Pepple & Waggoner, Ltd.
ATTORNEYS AT LAW
Crown Centre Building
5005 Rockside Road, Suite 260
Cleveland, Ohio 44131-6808
(216) 520-0088
Fax (216) 520-0044
www.pepple-waggoner.com

OHIO SCHOOL BOARDS ASSOCIATION CAPITAL CONFERENCE 2017

Columbus, Ohio
November 12, 2017

"Be Prepared: The New Due Process Trend"

Presented by:
Megan D. Maurer, Esq.
Brian J. DeSantis, Esq.
Sandy Stebly, Superintendent, Chippewa Local School District

I. Introduction

II. Legal Framework

A. Discipline of Students with Suspected or Alleged Disabilities.

1. Not yet identified students are to be given the same disciplinary protections under the IDEA as a student with a disability so long as the school district had knowledge that the student was a child with a disability before the disciplinary behavior occurred and no statutory exception exists. 34 C.F.R. §300.534(a).

2. If no knowledge exists or a statutory exception applies, a school district may proceed with the proposed discipline as it would with any other student. 34 C.F.R §300.534(d)(2).

   a. However, the school district must conduct an expedited evaluation upon parental request. 34 C.F.R §300.534(d)(2).

   b. Until the evaluation is complete, the child remains in the educational placement determined by the school district, which can include suspension or expulsion without educational services. 34 C.F.R §300.534(d)(2).

B. A school district is deemed to have "knowledge" in three different circumstances.

1. Written Notice. Knowledge exists if a parent provides a written notice: "before the behavior that precipitated the disciplinary action. . .[t]he parent of the child expressed concern in writing to [certain school district personnel] that the child is in need of special education and related services." 34 C.F.R. §300.534(b)(1).

   Required components of a parent's written notice:

   a. The notice must be sent before the behavior that precipitated the disciplinary action.

   b. The notice must be in writing.

      (1) The term "writing" is not defined in the statute. Therefore, a school district should consider any type of writing. Examples include, but are not limited to:

         (a) Letters,

         (b) Written notes,

         (c) Emails,

         (d) Text messages,

         (e) Social media notifications,

(f) School-sponsored communication, or

(g) Any other type of written communication.

(2) Tracking all writings may be difficult to manage. School district employees may not always share written notes or text messages. Likewise, school district employees may not put the writing in a student's file.

c. The notice must be sent to certain personnel:

(1) school district supervisory personnel,

(2) school district administrative personnel, or

(3) the child's teacher(s).

d. The notice must express concern that the child is in need of special education and related services.

2. Parental Request for Evaluation. Knowledge exists if a parent makes a request for evaluation: "before the behavior that precipitated the disciplinary action . . . [t]he parent of the child requested an evaluation of the child pursuant to [IDEA]." 34 C.F.R. §300.534(b)(2).

a. Required elements of a parent request:

(1) The request must be made before the behavior that precipitated the disciplinary action.

(2) The request must be for an evaluation of the child pursuant to IDEA.

b. District of Columbia Public Schools, 114 LRP 39116 (SEA D.C. 2014). A parent had requested that her child be evaluated. After this request - but before the IEP was completed - the school district suspended him for more than 10 days. The hearing officer held that since the IEP was not yet completed, the district had knowledge of the disability.

c. Chichester School District, 114 LRP 24895 (SEA PA 2014). A hearing officer concluded that a mother had requested evaluation when she had asked the assistant principal what else could be done to help her child and was not given any information about the possibility of an evaluation. The hearing officer determined that no magic words were required.

3. Intra-School Communication. Knowledge exists if there is an intra-school communication: "before the behavior that precipitated the disciplinary action . . . [t]he teacher of the child, or other personnel of the school district, expressed specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education of the agency or to other supervisory personnel of the agency." 34 C.F.R. §300.534(b)(3).

a. Required components of an intra-school communication:

(1) The communication must occur before the behavior that precipitated the disciplinary action.

(2) The communication must be made by the following personnel:

(a) the child's teacher(s), or

(b) other personnel of the school district.

(3) The communication must be made directly to the following personnel:

(a) the director of special education of the agency, or

(b) other supervisory personnel of the agency.

