

# Understanding Gifted Special Education Due Process Hearings



## A Guide for Parents



**OFFICE FOR DISPUTE RESOLUTION**

6340 Flank Drive  
Harrisburg, PA 17112-2764  
(800) 222-3353 (717) 901-2145  
TTY USERS: PA Relay 711  
[www.odr-pa.org](http://www.odr-pa.org)



**pennsylvania**  
DEPARTMENT OF EDUCATION

Through the Office for Dispute Resolution, the Pennsylvania Department of Education (PDE) fulfills its statutory mandate to maintain a special education due process system. PDE contracts with the Central Susquehanna Intermediate Unit to provide fiscal and certain management support for that office, without becoming involved in substantive operations. The hearing officers and mediators are free from interference or influence on any matters affecting the outcome of individual mediations and due process hearings. This includes, without limitation, interference or influence from any entity, individual, or group, such as parents, advocacy groups, school districts, intermediate units including CSIU, ODR staff, and PDE. At the same time, those hearing officers and mediators are provided with administrative support, as well as training delivered in a manner preserving their impartiality through ODR, which itself is also free of such interference or influence.

The Central Susquehanna Intermediate Unit will not discriminate in educational programs, activities or employment practices based on race, color, national origin, gender, disability, marital status, age, religion, sexual orientation, ancestry, union membership or other legally protected classifications. Announcement of this policy is in accord with Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990. Employees and program participants who have an inquiry or complaint of harassment or discrimination or who need information about accommodations for people with disabilities, should contact Director of Human Resources, CSIU, 90 Lawton Lane, Milton, PA, 17847, 570-523-1155.

## **Table of Contents**

	Page
Resolving Special Education Disagreements .....	1
Assessing the Strength of Your Position .....	11
Due Process Procedures .....	31
Objections .....	81
Motions.....	92
The Due Process Hearing.....	99
Conclusion.....	112
References.....	113
Glossary.....	114
Appendices .....	120
Additional Resources .....	174

Appendix A.	PaTTAN “Considerations Worksheet”
Appendix B.	Educational ABCs
Appendix C.	IEP Facilitation Information
Appendix D.	Mediation Information
Appendix E.	Chapter 16 State Regulations
Appendix F.	Chapter 711 State Regulations
Appendix G.	<u>Board of Education v. Rowley</u> , 458 U.S. 176 (1982)
Appendix H.	<u>Centennial School District v. Department of Education</u> , 517 Pa. 540, 539 A.2d 785 (1988)
Appendix I.	<u>B. C. v. Penn Manor School District</u> , 906 A.2d 642 (Pa. Commw. 2006)
Appendix J.	Generally Applicable Pre-Hearing Directions
Appendix K.	Sample Due Process Complaint
Appendix L.	Blank Due Process Complaint
Appendix M.	Guide to Mediation
Appendix N.	Gifted Due Process Procedures Fact Sheet
Appendix O.	Example of 5-Day Disclosure Letter
Appendix P.	Examples of Marked Exhibits
Appendix Q.	Example of Cover Sheet for Exhibit Notebook
Appendix R.	Sample Motion

This Guide is for parents of children who have been, or may be, identified as gifted under Chapter 16 of the Pennsylvania regulations. The regulations and procedures in this Guide apply to these children only.

If your child is also eligible as a child with a disability under the IDEA and/or Section 504, you should also review the guide for children who receive special education under the IDEA and/or Section 504 since the different laws are applied differently. See 22 Pa. Code §16.7 in the Appendix.



## Part One: Resolving Special Education Disagreements



Every day in schools across Pennsylvania, GIEP Teams work together to write a GIEP for a child.

Many times, you and the school will agree on the educational program for your child.

Sometimes, though, despite everyone's best efforts and intentions, there will be a disagreement about your child's education.

A due process hearing (litigation) is not the only way to resolve these disagreements.



## Ways to Resolve Special Education Disputes



### A. **Start with Informal Discussions**

Sometimes just talking to your child's teacher or school administrators may resolve the problem. The school may not be aware of your concerns. Open communication between parents and schools benefits everyone, particularly the student.

Begin by talking to your child's teacher. Contact him or her to schedule a time to meet or talk over the phone. This way you can be sure that the teacher has time to talk with you. Before the meeting, it might be helpful to send a list of your questions or concerns so the teacher can prepare. At the meeting, share your concerns, but be willing to listen to the teacher's thoughts as well. Often times, you will be able to resolve the problem together.

There may be other people you will want to talk to as well. Regardless of whom you talk to, if something is not clear to you, ask for an explanation.





It can be helpful to keep a journal or log of your communications with the school. After you speak to someone, you might want to send an email or letter to the school, summarizing what was discussed. This will give you a record of your discussions. This will also give the school the chance to revisit an issue with you if it understood your discussion to be different than how you summarized it. Communication problems can be avoided this way.



The [Pennsylvania Training & Technical Assistance Network](#) (PaTTAN) has prepared a “Considerations Worksheet”. This worksheet may be helpful in assisting you in organizing your concerns. See [Appendix A](#).

## **B. Meet with the Director of Special Education**

You may want to meet with the [Special Education Director](#) or Gifted Education Coordinator to talk about your concerns. If you want to, you can send a letter to him or her before the meeting, so that he or she has an idea of what you want to talk about. If there is a document which you think is important to the discussion, you can include it in your letter. Be willing to listen to what the Special Education Director has to say. Many times you can resolve the problem together.







There are many abbreviations, or acronyms, for terms used in the special education field. For example, the Gifted [Individualized Education Plan](#) is referred to as the GIEP. It can be helpful to become familiar with some of these frequently used abbreviations/acronyms as you prepare for the hearing. A list appears in [Appendix B](#).

**C. Contact the Bureau of Special Education's ConsultLine**  
**(In PA – 800-879-2301; outside of PA – 717-901-2146;**  
**TTY Users – PA Relay 711)**

[Consultline](#) is a helpline for parents and advocates of school age children who are or may be gifted and children with disabilities. ConsultLine staff can do the following:

- Explain special education laws
- Explain the Notice of Parental Rights for Gifted Students
- Describe options for parents when they disagree with their child's school
- Make referrals to other agencies

**D. Consult Other Resources**

The Parental Rights for Gifted Student lists many resources available to parents. Resources include:

**OFFICE FOR DISPUTE RESOLUTION**

6340 Flank Drive  
Harrisburg, PA 17112-2764  
717-901-2145 (Phone)  
800-222-3353 (Toll Free in PA only)  
TTY Users: PA Relay 711  
717-657-5983 (Fax)



[www.odr-pa.org](http://www.odr-pa.org)

The Office for Dispute Resolution administers the mediation and due process systems statewide, and provides training and services regarding alternative dispute resolution methods.

**PENNSYLVANIA ASSOCIATION FOR GIFTED EDUCATION (PAGE)**

P.O. Box 452

Natrona Heights, PA 15065

888-736-6443 (Helpline)

[www.giftedpage.org](http://www.giftedpage.org)

**PENNSYLVANIA BAR ASSOCIATION**

100 South Street

Harrisburg, PA 17101

800-932-0311 (Phone)

[www.pabar.org](http://www.pabar.org)

**PENNSYLVANIA DEPARTMENT OF EDUCATION**

Bureau of Teaching and Learning

Division of Curriculum

333 Market Street, 8th Floor

Harrisburg, PA 17126-0333

717-705-6359 (Voice)

<http://www.education.pa.gov/Teachers%20-%20Administrators>

Bureau of Special Education

333 Market Street, 7th Floor

Harrisburg, PA 17126-0333

717-783-6134 (Voice)

<http://www.education.pa.gov/K-12/Special%20Education/Pages/default.aspx>

**REGIONAL SUPPORT NETWORK – GIFTED EDUCATION CONTACT  
INFORMATION BY INTERMEDIATE UNIT**

<http://www.education.pa.gov/Documents/K-12/Gifted%20Education/Gifted%20Education%20Contact%20by%20IU%20rev%209%202015.pdf>



### **E. Request An Evaluation**

You may want to ask that your child be evaluated or re-evaluated. The results of an [evaluation](#) or [reevaluation](#) may help both you and the school decide what the next steps should be. There are limits to the number of evaluations that will be performed on your child. To learn more about evaluations, you can speak to a ConsultLine Specialist at 800-879-2301, TTY Users: PA Relay 711.



The Pennsylvania Department of Education has developed an annotated Gifted Written Report (GWR), which describes the contents of Pennsylvania's Gifted Multidisciplinary Evaluation form. This form is available on the PDE website, <http://www.education.pa.gov/K-12/Gifted%20Education> or on the ODR Parent Library webpage at <http://odr-pa.org/parents/parent-resource-library/>.

### **F. Request that the GIEP Team Meet**

You can ask that the [GIEP Team](#) schedule a meeting to discuss your concerns. To request this meeting, write a letter to the principal, with a copy to the Director of Special Education. Keep a copy of the letter for your records.

The next two services, facilitation and mediation, are free to you; however, there is a fee to the service provider. However, both you and the school must agree to use them. If only one of you wants the service, ODR cannot schedule it. Facilitation is available for the GIEP meeting. Mediation is available for special education disagreements.



### **G. Request GIEP Facilitation**

**(In PA – 800-222-3353; outside of PA – 717-901-2145; TTY Users: PA Relay 711)**

You may want to ask that a facilitator attend your child's GIEP meeting to assist the Team. ODR offers free [GIEP Facilitation](#) to parents with a fee to the LEA. Facilitation is not needed for all GIEP meetings. Facilitation is usually requested when the parent and the school believe that communication problems are preventing the GIEP Team from agreeing on a GIEP. The facilitator does not become a member of the GIEP Team. The facilitator is not at the meeting to give advice or to tell the Team what to do. Instead, the facilitator's role is to make sure that everyone is given the opportunity to speak and work together to try to reach agreement. The goal of GIEP Facilitation is an agreed-upon GIEP.

If you believe that a facilitator might assist the GIEP Team in better communication, contact ODR. You can let the school know you have made this request, but you are not required to. ODR staff will contact the school to see if it agrees with your request for facilitation. (The school can also request that you agree to the presence of a facilitator at the GIEP meeting.)



ODR has prepared a short video on IEP Facilitation, which is available on the ODR website (<http://odr-pa.org/alternative-dispute-resolution/iep-facilitation/>)



Written materials on IEP Facilitation are in [Appendix C](#).



ODR Mediation/Facilitation Case Managers, as well as ConsultLine Specialists, are available to speak with you about these services.

ConsultLine: 800-879-2301, TTY Users: PA Relay 711

ODR: 800-222-3353. TTY Users: PA Relay 711



## H. Request Mediation

**(In PA – 800-222-3353; outside of PA – 717-901-2145; TTY Users: PA Relay 711)**

You may request [mediation](#) from ODR. ODR offers free mediation to parents with a fee to the service provider. Like the GIEP facilitator, mediators are not decision makers. The mediator will facilitate communication between you and the school. The goal of mediation is for you and the school to resolve the problem and to put your agreement in writing. This is called the mediation agreement. Attorneys do not participate in mediation, but you may bring an advocate or other supportive person with you.

You may request mediation and due process at the same time. Your due process hearing will not be delayed because you requested mediation. Because mediation is usually easier to schedule, and usually takes only one day to complete, you may find that you have resolved your concern and do not need the due process hearing any more.



Written materials on mediation are in [Appendix D](#).



The ODR Mediation Case Managers, as well as ConsultLine Specialists, are available to speak with you about these services.

ConsultLine: 800-879-2301, TTY Users: PA Relay 711  
ODR: 800-222-3353, TTY Users: PA Relay 711



## **I. Contact PA Department of Education**

If it is a question about procedural issues (the screening, identification, the GIEP planning process or if the student is also identified with a disability), direct your questions to:

Don Dolbin  
Bureau of Special Education  
717-783-6879

If it is a question regarding programming options and what curriculum and/or instruction could look like, please direct your questions to:

Ray Young  
Bureau of Curriculum, Instruction and Assessment  
717-783-6633





## Checking In...

- ✓ If you have tried some or all of these suggestions, and you still have concerns about your child's education, then it may be time to consider whether you want to request a due process hearing.
- ✓ This is an important decision to make. Due process hearings are not something to be entered into lightly.
- ✓ The federal government (U.S. Department of Education's Office of Special Education Programs or OSEP), recommends that parents and schools use due process hearings *only when everything else has failed to resolve the problem*.
- ✓ Due process hearings are formal, complicated procedures.
- ✓ A due process hearing can be financially, physically, and emotionally draining for parents. It is difficult for school staff as well.
- ✓ But, you have the right to request a due process hearing, and sometimes that may be what is needed to resolve a problem.
- ✓ It is recommended that you be certain that you cannot resolve the problem in other ways first, before you request a hearing.
- ✓ And, even before you request a hearing, you will need to figure out whether you have a strong case. In other words, you need to figure out if you can win your case before a hearing officer. The first step is to gather as much information as possible, so that you can make an informed decision.







## Part Two: Assessing the Strength of Your Position



You do not want to spend the time, energy and money participating in a due process hearing if you are not likely to prevail. In other words, will the hearing officer agree with you, or will he or she agree with the school's position?

The next step is to figure out whether you have a case:

What is the likelihood that a hearing officer would agree with you?

What does the law say?

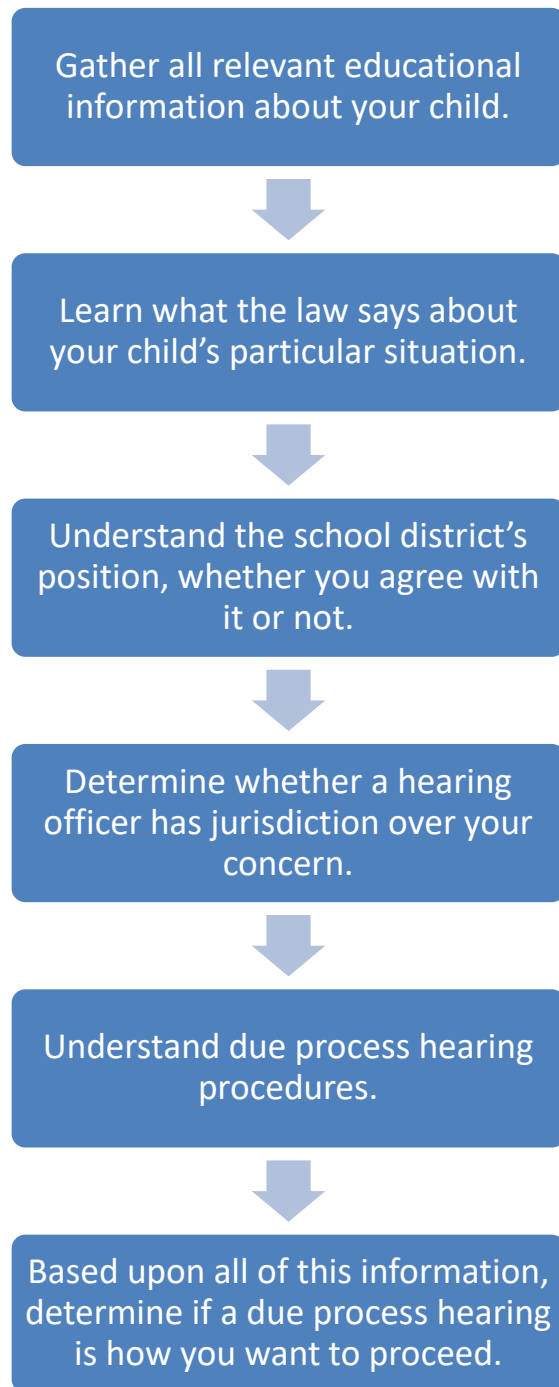
What documents and witnesses do you need to prove your case?

How do due process hearings work?

These may seem like overwhelming questions, so take it step by step.



Here is an outline of steps you may want to take to help you decide whether you want to request a due process hearing:





## Step 1: Gather All Relevant Educational Information About Your Child

You need to have a complete understanding of your child's needs and educational program. Here are some things you can do to become prepared.

As you go about gathering this information, do not stop talking to and working with the school. Sharing information as you get it may help both you and the school understand your child's situation better. Sharing information may result in the problem being resolved, or prevent future problems. Most due process cases are settled (resolved) before they get to the actual hearing.

### **Organize Your Records**

Start by organizing your records. Here is a list of documents that might be helpful to you. If you do not have copies, now is the time to get them and review them carefully:

**Report Cards** - Does the report card show that your child is doing well in school? Struggling in school or even failing? What do the teacher comments say?

**Homework and Tests** - Homework and tests help to show two things: 1) what your child is being taught in school; and 2) how well your child is doing in school. Standardized tests, such as the PSSA, Keystone Exam and others, may also be important information.

**Written Communication with School Staff** - Your child's school record includes notes and emails to you or other staff regarding your child. What do those communications show? Have you identified concerns to the school? How has the school responded? Has there been progress?



**Generally Distributed School Information** - This refers to the information that a school sends home with many (or all) students or puts on its website. This may be pamphlets, notices, calendars, or policies. Consider whether any of this information is important to the concern you have about your child's program.

There are three documents that are almost **always important** in any due process hearing:

- 1) Gifted Written Report;
- 2) Notice of Recommended Assignment (called the "NORA"); and
- 3) the Gifted Individualized Education Program (called the "GIEP").

The **GWR**, **NORA** and **GIEP** all work together to establish the program your child needs.

**Evaluations** - Your child's evaluation(s) are often times an important part of a due process hearing. Make sure you have copies of **all** evaluations done on your child whether by the school or private evaluators.

**Notice of Recommended Assignment (NORA)** - In many cases this is an important document, because it indicates what the GIEP team concludes is the educational program your child needs.

**Gifted Individualized Education Plan (GIEP)** - This is the blueprint (or map) for the education and services your child will receive. Make sure you have copies of every GIEP that pertains to your concern. Review each one of them carefully.



Some or all of these documents may be used as exhibits at a due process hearing, so the earlier you can get them together, the better prepared you will be.

**Classroom Visit** - You may want to visit your child's classroom. Your school district will have a policy about parents visiting the classroom. Check with the school district about its policies for such visits. Follow all school rules about the visits.

**Inspect Records at School** - The school maintains [educational records](#) on your child. You have the right to review those records. Once you ask to review them, the school is required to respond to your request in a timely way. At the most, the school must make those records available to you no more than 45 calendar days after you make the request. There may be a small per page charge by the school district for any documents that you request to be copied.

**Consider an Independent Educational Evaluations (IEE)** - If you disagree with the evaluation of your child done by the school, you may decide to seek an independent evaluation. An [independent educational evaluation](#), or IEE, is an evaluation conducted by a qualified examiner who is not employed by the school. However, for gifted students, IEEs are at the parents' expense, not the school's expense.

If you share with the school an evaluation you obtained and paid for yourself, the results of the evaluation:

- Must be considered by the school in determining your child's educational program, unless the evaluation did not meet the school's requirements; and
- May be used by you, the school, or both, as evidence at the due process hearing.





## Checking In...

You have now gathered all of the information you need about your child's educational program. Now the question is *"How strong of a case do I have based upon all of this information?"*

Here are some questions you will need to ask:

- ✓ What does the law say?
- ✓ What timelines must I follow?
- ✓ How have other similar cases been decided?
- ✓ What witnesses and exhibits will help to prove my case?
- ✓ What is the school district's position?





## Step 2: Learn the Law

### **Special Education Regulations and Law**

You will need to have at least a basic understanding of special education law and how those laws apply to your child's educational program.



There are many websites about special education law. Some are more respected than others. One well-known and well-respected national website, Wright's law, (<http://www.wrightslaw.com>), is geared towards parents.

The Parent Resources Library on ODR's website has information for parents about special education [regulations](http://odr-pa.org/parents/parent-resource-library/), rights and procedures. <http://odr-pa.org/parents/parent-resource-library/> The websites of the Resources listed on the Notice of Parental Rights for Gifted Students, and those listed on Pages 4-5, are also good resources for you.



ConsultLine Specialists are also available to you to review special education laws and regulations at 800-879-2301, TTY Users: PA Relay 711.

The main laws that apply to due process hearings for gifted students are found in the [Pennsylvania Code](#) at Title 22, [Chapter 16](#).







The Pennsylvania regulations are found in [Appendix E](#). The state regulations can also be found online at the Pennsylvania Code at <http://www.pacode.com/secure/data/022/chapter16/chap16toc.html>

The Pennsylvania Department of Education has developed a list of Frequently Asked Questions about Chapter 16, available at <http://www.education.pa.gov/Documents/K-12/Gifted%20Education/Gifted%20Education%20Frequently%20Asked%20Questions.pdf>



Chapter 16 does not apply to students who attend a charter school. Charter schools adhere to separate state special education regulations which are also found in the Pennsylvania Code, at [Chapter 711](#), which are found in [Appendix F](#).





**It is important to understand that just because you disagree with your child's educational program, this does not mean that you have met the legal standards for establishing a violation of state law.**

### **Proving Your Case Under the Law**

It is important to understand that just because you disagree with your child's educational program, this does not mean that you have met the legal standards for establishing a violation of state law.

Special education law can be complicated. But there is a basic concept that is important: a school is not required to provide the best program to a student, but instead, must provide an appropriate program.

The phrase you will often hear is that the school must provide *an appropriate program, reasonably calculated to enable the child to receive meaningful educational benefit*.

Due process hearings often center on a disagreement as to what is "appropriate" and/or what is "meaningful educational benefit".



Three of the cases you will likely hear about are Board of Education v. Rowley, 458 U.S. 176 (1982) ([Appendix G](#)), Centennial School District v. Department of Education, 517 Pa. 540, 539 A.2d 785 (1988), ([Appendix H](#)) and B.C. v. Penn Manor School District, 906 A.2d 642 (Pa. Commw. 2006) ([Appendix I](#)). There are many other cases that address these same issues. These three cases are starting points for you.



You will see many other cases cited in hearing officer decisions available on the ODR website: <http://odr-pa.org/due-process/hearing-officer-decision/>

It can be helpful to read and understand legal decisions in previous cases with issues similar to yours. They might assist you in understanding the legal aspects of your own case better. The ODR website contains copies of recent [hearing officer decisions](#) and older decisions from the [Appeals Panel](#). The Appeals Panel was discontinued in 2008, but those decisions may still be helpful to you in understanding the law and its application to your case. Court decisions are not available on the ODR website, and may require an individual with legal knowledge to access and interpret them for you.

The law requires *individualized* gifted educational plans for children who are gifted. What may be an appropriate education for one child is not necessarily an appropriate program for your child. Read hearing officer decisions. Feel free to talk to other parents, but remember that your child's GIEP Team, which includes you, determines what is needed for your child, based upon his or her unique, individual needs, not based upon what another child may be receiving.

## **Timelines**



**You do not have unlimited time to decide whether to request due process.**

A Pennsylvania appeals court has determined that, “initiation of a request for a due process hearing must occur within one year, or two years at the outside (if the mitigating circumstances show that the equities in the case warrant such a delay), of the date upon which a parent accepts a proposed IEP.” *Montour School District v. S.T.*, 805 A.2d 29 (Pa. Commw. 29 (2002)).

This is often referred to as a [statute of limitations](#), although as a court case it is technically not a statute per se.

If the school raises the statute of limitations as an issue (which you will see in the school's answer to your complaint or in a motion), the [hearing officer](#) will do the following:



1. Ask you to explain before the hearing why you believe that you have requested a hearing in a timely way (referred to as an [offer of proof](#), see Page 49); and/or
2. At the hearing take evidence from you and the school regarding any mitigating circumstances.

The hearing officer will determine whether your request was timely or not.

There are three possible outcomes:

1. You requested the hearing too late, and your complaint will be dismissed. You have the right to appeal that decision to state court.
2. You requested the hearing in a timely fashion, and the hearing will proceed.
3. You did not request the hearing in a timely fashion for some, *but not all* of the issues in your complaint. The hearing will proceed on the issues that you raised in a timely fashion. At the end of the hearing process, you have the right to appeal any aspect of the hearing officer's decision to state court including the hearing officer's ruling regarding which issues were/were not timely.





The **Notice of Parental Rights for Gifted Students** is available online at <http://www.education.pa.gov/Documents/K-12/Gifted%20Education/Notice%20of%20Parental%20Rights%20for%20Gifted%20Students.pdf>



ConsultLine Specialists are also available to you to review special education laws and regulations regarding due process hearings at 800-879-2301, TTY Users: PA Relay 711.

### **Exhaustion of remedies**

The concept of exhaustion of remedies essentially means that a party must go through the due process procedures **first**, before filing a lawsuit in state court. In other words, in most instances, you will be required to utilize the due process system to attempt to resolve your concern before proceeding to court.





### Step 3: Consider the School District's Position

Part of understanding *your* case is understanding the *school's* case. Ask yourself these questions:

- ? What is the school's position? How does its position differ from mine? Why?
- ? (If you know), what witnesses will the school present at the hearing? What will they say?
- ? (If you know), what documents (exhibits) will the school use at the hearing? Do those documents support what the school is saying, or what I am saying?
- ? Do the laws support my position or the position of the school?







## Step 4: The Hearing Officer's Jurisdiction

You will also need to be certain that the issue you have with your child's educational program is an issue that a due process hearing officer can decide. In other words, is your concern something that a hearing officer has the authority ([jurisdiction](#)) to hear and make a decision about?

A hearing officer's authority typically covers the following broad categories:

1. Determining the appropriateness of a program or placement, which may include:
  - The quality and extent of the educational program;
  - Whether the child is receiving meaningful educational benefit from the program;
2. Determining whether a child has been properly identified for services, which may include:
  - Determining whether a child should have been identified as gifted, but was not;
  - Whether gifted education services are no longer needed.
3. Ordering or denying [compensatory education](#) services.

You should ask yourself if your issue falls into one of the broad categories above. This question may be difficult to answer without the help of an attorney or [advocate](#). It is important to understand that, while a hearing officer's jurisdiction is pretty broad, a hearing officer does not have jurisdiction over *all* areas of your child's education.

For example, to determine the appropriateness of a program or placement, hearing officers can make decisions on very specific programmatic issues such



as the content and scope of a GIEP. However, a hearing officer could not conduct a hearing about a parent's concern that solely entails a parent-teacher personality conflict.

Utilize all of the resources available to you to assist you in your analysis. In the end, you are the only one who can decide whether or not you will move forward with a request for a due process hearing.





## Step 5: Understand Due Process Hearing Procedures

A **due process hearing** is a legal proceeding before a hearing officer. In Pennsylvania, hearing officers are either attorneys or psychologists with a doctoral degree. Each hearing officer has extensive background in special education and hearing procedures.



A list of current Pennsylvania hearing officers is always available on the ODR website at <http://odr-pa.org/due-process/hearing-officers/>. You and the school do not get to choose your hearing officer; ODR makes impartial assignments.

At a hearing, you and the school (referred together as “the **parties**”) are each given the opportunity to present witnesses and documents which support your position. Like any court proceeding, you will be required to prove your case. To do so, you will:

- Outline the issues to the hearing through your “**Opening Statement**”;
- Present **exhibits** to the hearing officer which prove your position in the matter;
- Question both your **witnesses** and the school’s witnesses; and
- Probably want to testify yourself. (If both parents are involved and would be testifying to the same facts, pick one of you to be the witness.)

A court reporter (or **stenographer**) attends every hearing, taking down everything that is said “on the record”. The document that the court reporter



produces is called the [transcript](#). You will be given one free copy of the transcript.

Most of what occurs at a hearing will be taken down (“transcribed”) by the court reporter. At times, however, the hearing officer will tell the court reporter to “go off the record”. The hearing officer will go off the record when it isn’t necessary for the court reporter to record the discussion (such as discussions about scheduling). The hearing officer determines whether discussions are on or off the record.

The hearing officer writes his or her decision by applying the law to the evidence presented at the hearing. Either you or the school, or both, can appeal the hearing officer’s decision to state court. It is recommended that you consult with an attorney to help you decide whether to appeal, as well as to assist you in meeting any court-imposed timelines and procedural requirements. The hearing officer will give you appeal information when he or she sends out the hearing officer decision.



To learn more about due process hearings, you might want to do some or all of the following things:



Review Generally Applicable Pre-Hearing Directions in [Appendix J](#).



Review ODR's website section on due process hearings.  
<http://odr-pa.org/due-process/overview/>

Read over the Notice of Parental Rights for Gifted Students again. <http://www.education.pa.gov/Documents/K-12/Gifted%20Education/Notice%20of%20Parental%20Rights%20for%20Gifted%20Students.pdf>

Watch ODR's videos on Motion Practice and Due Process Hearing Procedures: <http://odr-pa.org/due-process/hearing-procedures/>



Call ConsultLine for general information on due process hearings at 800-879-2301, TTY Users: PA Relay 711.



