug use. When the coordinator had not heard from the parents for almost a month, she recommended to the child study team that a CPS report be filed and this had nothing to do with the parent's speech activities.
2. Albuquerque (NM) Pub. Schs., 50 IDELR 263 (OCR 2007). The school district did not retaliate against the parent of a student with cerebral palsy when it prohibited her from coming on school grounds without prior authorization. Because the parent has a history of disrupting school activities, the district had a legitimate reason for excluding the

parent. Although the parent recently requested certain IEP services for her daughter and the district was aware of the parent's advocacy, the district had a legitimate, nondiscriminatory reason for banning the parent from campus, even if it would prevent her from helping the student with her backpack and providing assistance while her daughter exited their car. According to the district, the parent was creating a "climate of unrest" for students and staff at the middle school, and "[a]mple evidence demonstrates that [the parent's] behavior actually disrupted school proceedings on multiple days and that staff members felt personally threatened by her." This is important where the parent offered no evidence to rebut the district's evidence, which included a police report of one incident and a warning letter from the district. Importantly, the district has banned other parents who engaged in similar behavior on school grounds.

3. Wooster (OH) City Schs., 33 IDELR 253 (OCR 2000). There was insufficient evidence of retaliation, although the parent's request for due process was a protected activity and the district informed the parent that she was not permitted to enter district property or attend district events. However, the district's actions were legitimate and nondiscriminatory because the parent threatened school personnel on two occasions.
4. Williford (AR) Pub. Schs., 29 IDELR 735 (OCR 1998). Although the parent of a student with an unspecified disability engaged in a protected activity when he filed a lawsuit against the district and the district was aware of the lawsuit at the time it took the adverse actions against him, the adverse actions were not retaliatory. This is because they were taken for legitimate, nondiscriminatory reasons. State law allows the superintendent to file a complaint with the proper authorities after the parent threatened him, and the district was mandated by the state compulsory attendance law to file truancy charges after the student missed a specific number of days. Accordingly, no retaliation occurred.

E. Asserting/Filing Frivolous Claims/Cases

The 2004 IDEA Amendments added a provision for recovery of fees by prevailing parties who are school agencies in certain circumstances. Although rare, some school districts have been successful in recovering against a parent or their attorney when they have filed a frivolous case, filed on for an improper purpose, or unreasonably protracted the proceedings. In other cases, courts have agreed to reduce the fees recovered by a prevailing parent who unreasonably protracted the litigation.

1. Corpus Christi Indep. Sch. Dist. v. D.H., 112 LRP 30147 (S.D. Tex. 2012). Parents' overall fee award is reduced based upon the contract that the parent signed to hire her attorney, which provided that the parent would not attend a resolution meeting or settle her claims without the attorney's consent and that, if she did, she would become personally liable for paying his fees. According to the district, a settlement was imminent after the parent and school representatives met to resolve her claims prior to the due process hearing, but the parent refused to sign anything at the resolution meeting, saying that her attorney told her not to. Based upon that, the district argued that the fee request after the parent prevailed at the due process hearing should be drastically reduced because the hearing and appeal could have been avoided. Because the attorney's contract

was calculated to and did unreasonably lengthen the process, the fee amount is reduced by half the number of hours the attorney logged prior to the resolution session. In addition, the hours the attorney logged between the resolution session and the district's formal settlement offer were eliminated.

