

Overview of Basic IDEA Issues: ARD Committees, Parents, LRE, IEPs, and Avoiding Due Process Hearings

by

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The Individuals with Disabilities Education Act (“IDEA,” 20 U.S.C. §1400, et seq.) is a federal law passed in 1975 to provide the states with funding to create and develop programs to provide eligible disabled children with a free appropriate public education. With the Congress’ permission, the Department of Education promulgates hundreds of federal regulations that specifically set forth the requirements of the IDEA. In addition, the states pass their own laws, and each state’s board of education promulgates its own regulations and rules to ensure that the requirements of the act are met in their schools. It’s a big mess, but the basic features of the law can be summarized as follows:

1. Individualized Educational Plans (IEPs)

What is the IEP?

The main aspect of IDEA is the requirement that an Individualized Educational Plans (IEP) be developed for every eligible disabled child. The IEP must contain goals and objectives individualized for the child, a schedule of services to be provided the child, a description of the placement where the IEP will be implemented, and a variety of other statements and assurances that are set forth in IDEA, the Federal regulations, and the Texas Commissioner’s Rules. The IEP is the cornerstone of special education. It is the most important special education document in the eligibility folders.

How is the IEP developed?

First, the ARD committee determines what goals and objectives the child will be working on for the next year, and then it determines what placement is necessary for the child to make progress on those goals and objectives--Placement comes **after** goals and objectives. The IEP must be specific, clear, comprehensive, attainable, reasonable, measurable, logical, and complete. The ARD committee’s basic function is to develop the IEP (see below).

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.

2. Admission, Review, and Dismissal (ARD) Committees

Congress thought the IEP was too important to be developed by any one person. Thus, IDEA regulations require that the IEP be developed by a committee--a multi-disciplinary team usually composed of teachers, assessment personnel, administrators, and most importantly, the parent. (See 19 TEX ADMIN. CODE §89.1050).

In Texas, we call these teams Admission, Review, and Dismissal (ARD) Committees, because their main functions are to:

- a. **Admit** students into the special education process,
- b. **Review** their programs (IEPs), and
- c. **Dismiss** students who are no longer eligible for special education and related services.

ARD committees spend most of their time reviewing, modifying, and fine-tuning students' IEPs. The ARD committees work by consensus, not votes. The committee either is in consensus, or it is not. If it is not, usually because a parent disagrees with the IEP, the committee must offer the parent an opportunity for a recess of ten days or less, after which the committee will meet again to revisit the issues that led to the disagreement. If at that point, the committee cannot reach consensus, the District must proceed with implementation of its proposed plan, and the parent has a right to seek a due process hearing to contest the District's IEP.

The ARD committee also explains assessment data to the parent, coordinates delivery of services, and generally, makes all decisions that significantly affect a disabled child's educational program.

The ARD committees have the final word on decisions affecting disabled children's educations. Neither administrators nor the Board of Trustees can legally trump or overturn ARD committee determinations. Only the ARD committees have legal authority under IDEA to make these decisions.

The committees must meet whenever (1) changes to any part of the IEP are considered, (2) major discipline is being considered, (3) new assessment data must be discussed, (4) the child is transferring to another school within the District, (5) eligibility is in question, (6) the IEP must be developed for the next school year, (7) changes in related services are being considered, (8) changes in the behavior management plan are being considered, or (9) whenever the parent wants to have a meeting.

In Texas, parents must be provided five-day written notice of an ARD meeting and the general reasons for convening the committee. A parent may be asked to waive the five-day notice if an ARD meeting must be held immediately.

Parents can bring anyone they want to an ARD meeting, including attorneys, parent advocates, interpreters, and friends. If they bring an attorney without first notifying you, you may cancel the meeting and postpone until you are able to contact your own attorney and secure his or her attendance.

3. Parental Participation

The IDEA envisions a system whereby schools and parents work jointly in the planning and development of the IEP. Parents are actual consensus members of the IEP, and are considered equal participants in the ARD committee process under the law.

Parents usually make their presence known when they exercise the following rights:

A. Refuse consent for initial evaluation and/or placement

Parental consent is required before initial evaluation and initial placement. If a parent refuses to consent to either, the only things the school can do are to try and informally convince the parent to consent, seek mediation (see below), or request a due process hearing (see below) to get a hearing officer to order the child tested or placed. If the school has good reasons to test the child or have him placed after testing is complete, the hearing officers usually order the parents to consent to evaluation and placement. If a parent does not consent, and the school does nothing, there may also be legal problems, since schools have a duty to serve disabled kids even if their parents disagree. The law protects kids from unreasonable parents and you should try to do so also.

B. Disagree with the rest of the ARD committee

As stated previously, a parent can disagree with the school members' decisions. In these cases, the parents must be allowed the opportunity for a ten-day (or less) recess, at the end of which the committee must revisit the parties' disagreement and try to resolve the dispute. If the dispute cannot be resolved, the District can proceed with its recommended plan. The parent then can seek other actions, which are discussed below.

C. Request relevant educational records

Under the Family Educational Rights and Privacy Act ("FERPA," 20 U.S.C. 1232g), a parent has a right to access to any of their child's educational records. An educational record is anything that contains information relating to the child. Parents may review records, obtain copies at a reasonable cost, and allow the school to disclose records to whoever they want.

D. Request an Independent Educational Evaluation (IEE)

A federal regulation (34 C.F.R. 300.503) makes it possible for parents to request an IEE when they disagree with the results of a District evaluation. If the District wishes to deny the request, it must initiate a due process hearing (see below) to prove that its evaluation is appropriate. If the District grants the parent's request, the evaluation must meet the same criteria that the District applies to its own evaluations (i.e. cost, geographical area, qualifications of evaluator). After the evaluation is complete, the

District must consider the results of the evaluation in ARD committee deliberations (although it does not need to necessarily follow the IEE recommendations).

