Dissecting Due Process: While Keeping Sane!

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Presented by
Drummond Woodsum’s Special Education Team
# Dissecting Due Process – While Keeping Sane

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Drummond Woodsum’s Special Education Team

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Dissecting Due Process – While Keeping Sane

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Dissecting Due Process. That is a gruesome thought. But many of our readers would like to see exactly that – as long as it is done on someone else’s operating table! That said, Drummond Woodsum and MADSEC both thought it would be helpful to provide special education leaders with a comprehensive summary of how due process works in Maine.

With that in mind, we have prepared this extensive written review of virtually all components of due process. This material is intended to be used in concert with presentation by our special education litigation team, and involvement by the Directors’ Academy audience. Our hope is that participants will all leave the day having a very solid understanding of what to expect if due process enters into your lives. Get the scalpel!
INTRODUCTION

There is a powerful and speedy enforcement mechanism that anchors the entire special education system that you are a part of. That enforcement mechanism, established first by federal law and then pulled into Maine’s law and regulations, has come to be known as “due process.” Yet the concept of “due process” has a more specific meaning than the more grandiose concept found in constitutional law. Here, when we say due process, we mean the various administrative processes run by the Maine Department of Education as a way for parents (and occasionally schools) to make sure that students are receiving all that the law requires.

In other words, special education laws provide individual families with a right to challenge the educational decisions made by schools about their children through an independent due process system. This due process system can be very time consuming and expensive for schools and families, and it is important to have a good understanding of how it works.

Currently in Maine, a parent or a school unit has a right to file for an administrative due process hearing, which will be heard by an independent hearing officer. As a separate process, a parent or “interested party” also has a right to file what is called a special education complaint, which is resolved by the Commissioner of the Maine Department of Education, who appoints a complaint investigator to recommend a decision to the Commissioner. Finally, Maine also offers a voluntary mediation process for resolving any special education dispute. This is called a “stand-alone mediation.” But mediations are also a part of the other two proceedings – the hearing and the complaint. In all cases, mediations are voluntary – both sides must agree to participate. If a complaint or a hearing is filed, it will move forward even if one side would rather that it not!

1See 20-A M.R.S.A. § 7207-B; MUSER XVI.1(B)(3) (2017).
3See MUSER XVI.1(B)(2) (2017).
We are going to review below the complaint process, and then the hearing process, including some specific types of hearings that regularly arise. But we will start with a brief discussion of the mediation process, which is part of complaints and hearings, but also could be a stand-alone mediation.

I. The Mediation Process

The mediation process is available as part of all due process events. That is, the parents and school can agree to use mediation as part of a complaint or as part of a hearing. But very importantly, the mediation process is also available as a stand-alone. That is, if the school and parent are polarized on any particular issue, they can resort to the mediation process in an effort to resolve that dispute.4

The mediation process is run by the Maine Department of Education, and at no cost to parents or the school unit. The Maine DOE appoints the mediator, and schedules the mediation to occur, usually in the central office of the local school unit. The school is supposed to make two rooms available for the mediation, so that there are separate locations available to each side to caucus during the mediation. The two sides start together at the mediation. The mediator introduces him or herself and reviews the guidelines. All mediations are confidential, in that the proposals that are floated at the mediation cannot be shared by either side with others at a later time, and particularly cannot become a part of the evidence at a due process hearing or complaint process.

The mediator may shuttle between the two sides, passing proposals back and forth. If an agreement is reached, it is set forth in writing and signed by both sides. If a parent believes that the school unit is not complying with the mediation agreement, the parent may file a complaint with the Maine Department of Education, which will consider it through the complaint process described our next section.

Participating in a mediation is totally voluntary. That is often the difficulty. An upset family may be unwilling to sit down with the school in an effort to find a

4See MUSER XV1.2 (2017).
compromise. If either side does not agree to participate, the mediation cannot occur. This is unfortunate, because mediations have a very high success rate in Maine and are a great tool for resolving special education disputes.

Occasionally parents or the school would like to have advocates or attorneys present at the mediation. There are special rules on that subject, which generally prohibit a school unit from having an attorney at the mediation unless the parent does, or unless the parent agrees to permit the school to have an attorney. The rule on this issue states:

Parents may be accompanied to the mediation by an advocate or other person knowledgeable in providing special education services. School personnel with authorization to commit resources and personnel involved with the dispute shall attend any mediation. School administrative units may be represented by counsel in a mediation only when the parents are represented by counsel. The SAU may be accompanied at mediation by a non-attorney advocate or consultant only when the parent is similarly accompanied by an individual who has been engaged to perform special education advocacy or consultancy, or else is represented at the mediation by an attorney. An attorney representing a parent shall provide the superintendent of the school administrative unit and the Due Process Office of the Maine Department of Education with at least 7 days written notice prior to the mediation that they will be representing the parent at the mediation. Parties may consult with their attorneys prior to and after engaging in mediation. Both parties may agree in writing to waive the 7-day written notice of the parent’s attorney’s planned attendance at the mediation.5

School officials should realize that the mediation agreement is a binding document. The language of the agreement is important. It is helpful to have assistance if possible in drafting the agreement, and for that reason, the presence of an attorney or non-attorney consultant is useful. But as the reader sees, there are limits on when such a person can attend. The mediators are very helpful. But parents and school officials alike should both realize that the mediator is a neutral, and does not work for either side.

II. The Due Process Complaint

The due process complaint procedure is relatively informal, and is much quicker and less expensive for both families and schools than the due process hearing. Yet, just like in a due process hearing, a complaint investigation can consider virtually any dispute that might arise under state or federal special education laws, including disputes over identification, evaluation, placement, or the delivery of a free appropriate public education for the child, but also including any alleged violation of the special education rules.⁶

Schools are occasionally seeing parents or advocacy groups attempting to expand the investigatory authority of the Commissioner in this process out beyond special education. That is, a parent or advocacy group may occasionally file a complaint that is more accurately raising issues under Maine’s bullying law or under Maine’s restraint and seclusion rules. But these are not issues that are technically permitted to be raised under the special education complaint process, which is limited to complaints about school compliance with Maine’s special education rules. And besides, there are other avenues available under the law for raising issues about bullying or the restraint and seclusion rules. One need not access the special education process in order to have such matters considered. Furthermore, the Commissioner generally has authority to investigate allegations that the state education laws themselves are not being followed by schools – but this complaint process also exists separate from the special education laws.⁷

Whereas a due process hearing is decided by a hearing officer who is independent of the state (and the parties), the less formal complaint process is resolved by the Commissioner, acting through a complaint investigator who works for the Maine Department of Education and issues a recommended decision to the Commissioner.

⁶See MUSER XVI.1(B)(1) (2017).
⁷See 20-A M.R.S.A. §§ 6801-A, 2458-A.
It is important to recognize that the complaint process really reflects the authority of the Commissioner of Education to enforce the Maine special education rules. This is likely why the Commissioner’s investigator can expand the scope of a complaint investigation beyond the issues raised by the parent or interested party, if the Commissioner’s investigator discovers some other apparent violation of the special education rules while investigating the actual issues first presented. This is understood as the Commissioner’s authority to investigate “ancillary issues” that may arise. But when this occurs, it is important that the investigator provide the school with an opportunity to respond to any such new issues that have arisen, so as to provide the school’s perspective on the issue in question.

Special education complaints are usually filed by parents against the local school unit, yet the rules permit these complaints to be filed by any “organization or individual.” Some complexity arises because complaints can be filed by someone or some entity other than the parent, and the school unit’s response to the complaint generally contains extensive information about a particular student that is confidential and cannot be made available to an outside person or entity that is not the parent. The Department will take steps in these situations to limit the information that is made available to a non-parent complainant.

It is quite rare for an “interested party” to file a complaint on behalf of a particular child, rather than on a much broader issue. If the complaint is filed against the school by someone other than the parent – perhaps an advocacy organization of some sort – the complaint is more often being filed as what has been called the “systemic complaint” process. Maine’s special education rules do not reference the “systemic complaint.” But Maine’s complaint form includes “systemic complaint” as one option, and Maine once issued procedures that would guide how the Commissioner would review systemic complaints. These procedures were last revised

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8 See MUSER XVI.4(B)(1) (2017); 34 C.F.R. § 300.153(a).
in April 2017, but at the time of this book’s publication, had disappeared from the Maine DOE website.9

According to the Maine DOE guidance on systemic complaints, that particular process is to be limited to disputes about an alleged “policy, practice, or procedure that may result in a violation of IDEA or MUSER, and has impacted, or has the potential to impact, the provision of a free, appropriate public education to a group of students.”10 For a systemic complaint, mediation is not available because the complainant, as an “interested party” does not have a right to enter into agreements on behalf of a particular student or group of students. Only parents have that right.11

A good example of an issue that might be heard as a special education systemic complaint is an allegation that a school does not process in a timely manner identified special education students who are transferring into a school unit, with the result being that children remain out of program for an inordinate period of time. The investigation here would be of the overarching process followed by the school unit regarding special education students generally (or perhaps in a particular school building).

The federal government has also issued guidance on systemic complaints, although here too the federal laws and rules make no reference to systemic complaints. In a guidance document on complaints generally, the federal agency that oversees the IDEA wrote as follows:

Question A-1: May the State complaint procedures, including the remedies outlined in 34 CFR § 300.151(b), be used to address the problems of a group of children, i.e., a complaint alleging systemic noncompliance? If so, please provide an example of a systemic complaint.

9When last available, Maine’s procedural guidance on systemic complaints was titled, “Systemic Complaint Investigation Handbook: A Guide for Parents and Educators,” revised April 2017. Perhaps it will re-appear on the DOE website, and readers may want to search the site for guidance with this or a similar title.
Answer: Yes. An SEA is required to resolve any complaint that meets the requirements of 34 CFR § 300.153, including a complaint alleging that a public agency failed to provide FAPE to a group of children with disabilities. The Department views the State complaint procedures as an important tool for a State to use to fulfill its general supervision responsibilities to monitor implementation of the requirements in Part B of the IDEA by LEAs in the State. These responsibilities extend to both systemic and child-specific issues.

An example of a complaint alleging systemic noncompliance could include a complaint alleging that an LEA has a policy, practice, or procedure that results in not providing occupational therapy to children in a specific disability category, which if true, would be inconsistent with the requirements of the IDEA.12

The focus of systemic complaints, when they occur, should be on alleged policies and practices that may broadly impact students. They are not a proper investigating tool for reviewing an alleged denial of FAPE to a particular student – which is a deeply individualized assessment and cannot adequately be investigated without carefully considering the child, and the team process as it played out for that student.

Considering now the overall complaint process, rather than the infrequently used systemic complaint, both state and federal rules permit the complainant to raise concerns that go back in time “not more than one year prior to the date the complaint is received.”13 Maine rules complicate this fairly simple one-year limitation period by including the following exception that is not found in the federal law or rules:

. . . unless a longer period is reasonable because the complainant is requesting compensatory services for a violation that allegedly occurred not more than two years prior to the date that the written complaint is received.14

Of course, in many complaint proceedings, the family is seeking some sort of compensatory service for an alleged violation, and therefore what began as a 1-year statute of limitations may morph in Maine into a 2-year statute of limitations for a

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12See “Questions and Answers on Procedural Safeguards and Due Process Procedures,” 52 IDELR 256, q. A-1 (OSERS June 1, 2009).
13See MUSER XVI.4(B)(3) (2017); 34 C.F.R. § 300.153(c).
number of the complaints filed. But this is a very different statute of limitations than applies to special education due process hearings, as will be discussed later in this material.

