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R E S U L T S   M A T T E R

DBYD – EDUCATION LAW  
APRIL 21, 2010

## **The Due Process Hearing is Over – Now What?**

**“And there's winners and there's losers  
But they ain't no big deal”  
- Jon Mellencamp**

How do special education due process hearings end?

The IDEA provides two methods of dispute resolution for parents and school districts who disagree about a student’s special education program: mediation and due process hearings. Mediation is a voluntary process in which parents and school districts attempt to resolve their differences amicably. Due process hearings are trial-like, and there is significant state-to-state variability in how hearings are administered.

In all states, due process hearings end when an Independent Hearing Officer (IHO) (or Administrative Law Judge, depending on your jurisdiction) issues a final decision and order. I practice in Pennsylvania and so, out of force of habit, I will refer to IHOs. The IHO’s decision states her findings of fact and conclusions of law. The findings of fact are the IHO’s determinations of what actually happened. The conclusions of law are the IHO’s analyses of what special education laws require as a consequence of the findings of fact. The decisions are accompanied by orders that tell parents and school districts what happens next or what each side gets. Awards of compensatory education or tuition reimbursement are found in these orders.

Who is an “aggrieved party”?

Clear cut winners and losers are the exception to the rule. Even when parents “win,” they rarely get everything that they ask for. For instance, a parent claiming a denial of FAPE may seek 900 hours or more of compensatory education per school year. As an extreme example, consider a parent who seeks 1,000 hours of compensatory education and is awarded 10 hours. Did that parent “win” the hearing?

Parents who do not get everything that they ask for at a due process hearing are “aggrieved parties” under the IDEA. School districts that oppose remedies sought by

parents are aggrieved when parents receive an award. In the example above, the parent is aggrieved because 990 of the 1,000 requested hours were denied. The school district is also aggrieved because 10 hours were awarded.

### Who is a “prevailing party”?

In general, a “prevailing party” is the person who wins a lawsuit. As we have just seen, however, winners and losers are not cut and dry. Nevertheless, courts have held that a prevailing party is “one who has been awarded some relief by the court.”<sup>1</sup> This definition includes parties who receive anything at a due process hearing *and* parties who receive anything through a court-sanctioned settlement agreement. Parties who receive something through a regular settlement agreement, however, are not prevailing parties under this standard.

When a parent asks for 1,000 hours but gets only 10, the parent is clearly aggrieved but – technically – the parent is also, simultaneously, a prevailing party. The parent has been “awarded some relief” in the form of 10 hours of compensatory education. Whether you consider this result ironic or just plain ridiculous, it flows directly from the standard.

### What can an aggrieved party do?

Parties who are aggrieved by an IHO’s decision can appeal their case to court, but only after “administrative exhaustion.” This means that a special education case cannot go to court until it has been through the state-provided administrative process; namely a due process hearing and any “administrative” appeals. When administrative exhaustion occurs depends on whether your state uses a “one-tier” or “two-tier” system. In a one-tier state, the due process hearing is the only administrative proceeding. In a two-tier state, there is an appellate level administrative proceeding. The evolution of due process in Pennsylvania provides a clear example of how this works in the real world.

The agency that runs Pennsylvania due process hearings is called the Office for Dispute Resolution (ODR). Before June 15, 2008, ODR operated a two-tier system. Any party that was aggrieved by an IHO’s decision and order could file an appeal to the Pennsylvania Special Education Appeals Panel. The Panel would take a second look at the case, then issue a new decision and order either upholding, rejecting or modifying the IHO’s decision. As a result, parties aggrieved by an IHO could not take their case directly to court. Rather, aggrieved parties had to exhaust administrative remedies first by appealing to the Panel.

Pennsylvania has abandoned the Panel, making due process hearings the only (and therefore last) adjudication inside of ODR. Now, administrative exhaustion happens the moment the IHO issues her final decision and order. This is important because

administrative exhaustion allows aggrieved parties to bring a civil action in “any State court of competent jurisdiction or in a district court of the United States.”

This process raises many important questions: Is the civil action a brand new lawsuit or is it an appeal of the IHO’s decision? Under what circumstances can the parties present new evidence to the judge? How deferential must the judge be to the IHO? If these topics interest you, write to me at [bjford@dbyd.com](mailto:bjford@dbyd.com) and I will write more about this.

### What can a prevailing party do?

Surprisingly, parties who prevail at due process hearings also have options. Those options are different for parents and school districts. In some cases, parents have claims under laws that go beyond the jurisdiction of IHOs. In these cases, there is an argument that parents achieve administrative exhaustion when they prevail at a due process hearing. At this point, parents may bring the claims that the IHO could not hear. School districts should understand that sometimes due process hearings are only preludes to much larger lawsuits.

More often, however, prevailing parents are content to let the IHO’s decision stand. In these cases, the next step for parents often is to demand reimbursement of their legal expenses. Under the IDEA, a court may award reasonable attorneys’ fees to prevailing parents. In many states, IHOs cannot award attorneys fees because the IDEA says that a *court* may make this award. In those states, parents may bring a separate lawsuit in court to claim fees if they prevail at the hearing. In these cases, parents can also claim the cost of pursuing the fee demand. There is a surprising amount of litigation in this area, and courts do carefully scrutinize the “reasonableness” of the fee demand.

Options for prevailing school districts are more limited. Prevailing school districts can seek fees from an *attorney of a parent* who files a complaint (i.e. requests a hearing) that is frivolous, unreasonable, or without foundation. The school district has a cause of action against the parents’ attorney – not the parents themselves – and must prove not only that it prevailed but that the due process hearing was frivolous. However, prevailing school districts have a cause of action against both parents and their attorneys if the complaint is presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation. In reality, these are very difficult things to prove.

### Conclusion

After a special education due process hearing, prevailing parents may seek reimbursement for legal fees from school districts. Under very rare circumstances, school districts may seek the same from parents and/or their attorneys. Aggrieved parties may file an appeal to state or federal court, but only after administrative

exhaustion. Despite all of these rules, it is uncommon for there to be clear cut winners and losers after a due process hearing. IHOs seldom give either party exactly what they ask for.

1. See *Buckhannon v. W. Va. Dep't of Health & Human Res.*, 532 U.S. 598 (2001). This is an ADA case that has been broadly applied to IDEA cases.

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