## Checking In...

You have now done the following things:

- ✓ Gathered information about your child
- ✓ Learned what the law says about your particular concern
- ✓ Determined what the school's position is on the matter
- ✓ Considered whether the hearing officer has jurisdiction over your concern
- ✓ Learned some basic information about due process hearings

The next section will give you detailed information on hearings, including how to request one.





## Part Three: Due Process Procedures



This section provides detailed information on due process procedures.

Starting with a general overview of a hearing, and then moving into requesting due process, this section provides a step-by-step guide on due process hearing procedures.

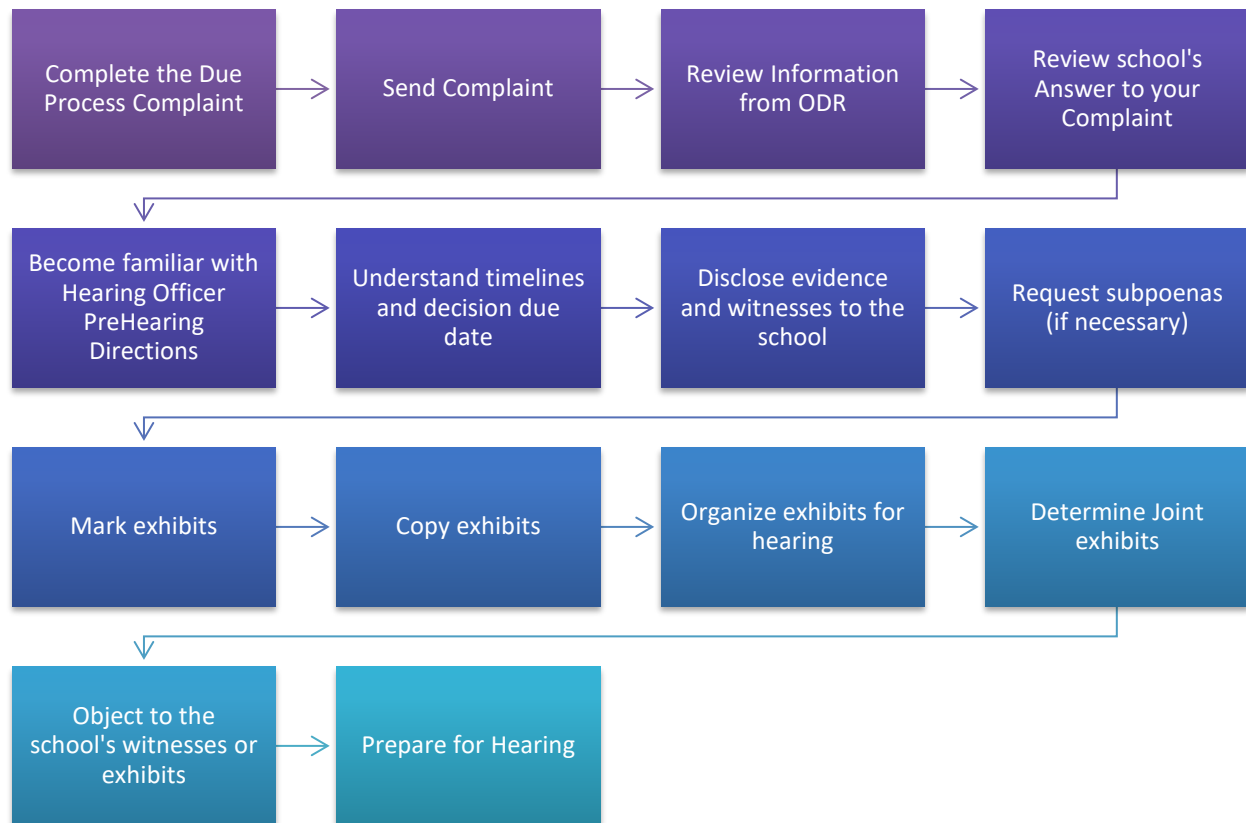
Although objections and motions are part of due process procedures, they are addressed in separate sections: Parts Four (Objections) and Five (Motions).





## **Due Process Procedures**

Here is a flowchart that lists each step of the process. Each section will be explained in full below.



## **Representation in a Due Process Hearing**

You have two choices when deciding who will represent you and your child at a due process hearing.

1. You can choose to represent yourself in the hearing. When a parent participates in a due process hearing without legal counsel, this is called appearing [pro se](#).
2. You can decide to use an attorney to represent you. If you choose to use an attorney, you will be responsible for the cost of the attorney.

You can be accompanied and advised by individuals with special knowledge or training in the area of special education, such as an advocate. It is important to note, however, that an advocate cannot represent you in the hearing unless he or she is an attorney.

The school, as well as any of its administrators or other employees appearing at the hearing, must be represented by an attorney.





## Step 1: Completing the Due Process Complaint

In order to request a due process hearing, you must first either

1. Fill out a [due process complaint](#), or
2. Put all of the required information into a letter.

The actual due process complaint form is not required, but is available to help make sure you are including all important information. If you are more comfortable writing a letter, rather than completing a form, you can do so. Just be certain that you include all of the information asked for on the form.

The complaint is an important document:

1. It is a formal notification to the school of your concerns; and
2. It starts the timeline for completing the hearing.





A sample Due Process Complaint form is in [Appendix K](#).

A blank Due Process Complaint form is in [Appendix L](#).



A blank Due Process Complaint form is also available on the ODR website, <http://odr-pa.org/odr-request-forms/>, or by calling ODR at 800-222-3353, TTY Users: PA Relay 711.

The complaint form (or a letter) should include:

- 1. The child's full name, first, middle and last.**
- 2. The address where the child lives.**

If you share custody with another person, list the primary residence for your child. If you believe it is important to explain any residency issues, you may do so in your request for a hearing.

- 3. The name of the school the child attends. Include both the school district and the actual name of your child's school building.**

Particularly in large school districts, with several elementary, middle and high schools, it is important to identify your child's school building:

*Example:* "My child attends Hamilton Elementary School within the School District of America."

If your disagreement is with a school district other than with the school district where your child currently goes to school, list the name of the school which should be involved in the due process hearing.



*Example: “My child currently attends the American Academy, but my complaint is against the USA School District.”*

4. **Contact information.** Both ODR and the hearing officer will need to have a reliable contact telephone number in order to get in touch with you, and your email address if you have one. Most correspondence to and from the hearing officer is sent through email; if you do not have email, correspondence will be sent by US mail but will take longer to get to you.
5. **A description of your concern, including all facts you are aware of to support your concern.**

You should describe your concern so that the school and the hearing officer understands it. For example, if you believe *that your child did not receive a meaningful educational benefit*, you should explain why you believe that. You can say that your child did not receive meaningful educational benefit, but then give specific facts to demonstrate why you believe your child did not receive meaningful educational benefit. Explain what you think your child needs in order to receive meaningful educational benefit. Regardless of what your issue may be, you need to provide enough information so that the school and hearing officer can fully understand your concerns.

6. **Your proposed solution to the problem** (if you know of a possible solution at the time you fill out the complaint).

The hearing officer can only decide issues that are identified in the complaint. Make sure that you have included in the complaint all issues and concerns you want to bring before the hearing officer. If you later discover that you forgot to include something, let the hearing officer know. You might be allowed to file another complaint containing those issues and have those issues also decided by the hearing officer. On the other hand, the hearing officer may tell you that it is too late. It is always best to include everything in the first complaint to avoid any delay.





## Step 2: Sending the Due Process Complaint

Once you have completed the complaint form, or your letter, you must do this:

1. Send a copy of your complaint to the school, and, at the same time,
2. Mail a copy to ODR at:

Office for Dispute Resolution  
6340 Flank Drive  
Harrisburg, PA 17112-2764

Or

Email a copy to ODR at:

[odr@odr-pa.org](mailto:odr@odr-pa.org)

Or

Fax a copy to ODR at:

717-657-5983



Instructions on how to email the complaint are found on ODR's website. <http://odr-pa.org/odr-request-forms/>





### Step 3: Review Information from ODR

Once ODR receives your complaint, you will receive the following information about your due process hearing:

- A Letter from the ODR Case Manager giving you the name and contact information for the hearing officer; and
- A [Notice of Hearing](#), listing the date and time for the hearing.

You will also be given general information by the Case Manager:

- Guide to Mediation (See [Appendix M](#))
- Gifted Due Process Procedures Fact Sheet (See [Appendix N](#))

If you have any questions about the information, you can contact the ODR Case Manager assigned to your case. While the hearing officer decides all aspects of the case (scheduling, motions, etc.), the ODR Case Manager is available to answer general questions you may have about the process.

You will also receive information from the hearing officer. This will include:

- Pre-Hearing Directions
- An explanation of due process timelines from complaint to decision
- A letter explaining hearing procedures to parents representing themselves. If you are represented by an attorney, the hearing officer will send the first two items to your attorney rather than to you.





Copies of the forms that you will receive from ODR are found in the Appendix.

Guide to Mediation - [Appendix M](#)

Gifted Due Process Procedures Fact Sheet (See [Appendix N](#))







## Step 4: Review any School's Answer to your Complaint

The school district may file an Answer to your complaint.

If the school filed the complaint, you may file an Answer. The same procedures will apply if you are the one filing the Answer.

### Here is an explanation about filing an Answer:

- There are no forms to follow when filing an Answer. A letter response is fine.
- In the Answer, the school (or you, if the school filed the complaint) should set forth its position. In other words, the Answer should address the information in the complaint.

*Example:* If your complaint indicates that you believe your child did not receive meaningful educational benefit, the District's Answer will indicate why it believes that your child did, in fact, receive meaningful educational benefit.

*Example:* If the school requests a hearing to demonstrate that its evaluation of your child was done properly, in your Answer, you should indicate all the reasons why you believe it was not an appropriate evaluation.

- The Answer should be sent to the hearing officer and the other side. A copy should also be sent to ODR.



Carefully read the District's Answer to your complaint if one is filed. The Answer will help you to understand the District's position (or beliefs) about the information in your complaint. This will give you a better idea of how the District's view of your child's situation differs from yours, and what the District intends to prove at the due process hearing.

## **Withdrawal of the Hearing Request**

You and the school may decide to hold a meeting to discuss the due process complaint and try to resolve it. Withdrawal of the hearing request occurs in these situations:

- a. You and the school have resolved the matter, either at a meeting, at mediation, or at some other point, and so a due process hearing is not needed. Notify the hearing officer immediately that you are withdrawing your complaint for one of these reasons. The hearing officer will ordinarily grant your request to withdraw.
- b. If, for other reasons, you decide that you do not want to pursue a due process hearing, you should notify the hearing officer that you wish to withdraw your complaint. The hearing officer will decide whether or not to allow the complaint to be withdrawn. Some of the factors a hearing officer might consider when deciding whether to allow you to withdraw your complaint are:
  - The stage of the proceedings. If the hearing is almost completed, the hearing officer might be less likely to grant the request;
  - Whether the school (or you, if it is the school attempting to withdraw its complaint) agrees to the withdrawal;



- If the school does not agree to the withdrawal, the extent of any harm the withdrawal may cause the school (or you, if it is the school attempting to withdraw its complaint);
- The likelihood of another hearing having to be held later on the same issues.





## Step 5: Become Familiar with the Hearing Officers' Generally Applicable Pre-Hearing Directions

The hearing officers have prepared a document called [Generally Applicable Pre-Hearing Directions](#).



The Generally Applicable Pre-Hearing Directions can be found in [Appendix I](#).

One of the issues the Directions address is how to communicate with the hearing officer. (See [Appendix I](#) at #1).

### A. Communicating with the Hearing Officer

Throughout the course of the proceedings, there will be times when you need to communicate with the hearing officer. The hearing officers have specific rules about such communications.

Here are the hearing officers' rules about communicating with them:

- **Email.** If the school's attorney or the parent has an email account, that is the *only way* to communicate with the hearing officer. If a party emails the hearing officer, he or she must copy the other party on that email. Unless the hearing officer indicates otherwise, it will not be necessary to send "hard copies" (paper copies) of any correspondence or documents that are emailed to the hearing officer. All emails must contain the ODR file number in the subject line. The hearing officers strongly discourage embedded graphics and electronic "stationery".



- **Mail and Fax.** If the school's attorney or parent do not have an email account, correspondence and other documents can be sent by mail or fax. The hearing officers prefer that mail be used rather than fax.
- **Conference calls.** If either party believes that a conference call is needed with the hearing officer, he or she should notify the hearing officer and the other party either through email, regular mail or fax, as set forth above.

The hearing officer does not work a typical 9 a.m. to 5 p.m. schedule. Therefore, do not be surprised if you receive email communications from the assigned hearing officer at night or on weekends. Check your mail or email regularly to see if you have received any communications from the hearing officer or the school's attorney.

## **B. Decorum at the Hearing**

The hearing officers' Generally Applicable Pre-Hearing Directions address decorum (See [Appendix I](#) at #12), or how everyone is expected to act at the hearing. The directions state:

Parties, attorneys, participants and observers at the due process hearing are advised that hearing officers will prohibit the reading of newspapers, magazines, books, and the like, or conducting work unrelated to the hearing, in the hearing room while the hearing is in session. Mobile phones may not be used by any individual in the hearing room while the hearing is in session. Hearing officers may limit or prohibit the use of laptops and other electronic devices that are distracting to the hearing process. However, hearing officers will not limit the use of a laptop or other electronic device when such technology is necessary for the accommodation of a disability. Hearing officers will address attendees, as necessary, regarding decorum during the hearing.



**C. Reduction of Unnecessary/Redundant Evidence**

The hearing officers' Generally Applicable Pre-Hearing Directions address the reduction of unnecessary and redundant evidence (See [Appendix I](#) at #11). The Directions say:

The timely resolution of due process hearings is not only contemplated by the law, but in practical terms is best for the student, family, and educators. Therefore, every attempt will be made to conclude hearings within two full days. It is the intent of the hearing officers that hearings will extend no longer than four full days.

A hearing officer, in his or her discretion or at the request of a party, may hold a pre-hearing conference in advance of the first session of a hearing.

Regardless of whether or not a pre-hearing conference is held, in the parties' opening statements on the record, the parties will state the issue(s) to be determined by the hearing officer. After the opening statements, the hearing officer will re-state the issues precisely on the record, seeking confirmation from the parties of issue(s) to be determined in the hearing. The hearing officer's re-statement of the issues on the record will govern the scope of the hearing and the evidence to be presented.

**D. Notifying the Hearing Officer of Settlement**

The Generally Applicable Pre-Hearing Directions address [settlement](#) (See [Appendix I](#) at #7). If your case settles at any time after a hearing officer is assigned, the hearing officer needs to be notified immediately. If you are the one who requested the hearing, you should notify the hearing officer.





## **Step 6:** **Understand Timelines and the Decision Due Date**

There are specific timelines for holding the due process hearing and the hearing officer's decision.

The Pennsylvania regulations require that a due process hearing be held within 30 days of the request for the hearing, and a hearing officer decision must be issued within 45 days of the request for the hearing.

In the initial letter from ODR, you will be given the decision due date based upon this simple calculation. The [decision due date](#) is the date the hearing officer will distribute his or her decision, and the due process case will be closed.





## Step 7: Disclose Your Evidence and Witnesses to the School



**This step is critically important and has timelines that you must follow.**

There are three types of [evidence](#) that are usually presented to the hearing officer at a due process hearing:

1. Your testimony;
2. The testimony of the witnesses for you and for the school, including any experts; and
3. Documents (referred to as “exhibits” at the hearing)

You must let the school know who your witnesses are, and what documents you plan on using, prior to the hearing taking place. The school is required to give this same information to you.

You must disclose all witnesses and all exhibits to the other party 5 calendar days before the hearing begins.

You do not need to use a particular form. A letter is fine. See [Appendix N](#) for a sample [5-day disclosure letter](#).

You may mail it, deliver it, or even fax it, but you should use a method that will enable you to prove that you disclosed your witnesses and exhibits in a timely manner. This is typically referred to as the “5-day disclosure”.







See [Appendix O](#) for a sample disclosure letter.

Both you and the school must abide by the disclosure rules. If either of you do not, the other side can ask the hearing officer to prevent those witnesses from testifying and prevent the party from using the exhibits. If this happens to you, it might prevent you from proving your case to the hearing officer. Do not take the chance of having the hearing officer say that you cannot present all of your witnesses and evidence because you did not follow the disclosure rules. Give this information to the school attorney in the timeframe required. Be able to prove that you provided the information within the timeline, just in case there is a question.

To decide what to list in your disclosure document, consider what you are attempting to prove to the hearing officer. What witnesses will help to prove your case? What exhibits will help to prove your case?

Your witnesses should meet all of these requirements:

- They have information about your child and the situation which is concerning you;
- They can give relevant information about the concern;
- Their testimony will assist the hearing officer in making a decision.

Do not call witnesses who will be testifying to the same facts; choose the witness you believe will be the most effective. If you present a long list of witnesses, the



hearing officer may ask you to tell him or her what you expect each witness to testify about. This is called giving “an offer of proof”. The hearing officer may prohibit you from presenting witnesses he or she believes may be redundant.

You have the right to have your child attend the hearing and testify. This does not happen frequently. However, you know best whether it is a good idea to have your child participate in this way. If you decide that your child has relevant information to provide, make sure you list him or her on your disclosure.

If you want your child to testify, but not be present for the entire hearing, make sure you discuss this in advance with the hearing officer and the school attorney. Arrangements can be made to have your child testify at a certain time and not have to stay for the entire hearing.

The school can object to any witness you list (just like you can object to any witness the school lists on its disclosure). The hearing officer will ultimately decide whether a particular witness can testify or not. Here are some circumstances that may cause the school to object:

*Example:* Your neighbor may be able to give testimony about your child’s abilities at home, but if the issue is your child’s needs and abilities at school, then it is not likely that your neighbor can provide relevant testimony. The school could object on the basis of “relevance”, and the hearing officer might prevent you from having your neighbor testify.

*Example:* Your neighbor’s child received a particular enrichment program and it worked well for that child. You are interested in the same enrichment program. The law requires individualized education plans. This means that what worked for one child is not necessarily what is needed for another child. Your neighbor’s testimony is probably not appropriate.



You will also need to determine what documents (exhibits) you intend to use at the hearing. Many of your exhibits will be the documents you gathered as you were determining whether you had a case or not (See Page 12).





## Step 8: Request Subpoenas (if necessary)

You have listed your witnesses in your 5-day disclosure letter to the school. It is your responsibility to notify your witnesses of the date and time of the hearing. The hearing officer may set specific hearing sessions for particular witnesses, based upon schedules and availability.

As soon as you have a hearing date, notify your witnesses of the date, time, and location of the hearing. If there are scheduling problems, notify the hearing officer immediately.

A **subpoena** is a legal order by the hearing officer telling a person that they must attend the due process hearing. (A subpoena may also be used to force someone to turn over documents.)

Usually the witnesses are known to the parties and will testify willingly. If you have listed a witness on your 5-day disclosure, but you learn that they will not voluntarily attend the hearing, you can ask the hearing officer to issue a subpoena. This takes some time, so make sure you request a subpoena well in advance of the hearing date.

In your letter to the hearing officer asking for a subpoena, you should provide the following information:

- The name of the person you wish to subpoena;
- Why it is important to your case that this person attend and testify;
- It is also helpful to provide your efforts to get the person to attend the hearing without the need for a subpoena.

Send a copy of this letter to the school's attorney.



Follow the same general process if you need a subpoena to get records for the hearing that have not been provided. Send a letter to the hearing officer asking for a subpoena, and include this information:

- The document(s) you are trying to get;
- Why it is important to your case to have this document(s);
- It is also helpful to provide your efforts to get the document(s) without the need for a subpoena.

Send a copy of this letter to the school's attorney.

The hearing officer will determine if the presence of the witness or document is necessary or not.

You will be responsible for delivering the subpoena to the individual. The hearing officer will not send the subpoena directly to the individual. It will be sent to you.

If you are having trouble getting copies of your child's educational records from the school, you do not have to request a subpoena. Contact the school's attorney and the hearing officer and explain the difficulties you are having in getting your child's records.





## Step 9: Marking Exhibits

Now that you have decided what exhibits to use at the hearing, this is a good time for you to organize your exhibits and mark (identify) them in preparation for the hearing. The hearing officers have strict rules about the way that exhibits are to be marked. This is standard procedure for legal proceedings.

The information below explains exactly how to mark exhibits as required by the hearing officers' Generally Applicable Pre-Hearing Directions ([Appendix I](#) at #3.).

1. Start by putting the exhibits in the order that makes sense to you. If your first witness will be addressing the GIEP, for example, then it might make sense to make the GIEP your first exhibit. There are no right or wrong ways to order your exhibits. The order of exhibits depends on what makes sense to you and is comfortable for you.
2. Now that you have organized your exhibits, it is time to mark them. All of your exhibits must be marked P for Parent. (The school will usually mark its exhibits S for School).
3. On **every page of every exhibit**, the page should include the exhibit number and the page number as part of the overall number of pages in the exhibit.
  - For example, Parents' first exhibit, with four pages, would be numbered P-1 page 1 of 4; P-1 page 2 of 4; P-1 page 3 of 4; and P-1 page 4 of 4, with each page marked separately and completely.
  - Exhibit numbers and page numbers should be in the lower right corner. So that exhibit numbers and page numbers are not cut off when being copied, they must be a minimum of ½ inch from the bottom of the page and ½ inch from the right side of the page.



- When exhibits are in landscape form (GIEPs sometimes are), the exhibits should be oriented so that, when placed in portrait format, the type faces away from the left side of the page. In effect, text on an exhibit in landscape form would be read from the bottom of the page to the top, when the page is held in portrait format.



See [Appendix P](#) for examples of marked exhibits.



## Step 10: Copying Exhibits

Now that you have marked your exhibits, you need to make copies of them. You are required to have four complete sets of your exhibits at the hearing.

The four copies will be used as follows:

1. One copy of exhibits will be for you.
2. One copy of exhibits will be given to the hearing officer at the first hearing session.
3. One copy of exhibits will be given to the school's attorney at or before the first hearing session.
4. One copy of exhibits will be available for a witness to refer to while testifying.

Here are the rules for copying exhibits (from the hearing officers' Generally Applicable Pre-Hearing Directions).

1. The copy of your exhibits for the hearing officer must be one-sided.
2. The copy of your exhibits for the school's attorney and any witness may be either one-sided or two-sided.

Your exhibits will be distributed as follows:

1. You may provide a copy of your exhibits to the school's attorney either prior to the first hearing or at the first hearing. The school's attorney will do the same.





2. You will provide a copy of your exhibits to the hearing officer at the first hearing.

If a document is in a binder but is not used in the hearing, the hearing officer will most likely not consider it accepted into the record and will most likely not use it in making his or her decision. If you want an exhibit to be considered, you should be sure to use it or reference it in the course of the hearing.





## Step 11: Organizing Your Exhibits for the Hearing

It is recommended that you put your four sets of (marked) exhibits into four individual binders (notebooks), and tab each exhibit so that you can find it easily. The first page of the binder will list all of the exhibits with their associated tab number. It is very common for all participants at a due process hearing to be nervous, and you will likely be nervous as well. This organizational system has been found to be the best way to manage the many (often multi-page) exhibits that are commonly used at a hearing.



See [Appendix Q](#) for an example of a cover sheet for the exhibit notebook.





## Step 12: Determine Joint Exhibits

Once you have exchanged exhibit lists with the school, it is likely that you will see that the school attorney intends to use some or all of the same exhibits that you do. GIEPs, NORAs, gifted [multidisciplinary evaluation](#) reports, report cards, etc. are frequently listed by both parents and schools as hearing exhibits. Eliminating duplicative exhibits creates a much clearer and more concise hearing record.

The Generally Applicable Pre-Hearing Directions address the issue of [joint exhibits](#):

Prior to the hearing, the parent and the school attorney must designate one copy of the following documents to serve as the exhibit of record:

### Exhibits of record:

- Permissions to Evaluate/Reevaluate
- Expert Reports
- Invitations to any meetings
- Gifted IEPs
- [NORAs](#)

These “exhibits of record” may be marked as an exhibit of *either* the parent, **or** the school **or** they can be marked as a joint exhibit. Regardless of how you and the school choose to mark these exhibits, there should be only one copy used at the hearing. The school attorney will work through this process with you.



*Example:* In your 5-day disclosure, you indicate that the September 2011 GIEP will be an exhibit. When you marked your exhibits (Step 9), you marked this GIEP P-1. In its 5-day disclosure, the school attorney indicated that the September 2011 IEP would be an exhibit, and marked it S-1. At the hearing, there will only be one copy of the September 2011 IEP used. You and the school attorney will decide whether it is marked with a P for parent, an S for school, or a J for joint, but, regardless, only one copy will be used.

The hearing officers encourage you and the school to talk about any other exhibits which are listed on both of the 5-day disclosure lists and choose one copy to use at the hearing. But the hearing officers may *require* the parties to designate one copy of the exhibits of record.



**These directions are intended to apply to duplicates of the same document. If you and/or the school attorney believe that there is a material (significant) difference in any of the exhibits of record that is important for the hearing officer to know about, then you and the school may use your own (duplicative) copy of the exhibit at the hearing.**



### **Step 13:** **Objecting to the School's Witnesses or Exhibits**

The school's 5-day disclosure document will list the witnesses it intends to present at the hearing, and the exhibits it intends to use. Review this information carefully. Determine whether you have any objections to the witnesses and exhibits listed. (If the school objects to any of your witnesses or exhibits, be prepared to explain to the hearing officer why you believe that those witnesses and exhibits are properly included in your 5-day disclosure.)

Remember that the school attorney is likely very experienced in special education due process hearings, and will know what witnesses and exhibits are properly listed on the 5-day disclosure. In other words, it is the exception rather than the norm that a parent will object to the school's 5-day disclosure, and the hearing officer will agree with the parent, and forbid the witness to testify or prevent an exhibit from being used at the hearing. However, there is the possibility that you have a legitimate objection to either, so review the school's 5-day disclosures carefully.

A witness or a document is not considered to be objectionable simply because you disagree with what you believe the witness will say at the hearing, or are in disagreement with what is listed on the exhibit. If you agreed with the school's witnesses and exhibits, you would not be going to a due process hearing.

While it is impossible to list all of the possible reasons the school might object, here are some possibilities:

- The witness you have listed is not an appropriate person to testify at the hearing.



*Example:* You have listed the Superintendent of your child's school or School Board members as witnesses for the due process hearing. While there may be a rare instance where the Superintendent or Board member truly is needed to establish a fact at the hearing, most often it is the principal, Director of Special Education, the teachers or other school personnel who have direct knowledge of your child and therefore are appropriate witnesses at the hearing.

- You have listed multiple witnesses to establish the same point.

*Example:* If one teacher can establish an important fact at the hearing, it is not necessary to present the testimony of five other teachers to say the exact same thing. Remember that it is not the quantity (number) of witnesses and exhibits, but the quality of the witness' testimony and exhibits that is important.

- You have listed as your exhibits every GIEP your child has ever had.

*Example:* Before the due process hearing begins, the hearing officer will very carefully and deliberately identify the issues to be addressed at the hearing. If your child's 5<sup>th</sup> grade GIEP is at issue at the hearing, it is probably irrelevant what your child's GIEP in 2<sup>nd</sup> grade said. This is not a hard and fast rule; every case is different and you may be able to establish the relevance of the earlier GIEP. But be prepared to explain to the hearing officer why this document is truly relevant to the issues.

See Part Four on Objections. It will give you much more information on objections.

If you believe that you have a legitimate objection to the school's exhibit(s) or witness(es), you can do one of two things:

1. You can send a letter to the hearing officer, with a copy to the school attorney, explaining, in very precise terms, why you believe the school should be prohibited from presenting a certain witness, or using a certain exhibit. The hearing officer may respond in several different ways:



- The hearing officer may respond to your letter, ruling on your objection (telling you whether or not he or she agrees with you);
  - The hearing officer may ask the school attorney to respond to your objection(s) before the hearing officer rules;
  - The hearing officer may decide to handle your objection(s) in a conference call;
  - The hearing officer may decide to handle your objection(s) at the first hearing.
2. Your other option is to make a note for yourself so that at the hearing you can raise your concerns (objections) at that time, and ask the hearing officer to make a decision.





## Checking In...

So far, the following things have occurred:

- ✓ A complaint was filed by either you or the school.
- ✓ Whoever did not file the complaint, may have filed an Answer to the complaint.
- ✓ You and the school have exchanged your 5-day disclosure lists.
- ✓ You have marked and copied the four copies of your exhibits.
- ✓ You have talked with the school attorney about joint exhibits.
- ✓ You have gathered your four copies of your exhibits and considered putting them in individual binders.
- ✓ You have reviewed the school's 5-day disclosure lists to see if you have any objections to its witnesses and/or exhibits.
- ✓ You and the school's attorney have either exchanged copies of your exhibits, or will do so at the first hearing.