(4) The communication must express specific concerns about a pattern of behavior demonstrated by the child.

b. The term "communication" is not defined by the statute. Note, however, that communication is not limited to written communications. Therefore, communications can be verbal or written. Examples include, but are not limited to:

(1) Verbal communications,

(2) Emails,

(3) Student file records (file notes, disciplinary notes, etc), or

(4) Any other type of communication.

c. Recall that parents have a right to review all of their student's educational records. 20 U.S.C. 1232g(a)(1)(A) (review pursuant to FERPA); 20 U.S.C. 1415(b)(1) (review pursuant to IDEA). A parent could request all of a student's educational records and identify a communication by reviewing all educational records.

d. A school district does not necessarily have knowledge if a student is receiving supplementary or compensatory services under a special educational support program. 64 Fed. Reg. 12,629 (1999).

e. Jackson v. NW. Local Sch. Dist., No. 1:09CV300, 2010 WL 3474970 (N.D. OH 2014). In a case from the Northern District of Ohio, a court held that a school district had knowledge when the student received intervention services for two years and made few gains through the intervention services.

C. Three exceptions to the presumption of "knowledge" existing. 34 C.F.R. §300.534(c). When these exceptions exist, a school district is deemed not to have knowledge of a disability.

1. These exceptions are:

a. The parents have not allowed an evaluation of the child pursuant to IDEA,

b. The parents have refused services, or

c. The student has been evaluated and it has been determined that the child is not eligible for services and the parent has been notified of that decision.

2. District of Columbia Public Schools, 114 LRP 39116 (SEA D.C. 2014). In this case, a parent requested that her son be evaluated. Her son then violated the code of conduct and was suspended. During the suspension, the mother refused to sign the IEP and requested an IEE because she disagreed with the diagnosis. The school district claimed that the mother had "refused services," and, therefore, an exception applied. The hearing officer disagreed, holding that refusing services requires "an affirmative act, or at least more than failure to sign the consent for initial provision of special education services." Furthermore, since the parent had requested an IEE, she had not refused services.

D. Assuming a school district (1) has knowledge and (2) no exceptions exist, the child must be given the same disciplinary protections under the IDEA. 34 C.F.R. §300.534(d)(1).

1. A school district is required to conduct a manifestation determination review when there is "a decision to change the placement of a child with a disability because of a violation of a code of student conduct." 34 C.F.R. §300.530(e).

2. A change of placement occurs if:

a. The removal is for more than ten (10) consecutive school days; or

b. The child has been subjected to a series of removals that constitute a pattern. A pattern exists if:

(1) The series of removals total more than ten (10) school days in a school year;

(2) The child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and

(3) Additional factors include the length of each removal, the total amount of time the child has been removed, and the proximity of the removals.

III. The Expedited Due Process Complaint Process

A. Hypothetical.

B. Disciplinary Event Occurs.

1. Legal Issues.

a. Regardless of whether an expedited due process hearing is anticipated, the District should review and carefully follow the statutory requirements for suspension and expulsion.

b. Before implementing discipline, identify how many days the student has previously been removed during the school year. If the proposed disciplinary removal would constitute a change of placement, and the District has notice of a suspected disability, the IDEA disciplinary protections apply.

2. Practical Concerns.

a. Conducting a full review of the student's file/records.

b. Speaking with administrators, including the special education director.

c. Developing a disciplinary checklist that reviews the number of days a student has previously been removed for disciplinary purposes.

C. IDEA Expedited Due Process Complaint Filed.

1. Identifying an expedited due process filing.

a. The complaint must request an expedited hearing.

b. Although the complaint may request an expedited hearing, the complaint may not present a valid basis for an expedited hearing. In which case, the District may file a motion to remove the case from expedited track.

c. A parent may request the expedited due process hearing only if the parent (a) disagrees with a disciplinary change of placement, or (b) disagrees with a manifestation determination. O.A.C. 3301-51-05(K)(22).

d. Statute of Limitations. Any due process complaint must allege a violation that occurred not more than two years before the date the parent knew or should have known about the alleged action that forms the basis of the complaint. O.A.C. 3301-51-05(K)(7)(a)(ii).

Exceptions. The two-year timeline does not apply to a parent if the parent was prevented from filing a due process complaint due to:

(1) Specific misrepresentations by the school district that it had resolved the problem forming the basis of the complaint; or

(2) The school district's withholding of information from the parent that was required to be provided to the parent under O.A.C. 3301-51-05.