Once a complaint is properly filed, the Commissioner assigns a state employee in its Division of Special Services, who is required to investigate the complaint and issue the recommended conclusion. In most cases, the complaint investigator reviews the complaint itself and issues a document with “draft allegations” – in essence, a reframing of the concerns set forth in the complaint into issues that reflect the actual rules that have allegedly been violated. The Department then schedules a meeting (in person or by phone) between the parties and the investigator for the purpose of ensuring that the investigator has a clear understanding of the issues being reviewed. During this same time period, the parties are also offered an opportunity to mediate the dispute.¹⁵

Both the complainant and the school are required to provide written responses to the investigator roughly a week after the mediation that the Department has scheduled to occur. These written responses set forth the positions of the parties and include records that should support their respective positions. After the investigator receives the documents and position statements, he or she then makes phone calls or visits on site the persons who appear to have played central roles in the issues of concern, and obtains additional information from those persons in these interviews. Based upon all this information, the investigator issues a report that includes findings of fact and conclusions.¹⁶ These findings are actually recommendations to the Commissioner, because the investigator is acting directly on the Commissioner’s behalf. The Commissioner may reject the recommendations, although that rarely occurs. The reader will see how different this is from the due process hearing, in which the hearing officer is neutral and the Commissioner has no authority to alter the decision of the hearing officer.

¹⁵See MUSER XVI.4(A)(2)(3) (2017); 34 C.F.R. § 300.152(b)(1)(ii). Again, the mediation process is not available for systemic complaints.
¹⁶See MUSER XVI.4(A)(1)(f) (2017); 34 C.F.R. § 300.152(a).
The investigator also has authority to recommend to the Commissioner an order for “corrective action” to achieve compliance, assuming a violation is found. This might involve training for involved school staff, but could also include orders for compensatory education if the investigator determines that there has been educational harm to the student. State law also provides that if a school unit fails to comply with an order issued by the Commissioner through this complaint process, the Commissioner may withhold financial aid from the school district until it complies and may refer the matter to the Attorney General to take action to bring about compliance.\(^\text{17}\)

In theory, a parent could file the same special education dispute in two different forums – the due process complaint process and the due process hearing. Both state and federal rules declare that when this occurs, the due process hearing must take precedence. Any issues in the complaint that are being raised in the hearing must be set aside in the complaint process, and the hearing decision on those issues is binding.\(^\text{18}\) In this situation, the complaint proceeding is put on hold, primarily to see if all the outstanding issues are resolved through the due process hearing. The Department of Education must move ahead with its review of any issues that are in the complaint but have not been raised in the due process hearing.\(^\text{19}\)

It is unclear under the law how a party might appeal a ruling of a complaint investigator. Maine law used to permit appeal to a regular due process hearing.\(^\text{20}\) Presumably, an aggrieved party could appeal the ruling into state court as a challenge to final agency action by the Maine Department of Education. This question is of some note, because factual findings in a complaint ruling might later be considered binding in a subsequent due process event. For example, in *Millay v. Surry School Department*, the federal district court relied on the negative factual findings by the complaint investigators regarding what occurred in earlier years as a basis for entering

\(^{17}\) See 20-A M.R.S.A. § 7206(5).

\(^{18}\) See MUSER XVI.4(A)(4)(a), (b) (2017); 34 C.F.R. § 300.152(c)(1), (2).

\(^{19}\) See MUSER XVI.4(A)(4)(a) (2017); 34 C.F.R. § 300.152(c)(1).

\(^{20}\) See 20-A M.R.S.A. § 7206(4) (repealed).
an order against the school department involving those same earlier years. The court in an earlier ruling in the same case had also relied upon the complaint investigation factual finding about what was the child’s current educational placement to resolve the question in the court case about the child’s stay put placement.

It is worth noting that one remedy that is not available to parents in the complaint process is an award of attorney fees, which is only available to a parent who prevails in a due process hearing. We will discuss fee awards later in this material.

In short, even though the complaint proceedings are fairly informal, the Commissioner, through his or her investigator, has authority to issue powerful orders compelling schools to take actions, and also even to provide compensatory educational services. The findings reached in this process may also later be understood as binding in subsequent proceedings.

III. The Due Process Hearing

The IDEA permits a parent or the local school unit to file for a due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. In fact, families are not permitted to file lawsuits in state or federal court alleging special education matters unless they have first presented their concerns in a due process hearing — a legal doctrine known as the “exhaustion of administrative remedies.” Unlike special education complaints, the rules appear not to provide a right to a due process hearing simply for a violation of a special education rule — unless that violation impacts the child’s identification, evaluation, or educational placement, or the provision of a FAPE.

Set forth below is a review of the hearing process, and then a consideration of various types of hearings and other elements that come to bear when schools and parents go off to hearing.

A. The hearing process

The family (or occasionally the school unit) files for a due process hearing with the Maine Department of Education, and must use a specific form established by the Department and available on its website. At the same time that the family files for a hearing with the Maine Department of Education, the party filing for the hearing must provide the opposing side with a copy of their hearing request. In addition to expected types of information that must be part of the notice, it must also include “a description of the nature of the problem of the child relating to such proposed initiation or change [of program/placement], including facts relating to such problem” and a proposed resolution of the problem. A party may not have a due process hearing until the party has complied with this notice requirement and may not have a due process hearing on any issue that is not specifically included in the hearing request.

The purpose of requiring this information in the hearing request is to give the other side a clear understanding of what the dispute is, which then permits the two sides to engage meaningfully in the dispute resolution process envisioned by the IDEA. This requirement serves to limit the issues being considered at the due process hearing, preventing either side from springing surprise issues that have not been set forth as part of the case.

If the hearing request does not provide adequate information of the sort required, the opposing party is permitted within 15 days of receipt of the hearing request to file an objection to the adequacy of the notice with the due process hearing officer who, by this point in time, will have been appointed. The hearing

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26See 20 U.S.C. § 1415(b)(7)(A); 34 C.F.R. §§ 300.508(a) (1), (2); MUSER XVI.6(A) (2017).
28See 20 U.S.C. § 1415(b)(7)(B); 34 C.F.R. § 300.508(c); MUSER XVI.6(C) (2017).
officer then reviews the adequacy of the hearing request and within 5 days must issue a decision regarding whether the notification met the requirements for such a notice. 29 Hearing officers in Maine have occasionally ruled that the hearing request is insufficient, usually because it fails to make clear what the issues are presented for hearing, or fails in any meaningful manner to delineate the remedy or relief being sought.

Once the opposing party receives the hearing request, that party is generally required to file a response with the complainant and must do so within 10 days of receiving the hearing request. The law notes, however, that if it is the family that has filed the hearing request, the school need not file a response if the school has already provided the family with the Written Notice form for a change in program or placement. If the school has not yet provided its Written Notice form, then it is required to provide the response to the hearing request, which essentially includes the same type of information that is included in the Written Notice form. 30

That said, most schools will file a comprehensive hearing response, which provides the school with its first opportunity to inform the hearing officer of the school’s side of the story. This response to the hearing request must be prepared on very short notice, and if it is to be well done, it requires a meeting with involved staff about the issues being alleged and a careful initial review of the relevant documents to ensure accuracy in the answer being provided. Assuming a mediation is also scheduled, the school’s response to the hearing request is sent to the mediator, as well as to the hearing officer and parent (or parent’s legal counsel).

The rules also permit parties to file additional “motions” with the hearing officer. 31 These are generally used to request that some issue raised in the hearing request be dismissed from the case. For example, a party may attempt to present an issue involving Section 504 in the hearing, or involving FERPA, or perhaps compliance with Maine’s bullying law or restraint and seclusion rules. But the hearing officer has

29See 20 U.S.C. §§ 1415(c)(2)(A), (C), (D); 34 C.F.R. § 300.508(d); MUSER XVI.6(D) (2017).
30See 20 U.S.C. § 1415(c)(2)(B)(i); 34 C.F.R. § 300.508(e); MUSER XVI.6(E) (2017).
31See MUSER XVI.8 (2017).
no authority over those laws, so the opposing party would file a motion to dismiss such issues. The hearing officer will usually provide the other side with time to submit a response to the motion, and then will issue a decision. Motions are also used occasionally to address disagreements about documents that are going to be a part of the hearing.

Once the family files a hearing request, the IDEA puts the due process hearing timelines on hold for 30 days while the parties attempt to resolve the dispute.\textsuperscript{32} Although there are many ways that the parties could attempt to resolve the dispute, the law mentions two – the mediation process or the resolution session – and the two are not mutually exclusive.

Under the IDEA, the mediation process is always available to the parties, whether there is a hearing request or not, and it is a good opportunity to have an impartial official help the two sides with a dispute. It is voluntary, of course, so neither side can force the other side to participate. This voluntary process is one system that the parties can use during the 30-day period (or afterwards, for that matter) in an effort to resolve the dispute.\textsuperscript{33} Any written settlement agreement arising out of mediation is an enforceable agreement between the parties, either in state or federal court. We will discuss the mediation process a bit later in this material, because it is available to parties not just for hearings and complaints, but also as a stand-alone procedure for early efforts to resolve disputes.

If the two sides do not agree to use mediation, then the parties are mandated to participate in a “resolution session” in an effort to resolve their dispute. Absent a mutual agreement by the two sides to forego this session, the resolution session must be convened within 15 days of receiving notice of the parent’s due process hearing.\textsuperscript{34} The law requires the meeting to include the parent and a school representative with authority to make decisions, but does not specify who else may attend on behalf of

\textsuperscript{34}See 20 U.S.C. § 1415(f)(1)(B)(i); 34 C.F.R. § 300.510(a); MUSER XVI.11(A) (2017).
either the parent or the school – other than to state that the school may not bring an attorney unless the family brings an attorney.

At this resolution session the parents discuss their hearing request and the facts that form the basis of it. The school is then provided the opportunity to resolve the dispute at that meeting. Any written settlement agreement that comes out of that meeting is a legally binding agreement that can be enforced in court. Maine also offers enforcement through its state complaint process.\(^{35}\) Unlike an agreement at mediation, either party to the resolution session agreement has three days after it is signed to void the agreement.\(^{36}\)

The resolution session has an additional value. Proposals made at mediation are confidential, and cannot be raised later in the due process hearing. But a proposal made by the school at a resolution session is not confidential, and it can be offered into evidence as an example of what the school was willing to do to resolve the dispute. Thus, if the school’s IEP that is being challenged in the hearing is not particularly strong, the school can improve the IEP, go into the resolution session and discuss that improved document, and perhaps improve it even more in light of the parent’s comments. That document can then be issued by the school with a Written Notice, and should be considered the current IEP in the hearing.

As stated above, if the parties fail to settle their dispute within 30 days of the due process hearing request being received by the state, then the regular due process hearing timelines commence – which means the 45-day timeline for holding and completing the hearing (the current federal regulatory timeline). Nothing prevents the parties from continuing to try to resolve their dispute after the timeline for hearing begins; informal efforts can still be used and the mediation process can still be accessed. Scheduling the hearing is complicated. The attorneys on either side – or the unrepresented parent – have a scheduling conference by phone with the hearing officer to address the dates for the hearing. The average length of a hearing is four full

\(^{35}\)See MUSER XVI.11(F) (2017).

\(^{36}\)See 20 U.S.C. § 1415(f)(1)(B)(iv); 34 C.F.R. §§ 300.510(d), (e); MUSER XVI.11(D), (E) (2017).
days, although they have gone much longer, with the longest hearing in Maine having lasted 12 days! The parties are rarely able to schedule four days in a row, so hearing dates might spread out over a number of weeks.

The hearing officer also provides additional time after the hearing for the parties to set forth their positions in writing. These documents are called “briefs”, but they are usually anything but! The briefs are often 50 to 60 pages long. The hearing officer then has an additional couple of weeks to write his or her decision. All of which is to say that even though the hearing process is to play out over 45 days, it usually takes a fair amount longer. But because both sides agree to the additional time, it is legally permissible.