2. I.S. v. School Town of Munster, 58 IDELR 186 (N.D. Ind. 2012). In filing for fees against the parent (who is also an attorney), the district sufficiently alleged that the parent filed a due process complaint for an improper purpose. The IDEA has two standards for fee recovery by districts: 1) a district may recover fees from the parent's counsel if the due process complaint was frivolous, unreasonable or baseless; 2) a district may recover fees from a parent if the parent acted with an improper purpose, such as to harass the district or increase the cost of litigation. Although the parent here is also an attorney, she is a parent for fee-shifting purposes. The district alleged that the parent acted with an improper purpose by making many redundant filings and requests for records, failing to submit documents as required and canceling hearings at the last minute. "Coloring all of this is the allegation that [the parent] is a licensed attorney with considerable litigation experience in the special education arena." Therefore, while the parent alleged that she was successful in some ways at the administrative level—a circumstance that would indicate that her claim was not frivolous or filed for an improper purpose—the district's allegations are sufficient to survive a motion to dismiss.
3. Gary G. v. El Paso Indep. Sch. Dist., 56 IDELR 32, 632 F.3d 201 (5th Cir. 2011). Parent attorney's fee award is reduced 93% to \$3,243 from \$44,572 because the parent was not justified in rejecting the district's proposed settlement offer made at the beginning of the case. The parent's argument that the settlement offer was not enforceable is rejected because the offer was reaffirmed at a resolution session just two weeks later and any agreement reached at a resolution session is enforceable. In addition, the fact that the offer did not include attorney's fees did not justify the refusal in this case because the attorney had only spent 13.8 hours on the case before the district offered to settle it. Given that the district offered all of the relief the parent sought and far more than the parent actually recovered during the due process hearing, the parent was not substantially justified in rejecting the offer. Thus, the parent cannot recover fees for work performed after he rejected the proposed settlement. However, the parent may recover the fees for the initial 13.8 hours his attorney spent on the case, since the district's failure to include attorney's fees in the settlement offer was at least partly to blame.
4. Bridges Pub. Charter Sch. v. Barrie, 57 IDELR 3 (D. D.C. 2011). Parents' claims lacked merit, particularly in light of the parent's refusal to participate in a resolution session, and their poorly worded allegations in the IDEA due process complaint will cost two D.C.-area attorneys \$15,472 in legal expenses to be paid to the charter preschool. The hearing officer was correct that the claims were frivolous and without foundation, where the parent alleged that the charter school failed to consult her about her daughter's IEP but the overwhelming evidence showed that the parent participated in two IEP meetings. "[The parent's attorneys] do not dispute this" but instead "contest in what level of detail the goals were discussed with [the parent]." Because the attorneys had no factual basis for their claim, it is without merit. It is also important that the parent refused to discuss

her daughter's services at a resolution session, despite her unspecified allegation that the charter school failed to offer the services the child needed to receive FAPE. Where the IDEA action was frivolous, unreasonable, and without foundation and the attorneys continued litigating despite those deficiencies, the charter school's fee petition is granted.

5. El Paso Indep. Sch. Dist. v. Berry, 55 IDELR 186 (5th Cir. 2010) (unpublished). In a case where the parent attorney rejected generous settlement offers from the district, pursued unnecessary services for the student and engaged in delay tactics, the district is entitled to \$10,000 in fees. IDEA clearly allows attorney's fee awards against parent attorneys who persist in litigating after a case clearly becomes frivolous, unreasonable, or without foundation. "[T]his case presents more than a 'refusal to settle.' Instead, this case involves an attorney repeatedly prolonging litigation and stonewalling efforts to conclude it to the detriment of his client—A.L.--who continued receiving services under an old and unnecessary plan while the 'grown ups' fought."
6. El Paso Indep. Sch. Dist. v. Richard R., 53 IDELR 175, 591 F.3d 417 (5th Cir. 2009). Where district offered payment of reasonable attorney's fees in a proposed settlement offer via a resolution session, the parent's attorney unreasonably protracted the litigation when it pursued the litigation. Because the parent was not justified in rejecting the settlement offer, he could not recover his fees incurred after the district made it written settlement offer; nor could the parent recover fees for work performed prior to the settlement offer because of the parent's unreasonable protraction of the litigation. Where the district offered fees as part of its settlement offer, the parent was offered all requested educational relief *and* reasonable attorneys' fees, leaving absolutely no need to continue litigating.
7. E.K. v. Stamford Bd. of Educ., 52 IDELR 133 (D. Conn. 2009). In a case involving the suspension/expulsion of a student who had exited from special education over two years ago, plaintiff's counsel "continued to litigate [the IDEA claim] after the litigation clearly became frivolous, unreasonable, or without foundation." Thus, the school system is awarded \$15,972.50 in fees to be paid by the parents' counsel.

III. THE EFFECT OF SCHOOL PERSONNEL BEHAVING BADLY

Even where the parents or their attorney are not behaving appropriately, school personnel should maintain professional and compliant behavior in response. School personnel should never allow their personal feelings or principles to get in the way of making defensible decisions on behalf of the child and to deal with the parents in a reasonable way.

A. Retaliation

School personnel should avoid retaliatory behavior against a parent who may be assertively advocating on behalf his/her child with a disability. Retaliation on that basis could be considered a form of discrimination under Section 504/the Americans with Disabilities Act (ADA). As discussed above, however, it is not expected that school personnel must allow for parents to act in a threatening or abusive way.