Now it is time for you to do your final hearing preparation. Everyone prepares for a hearing differently, and in different order, but here is a checklist of commonly done activities to prepare.







## Step 14: Prepare for Hearing

### **Opening Statement**

At the first hearing session, you will be asked by the hearing officer to give an Opening Statement.

An opening statement is not evidence. The hearing officer will not decide the case based upon what you do or do not say in your opening statement. But the opening statement helps the hearing officer determine exactly what the issues are (the things you and the school disagree about). The opening statement also gives the hearing officer an overview of your case. You can explain the basic facts of the situation, and what you would like the hearing officer to do.

Remember, up to this point, all the hearing officer knows about your case is what you put in the complaint, and what the school has put in its Answer. The opening statement is your opportunity to explain in your own words what the case is all about.

Be aware that the hearing officer expects the side that asked for the hearing to state exactly what the issues in the hearing are. The hearing officer will only listen to testimony and consider documents that are related to the issues identified in the opening statements.



**If an issue is not raised in the opening statement it will not be addressed in the hearing officer's decision, with some very rare exceptions.**

After you finish giving your opening statement, the school attorney will give his or her opening statement. Listen carefully, as it will give you a good idea of where the school intends to challenge your views about your child's educational program.

After both sides have given their opening statements, the hearing officer will typically state the issues precisely on the record. The hearing officer will ask each side if he or she has correctly summarized the issues and will work with the parties until the issues are complete and clear. If there is something that is not included in the final hearing officer summary of the issues, it will not be addressed in the hearing and it will not be included in the hearing officer's decision.

As you begin to prepare for the upcoming hearing, you might want to start by writing out your opening statement to organize your thinking. Other people prefer to write out the opening statement after all hearing preparation is completed. There is no set time to write the opening statement. Whatever works best for you is fine. However, you should write out your opening statement before the hearing and you should probably read it at the hearing. Typically, an opening statement is about 5 minutes long.

Here are some tips when planning your opening statement:

- State the facts as you believe them to be.
- Be clear.
- Be assertive, yet positive. Now is not the time to be argumentative.
- Do not overstate your case.



- Explain the theory of your case (what you believe the situation is, and what you believe the situation should be).
- End by explaining the remedy or outcome you seek.

(Mauet, 1980)

### **Example Format for Opening Statements**

Here is one format you may want to follow. You are not required to use it, but this gives you an idea of how to structure your opening statement:

- Introduction:

“Hearing Officer *[Name]*: My name is Beth Jones, and I am the parent of Connor Jones, a 5<sup>th</sup> grade student in [school district].”

- Short description of the relevant facts about your child and why you requested due process:

“I requested a due process hearing because I have concerns about my son’s gifted program. Connor has been identified as gifted in math. He has been doing very well in school until this year.....”

- Explain what you believe has occurred.
- Explain what you believe the evidence will show:

“The November 2012 GIEP indicates that..... “

- What you are seeking:

“What I am asking you to do is to.....”

“Thank you.”



### **Order of Witnesses at Hearing**

Look at your list of witnesses in your 5-day disclosure letter. You will need to decide in what order you want to present your case.

- What makes logical sense?
- What witness should testify first?
- Are there any scheduling problems with any witness? If so, you may have to go out of order. This means that you present a witness at a different time than you would have preferred. This usually does not harm your case in any way.
- What do you want each witness to establish?
- Are there certain exhibits that you want a witness to testify about? Include that in your notes so that you do not forget.

### **Your Testimony at Hearing**

You may want to be a witness at the hearing. Normally witnesses have to be asked questions, which they answer. Because you do not have your own attorney to ask you questions, you are permitted to give a statement instead. You will be sworn in by the court reporter, like every other witness, asked to swear or affirm that you will tell the truth. You will then be given the opportunity to testify. You will then be asked questions by the school's attorney and maybe by the hearing officer.

You may write out your testimony and refer to it, or even read it, if that makes you more comfortable.

### **Preparing Questions for Witnesses**

Witnesses (other than you; see Page 68) cannot simply make a series of statements. Instead, the attorney or the parent must ask questions of that



witness. The way you prepare for witness questioning will depend on you and your style and preferences. You may want to write out specific questions to be asked of each witness. You may want to write out a list of topics you would like to address with each witness, rather than the actual questions. But regardless of how you choose to do it, you should spend time figuring out what you want to ask all of the witnesses (both yours and the school's) at the hearing.

Remember, the questions you ask your witnesses and the answers you expect to get from them are intended to prove your case, that is, what you believe to be the facts. Keep this in mind when writing out questions, but know that you can never know with 100% certainty what any witness will say.

### **Guidelines for Questioning Witnesses**

There are rules about questioning witnesses. A due process hearing is an administrative proceeding, rather than a court proceeding, so the hearing officer is not obligated to follow the strict rules that apply in a court proceeding. However, it is important that you be familiar with some of these rules because the hearing officer will expect both you and the school's attorney to follow them in some manner.

One of the fundamental rules to remember is that you cannot testify for your witnesses. You present or call a witness at the hearing because you believe that this witness will testify to important facts that the hearing officer needs to hear. You do not call your witness and then essentially give them the answers you are looking for in your question, or suggest the answers in your questions. This is called [leading the witness](#).

So when you are questioning your own witnesses, referred to as [direct examination](#), you will usually not be allowed to ask leading questions, which are questions that suggest or contain their answer.

Here is an example of a leading question, which is inappropriate:

*Parent:* "So my child did not receive any math enrichment activities during the months of January through March, three times a week like his GIEP required, right?"



*School District Counsel:* "Objection. [Parent's Name] is leading the witness."

Instead, questioning should proceed this way:

*Parent (non-leading question):* "How often did my child receive math enrichment activities during the months of January through March?"

[witness answers]

"How often did the GIEP say my child was to receive math enrichment activities during that time frame? "

[witness answers]

"What effect, if any, did this reduction in math enrichment have on my child's ability to make progress on his GIEP goal?"

[witness answers]

It is very easy to ask leading questions; even experienced attorneys may do so at times. It might be helpful to start your questions to your witnesses with words like who, what, where, when, why, how, to reduce the possibility of asking leading questions.

You may not ask leading questions of your own witnesses. But you *may* ask leading questions of the school's witnesses. Questioning the school's witnesses occurs during [cross examination](#).

The classic way to conduct cross examination is to start with

*"Isn't it true that...."*



Or

*“Would you agree with me that...”*

When you are deciding what questions you want to ask witnesses, keep straight in your mind that you should not ask leading questions of your witnesses, but you can ask leading questions of the school’s witnesses. If it is not clear whether a witness is considered to be a parent witness or a school witness, talk to the hearing officer about it.

### **Facts versus Opinion**

Normally, a witness may only testify as to facts within his or her knowledge, and not their opinion. An exception is for an [expert witness](#), who may testify as to their opinions; however, you must prove that your witness is an expert by asking a few questions that show him or her to be knowledgeable in the area they will be testifying about. The expert is usually a professional in the area on which the testimony is sought. Examples would be a psychologist, therapist or other professional who works with your child. The school may also present its experts to testify at the hearing.

To qualify a witness as an expert, the usual questions ask about the person’s educational background, degrees, and work experience. Their answers demonstrate that they are knowledgeable about the subject they are being asked to testify about, such as psychological testing, physical therapy, etc.

Here is an example of questions that are asked of experts:

*Parent:* “Dr. Smith, will you please describe your educational background?”

[witness answers]

“Please describe your work experience.”

[witness answers]



If the expert has published books or papers on the topic, or has done anything else of importance, you can ask him or her about that. You will get ideas for questions by reviewing the expert's resume.

You conclude your questioning with, "I offer Dr. Smith as an expert in the field of [specialty area]".

Note: You may not be required to qualify your expert. If the expert is already known to the school attorney and hearing officer, you may not be required to go through this process. Sometimes the parties can stipulate, or agree, to an expert's qualifications.

Always have a current copy of your expert's resume to submit to the hearing officer (with a copy for the school attorney).

If you are presenting an expert who requires a fee to attend the hearing, you will be responsible for that fee. Talk with your expert as early as possible to determine what he or she will charge to attend a hearing. If you have an outside report or evaluation completed by a doctor or other professional, it is usually best to have them there to testify about the report. However, because the cost can be substantial, you will have to make a determination whether to have the expert appear at the hearing, ask the hearing officer to allow him or her to testify by telephone (which may save some money), or submit the expert report only into the record. See Pages 107-109 for information on using expert reports at the hearing.

Before you write out your questions, read Part Four about objections. Understanding common objections will increase the likelihood that your questions are "not objectionable". Then, return to this section, and begin preparing questions or areas of inquiry for each witness.

## **Final Hearing Preparation**

Double-check the date, time, and location of the hearing.





Confirm with your witnesses that they know the date, time, and location of the hearing.

Make sure your witnesses will be available all day for the hearing. If they are not, work out the time they will be available with the hearing officer and the school attorney so the hearing will run smoothly and your witness will be able to testify.

Let your witness know what to expect. Explain to them that they will be under oath and will need to answer questions truthfully. Make them aware that the district will be allowed to ask them questions when you are done questioning them. Let them know that the hearing officer may ask them questions too.

If it is important to you, confirm in advance arrangements for beverages/water during the hearing, the arrangements for lunch or dinner depending on the hearing time, and anything of a special nature you or anyone attending on your behalf may require.

Pack items that will make you more comfortable (coffee, water, snacks for breaks, lunch). Either bring your lunch or have cash available for lunch. There may not be refrigeration available for your lunch, so take that into consideration.

Arrange for time off from work.

Arrange for child care or transportation, if needed.

There is no dress code for hearings, but because it is a legal proceeding, it is not recommended that you dress too casually (shorts, flip flops, etc.).



A mock due process hearing is available on the ODR website. It might be helpful to watch the video before your hearing.

<http://odr-pa.org/odr-training-videos/>





## Step 15: Miscellaneous Information: Requesting that a Hearing be Rescheduled

When a hearing officer is assigned a case, he or she will schedule the hearing.

There will be times when you simply cannot attend a scheduled hearing. Realize that there are no particular facts that will always result in a hearing being rescheduled. Instead, the hearing officer has to consider each individual case. The only person with the authority to decide, the hearing officer, must balance numerous and frequently competing factors.

There are a number of common reasons that a parent may ask that a hearing be rescheduled. Whether the hearing officer agrees to reschedule the hearing or not should not be interpreted as reflecting on the strength or weakness of your case, or a hearing officer's preference for one party over another.

Keep in mind that every case is different, and the hearing officer has many factors to consider when deciding whether a hearing should be rescheduled, including the required timelines for holding the hearing and issuing the decision.

The hearing officers have rules about requesting that a hearing be rescheduled, set forth in the Generally Applicable Pre-Hearing Directions. (See [Appendix I](#) at #2.) When requesting that a hearing be rescheduled, you will need to follow this procedure:

1. Check with the school attorney to see if he or she objects to the hearing being rescheduled.
2. Immediately notify the hearing officer of the need for a hearing to be rescheduled as soon as that need becomes known to the party.
3. State the **exact reason** for the request.



4. Let the hearing officer know whether the school is in agreement with your request that the hearing be rescheduled.

Examples of reasons for requesting a rescheduled hearing may include:

1. “My boss won’t let me off work that day.”

To the extent possible, try to clear your upcoming absence with your employer as soon as possible.

2. “I am currently seeking counsel.”

If you are trying to find an attorney, let the hearing officer know that this is why a rescheduled hearing is being requested. Do not delay your efforts to locate an attorney, because at some point the hearing officer will insist that the hearing proceed even if you cannot find an attorney.

3. “I can’t get childcare on that date.”

Try to anticipate and make arrangements for childcare prior to the date of the hearing.

4. “I have a special child or family event to attend on the date of the hearing.”

If you know of scheduled special events at the beginning of the hearing process, notify the hearing officer of your unavailability on that particular day. The hearing officer may allow for this depending on the event and status of the hearing.

5. “I have an evaluation pending and the results will not be in before the hearing date.”

When this is the situation, the hearing officer may respond in one of two ways:

- Reschedule the hearing to allow the evaluation to be completed;



Or

- Direct the party who requested due process to withdraw the request, and re-file the complaint when the evaluation is complete and they are prepared to go to a hearing.

It is more likely that the hearing officer will grant the request to have a hearing rescheduled when the evaluation is already underway and will be completed very soon, as long as the timelines can still be followed

6. “I have another matter in court the same date and time.”

Give the hearing officer as much information as possible regarding the other matter. The hearing officer may request proof of this scheduling conflict (such as a hearing notice or court order). Remember, the due process hearing is a legal proceeding as well, and usually just as important as any other legal matter.

7. “I will be away on vacation during this time.”

If you know of scheduled vacations at the beginning of the hearing process, notify the hearing officer of the dates of your vacation as soon as possible. It is best to alert the hearing officer to pre-planned vacations as soon as you are given the assigned hearing officer’s name.

8. “I am having trouble obtaining school records and need more time.”

If you are having trouble getting your child’s educational records, you should make a request to the school in writing for those records and copy the hearing officer. The hearing officer may allow the hearing date to be rescheduled and order the school to provide access to the records.

9. “My witnesses are not available on the day of the hearing.”

When this is the situation, the hearing officer may respond in several different ways:



- The hearing officer may reschedule the hearing to a time when your witnesses are available.
- The hearing officer may permit telephone testimony at the hearing instead of having your witness actually attend the hearing.
- The hearing officer may direct that a deposition of your witness take place instead of having your witness actually attend the hearing. Although this is an exception in due process hearings, at deposition witnesses may testify before a court reporter and representatives from both sides, with the transcript then submitted to the hearing officer. (See Step 16)
- It may also be possible in the case of an expert witness to submit his or her expert report into the record, rather than having the expert testify in person at the hearing. See Page 107.

10. “I had a sudden emergency (illness, accident, etc.).”

Contact the hearing officer and the school as soon as possible after an emergency occurs so that everyone is notified in a timely way that you cannot attend the hearing.

11. “The school and I are trying to resolve (settle) the case, but we need a little more time to talk.”

If you and the school are trying to resolve the case without going to a hearing, but need a little more time in which to talk, alert the hearing officer to this. The hearing officer may be willing to grant a short delay of the proceedings to allow time to see if agreement can be reached and the hearing request withdrawn.

12. “I didn’t receive notice of the hearing until right before it was scheduled to occur.”

If you received notice shortly before the date of the hearing and do not have sufficient time to prepare, you should let the hearing officer know



and request that the hearing be rescheduled. It is rare, however, that parties receive late notice of a hearing, and even if they do, preparation for the hearing should have begun before the complaint was filed, or as soon as the other party's complaint is received.

### **Basics About Rescheduled Hearings**

The following should be remembered about rescheduled hearings:

- It is more likely, but not guaranteed, that the hearing officer will grant a joint request (both you and the school want the hearing to be rescheduled).
- Either party has the right to object to the other side's request for a rescheduled hearing. If you think the hearing officer should not grant the school district's request for a rescheduled hearing, an email message or letter should be sent to the hearing officer without delay (with a copy sent to the school), explaining why you feel that way.
- Remember, hearing officers are the only people who can decide whether a case should be rescheduled or not. Things that a hearing officer might consider include:
  - The timelines for completing the hearing and issuing the decision;
  - Whether or not the hearing has already been rescheduled;
  - The amount of available time you have had to find an attorney to represent you;
  - The amount of time either you or the school has had to prepare for the hearing;
  - Your child's status. If your child is without an educational placement, for example, the hearing officer will likely be reluctant to postpone the proceedings except for the most compelling reasons.



A due process hearing is more like a court proceeding than a personal appointment. Because the daily schedules of the numerous individuals required to be there will almost always be in conflict, only very critical reasons are good cause for rescheduling requests. This applies to requests that you make for rescheduling, as well as requests the school makes for rescheduling. If the rescheduling request is denied, it is important that you still attend the hearing, and do your best to present the case for the program or services you believe your child needs. If you fail to attend the hearing, it may proceed without you and decisions made without your input.





## **Step 16:** **Miscellaneous Information:** **Depositions**

A **deposition** is the process of taking a witness' testimony outside the scheduled hearing process. A deposition is used when it is impossible for the witness to attend the hearing. Taking a deposition follows much of the same procedures as a hearing: a court reporter is present; the witness swears or affirms to tell the truth; all discussion is taken down by the court reporter, etc. The major difference, of course, is that the hearing officer is not present. If objections are raised, they are noted on the record for the hearing officer to rule on at a later date. The transcript of the deposition is submitted to the hearing officer as evidence. Depositions are not frequently used in due process hearings, but they are a possible solution to scheduling problems. If you believe that you may need to take a deposition, let the hearing officer know as soon as possible.







## Checking In...

You have now done the following items to get ready for the hearing:

- ✓ Prepared for the hearing by planning:
  - Your opening statement
  - The order of your witnesses
  - Your testimony
  - The questions for the witnesses
- ✓ Reviewed the due process hearing videos on ODR's website to get a better idea of what might happen during the hearing. <http://odr-pa.org/odr-training-videos/>
- ✓ Confirmed the date, time, and location of the hearing and reviewed this information with your witnesses.
- ✓ Became familiar with the rules the hearing officer has about rescheduling hearings, in case a scheduling conflict arises. These rules are found in the Pre-Hearing Directions on ODR's website.
- ✓ Talked to the hearing officer to see if a deposition would be appropriate. This is only necessary if you have found out that a witness is not able to attend the hearing.
- ✓ The next section will further prepare you for the hearing by explaining objections.





## Part Four: Objections



Objections are oral or written challenges to witnesses and evidence presented by a party. Either the parent or the school may object to the other's evidence. This section lists the most common objections and provides a brief explanation of each.



A due process hearing is an administrative proceeding, as opposed to a court hearing. This means that hearing officers do not have to follow the strict rules about evidence and witnesses that a judge does. Nonetheless, it is likely that the school's attorney may raise [objections](#) during the course of the hearing; this is standard procedure. You may want to raise your own objections as well. In either event, it would be helpful for you to have a general understanding about common objections made during a hearing. Both the hearing officer and the school attorney will understand that you are not an attorney and are not going to be as familiar and comfortable with objections as they are.

You will probably not agree with some of the testimony that is given. This alone does not mean you should object. Save your objections for questions and answers that truly are "objectionable". Remember that you will have the opportunity to question every witness too. If you believe that school witnesses are not taking into consideration an important fact, for example, you can point that out during your cross examination.

## **Relevance**

The questions asked of witnesses, and the exhibits used at the hearing, must be relevant to the issues addressed at the hearing. In other words, the documents and witnesses must assist the hearing officer in deciding the case.

*Example:* The issues at the hearing pertain to your child's math enrichment in 5<sup>th</sup> grade. Questions about your child's math class in 2<sup>nd</sup> grade are probably not relevant to the issues of the hearing. The school attorney may object to those questions on the basis of relevance.

When thinking about the questions to ask of witnesses, ask yourself whether a particular question or series of questions helps to establish what you are trying to prove to the hearing officer.



### **Repetitive (asked and answered)**

If a witness is asked, and answers, the same question repeatedly, this can be the basis for an objection.

*Example:* If a witness is asked the same question repeatedly, you may hear this objection from school counsel: “Objection. Asked and answered. This witness has already stated several times that....[whatever the witness answer is]....These questions are repetitive.”

Remember that the hearing officer is listening to the testimony at the hearing, and will review the transcript before writing a decision. Repeating testimony is not going to increase the odds of one party winning. If the witness has clearly stated his or her answer, it is not necessary to have them repeat it over again.

### **Hearsay**

**Hearsay** statements are:

- Statements made by a person at some point other than at the hearing;
- Presented at the hearing to prove the truth of the statement made.

The problem with hearsay statements is that the person is not present at the hearing to question them on what they did or did not say.

*Example:* Mrs. Jones has relevant information for the hearing. Mrs. Jones is not at the hearing. You ask the witness, “What did Mrs. Jones say about...?” You may hear this statement from school counsel: “Objection. The question calls for a hearsay answer.”

There are numerous exceptions to the hearsay rule. However, there are three important things to remember regarding hearsay:



1. A due process hearing officer does not have to follow the hearsay rule exactly, as a court does. Your hearing officer *may* allow some hearsay evidence.
2. A hearing officer cannot base his or her decision solely on hearsay evidence.
3. If the statement made by a person at some point other than at the hearing is crucially important, you should present that person as a witness at the hearing.

### **Calls for an Opinion**

As indicated on Pages 106-108, only experts can testify as to their opinions. Non-expert witnesses can only testify about facts, even though they may have an opinion about the issues in the due process case.

*Example:* Your neighbor testifies at the hearing. You ask her this question: “Do you think the lack of enrichment activities impacted my child’s education?”

You may hear this objection from school counsel: “Objection. That question calls for an expert opinion. This witness is not qualified to give that information.” The hearing officer will likely agree.

Because experts can render opinions, you have more latitude when you are questioning your expert.

Make sure you are asking your non-expert witnesses questions about the facts of your child’s situation. Do not ask non-expert witnesses their opinions about your child’s situation.



To organize your evidence, list your expert witnesses separate from your non-expert witnesses in your hearing preparation materials and make sure that the questions you are asking your non-expert witnesses do not call for an opinion.

### **Misstates Evidence\Misquotes Witnesses**

This objection is exactly what it sounds like. The question to the witness misstates the evidence that has been presented in some way.

*Example:* School district witness testifies that it is too early to determine whether a particular science enrichment program is appropriate for your child. In your question to the school district person, you say “You have testified that the science program does not challenge my child, right?” You may hear this objection from school counsel: “Objection. This question misrepresents what the witness said in her testimony.”

### **Confusing/Misleading/Ambiguous/Vague/Unintelligible**

It is a skill to ask appropriate questions at a hearing. This is why there are law schools to teach these skills! For your purposes, know that questions must be asked in a reasonably clear and straightforward manner. The point is not to trick a witness with a poorly-worded question. The point is to ask questions that will get from each witness information for the hearing officer to consider.

The same thing applies for the answers witnesses give. If a witness gives an answer that is difficult to understand, an objection may be raised. The witness will be asked to clarify his or her statement.

*Example:* “I didn’t hear (or understand) the last part of the witness’ answer. Can she please repeat it?”



### **Speculative Questions**

Any question that asks the witness to guess about something may be considered improper.

*Example:* Questions like this are generally considered to be calling for a guess:

“So what do you think would have happened if...”

“Isn’t it possible that...”

Try to ask questions that will allow witnesses to talk about what actually happened, not guess about what could have happened.

### **Compound Questions**

A compound question is one that brings up two separate facts within a single question. The problem with compound questions is that they can lead to confusing answers. The witness may have a “yes” answer to the first part of the question, but a “no” answer to the second, for example.

*Example:* This is a compound question: “Did you provide math enrichment activities on Monday and then there was no enrichment on Wednesday?” Instead, you would ask:

“Did you provide math enrichment on Monday?”

[witness answers]

“Was there math enrichment on Wednesday?”

Break out compound questions into two questions, and allow the witness to answer the first question before you ask the second.



### **Question is Argumentative**

Your question should not be an argument to the hearing officer. To figure out if your question is argumentative, ask yourself these questions:

- Will the witness' answer to my question bring forth new information?

Or

- Am I stating a conclusion in my question and asking the witness to debate it with me?

*Example:* You may believe that because your child was not given certain acceleration options that he or she did not receive meaningful educational benefit. You need to prove with facts and perhaps expert opinion that this is, in fact, the case. Simply asking a witness whether or not they agree with your position is not likely to add much to the hearing. The following question may draw an objection from the school attorney:

"Since my child didn't receive program X, then she did not receive meaningful educational benefit, and is entitled to compensatory education, correct?"

"Objection; question is argumentative."

An objection may also be raised if the questioner literally starts arguing with the witness. This can happen when the questioner disagrees with the witness' answer. Remember that you are not going to agree with everything every witness says. You can point out problems you see in a witnesses' testimony, and introduce your own evidence (exhibits, witnesses) which demonstrate your position, but you cannot argue with a witness with whom you disagree.

*Example:* "How can you say that my child missing enrichment sessions is ok?"

You may hear this objection from school counsel: "Objection. Ms. Smith is arguing with the witness" or simply "Objection. Argumentative."





### **Answer is Unresponsive**

Make sure the witness answers the question! Witnesses do not always answer the exact question that has been asked. This is why you have to listen carefully to each answer before you ask your next question. If the witness does not answer the question, an objection may be raised:

*Example:* Question: “How often did the student receive enrichment activities?”

Answer: “The student got all the enrichment that was needed.”

You may hear this objection from school counsel: “Objection. The witness didn’t answer the question.”

Make sure that your witnesses answer the questions they are asked. Listen to the answer that is given and *then* turn to your next question. Do not be so concerned about asking the next question that you fail to realize that the witness did not answer your previous question.

### **Questioning is Cumulative**

The hearing officer will not allow multiple witnesses to testify to the exact same thing. Therefore, if one witness can establish a fact, the hearing officer may not allow you to present five other witnesses to say the exact same thing. Remember it is not the *quantity* of evidence that decides a case, it is the quality of evidence.

*Example:* You may hear the school attorney say this: “I object to this evidence. It’s already been covered by the previous witnesses.”



When putting together your list of witnesses and exhibits to disclose to the school, consider whether you can establish the same facts with one witness or exhibit, rather than through multiple witnesses and exhibits. Remember, it is the quality of the evidence submitted to the hearing officer, not the quantity of evidence that is important.

### **Lack of Foundation**

“Laying a foundation” for a witness to testify or for an exhibit to be used at the hearing means putting it in context. In other words, why does the witness or exhibit matter to the hearing?

*Example:* You have listed your neighbor on your 5-day disclosure. It may not be apparent to the school why your neighbor is relevant to a due process hearing and your child’s educational program. The school attorney may ask that a foundation be laid to establish why your neighbor has relevant information. The school attorney may instead ask for an “offer of proof”. An offer of proof explains to the hearing officer why the particular witness or exhibit is important to the issues.

Exhibits must have the necessary foundation established before they are entered into evidence. So, for example, you can’t just hand to the hearing officer a paper with writing on it and say that you want it to be an exhibit. You must first establish who prepared the document, when, and what it pertains to.





## Checking In...

- ✓ See the tips for witnesses in the appendix of this Guide. Share this information with the witnesses you have selected.
- ✓ Watch the Mock Due Process hearing on the ODR website.
- ✓ Make a list of questions you would like to ask each witness to take with you to the hearing. This will help you to organize your thoughts and make sure you don't miss or forget anything on the day of the hearing.
- ✓ List any evidence you would like to review with a witness or submit during the time a witness is questioned next to the witness' name on your list.
- ✓ You can't object to a document or a witness' testimony simply because you disagree with it. (You establish your disagreement by producing other evidence (witnesses and documents) which supports your viewpoint, as well as through cross examination of the witness.)
- ✓ You can object to a document becoming an exhibit, or a witness testifying at hearing, if you believe that there is a basis for it or them to be excluded. You must be prepared to explain why you believe this.
- ✓ Most often, objections are raised to the questions being asked of the witnesses by either the parent or the school attorney or to the answer of the witness. But remember, just because a witness gives an answer that you don't like, that doesn't make it worthy of an objection.

More often, objections are raised at the actual hearing, in response to questions being asked of witnesses by the other side **or** objections are raised to the answers of the witness.



Regardless of whether an objection is written or oral, made before the hearing or at the hearing, you must be prepared to outline the legal and/or factual basis for your objection.





## Part Five: Motions



Motions are written or oral requests to the hearing officer asking that certain actions occur. This section discusses the most common types of motions, and the procedures to follow.



## **General Information on Motions**

**Motions** may be filed by either party.

A copy of a written motion must be provided to the other side at the same time it is sent to or otherwise provided to the hearing officer.

Motions may be directed to the hearing officer at any time during the process.

The hearing officer will decide (or rule on) the motion.

Not all motions are written; some motions are oral. The complexity of the subject matter of the motion usually determines whether it makes more sense to put the motion in writing, or to present it to the hearing officer orally. Personal preference can also determine whether the motion is written or oral. If the motion addresses complicated legal issues, a written motion is probably a good idea to be certain that all of the points you want to make are listed. If the motion is fairly straightforward, then an oral motion may be more appropriate. Also, an unexpected issue may arise at the hearing, so that it is impossible to know that a motion needs to be prepared. There are two possible solutions:

1. An oral motion is made at the hearing; or
2. Depending on whether this works time-wise and the hearing officer allows it, a request can be made to be given time to prepare a written motion. This is usually only necessary when the issues are complex.

There are no hard and fast rules about whether a motion should be in writing or presented orally.