We discuss Maine’s statute of limitations a bit later in the material. But an initial word is warranted here. More and more due process hearings in Maine involve efforts by parents to present claims from long ago. As you will soon read, the law on this is complicated. But the upshot is that the hearing officer occasionally has to schedule a preliminary hearing – usually a day in length – prior to the regular hearing, simply for the purpose of determining what the parties knew when, which is important for answering the statute of limitations issue. There will then be a “brief” by each side on that issue, and the hearing officer will need to write a decision on the preliminary matter. At that point, the case will move forward to consider the number of years that the hearing officer has permitted to remain in the case. If a preliminary hearing on the statute of limitations is needed, it greatly complicates scheduling for the overall case.

In any due process hearing, the documents must be submitted to the hearing officer at least 5 days in advance of the hearing. Preparation of documents by both sides has grown more and more complicated over the years. The family will usually request that schools provide in advance all their education records, including emails, about the student. On occasion, these are thousands of pages in length. Generally, FERPA and the IDEA grant parents a right to these records because they are “education records.” At the present time, the school has no corresponding right to all
the parent records in a due process hearing. But the hearing process includes the right of either side to issue subpoenas, and the subpoena permits access to records that are in the possession of any involved person or entity.\textsuperscript{37} In this manner, schools are able to obtain extensive records from the parent, from private evaluators or mental health professionals who have worked with the student, or from any private schools or private providers who may have been working with the student.

At the hearing itself, the party requesting the hearing generally presents its testimonial evidence first to the hearing officer. The party defending in the case then presents its testimonial evidence afterwards. Witnesses give testimony under oath and a court reporter transcribes the testimony. There is cross examination of witnesses. Attorneys are usually involved on both sides, but parents occasionally proceed without attorneys. At the end of the testimony, the parties can present an oral summary or agree on a written summary of the facts and legal issues. When lawyers are involved, they usually agree to submit written summaries and legal arguments rather than oral closing. The hearing officer usually submits their written decision two weeks after the close of the hearing.

In any due process hearing, the burden of proof is on the party challenging the decisions that have been made, which is usually the parent.\textsuperscript{38} This means that they must put on sufficient evidence to convince the hearing officer that the school has failed to meet its IDEA duties.

This is how the hearing process works. It is very expensive and takes considerable time in advance of the hearing to prepare. This is not just time for the attorney and the special education director. It is also extensive time for teachers, related service providers, or other administrators to prepare in advance for the difficult cross examination that is likely to occur when testimony begins.

\textsuperscript{37}See MUSER XVI.7 (2017).
\textsuperscript{38}See D.B. v. Esposito, the Sutton Sch. Dist., et al., 675 F.3d 26, 35 (1st Cir. 2012); see also Schaffer v. Weast, 546 U.S. 49, 51 (2005).

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B. Types of Due Process Hearings

One might say that a due process hearing is a due process hearing, and of course this is broadly true. But there are a number of types of hearing that regularly arise in Maine, and these are worth a few brief additional comments here. Most hearings, of course, are about the delivery of a FAPE. Some hearings, however, focus specifically on disciplinary events that occurred at school, and in this situation, there may be an expedited hearing. Much less frequently, there are also hearings about independent evaluation hearings. This delineation of types of hearing is arbitrary, and not necessarily identified in the law, but there is value in making a few comments about each type.

1. Hearings over FAPE

Again, the hearing over FAPE is the most common. It follows the processes identified above. In these hearings, the family’s attorney usually seeks to raise as many different years in the dispute as possible – alleging that the programming was inappropriate for multiple years in a row, going back as far as the statute of limitations will permit them. School personnel will often observe that the parents approved all those earlier IEPs, but the parents will assert that they did not understand the process and that schools are the experts.

Testimony in these cases often focuses on each school year, with the school witnesses explaining the IEP process for the year and the content of the IEP. School witnesses and parent witnesses testify about the student’s performance under the IEPs, with school witnesses usually stating that the student made meaningful gains, and parent witnesses stating that gain was inadequate. As stated earlier, the burden in on the parent to prove the inadequacy of programming. And readers know, no IEP is a guarantee of success, and theoretically a school should be able to win a FAPE fight even if the student did not do all that well – as long as the school met regularly to address programming weaknesses and made reasonable calculations about how to address those weaknesses.
But no school counts on these legal principles in the hearing itself. School witnesses attempt to show that in fact the child did benefit, and presents as much evidence as possible to establish that this occurred. This evidence must cover all the years that are actually in dispute in the hearing. It appears to be very important to Maine hearing officers for some sort of “expert” to testify that in fact the data does show that the student received a FAPE, and parents also will usually attempt to provide expert testimony showing the school did not do well.

FAPE hearings may often have begun with the parents pulling their child unilaterally out of school and placing them in a private school program. The parents will then be asking the hearing officer to order the school unit to reimburse the parents for the educational costs that they have incurred up until the hearing, and also to order that the child remain in the placement going forward. Somewhat later in this material we discuss the procedural requirements for these reimbursement claims. But at this point we simply note that the duty is on the parent to show not only that the school’s IEPs were inappropriate, but also that the private school placement was proper. This leads to testimony by the private school program about their school and how the child did there.

The hearing officer in these cases can rule for or against the school on any of the IEP years at issue, and order various types of remedies based on what the hearing officer concludes. We discuss remedies later in the material, but the point here is that the outcome of the hearing can be mixed, with either side winning in regard to some years but not all.

2. Disciplinary and Expedited Hearings

Technically, a hearing over disciplinary removals is not any different from any other hearing, but in practice these hearings are very different. Plus, they have the added twist that they might include an “expedited hearing”, which is legally different than standard hearings.

What this material is calling a disciplinary hearing is actually a hearing in which the parents challenge a change of placement ordered by the IEP team in response to student behavioral concerns. The parents may be trying to get the child returned to his or her previous placement, or may be seeking any other programming beyond tutoring in an abbreviated school day program. The point here is that this type of hearing often is not challenging the appropriateness of programming over past years, but is instead addressing the school’s more immediate response to behavioral issues that arise. A hearing of this nature may often include disputes over manifestation determinations.

Ultimately, these cases are disputes about the delivery of a FAPE in the least restrictive environment, as are the FAPE hearings described in the previous section. But they tend to be short in length and have the more immediate purpose of altering the child’s placement immediately.

These disciplinary hearings will also often include, or be comprised solely of, an expedited due process hearing. The IDEA provides for an expedited hearing in certain limited circumstances to address parental disagreement with manifestation determination decisions or with decisions to place students in interim alternative educational settings. The expedited hearing may also be used to address school concerns that if a student remains in the current placement – as a result either of the IDEA’s stay put mandate or because the team found student misbehavior to be a manifestation of his or her disability – then the student may be substantially likely to injure him or herself or others. An expedited hearing must be held within 20 school days of the hearing request, with a decision issued within 10 school days of the hearing.\(^40\)

A true expedited hearing is very different from regular hearings, even beyond their shorter time line. The hearing officer’s authority in an expedited hearing is sharply constrained. In regular hearings, a hearing officer has broad authority to

\(^40\)See 20 U.S.C. § 1415(k)(4)(B); 34 C.F.R. § 300.532(a); MUSER XVII.3 (2017).

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remedy any violations found. In an expedited hearing, the hearing officer’s authority is circumscribed. According to state and federal standards for expedited hearings:

In making the determination [at an expedited hearing], the hearing officer may—

(a) Return the child with a disability to the placement from which the child was removed if the hearing officer determines that the removal was a violation of §300.530 [regarding special education disciplinary removals], or that the child’s behavior was a manifestation of the child’s disability; or

(b) Order a change of placement of the child with a disability to an appropriate interim alternative educational setting for not more than 45 school days if the hearing officer determines that maintaining the current placement of the child is substantially likely to result in injury to the child or to others.  

That’s it. There is no general authority to modify IEPs, to order compensatory relief, or to make long term placement changes. The process is meant to be quick, and to address current disputes over violations of the discipline rules in the law.

Strategy comes to bear in these disciplinary hearings. Often, the school is seeing significant behavioral issues that warrant a placement change. The team meets to make that change. The parent may ask for a manifestation determination. It does not appear that one is required, in that there have not been extended disciplinary removals ordered by school administrators. At least one Maine hearing officer has ruled that the manifestation determination is not needed for placement changes by the IEP team addressing student misbehaviors, as opposed to suspensions or expulsions.  

This distinction matters, because if a manifestation determination is held and the team finds the misbehavior is a manifestation, the student must return to his or her former placement unless the parent and school agree otherwise. If the school

42 See Lewiston School Department, 116 LRP 251 (SEA Me. June 29, 2015). The hearing officer here carefully distinguished between the removal days ordered by the school administrator, and the placement changed ordered by the IEP team. The duty to have a manifestation determination arises for disciplinary changes by the school department, rather than IEP team decisions, the hearing officer appeared to rule.
sees a substantial likelihood of injury in such an outcome, the only avenue for the school is to request a hearing. If the team has instead ordered a different placement to address the student’s disability related behavior, then no manifestation is needed and the placement change goes into effect, unless the parent requests a due process hearing. This would result in the stay put provision going into effect, which would then require a school concerned about danger to request the expedited hearing. The permutations on this example are multiple, but the reader gets the point. Whether a manifestation determination is required matters in the ultimate strategy that might result in an expedited hearing.

Hopefully the reader sees how different these types of hearing are, when compared to the more traditional FAPE hearings described earlier. Each has its own strategy demands, which are faced by both the school unit and the parent who may be engaged in the dispute.

3. Independent evaluation hearings

As most readers know, a parent has a right to ask for an independent evaluation at public expense, and the school unit must either grant the request or deny it and then file for a due process hearing within 30 days of the request. This duty to request a hearing following a denial is mandatory under the law.44

The purpose of this due process hearing request is solely to establish whether the school unit’s evaluation has been appropriate. If it has been, the school wins. If it has not been, the parent wins and the school must then pay for the independent evaluation.

Hearing officers in Maine have strictly limited these hearings to the purpose of determining the appropriateness of the evaluation, and have not otherwise let either side bring in other issues – such as, for example, whether the IEP team correctly refused to find a student eligible for special education. A party disputing that point would have to bring a separate hearing.

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44 See MUSER V.6(2) (2017); 34 C.F.R. § 300.502(b)(2).
Because the purpose of these hearings are very limited, their length is also limited, and these hearings have rarely lasted more than a day in length. Because the school has filed for the hearing, the burden of proving the evaluation is appropriate rests with the school. The school usually puts on a case by having the special education director testify to the process the team went through in ordering the school’s evaluation, and then the process the director followed in responding to the parent’s request for the independent evaluation. The school’s next witnesses are usually just the evaluators themselves, who testify about the test instruments they chose, why they were used, and whether these are usual and customary instruments to use in this process. The hearing officer will also usually make a determination about whether the evaluation report meets the standards set forth in the Maine rules for evaluations.45

Almost always, the school unit will win these hearings.46 The problem, however, is that the cost of the hearing, if the school uses an attorney, usually outweighs by far the cost of the evaluation, so schools often agree to the assessment even when their own evaluation clearly was appropriate. The other alternative, though, is for the director to do the hearing herself or himself, but with a little advice over the phone from the attorney. In Maine, this has happened with some frequency, and again, the school usually prevails. But here, too, the director is taking on a heavy workload demand, preparing for the hearing and then doing it. Along with this comes added stress for a director who likely has enough of it. The decision whether to go through this process is very dependent on the school unit and the special education director.

45Hearing officers most often consider whether the evaluator is properly licensed or certified, and whether the report meets the standards found in MUSER V.4 (2017). See, e.g., Regional School Unit No. 16, No. 19.068H (SEA Me. April 9, 2019).