1. Hayward (CA) Unif. Sch. Dist., 54 IDELR 63 (OCR 2009). Parent's complaint of retaliation is justified where principal informed her that her second-grader would be transferred to another classroom at the teacher's request because of stress the teacher was experiencing related to her interactions with the parent. Where the parent met with the student's teachers more than once to discuss his academic progress and also sent several e-mails to the student's general education teacher to suggest changes in his behavior plan, these were protected activities under Section 504. While the teacher complained to the principal that she was experiencing stress caused by the parent that was affecting a preexisting health condition, the principal did not verify the teacher's medical concerns. Although Section 504 generally protects a parent from retaliation for advocating on behalf of her child with a disability, it does not provide blanket protection under all circumstances. Instances where parents put excessive pressure on teachers or staff, manifesting as overly aggressive, harassing, or inappropriate conduct are not protected by law. Here, however, and even despite the teacher's complaints that the parent stressed her out and comments by other staff indicating that the parent exhibited hostile, rude or offensive behavior, the parent's activities were not so unreasonable that they fell outside the scope of protected activity.
2. Pinellas County (FL) Sch. Dist., 52 IDELR 23 (OCR 2009). Where district's meeting minutes showed that staff discussed not placing the student in a German class because there was a pending OCR Complaint, this is sufficient to reflect retaliation.
3. Jenkins v. Rock Hill Local Sch. Dist., 49 IDELR 94, 513 F.3d 580 (6th Cir. 2008). Superintendent's alleged decisions to exclude the student from school, report the parent to child protective services and to refuse to provide home-based tutoring were all intended to prevent the parent from exercising free speech. In addition, his purported admission that the parent's complaints prompted him to report to child welfare authorities established a causal connection between the parent's complaints about the child's educational program and the superintendent's alleged misconduct. Thus, the parent established all elements of retaliation and may pursue her Section 1983 claim. However, the school district itself cannot be held liable for the superintendent's purported actions as there is no evidence that a government custom or policy led to any adverse action against the parent.
4. Herring v. Chichester Sch. Dist., 49 IDELR 186, 2008 WL 436910 (E.D. Pa. 2008). Attorney who represents students at IEP meetings and in due process hearings has made sufficient allegations of retaliation to proceed with her Section 504 and Section 1983 claims. According to the amended complaint, the attorney's actions prompted the District to act to attempt to interfere with her advocacy efforts. Specifically, she alleged that the day after the District learned that she would be filing more complaints for due process, the District sent her a trespass notice that she would be considered a trespasser anytime she entered the District's property without its prior approval. When she appeared at an IEP meeting later, the District called the police to issue trespass citations to the attorney. Therefore, the District's motion to dismiss the case is denied.

5. East Bridgewater (MA) Pub. Schs., 108 LRP 21714 (OCR 2007). There was insufficient evidence that the district's stated reasons for restricting the parent's access to teachers were not legitimate or were a cover for retaliation. Based upon teacher complaints that the parent intimidated them and that unplanned meetings with him interfered with their jobs, the district told the parent that he was no longer allowed to approach the teachers directly and that he would need to contact the director of pupil services or the assistant superintendent to schedule a meeting with a specific teacher or aide. In addition, an administrator would be present at every meeting. In so doing, the district was following a 25-year policy of including administrators in teacher-parent meetings when the teacher felt uncomfortable.

B. Denying Parental Participation in the Decision-making Process

The IDEA contemplates that parents are afforded the opportunity to be equal participants in educational decision-making. Often, if a court finds that school personnel have not afforded the parents this opportunity, a denial of FAPE has occurred.

1. J.T. v. Department of Educ., 59 IDELR 4 (D. Haw. 2012). Even though the district believed it was required to hold an IEP meeting for the SLD student by March 3, 2010, that did not excuse its decision to proceed with the meeting without the parent in this case. The district's position that the internal deadline for annual IEP reviews takes precedence over the parent's right to participate is rejected. In this case, the parent did not refuse to attend the meeting; rather, she informed that ED that she was unable to attend the meeting scheduled for the next day and asked if the team could meet the following week. While the district held two follow-up meetings attended by the parent, the parent's after-the-fact participation did not remedy her exclusion from the initial IEP meeting. In addition, the ED erred in failing to consider an independent evaluator's report and the parent's concerns about the student's health and communication skills. These procedural violations denied the student FAPE and compensatory education would be the best way to compensate for the procedural violations. Thus, the parties are to arrange for an evaluation of the student to determine his compensatory education needs.
2. Marc M. v. Department of Educ., 56 IDELR 9, 762 F. Supp. 2d 1235 (D. Haw. 2011). Although parents of a teenager with ADHD waited until the very last moment of an IEP meeting to provide the team with a private school progress report, that was no basis for the team to disregard it. The Education Department procedurally violated the IDEA and denied FAPE when it declined to review the private report because it contained vital information about the student's present levels of academic achievement and functional performance. The document, which showed that the student had progressed in his current private school, contradicted the information placed in the IEP, but the care coordinator who received the document did not share it with the rest of the team, because the team had just completed the new IEP. Where the new IEP proposed that the student attend public school for the upcoming school year, the parents reenrolled the student in private school and sought reimbursement. Since the IDEA requires districts to consider private evaluations presented by parents in any decision with respect to the provision of FAPE, the coordinator's contention that because the document was provided at the end of the