## **Types of Motions**

**Motion to Limit Issues:** The hearing officer will hear evidence on two types of issues:

1. The issues the hearing officer identifies at the beginning of the hearing after listening to the opening statements;



2. The issues which are within the hearing officer's jurisdiction.

If either you or the school attempts to address issues other than these two, a motion to limit issues might be made. (Or, instead, an objection may be raised; see Part Four on Objections.)

*Example:* At the first hearing, it is agreed that the only issue will be your child's math program. If you ask questions about your child's reading program, which has no connection to the math program issue, the school attorney may ask the hearing officer to prevent you from doing that.

*Example:* The complaint raises child custody issues. Hearing officers do not decide custody issues. A motion may be filed by the school to ensure that this issue is not part of the case.

When preparing your complaint, make sure that 1) the issues you raise can be decided by the hearing officer; and 2) that you raise all of your issues at that time, to be certain that they will be heard together.

**Motion for Reconsideration:** A motion for reconsideration is exactly what it sounds like. The hearing officer has ruled on (made a decision on) a motion during the hearing. One of the parties, usually the one who filed the motion, disagrees with the hearing officer's decision and asks that he or she reconsider the decision. A motion for reconsideration should only be filed if you believe that the hearing officer missed a critical fact or point of law. A motion for reconsideration should not be filed simply because you disagree with the hearing officer's decision on the motion. However, motions for reconsideration of final hearing officer decisions at the conclusion of the case will not be considered.

**Motion to Dismiss:** There are many reasons why a motion to dismiss the complaint might be filed.



1. Lack of Jurisdiction (authority). If the only issue in the complaint is about something the hearing officer cannot decide, the school will likely file a motion to dismiss.
2. Res Judicata. This Latin term means that the issue has already been decided in a previous due process hearing. This means that due process hearings cannot be requested over and over again to address the exact same issue.
3. Recusal. A Motion for Recusal is a request to a hearing officer that he or she step down from hearing the case. A Motion for Recusal should be filed in only the most serious of cases, when you believe the evidence is clear that the hearing officer cannot serve in an impartial way. The regulations list those instances where the hearing officer would be required to remove him or herself from a case. If any one of these circumstances exists, the hearing officer must relinquish the case back to ODR for assignment.

The Pennsylvania Standards of Conduct for ODR Special Education Hearing Officers, available on the ODR website, describes the circumstances when a hearing officer must recuse himself or herself, and the procedures that will be followed.

The requirements for an impartial hearing officer are:

- He or she must not be an employee of the school district or educational agency that is involved in the education or care of the child; and
- He or she cannot have a personal or professional interest that conflicts with the hearing officer's objectivity in the hearing.







See Chapter 16 ([Appendix E](#)) to read the Pennsylvania regulations that govern due process hearings, including the requirements for a hearing officer.

The hearing officer decides all motions for recusal. If you or the school disagree with the hearing officer's decision, you need to appeal this issue to state or federal court. No one, other than a state or federal judge, can overturn a hearing officer's decision on a request for recusal.

4. Precluding Testimony. A motion may be filed to preclude (or prevent) testimony in these circumstances:
  - The testimony is irrelevant (has nothing to do with the issues at the hearing);
  - The testimony is repetitive (already testified to);
  - The testimony is not permitted or allowed (for example, testimony about settlement discussions or mediation is not typically allowed);
  - The witness was not properly disclosed on the 5-day disclosure document.

Sometimes objections will work just as effectively as a motion. So, for example, if a party tries to present three witnesses who will say the same thing, either an objection can be raised (see Part Four on Objections) or a motion can be made orally, or prepared in writing. Consider the following when deciding whether an objection is enough, or whether you want to make a formal motion:

- Is the issue so straightforward that an objection will probably be sufficient to alert the hearing officer to your concern?



- Is the issue complicated so that a written motion is needed to explain all of the complexities?
- Is the issue so critical to your case that it makes sense to prepare a formal motion, rather than simply raise an objection?



See [Appendix R](#) for an example of a sample motion.





## Checking In...

- ✓ Motions are sometimes needed during the course of a due process hearing.
- ✓ Motions can be filed by either party. They may be directed to the hearing officer at any time during the process.
- ✓ Motions can be written or oral. The complexity of the subject matter of the motion usually determines whether a motion should be in writing or presented to the hearing officer orally.
- ✓ There are different types of motions including:
  - motions to limit issues
  - motions for reconsideration
  - motions to dismiss
- ✓ Sometimes an objection will work just as effectively as a motion. Consider the complexity and critical nature of the issue when determining if you should use a motion or an objection.





## Part Six: The Due Process Hearing



You probably have many questions about a due process hearing, from where to sit, how to address the hearing officer, to when you will receive the hearing officer's decision. This section of the Guide provides detailed information about the many aspects of a due process hearing.



## **Location of Hearing**

The hearing is almost always held somewhere within the school district. The law requires that the hearing be at a location that is “reasonably convenient” for the parent, which is most often the school.

The hearing usually takes place in a conference room. Before the hearing begins, the hearing officer will have the room set up the way he or she wants it to be. The hearing officer will tell you and your witnesses where to sit.

Usually the hearing officer sits at one end of a table with the court reporter on one side and the “witness seat” on the other. This is to make sure that both the hearing officer and the court reporter, who is taking down all the testimony, can hear the witness. Usually the parents and witnesses sit on one side of the table together, and the school attorney and school staff sit on the other side of the table together.

Depending on how many witnesses there are, the witnesses may have to be in chairs along the walls, back from the table where you will be sitting. Keep in mind, however, the type of building, room, and furniture available, as well as individual hearing officer preference, may slightly or significantly change how the room is set up.

Those present at the hearing usually include the parties, attorneys, advocates, witnesses such as teachers or psychologists as well as others, occasional observers from ODR (for purposes of hearing officer evaluation or in-service training), and representatives of public agencies beyond your school district that may be involved. As a courtesy, you will be notified ahead of time if an ODR staff person will be attending.

- On the day of the hearing make sure you have all your exhibits with you as well as the notice of hearing (which lists all participants’ names, numbers and the location address and phone number), as well as any of your own notes and proposed questions for witnesses.
- Check all messages before you leave for the hearing to make sure nothing has been cancelled or delayed.



- In case of bad weather, contact the location of the hearing (if the hearing officer has not given you other instructions) to make sure it has not been postponed.
- If you will be unavoidably late or unable to attend due to a last minute emergency the day of the hearing, contact the hearing officer immediately by whatever means he or she may have provided and someone at the location of the hearing (usually the school).
- A hearing session may be a few hours or last the entire day. The parties usually have an idea of hearing length in advance, but be prepared for the event. Feel free to bring coffee or another beverage to the hearing, and pack snacks for during breaks.

### **Addressing the Hearing Officer**

Many of the hearing officers have name cards that they place on the table. You can assume that the name on the card is how the hearing officer would like to be addressed, such as “Dr. Jones” or “Hearing Officer Jones”. If there is no name card or you aren’t sure how to address the hearing officer, and/or school district counsel, ask at the beginning of the hearing how that should be done.

Due to large volume of cases and the relatively small number of hearing officers, it is entirely possible and likely that the hearing officer will already know one or more attorneys involved in the case. This does not mean the hearing officer is in violation of legal standards for impartiality. If you have concerns, however, you may ask the hearing officer about it.

### **Length of Hearings**

Part Three, Step 6 of this Guide addresses the timelines for completing a hearing. The hearing officer may address the length of time a hearing should last based upon the timelines and the evidence to be presented.

Timely resolution of due process hearings is not only required by the law, but in practical terms is best for the student, family, and educators.



### **Pre-Hearing Conferences**

Prior to the first hearing, the hearing officer may hold a [pre-hearing conference](#) by telephone with you and the school attorney. The purpose of the call is often times to clarify the issues. (See [Appendix I](#) at #11).

### **Hearing Officer's Opening Statement**

The hearing will begin with the hearing officer's opening statement. The hearing officer will introduce him or herself, identify the parties, and state the general purpose of the hearing. The hearing officer will make sure you understand your right to be represented by counsel. He or she will also explain the difference between an open (to the public) hearing and a closed (confidential) hearing, making sure you understand the difference. He or she will advise you that it will be closed unless you want it to be open. The hearing officer will also advise you of your right to a free transcript, and the different formats for transcripts. The hearing officer will make sure the parties exchanged witness and exhibit lists.

Sometimes before the hearing begins, the hearing officer will ask the parties whether they want informal time to discuss possible settlement. This is simply an effort to be sure that the parties have had all the pre-hearing opportunities they wanted to explore settlement. Consider taking this final opportunity to talk to the school about resolving the case, but do not feel compelled to do so, or to settle.

### **Opening Statements of Parties**

Once the hearing officer has completed those initial aspects, each party will be asked for an opening statement, and it is likely that you give yours first (because the parent is usually the one asking for a due process hearing). This is usually a 5 minute or less statement of the specific issues to be resolved at the hearing as well as how you want the hearing officer to rule, and is similar to what is contained in the Complaint. You can bring a prepared statement and read from



it, if you choose. After the opening statements, the hearing officer will typically restate the issues precisely on the record, seeking confirmation from the parties of the issue(s). Thereafter, the hearing will address only those issues that have been identified, and the parties agreed to. (See [Appendix I](#) at #11)

### **Order of Witnesses and Progression of Testimony**

Typically, the party who requested the due process hearing will be the first to present its evidence. (See [Appendix I](#) at #8) So, if you requested the hearing by filing the complaint, be prepared to start with an opening statement, and then call your first witness to the stand. You can discuss with the hearing officer and school district counsel prior to the start of the hearing about the order of witnesses. Sometimes both you and the school will have filed a complaint to handle multiple issues. If that occurs, contact the hearing officer (copy to school attorney), asking how the presentation of evidence will occur, that is, whether you will be expected to go first, or if the school will.

### **Questioning Witnesses**

Questions that a party is asking of its own witnesses is referred to as direct examination or simply direct. Questions that a party is asking of the other side's witnesses is referred to as cross examination or simply cross. Thereafter, you may see questioning going back and forth (**Re-direct** and **re-cross**). [Re-direct examination](#) consists of questions about information provided by the witness during cross examination. [Re-cross examination](#) consists of questions about information provided by the witness during re-direct examination.

The purpose of re-direct and re-cross examinations are not to repeat what has already been addressed by the witness' testimony. Instead, re-direct and re-cross are limited to the information provided by the witness during cross examination (in the case of re-direct) and limited to the information provided by the witness during re-direct examination (in the case of re-cross).





*Example:* Here is how the presentation of a witness' testimony may proceed:

- You call your witness. You ask him or her a series of questions, referred to as direct examination.
- When you are through questioning your witness, the school's attorney is given the opportunity to cross examine this witness.
- When the school's attorney is through asking questions of your witness, you are given the opportunity to ask questions on re-direct examination based upon information the witness provided during cross examination.
- When you are through asking questions of your witness, the school's attorney may be given the opportunity to ask questions on re-cross examination based upon the information the witness provided in response to your questions on re-direct examination.

When all of this has concluded, the hearing officer may also ask questions. The hearing officer may also interrupt direct or cross- examination to ask questions.

### **Beyond the Scope of (Direct, Cross, Re-direct, or Re-cross)**

Under strict rules of evidence, cross examination is supposed to be limited to facts and information addressed during direct examination. Likewise, re-direct examination (which follows cross examination) is supposed to be limited to facts and information addressed during cross examination. Otherwise, the same information is being covered again and again. It can be challenging for even the most experienced attorneys to keep track of what was covered on direct examination, as opposed to cross examination, for example. And there is often a disagreement as to whether a question is **beyond the scope of** what was covered in the prior questioning. Hearing officers are not required to follow strict rules of evidence, so you do not need to get too bogged down in this, but understand generally that the same types of questions cannot be asked of a witness over and over again.



When the hearing is proceeding, the hearing officer must have only one person speaking at a time. Otherwise, not only will it be difficult for the hearing officer to follow the case, but the court reporter will not be able to record the proceedings if there is more than one person speaking at a time.

This is more difficult than it seems! Do not be offended if the hearing officer tells you several times to wait until someone else has finished speaking before you begin. It is a very common for the hearing officer to have to remind people of this.

### **Notes and Other Memory Refreshers**

Witnesses often times want to have notes in front of them when they testify to ensure that they remember everything they want to say. A witness may use notes or other items to refresh his or her memory for the purpose of testifying. This is acceptable, but be aware that the other side (and the hearing officer) is entitled to see the notes that the witness uses.

1. If a witness uses notes or other items to refresh his or her memory the opposing party may:
  - Request to review the notes or other items;
  - Cross examine the witness on the notes or other items;
  - Introduce the notes or other items as an exhibit.
2. If a witness refuses to produce the notes or other items, the other party may request that all the testimony based on those notes or other items be stricken from the record.



### **Offers of Proof** (See also Part Four: Objections)

Prior to and throughout the presentation of your case, the school attorney may ask for an “offer of proof”. This means that the school attorney is not clear why you are presenting a witness or exhibit, or why you are asking particular questions of a witness. The request for an offer of proof alerts you to the fact that the attorney has a potential objection to that witness or exhibit or line of questioning. Explain to the hearing officer why you are proceeding the way you are. Likewise, an offer of proof may be asked for when a particular line of questioning seems objectionable to the other side.

Example: “I would like an offer of proof for this line of questioning. The qualifications of the teacher are not an issue in this case; the frequency of the enrichment activities is the issue.”

You can also ask the hearing officer for an offer of proof from school counsel if you have concerns or objections to their witnesses or exhibits. Example: “I would like an offer of proof for this witness. I don’t see how this witness can add anything new to what has already been covered thus far.”

(Mauet, 1980)

### **Expert Reports**

By the time you get to the hearing, you will have decided how you will be presenting your expert’s testimony, if you have one:

1. Submit the expert’s report into evidence as an exhibit;
2. Have the expert attend the hearing and present testimony;
3. Have the expert testify by telephone at the hearing.



The Generally Applicable Pre-Hearing Directions cover expert reports as evidence (See [Appendix I](#) at #10). The rules about [expert reports](#) were made specifically for the purpose of making hearings more efficient.

If your expert will not be attending the hearing, the Directions say this:

*Where the Author Does Not Testify.* Any evaluation report, re-evaluation report, independent report, or other report, shall be offered as an exhibit. The report shall speak for itself. Each hearing officer will give the report the weight the hearing officer determines to be appropriate in the exercise of his or her sole discretion.

If your expert is not attending the hearing, you will submit his or her expert report to the hearing officer as an exhibit by referencing it in your testimony. This is the most cost effective way to handle expert testimony.

On the other hand, this prevents the hearing officer from hearing directly from the witness. It prevents the school district from challenging the expert's opinion through cross examination. It prevents the hearing officer from asking questions of the expert. Because of these limitations, the Generally Applicable Pre-Hearing Directions at #8 say: "Each hearing officer will give the report the weight the hearing officer determines to be appropriate in the exercise of his or her sole discretion".

If your expert will be attending the hearing or testifying by telephone, the Directions says this:

*Where the Author Testifies.* Any evaluation report, re-evaluation report, independent report, or other report that is offered as an exhibit shall speak for itself, and shall serve as direct testimony of its author as to the *substantive contents of the report*. A hearing officer may permit, however, direct examination of the author on matters that, while not repeating the substantive contents of the report, are important to establishing its evidentiary weight and/or relevance, or to fostering understanding of the report. Upon admission of the report and direct examination of the author, the opposing party may commence cross examination of the author. Re-direct examination will be permitted.



Many times, during direct examination of an expert, the expert will just read what he or she has written in the report. Since the expert is not adding anything beyond what is already in the report, it does not make sense to take this time to have him or her do so, when the hearing officer can read the expert report on their own. In other words, “the document speaks for itself”. It is not acceptable to have an expert essentially read his or her report into the record.

Other times, however, the expert may need to explain certain portions of his or her report. In other words, the expert’s testimony is going to go beyond simply reading what he or she has written in the report. This is acceptable.

So, your expert’s testimony will be handled in one of two ways:

1. Your expert has nothing to add beyond what is already written down in his or her report. The report itself will serve as the expert’s direct examination testimony. The school’s attorney will be permitted to cross examine the expert. You will then have the opportunity to ask questions on re-direct examination. (See Pages 103-105 for information on direct/cross/re-direct examination). You will then tell the hearing officer that you want the expert report to be an exhibit.

OR

2. There are areas of the report that your expert would like to explain or elaborate on. You will ask questions of your expert about these areas only. Therefore, the expert’s direct testimony will consist of what is written in the report; and what he or she testifies to in response to your questioning. The school’s attorney will be permitted to cross examine the expert. You will then have the opportunity to ask questions on re-direct examination. (See Pages 103-105 for information on direct/cross/re-direct examination). You will then tell the hearing officer that you want the expert report to be an exhibit.



### **Taking Breaks at the Hearing**

The hearing officer will determine when breaks will occur and how often. If you need to take a break from the proceedings, for whatever reason, let the hearing officer know that you need to do so. Your request, if reasonable, will likely be granted. The hearing officer will also address prior to the hearing or before the hearing begins how meal time breaks will be handled. Lunch breaks are handled differently by each school and you may choose to participate, or not, in each instance:

- Some schools will order lunch for all due process participants, with no charge to participants.
- Some schools will pass around a menu, take orders, and collect money.
- Some schools will make their cafeterias available to the participants, with each participant paying for his or her lunch.
- The hearing officer may allow the participants to leave school grounds, and get lunch at any surrounding restaurants. This tends to take the most time, which cuts into valuable hearing time, so it is not the preference of some hearing officers.
- Regardless of any of the above, you may choose to bring your own lunch, if that is your preference. Do not count on having access to a refrigerator to store your lunch until lunchtime.

### **Closing Arguments**

When all the evidence has been introduced, the hearing officer will ask for a closing statement from each party. Your closing should summarize the issues, the evidence presented, and the remedy you seek. At the hearing officer's discretion, it may be done verbally, in which event you may read from a pre-written paper; or you may be permitted to hand the hearing officer that paper; or the hearing officer may ask that the parties submit written closing statements by a specific date.



## **The Decision Due Date**

At the final hearing, the hearing officer will typically confirm for the parties when the decision due date is. This is the date by which the hearing officer will have written and distributed to the parties his or her decision. See Page 46 on Decision Due Dates for more information.

## **The Decision**

You will know at the beginning of the case when the decision due date will be. At the final hearing, the decision due date will again be addressed so that you know the (latest) date upon which you will receive the hearing officer's decision.

## **Appeals**

If you are dissatisfied with the hearing officer's decision, and believe that legal errors have been made, you may [appeal](#) it to Pennsylvania Commonwealth Court. The hearing officer will give you appeal procedures with the decision. Although sometimes a court clerk may be able or willing to provide you some assistance on how to file documents, there are complexities to doing this that make it preferable that you have an attorney do so on your behalf. At a minimum, you are encouraged to consult with any of the advocacy groups listed in the Appendix to assist you.

## **Final Comments**

This Guide contains a lot of legal information, none of which should be taken as formal legal advice for your individual situation as ODR is not permitted to provide same. The hearing officer will understand that you are not an attorney, and, therefore, will not be as familiar with legal proceedings as is the school attorney. Throughout the course of the hearing, you may ask questions of the hearing officer regarding procedures. However, understand that the hearing officer is legally required to remain impartial throughout the course of the proceedings. He or she cannot assist you in the presentation of your case, as an attorney (or advocate) would. His or her assistance will be limited to explaining the procedures that will be followed during the hearing. Hearing officers cannot give legal advice to a party on how to present their case.





## Checking In...

- ✓ On the day of the hearing, make sure you have all of your exhibits, the notice of hearing, your own notes, and anything you might need during the day (beverages, snacks, etc.)
- ✓ Check your messages before leaving for the hearing to make sure nothing has been delayed or cancelled.
- ✓ Be prepared to give an opening statement that addresses the specific issues to be resolved and how you would like the hearing officer to rule.
- ✓ When questioning a witness, understand how the presentation of a witness' testimony usually proceeds. This includes direct examination, cross examination, re-direct examination, and usually re-cross examination.
- ✓ The school attorney may ask you for an offer of proof. If this happens, you will need to explain to the hearing officer why you are proceeding the way you are. You can also ask for an offer of proof if you have concerns about the opposing party's witnesses or exhibits.
- ✓ Determine how your expert's testimony will be presented.
- ✓ Have your closing arguments prepared so that you can provide them to the hearing officer in the manner he or she chooses.
- ✓ If you are dissatisfied with the hearing officer's decision, and believe that legal errors have been made, you may appeal the decision in court.







## **Conclusion**

Clearly, proceeding to a due process hearing is not a decision to be taken lightly. Indeed, there are several avenues that can be pursued before that option. Nevertheless, if you decide that a due process hearing is the only alternative, this Guide supplemented by other resources provided in the Appendices should provide you with a good foundation for proceeding pro se.



## References

Mauet, T. (1980) *Fundamentals of Trial Techniques*. Boston, MS: Little, Brown & Company



## Glossary

**5-day disclosure letter**: a required letter from both parties (parent and school) listing witnesses and exhibits to be presented at a due process hearing

**Advocate**: a person who is knowledgeable about the gifted education and/or the special education process and requirements and can help a parent seek a specific service or program

**Appeal**: filing papers with state or federal court within a specified time frame, explaining why the hearing officer's decision is legally incorrect and asking that it be changed

**Appeals Panel**: No longer in existence, the Appeals Panel decided appeals of hearing officer decisions prior to the case being appealed to state or federal court. See "appeal"

**Beyond the scope of**: a legal term that means the parent or school attorney has gone beyond the subject area to be addressed

**Chapter 16**: the section of Pennsylvania's education law which applies to students who are gifted

**Chapter 711**: the section of Pennsylvania's education law that provides special education regulations in compliance with Federal education law, and specifically pertains to students with disabilities who are enrolled in charter, cyber charter, or regional charter schools.

**Compensatory education**: additional or supplemental educational services provided to a student who did not receive a free appropriate education to make up for the loss of not receiving meaningful educational benefit.



**ConsultLine**: (800-879-2301) the toll-free helpline provided by the Pennsylvania Department of Education's Bureau of Special Education to assist parents of children with disabilities who have questions concerning their children's special education programs

**Cross examination**: questions that a party asks of the other side's witnesses

**Decision due date**: the date by which the hearing officer will have written and distributed his or her decision to the parties

**Deposition**: the process of taking a witness' testimony outside the scheduled hearing process, used on the very rare occasion when there is no other way to get the witness' testimony

**Direct examination**: questions that a party asks of its own witnesses

**Due process complaint**: the written request for a due process hearing

**Due process hearing**: a legal proceeding similar to a court proceeding wherein a hearing officer is presented with evidence by disagreeing parties and writes a decision

**Educational records**: records that directly relate to a student and that are maintained by an educational agency or institution or by a party acting for the agency or institution

**Evaluation**: a series of tests and observations performed by a multidisciplinary team to find out if a child is in need of gifted educational programming

**Evidence**: exhibits and witnesses used at the due process hearing to support the party's case and your case

**Exhibits**: the documents used as evidence to support your case during the due process hearing

**Expert reports**: a report written by an expert that includes the expert's opinion and is used as evidence in the due process hearing



**Expert witness**: a person with specialized knowledge about a subject who testifies about his or her opinion about a matter

**Generally Applicable Pre-Hearing Directions**: a document prepared by the hearing officers which explains their generally accepted procedures to follow at a hearing

**GIEP Facilitation**: a dispute resolution process offered by the Office for Dispute Resolution where a trained impartial facilitator attends a GIEP meeting to assist the GIEP team

**GIEP Team**: the group of individuals, including the parents of the child, who develop the IEP

**Gifted Individualized Education Plan (GIEP)**: a written statement of a gifted child's current level of educational performance and of the child's individualized plan of instruction

**Hearing officer**: a trained and impartial individual who conducts a due process hearing

**Hearing officer decision**: the document a hearing officer writes after the hearing is completed outlining the case and the hearing officer's legal conclusion

**Hearsay**: statements made by a person at some point other than at the hearing and presented at the hearing to prove the truth of the statement made

**Individualized Education Program (IEP)**: a written statement of a child's current level of educational performance and of the child's individualized plan of instruction

**Independent Educational Evaluation (IEE)**: an evaluation conducted by a qualified examiner who is not employed by the school

**Joint exhibits**: documents that both parties intend to use in the hearing



**Jurisdiction**: the authority of the hearing officer to hear and make a decision about an issue

**Leading the witness**: asking a question in such a way that it suggests the answer to the witness

**Mediation**: voluntary process where an impartial mediator facilitates problem-solving discussions between parent and school personnel

**Motions**: written or oral requests to the hearing officer asking that certain actions occur

**Multidisciplinary Evaluation**: a series of tests and observations performed by a multidisciplinary team to make a recommendation about whether or not a student is gifted or needs gifted education

**Notice of Hearing**: a document from the Office for Dispute Resolution listing the time and date of the hearing

**Notice of Parental Rights for Gifted Students**: Notice describing rights of parents in Chapter 16 (gifted education) and procedures that safeguard those rights

**Notice of Recommended Educational Assignment (NORA)**: a document that summarizes for the parents the recommendations of the school for the child's educational program or assignment and other actions taken by the school

**Objections**: oral or written challenges to evidence and witnesses presented by a party

**Offer of proof**: explanation to a hearing officer as to why a party should be permitted to present a witness, use an exhibit, ask certain questions, etc.

**Opening statement**: the opportunity at the beginning of a due process hearing for each party to provide a brief summary of the case and explain exactly what issues the hearing officer is being asked to decide



**Party/Parties**: the generic name given to the parent and school district involved in a due process hearing

**Pennsylvania Code**: a publication of Pennsylvania that organizes all the rules and regulations from the state government; regulations about education are found under Title 22

**Pennsylvania Training & Technical Assistance Network (PaTTAN)**: an initiative of the Bureau of Special Education (BSE), Pennsylvania Department of Education (PDE), PaTTAN works in partnership with families and local education agencies, to support programs and services to improve student learning and achievement

**Pre-hearing conference**: a telephone conference between the hearing officer and both parties to address any issues that need to be handled prior to a hearing

**Pro se parent**: a Latin term that means the parent is not represented by an attorney

**Re-cross examination**: questions about information provided by the witness during re-direct examination

**Re-direct examination**: questions about information provided by the witness during cross examination

**Reevaluation**: a series of tests and observations performed by a multidisciplinary team to find out if a child continues to be gifted or need gifted educational programming

**Regulations**: interpretation of the state or federal statute which provides more specific information about how the statute is to be followed

**Settlement**: private agreement between the parent and school which resolves the dispute between them

**Special Education Director**: a general term for a special education administrator who oversees school district special education programs



**Statute of limitations**: the period of time a party has to file for a due process hearing

**Stenographer**: also referred to as a “court reporter”, this person records (types) everything that is said on the record at a hearing

**Subpoena**: a legal order by a hearing officer directing a person to attend a due process hearing or provide records

**Twice Exceptional Student**: a student who has been identified as having special education issues under Chapter 14 and is also gifted

**Transcript**: the document prepared by the stenographer (court reporter) of everything that is said on the record at a due process hearing

**Witnesses**: those people who testify at the due process hearing (including parent)





## **Appendix A: PaTTAN “Considerations Worksheet”**

### **IDENTIFICATION**

Describe your concerns regarding the identification determined through the evaluation process.

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What are your concerns with the evaluation/reevaluation process?

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If there is information or interpretations within the evaluation report that you disagree with, clarify what that is and what your interpretation is.

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Does the evaluation clarify how the student is performing in relation to the regular education curriculum and regular education setting?

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**PLACEMENT**

What are your concerns regarding the suggested location of services?

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What are your concerns regarding the type of services suggested or offered through the IEP or Evaluation Report? What is the alternative you are recommending?

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What are your concerns regarding the type of supports suggested or offered through the IEP or Evaluation Report? What is the alternative you are recommending?

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**SERVICES**

Is there agreement on the services that are offered, the frequency at which they are offered and the duration for which they are offered? If not, what alternative are you suggesting? Clarify why you feel your alternative is more appropriate.

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Do you feel the services meet the student's needs as determined through the assessment data collected? What do you feel needs changed and what are you basing that on?

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Describe your concerns with the personnel involved in providing the services.

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**PROCEDURAL**

Have timelines been honored throughout the process?  
Identify when they may not have been.

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Did the appropriate people have an opportunity to participate in the process? Were parents, appropriate professionals, outside agency staff, private practitioners or others involved in the process?

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Describe your concerns with the documentation. Has it been complete, received within timelines, thorough and accurate?