46See, e.g., S.F. v. McKinney Indep. Sch. Dist., 2012 WL 718589 (E.D. Tex. Mar. 6, 2012); Regional School Unit No. 16, No. 19.068H (SEA Me. April 9, 2019); Regional School Unit No. 38, 113 LRP 1279 (SEA Me. July 25, 2012); M.S.A.D. No. 17, 39 IDELR 281 (SEA Me. 2003); Jay Sch. Dept’, 102 LRP 18988 (SEA Me. 2002); Lincolnville Sch. Dist., 102 LRP 7183 (SEA Me. 2001); Reading Sch. Dist., 58 IDELR 239 (SEA Pa. 2012); Gwinnet County Sch. Dist., 59 IDELR 21 (SEA Ga. 2012).
C. Maine’s Statute of Limitations

The IDEA also imposes a time limit for bringing claims through the due process hearing, requiring that claims be brought within 2 years of when the family “knew or should have known” about the alleged actions of concern.\(^47\) Federal law permits states to adopt different limitation periods, but Maine has chosen to follow the 2 year limitation.\(^48\) On the surface, this law appears to establish a simple 2 year statute of limitations, meaning that a parent would have to file for a due process hearing with their concern within 2 years of when the alleged misconduct occurs. The statute of limitations is somewhat more complicated than that. We discuss this below.

Maine's statute of limitations is set forth in two places. The first reference states:

The due process hearing request must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the due process hearing request.\(^49\)

The second reference states:

A parent or agency must request an impartial hearing on their due process hearing request within two years of the date the parent knew or should have known about the alleged action that forms the basis of the due process hearing request.\(^50\)

There was a longstanding dispute in Maine about the interplay of these two provisions. It was argued that the first provision quoted above imposed a limit on how many years back in time a parent could raise for IDEA violations from the time that the parent first learned of the underlying facts of the claim. As the argument goes, it was only the second provision that set the time limit on how long a parent had to file for a hearing from when the claim was discovered. This issue found its way into court because an amendment to the Maine rules that had lowered the number of years in each provision from four years to two was put into place in a manner that


\(^{50}\)See MUSER XVI.13(E) (2017).
raised doubt about whether the Maine Legislature had approved the change in the second provision. In the court case that resolved this issue, *Ms. S. v. Regional School Unit No. 72*, the parent argued that she could file for four years of claims because the second provision above had not been properly amended, leaving the time period in that provision at four years.

After extensive litigation, the First Circuit ruled that both provisions actually mean the same thing, with each one referring to the time period for filing the claim from the time the parent first becomes aware of it. This means, the court concluded, that even if the second provision had not been properly changed from four years to two back in 2010, the first provision indisputably had been. Because they mean the same thing, the proper change in one successfully altered the filing period to two years.

This still leaves complicated issues about the number of years that can be litigated in a hearing. The reader may think, “Well, two years is two years.” But in truth, the language in the law says that the parent must file within two years of when “the parent knew or should have known about the alleged action that forms the basis of the due process hearing request.” It may be fairly clear what it means for a parent to know or should have known. But to know or should have known what?

Parent attorneys are arguing that this means when the parent knew or should have known that the programming the school was providing arguably was inadequate for the child. Under this argument, the parent attorney will argue that the parent did not know until some private expert recently assessed the child and gave the opinion that earlier programming was inadequate. With this formulation, a parent could not have sufficiently known any earlier claims until very recently, and then could pursue many earlier years in a current hearing request.

51 See *Ms. S. v. Regional School Unit No. 72*, 917 F.3d 41 (1st Cir. 2019).
52 See *Ms. S. v. Regional School Unit No. 72*, 917 F.3d at 50. The Court followed two other circuit court of appeals on this conclusion. See *Avila v. Spokane Sch. Dist.*, 81, 852 F.3d 936, 937 (9th Cir. 2017); *G.L. v. Ligonier Valley Sch. Dist. Authority*, 802 F.3d 601, 604-05 (3rd Cir. 2015).
53 See *Ms. S. v. Regional School Unit No. 72*, 917 F.3d at 51.
School attorneys are arguing that it means when the parent knew or should have known the underlying details of the child’s learning profile, the services being provided to the child, and the child’s level of progress. Under this formulation, the parent would have known, or should have known, back at time of each set of team decisions, assuming that the school had met all its duties to do timely evaluations, convene timely meetings, involve the parent in the process, provide them all relevant records, and provide them procedural safeguards.

At the present time, the answer to this important issue is unclear. Maine hearing officers have addressed it to some degree. In *Regional School Unit No. 51*, a ruling that has since been followed in other cases, the hearing officer concluded that this language asks when the family knew or should have known of the underlying “action that creates an injury done to the student, not to a family’s understanding of the potential liability of the school district.” At the very least, this standard will usually be met in a FAPE claim when the family knew or should have known that the child is not doing well in his or her special education program – or should have known that based on information provided to them.

That said, the issue is unresolved and will undoubtedly spawn future litigation. The length of the limitation period is particularly important, because the more years in contention, the lengthier the hearing, the more witnesses involved, and also the more likely that the parent can find one year or another during which school programming may have fallen short. This in turn leads to some sort of remedial order by the hearing officer, and then also a dispute about what percentage of the parent’s attorney fees should be paid by the school. The issue of attorney fees is discussed later in this material.

In addition to the question of how long the two year limitation period actually is in practice, there are also total exceptions to the operation of the limitation period

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54 See *Regional School Unit No. 51*, No. 11.107 and 12.013H, slip op. at 9 (SEA Me. Sept. 1, 2011); see also *M.S.A.D. No. 31*, No. 18.095H, slip op. at 27 (Mar. 15, 2019) (preliminary order); *York School Department*, No. 16.027 slip op. at 10-11 (Feb. 3, 2016) (preliminary order); *RSU 72*, 13.073, slip op. at 13 (June 12, 2013) (preliminary order); *Portland Public Schools*, No. 12.075, slip op. at 23-24 (June 1, 2012)(preliminary order).

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that can permit a claim running even further back. Both federal law and Maine rules state that the limitation period does not apply to a parent if the parent was prevented from requesting a hearing due to: 1) specific misrepresentations by the school that it had resolved the problem at issue; or 2) the school having withheld information from the parent that was required under the IDEA to be provided to the parent.

The first exception requires intentionally misleading the family about key actions that had been taken to resolve a concern. The second exception, involving the withholding of information, does not require intentional action. Most courts that have interpreted this second exception have determined that it is narrow and refers only to the withholding of information regarding the procedural safeguards available to a parent under the IDEA. These safeguards include, most importantly, notice to parents of their right to file a complaint or request an impartial due process hearing on the issues in dispute. The question of when this exception should be applied does not appear to be completely settled, however. Some courts have adopted a broader interpretation that would give the family much longer to file for a hearing, with the time period running from the date on which the family finally did discover (or should have discovered) the issues of concern. However, even if the exception is limited to a failure to provide the family with the required procedural safeguards, the exception might frequently arise in situations involving students who have not yet been referred into special education, given that the duty to provide procedural safeguards does not arise until that point in time. This has been the basis

55 See MUSER XVI.13(F) (2017); D.K. v. Abington Sch. Dist., 696 F.3d 233, 246 (3rd Cir. 2012); (school must have knowledge that its representations of student progress or disability are untrue or inconsistent with the school’s own assessment”); Regional Sch. Unit No. 72, No. 13.073, slip op. at 16 (SEA Me. June 12, 2013) (interim ruling); Vassalboro Sch. Dep’t, No. 13.082H, slip op. at 19-22 (SEA Me. Sept. 6, 2013) (interim ruling)
for at least two Maine hearing officer rulings that have extended the limitation period.\textsuperscript{59}

In sum, Maine has a 2-year statute of limitations within which the parents must pursue a due process hearing or review the claim that is of concern to them. However, that limitation period is complicated and may often permit claims that are older than 2 years to move forward.

D. Court Appeals

State and federal special education laws also permit a party to the due process hearing to file an appeal into court if upset with the hearing officer ruling.\textsuperscript{60} Federal law requires that the appeal be filed within 90 days of the hearing officer decision, unless a state has adopted a different standard.\textsuperscript{61} Maine follows this same 90 day period.\textsuperscript{62} An appeal of a hearing officer ruling can be filed in state or federal court, but in Maine these claims usually end up in federal court. A special education appeal generally involves a review by the court of the record that was prepared at the administrative hearing level, although sometimes the court permits that record to be supplemented by the parties, especially to update the court on what has happened since the due process hearing.\textsuperscript{63}

When considering the record, the judge is free to give whatever deference to the hearing officer’s determinations that the court believes to be appropriate. In practice, courts will not give any deference to the hearing officer’s interpretation of the governing legal standard in the case, but will give deference to the factual findings entered by the hearing officer. The Federal District Court in Maine has explained its review standard as follows:

Where the issue is one that implicates the educational expertise of the school district, more deference is due the administrative findings. . . . But when the

\textsuperscript{59} See Regional Sch. Unit No. 51, No. 11.107 and 12.013H (SEA Me. 2011) (interim order); Regional Sch. Unit No. 57, No. 12.099H (SEA Me. 2012) (interim order).
\textsuperscript{62} See MUSER XVI.19(B) (2017).
\textsuperscript{63} See 20 U.S.C. § 1415(i)(2)(C).
issue is more a matter of law, the educational expertise of the agency is not implicated, and less deference is required. Thus, where the issue was the proper construction of the statutory term ‘education,’ and the facts relating to the child’s needs were undisputed, the First Circuit rejected the argument that the trial court gave insufficient deference to the agency: ‘[t]he construction of a statutory term traditionally falls within the scope of judicial review.’ Although a trial court should not ‘impose a particular educational methodology upon a state’ under the guise of interpreting a statute,’ for judicial review to have any meaning, beyond a mere review of state procedures, the courts must be free to construe [terms] so as to insure” compliance with the IDEA. . . . According to the First Circuit: ‘In the end, the judicial function at the trial-court level is ‘one of involved oversight,’ and in the course of that oversight, the persuasiveness of a particular administrative finding, or the lack thereof, is likely to tell the tale.’

A decision about what constitutes a “free appropriate public education” is more often seen as a mixed question of fact and law, and is “handled on a degree-of-deference continuum, and the exact standard of review depends on whether and to what extent a particular determination is law- or fact-dominated.” That said, as a practical matter, it is not easy to convince a court to reverse a hearing officer ruling about the delivery of a FAPE absent a legal error by the hearing officer.

Generalizations are only that. However, an appeal of a hearing officer ruling to the federal district court generally takes about one year to reach a final conclusion, from the date the appeal is filed until the final date on which the court issues its decision.

Finally, a party who disagrees with the district court ruling can appeal that decision to the First Circuit Court of Appeals, located in Boston, Massachusetts. An aggrieved party has 30 days to file that appeal. On average, it takes about 6 to 9 months for the Court of Appeals to issue its final ruling in an appeal of a special education decision, again from the date that the appeal is first filed until the date that the First Circuit issues its ruling. In theory, a disgruntled party could seek review of the First Circuit decision with the United States Supreme Court through a petition for

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64 See Mr. and Mrs. I. v. M.S.A.D. No. 55, 416 F. Supp. 2d 147, 156-57 (D. Me. 2006) (citations omitted).
65 See Lessard v. Wilton-Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 24 (1st Cir. 2008); Mr. and Mrs. I. v. M.S.A.D. No. 55, 480 F.3d 1, 10 (1st Cir. 2007).
a writ of certiorari. There is no “right” to be heard by the Supreme Court and these petitions are rarely accepted. Practically speaking, the highest level of review in a dispute over an IEP Team decision is with the First Circuit Court of Appeals.