meeting, the team could not have considered and incorporated it into the new IEP, is rejected. As a result of failing to consider the private report, the IEP contained inaccurate information about the student's current levels of performance, such that these procedural errors "were sufficiently grave" to support a finding that the student was denied FAPE.

3. Berry v. Las Virgenes Unif. Sch. Dist., 54 IDELR 73 (9th Cir. 2010) (unpublished). District court's determination that district personnel predetermined placement is affirmed. Based upon the superintendent's statement at the start of the IEP meeting that the team would discuss the student's transition back to public school, the district court had found that the district determined the student's placement prior to the meeting.
4. J.N. v. District of Columbia, 53 IDELR 326 (D. D.C. 2010). Where the parties never agreed to a final IEP meeting date and there was no evidence that, had the district contacted the parent, it could not have persuaded her to attend the third scheduled meeting, a denial of FAPE occurred when the district proceeded with the IEP meeting in the parent's absence. After receiving no response to two notices for meeting provided to the parent, the district sent a third notice that explained that the meeting would be held three days later. On each of the following three days, the parent called the district to propose alternative dates but the district did not respond and held the meeting without her.
5. D.B. v. Gloucester Township Sch. Dist., 55 IDELR 224, 751 F.Supp.2d 764 (D. N.J. 2010). In an LRE dispute, where the district's special education director testified that there was no need to discuss other placements at an IEP meeting because the district had already determined that any greater inclusion time for the student was inappropriate, district denied FAPE because it denied the parents meaningful participation. Another IEP team member testified that discussion was unnecessary because the parties were at "opposing poles." Additional testimony confirmed that the district closed its mind even before the IEP meeting doors were closed. Importantly, the District had come to definitive conclusions about the child's placement without parental input, failed to incorporate any suggestions of the parents or discuss with them the prospective placements, and in some instances even failed to listen to the parent's concerns.
6. S.H. v. Plano Indep. Sch. Dist., 54 IDELR 114 (E.D. Tex. 2010). School district's failure to include a private program representative at an IEP meeting resulted in a denial of FAPE and an order for the district to reimburse the parents \$14,625 for private school services for a 3-year-old student with autism. FAPE was denied because the private program representative's absence from the team meeting resulted in an inappropriate placement of the student in an integrated classroom, as well as a failure to provide ESY services. As noted by the hearing officer, the lack of ESY services resulted in the student's "unmastering" of the objectives he had mastered in the private program. Clearly, an IEP team must include, among others, "at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child" and the incomplete IEP team resulted in a loss of educational opportunities. The district did not offer ESY because it lacked data regarding the possibility of regression for the student, which the private program representative would have provided. Furthermore, had

the district invited the representative, it would not have placed the child in an integrated classroom, which was a poor fit in light of the child's severe deficits.