2. Practical Concerns.

3. Timeline.

a. An expedited due process hearing is still subject to all of the hearing requirements set forth in the IDEA. Letter to Gerl, 51 IDELR 166 (OSEP 2008).

b. Due dates vary between "business, "calendar," and "school" days.

c. Notice of Complaint. The District must contact ODE before the end of the next business day following receipt of the parent's expedited due process hearing complaint. O.A.C. 3301-51-05(K)(22)(d)(i).

d. Resolution Meeting. A Resolution Meeting must occur within seven (7) calendar days of receiving notice. 34 C.F.R. §300.532(c)(3). This period is measured in calendar days, not school days.

e. Response to Complaint. A response to the complaint is required pursuant to O.A.C. 3301-51-05(K)(8)(f)(i). A Response must be filed within ten (10) calendar days of the request.

f. Resolution Period. The due process hearing may proceed unless the matter has been resolved to the satisfaction of both parties within fifteen (15) calendar days of the receipt of the complaint. 34 C.F.R. §300.532(c)(3).

g. Evidence Disclosure. The duty to disclose evidence at least five (5) business days before the start of the hearing. *See* OSEP Memo 13-08.

h. Expedited Hearing. The hearing must occur within twenty (20) school days of the complaint requesting the hearing. 34 C.F.R. §300.532(c)(2).

i. Determination. The Hearing Officer must make a determination within ten (10) school days after the hearing. 34 C.F.R. §300.532(c)(2).

D. Records.

1. District Review of Records.

a. Whether the school district (a) has knowledge and (b) no exceptions exist is largely determined based on written records.

b. Records to review include, but are not limited to: the student's permanent file, the student's "virtual" profile, documentation related to prior requests for evaluation, emails, and other communications from parents.

c. District staff may not remember emails or other written communications they have exchanged with the student's parents.

2. Parental Requests for Records.

Pursuant to FERPA and the IDEA, parents (and eligible students) must be given the opportunity to inspect and review education records relating to their children that are collected, maintained, or used by the District. 34 C.F.R. §99.3; 34 C.F.R. §99.10(a) (FERPA); and 34 C.F.R. §300.613(a) (IDEA).

a. FERPA. 34 C.F.R. §99.10.

The District shall comply with a request for access to records within a reasonable period of time, but not more than 45 days after it has received the request.

b. IDEA. 34 C.F.R. §300.613.

(1) Each District must permit parents to inspect and review any education records relating to their children that are collected, maintained, or used by the District.

(2) The District must comply with a request without unnecessary delay and before any meeting regarding an IEP, or any hearing pursuant to §300.507 or §§300.530 through 300.532, or resolution session pursuant to §300.510, and in no case more than 45 days after the request has been made.

(3) The right to inspect and review education records under this section includes:

(a) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(b) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(c) The right to have a representative of the parent inspect and review the records.

IV. Meeting with School Personnel

A. Identify all relevant district personnel for the time at issue including, but not limited to: teachers, principals, administrators, special education personnel, school psychologists, coaches, and others who closely work with the student.

B. Use records already reviewed to assist district staff in recalling communications to determine whether "knowledge" exists.

C. Reach out to former staff and administrators to ensure that there are no gaps or misunderstandings of knowledge.

V. Seeking Resolution

A. Resolution Session.

1. A resolution meeting is required unless the parent and the district agree to waive it or agree to use mediation. 34 C.F.R. §300.532. A resolution meeting must occur within seven (7) calendar days of receiving notice.

2. The resolution meeting's purpose is for the parent to discuss the due process complaint, and the facts that form the basis of the due process complaint, so that the District has the opportunity to resolve the dispute. 34 C.F.R. §300.510.

3. The resolution meeting may not be attended by the District's attorney unless the parent is accompanied by an attorney. 34 C.F.R. §300.510(a)(1)(ii). The presence of a non-attorney representative does not permit the District to bring its attorney. Letter to Lawson, 55 IDELR 232 (OSEP 2010).

4. If a resolution is reached, the parties must execute a legally binding agreement. A party may void the agreement within three (3) business days of the agreement's execution. 34 C.F.R. §300.510.

B. Mediation.

Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding of any Federal court or State court of a State receiving assistance under this part. 34 C.F.R. §300.506(B)(8).

C. Practical Considerations.

The District should evaluate the merits of the expedited due process complaint prior to conducting the resolution meeting and/or mediation so that the parties can discuss the merits of the case.