E. The Stay Put Provision

One of the most important provisions in both state and federal special education laws is the mandate that during any due process hearing and court appeal the child will remain in his or her “then current educational placement.” The actual language of this provision reads as follows:

Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.66

As the federal district court of Maine has recognized, “the purpose of the stay put provision is to ‘strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school’ and to protect children from any retaliatory action by the local educational agency.”67

The law does not specifically define “then-current educational placement,” but our First Circuit has observed that the stay put requirement “is designed to preserve the status quo pending resolution of administrative and judicial proceedings under the [IDEA]. The preservation of the status quo ensures that the student remains in the last placement that the parents and the educational authority agreed to be appropriate.”68 In practice, the requirement is generally understood to bar the local school unit from making “a fundamental change in, or elimination of a basic element of the education program” during the due process proceedings.69

66 See 20 U.S.C. § 1415(j); see also 34 C.F.R. § 300.518(a); MUSER XVI.20(A) (2017).
68 See Verhoeven v. Brunswick Sch. Comm., 207 F.3d 1, 10 (1st Cir. 1999) (quotation and citation omitted).
69 See Millay, 584 F. Supp. 2d at 228 (quoting Lanceford v. D.C. Bd. of Educ., 745 F.2d 1577, 1582 (D.C. Cir.)
Under federal law, the stay put provision goes into effect only upon the filing of a due process hearing. In Maine, the provision extends more broadly than just hearing requests and also goes into effect any time there is a filing with the Maine Department of Education for a mediation, complaint investigation, or due process hearing. The stay put requirement does NOT go into effect any time a parent states that he or she plans to do any one of these three events. It goes into effect only upon the actual submission of the request to the Maine Department of Education.

Once the stay put provision goes into effect, the child then remains in the last IEP and placement that the parties had agreed upon, and remains in that program and placement until the end of the due process proceeding, which would also include the end of any court appeal of the hearing officer ruling.

There are a number of twists on the stay put provision about which readers should be aware. The most important of these is that the parties themselves may agree on changes in the student’s placement pending the appeal, and the agreed-upon changes would then continue as the stay put placement for the pendency of the due process event – unless and until the parties again agree on another change. Agreements of this sort might occur through the normal IEP Team process, but they are often made through private agreements between the parties on what would be the child’s stay put placement during any subsequent dispute.

That said, not all agreements between parties are intended to have ongoing impact, but instead are specifically limited to a set period of time. In Verhoeven v.

1984)); see also Cavanagh v. Grasmick, 75 F. Supp. 2d 446, 468 (D. Md. 1999) (“[A] fundamental change in, or elimination of a basic element of, the educational program, which adversely affects the child’s learning experience in a significant way, is what constitutes a ‘change in educational placement’ for purposes of the IDEA.”); Weil v. Bd. of Elementary & Secondary Educ., 931 F.2d 1069, 1072 (5th Cir. 1991) (school board’s transfer of student from one school to another did not amount to a change in student’s educational placement); Concerned Parents v. New York City Bd. of Educ., 629 F.2d 751, 754 (2nd Cir. 1980), cert. denied, 449 U.S. 1078 (1981) (transfer from one school to another school within same school district with similar but less “innovative” programs was not a change in educational placement as the transfers did not affect the “general educational program in which a child . . . is enrolled”).

70 See MUSER XVI.20(A) (2017).
71 See Verhoeven v. Brunswick Sch. Comm., 207 F.3d 1, 6 (1st Cir. 1999).
72 See 20 U.S.C. § 1415(j); 34 C.F.R. § 300.518(a); MUSER XVI.20(A) (2017).
73 See Verhoeven, 207 F.3d at 8 (parties privately agreed to permit hearing officer to determine what the stay put placement would be).
Brunswick School Committee,74 the First Circuit ruled that requiring schools to fund a temporary placement made through a settlement agreement during the pendency of a due process hearing is contrary to the purpose and policy of § 1415(j) in that will “actually change the agreed-upon status quo, [rather than] [] preserve it.”75 The Court explained its ruling as follows:

The policy behind section 1415(j) supports an interpretation of ‘current educational placement’ that excludes temporary placements like P.J.’s SMLC placement. Section 1415(j) ‘is designed to preserve the status quo pending resolution of administrative and judicial proceedings under the Act.’ Anrig, 692 F.2d at 810. The preservation of the status quo ensures that the student remains in the last placement that the parents and the educational authority agreed to be appropriate. However, in the case of P.J.’s temporary placement at SMLC, Brunswick and the Verhoevens never agreed that P.J. would be placed at SMLC beyond June 1, 1998. To the contrary, the parties expressly agreed that P.J. would only be placed at SMLC during the 1997–98 school year. Therefore, to maintain P.J. at SMLC during the pendency of the Verhoevens’ challenge would actually change the agreed-upon status quo, not preserve it. Thus, because a reading of “current educational placement” that includes the temporary SMLC placement at issue here would thwart the purpose of section 1415(j), we decline to adopt such a reading.76

Moving away from settlement agreements between the parties, if the administrative hearing officer at a due process hearing enters a ruling for the parent on the IEP or placement, this ruling itself then becomes the stay put placement during any subsequent appeals that may occur.77 This is because the ruling is understood as an agreement between the parent and the state on the child’s placement, and the law permits changes in the stay put placement when the family and educational agency agree on a change. By the time of the hearing officer ruling, the state (through the hearing officer) is now the educational agency that controls the placement of that child. A Maine court has concluded that this principle can also apply to complaint investigation rulings for the parent which, depending on the circumstances, could

74 See Verhoeven v. Brunswick Sch. Comm., 207 F.3d 1 (1st Cir. 1999).
75 See Verhoeven v. Brunswick Sch. Comm., 207 F.3d at 9, 10.
76 See Verhoeven v. Brunswick Sch. Comm., 207 F.3d at 10.
77 See 34 C.F.R. § 300.518(d); MUSER XVI.20(D) (2017).
later be considered the stay put placement during a subsequent due process hearing and court appeal.⁷⁸

Occasionally there is a dispute about just what the stay put placement would be. In disputes of this sort, the question is never about what placement would be appropriate for the child, which is usually the issue in the underlying due process hearing. –Instead, a stay put dispute is a dispute about what the parties had last agreed upon at some earlier point in time, regardless of whether that earlier placement is working well for the child.⁷⁹ In any event, the last agreed upon placement is the stay put placement during the due process event, absent a subsequent agreement by the parties to a different arrangement.

The stay put provision can be most keenly felt when school officials believe that a child simply should not be continuing in the public setting based on the child’s level of disruption, and perhaps even dangerousness. If the IEP Team makes a placement change for that reason, and the family requests a hearing to contest the decision, it is normally true that the law’s stay put provision keeps the child in the last agreed upon placement until the dispute is over.

State and federal special education laws include some exceptions to the normal operation of the stay put provision in a few, but not all, of the circumstances that can be most distressing for schools. For example, in any situation when the student has possessed illegal drugs or weapons on school grounds or at school activities, the school can impose a 45-school-day removal of the child into an “interim alternative educational setting” that will remain in effect even if the family brings a due process hearing to challenge the decision. The same is true when the child inflicts “serious bodily injury” at school or at a school function. These concepts are discussed in more detail in Chapter 8 of Maine Special Education Law (2013), but of note here is that the stay put provision will not override these removals.⁸⁰

⁷⁹ See Millay, 584 F. Supp. 2d at 233-34 (refusing to order as a stay put placement that the child be moved to a school the parent considered more appropriate).
⁸⁰ See 20 U.S.C. § 1415(k)(1)(G), (k)(4); 34 C.F.R. § 300.530(g); 533 ; MUSER XVI.20(A), XVII.1(G), 4 (2017).
The exception for serious bodily injury requires actual injury and does not apply to threats of serious bodily injury. Yet, in those situations when a school believes that the child presents a “substantial likelihood of injury” to the child or to others, the school could order the child into an interim alternative educational setting. If the family does not agree, and either the family or the school requests an expedited due process hearing on this decision, the child’s stay put placement during the expedited hearing is in the interim alternative educational setting until after the hearing officer rules at this expedited hearing about whether the child indeed does present such a risk.\(^{81}\) All of these exceptions to the normal operation of the stay put provision are for limited periods of time and would require explicit extensions by a hearing officer if the parent or school were unable to agree on their continuation.\(^{82}\)

**F. Summary of Due Process Hearing Procedures**

Most special education practitioners will likely avoid due process hearings in their careers. Yet it is still a good idea to have a general sense of the due process standards discussed above. A summary of all these due process requirements looks like this:

- The family has 2 years from the date they knew or should have known of the IDEA issue that concerns them to file for a due process hearing with the Maine Department of Education;
- At the same time that the family files a timely due process hearing request, the family must also file a due process notice with the local school district and the Maine Department of Education;
- The local school district has 10 days to file a response to the family to the issues raised in the hearing notice, unless the school has provided a proper Written Notice explaining the dispute in question. Even then, filing a response may be advisable. Filing a response does not prevent the school from challenging the adequacy of the complaint notice, as discussed below;
- The local school district has 15 days to challenge the adequacy of the hearing notice that the family provided to the school and a hearing officer has an additional 5 days to respond to the adequacy challenge;

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\(^{82}\) See 20 U.S.C. § 1415(k)(3)(B); 34 C.F.R. § 300.532(b); MUSER XVII.3(B) (2017).
• The parties have 30 days from the receipt of the hearing request by the State to attempt to resolve the dispute informally, either through mediation, through a resolution session, or through some other means. If held, a resolution session must occur within 15 days of receipt of the hearing request;
• If the parties fail to resolve the dispute during this 30-day period, then the regular time line for conducting the hearing moves forward. This time period is not specified in federal law, but has traditionally been included in federal regulations. Currently, it is a 45-day time period, unless the hearing officer grants extensions;
• Expedited hearings must occur within 20 school days of the hearing request, with a decision within an additional 10 school days;
• After the hearing officer issues a decision, either party has 90 days to challenge the decision in court.

This is how due process works in Maine. What may be even more important, however, is what can due process do? In other words, when a school has failed to comply fully with the law, what power does a hearing officer or court have to effect change, and in essence, to remedy any harm that may have occurred? We discuss that in the next section.

G. Remedies under the IDEA

Parents have a variety of remedies available to them in the event that they prevail in a special education due process hearing. In fact, federal law states that a court “may grant such relief as the court determines is appropriate.”83 Hearing officers have this same authority. Broadly put, the available remedies can be summarized as follows. First, parents can obtain orders for the student’s IEP and/or placement to be changed prospectively – something lawyers would call injunctive relief. Second, parents can obtain orders for schools to provide compensatory education in the present or future to remedy educational harm done in the past. Third, parents can obtain orders for reimbursement of educational costs that they have incurred. And fourth, they can obtain orders for the school to pay for some or all

of the attorney fees that the family generated as a result of a due process hearing and/or court appeal. What families cannot obtain as a remedy under the special education laws is an order for traditional monetary damages distinct from the costs for educational services that they may have incurred – for example, they cannot obtain orders for lost wages or for emotional distress.84 Set forth below is a summary of each of these types of relief available to families through the due process hearing or court.

1. **Orders to change IEPs and placements**

   Most typically, the hearing officer or court would conclude that the school’s IEP was inappropriate and then order a change in the IEP to reflect what would be an appropriate level of services. This could take many different forms, some expensive and some not so expensive for schools. On a number of occasions, for example, Maine hearing officers found that the child’s current IEP was inappropriate and concluded that the student required placement in an out-of-state residential placement.85

   Orders regarding the shape of an IEP and placement going forward can be more subtle, however. For example, in a 2010 Maine decision, the hearing officer rejected the school district’s decision to place a child in a regional behavior program in a non-neighborhood school within the district, and instead ordered the school to undertake a comprehensive functional behavior assessment (“FBA”) and develop a detailed behavior plan based on that assessment. Following that process, she ordered the IEP Team to meet and, if the Team concluded that the behavior plan arising out of that FBA could be implemented in the child’s neighborhood school, then that is what the district must do. If the Team concluded that the behavior plan could only be implemented in the behavior program at the non-neighborhood school, then that is where the student should attend.86 This ruling was later upheld on appeal.87

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85 See, e.g., York Sch. Dep’t, 113 LRP 14212 (SEA Me. 2012).
86 See Regional Sch. Unit No. 21, 111 LRP 8384 (SEA Me. 2010).
The premise of any order that the school revise an IEP or placement is that the programming offered by the school department to the child for that current school year is not appropriate. The hearing officer or court then needs to enter an order that will ensure that the child receives an appropriate education, consistent with the general requirements of special education law. Of course, in many cases, the hearing officer or court considers the IEP and placement offered by the IEP Team and concludes that they are appropriate. In that situation, the hearing officer would enter no order at all.88

Most disputes that end up in a due process hearing begin as a disagreement about the current school year in which the IEP was developed and object to that IEP and/or placement. The parents then usually access due process seeking an order changing the decisions made by the IEP Team. Occasionally the school unit itself requests the hearing seeking an order that the IEP or placement that it offered was appropriate.