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## **Appendix B: Educational ABCs**

[Educational ABCs](#)

## **Appendix C: IEP Facilitation Information**

[IEP Facilitation Brochure](#)

[IEP Facilitation Request Form](#)

## **Appendix D: Mediation Information**

[Mediation Guide](#)

[Stay-Put during the Mediation Process](#)

[FAQs regarding Pendency during Mediation](#)

[Mediation Request Form](#)



**[Appendix E](#): Chapter 16 State Regulations**

**[Chapter 16 State Regulations](#)**

**[Appendix F](#): Chapter 711 State Regulations**

**[Chapter 711 State Regulations](#)**



**Appendix G: Board of Education v. Rowley, 458 U.S. 176 (1982)**

102 S.Ct. 3034  
458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690, 5 Ed. Law Rep. 34, 1 A.D.D. 85  
(Cite as: 458 U.S. 176, 102 S.Ct. 3034)

Supreme Court of the United States  
BOARD OF EDUCATION OF the HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER  
COUNTY, et al., Petitioners

v.

Amy ROWLEY, by her parents and natural guardians, Clifford and Nancy Rowley etc.

No. 80-1002.  
Argued March 23, 1982.  
Decided June 28, 1982.

Petition for writ of certiorari was filed seeking review of a decision of the United States Court of Appeals for the Second Circuit, [632 F.2d 945](#), which affirmed a decision of the United States District Court for the Southern District of New York, Vincent L. Broderick, J., [483 F.Supp. 528](#), [483 F.Supp. 536](#), denying motion by Commissioner of Education of New York to dismiss for lack of jurisdiction and directing appellants to provide a sign-language interpreter in the classroom of appellee, an eight-year-old deaf child. The Supreme Court, Justice Rehnquist, held that: (1) Education for All Handicapped Children Act's requirement of a "free appropriate public education" is satisfied when state provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction; (2) Education for All Handicapped Children Act's requirement of a "free appropriate public education" did not require state to maximize potential of each handicapped child commensurate with opportunity provided nonhandicapped children; and (3) in light of finding that deaf child, who performed better than average child in her class and was advancing easily from grade to grade, was receiving personalized instruction and related services calculated by school administrators to meet her educational needs, Act did not require provision of a sign-language interpreter for the deaf child.

Reversed and remanded.

Justice Blackmun filed separate opinion concurring in the judgment.

Justice White filed dissenting opinion in which Justice Brennan and Justice Marshall joined.

**\*\*3035 \*176 Syllabus** [FN\\*](#)

[FN\\*](#) The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See [United States v. Detroit Lumber Co.](#), 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

The Education of the Handicapped Act (Act) provides federal money to assist state and local agencies in educating handicapped children. To qualify for federal assistance, a State must demonstrate, through a detailed plan submitted for federal approval, that it has in effect a policy that assures all handicapped children the right to a "free appropriate public education," which policy must be tailored to the unique needs of the handicapped child by means of an "individualized educational program" (IEP). The IEP must be prepared (and reviewed at least annually) by school officials with



participation by the child's parents or guardian. The Act also requires that a participating State provide specified administrative procedures by which the child's parents or guardian may challenge any change in the evaluation and education of the child. Any party aggrieved by the state administrative decisions is authorized to bring a civil action in either a state court or a federal district court. Respondents—a child with only minimal residual hearing who had been furnished by school authorities with a special hearing aid for use in the classroom and who was to receive additional instruction from tutors, and the child's parents—filed suit in Federal District Court to review New York administrative proceedings that had upheld the school administrators' denial of the parents' request that the child also be provided a qualified sign-language interpreter in all of her academic classes. Entering judgment for respondents, the District Court found that although the child performed better than the average child in her class and was advancing easily from grade to grade, she was not performing as well academically as she would without her handicap. Because of this disparity between the child's achievement and her potential, the court held that she was not receiving a “free appropriate public education,” which the court defined as “an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children.” The Court of Appeals affirmed.

**\*177** *Held:*

1. The Act's requirement of a “free appropriate public education” is satisfied **\*\*3036** when the State provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate grade levels used in the State's regular education, and must comport with the child's IEP, as formulated in accordance with the Act's requirements. If the child is being educated in regular classrooms, as here, the IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. Pp. 3041-3049.

(a) This interpretation is supported by the definitions contained in the Act, as well as by other provisions imposing procedural requirements and setting forth statutory findings and priorities for States to follow in extending educational services to handicapped children. The Act's language contains no express substantive standard prescribing the level of education to be accorded handicapped children. Pp. 3041-3042.

(b) The Act's legislative history shows that Congress sought to make public education available to handicapped children, but did not intend to impose upon the States any greater substantive educational standard than is necessary to make such access to public education meaningful. The Act's intent was more to open the door of public education to handicapped children by means of specialized educational services than to guarantee any particular substantive level of education once inside. Pp. 3042-3046.

(c) While Congress sought to provide assistance to the States in carrying out their constitutional responsibilities to provide equal protection of the laws, it did not intend to achieve strict equality of opportunity or services for handicapped and nonhandicapped children, but rather sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education. The Act does not require a State to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Pp. 3046-3048.

2. In suits brought under the Act's judicial-review provisions, a court must first determine whether the State has complied with the statutory procedures, and must then determine whether the individualized program developed through such procedures is reasonably calculated to enable the child to receive educational benefits. If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more. Pp. 3050-3052.

**\*178** (a) Although the judicial-review provisions do not limit courts to ensuring that States have complied with the Act's procedural requirements, the Act's emphasis on procedural safeguards demonstrates the legislative conviction that adequate compliance with prescribed procedures will in most cases assure much, if not all, of what Congress wished in the way of substantive content in an IEP. Pp. 3050-3051.





## Understanding Gifted Special Education Due Process Hearings

### A Guide for Parents

---

(b) The courts must be careful to avoid imposing their view of preferable educational methods upon the States. Once a court determines that the Act's requirements have been met, questions of methodology are for resolution by the States. Pp. 3051-3052.

3. Entrusting a child's education to state and local agencies does not leave the child without protection. As demonstrated by this case, parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act. P. 3052.

4. The Act does not require the provision of a sign-language interpreter here. Neither of the courts below found that there had been a failure to comply with the Act's procedures, and the findings of neither court will support a conclusion that the child's educational program failed to comply with the substantive requirements of the Act. Pp. 3052-3053.

[632 F.2d 945 \(2d Cir.\)](#), reversed and remanded.

**\*\*3037** *Raymond G. Kuntz* argued the cause for petitioners. With him on the briefs were *Robert D. Stone, Jean M. Coon, Paul E. Sherman, Jr., and Donald O. Meserve.*

*Michael A. Chatoff* argued the cause and filed a brief for respondents.

*Elliott Schulder* argued the cause for the United States as *amicus curiae* urging affirmance. On the brief were *Solicitor General Lee, Assistant Attorney General Reynolds, Walter W. Barnett, and Louise A. Lerner.*\*

\* Briefs of *amici curiae* urging affirmance were filed by *Charles S. Sims* for the American Civil Liberties Union; by *Jane Bloom Yohalem, Norman S. Rosenberg, Daniel Yohalem, and Marian Wright Edelman* for the Association for Retarded Citizens of the United States et al.; by *Ralph J. Moore, Jr., and Franklin D. Kramer* for the Maryland Advocacy Unit for the Developmentally Disabled, Inc., et al.; by *Marc Charnatz, Janet Stotland, and Joseph Blum* for the National Association of the Deaf et al; by *Minna J. Kotkin and Barry Felder* for the New York State Commission on the Quality of Care for the Mentally Disabled, Protection and Advocacy System; and by *Michael A. Rebell* for the United Cerebral Palsy Associations, Inc., et al.

*Norman H. Gross, Gwendolyn H. Gregory, Thomas A. Shannon, and August W. Steinhilber* filed a brief for the National School Boards Association et al. as *amici curiae*.

**\*179** Justice REHNQUIST delivered the opinion of the Court.

This case presents a question of statutory interpretation. Petitioners contend that the Court of Appeals and the District Court misconstrued the requirements imposed by Congress upon States which receive federal funds under the Education of the Handicapped Act. We agree and reverse the judgment of the Court of Appeals.

#### I

The Education of the Handicapped Act (Act), 84 Stat. 175, as amended, [20 U.S.C. § 1401 et seq.](#) (1976 ed. and Supp.IV), provides federal money to assist state and local agencies in educating handicapped children, and conditions such funding upon a State's compliance with extensive goals and procedures. The Act represents an ambitious federal effort to promote the education of handicapped children, and was passed in response to Congress' perception that a majority of handicapped children in the United States "were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to 'drop out.'" H.R.Rep.No. 94-332, p. 2 (1975) (H.R.Rep.). The Act's evolution and major provisions shed light on the question of statutory interpretation which is at the heart of this case.

Congress first addressed the problem of educating the handicapped in 1966 when it amended the Elementary and **\*180** Secondary Education Act of 1965 to establish a grant program "for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects ... for the education of handicapped children." Pub.L. 89-750, § 161, 80 Stat. 1204. That program was repealed in 1970 by the Education of the Handicapped Act, Pub.L. 91-230, 84 Stat.



## Understanding Gifted Special Education Due Process Hearings A Guide for Parents

---

175, Part B of which established a grant program similar in purpose to the repealed legislation. Neither the 1966 nor the 1970 legislation contained specific guidelines for state use of the grant money; both were aimed primarily at stimulating the States to develop educational resources and to train personnel for educating the handicapped.<sup>FN1</sup>

<sup>FN1</sup>. See [S.Rep.No. 94-168, p. 5 \(1975\)](#) (S.Rep.); H.R.Rep., at 2-3, U.S.Code Cong. & Admin.News 1975, p. 1425.

Dissatisfied with the progress being made under these earlier enactments, and spurred by two District Court decisions holding that handicapped children should be given access to a public education,<sup>FN2</sup> Congress in 1974 greatly increased federal funding for education of the handicapped and for the first time required recipient States to adopt “a goal of providing full educational opportunities to all handicapped children.” [Pub.L. 93-380, 88 Stat. 579](#), 583 (1974 statute). The 1974 statute was recognized as an interim measure only, adopted “in order to give the Congress an additional year in which to study what if any additional Federal assistance [was] required to enable the States to meet the needs of handicapped children.” H.R.Rep., at 4. The ensuing year of study produced the Education for All Handicapped Children Act of 1975.

<sup>FN2</sup>. Two cases, [Mills v. Board of Education of District of Columbia](#), 348 F.Supp. 866 (D.C.1972), and [Pennsylvania Assn. for Retarded Children v. Commonwealth](#), 334 F.Supp. 1257 (ED Pa.1971) and [343 F.Supp. 279 \(1972\)](#), were later identified as the most prominent of the cases contributing to Congress' enactment of the Act and the statutes which preceded it. H.R.Rep., at 3-4. Both decisions are discussed in Part III of this opinion.

In order to qualify for federal financial assistance under the Act, a State must demonstrate that it “has in effect a policy \*181 that assures all handicapped children the right to a free appropriate public education.”\*\*3038 [20 U.S.C. § 1412\(1\)](#). That policy must be reflected in a state plan submitted to and approved by the Secretary of Education,<sup>FN3</sup> § 1413, which describes in detail the goals, programs, and timetables under which the State intends to educate handicapped children within its borders. [§§ 1412, 1413](#). States receiving money under the Act must provide education to the handicapped by priority, first “to handicapped children who are not receiving an education” and second “to handicapped children ... with the most severe handicaps who are receiving an inadequate education,” [§ 1412\(3\)](#), and “to the maximum extent appropriate” must educate handicapped children “with children who are not handicapped.” [§ 1412\(5\)](#).<sup>FN4</sup> The Act broadly defines “handicapped children” to include “mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, [and] other health impaired children, [and] children with specific learning disabilities.” [§ 1401\(1\)](#).<sup>FN5</sup>

<sup>FN3</sup>. All functions of the Commissioner of Education, formerly an officer in the Department of Health, Education, and Welfare, were transferred to the Secretary of Education in 1979 when Congress passed the Department of Education Organization Act, [20 U.S.C. § 3401 et seq.](#) (1976 ed., Supp.IV). See [20 U.S.C. § 3441\(a\)\(1\)](#) (1976 ed., Supp.IV).

<sup>FN4</sup>. Despite this preference for “mainstreaming” handicapped children-educating them with nonhandicapped children-Congress recognized that regular classrooms simply would not be a suitable setting for the education of many handicapped children. The Act expressly acknowledges that “the nature or severity of the handicap [may be] such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” [§ 1412\(5\)](#). The Act thus provides for the education of some handicapped children in separate classes or institutional settings. See *ibid.*; [§ 1413\(a\)\(4\)](#).

<sup>FN5</sup>. In addition to covering a wide variety of handicapping conditions, the Act requires special educational services for children “regardless of the severity of their handicap.” [§§ 1412\(2\)\(C\), 1414\(a\)\(1\)\(A\)](#).

The “free appropriate public education” required by the Act is tailored to the unique needs of the handicapped child by means of an “individualized educational program” (IEP). \*182 [§ 1401\(18\)](#). The IEP, which is prepared at a meeting between a qualified representative of the local educational agency, the child's teacher, the child's parents or guardian, and,



## Understanding Gifted Special Education Due Process Hearings

### A Guide for Parents

---

where appropriate, the child, consists of a written document containing

“(A) a statement of the present levels of educational performance of such child, (B) a statement of annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, (D) the projected date for initiation and anticipated duration of such services, and (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.” [§ 1401\(19\)](#).

Local or regional educational agencies must review, and where appropriate revise, each child's IEP at least annually. [§ 1414\(a\)\(5\)](#). See also [§ 1413\(a\)\(11\)](#).

In addition to the state plan and the IEP already described, the Act imposes extensive procedural requirements upon States receiving federal funds under its provisions. Parents or guardians of handicapped children must be notified of any proposed change in “the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child,” and must be permitted to bring a complaint about “any matter relating to” such evaluation and education. [§§ 1415\(b\)\(1\)\(D\) and \(E\)](#). <sup>FN6</sup> \*183 \*\*3039 Complaints brought by parents or guardians must be resolved at “an impartial due process hearing,” and appeal to the state educational agency must be provided if the initial hearing is held at the local or regional level. [§§ 1415\(b\)\(2\) and \(c\)](#).<sup>FN7</sup> Thereafter, “[a]ny party aggrieved by the findings and decision” of the state administrative hearing has “the right to bring a civil action with respect to the complaint ... in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.” [§ 1415\(e\)\(2\)](#).

<sup>FN6</sup>. The requirements that parents be permitted to file complaints regarding their child's education, and be present when the child's IEP is formulated, represent only two examples of Congress' effort to maximize parental involvement in the education of each handicapped child. In addition, the Act requires that parents be permitted “to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and ... to obtain an independent educational evaluation of the child.” [§ 1415\(b\)\(1\)\(A\)](#). See also [§§ 1412\(4\), 1414\(a\)\(4\)](#). State educational policies and the state plan submitted to the Secretary of Education must be formulated in “consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents or guardians of handicapped children.” [§ 1412\(7\)](#). See also [§ 1412\(2\)\(E\)](#). Local agencies, which receive funds under the Act by applying to the state agency, must submit applications which assure that they have developed procedures for “the participation and consultation of the parents or guardian[s] of [handicapped] children” in local educational programs, [§ 1414\(a\)\(1\)\(C\)\(iii\)](#), and the application itself, along with “all pertinent documents related to such application,” must be made “available to parents, guardians, and other members of the general public.” [§ 1414\(a\)\(4\)](#).

<sup>FN7</sup>. “Any party” to a state or local administrative hearing must

“be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions.” [§ 1415\(d\)](#).

Thus, although the Act leaves to the States the primary responsibility for developing and executing educational programs for handicapped children, it imposes significant requirements to be followed in the discharge of that responsibility. Compliance is assured by provisions permitting the withholding of federal funds upon determination that a participating state or local agency has failed to satisfy the requirements of the Act, [§§ 1414\(b\)\(2\)\(A\), 1416](#), and by the provision for judicial review. At present, all States except New \*184 Mexico receive federal funds under the portions of the Act at issue today. Brief for United States as *Amicus Curiae* 2, n. 2.



#### II

This case arose in connection with the education of Amy Rowley, a deaf student at the Furnace Woods School in the Hendrick Hudson Central School District, Peekskill, N.Y. Amy has minimal residual hearing and is an excellent lipreader. During the year before she began attending Furnace Woods, a meeting between her parents and school administrators resulted in a decision to place her in a regular kindergarten class in order to determine what supplemental services would be necessary to her education. Several members of the school administration prepared for Amy's arrival by attending a course in sign-language interpretation, and a teletype machine was installed in the principal's office to facilitate communication with her parents who are also deaf. At the end of the trial period it was determined that Amy should remain in the kindergarten class, but that she should be provided with an FM hearing aid which would amplify words spoken into a wireless receiver by the teacher or fellow students during certain classroom activities. Amy successfully completed her kindergarten year.

As required by the Act, an IEP was prepared for Amy during the fall of her first-grade year. The IEP provided that Amy should be educated in a regular classroom at Furnace Woods, should continue to use the FM hearing aid, and should receive instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours each week. The Rowleys agreed with parts of the IEP, but insisted that Amy also be provided a qualified sign-language interpreter in all her academic classes in lieu of the assistance **\*\*3040** proposed in other parts of the IEP. Such an interpreter had been placed in Amy's kindergarten class for a 2-week experimental period, but the interpreter had reported that Amy did not need his services at that time. The school administrators<sup>**\*185**</sup> likewise concluded that Amy did not need such an interpreter in her first-grade classroom. They reached this conclusion after consulting the school district's Committee on the Handicapped, which had received expert evidence from Amy's parents on the importance of a sign-language interpreter, received testimony from Amy's teacher and other persons familiar with her academic and social progress, and visited a class for the deaf.

When their request for an interpreter was denied, the Rowleys demanded and received a hearing before an independent examiner. After receiving evidence from both sides, the examiner agreed with the administrators' determination that an interpreter was not necessary because "Amy was achieving educationally, academically, and socially" without such assistance. App. to Pet. for Cert. F-22. The examiner's decision was affirmed on appeal by the New York Commissioner of Education on the basis of substantial evidence in the record. *Id.*, at E-4. Pursuant to the Act's provision for judicial review, the Rowleys then brought an action in the United States District Court for the Southern District of New York, claiming that the administrators' denial of the sign-language interpreter constituted a denial of the "free appropriate public education" guaranteed by the Act.

The District Court found that Amy "is a remarkably well-adjusted child" who interacts and communicates well with her classmates and has "developed an extraordinary rapport" with her teachers. [483 F.Supp. 528, 531 \(1980\)](#). It also found that "she performs better than the average child in her class and is advancing easily from grade to grade," *id.*, at 534, but "that she understands considerably less of what goes on in class than she could if she were not deaf" and thus "is not learning as much, or performing as well academically, as she would without her handicap," *id.*, at 532. This disparity between Amy's achievement and her potential led the court to decide that she was not receiving a "free appropriate public<sup>**\*186**</sup> education," which the court defined as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children." *Id.*, at 534. According to the District Court, such a standard "requires that the potential of the handicapped child be measured and compared to his or her performance, and that the resulting differential or 'shortfall' be compared to the shortfall experienced by nonhandicapped children." *Ibid.* The District Court's definition arose from its assumption that the responsibility for "giv [ing] content to the requirement of an 'appropriate education' " had "been left entirely to the [federal] courts and the hearing officers." *Id.*, at 533. <sup>FN8</sup>

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<sup>FN8</sup>. For reasons that are not revealed in the record, the District Court concluded that "[t]he Act itself does not define 'appropriate education.' " [483 F.Supp., at 533](#). In fact, the Act expressly defines the phrase "free appropriate public education," see [§ 1401\(18\)](#), to which the District Court was referring. See [483 F.Supp., at 533](#). After overlooking the statutory definition, the District Court sought guidance not from regulations interpreting the Act, but from regulations promulgated under § 504 of the Rehabilitation Act. See [483 F.Supp., at 533](#), citing [45 CFR § 84.33\(b\)](#).



## Understanding Gifted Special Education Due Process Hearings A Guide for Parents

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A divided panel of the United States Court of Appeals for the Second Circuit affirmed. The Court of Appeals “agree[d] with the [D]istrict [C]ourt’s conclusions of law,” and held that its “findings of fact [were] not clearly erroneous.” [632 F.2d 945, 947 \(1980\)](#).

We granted certiorari to review the lower courts’ interpretation of the Act. [454 U.S. 961, 102 S.Ct. 500, 70 L.Ed.2d 376 \(1981\)](#). Such review requires us to consider two questions: What is meant by the Act’s requirement of a “free appropriate public education”? And what is the role of state and federal courts in exercising the **\*\*3041** review granted by [20 U.S.C. § 1415](#)? We consider these questions separately.<sup>[FN9](#)</sup>

<sup>[FN9](#)</sup>. The IEP which respondents challenged in the District Court was created for the 1978-1979 school year. Petitioners contend that the District Court erred in reviewing that IEP after the school year had ended and before the school administrators were able to develop another IEP for subsequent years. We disagree. Judicial review invariably takes more than nine months to complete, not to mention the time consumed during the preceding state administrative hearings. The District Court thus correctly ruled that it retained jurisdiction to grant relief because the alleged deficiencies in the IEP were capable of repetition as to the parties before it yet evading review. [483 F.Supp. 536, 538 \(1980\)](#). See *Murphy v. Hunt*, [455 U.S. 478, 482, 102 S.Ct. 1181, 1183, 71 L.Ed.2d 353 \(1982\)](#); *Weinstein v. Bradford*, [423 U.S. 147, 149, 96 S.Ct. 347, 348, 46 L.Ed.2d 350 \(1975\)](#).

### \*187 III

#### A

<sup>[\[1\]\[2\]](#)</sup> This is the first case in which this Court has been called upon to interpret any provision of the Act. As noted previously, the District Court and the Court of Appeals concluded that “[t]he Act itself does not define ‘appropriate education,’ ” [483 F.Supp., at 533](#), but leaves “to the courts and the hearing officers” the responsibility of “giv[ing] content to the requirement of an ‘appropriate education.’ ” *Ibid*. See also [632 F.2d, at 947](#). Petitioners contend that the definition of the phrase “free appropriate public education” used by the courts below overlooks the definition of that phrase actually found in the Act. Respondents agree that the Act defines “free appropriate public education,” but contend that the statutory definition is not “functional” and thus “offers judges no guidance in their consideration of controversies involving ‘the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education.’ ” Brief for Respondents 28. The United States, appearing as *amicus curiae* on behalf of respondents, states that “[a]lthough the Act includes definitions of a ‘free appropriate public education’ and other related terms, the statutory definitions do not adequately explain what is meant by ‘appropriate.’ ” Brief for United States as *Amicus Curiae* 13.

We are loath to conclude that Congress failed to offer any assistance in defining the meaning of the principal substantive phrase used in the Act. It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define “free appropriate public education”:

**\*188** “The term ‘free appropriate public education’ means *special education* and *related services* which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under [section 1414\(a\)\(5\)](#) of this title.” [§ 1401\(18\)](#) (emphasis added).

“Special education,” as referred to in this definition, means “specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.” [§ 1401\(16\)](#). “Related services” are defined as “transportation, and such developmental, corrective, and other supportive services ... as may be required to assist a handicapped child to benefit from special education.” [§ 1401\(17\)](#).<sup>[FN10](#)</sup>

<sup>[FN10](#)</sup>. Examples of “related services” identified in the Act are “speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such





medical services shall be for diagnostic and evaluation purposes only.” [§ 1401\(17\)](#).

Like many statutory definitions, this one tends toward the cryptic rather than the comprehensive, but that is scarcely a reason for abandoning the quest for legislative intent. Whether or not the definition **\*\*3042** is a “functional” one, as respondents contend it is not, it is the principal tool which Congress has given us for parsing the critical phrase of the Act. We think more must be made of it than either respondents or the United States seems willing to admit.

According to the definitions contained in the Act, a “free appropriate public education” consists of educational instruction specially designed to meet the unique needs of the handicapped\***189** child, supported by such services as are necessary to permit the child “to benefit” from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State’s educational standards, approximate the grade levels used in the State’s regular education, and comport with the child’s IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a “free appropriate public education” as defined by the Act.

Other portions of the statute also shed light upon congressional intent. Congress found that of the roughly eight million handicapped children in the United States at the time of enactment, one million were “excluded entirely from the public school system” and more than half were receiving an inappropriate education. 89 Stat. 774, note following [§ 1401](#). In addition, as mentioned in Part I, the Act requires States to extend educational services first to those children who are receiving no education and second to those children who are receiving an “inadequate education.” [§ 1412\(3\)](#). When these express statutory findings and priorities are read together with the Act’s extensive procedural requirements and its definition of “free appropriate public education,” the face of the statute evinces a congressional intent to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt *procedures* which would result in individualized consideration of and instruction for each child.

Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children. Certainly the language of the statute contains no requirement like the one imposed by the lower courts—that States maximize the potential of handicapped children “commensurate with the opportunity \***190** provided to other children.” [483 F.Supp., at 534](#). That standard was expounded by the District Court without reference to the statutory definitions or even to the legislative history of the Act. Although we find the statutory definition of “free appropriate public education” to be helpful in our interpretation of the Act, there remains the question of whether the legislative history indicates a congressional intent that such education meet some additional substantive standard. For an answer, we turn to that history. [FN11](#)

[FN11](#). The dissent, finding that “the standard of the courts below seems ... to reflect the congressional purpose” of the Act, *post*, at 3057, concludes that our answer to this question “is not a satisfactory one.” *Post*, at 3056. Presumably, the dissent also agrees with the District Court’s conclusion that “it has been left entirely to the courts and the hearing officers to give content to the requirement of an ‘appropriate [education.](#)’ ” [483 F.Supp., at 533](#). It thus seems that the dissent would give the courts *carte blanche* to impose upon the States whatever burden their various judgments indicate should be imposed. Indeed, the dissent clearly characterizes the requirement of an “appropriate education” as open-ended, noting that “if there are limits not evident from the face of the statute on what may be considered an ‘appropriate education,’ they must be found in the purpose of the statute or its legislative history.” *Post*, at 3054. Not only are we unable to find any suggestion from the face of the statute that the requirement of an “appropriate education” was to be limitless, but we also view the dissent’s approach as contrary to the fundamental proposition that Congress, when exercising its spending power, can impose no burden upon the States unless it does so unambiguously. See *infra*, at 3049, n. 26.

No one can doubt that this would have been an easier case if Congress had seen fit to provide a more comprehensive statutory definition of the phrase “free appropriate public education.” But Congress did not do so, and “our problem is to construe what Congress has written. After all, Congress expresses its purpose by



## Understanding Gifted Special Education Due Process Hearings A Guide for Parents

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words. It is for us to ascertain-neither to add nor to subtract, neither to delete nor to distort.” [62 Cases of Jam v. United States, 340 U.S. 593, 596, 71 S.Ct. 515, 518, 95 L.Ed. 566 \(1951\)](#). We would be less than faithful to our obligation to construe what Congress has written if in this case we were to disregard the statutory language and legislative history of the Act by concluding that Congress had imposed upon the States a burden of unspecified proportions and weight, to be revealed only through case-by-case adjudication in the courts.

### **\*191 \*\*3043 B**

(i)

As suggested in Part I, federal support for education of the handicapped is a fairly recent development. Before passage of the Act some States had passed laws to improve the educational services afforded handicapped children, [FN12](#) but many of these children were excluded completely from any form of public education or were left to fend for themselves in classrooms designed for education of their nonhandicapped peers. As previously noted, the House Report begins by emphasizing this exclusion and misplacement, noting that millions of handicapped children “were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to ‘drop out.’ ” H.R.Rep., at 2. See also S.Rep., at 8. One of the Act's two principal sponsors in the Senate urged its passage in similar terms:

[FN12](#). See H.R.Rep., at 10; Note, The Education of All Handicapped Children Act of 1975, 10 U.Mich.J.L.Ref. 110, 119 (1976).

“While much progress has been made in the last few years, we can take no solace in that progress until all handicapped children are, in fact, receiving an education. The most recent statistics provided by the Bureau of Education for the Handicapped estimate that ... 1.75 million handicapped children do not receive any educational services, and 2.5 million handicapped children are not receiving an appropriate education.” 121 Cong.Rec. 19486 (1975) (remarks of Sen. Williams).

This concern, stressed repeatedly throughout the legislative history, [FN13](#) confirms the impression conveyed by the language\*192 of the statute: By passing the Act, Congress sought primarily to make public education available to handicapped children. But in seeking to provide such access to public education, Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful. Indeed, Congress expressly “recognize[d] that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome.” S.Rep., at 11, U.S.Code Cong. & Admin.News 1975, p. 1435. Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.

