

# Is a Lawyer Always Necessary to Assure FAPE or LRE?

By Donna Martinez, M.A.

**A** Free Appropriate Public Education (FAPE) is an entitlement to a child identified as having a disability and needing special education and related services in order to benefit from education. As much as possible, given the needs of the child, services of FAPE must be provided in the Least Restrictive Environment (LRE). The school plans with you and your child during the IEP process to determine the goals, objectives, supports, and services required for your child to attend class and school activities along with students without disabilities.

It is required that families be informed of their special education rights under The Individuals with Disabilities Education Improvement Act of 2004 (IDEA). Documents outlining procedural safeguards are to be accessible and understandable by the family. The Virginia Department of Education's Procedural Safeguards Notice includes general information on special education and IEPs, parental consent, electronic mail, independent educational evaluations (IEEs), confidentiality, state complaint procedures, due process complaint procedures, due process hearings, appeals, procedures when disciplining children with disabilities, and requirements for unilateral placement by parents in private schools at public expense.

However, even with these safeguards it is possible to find yourself in one of the following scenarios:

- ◆ The eligibility team determines your child does not need special education, while you, on the other hand, are firmly convinced he does;
- ◆ Your child was well evaluated for present level of performance in math, but her area of

deficiency was in reading. Not only that, the assessments used were out of date leading you to believe your child could be better assessed by someone outside of the school district;

- ◆ It's been a few months since you signed the Individual Education Plan (IEP) for your child, and still the services and supports you all agreed were critical to access the general education curriculum (including actual placement in that classroom) have not been implemented;
- ◆ You decide that the only route for a proper education is placement in a private special school; however, you realize you are entitled to Free Appropriate Public Education (FAPE).

When confronting problems such as these, what are you to do? How will you turn the emotions of anger, frustration, and bafflement that are welling up inside into an action plan that will remedy the situations blocking your child's progress in school? In what way may you be assured of being informed and that your child's rights to a free, appropriate public education in the least restrictive environment are protected? How do you know you need a lawyer and what do you do to prepare for court?

## Organize and Document

Step one is to gather and organize all your documentation: your child's IEPs, evaluations by the school and any outside evaluations by other professionals or doctors, notations of all the times your child did not receive a needed service, and copies of pertinent communication (notes, email, and phone logs). Set your records in order by sorting the items by date, placing the current record on top. Keeping your documents



organized chronologically rather than sorted out by category (IEPs, letters, evaluations) builds a clearer historical record.

An added helpful resource for your documentation is a communication log set up between you, your child's service providers and/or teacher. A notebook or communication book, often used for instruction reinforcement at home, provides daily or weekly notes between you and your child's teachers and service providers on your child's progress. Items recorded may include your child's records of behavior, how the goals are actually met in pull-out programs or supported in the general education classroom, or if special equipment and material have been provided and utilized successfully. This information may be useful to indicate your child's current level of progress. It will also provide a record of any specific requests made up to this point regarding your child's education.

## Meet with School Personnel

Equally important is to meet with your child's teacher. Teachers can be one of your strong frontline supporters willing to collaborate with you to advocate for their student, your child. Come prepared with your questions to discuss what you believe is and is not working for your child, and what is not being provided within the IEP. Is the teacher aware of these problems? What does the teacher believe are the reasons the IEP is not being followed as was agreed? Can you collaborate to resolve those issues now?

Should the meeting with your child's teachers and/or service providers prove unproductive, the next step is to meet with

the principal. Failing a resolution with the principal you may want to meet with the director of special education or school district staff member, such as the program specialist or case manager assigned to your child. Don't forget to bring your organized documentation and records to these meetings. Also record the topic of the discussion, the name of the person with whom you met, the date you met, and the outcomes or action items from that meeting.

### **A Little Help from Friends, Parent Advocates or Lawyers**

It may be at this juncture (if not sooner) that you consider having a friend, a parent advocate, or lawyer trained in special education law accompany you to these meetings. The complexity of your issues, strength of your case, your time and energy, your budget, and your self confidence are factors that determine whom you select as your supporter. Should your school be represented by their attorney, you will want to have the same level of protection and expertise at your side. However, you may find that having an attorney causes the proceedings to be more formal and adversarial and has a lasting effect on the atmosphere of future interactions with the school (Siegel, 2005).

### **Writing Memos the Wright Way**

A difficult task for parents when meeting after meeting proves fruitless is to move through the anger and emotional flood that may overcome them when they believe their children's needs are not met appropriately. How you approach the topic is critical to how you will resolve your child's situation. When you find you need to write letters or memos requesting meetings or clarification of the issues, I strongly recommend the excellent suggestions found in Pete and Pamela Wright's book *From Emotions to Advocacy* (2002). The Wrights advise your letters to school personnel should never be therapeutic for you, rather they should always be written as though you are telling the facts to a total stranger.

### **Complaints and Mediation or Due Process and Hearings**

With your documentation organized, your emotions channeled into advocacy, your rights understood, the next step to take is to determine if you need to file a complaint or move forward to due process. A complaint reviews the alleged procedure violations such as services not being provided to a child with a disability in accordance with the student's IEP that have occurred not more than one year prior to the date that the complaint is received by the school division. Seeking mediation is voluntary on your part or that of the school. Disputes that focus on a violation of a particular process or procedure in special education law or regulation would be addressed through the complaint process and are generally resolved within a 60-day time period. Disputes between the parent and the local school division over the appropriateness or nature of the student's program or services may lead the family to seek a due process hearing.

*Not only are you the parent, you are also the protector of your child. There may come a time when the role of protector requires you to confront school personnel to assure your child's rights and benefits from public education are upheld.*

ing. Mediation is not used to deny or delay your rights under IDEA, including your right to seek a due process hearing.