2. Orders for compensatory education

Even though many special education disputes begin as disagreements over a current IEP and the parents seek a change in that IEP, these disputes often also involve assertions that the school unit has failed to provide appropriate educational services in the past, and the family asks a hearing officer or court to order a remedy to compensate the child. In such a situation, the family is seeking an order for compensatory education. In essence, they argue that the school failed to provide the child with an appropriate education in the past, and therefore the school should provide compensatory educational services now or in the future to make up for this wrong. Any such services would be in addition to the services that the child currently receives just to obtain an appropriate education.

Our own First Circuit Court of Appeals has discussed the nature of compensatory education a number of times. The court first recognized that parents

88 See, e.g., Surry Sch. Dep’t, 52 IDELR 209 (SEA Me. 2009) (upholding appropriateness of IEP and proposed day treatment placement), aff’d, Millay v. Surry Sch. Dep’t, 2011 WL 778401 (D. Me. 2011) (adopting magistrate ruling at 2010 WL 5288191 (D. Me. Dec. 8, 2010)).
can obtain an order for compensatory education in *Pihl v. Massachusetts Department of Education* in 1993. The court wrote:

> The nature and extent of compensatory education services which federal courts have recognized varies according to the facts and circumstances of a given case. Such an award may include extra assistance in the form of tutoring, or summer school while students are still within the age of entitlement for regular services under the Act, or an extended period of assistance beyond the statutory age of entitlement.89

The court concluded in that case, “If an IEP from a past year is found to be deficient, the Act may require services at a future time to compensate for what was lost.”90

Beyond this, the First Circuit has also explained, “Compensatory education is a surrogate for the warranted education that a disabled child may have missed during periods when his IEP was so inappropriate that he was effectively denied a FAPE.”91 In that vein, “[C]ompensatory education is not an automatic entitlement but, rather, a discretionary remedy for nonfeasance or misfeasance in connection with a school system's obligations under the IDEA.”92 The federal district court of Maine has observed, “As a discretionary equitable remedy, the extent of a compensatory education award is very dependent on the particular facts and circumstances of the case.”93 In *M.S.A.D. No. 35 v. Mr. and Mrs. R.*, the First Circuit stated the standard for a compensatory education order as follows: “A child’s claim for compensatory education begins to accrue when his or her IEP is so inappropriate that the child is receiving no real educational benefit.”94

In that same *M.S.A.D. No. 35* ruling, the First Circuit recognized that even students who are aging or graduating out of the school system could still have a right to a compensatory education order, if the school had failed to provide the student with appropriate services prior to the point when the student lost eligibility for school

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89 See *Pihl v. Mass. Dep’t of Educ.*, 9 F.3d 184, 188 n.8 (1st Cir. 1993).
90 See *Pihl*, 9 F.3d at 189.
91 See *C.G. and B.S. v. Five Town Comm. Sch. Dist.*, 513 F.3d 279, 290 (1st Cir. 2008).
92 See *C.G.*, 513 F.3d at 290.
94 See *M.S.A.D. No. 35 v. Mr. and Mrs. R.*, 321 F.3d 9, 18 (1st Cir. 2003).
One Maine hearing officer ordered a school department to pay the tuition for a student to attend three non-degree classes at the University of Maine at Presque Isle during the first semester of his attendance there, after he graduated from high school, to compensate for inappropriate transition services prior to high school graduation.  

If a compensatory award is determined to be appropriate, it “should aim to place disabled children in the same position they would have occupied but for the school district’s violation.” Accordingly, the parties must “present evidence regarding [the student’s] specific educational deficits resulting from his loss of FAPE and the specific compensatory measures needed to best correct those deficits.” Some courts have calculated compensatory education orders on an hour-by-hour, or day-by-day calculation of the quantity of services missed during the relevant period of time. Other courts have based the order on a more equitable assessment of the degree of educational harm that the student has incurred or the amount of service necessary to put him or her in the educational position that the student would have been in if the school had not failed to meet its IDEA duties.

Given the fact specific inquiry that the hearing officer undertakes in fashioning an award of compensatory education, the hearing officer must consider such factors as: the parties’ conduct; the specific area in which the student was deprived a FAPE; and the degree of harm (if any) suffered by the student.

The degree of educational loss was an essential component of the hearing officer’s analysis in a 2013 Maine hearing officer ruling. In that case, Portland Public

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95 See Mr. and Mrs. R., 321 F.3d at 18.
96 See Caribou Sch. Dep’t, 35 IDELR 118 (SEA Me. 2001).
98 Reid, 401 F.3d at 526.
100 See, e.g., Reid, 401 F.3d at 523-24; Student W. v. Puyallup Sch. Dist. No. 3, 31 F.3d 1489, 1497 (9th Cir. 1994).
101 See Reid, 401 F.3d at 524.
103 See In re: Student with a Disability, 54 IDELR 240 (SEA Va. 2010).
Schools, the family had withdrawn the child from Portland schools and placed him at a private day school. The parent was seeking reimbursement for allegedly inappropriate programming in past years. The hearing officer upheld the appropriateness of most of what Portland had provided, but did find that in one school year the school had provided individualized reading instruction only four days a week for part of the year rather than the five days a week called for in the IEP. She concluded that this failure contributed to some educational harm the child had incurred. However, she refused to order reimbursement for the day treatment placement made by the family. She instead calculated the relief in a manner much more in tune with the actual loss the student incurred, and ordered the school to provide 6 weeks of summer programming to address the loss during the regular school year. If a student is denied a FAPE due to a deficiency in one aspect of a special education program, this should not necessitate a compensatory education award which covers all aspects of an educational program.

Similarly in Wheaton v. District of Columbia, the hearing officer and then the court concluded that even though a high school student had spent nearly two years in an educational setting that did not meet his needs, other actions that were since taken by the school had resolved the issue and there was no continuing educational harm to be remedied.

One of the more notable compensatory education rulings arose out of the case of Millay v. Surry School Department. The dispute in that case involved a number of due process hearings covering a variety of school years. At the end of the day, hearing officers and courts had upheld educational programming offered to the child during the 2008-2009 school year, but found that the school failed to offer

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106 See Neena S. ex rel. Robert S., 2008 WL 5273546, at *10 (upholding hearing officer’s award of compensatory education, which limited services to the areas in which the student was deprived a FAPE).

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appropriate programming from May 2006 through the end of the 2007-2008 school year. The remedy sought by the family in that case was the creation of an educational trust fund in excess of $650,000, the dollar value of which was computed based on a costing out of the educational services the child would have received if she had been appropriately served during those school years.\textsuperscript{108} The trust fund would be used for services after the child had exceeded the age for educational eligibility.

The court in \textit{Surry School Department} rejected the educational trust fund concept, concluding that at least in this case, such an approach would deprive the child of the value of an IEP Team meeting regularly to consider her needs and to determine just what she really should have. The court observed “that ensuring IEP development is an obligation essential to the delivery of a free appropriate public education and that it is not a simple matter to disconnect the local education agency (“LEA”) (or a substitute agency of the state) from this obligation and still fulfill the objectives of the IDEA.”\textsuperscript{109} Showing how extensive a compensatory education can be, the court instead ordered the school department to provide the child with 86 weeks of additional educational services through the IEP Team process after the point in which she would otherwise have aged out of school, calculated to compensate for an equivalent number of weeks when she did not receive appropriate services during years in which she was eligible.\textsuperscript{110}

\textbf{3. Orders for reimbursement}

Courts have long recognized that schools can, in appropriate circumstances, be ordered to reimburse the family for educational costs that they incurred on their own when it is shown that the school failed to provide appropriate educational services. The Supreme Court recognized this type of relief as long ago as 1985 in the case of \textit{School Committee of Burlington, Massachusetts v. Department of Education of Massachusetts}.\textsuperscript{111} In that case, the court insisted that a reimbursement order was not

\begin{itemize}
\item \textsuperscript{109} See \textit{Millay}, 2011 WL 1122132, at *11.
\item \textsuperscript{110} See \textit{Millay}, 2011 WL 1122132, at *16.
\item \textsuperscript{111} See \textit{Burlington Sch. Comm. v. Dep’t of Educ. of Massachusetts}, 471 U.S. 359, 370-71, 105 S. Ct. 1996, 2002-03
\end{itemize}
a type of monetary damage award, stating, “Reimbursement merely requires the
Town to belatedly pay expenses that it should have paid all along and would have
borne in the first instance had it developed a proper IEP.”

In that case, the court declared that parents make unilateral private
placements at “their own financial risk.” The Supreme Court explained the
justification behind its reimbursement order in this way:

If the administrative and judicial review under the Act could be completed in a
matter of weeks, rather than years, it would be difficult to imagine a case in
which such prospective injunctive relief would not be sufficient. As this case
so vividly demonstrates, however, the review process is ponderous. A final
judicial decision on the merits of an IEP will in most instances come a year or
more after the school term covered by that IEP has passed. In the meantime,
the parents who disagree with the proposed IEP are faced with a choice: go
along with the IEP to the detriment of their child if it turns out to be
inappropriate or pay for what they consider to be the appropriate placement.
If they choose the latter course, which conscientious parents who have
adequate means and who are reasonably confident of their assessment
normally would, it would be an empty victory to have a court tell them several
years later that they were right but that these expenditures could not in a
proper case be reimbursed by the school officials. If that were the case, the
child’s right to a free appropriate public education, the parents’ right to
participate fully in developing a proper IEP, and all of the procedural
safeguards would be less than complete. Because Congress undoubtedly did
not intend this result, we are confident that by empowering the court to grant
“appropriate” relief Congress meant to include retroactive reimbursement to
parents as an available remedy in a proper case.

The court in this case also set out the legal standard to be followed when
deciding on a parental request for reimbursement of the cost of a private school
placement:

In a case where a court determines that a private placement desired by the
parents was proper under the Act and that an IEP calling for placement in a
public school was inappropriate, it seems clear beyond cavil that
“appropriate” relief would include a prospective injunction directing the

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113 See Burlington Sch. Comm., 471 U.S. at 373-74, 105 S. Ct. at 2004-05 (1985); see also Florence County Sch. Dist.
school officials to develop and implement at public expense an IEP placing the child in a private school.  

In short, a hearing officer or court would first ask if the public school’s proposed program was appropriate. If yes, the school wins. If not, the hearing officer or court then asks whether the private school placement was “proper under the Act.” In most circumstances, if the answer to that question is yes, the family can win its reimbursement claim.

In 1993 the Supreme Court returned to the issue of reimbursement for private school placement. In *Florence County School District Four v. Carter*, the Supreme Court upheld reimbursement for a private placement even though the private school in question was not state approved. The court ruled that a private school placement could be “proper” under the IDEA even without state approval as long as it is providing an appropriate education to the student.

Since those rulings, the First Circuit Court of Appeals has declared that not any placement is proper simply because the school’s IEP is found deficient. In *Rafferty v. Cranston Public School Committee*, the First Circuit denied reimbursement for the private placement, even though the student had been benefiting from the program. The child in that case worked 4 to 5 hours a day alone with a teacher in the private placement, a very restrictive setting. The court stated, “Mainstreaming may not be ignored, even to fulfill substantive educational criteria.” In other words, the requirement for least restrictive programming should play some role in assessing whether a private placement is appropriate for reimbursement purposes under the law. The court concluded, “Therefore, we reject Rafferty’s argument that a parent can seek any alternative school she wishes if the public school education is inadequate.”