[FN13](#). See, e.g., 121 Cong.Rec. 19494 (1975) (remarks of Sen. Javits) (“all too often, our handicapped citizens have been denied the opportunity to receive an adequate education”); *id.*, at 19502 (remarks of Sen. Cranston) (millions of handicapped “children ... are largely excluded from the educational opportunities that we give to our other children”); *id.*, at 23708 (remarks of Rep. Mink) (“handicapped children ... are denied access to public schools because of a lack of trained personnel”).

Both the House and the Senate Reports attribute the impetus for the Act and its predecessors to two federal-court judgments rendered in 1971 and 1972. As the Senate Report states, passage of the Act “followed a series of landmark court cases establishing in law the right to education for all handicapped children.” S.Rep., at 6, U.S.Code Cong. & Admin.News 1975, p. 1430. [FN14](#) The first case, **\*\*3044**[Pennsylvania Assn. for Retarded Children v. Commonwealth, 334 F.Supp. 1257 \(Ed Pa.1971\)](#) and [343 F.Supp. 279 \(1972\)](#) (*PARC*), was a suit on behalf of retarded children challenging the constitutionality of a Pennsylvania statute which acted to exclude them from public education and training. The case ended in a consent decree which enjoined the State from “deny[ing] to any mentally retarded child access to a free public program of education and training.” [334 F.Supp., at 1258](#) (emphasis added).

[FN14](#). Similarly, the Senate Report states that it was an “[i]ncreased awareness of the educational needs of



## Understanding Gifted Special Education Due Process Hearings A Guide for Parents

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handicapped children and landmark court decisions establishing the right to education for handicapped children [that] pointed to the necessity of an expanded federal fiscal role.” S.Rep., at 5, U.S.Code Cong. & Admin.News 1975, p. 1429. See also H.R.Rep., at 2-3.

*PARC* was followed by [Mills v. Board of Education of District of Columbia, 348 F.Supp. 866 \(D.C.1972\)](#), a case in which the plaintiff handicapped children had been excluded \*193 from the District of Columbia public schools. The court's judgment, quoted in S.Rep., at 6, provided that

“no [handicapped] child eligible for a publicly supported education in the District of Columbia public schools shall be *excluded* from a regular school assignment by a Rule, policy, or practice of the Board of Education of the District of Columbia or its agents unless such child is provided (a) *adequate* alternative educational services suited to the child's needs, which may include special education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the *adequacy* of any educational alternative.” [348 F.Supp., at 878](#) (emphasis added).

*Mills* and *PARC* both held that handicapped children must be given *access* to an adequate, publicly supported education. Neither case purports to require any particular substantive level of education.<sup>FN15</sup> Rather, like the language of the Act, \*194 the cases set forth extensive procedures to be followed in formulating personalized educational programs for handicapped children. See [348 F.Supp., at 878-883](#); [334 F.Supp., at 1258-1267](#).<sup>FN16</sup> The fact that both *PARC* and *Mills* are discussed at length in the legislative Reports<sup>FN17</sup> suggests that the principles which they established are the principles which, to a significant extent, guided the drafters of the Act. Indeed, immediately after discussing these cases the Senate Report describes the 1974 statute as having “incorporated the major principles\*\*3045 of the right to education cases.” S.Rep., at 8, U.S.Code Cong. & Admin.News 1975, p. 1432. Those principles in turn became the basis of the Act, which itself was designed to effectuate the purposes of the 1974 statute. H.R.Rep., at 5.<sup>FN18</sup>

<sup>FN15.</sup> The only substantive standard which can be implied from these cases comports with the standard implicit in the Act. *PARC* states that each child must receive “access to a free public program of education and training *appropriate to his learning capacities*,” [334 F.Supp., at 1258](#) (emphasis added), and that further state action is required when it appears that “the needs of the mentally retarded child are not being *adequately* served,” *id.*, at [1266](#). (Emphasis added.) *Mills* also speaks in terms of “adequate” educational services, [348 F.Supp., at 878](#), and sets a realistic standard of providing *some* educational services to each child when every need cannot be met.

“If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the ‘exceptional’ or handicapped child than on the normal child.” *Id.*, at [876](#).

<sup>FN16.</sup> Like the Act, *PARC* required the State to “identify, locate, [and] evaluate” handicapped [children, 334 F.Supp., at 1267](#), to create for each child an individual educational program, *id.*, at [1265](#), and to hold a hearing “on any change in educational assignment,” *id.*, at [1266](#). *Mills* also required the preparation of an individual educational program for each child. In addition, *Mills* permitted the child's parents to inspect records relevant to the child's education, to obtain an independent educational evaluation of the child, to object to the IEP and receive a hearing before an independent hearing officer, to be represented by counsel at the hearing, and to have the right to confront and cross-examine adverse witnesses, all of which are also permitted by the Act. [348 F.Supp., at 879-881](#). Like the Act, *Mills* also required that the education of handicapped children be conducted pursuant to an overall plan prepared by the District of Columbia, and established a policy of educating handicapped children with nonhandicapped children whenever possible. *Ibid.*

<sup>FN17.</sup> See S.Rep., at 6-7; H.R.Rep., at 3-4.





[FN18](#). The 1974 statute “incorporated the major principles of the right to education cases,” by “add[ing] important new provisions to the Education of the Handicapped Act which require the States to: establish a goal of providing full educational opportunities to all handicapped children; provide procedures for insuring that handicapped children and their parents or guardians are guaranteed procedural safeguards in decisions regarding identification, evaluation, and educational placement of handicapped children; establish procedures to insure that, to the maximum extent appropriate, handicapped children ... are educated with children who are not handicapped; ... and, establish procedures to insure that testing and evaluation materials and procedures utilized for the purposes of classification and placement of handicapped children will be selected and administered so as not to be racially or culturally discriminatory.” S.Rep., at 8, U.S.Code Cong. & Admin.News 1975, p. 1432.

The House Report explains that the Act simply incorporated these purposes of the 1974 statute: the Act was intended “primarily to amend ... the Education of the Handicapped Act in order to provide permanent authorization and a comprehensive mechanism which will insure that those provisions enacted during the 93rd Congress [the 1974 statute] will result in maximum benefits for handicapped children and their families.” H.R.Rep., at 5. Thus, the 1974 statute's purpose of providing handicapped children *access* to a public education became the purpose of the Act.

**\*195** That the Act imposes no clear obligation upon recipient States beyond the requirement that handicapped children receive some form of specialized education is perhaps best demonstrated by the fact that Congress, in explaining the need for the Act, equated an “appropriate education” to the receipt of some specialized educational services. The Senate Report states: “[T]he most recent statistics provided by the Bureau of Education for the Handicapped estimate that of the more than 8 million children ... with handicapping conditions requiring special education and related services, only 3.9 million such children are receiving an appropriate education.” S.Rep., at 8, U.S.Code Cong. & Admin.News 1975, p. 1432. [FN19](#) This statement, which reveals Congress' view that 3.9 million handicapped children were “receiving an appropriate education” in 1975, is followed immediately in the Senate Report by a table showing that 3.9 million handicapped children were “served” in 1975 and a slightly larger number were “unserved.” A similar statement and table appear in the House Report. H.R.Rep., at 11-12.

[FN19](#). These statistics appear repeatedly throughout the legislative history of the Act, demonstrating a virtual consensus among legislators that 3.9 million handicapped children were receiving an appropriate education in 1975. See, e.g., 121 Cong.Rec. 19486 (1975) (remarks of Sen. Williams); *id.*, at 19504 (remarks of Sen. Schweicker); *id.*, at 23702 (remarks of Rep. Madden); *ibid.* (remarks of Rep. Brademas); *id.*, at 23709 (remarks of Rep. Minish); *id.*, at 37024 (remarks of Rep. Brademas); *id.*, at 37027 (remarks of Rep. Gude); *id.*, at 37417 (remarks of Sen. Javits); *id.*, at 37420 (remarks of Sen. Hathaway).

**\*196** It is evident from the legislative history that the characterization of handicapped children as “served” referred to children who were receiving some form of specialized educational services from the States, and that the characterization of children as “unserved” referred to those who were receiving no specialized educational services. For example, a letter sent to the United States Commissioner of Education by the House Committee on Education and Labor, signed by two key sponsors of the Act in the House, asked the Commissioner to identify the number of handicapped “children served” in each State. The letter asked for statistics on the number of children “being served” in various types of “special education program[s]” and the number of children who were not “receiving educational services.” Hearings on S. 6 before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 94th Cong., 1st Sess., 205-207 (1975). Similarly, Senator Randolph, one of the Act's principal sponsors in the Senate, **\*\*3046** noted that roughly one-half of the handicapped children in the United States “are receiving special educational services.” *Id.*, at 1. [FN20](#) By **\*197** characterizing the 3.9 million handicapped children who were “served” as children who were “receiving an appropriate education,” the Senate and House Reports unmistakably disclose Congress' perception of the type of education required by the Act: an “appropriate education” is provided when personalized educational services are provided. [FN21](#)

[FN20](#). Senator Randolph stated: “[O]nly 55 percent of the school-aged handicapped children and 22 percent of



the pre-school-aged handicapped children are receiving special educational services.” Hearings on S. 6 before the Subcommittee on the Handicapped of the Senate Committee on Labor and Public Welfare, 94th Cong., 1st Sess., 1 (1975). Although the figures differ slightly in various parts of the legislative history, the general thrust of congressional calculations was that roughly one-half of the handicapped children in the United States were not receiving specialized educational services, and thus were not “served.” See, e.g., 121 Cong.Rec. 19494 (1975) (remarks of Sen. Javits) (“only 50 percent of the Nation's handicapped children received proper education services”); *id.*, at 19504 (remarks of Sen. Humphrey) (“[a]lmost 3 million handicapped children, while in school, receive none of the special services that they require in order to make education a meaningful experience”); *id.*, at 23706 (remarks of Rep. Quie) (“only 55 percent [of handicapped children] were receiving a public education”); *id.*, at 23709 (remarks of Rep. Biaggi) (“[o]ver 3 million [handicapped] children in this country are receiving either below par education or none at all”).

Statements similar to those appearing in the text, which equate “served” as it appears in the Senate Report to “receiving special educational services,” appear throughout the legislative history. See, e.g., *id.*, at 19492 (remarks of Sen. Williams); *id.*, at 19494 (remarks of Sen. Javits); *id.*, at 19496 (remarks of Sen. Stone); *id.*, at 19504-19505 (remarks of Sen. Humphrey); *id.*, at 23703 (remarks of Rep. Brademas); Hearings on H.R. 7217 before the Subcommittee on Select Education of the House Committee on Education and Labor, 94th Cong., 1st Sess., 91, 150, 153 (1975); Hearings on H.R. 4199 before the Select Subcommittee on Education of the House Committee on Education and Labor, 93d Cong., 1st Sess., 130, 139 (1973). See also [34 CFR § 300.343 \(1981\)](#).

**FN21.** In seeking to read more into the Act than its language or legislative history will permit, the United States focuses upon the word “appropriate,” arguing that “the statutory definitions do not adequately explain what [it means].” Brief for United States as *Amicus Curiae* 13. Whatever Congress meant by an “appropriate” education, it is clear that it did not mean a potential-maximizing education.

The term as used in reference to educating the handicapped appears to have originated in the *PARC* decision, where the District Court required that handicapped children be provided with “education and training appropriate to [their] learning capacities.” [334 F.Supp., at 1258](#). The word appears again in the *Mills* decision, the District Court at one point referring to the need for “an appropriate educational program,” [348 F.Supp., at 879](#), and at another point speaking of a “suitable publicly-supported education,” *id.*, at 878. Both cases also refer to the need for an “adequate” education. See [334 F.Supp., at 1266](#); [348 F.Supp., at 878](#).

The use of “appropriate” in the language of the Act, although by no means definitive, suggests that Congress used the word as much to describe the settings in which handicapped children should be educated as to prescribe the substantive content or supportive services of their education. For example, [§ 1412\(5\)](#) requires that handicapped children be educated in classrooms with nonhandicapped children “to the maximum extent appropriate.” Similarly, [§ 1401\(19\)](#) provides that, “whenever appropriate,” handicapped children should attend and participate in the meeting at which their IEP is drafted. In addition, the definition of “free appropriate public education” itself states that instruction given handicapped children should be at an “appropriate preschool, elementary, or secondary school” level. [§ 1401\(18\)\(C\)](#). The Act's use of the word “appropriate” thus seems to reflect Congress' recognition that some settings simply are not suitable environments for the participation of some handicapped children. At the very least, these statutory uses of the word refute the contention that Congress used “appropriate” as a term of art which concisely expresses the standard found by the lower courts.

#### \*198 (ii)

Respondents contend that “the goal of the Act is to provide each handicapped child with an equal educational opportunity.” Brief for Respondents 35. We think, however, that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential “commensurate with the opportunity provided other children.” Respondents\*\***3047** and the United States correctly note that Congress sought “to provide assistance to the States in



## Understanding Gifted Special Education Due Process Hearings A Guide for Parents

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carrying out their responsibilities under ... the Constitution of the United States to provide equal protection of the laws.” S.Rep., at 13, U.S.Code Cong. & Admin.News 1975, p. 1437. [FN22](#) But we do not think that such statements imply a congressional intent to achieve strict equality of opportunity or services.

[FN22](#). See also 121 Cong.Rec. 19492 (1975) (remarks of Sen. Williams); *id.*, at 19504 (remarks of Sen. Humphrey).

The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide “equal” educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped\*199 children would in all probability fall short of the statutory requirement of “free appropriate public education”; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of “equal” services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is “free appropriate public education,” a phrase which is too complex to be captured by the word “equal” whether one is speaking of opportunities or services.

The legislative conception of the requirements of equal protection was undoubtedly informed by the two District Court decisions referred to above. But cases such as *Mills* and *PARC* held simply that handicapped children may not be excluded entirely from public education. In *Mills*, the District Court said:

“If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom.” [348 F.Supp., at 876](#).

The *PARC* court used similar language, saying “[i]t is the commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity....” [334 F.Supp., at 1260](#). The right of access to free public education enunciated by these cases is significantly different from any notion of absolute equality of opportunity regardless of capacity. To the extent that Congress might have looked further than these cases which are mentioned in the legislative history, at the time of enactment of the Act this Court had held at least twice that the Equal Protection Clause of the Fourteenth \*200 Amendment does not require States to expend equal financial resources on the education of each child. [San Antonio Independent School Dist. v. Rodriguez](#), 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973); [McInnis v. Shapiro](#), 293 F.Supp. 327 (ND Ill.1968), *aff'd sub nom. McInnis v. Ogilvie*, 394 U.S. 322, 89 S.Ct. 1197, 22 L.Ed.2d 308 (1969).

In explaining the need for federal legislation, the House Report noted that “no congressional legislation has required a precise guarantee for handicapped children, i.e. a basic floor of opportunity that would bring into compliance all school districts with the constitutional right of equal protection with respect to handicapped children.” H.R.Rep., at 14. Assuming that the Act was designed to fill the need identified in the House Report—that is, to provide a “basic floor of opportunity” consistent with equal protection—neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal \*\*3048 access. Therefore, Congress' desire to provide specialized educational services, even in furtherance of “equality,” cannot be read as imposing any particular substantive educational standard upon the States.

The District Court and the Court of Appeals thus erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Desirable though that goal might be, it is not the standard that Congress imposed upon States which receive funding under the Act. Rather, Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education.



(iii)

Implicit in the congressional purpose of providing access to a “free appropriate public education” is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the \*201 handicapped child receive no benefit from that education. The statutory definition of “free appropriate public education,” in addition to requiring that States provide each child with “specially designed instruction,” expressly requires the provision of “such ... supportive services ... as may be required to assist a handicapped child *to benefit* from special education.” § 1401(17) (emphasis added). We therefore conclude that the “basic floor of opportunity” provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.<sup>FN23</sup>

<sup>FN23</sup>. This view is supported by the congressional intention, frequently expressed in the legislative history, that handicapped children be enabled to achieve a reasonable degree of self-sufficiency. After referring to statistics showing that many handicapped children were excluded from public education, the Senate Report states:

“The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society.” S.Rep., at 9, U.S.Code Cong. & Admin.News 1975, p. 1433.

See also H.R.Rep., at 11. Similarly, one of the principal Senate sponsors of the Act stated that “providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds.” 121 Cong.Rec. 19492 (1975) (remarks of Sen. Williams). See also *id.*, at 25541 (remarks of Rep. Harkin); *id.*, at 37024-37025 (remarks of Rep. Brademas); *id.*, at 37027 (remarks of Rep. Gude); *id.*, at 37410 (remarks of Sen. Randolph); *id.*, at 37416 (remarks of Sen. Williams).

The desire to provide handicapped children with an attainable degree of personal independence obviously anticipated that state educational programs would confer educational benefits upon such children. But at the same time, the goal of achieving some degree of self-sufficiency in most cases is a good deal more modest than the potential-maximizing goal adopted by the lower courts.

Despite its frequent mention, we cannot conclude, as did the dissent in the Court of Appeals, that self-sufficiency was itself the substantive standard which Congress imposed upon the States. Because many mildly handicapped children will achieve self-sufficiency without state assistance while personal independence for the severely handicapped may be an unreachable goal, “self-sufficiency” as a substantive standard is at once an inadequate protection and an overly demanding requirement. We thus view these references in the legislative history as evidence of Congress’ intention that the services provided handicapped children be educationally beneficial, whatever the nature or severity of their handicap.

\*202 The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act presents a more difficult problem. The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied.\*3049 It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above



average in the regular classrooms of a public school system, we confine our analysis to that situation.

The Act requires participating States to educate handicapped children with nonhandicapped children whenever possible.<sup>[FN24](#)</sup> When that “mainstreaming” preference of the Act \*203 has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors the educational progress of the child. Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit. Children who graduate from our public school systems are considered by our society to have been “educated” at least to the grade level they have completed, and access to an “education” for handicapped children is precisely what Congress sought to provide in the Act.<sup>[FN25](#)</sup>

[FN24. Title 20 U.S.C. § 1412](#)(5) requires that participating States establish “procedures to assure that, to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and that special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.”

[FN25.](#) We do not hold today that every handicapped child who is advancing from grade to grade in a regular public school system is automatically receiving a “free appropriate public education.” In this case, however, we find Amy’s academic progress, when considered with the special services and professional consideration accorded by the Furnace Woods school administrators, to be dispositive.

#### C

When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a “free appropriate public education,” we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State’s educational standards, must approximate the grade levels used in the State’s regular education, and must comport with the child’s IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of \*204 the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.<sup>[FN26](#)</sup>

[FN26.](#) In defending the decisions of the District Court and the Court of Appeals, respondents and the United States rely upon isolated statements in the legislative history concerning the achievement of maximum potential, see H.R.Rep., at 13, as support for their contention that Congress intended to impose greater substantive requirements than we have found. These statements, however, are too thin a reed on which to base an interpretation of the Act which disregards both its language and the balance of its legislative history. “Passing references and isolated phrases are not controlling when analyzing a legislative history.” [Department of State v. Washington Post Co.](#), 456 U.S. 595, 600, 102 S.Ct. 1957, 1960, 72 L.Ed.2d 358 (1982).

Moreover, even were we to agree that these statements evince a congressional intent to maximize each child’s potential, we could not hold that Congress had successfully imposed that burden upon the States.

“[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions. The legitimacy of Congress’ power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the ‘contract.’ ... Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously.” [Pennhurst State School v. Halderman](#), 451 U.S. 1, 17, 101 S.Ct. 1531, 1539-40, 67 L.Ed.2d 694 (1981) (footnote omitted).





As already demonstrated, the Act and its history impose no requirements on the States like those imposed by the District Court and the Court of Appeals. *A fortiori* Congress has not done so unambiguously, as required in the valid exercise of its spending power.

### **\*\*3050 IV**

#### **A**

[3] As mentioned in Part I, the Act permits “[a]ny party aggrieved by the findings and decision” of the state administrative hearings “to bring a civil action” in “any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.” [§ 1415\(e\)\(2\)](#). The complaint, and therefore the civil action, may concern “any matter relating to the identification, evaluation, or educational placement of the child, or the provision\*205 of a free appropriate public education to such child.” [§ 1415\(b\)\(1\)\(E\)](#). In reviewing the complaint, the Act provides that a court “shall receive the record of the [state] administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.” [§ 1415\(e\)\(2\)](#).

The parties disagree sharply over the meaning of these provisions, petitioners contending that courts are given only limited authority to review for state compliance with the Act's procedural requirements and no power to review the substance of the state program, and respondents contending that the Act requires courts to exercise *de novo* review over state educational decisions and policies. We find petitioners' contention unpersuasive, for Congress expressly rejected provisions that would have so severely restricted the role of reviewing courts. In substituting the current language of the statute for language that would have made state administrative findings conclusive if supported by substantial evidence, the Conference Committee explained that courts were to make “independent decision[s] based on a preponderance of the evidence.” [S.Conf.Rep.No.94-455, p. 50 \(1975\)](#), U.S.Code Cong. & Admin.News 1975, p. 1503. See also 121 Cong.Rec. 37416 (1975) (remarks of Sen. Williams).

But although we find that this grant of authority is broader than claimed by petitioners, we think the fact that it is found in [§ 1415](#), which is entitled “Procedural safeguards,” is not without significance. When the elaborate and highly specific procedural safeguards embodied in [§ 1415](#) are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, see, e.g., [§§ 1415\(a\)-\(d\)](#), as it did upon the measurement of the resulting\*206 IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

**\*\*3051** Thus the provision that a reviewing court base its decision on the “preponderance of the evidence” is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at naught. The fact that [§ 1415\(e\)](#) requires that the reviewing court “receive the records of the [state] administrative proceedings” carries with it the implied requirement that due weight shall be given to these proceedings. And we find nothing in the Act to suggest that merely because Congress was rather sketchy in establishing substantive requirements, as opposed to procedural requirements for the preparation of an IEP, it intended that reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself. In short, the statutory authorization to grant “such relief as the court determines is appropriate” cannot be read without reference to the obligations, largely procedural in nature, which are imposed upon recipient States by Congress.

Therefore, a court's inquiry in suits brought under [§ 1415\(e\)\(2\)](#) is twofold. First, has the State complied with the



## Understanding Gifted Special Education Due Process Hearings

### A Guide for Parents

---

procedures set forth in the Act? <sup>FN27</sup> And second, is the \*207 individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?<sup>FN28</sup> If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

<sup>FN27</sup>. This inquiry will require a court not only to satisfy itself that the State has adopted the state plan, policies, and assurances required by the Act, but also to determine that the State has created an IEP for the child in question which conforms with the requirements of [§ 1401\(19\)](#).

<sup>FN28</sup>. When the handicapped child is being educated in the regular classrooms of a public school system, the achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit. See Part III, *supra*.

#### B

[4] In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States.<sup>FN29</sup> The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. The Act expressly charges States with the responsibility of “acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials.” [§ 1413\(a\)\(3\)](#). In the face of such a clear statutory directive, it seems highly unlikely that Congress intended \*208 courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to [§ 1415\(e\)\(2\)](#).<sup>FN30</sup>

<sup>FN29</sup>. In this case, for example, both the state hearing officer and the District Court were presented with evidence as to the best method for educating the deaf, a question long debated among scholars. See [Large, Special Problems of the Deaf Under the Education for All Handicapped Children Act of 1975](#), 58 Wash.U.L.Q. 213, 229 (1980). The District Court accepted the testimony of respondents' experts that there was “a trend supported by studies showing the greater degree of success of students brought up in deaf households using [the method of communication used by the Rowleys].” 483 F.Supp., at 535.

<sup>FN30</sup>. It is clear that Congress was aware of the States' traditional role in the formulation and execution of educational policy. “Historically, the States have had the primary responsibility for the education of children at the elementary and secondary level.” 121 Cong.Rec. 19498 (1975) (remarks of Sen. Dole). See also [Epperson v. Arkansas](#), 393 U.S. 97, 104, 89 S.Ct. 266, 270, 21 L.Ed.2d 228 (1968) (“By and large, public education in our Nation is committed to the control of state and local authorities”).

**\*\*3052** We previously have cautioned that courts lack the “specialized knowledge and experience” necessary to resolve “persistent and difficult questions of educational policy.” [San Antonio Independent School Dist. v. Rodriguez](#), 411 U.S., at 42, 93 S.Ct., at 1301. We think that Congress shared that view when it passed the Act. As already demonstrated, Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped. Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

#### V

Entrusting a child's education to state and local agencies does not leave the child without protection. Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies, *supra*, at 3038, and n. 6, and in the formulation of the child's individual educational program. As the Senate Report states:

“The Committee recognizes that in many instances the process of providing special education and related services to handicapped children is not guaranteed to produce any particular outcome. By changing the language [of the provision relating to individualized educational programs] to emphasize the process of parent and child \*209 involvement and to



## Understanding Gifted Special Education Due Process Hearings A Guide for Parents

---

provide a written record of reasonable expectations, the Committee intends to clarify that such individualized planning conferences are a way to provide parent involvement and protection to assure that appropriate services are provided to a handicapped child.” S.Rep., at 11-12, U.S.Code Cong. & Admin.News 1975, p. 1435.

See also S.Conf.Rep.No.94-445, p. 30 (1975); [34 CFR § 300.345 \(1981\)](#). As this very case demonstrates, parents and guardians will not lack ardor in seeking to ensure that handicapped children receive all of the benefits to which they are entitled by the Act. [FN31](#)

[FN31](#). In addition to providing for extensive parental involvement in the formulation of state and local policies, as well as the preparation of individual educational programs, the Act ensures that States will receive the advice of experts in the field of educating handicapped children. As a condition for receiving federal funds under the Act, States must create “an advisory panel, appointed by the Governor or any other official authorized under State law to make such appointments, composed of individuals involved in or concerned with the education of handicapped children, including handicapped individuals, teachers, parents or guardians of handicapped children, State and local education officials, and administrators of programs for handicapped children, which (A) advises the State educational agency of unmet needs within the State in the education of handicapped children, [and] (B) comments publicly on any rules or regulations proposed for issuance by the State regarding the education of handicapped children.” [§ 1413\(a\)\(12\)](#).

### VI

[\[5\]](#) Applying these principles to the facts of this case, we conclude that the Court of Appeals erred in affirming the decision of the District Court. Neither the District Court nor the Court of Appeals found that petitioners had failed to comply with the procedures of the Act, and the findings of neither court would support a conclusion that Amy's educational program failed to comply with the substantive requirements of the Act. On the contrary, the District Court found that the “evidence firmly establishes that Amy is receiving an \*210 ‘adequate’ education, since she performs better than the average child in her class and is advancing easily from grade to grade.” [483 F.Supp., at 534](#). In light of this finding, and of the fact that Amy was receiving personalized instruction and related services calculated by the Furnace Woods school administrators to meet her educational needs, the lower courts should not have concluded that the Act requires the provision of a sign-language interpreter. Accordingly, the decision of the Court of Appeals is reversed, and the case is \*\*3053 remanded for further proceedings consistent with this opinion. [FN32](#)

[FN32](#). Because the District Court declined to reach respondents' contention that petitioners had failed to comply with the Act's procedural requirements in developing Amy's IEP, [483 F.Supp., at 533, n. 8](#), the case must be remanded for further proceedings consistent with this opinion.

*So ordered.*

Justice BLACKMUN, concurring in the judgment.

Although I reach the same result as the Court does today, I read the legislative history and goals of the Education of the Handicapped Act differently. Congress unambiguously stated that it intended to “take a more active role under its responsibility for equal protection of the laws to guarantee that handicapped children are provided *equal educational opportunity*. ” [S.Rep.No.94-168, p. 9](#) (1975), U.S.Code Cong. & Admin.News 1975, p. 1433 (emphasis added). See also [20 U.S.C. § 1412\(2\)\(A\)\(i\)](#) (requiring States to establish plans with the “goal of providing full educational opportunity to all handicapped children”).

As I have observed before, “[i]t seems plain to me that Congress, in enacting [this statute], intended to do more than merely set out politically self-serving but essentially meaningless language about what the [handicapped] deserve at the hands of state ... authorities.” [Pennhurst State School v. Halderman](#), 451 U.S. 1, 32, 101 S.Ct. 1531, 1547, 67 L.Ed.2d 694 (1981) (opinion concurring in part and concurring in the judgment). The clarity of the legislative \*211 intent convinces me that the relevant question here is not, as the Court says, whether Amy Rowley's individualized education program was “reasonably calculated to enable [her] to receive educational benefits,” *ante*, at 3051, measured in part by





## Understanding Gifted Special Education Due Process Hearings A Guide for Parents

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whether or not she “achieve[s] passing marks and advance[s] from grade to grade,” *ante*, at 3049. Rather, the question is whether Amy’s program, *viewed as a whole*, offered her an opportunity to understand and participate in the classroom that was substantially equal to that given her nonhandicapped classmates. This is a standard predicated on equal educational opportunity and equal access to the educational process, rather than upon Amy’s achievement of any particular educational outcome.