You and your school personnel are encouraged to work through mediation at the local level to resolve the conflicts and to arrive at a mutual agreement in the best interests of your child with disabilities. School divisions must make available mediation services to you and the school to help

resolve differences you may have whether or not you have or intend to file a request for a due process hearing. Mediation is facilitated by trained volunteers at no cost to your family. Mediators do not make final decisions; rather their goal is to review the issues, encourage new thinking, help facilitate cooperative problem-solving, and assist you and the school to come to consensus for the best interest of your child. While your lawyer may act as your advisor, during the mediation you actually represent yourself.

Based upon allegations of improper identification, evaluation, or education of a child, or the failure to provide FAPE for the child you may decide to request a due process hearing. This is a formal, contested adversarial trial between the parent and the local school division over the appropriateness or nature of the student's program or services. Evidence is presented by you and the school to a Hearing Officer who acts as both judge and jury.

Special education cases are serious and sometimes difficult civil litigation seeking money and access to limited school resources. Intense emotions of anger, frustration, betrayal, and guilt may add a troubling dimension to the process. You may represent yourself or you may hire an attorney, but you must pay for the attorney yourself. If you prevail at the hearing, the Hearing Officer does not have the authority to award you attorney's fees. However, district judges and federal court may award fees based on the Hearing Officer's decision.

### **How to Locate an Advocate**

Often parent organizations have ombudsmen (specially trained mentors for families) who are available to assist you in navigating the complaint and due processes. You may find your school has such a program or you may contact the Commonwealth of Virginia's ombudsman at 804-371-7420 or 800-422-2083. If you seek the services of a lawyer, interview the advocate first, asking questions that relate to his/her experience in the special education law: the number of formal complaints and cases filed; whether the lawyer has represented parents successfully through to con-

# training and advocacy

clusion in due process hearings; how current the lawyer's resources and library materials are; and what the fee structure is.

## Are You Ready to Protect Your Rights?

Not only are you parent, you are also the protector of your child. There may come a time when the role of protector requires you to confront school personnel to assure your

child's rights and benefits from public education are upheld. It can be a scary and intimidating position, especially when professionals and parents presumed to be partners and supporters for the child with a disability now take on the mutually exclusive roles of adversaries. However, by knowing your rights, seeking alternative means of dispute resolution such as mediation, or ultimately preparing well with your lawyer

*Donna Martinez, a long time contributing writer to CSC, was recently appointed to the directorship of the The HEATH Resource Center, The George Washington University, Graduate School of Education and Human Development, Washington, D.C. Congratulations Donna!*

## Notes

## Resources

- ◆ **IDEA:** <http://idea.ed.gov>
  - ◆ **IDEA 2004 Statute and Regulations:** [www.wrightslaw.com/idea/law.htm](http://www.wrightslaw.com/idea/law.htm)
  - ◆ **VA Department of Education: Procedural Safeguards:** [www.pen.k12.va.us/VDOE/Instruction/Sped/procsafe.pdf](http://www.pen.k12.va.us/VDOE/Instruction/Sped/procsafe.pdf)
  - ◆ **VA Department of Education - Special Education Due Process and Complaints:** [www.pen.k12.va.us/VDOE/dueproc](http://www.pen.k12.va.us/VDOE/dueproc)
  - ◆ **Special Education Mediation System** [www.pen.k12.va.us/VDOE/Instruction/ssems.html](http://www.pen.k12.va.us/VDOE/Instruction/ssems.html)
  - ◆ **Representing the Special Education Child: A Manual for the Attorney and Lay Advocate:** [www.wrightslaw.com/advoc/articles/attorney\\_manual.html](http://www.wrightslaw.com/advoc/articles/attorney_manual.html)
  - ◆ **The Art of Letter Writing:** [www.wrightslaw.com/advoc/articles/DRAFT\\_Letters.html](http://www.wrightslaw.com/advoc/articles/DRAFT_Letters.html)
  - ◆ **About State Ombudsman:** [www.pen.k12.va.us/VDOE/sess/ombudsman/index.html](http://www.pen.k12.va.us/VDOE/sess/ombudsman/index.html)
  - ◆ **Finding Legal Help:** [www.doe.virginia.gov/VDOE/dueproc/LglAdvGrpsforSpEdCases.pdf](http://www.doe.virginia.gov/VDOE/dueproc/LglAdvGrpsforSpEdCases.pdf)
  - ◆ **Procedural Safeguards-- Providing Parents with Information about Free or Low-Cost Legal Services** [www.virginialac.org/pdf/SelectingAttorney\\_Advocate.pdf](http://www.virginialac.org/pdf/SelectingAttorney_Advocate.pdf)
  - ◆ **Do I Need a Special Education Lawyer?** [www.keepmedia.com/pubs/Nolo/2006/05/08/1693975?ba=a&bi=10&bp=7](http://www.keepmedia.com/pubs/Nolo/2006/05/08/1693975?ba=a&bi=10&bp=7)
- ### Videos of Due Process:
- ◆ **Resolving Special Education Disputes** [www.isbe.state.il.us/spec-ed/html/due\\_process.htm](http://www.isbe.state.il.us/spec-ed/html/due_process.htm)  
*This streaming video presents vignettes of the steps in due process, beginning with a dispute occurring at a meeting about a student's Individualized Education Program (IEP) and concluding with the hearing itself. (Captioned version is available -- click the CAP button. You will need the free RealOne player to view the video.)*
  - ◆ **Special Ed Mediation**  
*This video demonstrates a sample Special Education Mediation session. The program was produced in 1986. While the program itself is dated, the information presented is accurate and the procedures are still applicable. You'll need the free RealOne player to view the video.)*