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116 See *Carter*, 510 U.S. at 7, 114 S. Ct. at 361.
118 See *Rafferty*, 315 F.3d at 27.
This limitation on reimbursement rulings was further explained by the First Circuit in Mr. and Mrs. I. v. M.S.A.D. No. 55. In that case, the court had earlier ruled that the school unit had erred when it failed to identify the child in question as a student with a disability. However, when the court turned to the question of remedy, the court rejected the family’s request for reimbursement of their unilateral, private school placement. The child had Asperger’s Syndrome, and the private school placement offered no substantive programming to address the child’s pragmatic language and social skill deficits – despite the fact that these deficits were the primary reason the court had found the student to be eligible under the law. The First Circuit reasoned:

We do not see, then, how the decision to reject public education in favor of enrolling a child in private school can be described as ‘reasonably calculated to enable the child to receive educational benefit’ if the private school does not offer at least ‘some element of special education services in which the public school placement was deficient.’

The court concluded that “to hold otherwise would, in essence, embrace the argument we explicitly rejected in Rafferty; that the IDEA entitles a parent, at public expense, to ‘seek any alternative school she wishes if the public education is inadequate.’”

This standard set by the Supreme Court for reimbursement claims has since been included specifically in the federal IDEA and in the Maine rules. The primary addition found in the statutory and regulatory language beyond what the Supreme Court has discussed is the requirement that families meet a statutory notice requirement in order to obtain reimbursement for a private placement. In particular, the statute declares that reimbursement can be denied if:

(I) At the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the

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119 See Mr. and Mrs. I. v. M.S.A.D. No. 55, 480 F.3d 1, 24 (1st Cir. 2007).
120 See Mr. and Mrs. I., 480 F.3d at 24 (quoting Berger v. Medina City Sch. Dist., 348 F.3d 513, 523 (6th Cir. 2003)).
121 See Mr. and Mrs. I., 480 F.3d at 24 (quoting Rafferty, 315 F.2d at 27).
public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(II) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (I). 123

This notice requirement “serves the important purpose of giving the school system the opportunity, before the child is removed, to assemble the Team, evaluate the child, devise an appropriate plan, and determine whether a free appropriate public education can be provided in the public schools.” 124

The First Circuit has applied this notice requirement quite strictly. For example, in Rafferty v. Cranston Public School Committee, the court found a violation of the 10-day notice requirement when the family gave notice only 4 days before the withdrawal of the student, and later claimed her delay was due to brain cancer. 125 In Greenland School District v. Amy N., the court found a violation of the notice requirement when the family failed to notify the school department consistent with the law until some months after the child actually started at the private school, rather than 10 business days prior to withdrawal from public school. 126 In both cases, the court completely denied the reimbursement claims based on the notice failure. Other courts have rejected reimbursement claims when it was clear from the family’s actions that they had withdrawn the child prior to when they gave notice of the withdrawal, 127 and have rejected claims for reimbursement of the cost of psychological counseling when the family failed to raise the request at an IEP meeting prior to the start of the counseling. 128

There are a number of exceptions to this authority to reduce or deny reimbursement claims based on a failure to meet the notification requirement. The

124 See Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 (1st Cir. 2004).
125 See Rafferty, 315 F.3d at 24, 27.
126 See Amy N., 358 F.3d at 155, 160-61.
127 See Berger v. Medina City Sch. Dist., 348 F.3d 513, 524 (6th Cir. 2003).
128 See M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 (2nd Cir. 2000).
court or hearing officer is barred from reducing or denying reimbursement based on a notice failure in three situations. One is when the school in some manner “prevented the parent from providing such notice; the second is when the parent had not received the procedural safeguards statement that includes the requirement that the parent must provide the notice; and the third is when giving timely notice would “result in physical harm to the child.”129 Beyond this, the law grants courts and hearing officers the discretion to reduce or deny reimbursement despite a notification problem in two situations. The first is when the parent is “illiterate or cannot write in English.” The second is when compliance would “likely result in serious emotional harm to the child.”130

In a Maine case, the First Circuit refused to apply the illiteracy exception just noted based on the following facts:

It was not clearly erroneous for the district court to conclude that Ms. M. is not illiterate. The district court’s holding did not rest alone on the letters that Ms. M. signed. Ms. M. is a high school graduate, and while K.M.’s teachers knew that she had difficulty writing, they had “no indication that she was unable to read.” Ms. M. also completed the written application to Aucocisco, which the hearing officer concluded “containe[d] well-formed words and language that is clear, despite some grammatical errors.” Finally, when Ms. M. enrolled K.M. in kindergarten, she filled out a school questionnaire in her own handwriting in which she indicated that she read stories to K.M.131

A final issue is worth noting regarding reimbursement claims. There is an ongoing dispute about whether families can obtain tuition reimbursement as a form of compensatory education. There are two First Circuit rulings that appear to say no, but a Maine federal district court’s ruling that reads those decisions more narrowly permits it. In Diaz-Fonseca v. Commonwealth of Puerto Rico, the First Circuit wrote:

As the term ‘reimbursement’ suggests, tuition reimbursement is a backward-looking form of remedial relief; [r]eimbursement merely requires the [defendant] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP.’ Sch. Comm. v. Dep’t of Educ., 471 U.S. 359, 371-72 (1985). It goes without saying

that those ‘expenses’ must be actual and retrospective, not anticipated. Indeed, this reasoning is at the heart of the distinction, recognized by this court, between ‘tuition reimbursement’ and ‘compensatory education.’\textsuperscript{22} See Ms. M. ex rel. K.M. v. Portland Sch. Comm., 360 F.3d 267, 273 (1st Cir. 2004) (‘[W]hen this court has used the term ‘compensatory education,’ it has usually assumed that the remedies available involve prospective injunctive relief, which would not encompass tuition reimbursement.’). . . .

Under normal IDEA principles, Diaz is thus not entitled to be reimbursed for educational expenses that she has yet to pay. She is entitled to no more than the sum of the educational expenses she has already paid— that is, the sum of Lyssette’s private school tuition and costs for transportation, see 34 C.F.R. § 300.24(b)(15), and psychological services, see id. § 300.24(b)(9), that she has paid through the conclusion of the 2005-2006 school year.\textsuperscript{132}

The court made similar statements in Ms. M. ex rel. K.M. v. Portland School Committee.\textsuperscript{133}

However, in a recommended ruling by a Magistrate Judge in Regional School Unit No. 51 v. Doe, the court concluded that the broad equitable power of courts to fashion relief in special education cases argues against a narrow reading of the law to prohibit reimbursement as a form of compensatory education. In the end, the court concluded that the earlier First Circuit rulings meant only that a family cannot avoid the specific requirements of the law (like notice) for obtaining reimbursement by styling the reimbursement claims as a claim for compensatory education.\textsuperscript{134} At some point the First Circuit will likely weigh in on this issue again.

4. Orders for attorney's fees

It is also clear that a parent can obtain reimbursement for attorneys' fees if the parent prevails at a due process hearing or in court.\textsuperscript{135} For the parent to “prevail” at the hearing, he or she must have:

(i) obtained relief on a significant claim in litigation, (ii) effecting a material alteration in the parties’ legal relationship, (iii) that is not merely technical or de minimis in nature.\textsuperscript{136}

\textsuperscript{132} See Diaz-Fonseca v. Commonwealth of Puerto Rico, 451 F.3d 13, 32 (1st Cir. 2006).
\textsuperscript{133} See Ms. M. ex rel. K.M., 360 F.3d at 273.
\textsuperscript{134} See Regional Sch. Unit No. 51 v. Doe, 2013 WL 357793, at *36-37 (D. Me. 2013).
\textsuperscript{136} See Mr. and Mrs. R. v. Maine Sch. Admin. Dist. No. 35, 321 F.3d 9, 14 (1st Cir. 2003); Fenneman v. Gorham Sch.
The parent does not have to win completely at the hearing or in court to be considered a prevailing party. If the outcome of the case is a material alteration in the position of the parties, a court will award some amount of fees, and the dispute will primarily be about the extent to which the family prevailed. For example, after a careful review of the various legal issues that were considered in a special education hearing and on appeal, the federal district court in Maine entered an award providing the family with 50 percent of the fees they incurred at the due process hearing, and 15 percent of the fees they incurred on the court appeal itself. This amounted to a fee award of $35,804.95 out of a total sought by the family of $80,631.50.137

The parent cannot, however, obtain attorneys’ fees for time spent at IEP Team meetings, unless a due process hearing officer or court ruling required the attorney’s attendance at that meeting.138 The family also cannot obtain attorneys’ fees for settlement agreements that they obtain with the school – entitlement to attorneys’ fees is strictly limited to rulings issued in favor of the parent by a hearing officer or court.139 Even if a parent has prevailed in the litigation, a court will also reject fees for attorney time that is “duplicative, unproductive, or excessive hours.”140 Nor could parents obtain fees for time spent attending IEP meetings or speaking with/advising the family prior to filing the hearing request.141

The IDEA permits local school units (or the state) to obtain attorneys’ fees from the family’s attorney (not the family) if the local school prevailed in the hearing and the family’s attorney files a complaint or appeal “that is frivolous, unreasonable, or without foundation,” or if the attorney continues “to litigate after the litigation

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137 See C. v. M.S.A.D. No. 6, 582 F. Supp. 2d 65, 68 (D. Me. 2008); Aguirre v. Los Angeles Unified Sch. Dist., 461 F.3d 1114, 1117, 1119 (9th Cir. 2006) (prevailing party generally unable to recover fees for “unsuccessful claims”) (citing cases); A.S. v. Colts Neck Bd. of Educ., 190 F. App’x 140 (3rd Cir. 2006) (affirming 80% reduction); Mr. and Mrs. B. v. East Granby Bd. of Educ., 201 F. App’x 834 (2nd Cir. 2006) (no fees for litigation regarding two school years in which the school district provided FAPE); Jason D.W. v. Houston Indep. Sch. Dist., 150 F.3d 205 (5th Cir. 1998) (reducing fees based on issues won and lost).


clearly became frivolous, unreasonable, or without foundation.” 142 Local schools (or the state) could obtain attorneys’ fees from the family or the family’s attorney if the local district prevails in the hearing, and the family’s due process hearing or later court appeal “was presented for an improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of the litigation.” 143

In addition to other longstanding bases in the IDEA for reducing the attorneys’ fees that a family may receive, even if they prevail, the IDEA also permits courts to reduce a family’s claim for attorneys’ fees in that situation where the attorney representing the family did not provide the local school unit with the appropriate information required in the due process complaint notice that had to be filed with the local district, as discussed above. 144

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APPENDICES

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Dissecting Due Process: You are the surgeon!

Set forth below are three summaries of due process cases. Review the summaries. Discuss with your team. Then you decide:
Do you settle, or do you go to hearing?

Administrative hearing costs:

- Assume in each case that the hearing will last 5 days.
- Assume your legal fees (after insurance) will be $20,000.
- Assume the other side’s legal fees will be $50,000.

Case One:

Factual Background:

This case involved a 12 year old student with a specific learning disability who was placed at the Landmark School in Massachusetts in June of his 5th grade year. Prior to that time, since kindergarten, the Student had been educated in your school district.

This case really began in the Student’s 3rd grade year, when testing completed by Ms. Victoria Papageorge, an educational consultant, indicated that the Student had a dual processing deficit with weaknesses in phonological skills and orthographic processing. Ms. Papageorge recommended the Seeing Stars and LiPS programs to target the Student’s deficits. The Student’s IEP team determined to provide the Student LiPS and Seeing Stars -- adding these methodologies to the IEP -- and to retain Ms. Papageorge to consult regarding the Student’s literacy instruction on three occasions. The Student made great progress in 3rd grade, a fact disputed by neither party.