In answering this question, I believe that the District Court and the Court of Appeals should have given greater deference than they did to the findings of the School District’s impartial hearing officer and the State’s Commissioner of Education, both of whom sustained petitioners’ refusal to add a sign-language interpreter to Amy’s individualized education program. Cf. [20 U.S.C. § 1415\(e\)\(2\)](#) (requiring reviewing court to “receive the records of the administrative proceedings” before granting relief). I would suggest further that those courts focused too narrowly on the presence or absence of a particular service—a sign-language interpreter—rather than on the total package of services furnished to Amy by the School Board.

As the Court demonstrates, *ante*, at 3039-3040, petitioner Board has provided Amy Rowley considerably more than “a teacher with a loud voice.” See *post*, at 3055 (dissenting opinion). By concentrating on whether Amy was “learning as much, or performing as well academically, as she would without her handicap,” [483 F.Supp. 528, 532 \(S.D.N.Y.1980\)](#), the District Court and the Court of Appeals paid too little attention to whether, on the entire record, respondent’s individualized education program offered her an educational opportunity\*212 substantially equal to that provided her nonhandicapped classmates. Because I believe that standard has been satisfied here, I agree that the judgment of the Court of Appeals should be reversed.

Justice WHITE, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

In order to reach its result in this case, the majority opinion contradicts itself, the \*\*3054 language of the statute, and the legislative history. Both the majority’s standard for a “free appropriate education” and its standard for judicial review disregard congressional intent.

### I

The majority first turns its attention to the meaning of a “free appropriate public education.” The Act provides:

“The term ‘free appropriate public education’ means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under [section 1414\(a\)\(5\)](#) of this title.” [20 U.S.C. § 1401\(18\)](#).

The majority reads this statutory language as establishing a congressional intent limited to bringing “previously excluded handicapped children into the public education systems of the States and [requiring] the States to adopt *procedures* which would result in individualized consideration of and instruction for each child.” *Ante*, at 3042. In its attempt to constrict the definition of “appropriate” and the thrust of the Act, the majority opinion states: “Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children. Certainly \*213 the language of the statute contains no requirement like the one imposed by the lower courts—that States maximize the potential of handicapped children ‘commensurate with the opportunity provided to other children.’ ” *Ante*, at 3042, quoting [483 F.Supp. 528, 534 \(SDNY 1980\)](#).

I agree that the language of the Act does not contain a substantive standard beyond requiring that the education offered must be “appropriate.” However, if there are limits not evident from the face of the statute on what may be considered an “appropriate education,” they must be found in the purpose of the statute or its legislative history. The Act itself announces it will provide a “*full* educational opportunity to all handicapped children.” [20 U.S.C. § 1412\(2\)\(A\)](#) (emphasis added). This goal is repeated throughout the legislative history, in statements too frequent to be “ ‘passing references and isolated phrases.’ ” <sup>ENI</sup> *Ante*, at 3049, n. 26, quoting [Department of State v. Washington Post Co., 456 U.S.](#)



## Understanding Gifted Special Education Due Process Hearings

### A Guide for Parents

---

[596, 600, 102 S.Ct. 1957, 1960, 72 L.Ed.2d 358 \(1982\)](#). These statements elucidate the meaning of “appropriate.” According to the Senate Report, for example, the Act does “guarantee that handicapped children are provided *equal* educational opportunity.” [S.Rep.No.94-168, p. 9](#) (1975), U.S.Code Cong. & Admin.News 1975, p. 1433 (emphasis added). This promise appears throughout the legislative history. See 121 Cong.Rec. 19482-19483 (1975) (remarks of Sen. Randolph); *id.*, at 19504 (Sen. Humphrey); *id.*, at 19505 (Sen. Beall); *id.*, at 23704 (Rep. Brademas); *id.*, at 25538 (Rep. Cornell); *id.*, at 25540 (Rep. Grassley); *id.*, at 37025 (Rep. Perkins); *id.*, at \*214 37030 (Rep. Mink); *id.*, at 37412 (Sen. Taft); *id.*, at 37413 (Sen. Williams); *id.*, at 37418-37419 (Sen. Cranston); *id.*, at 37419-37420 (Sen. Beall). Indeed, at times the purpose of the Act was described as tailoring each handicapped child’s educational plan to enable the child “to achieve his or her maximum potential.” H.R.Rep.No.94-332, pp. 13, 19 (1975); see 121 Cong.Rec. 23709 (1975). \*\*3055 Senator Stafford, one of the sponsors of the Act, declared: “We can all agree that education [given a handicapped child] should be equivalent, at least, to the one those children who are not handicapped receive.” *Id.*, at 19483. The legislative history thus directly supports the conclusion that the Act intends to give handicapped children an educational opportunity commensurate with that given other children.

[FN1](#). The Court’s opinion relies heavily on the statement, which occurs throughout the legislative history, that, at the time of enactment, one million of the roughly eight million handicapped children in the United States were excluded entirely from the public school system and more than half were receiving an inappropriate education. See, e.g., *ante*, at 3042, 3045, 3046, n. 20. But this statement was often linked to statements urging equal educational opportunity. See, e.g., 121 Cong.Rec. 19502 (1975) (remarks of Sen. Cranston); *id.*, at 23702 (remarks of Rep. Brademas). That is, Congress wanted not only to bring handicapped children into the schoolhouse, but also to benefit them once they had entered.

The majority opinion announces a different substantive standard, that “Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful.” *Ante*, at 3043. While “meaningful” is no more enlightening than “appropriate,” the Court purports to clarify itself. Because Amy was provided with *some* specialized instruction from which she obtained *some* benefit and because she passed from grade to grade, she was receiving a meaningful and therefore appropriate education.[FN2](#)

[FN2](#). As further support for its conclusion, the majority opinion turns to [Pennsylvania Assn. for Retarded Children v. Commonwealth](#), 334 F.Supp. 1257 (ED Pa.1971), 343 F.Supp. 279 (1972) (PARC), and [Mills v. Board of Education of District of Columbia](#), 348 F.Supp. 866 (D.C.1972). That these decisions served as an impetus for the Act does not, however, establish them as the limits of the Act. In any case, the very language that the majority quotes from *Mills*, *ante*, at 3044, 3047, sets a standard not of *some* education, but of educational opportunity equal to that of non-handicapped children.

Indeed, *Mills*, relying on decisions since called into question by this Court’s opinion in [San Antonio Independent School Dist. v. Rodriguez](#), 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), states:

“In [Hobson v. Hansen](#), [269 F.Supp. 401 (D.C.1967)] Judge Wright found that denying poor public school children educational opportunity equal to that available to more affluent public school children was violative of the Due Process Clause of the Fifth Amendment. *A fortiori*, the defendants’ conduct here, denying plaintiffs and their class not just an equal publicly supported education but all publicly supported education while providing such education to other children, is violative of the Due Process Clause.” [348 F.Supp., at 875](#).

Whatever the effect of *Rodriguez* on the validity of this reasoning, the statement exposes the majority’s mischaracterization of the opinion and thus of the assumptions of the legislature that passed the Act.

\*215 This falls far short of what the Act intended. The Act details as specifically as possible the kind of specialized education each handicapped child must receive. It would apparently satisfy the Court’s standard of “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child,” *ante*, at 3048, for a deaf child such as Amy to be given a teacher with a loud voice, for she would benefit from that service.



## Understanding Gifted Special Education Due Process Hearings

### A Guide for Parents

---

The Act requires more. It defines “special education” to mean “specifically designed instruction, at no cost to parents or guardians, to *meet the unique needs* of a handicapped child....” [§ 1401\(16\)](#) (emphasis added).<sup>FN3</sup> Providing a teacher with a loud voice would not meet Amy’s needs and would not satisfy the Act. The basic floor of opportunity is instead, as the courts below recognized, intended to eliminate the effects of the handicap, at least to the extent that the child will be given an equal opportunity to learn if that is reasonably possible. Amy Rowley, without a sign-language interpreter, comprehends less than half of what is said in the classroom—less than half of what normal children comprehend. This is hardly an equal opportunity to learn, even if Amy makes passing grades.

<sup>FN3</sup>. “Related services” are “transportation, and such developmental, corrective, and other supportive services ... as may be required to assist a handicapped child to benefit from special education.” [§ 1401\(17\)](#).

Despite its reliance on the use of “appropriate” in the definition of the Act, the majority opinion speculates that “Congress used the word as much to describe the settings in which **\*216** handicapped children should be educated as to prescribe the substantive content or supportive services of their education.” *Ante*, at 3046, n. 21. Of course, the word “appropriate” can be applied in many ways; at times in the Act, Congress used it to recommend mainstreaming**\*\*3056** handicapped children; at other points, it used the word to refer to the content of the individualized education. The issue before us is what standard the word “appropriate” incorporates when it is used to modify “education.” The answer given by the Court is not a satisfactory one.

## II

The Court’s discussion of the standard for judicial review is as flawed as its discussion of a “free appropriate public education.” According to the Court, a court can ask only whether the State has “complied with the procedures set forth in the Act” and whether the individualized education program is “reasonably calculated to enable the child to receive educational benefits.” *Ante*, at 3051. Both the language of the Act and the legislative history, however, demonstrate that Congress intended the courts to conduct a far more searching inquiry.

The majority assigns major significance to the review provision’s being found in a section entitled “Procedural safeguards.” But where else would a provision for judicial review belong? The majority does acknowledge that the current language, specifying that a court “shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate,” [§ 1415\(e\)\(2\)](#), was substituted at Conference for language that would have restricted the role of the reviewing court much more sharply. It is clear enough to me that Congress decided to reduce substantially judicial deference to state administrative decisions.

The legislative history shows that judicial review is not limited to procedural matters and that the state educational agencies are given first, but not final, responsibility for the **\*217** content of a handicapped child’s education. The Conference Committee directs courts to make an “independent decision.” [S.Conf.Rep.No.94-455, p. 50 \(1975\)](#). The deliberate change in the review provision is an unusually clear indication that Congress intended courts to undertake substantive review instead of relying on the conclusions of the state agency.

On the floor of the Senate, Senator Williams, the chief sponsor of the bill, Committee Chairman, and floor manager responsible for the legislation in the Senate, emphasized the breadth of the review provisions at both the administrative and judicial levels:

“Any parent or guardian may present a complaint concerning *any matter* regarding the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to such child. In this regard, Mr. President, I would like to stress that the language referring to ‘free appropriate education’ has been adopted to make clear that a complaint may involve matters such as questions respecting a child’s individualized education program, questions of whether special education and related services are being provided without charge to the parents or guardians, questions relating to whether the services provided a child meet the standards of the State education agency, or *any other question* within the scope of the definition of ‘free appropriate public education.’ In addition, it should be



## Understanding Gifted Special Education Due Process Hearings

### A Guide for Parents

---

clear that a parent or guardian may present a complaint alleging that a State or local education agency has refused to provide services to which a child may be entitled or alleging that the State or local educational agency has erroneously classified a child as a handicapped child when, in fact, that child is not a handicapped child.” 121 Cong.Rec. 37415 (1975) (emphasis added).

There is no doubt that the state agency itself must make substantive decisions. The legislative history reveals that the \*218 courts are to consider, *de novo*, the same \*\*3057 issues. Senator Williams explicitly stated that the civil action permitted under the Act encompasses all matters related to the original complaint. *Id.*, at 37416.

Thus, the Court's limitations on judicial review have no support in either the language of the Act or the legislative history. Congress did not envision that inquiry would end if a showing is made that the child is receiving passing marks and is advancing from grade to grade. Instead, it intended to permit a full and searching inquiry into any aspect of a handicapped child's education. The Court's standard, for example, would not permit a challenge to part of the IEP; the legislative history demonstrates beyond doubt that Congress intended such challenges to be possible, even if the plan as developed is reasonably calculated to give the child some benefits.

Parents can challenge the IEP for failing to supply the special education and related services needed by the individual handicapped child. That is what the Rowleys did. As the Government observes, “courts called upon to review the content of an IEP, in accordance with [20 U.S.C. \[§\] 1415\(e\)](#) inevitably are required to make a judgment, on the basis of the evidence presented, concerning whether the educational methods proposed by the local school district are ‘appropriate’ for the handicapped child involved.” Brief for United States as *Amicus Curiae* 13. The courts below, as they were required by the Act, did precisely that.

Under the judicial review provisions of the Act, neither the District Court nor the Court of Appeals was bound by the State's construction of what an “appropriate” education means in general or by what the state authorities considered to be an appropriate education for Amy Rowley. Because the standard of the courts below seems to me to reflect the congressional purpose and because their factual findings are not clearly erroneous, I respectfully dissent.

U.S.N.Y.,1982.

Board of Educ. of Hendrick Hudson Central School Dist., Westchester County v. Rowley  
458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690, 5 Ed. Law Rep. 34, 1 A.D.D. 85

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**Appendix H: Centennial School District v. Department of Education, 517 Pa. 540, 539 A.2d 785 (1988)**

**CENTENNIAL SCHOOL DISTRICT, Appellant, v. COMMONWEALTH of Pennsylvania, DEPARTMENT OF EDUCATION and Robert C. Wilburn, Secretary of Education, Appellees**

**No. 60 E.D. Appeal Docket, 1987**

**Supreme Court of Pennsylvania**

***517 Pa. 540; 539 A.2d 785; 1988 Pa. LEXIS 95***

**December 7, 1987, Argued**

**March 22, 1988, Decided PRIOR HISTORY:** [\*\*\*1] Appeal from the Order entered January 31, 1986 in the Commonwealth Court of Pennsylvania at No. 1345 C.D. 1984, which affirmed the Order entered April 11, 1984 by the Secretary of Education as Special Education Opinion No. 229.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant school district appealed an order from the Commonwealth Court (Pennsylvania), affirming appellee secretary of education's order finding that appellant was required to set up specialized instruction for a gifted student, in addition to an enrichment program. Appellant claimed that the enrichment program was all that it was required to provide under *24 P.S. § 13-1372(1, 2)*.

**OVERVIEW:** Appellant school district devised an individualized education program (IEP) for a mentally gifted student. The enrichment program added certain materials to the regular curriculum, but did not provide accelerated instruction in any academic area. The student's parents claimed that the IEP was insufficient to address the child's need for accelerated instruction. A hearing officer determined that the student should be given specialized instruction in math and reading, in addition to the enrichment program. The secretary of education and a trial court affirmed the hearing officer. The school district appealed, claiming that appellant's enrichment program was all it was required to provide. The appellate court affirmed. The court found that under *24 P.S. § 13-1372(1, 2)*, appellant was required to provide accelerated instruction. Further, the secretary of education did not exceed his authority in promulgating regulations for gifted students. However, appellant was not required to provide instruction that "maximized" the student's ability to benefit from the IEP, such as providing individual tutors or an exclusive individual program beyond appellant's regular offerings.

**OUTCOME:** The court affirmed the trial court's judgment that a gifted student in appellant school district was entitled to specialized instruction. Because school districts were required to set up individualized education programs for mentally gifted students, the student was entitled to accelerated instruction. However, instruction did not have to be specialized to the extent it included individual tutors or an exclusive individual program.

**COUNSEL:** John Philip Diefenderfer, Newtown, for appellant.

Michael I. Levin, Harrisburg, for amicus -- Pennsylvania School Bds. Assoc.

Caryl Oberman, Philadelphia, for amicus -- Pennsylvania Assoc. for Gifted Educ.



# Understanding Gifted Special Education Due Process Hearings

## A Guide for Parents

---

John A. Alzamora, Mary Beth O'Hara Osborne, Harrisburg, for Department of Educ.

Thomas E. Coval, Willow Grove, David M. Donaldson, Deputy Atty. Gen., Andrew S. Gordon, Chief, Deputy Atty. Gen., for appellees.

**JUDGES:** Nix, C.J., and Larsen, Flaherty, McDermott, Zappala and Papadakos, JJ. Stout, J., did not participate in the consideration or decision of this matter.

### **OPINION BY: FLAHERTY**

### **OPINION**

#### [\*542] [\*\*786] OPINION OF THE COURT

The issue in this case is whether the Public School Code and regulations promulgated by the Department of Education require school districts to provide an individualized program of education for mentally gifted students, or whether school districts may lawfully elect to provide only generalized education programs for such students.

In 1981 Centennial [\*\*\*2] School District (the school district) devised an individualized education program (IEP) for an exceptional student, Terry Auspitz, which recommended that Terry be included in the district's program for mentally gifted students. This program (an "enrichment" program) added certain materials to the regular curriculum, but did not attempt to provide accelerated instruction in particular academic areas. Terry's parents agreed that their son should participate in the enrichment program, but they asserted that the enrichment program was insufficient to address Terry's need for accelerated instruction in reading and mathematics. Because the parents and the school district could not agree on the IEP, the parents requested a due process hearing as provided for in 22 *Pa. Code* § 13.32.

[\*543] The hearing officer concluded that Terry was a mentally gifted student whose academic abilities were advanced beyond his chronological age and that Terry required placement in an age-appropriate setting because his social and emotional development were not advanced beyond that typical of his chronological age. Further, he determined that Terry should be given specialized instruction in mathematics [\*\*\*3] and reading in addition to inclusion in the "enrichment" program provided by the district. The hearing officer wrote:

Within the Commonwealth of Pennsylvania, mentally gifted students are considered to be educationally exceptional and therefore entitled to an individually prescribed educational program appropriate [\*\*787] to their unique educational needs. The fact that most school districts meet this obligation by providing a part-time program of educational enrichment does not mean that such programming is appropriate for all mentally gifted students. In order to provide an appropriate program for an individual student, that student's IEP must be developed based on *his* current educational levels and needs regardless of administrative considerations. Further, unlike other educationally exceptional students, mentally gifted students may receive their education within the regular and/or special education programs of the school; this determination is to be based on the student's individual needs and IEP as well.

In the case of Terry, his current educational program is neither appropriate nor adequate in terms of his intellectual potential and levels of academic achievement reflected [\*\*\*4] by considerable evaluation. His inconsistent classroom performance and distracting behaviors can be viewed as indications of boredom and cries for attention from a child whose intellectual development has far exceeded his emotional social [sic] development. In meeting his educational needs, this imbalance must be remembered. Therefore, as much of his educational program as possible should be provided in age-appropriate normalized settings. Although this will undoubtedly present administrative [\*544] and instructional difficulties and challenges to the school staff, it is consistent with both Terry's needs and the legal mandate for education within the least restrictive environment.

On March 2, 1983, the school district filed exceptions to the hearing officer's decision with the Secretary of Education. In affirming the hearing officer, the Secretary wrote:





Simply because PDE has approved the district's program of enrichment for gifted students does not relieve the district of its duty under 24 P.S. § 13-1371, § 13-1372, 22 Pa.Code § 13.31, § 341.1, and § 341.15, to provide Terry with an appropriate academic education. Furthermore, the fact that PDE approves a district's [\*\*\*5] special education program does not mean that the program is necessarily appropriate for all students within a particular exceptionality or that individual modifications may not be necessary to meet individual needs . . . .

A regular program with special instruction in accordance with a child's IEP specifying enrichment could be appropriate for certain exceptional children, however, such a gifted enrichment program without advanced instruction in reading and math is not appropriate for Terry. *See In re the Educational assignment of Eric L.*, Special Education Opinion # 119 (1978). Moreover, the district is specifically responsible for developing educational programs appropriate for the needs of *each* child, not of all children generally. *Shanberg v. Comm. Secretary of Ed.*, 57 Pa.Comwlth.Ct. 384, 426 A.2d 232, 233 (1981).

Secretary's Opinion at 10. The school district appealed this order to Commonwealth Court, which on January 31, 1986, affirmed the decision of the Secretary. Commonwealth Court stated that each school district is required to identify exceptional children and to develop an appropriate program of education suited to each [\*\*\*6] child's individual needs. The court also observed that the Secretary of Education is responsible for determining what educational program is [\*545] suited for each individual child. 94 Pa.Comwlth.Ct. 530, 537, 503 A.2d 1090, 1094 (1986). The court added:

As for whether the IEP prescribed by the Secretary is in accordance with the law, we note that 22 Pa.Code § 341.15, which sets forth the elements of an IEP, requires that the IEP include a statement of the specific educational services that are to be provided to the child, including a "description of all special education and related services required to meet the unique needs of the child . . . ." Moreover, 22 Pa.Code § 13.22 specifies that "[c]urricula for gifted and talented school-aged persons shall be conducted in accordance with standards established by the Secretary and shall include provisions for . . . (3) Amount of supervision and [\*\*788] special teaching, determined by the type and degree of mental abilities or talents." In approving an IEP for Terry, the Secretary acted in accordance with the above regulations and with the underlying requirement that exceptional children be given an appropriate [\*\*\*7] education, designed to address their individual needs.

*Id.* at 538, 503 A.2d at 1095.

We granted allocatur to determine whether the Secretary and Commonwealth Court exceeded the mandate of the Public School Code in requiring the school district to provide a gifted student with an individualized program of instruction which goes beyond that provided by the district's "enrichment" program.

The School Code defines "exceptional children" as follows:

(1) The term "exceptional children" shall mean children of school age who deviate from the average in physical, mental, emotional or social characteristics to such an extent that they require special educational facilities or services and shall include all children in detention homes.

24 P.S. § 13-1371(1). In 1973, the State Board of Education published its first proposed regulations on the subject of special education. Citing *section 13-1371*, the proposed regulation states:

[\*546] The provisions of this Chapter shall provide for the comprehensive education and special training necessary for pupils who are:

- (1) mentally impaired;
- (2) physically impaired; or
- (3) *gifted and talented*.



[\*\*8] 22 Pa.Code § 13.3, 3 Pa. Bulletin 1473 (1973). (Emphasis added). <sup>1</sup> Four years later, the General Assembly, which had theretofore made no reference to "gifted" students in the School Code, amended Section 13-1372(3) of the School Code to include the following language:

[T]he institution of special classes and programs at the secondary level for *exceptional children who are gifted and talented students* may be deferred until September 1978.

(Emphasis added.) The expressed and clear import of this new language is that by 1977, both the General Assembly and the Department of Education included gifted children within the meaning of "exceptional" children.

1 This section was not finally adopted by the State Board of Education, but the Board did adopt Section 13.1, 5 Pa. Bulletin 1542 (1975), which defines "exceptional persons" as "gifted and talented school-aged persons." This provision may be found currently at 22 Pa.Code § 13.1.

In general, the School Code requires special treatment for exceptional students: [\*\*9]

**(1) Standards for Proper Education and Training of Exceptional Children.** The State Board of Education shall adopt and prescribe standards and regulations for the proper education and training of all exceptional children by school districts or counties singly or jointly . . . .

**(2) Plans for Education and Training Exceptional Children.** Each intermediate unit, cooperatively with other intermediate units and with school districts shall prepare and submit to the Superintendent of Public Instruction, on or before the first day of August . . . for his approval or disapproval, *plans for the proper education and training of all exceptional children in accordance* [\*547] *with the standards and regulations adopted by the State Board of Education.* Plans as provided for in this section shall be subject to revision from time to time as conditions warrant, subject to the approval of the Superintendent of Public Instruction.

24 P.S. § 13-1372(1, 2). (Emphasis added.) <sup>2</sup>

2 The superintendent of every school district is required to identify "every exceptional child" within his district and report that information to the proper intermediate unit. 24 P.S. § 13-1371(2).

[\*\*10] In sum, Section 13-1372 requires that the State Board of Education promulgate standards and regulations for the education of all exceptional children, and that each intermediate [\*789] unit and each school district within those units cooperate to prepare a plan for the education of all exceptional children, subject to the approval of the Superintendent of Public Instruction. In response to this statutory mandate, the State Board of Education has prescribed the following pertinent definitions and regulations:

### 22 [Pa.Code] § 341.1. Definitions.

(iv) *Mentally gifted.* -- Outstanding intellectual and creative ability the development of which requires special activities or services not ordinarily provided in the regular program. Persons shall be assigned to a program for the gifted when they have an IQ of 130 or higher. A limited number of persons with IQ scores lower than 130 may be admitted to gifted programs when other educational criteria in the profile of the person strongly indicate gifted ability.

### 22 [Pa.Code] § 341.15. Individualized Education Program.

The Individualized Education Program for each person assigned to special education programs or services shall include: [\*\*11]

(1) A statement of the present level of educational performance of the person.





(2) A statement of annual goals which describes the expected behaviors to be achieved through the implementation [\*548] of the Individualized Education Program of the person.

(3) A statement of short-term instructional objectives.

(4) A statement of specific educational services to be provided to the child, including a description of special education and related services required to meet the unique needs of the child, a special instructional media and materials to be provided, and the type of physical education program in which the child will participate.

(5) A description of the extent to which the child will be able to participate in regular education programs.

(6) The projected date for initiation and the anticipated duration of services.

(7) Appropriate objective criteria, evaluation procedures and schedules for determining, on at least an annual basis, whether the instructional objectives are being achieved.

#### **[22 Pa.Code] § 13.1. Definitions.**

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

\* \* \*

*Appropriate* [\*\*\*12] *program* -- A program of education or training for exceptional school-aged persons which meets their individual needs as agreed to by a parent, school district or intermediate unit personnel; or as ordered by a hearing officer; or upon appeal as ordered by the Secretary of Education.

*Exceptional persons* -- *Persons of school-age who deviate from the average in physical, mental, emotional or social characteristics to such an extent that they require special educational programs, facilities or services and shall include school-aged persons in detention homes and State schools and hospitals.*

(i) . . . .

(ii) *Gifted and talented school-aged persons* -- Those who, in accordance with criteria prescribed in standards developed by the Secretary of Education, have outstanding [\*549] intellectual or creative ability, the development of which requires special activities or services not ordinarily provided to regular children by local educational agencies.

\* \* \*

*Special education* -- A basic education program adjusted to meet the educational needs of exceptional persons.

These regulatory provisions can be fairly summarized as requiring that mentally gifted students be [\*\*\*13] provided with a plan of individualized instruction (an "appropriate program") designed to meet "the unique needs of the child."

At the root of this case is the school district's concern about costs. The district asks whether it is required to become a Harvard or a Princeton for those who have IQ's over 130, and the School Boards Association, arguing as amicus curiae, asserts that a "subjective standard" will lead to [\*\*790] "bankruptcy of the public school system." Both the district and the association assert that what is required of school districts is only that they provide an approved program for exceptional children which "to some degree" addresses the needs of exceptional children. They argue that the district's "enrichment" program, which has been approved by the Secretary, is all they are required to provide. The "enrichment" program, which



consists of materials added to the regular curriculum available to exceptional students, augments the regular curriculum, but does not attempt to address the needs of individual students.

Our response to these claims need go no further than reference to the Public School Code and the regulations. It is plain that *section 13-1372(1)* of the Code [\*\*14] requires that the State Board of Education "adopt and prescribe standards and regulations for the proper education . . . of all exceptional children," and it is equally plain that *section 13-1372(2)* requires the school districts to participate in the planning of educational programs for these children, *in accordance with the Superintendent's standards and regulations* and subject to his approval. See 24 P.S. § 13-1372(2), *supra*. It is also abundantly clear that the State [\*\*550] Board has promulgated standards and regulations which require the production of an individualized education program for each exceptional child, including "gifted and talented" children, as defined by the General Assembly. 22 Pa.Code § 341.15, *supra*.

In light of this, the district's claim that individualized planning and education for gifted exceptional children is not required is unfounded. The district's related claim that its *section 13-1372(2)* approved plan, which consists of "enrichment" of the regular curriculum, is all that it is required to do with respect to gifted students, is equally unfounded. The General Assembly has authorized the State Board of Education to define and regulate special [\*\*15] education for exceptional children in Pennsylvania. This the State Board has done, and it has done it in such a way as to require *individualized*, as well as group planning and education of exceptional children. The district is correct in recognizing that it is required to formulate a plan pursuant to *section 13-1372(2)* to educate exceptional youngsters, that this plan must be approved by the Secretary, and that the plan may be general in nature, as is the district's "enrichment" program. But it does not follow from the school district's completion of this threshold requirement that it is excused from completing the other requirements found in the regulations concerning exceptional children.

Among these other requirements are that the school district identify all children who may be in need of special education programs or services, 22 Pa.Code § 341.12; that the district evaluate such students, *id.* § 341.13; that the district prepare an individualized education program for each child assigned to the special education program, *id.* at 341.15; that the district conduct a conference with the parent concerning the IEP, *id.* § 341.16; that the IEP be developed jointly by [\*\*16] parents and school personnel, and if parents disagree with the program, they may request a hearing before a hearing officer, who will issue an opinion and order defining the assignment, program and services to be provided the child. *Id.* at § 341.18, § 13.1.