E. Seek mediation with TEA

The parent (and the District as well) may ask TEA to involve an impartial, trained mediator in the dispute. Mediation is completely voluntary; either party may disagree to mediate their dispute. If the parties agree, a mediator of TEA's choosing may contact the parent and perhaps the District to ascertain what issues will be discussed in mediation. Then, the mediator will go to the District and hold a mediation session designed to facilitate the drafting of a mediation agreement satisfactory to both parties.

The role of the mediator is not to determine who is right or wrong, but rather to facilitate the reaching of an agreement by the parties involved. If either party is dissatisfied with the course of the session, they may choose to end the mediation. If, on the other hand, the parties reach an agreement, they are bound to comply with it. School staff present at the mediation must have authority to bind the District to the provisions of the mediation agreement.

F. File a complaint with the Office for Civil Rights (OCR)

Any parent of a disabled child, whether disabled under §504 or IDEA, may file a complaint with OCR alleging a violation of §504. Because all IDEA-eligible children could also be eligible for services under the broader definitions of §504, OCR can also investigate violations of §504 in special education programs.

OCR addresses all complaints under its new Complaint Resolution Manual, which emphasizes the reaching of agreements with the school regarding the issues raised in the parent's complaint. If efforts at reaching an agreement are unsuccessful, OCR will send an investigator to the District to conduct an investigation. The investigator will ask for records, and may ask to speak to relevant personnel about the issues raised in the complaint. If OCR finds that the District violated §504, it will try to negotiate a corrective action plan with the District, outlining the steps that must be taken to remedy the violation. If the District refuses to cooperate, OCR has the power to terminate a District's entire federal funding (this has only happened about seven times).

OCR complaints, even if they do not result in on-site investigations, are time-consuming and stressful. In addition, once OCR investigates a District, there is a tendency toward additional future complaints and investigations.

G. Request a due process hearing

Ultimately, the parent can request that TEA appoint an impartial hearing officer to preside over a due process hearing to make formal rulings regarding the parent's claims and allegations. There are currently thirteen special education hearing officers that hear all due process hearings in Texas. Hearings are fairly formal,

with court reporters, trial-like formats, disclosure of evidence rules, expert witnesses, school witnesses, parent witnesses, and interpreters, if needed. Some hearings can take five or more days to complete.

The hearing officer has the power to order a District to change an IEP, pay for residential placement, pay for an independent evaluation, provide certain services, or provide compensatory education as a penalty for the failure to provide necessary services for a period of time. The hearing officer can find an IEP or evaluation to be inappropriate, and can review any action of the ARD committee with respect to the identification, evaluation, or placement of IDEA-eligible children.

Because the process is rather formal, and because the stakes can be quite high, due process hearings usually involve attorneys on both sides. If a school district loses on any significant issue in the due process hearing, the district must pay the opposing attorney's fees, which can run as high as \$80,000.00. Few of the insurance companies currently in the business of insuring school districts in Texas provide coverage for the defense of these hearings or any potential attorney's fees liability. These losses must come out of local funds. Of course, the cost of defending a due process hearing can also be quite high, since attorneys must evaluate and prepare the case and witnesses carefully prior to the hearing.

If a parent loses on any issue raised in the hearing, they may appeal the decision to the nearest federal district court. These actions are generally covered by insurance.

4. Least Restrictive Environment

IDEA mandates that whenever possible, disabled children should be educated in the regular classrooms. If not possible, then they must be educated in **the setting that provides the maximum opportunities for interaction with non-disabled peers**. This is called the IDEA's Least Restrictive Environment (LRE) mandate, and it has received tremendous attention in the past few years. The attention is due to a growing perception among many educational experts that pull-out special programs, and segregated settings, do not adequately prepare disabled children for their post-school experiences. Recent federal court cases have reflected this emerging philosophy, and inclusion advocacy, headed by groups such as Advocacy, Inc. and ARC-Texas, has become increasingly aggressive and litigious.

The best avenue to prevent LRE litigation is to allow disabled children, no matter how disabled, at least a chance in the regular classroom before concluding that the child cannot be served there. Inclusion is not about "dumping" kids in regular classes; it is about providing the support services to both teacher and student that may be necessary for the child to succeed in the regular classroom, including aides, team teachers, modifications, behavior plans, assistive technology, peer tutors, etc. Although some of inclusion thinking is debatable, one issue is clear: there are too many children in resource and self-contained classes that could be served in regular classes with some effort, training, and planning.

The trend towards more inclusive programming is creating increased emphasis on modifications in the regular classroom setting. Regular teachers are being asked to be more

creative, efficient, and consistent in implementing modifications that will allow for successful placement in regular classes.

5. Avoiding due process hearings

Sometimes, hearings cannot be avoided. But generally, the following factors are essential in reducing the risk of litigation in the special education context:

- a. Respect parental rights, especially their right to participate fully in the development of the IEP;
- b. Keep lines of communication open;
- c. Address and investigate issues of parental concern promptly;
- d. Address children's problems in the classroom promptly;
- e. Return parents' phone calls;
- f. Be very careful with discipline issues;
- g. Always pay attention to legal compliance issues;
- h. Get consultation on legal issues before making tough decisions;
- i. Do not rely on old practice and policy that does not comply with the law;
- j. Develop good IEPs, and implement them to the letter;
- k. Coordinate delivery of services effectively;
- l. Follow required ARD procedures;
- m. Develop behavior management plans for recurring behavior problems in any disabled child;
- n. Get ample consultation in developing programs for autistic kids;
- o. Use cost-benefit analysis in choosing what issues to make a stand on.