In 4th grade, the IEP team removed the references in the IEP to Seeing Stars and LiPS, although they continued using these methodologies, among others. Shortly after the school year started, the school determined to contract with a different literacy consultant. Although the Parents protested these changes, the Student continued to make progress throughout his 4th grade year.
Staff identified five objectives/areas of weakness for the student: fluency (RAN), vowel sounds, spelling (encoding), decoding, sight words; each of which they were addressing through his literacy programming. They conducted daily fluency measures in each area of weakness and regular probes to assess progress and ensure appropriateness of the programming. They set "aims" or practice goals, both for levels of performance and for rate of learning, to assist Andrew in progressing as rapidly as possible in each objective in his program. They charted the data daily and the student made regular and obvious progress in each area of weakness. They also kept detailed clinical notes of his progress with the LiPS and Seeing Stars programming and kept track daily of the components of each lesson plan.

Student Progress in Literacy:

By the end of 4th grade, the student was reading at an end of 3rd grade level as measured by the BAS instructional level P. He had begun the school year at an instructional Level L, he had made approximately a year and a half of growth during 4th grade. These results were consistent with the Analytic Reading Inventory ("ARI"), which showed growth between the February (3rd grade frustration), May (3rd grade instructional) and August (3rd grade independent) administrations. From the spring of 2015 to September 2016, the student progressed in the Reads Naturally placement assessment from a level 2.0 to 3.0 in fluency.

In June of 4th grade, after reviewing the Student’s IEP and schedule for 5th grade, the Family opted to place the Student at the Landmark School, a Massachusetts-based program specializing in instructing students with dyslexia and language-based learning disabilities. The Student attended there for all of 5th grade. He is currently attending there for 6th grade as well.

The Ask:

The family is challenging the appropriateness of the Student’s programming for 4th and 5th grade, and also for the upcoming 6th grade. They seek reimbursement for 5th grade placement costs at Landmark ($65,000) to compensate for inadequate programming in 4th and 5th grade. They also seek placement there going forward because of an inadequate 6th grade IEP.

Settle? Then what is your maximum offer: ______________________

Case Two:

Factual Background:

The student at issue in this case is a 12 year old boy with a significant orthographic processing disability, ADHD, and low abilities in executive functioning. The Student has been receiving special
education services as a Student with Multiple Disabilities for ADHD and a specific learning disability. The combination of significant orthographic processing and attention difficulties make remediating the Student’s learning difficulties more difficult – with it being harder for him to focus in on instruction in those very areas that are most difficult for him as a result of his orthographic processing disability.

The Student first arrived in your school district having just moved to Maine in November 2013, part way through his 3rd grade year. At the time he arrived, the Student was reported to be reading at a late first or early 2nd-grade level, but appeared to your skilled teachers to be essentially a non-reader. While in your district, the school provided the Student with a number of services designed to improve his reading capabilities, including significant reading instruction, ESY (which the Family declined to access), and later, direct behavioral support services with consult from a behavior strategist. Your teachers used the Wilson Reading Program and other reading tools to address the student’s reading deficits. His special education teacher was an extremely experienced and strong masters-level special education teacher.

**Student Progress in Reading on the BAS:**

3rd grade: Non reader to Level J (late 1st grade level)  
4th grade: Level J to Level K (early 2nd grade level)  
5th grade: Level K to Level N (early 3rd grade level)

In November of 5th grade, at a team meeting the family reported:

- In general, the student is much happier in school than he was at any other point in his school career.  
- He is not intimidated by doing homework.  
- He likes school.  
- He is excited about some projects he has been working on this year.  
- He can be insecure about being wrong.  
- He is having more success in general. This inspires him to continue learning.  
- A couple years ago, he was reluctant to read even a couple of sentences, now he picks up books.  
- He has friends, ran cross country and has engaged with peers.

The family pulled him out of school at the end of 5th grade, and placed him at the Aucocisco School, where he attended through all of 6th grade and now for the current 7th grade year.

An independent evaluation of the student after 6 months at the private school showed him reading at the mid-second grade level.

**The Ask:**

In the hearing, the family is challenging the appropriateness of IEPs for 4th and 5th grades, and also the IEP for the current 6th grade year.

They want payment for the past year and payment for the current year at the private school. Total cost would be about $90,000 in tuition expenses.
Factual Background

The student had transferred into your school for the start of his 6th grade school year. In 4th grade, he had attended a different public school system, and late in that school year, he was identified for special education based on his ADHD and difficulty with organization and work completion. At the end of that school year, however, the family placed him in a private, non special education school for his 5th grade school year. During that year, the IEP that had been in place in his previous public school expired. Just before the start of his 6th grade year, as noted, his family transferred to your district and enrolled him there for middle school.

The family informed the District that the student had once been in special education. When he encountered difficulties with work completion and organization early in the school year, the District offered to have him under either special education or Section 504. The family was hesitant to have the son in special education or to do any further testing, and they instead chose the Section 504 route.

For the rest of 6th grade, all of 7th grade, and the beginning of 8th grade, the student was served under a fairly comprehensive 504 plan, which addressed work completion, organization, and also included social skills work with the school counselor.

During 6th and 7th grades, the child was mostly a Bs and Cs student. He did continue to struggle with work completion and organization, but with the 504 plan, seemed to get the work done that was required by the end of each ranking period.

At the start of his 8th grade, the student’s work completion issues worsened, and the family then made a referral of him to special education in November of 8th grade. After private evaluations identified ADHD and high functioning autism, the team met in March of 8th grade and identified the child for special education, developing an IEP that called for special education assistance with work completion, and additional counselor work on social skill issues. The student was served under that IEP from March through the end of the school year. His performance improved during this time, as did his work completion. The student’s grades in 8th grade also were average.

In late June, after the completion of 8th grade, the family placed the student at a private residential placement in Massachusetts – Eagle Hill. They notified the school that their son would be attending there for 9th grade.
At that point, the school offered some additions to the IEP that had been implemented in the spring, including a draft behavior plan to address work completion and reward better effort in that area. The family rejected the IEP.

The student attended Eagle Hill for the entire school year, and then filed for a due process hearing at the end of that school year. The school then developed and offered a new IEP for the upcoming 10th grade school year, fairly similar to the 9th grade IEP, and the family rejected this as well.

The family files for hearing, arguing that the school should have had the student in special education rather than in 504 during the early years. They also argue that the IEPs from March of 8th grade forward were inappropriate, straight through 10th grade.

The Ask:

The family is seeking reimbursement for the $66,000 in tuition for 9th grade as compensatory education for past wrongs, and a placement order going forward at Eagle Hill as required now for FAPE ($66,000 for 10th grade).

Litigate: ______ Settle: _______________

Settle? Then what is your maximum offer: ____________________

Dissecting Due Process: While keeping sane!
Dissecting Due Process – While Keeping Sane

In the Operating Room: You Were There!!

Panel Discussion

We thought it would be particularly helpful to hear insights from special education directors who have gone all the way through due process in the past. The best way to do that is to assemble a panel of those who have done so. Let’s call them The Illuminati!

We know a number of you in the audience have been through hearings, but we had to limit the number who could fit at a single table, so we have chosen just four. But we encourage any of you to join in our discussion!

Our Panel: The Illuminati!

1) Julie Olsen, Director for M.S.A.D. No. 51
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Eric Herlan has been working more than 30 years representing public school districts on a wide variety of legal issues, but with a focus on both special education and general school law questions.

Eric’s particular expertise is in the areas of special education and disability rights law. He has represented Maine and New Hampshire school districts in more than 100 special education due process hearings, in addition to state complaint investigations, human rights proceedings, and in federal Office for Civil Rights investigations. Eric has also practiced in both federal and state courts, including many cases before the First Circuit Court of Appeals as well as the U.S. District Court. He has also appeared before the Maine Supreme Court.

In addition to his legal practice, Eric regularly presents on school law topics in Maine, New Hampshire, and nationally. His presentations are energetic and entertaining, whether in front of school staff in a local school district or in front of attorneys at a national conference.

Eric also publishes frequently on special education and other school law topics. He has written and published Maine Special Education Law (2013), the premier book on special education in this State. He is also a regular contributor to the School Law Advisory, and served in the past as its editor for many years. He is a contributing author to the desk book, Maine School Law (6th Edition 2018) and Editor of Maine School Law for Board Members, a Reference Manual (Second Edition). He has written for the Maine Law Review and was its editor in chief while in law school. Eric is listed in Best Lawyers in America, a guide to leading lawyers in the country, and in the New England Super Lawyers directory in the category of Education Law.

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Hannah King is a member of the School and Local Government Group and the Regulated Substances Group. In both practice areas Hannah advises on and litigates complex regulatory matters.

Hannah’s school law practice includes special education, employment and labor, and general school law, with a concentration in special education and disability rights law, and legal issues involving student rights. She has advised both public and private schools on a variety of issues, including disability rights, anti-discrimination laws, student and parent handbooks and employment issues. Hannah has represented school districts in special
education due process hearings, state complaint investigations, and in federal Office for Civil Rights investigations, as well as in a variety of civil lawsuits. Hannah has also practiced in both federal and state courts, including cases before the First Circuit Court of Appeals and the U.S. District Court. Hannah regularly presents at a number of at school law conferences across the State, has presented at a nation conference on Title IX issues, and has been an instructor for a graduate level school law course for the University of Southern Maine.

In her labor and employment practice, Hannah counsels employers on achieving and maintaining compliance with federal and state employment laws, the development of personnel policies, and employment contracts. Hannah also conducts investigations for employers into a variety of matters including employee misconduct, discrimination and sexual harassment complaints.

Before coming to Drummond Woodsum, Hannah worked as an Assistant Public Defender with the Alaska Public Defender Agency where she practiced in both the trial and appellate units. She represented clients in Superior Court against the most serious criminal charges, and argued cases before the Alaska Court of Appeals. She was named “2011 New Litigator of the Year” by the Alaska Public Defender Agency. While in law school, Hannah served as Editor-in-Chief of the Ocean and Coastal Law Journal and co-chair of the Environmental Law Society. She received the 2009 Edward S. Godfrey Leadership Award and the 2009 Award for Outstanding Scholastic Achievement in Environmental and Marine Law.

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Isabel is a member of the firm’s School and Local Government Group. Isabel provides counseling and litigation services on all aspects of school and education law, including special education and disability rights, student discipline, student rights, employment disputes, and investigations. She also reviews and writes policies and procedures to ensure compliance with state and federal law and best practices. Isabel represents school districts in administrative hearings and complaints before the Maine Department of Education, as well as in discrimination, harassment, and retaliation cases before the Maine Human Rights Commission and state and federal courts. Isabel is a frequent presenter at conferences and events related to special education and general school law. Isabel also represents healthcare providers on issues involving HIPAA compliance.

Before joining the firm in 2014, Isabel attended the University of Maine School of Law where she graduated magna cum laude. While in law school, Isabel served as Managing Editor for the Ocean and Coastal Law Journal, worked as a student attorney in the Cumberland Legal Aid Clinic, and received both the Maine Association of Public Interest Law fellowship and Cumberland Bar Association fellowship to work with low-income Mainers at the Volunteer Lawyers Project. Isabel grew up in Vermont, and, having also spent significant time living in Paris, brings a proficiency in French with her to the firm. She lives in Portland with her husband, also a lawyer.
Penelope Wheeler-Abbott,  Education & Human Resources Specialist
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Penelope Wheeler-Abbott is a non-lawyer Education and Human Resources specialist who joined the firm in 2012. Penny’s practice focuses on a wide range of education and human resources issues for our clients. She provides our school clients with consultation and support in the areas of special education, employee supervision and conduct, student matters, and policy topics.

In the special education arena, Penny works closely with school districts in preparing for special education mediations, complaint investigations, and due process hearings and she provides in-service training and on-going consultation about special education matters. Penny also regularly conducts a wide variety of investigations for public and private sector clients including investigations of harassment, discrimination, and Title IX complaints and employee and student misconduct, including student bullying allegations. In addition, Penny provides consultation support to clients regarding employee supervision and evaluation.

Penny joined the firm after 17 years as a teacher and a school administrator in Southern Maine. She has extensive experience in dealing with employee, student, and education issues of all kinds and maintains her certifications as a teacher, building administrator, and assistant superintendent.
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