VI. Written Offer of Settlement

A. Legal Rationale.

1. Pursuant to 34 C.F.R. §300.517, attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding for services performed subsequent to the time of a written offer of settlement to a parent if:

a. The offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten (10) days before the proceeding begins;

b. The offer is not accepted within ten (10) days; and

c. The court or administrative hearing officer finds that the relief finally obtained by the parents is not more favorable to the parents than the offer of settlement.

B. Interest-Based Rationale.

VII. Preparation for Due Process Hearing

A. Five-Day Evidence Rule.

1. Either party has the right to prohibit the introduction of any evidence that has not been disclosed to that party at least five (5) business days before the hearing. 34 C.F.R. §300.512(a)(3).

2. The Five-Day Evidence Rule's purpose is to allow all parties the opportunity to adequately respond to the impact of the evidence presented and to eliminate the element of surprise as a strategy. Letter to Steinke 18 IDELR 730 (OSEP 1992).

B. Disclosure Conference.

C. Practical Considerations.

1. The District should identify an administrator to coordinate preparation.

2. The District should review and coordinate staff schedules prior to the dates that the hearing is scheduled.

VIII. Expedited Due Process Hearing

A. Overview of Hearing.

1. A party at the hearing has the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities. 34 C.F.R. §300.512(a)(1).

2. A party at the hearing has the right to present evidence and confront, cross-examine, and compel the attendance of witnesses. 34 C.F.R. §300.512(a)(2).

3. Hearing officers generally have authority to determine procedural matters not specifically outlined in the IDEA, as long as they are consistent with the party's IDEA rights. The IDEA is silent on procedures related to the timing for presentation of evidence and regarding confrontation, cross-examination, and compelling the attendance of witnesses in a due process hearing. Letter to Kane, 65 IDELR 20 (OSEP 2015).

4. A party to an expedited hearing has the right to obtain a written, or, at the option of the parents, an electronic, verbatim record of the hearing. 34 C.F.R. §300.512(a)(4).

5. A party to an expedited hearing has the right to obtain a written, or, at the option of the parents, an electronic, findings of fact and decisions. 34 C.F.R. §300.512(a)(5).

6. Parents must be given the right to: (1) have the child who is the subject of the hearing present; (2) open the hearing to the public; and (3) have the record of the hearing and the findings of fact and decisions provided at no cost to parents. 34 C.F.R. §300.512(c).

B. Practical Considerations.

1. Ensure that the expedited due process hearing is not used as a fishing expedition for other matters.

2. The hearing process can become very adversarial. District staff will be questioned about knowledge, inaction, competency, and communications with the parent that District staff may or may not remember.

IX. Due Process Decision

A. The Hearing Officer must make a determination within ten (10) school days after the hearing. 34 C.F.R. §300.532(c)(2).

B. A party to an expedited hearing has the right to obtain a written, or, at the option of the parents, an electronic, findings of fact and decisions. 34 C.F.R. §300.512(a)(5).

C. Potential outcomes.

X. Hearing Costs

A. The District is responsible for the following hearing related costs:

1. Hearing Officer. O.A.C. §3301-51-05(K)(16).

2. The written, or, electronic, verbatim record of the hearing. *See* 34 C.F.R. §300.512(c).

3. The written findings of fact and decisions, which are to be provided at no cost to parents. *See* 34 C.F.R. §300.512(c).

4. All other costs incurred in impartial hearing, except the following, which will be paid by the party requesting services: expert testimony, outside medical evaluation, witness fees, subpoena fees, and cost of counsel. O.A.C. §3301-51-05(K)(16).

B. Staff Time.

1. Preparation for hearing.

2. Testimony.

C. School district's expert(s).

D. School district's legal fees.

E. A parent may file a separate due process complaint on an issue separate from a due process complaint already filed. 34 C.F.R. §300.514(c).

XI. Appeal

A. Legal Issues.

1. The decisions on expedited due process hearings are appealable. 34 C.F.R. §300.532(c)(5).

2. The decision of the Hearing Officer is final, unless a party to the expedited due process hearing appeals the decision to the Ohio Department of Education, within 45 calendar days of the notification of the decision. O.A.C. 3301-51-05(K)(22)(d)(v).

B. Practical Considerations.

XII. Fee Shifting

A. If the school district is the prevailing party, attorney fees may be recovered from:

1. The parent's attorney (a) who filed a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, (b) who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation, or (c) if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

2. The parent, if the parent's request for a due process hearing or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

B. The prevailing party who is the parent of a child with a disability may recover attorney fees from the school district.

XIII. Conclusion