7. Board of Educ. of the Toledo City Sch. Dist. v. Horen, 55 IDELR 102, 2010 WL 3522373 (N.D. Ohio 2010). The district denied FAPE when it seriously infringed on the parents' opportunity to participate in the decision-making process by proceeding with an IEP meeting in their absence. Although the parents called to cancel the meeting indicating that they would re-schedule but never did so, the district should have taken additional steps to reschedule an IEP meeting with them. A parental request to reschedule an IEP meeting is not the same as a refusal to meet. The district should have attempted to identify another date or, at the very least, should have informed the parents that it intended to proceed with the meeting. This is especially the case where school staff met with the parents earlier on the same day as the IEP meeting (and in the same school building) and should have asked them if they intended to stay for the IEP meeting, notwithstanding the parents' earlier indication that they could not attend.
8. Drobnicki v. Poway Unif. Sch. Dist., 109 LRP 73255 (9th Cir. 2009) (unpublished). Where the district scheduled an IEP meeting without asking the parents about their availability and did not contact them to arrange an alternative date when the parents informed the district that they were unavailable on the scheduled date, the district denied FAPE. Though the district offered to let the parents participate by speakerphone, the offer did not fulfill the district's affirmative duty to schedule the IEP meeting at a mutually agreed upon time and place. "The use of [a phone conference] to ensure parent participation is available only 'if neither parent can attend an IEP meeting.'" Further, the fact that the student's mother asked the district to reschedule the meeting undermined claims that the parents affirmatively refused to participate--a circumstance that would allow the district to proceed in the parents' absence. Although the mother attended two other IEP meetings that year, the student's IEP was developed in the parents' absence. As such, the district's procedural violation deprived the parents of the opportunity to participate in the IEP process and, therefore, denied the student FAPE.
9. N.B. v. Hellgate Elementary Sch. Dist., 50 IDELR 241, 541 F.3d 1202 (9th Cir. 2008). Where the parents had disclosed that the student had been privately diagnosed with autism but school district suggested that the parents arrange for an evaluation, the school district committed a procedural violation that denied FAPE to the student. The school district clearly failed to meet its obligation to evaluate the student in all areas of suspected disabilities after becoming aware of the medical diagnosis.
10. S.B. v. Pomona Unified Sch. Dist., 50 IDELR 72, 2008 WL 1766953 (C.D. Cal. 2008). The district's failure to include the student's private preschool teacher (the regular education teacher) was a procedural violation that resulted in a loss of educational opportunity for the student. Had the teacher been at the important IEP meeting, she could have shared her observations of the student's abilities and special needs from the year that the student was in her classroom. "At the very least, she could have elaborated on what she had told the transdisciplinary assessment team." A preponderance of the evidence shows that the teacher's participation at the November 2004 IEP meeting, as

mandated by the IDEA, “would have assisted the IEP team in devising a program that was better tailored to Student’s abilities and special needs. Accordingly, the District’s procedural violation of the IDEA resulted in Student’s loss of an educational opportunity and his denial of FAPE.”

11. Deal v. Hamilton County Bd. of Educ., 42 IDELR 109, 392 f.3D 840 (6th Cir. 2004), cert. denied, 546 U.S. 936 (2005). District denied parents of student with autism the opportunity to meaningfully participate in the IEP process when it placed their child in a program without considering his individual needs. Though parents were present at the IEP meetings, their involvement was merely a matter of form and after the fact, because district had, at that point, pre-decided the student's program and services. Thus, district's predetermination violation caused student substantive harm and therefore denied him FAPE. It appeared that district had an unofficial policy of refusing to provide 1:1 ABA programs because it had previously invested in another educational methodology program. This policy meant "school system personnel thus did not have open minds and were not willing to consider the provision of such a program," despite the student's demonstrated success under it.

C. Failing to Develop/Finalize an IEP

Not offering an IEP is rarely defensible, even if the parents are unpleasant or it is thought that they would never agree to anything anyway!

1. Anchorage Sch. Dist. v. M.P., 57 IDELR 242 (9th Cir. 2011) (unpublished). The parent’s conduct did not excuse the district’s failure to develop an updated IEP for the student. “Neither the IDEA nor its implementing regulations qualifies any duty imposed on a state or local educational agency as contingent upon parental cooperation.” Here, the district denied FAPE by using an outdated IEP and this denial entitles the parents to recover the costs of the student’s private tutoring in reading and math, as well as attorney’s fees.
2. Knable v. Bexley City Sch. Dist., 238 F.3d 755 (6th Cir. 2001). Although the district met with the parents on several occasions to review possible placement options for the student, such meetings were not the “equivalent of providing the parents a meaningful role in the process of formulating an IEP.” Because the district did not formally offer an IEP/placement prior to placement in a residential program by the parents, parents are entitled to reimbursement. The parents’ refusal to agree with the district’s placement recommendations did not excuse the district’s failure to conduct an IEP conference.
3. Glendale Unified Sch. Dist. v. Almasi, 122 F.Supp.2d 1093 (C.D. Cal. 2000). Where district offered four possible placements to student, three of which were district programs and one was continued placement at private school at parents’ expense, offer of several placements was a procedural violation that denied FAPE. District must make a formal, specific offer of placement.