[\*\*551] Since the State Board of Education has been mandated to promulgate regulations concerning the "proper education and training of all exceptional children," and since these regulations have been duly promulgated and instruct the school districts as indicated above, it is difficult to understand the school district's claim that the districts are required to do no more than provide the generalized "enrichment" programs mentioned earlier.

It is true that the School Code itself does not identify individualized education programs and does not speak, as do the regulations, of the unique needs of each exceptional child. That is to be expected, for when the General Assembly delegated to the State Board of Education the duty of providing the details of "proper education and training of all exceptional children," 24 P.S. § 13-1372(1), it had no need to be more specific.

[\*\*791] The district argues, however, that even if the State Board [\*\*17] is empowered to promulgate regulations, these particular regulations exceed its authority. This argument also is without merit. The General Assembly required the State Board to promulgate regulations concerning the proper education and training of exceptional children. That is exactly what these regulations treat, and they are not, therefore, beyond the authority granted by the General Assembly.

Finally, with respect to cost, we not only sympathize, but agree with the district and the Pennsylvania School Boards Association that the district's responsibility *is not without limits*. The instruction to be offered need not "maximize" the student's ability to benefit from an individualized program. However, the idea that the school district's obligation is limited is not new and does not compel the district's conclusions in this case. In *Scott S. v. Department of Education*, 99 Pa.Comwlth.Ct. 57, 512 A.2d 790 (1986), limits were set on the amount of individualized mathematics instruction which a school district could be required to provide to a gifted student. After observing that a senior high curriculum must offer three years of [\*\*552] mathematics [\*\*18] acceptable for college admission, that it *may* offer advanced placement courses, and *may* allow part-time college enrollment, the Secretary wrote:



Although gifted exceptional students are entitled to a program of special education which will address the student's individual needs, the district's responsibility to provide such is not without bounds . . . . Accordingly, Scott is entitled to a basic education program adjusted to meet his needs. The curriculum of this program is to be adapted from the regular basic education curriculum. In this regard, the district witnesses testified on the hearing record that Scott had exhausted the district's curricular offerings in mathematics . . . . In other words, we may assume that Scott has exhausted the district's curricular mathematics offerings in both regular and special education and has completed the mathematics courses required for graduation. Yet, Scott's parents wish him to be provided with more.

We can find neither legal nor factual basis for this. The district has addressed Scott's giftedness, specifically in the area of mathematics for several years. This has been accomplished by accelerating Scott to higher level classes [\*\*\*19] or by providing independent study . . . . In this manner the district addressed Scott's individual needs for mathematics instruction. However, to provide Scott with yet another mathematics course at this point in time *would go beyond adaptation of the district's legally required mathematics curriculum* and . . . constitute provision of more than an appropriate program of special education to Scott.

*In Re the Educational Placement of Scott S.* (Special Education Opinion No. 250), p. 5, *aff'd Scott S. v. Dept. of Education*, 99 Comwlth Ct. 57, 512 A.2d 790 (1986).

The rule which we extrapolate and endorse from this well-reasoned opinion of the Secretary is that a school district may not be required to become a Harvard or a Princeton to all who have IQ's over 130. We agree that "gifted" students are entitled to special programs as a [\*553] group to bring their talents to as complete a fruition as our facilities allow. We do not, however, construe the legislation as authorizing individual tutors or exclusive individual programs outside or beyond the district's existing, regular and special education curricular offerings.

Because we can [\*\*\*20] find no legal basis to determine that the Secretary has exceeded his authority in promulgating regulations pertinent to this case and because the regulations clearly require that school districts create individualized educational plans for exceptional students (which may or may not involve accelerated instruction) as well as create a general plan to educate exceptional students, we affirm the order of Commonwealth Court.<sup>3</sup>

3 The school district's additional claim that the Secretary improperly limited his review of the hearing officer's report is also without merit. As observed by Commonwealth Court, although the Secretary was free to make his own findings, the record indicates that he adopted the findings of the hearing officer after an independent examination of the record led him to concur with the reasoning and findings of the hearing officer.

Affirmed.



**Appendix I:** B.C. v. Penn Manor School District, 906 A.2d 642 (Pa. Commw. 2006

**B.C., by and through his parent and natural guardian, J.C., Petitioner v. Penn  
Manor School District, Respondent**

**No. 1150 C.D. 2005**

**COMMONWEALTH COURT OF PENNSYLVANIA**

***906 A.2d 642; 2006 Pa. Commw. LEXIS 445***

**April 3, 2006, Argued  
August 15, 2006, Decided  
August 15, 2006, Filed**



**PRIOR HISTORY:**    [\*\*1]   Appealed from No. 1604.   State Agency Special Education Due Process Appeals Review Panel.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Petitioner student, by and through his parent and natural guardian, appealed the determination of the Special Education Due Process Appeals Review Panel (Pennsylvania), which affirmed a hearing officer's award of one hour of compensatory education for every school day of the 2003-04 school year and no compensatory education for the 2002-03 or 2004-05 school years.

**OVERVIEW:** On appeal, the student argued that the Panel erred in applying a one-year statute of limitations period to his challenge of the 2002-03 gifted individualized education programs (GIEP) and in awarding an insufficient amount of compensatory education for the 2003-04 and 2004-05 school years. Several of the student's arguments were waived because he failed to argue them below and had not identified in his brief where the issues were properly raised and preserved below. Because the student failed to demonstrate why he was delayed in requesting a due process hearing or why his delay should be excused, the appellate court held that the Panel appropriately applied a one-year statute of limitations period. Finally, the appellate court concluded that where there was a finding that a student was denied a free and appropriate public education (FAPE) and the Panel determined that an award of compensatory education was appropriate, the student was entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE. Thus, the award to the student was appropriate.

**OUTCOME:** The Panel's order was affirmed.

**COUNSEL:** James R. Clark, Lancaster, for petitioner.

Kim R. Smith, Lancaster, for respondent.

**JUDGES:** BEFORE: HONORABLE BERNARD L. McGINLEY, Judge, HONORABLE BONNIE BRIGANCE LEADBETTER, Judge, HONORABLE JOSEPH F. McCLOSKEY, Senior Judge. **OPINION BY JUDGE LEADBETTER.**

**OPINION BY: BONNIE BRIGANCE LEADBETTER**

**OPINION**

[\*643]   OPINION BY JUDGE LEADBETTER

B.C. (Student), by and through his parent and natural guardian, J.C., appeals from a determination of the Special Education [\*644] Due Process Appeals Review Panel (Panel), which affirmed a hearing officer's award of one hour of compensatory education for every school day of the 2003-04 school year and no compensatory education for the 2002-03 or 2004-05 school years. We affirm.

Student, who began kindergarten in the Penn Manor School District (District) during the 2000-01 school year, was identified as a gifted student during the 2001-02 school year. <sup>1</sup> On November 12, 2002, the District issued a report concluding that Student was eligible for the District's Discover program, which is a "pull-out," theme-based enrichment program for gifted students. <sup>2</sup> As such, the District [\*\*2] created a gifted individualized education program (GIEP) <sup>3</sup> for Student for the 2002-03 school year. When it was finalized, Student's parents (Parents) signed the Notice of Recommended Assignment (NORA) agreeing to the services contained therein. The 2002-03 GIEP essentially tracked the Discover program's themes, but provided little individualized education. *See* R.R. 1051a-57a.

1   Student is unquestionably a gifted student with a full scale IQ of 144, a verbal IQ of 148 and a performance IQ of 132. Generally, to qualify for gifted services in Pennsylvania, a student must have an IQ at or above 130. *See* 22 Pa. Code § 16.21(d).

2   Essentially, the Discover program involves topic-oriented instruction, in which students are encouraged to pick an individual project involving one or more school subject areas within the Discover program's topics.

3 Title 22, Chapter 16 of the Pennsylvania Code sets forth the extensive requirements for drafting GIEPs, including identifying the gifted child, completing a multi-disciplinary evaluation and reevaluation, and writing a GIEP with the student, the student's parents, and representatives from the school District. *See 22 Pa. Code § 16.21-16.32.* The GIEP is to include: 1) a statement of the student's present levels of educational performance; 2) annual goals and short-term learning outcomes which are responsive to the student's needs as identified in the evaluation report; 3) a statement of the specially designed instruction and support services that the student will receive; 4) projected dates for initiation and duration of the GIEP services; 5) objective criteria, assessment procedures, and timelines to determine whether the student has met the goals and learning outcomes; and 6) the names of the persons who helped draft the GIEP and the date of the meeting. *22 Pa. Code § 16.32(e).*

[\*\*3] On September 4, 2003, the 2003-04 GIEP was finalized with Parents signing the NORA. The 2003-04 GIEP outlined that Student would receive advanced math instruction, but did not provide any other individualized instruction. Once again, the short-term learning outcomes and goals tracked the three topics presented within the Discover program that year (Student participated in Discover during the 2003-04 school year for approximately 1.5 to 2.0 hours per school day out of a "six-school-day cycle"). Additionally, as per the 2003-04 GIEP, Student received accelerated math instruction in a small group for fifty minutes per day.

Because they believed Student was not receiving sufficiently individualized instruction, on March 8, 2004, Parents requested that Student be re-evaluated, which the District did between May 20 and 21, 2004. Additionally, Parents twice had Student independently evaluated.<sup>4</sup> Subsequently, Student rejected the proposed 2004-05 GIEP and ensuing revisions thereto. Eventually, on August 5, 2004 [\*645] Parents requested a due process hearing.<sup>5</sup>

4 Parents shared these independent evaluations with the District. Additionally, Student presented the testimony of the independent evaluators and their reports to the hearing officer. Student's experts concluded that Student was gifted in all areas of instruction, especially math, with the exception of art.

[\*\*4]

5 Following Parents' request for a due process hearing, the Parents further rejected four additional revisions to the 2004-05 GIEP.

Between December 6, 2004, and February 15, 2005, the requested due process hearing took place with Student and the District presenting extensive testimony, including that from Student's teachers, persons who evaluated Student, Student, and his father, and copious documents, including Student's GIEPs (from 2002 through 2005), various evaluations performed upon Student, Student's schoolwork, correspondence between the District and Student's Parents, and Student's academic record. On April 2, 2005, the hearing officer filed extensive findings of fact and conclusions of law. Although Student presented evidence on the 2002-03 GIEP, the hearing officer held that any claim regarding the 2002-03 GIEP was time-barred under *Montour School District v. S.T., 805 A.2d 29 (Pa. Cmwlth. 2002) (Montour)* (establishing that the statute of limitations in compensatory education cases begins one year from the date that a due process hearing is requested, unless the [\*5] party proves that mitigating circumstances existed, which extends the statute of limitations to two years prior to the due process hearing request) and *Carlynton School District v. D.S., 815 A.2d 666 (Pa. Cmwlth. 2003) (Carlynton)* (applying *Montour* to compensatory education claims involving gifted students). Further, the hearing officer held that Student failed to prove that mitigating circumstances existed to excuse his delay in requesting a due process hearing.

On Student's claim for compensatory education for the 2003-04 school year, the hearing officer found that the 2003-04 GIEP was procedurally deficient in that it failed to sufficiently describe Student's present abilities or needs, did not contain necessary test scores or descriptive goals, and generally failed to provide student with individualized instruction. As for the 2004-05 GIEP, the hearing officer found that, although it did not contain short-term learning outcomes or a sufficient spelling program, it was a vast improvement over the 2003-04 GIEP, as it provided for further testing of Student and individualized instruction in virtually every subject area. Based on her findings, the hearing [\*6] officer concluded that Student was denied a free and appropriate public education (FAPE) for the 2003-04 school year and ordered one hour of compensatory education for every school day of the 2003-04 school year. In contrast, the hearing officer found that Student received a FAPE for the 2004-05 school year and, thus, did not award any compensatory education for that school year. However, she did order the District to draft the 2004-05 GIEP with short-term learning outcomes.



Both Student and the District filed exceptions to the hearing officer's decision with the Panel.<sup>6</sup> The Panel conducted an independent review of the evidence, assessed credibility, and weighed the evidence. *See York Suburban Sch. Dist. v. S.P.*, 872 A.2d 1285 (Pa. Cmwlth. 2005) (establishing that the Panel is the fact-finding body and that the Panel must make an independent review of the evidence). First, the Panel rejected Student's exception that the statute of limitations was actually two years. The Panel held that the recently reauthorized Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400, *et seq.*, was inapplicable to gifted students<sup>7</sup> and that, [\*\*7] in any case, the provisions that Student pointed to in support were not effective until July 1, 2005. Further, the Panel held that Student failed to present any mitigating circumstances to excuse his delay in requesting a due process hearing, and thus, the appropriate statute of limitations under *Montour* and *Carlynton* was one year.

6 Student's exceptions and brief in support of those exceptions were not included with the original record. Although the District filed a supplemental reproduced record containing a copy of Student's brief, it was not considered by this court as it is not part of the original record. Thus, any discussion that follows regarding Student's exceptions is taken from the Panel's characterization of those exceptions.

7 *See Saucon Valley Sch. Dist. v. Jason O.*, 785 A.2d 1069, 1075 n.10 (Pa. Cmwlth. 2001) (determining that IDEA, which is a federal statute that applies only to students receiving special education, is not applicable to gifted students, to whom Title 22, Chapter 16 of the Pennsylvania Code applies).

[\*\*8] Second, the Panel rejected Student's exception to the amount of compensatory education awarded, finding that Student was not entitled to a full day of compensatory education for each day of the 2003-04 school year, nor was he automatically entitled to compensatory education for the 2004-05 school year by virtue of the presence of minor deficiencies in the 2004-05 GIEP. Specifically, the Panel held:

On the other hand, for the 2004-05 school year, we conclude that the ultimately revised GIEP met the applicable standard. Unlike its predecessors for the previous years, it was not of the cookie-cutter variety. More specifically, it included, *inter alia*, the following features reasonably responsive to the Student's individual, gifted needs: 1) specific present educational levels; 2) acceleration and enrichment in math and reading, [sic] 3) coordinated enrichment activities and social studies and science; and 4) sufficient support services.

Overall, we conclude that the hearing officer's calculus of one hour for each day in the 2003-04 school year, i.e., a total compensatory education award of approximately 180 hours, was within equitable bounds. For the relevant year, the amount [\*\*9] of gifted support approximated an average of slightly more than an hour per day. This amount does not include the differentiated instruction amounting to specially designed education beyond the pull-out program. Yet, various equitable reductions, including but not limited to absences, [and services received in both the Discover program and small math group] serve as counterbalancing offsets. Moreover, although the relevant GIEP for our determination usually is the latest one proposed before the Parents filed for the hearing, in this case the period of time that the District took to improve the 7/4/04 GIEP to the point of being appropriate effectively serves as a reasonable measure of the reduction for reasonable rectification. Thus, although she did not specifically explain her process of calculation, the hearing officer's bottom line in terms of the amount of compensatory education passes equitable muster as a reasonably tailored level of relief in this case.

*In re: The Educational Assignment of B.C.*, (Special Educ. Op. No. 1604, filed May 6, 2005), slip op. at 8-9 (footnotes omitted). As such, the Panel affirmed the hearing officer's award of one hour of compensatory [\*\*10] education for every school day of the 2003-04 school year, but modified the part of the hearing officer's order that required the District to draft short-term learning outcomes for the 2004-05 GIEP to be merely a strong suggestion.<sup>8</sup>

8 The Panel also rejected the District's exception that it had proved the 2003-04 GIEP was sufficiently individualized.

[\*647] Student appealed to this court arguing that the Panel erred in applying a one-year statute of limitations period to his challenge of the 2002-03 GIEP because: 1) the Panel should have applied a six-year statute of limitations





period under *Section 5527* of the Judicial Code, 42 Pa. C.S. § 5527;<sup>9</sup> 2) the minority tolling provisions of *Section 5533(b)* of the Judicial Code, 42 Pa.C.S. § 5533(b), should have tolled the statute of limitations period until student reached eighteen years of age; 3) *Montour* and *Carlynton* were wrongly decided and this court should adopt an "equitable statute of limitations, [\*\*11] " which runs from the time the District knows or should have known that the GIEP is deficient; and 4) the Panel erred in failing to find that mitigating circumstances existed. Student also argues that the Panel erred in awarding an insufficient amount of compensatory education for the 2003-04 and 2004-05 school years.

9 The Judicial Code has been recently amended by the Act of May 4, 2006 (Act No. 34 of 2006), to take effect in 120 days. The amendment is of no moment in this particular case.

### Issue Preservation

Before reaching the merits of the issues that Student has appealed, we first address whether Student has properly preserved all of the issues he is now raising for our review. It is well-settled that, where an issue was not raised below, it will not be addressed for the first time in this court. *Pa. R.A.P. 1551*. To preserve an issue for review, a litigant must make a timely objection at the hearing before the lower tribunal. *In re: Condemnation by the County [\*\*12] of Allegheny of a Certain Parcel of Land in Robinson Twp., 453 A.2d 744, 745, 70 Pa. ommw. 642 (Pa. Cmwlt. 1982)*. Furthermore, the Rules of Appellate Procedure require a petitioner to set forth the location in the record where the issue was raised and preserved below. *See Pa. R.A.P. 2117(c)* (requiring the statement of the case in an appellate brief to identify the place and manner in which the issues were raised and preserved below); and *Pa. R.A.P. 2119(e)* (requiring argument in an appellate brief to identify where the issues were raised below).

Our review of the record indicates that Student failed to argue, before either administrative body, that: 1) a six-year statute of limitations applied; 2) the minority tolling provision of the Judicial Code tolled the statute of limitations; or, 3) this court should disregard *Montour* and *Carlynton* and adopt an "equitable statute of limitations." Moreover, Student has not identified anywhere in his brief where these issues were properly raised and preserved below. Although Student argues that he is merely "refining" issues that he did raise below, we disagree. Instead, Student [\*\*13] is raising entirely new arguments regarding the applicable statute of limitations, all of which he never identified or raised before either lower body. What the record reveals is that Student has consistently changed his legal theory regarding the statute of limitations in an attempt to find a meritorious argument.<sup>10</sup> Thus, [\*\*648] these arguments are waived. Even if that were not the case, we are bound by the decisions in *Montour* and *Carlynton* and decline Student's invitation to re-evaluate these precedents.

10 In his reply brief, Student argues that these issues are not waived because: 1) he has merely refined his argument; 2) equity requires that this court apply a longer statute of limitations period; and 3) the District's citation in its brief to the Local Agency Law, 2 Pa. C.S. § 753(a), rather than to the Administrative Agency Law, results in waiver. These contentions are all unmeritorious. First, as discussed above, Student has not merely refined his argument but, instead, is raising new legal arguments for the first time before this court. Second, in *Montour*, this court considered the equitable nature of a compensatory education award and chose to limit the statute of limitations to one year. *Id. at 37 and 40*. Finally, assuming *arguendo* that an incorrect citation alone can be the basis for waiver, this court may raise the issue of waiver *sua sponte*. Furthermore, although the District incorrectly cited to the Local Agency Law instead of to *Section 703(a)* of the Administrative Agency Law, 2 Pa. C.S. § 703, District's subsequent citations to case law discussing waiver under *Section 703(a)*, such as *Wing v. Unemployment Compensation Board of Review, 496 Pa. 113, 436 A.2d 179 (1981)* and *Sharp Equipment Co. v. Unemployment Compensation Board of Review, 808 A.2d 1019 (Pa. Cmwlt. 2002)*, sufficiently asserted waiver.

### [\*\*14] Statute of Limitations

We next turn to Student's argument that he proved mitigating circumstances existed to extend the limitations period beyond one year.<sup>11</sup> *Montour* and *Carlynton* established that, in compensatory education cases, a party can only challenge the GIEPs falling within the one-year period prior to the request for a due process hearing, unless that party proves that mitigating circumstances existed to excuse their delay in requesting a due process hearing. Then, the statute of limitations period is extended to two years prior to the request for a due process hearing. Although this court has not identified standards to measure "mitigating circumstances,"<sup>12</sup> we need not do so here because Student





has failed to present any relevant facts demonstrating why he was delayed in requesting a due process hearing, much less why we should excuse this delay.<sup>13</sup> Thus, in light of Student's failure to articulate any relevant facts demonstrating why he was delayed in requesting a due process hearing or why his delay should be excused, we hold that the Panel's finding that Student failed to prove mitigating circumstances is supported by substantial evidence. [\*\*15] We therefore conclude that the panel appropriately applied a one-year statute of limitations period and, consequently, only considered Student's claims regarding the 2003-04 and 2004-05 GIEPs.

11 Our review is limited to determining whether the panel's decision was supported by substantial evidence or whether the panel committed an error of law. *Brownsville Area Sch. Dist. v. Student X*, 729 A.2d 198 (Pa. Cmwlth. 1999).

12 Student requests that we define "mitigating circumstances" broadly in compensatory education cases yet has not suggested a definition for this court to adopt.

13 As proof of mitigating circumstances, Student points to the District's policy of screening all second grade students for giftedness, but not before that unless a teacher identifies a kindergartner or first grader as exceptional. We agree with the Panel that Student fails to explain how this policy delayed his request for a due process hearing before August 2004. Additionally, Student received gifted services in his second grade year (2002-03) but is attempting to contest the adequacy of those services.

### [\*\*16] Award of Compensatory Education

We next turn to Student's argument that the Panel erred in awarding him only one hour per school day of compensatory education for the 2003-04 year and no compensatory education for the 2004-05 year. This court has recognized that when a gifted child is denied a FAPE, compensatory education may be an appropriate remedy for the District's failure to provide an adequate educational program for the gifted child. *Brownsville Area Sch. Dist. v. Student X*, 729 A.2d 198 (Pa. Cmwlth. 1999). "[Compensatory education's] purpose is to fairly compensate the student whose school district has failed to provide the student a free appropriate public education." *Id.* at 200. However, in the context of gifted education, the compensatory education award must be limited to the [\*649] education available within the curriculum of the school district. *Id.*<sup>14</sup> Although this court has determined that compensatory education is an appropriate remedy once the Panel finds that the student was denied a FAPE, we have found no decision setting out a standard for determining the amount of compensatory education to be awarded to a student. [\*\*17]

14 In so holding, the *Brownsville* decision relied upon the Supreme Court's decision in *Centennial School District v. Department of Education*, 517 Pa. 540, 539 A.2d 785 (1988). In *Centennial School District*, the Supreme Court stated:

a school district may not be required to become a Harvard or a Princeton to all who have IQ's over 130. We agree that "gifted" students are entitled to special programs as a group to bring their talents to as complete a fruition as our facilities allow. We do not, however, construe the legislation as authorizing individual tutors or exclusive individual programs outside or beyond the district's existing, regular and special education curricular offerings.

*Id.* at 552-53, 539 A.2d at 791.

However, three federal circuits have addressed the appropriate standard for determining the amount of compensatory education to be awarded under IDEA.<sup>15</sup> Although these cases involve a different statutory scheme that applies only to students [\*\*18] receiving special education services (and not to gifted children), we find the discussions contained therein instructive. Additionally, in their briefs, the parties have suggested standards that they urge this court to adopt in reviewing whether a compensatory education award is appropriate. Student's suggested standard, "[c]ompensatory education equal to the period of the deprivation," is similar to the standard adopted by the United States Court of Appeals for the Third Circuit. Petitioner's Brief at 33. In *M.C. v. Centrail Regional School District*, 81 F.3d 389 (3d Cir. 1996), the court held that "a disabled child is entitled to compensatory education for a period equal to the period of deprivation." *Id.* at 397. See also *Westendorp v. Indep. Sch. Dist.*, 35 F. Supp. 2d 1134, 1137 (D. Minn. 1998) (presuming that an award equal to the period of deprivation is the appropriate remedy based on balancing the equities and facts in the case). As such, in cases under the IDEA, the Third Circuit awards



compensatory education solely on the basis of the actual time a student was deprived of a FAPE, without further analysis.

15 We have found no decisions from the courts of appeal of the other nine circuits.

[\*\*19] In contrast, the school district suggests a less rigid approach, stating that an award of compensatory education is an equitable, and, hence, discretionary, award, which gives the Panel flexibility in tailoring a particularized award based on the facts and equities of the case. The school district's emphasis on the equitable and discretionary aspect of a compensatory education award is similar to the standard adopted in the Ninth and District of Columbia Circuits. Specifically, when looking at whether a compensatory education award was appropriate, the Ninth Circuit rejected the argument that the student was "ipso facto" entitled to an amount of compensatory education equal to the time of deprivation "without any further analysis." *Parents of Student W v. Puyallup Sch. Dist.*, No. 3, 31 F.3d 1489, 1497 (9th Cir. 1994). The court stated, "[t]here is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Id.* In determining the appropriate amount of compensatory education to be awarded, that court focused on compensatory education's [\*\*20] equitable nature and held that the district court should apply a fact-specific analysis [\*\*650] that focused on both parties' conduct and what the student had or had not achieved. *Id.*

Similarly, in *Reid v. District of Columbia*, 365 U.S. App. D.C. 234, 401 F.3d 516 (D.C. Cir. 2005), the court rejected a "mechanical calculation" of a compensatory education award. *Id.* at 518. Specifically, the court stated:

"[C]ompensatory education is not a contractual remedy, but an equitable remedy, part of the court's resources in crafting 'appropriate relief.'" More specifically, as the Fourth Circuit has explained, "[c]ompensatory education involves discretionary, prospective, injunctive relief crafted by a court to remedy what might be termed an educational deficit created by an educational agency's failure over a given period of time to provide a FAPE to a student." Overlooking this equitable focus, the [student's] hour-for-hour formula in effect treats compensatory education as a form of damages -- a charge on school districts equal to expenditures they should have made previously. Yet "[t]he essence of equity jurisdiction" is "to do equity and to mould each [\*\*21] decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it."

*Id.* at 523-24 (citations omitted). The court agreed with the Ninth's Circuit's rejection of "day-for-day compensation for time missed," stating:

We think it would be highly incongruous if this qualitative focus on individual needs gave way to mechanical hour-counting when past rather than current violations of the FAPE standard were at issue. Accordingly, just as IEPs focus on disabled students' individual needs, so must awards compensating past violations rely on individualized assessments.

Unlike the [student's] one-for-one standard, this flexible approach will produce different results in different cases depending on the child's needs. Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies. Others may need extended programs, perhaps even exceeding hour-for-hour replacement of time spent without FAPE. In addition, courts have recognized that in setting the award, equity may sometimes require consideration of the parties' conduct, such as when the school system reasonably "require[s] some time [\*\*22] to respond to a complex problem," or when parents' refusal to accept special education delays the child's receipt of appropriate services. In every case, however, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place.

*Id.* at 524 (citations omitted). In conclusion, the court held that the student was not entitled "to an amount of such [compensatory education as] predetermined by a cookie-cutter formula, but rather to an informed and reasonable



exercise of discretion regarding what services he needs to elevate him to the position he would have occupied absent the school district's failures." *Id.* at 527.

We find the Ninth and District Columbia's Circuits' standard more persuasive and workable than that of the Third Circuit, as it tailors the equitable award of compensatory education to the particular student's needs, which a one-for-one standard fails to do. Hence, we reject Student's proposed hour-for-hour standard. Rather, we hold that where there [\*\*23] is a finding that a student is denied a FAPE and the Panel determines that an award of compensatory [\*\*651] education is appropriate, the student is entitled to an amount of compensatory education reasonably calculated to bring him to the position that he would have occupied but for the school district's failure to provide a FAPE. As noted by the District of Columbia Circuit, doing so may require awarding the student more compensatory education time than a one-for-one standard would, while in other situations the student may be entitled to little or no compensatory education, because (s)he has progressed appropriately despite having been denied a FAPE.

Of course, since we have not previously set out this standard in these terms, it was not specifically addressed by the hearing officer or the Panel, as should occur in future cases. Nonetheless, given the evidence in this case, the special expertise of hearing officers and the Panel in such matters and the equitable nature of compensatory awards, we are satisfied that the award here was not an abuse of discretion, but was appropriate under the circumstances.

Accordingly, we affirm.

**BONNIE BRIGANCE LEADBETTER**, Judge

#### **ORDER**

[\*\*24] AND NOW, this 15th day of August, 2006, the order of the Special Education Due Process Appeals Panel in the above captioned matter is hereby **AFFIRMED**.

**BONNIE BRIGANCE LEADBETTER**, Judge



## **Appendix J: Generally Applicable Pre-Hearing Directions**

[Prehearing Directions – Uniform](#)

[Prehearing Directions - Plain Writing Act Version](#)



## **Appendix K: Sample Due Process Complaint**

### **OUTLINE OF A “DUE PROCESS COMPLAINT”**

Date

Method of Correspondence (Example: “*Via e-mail and first class mail*”)

Name of School District’s Attorney or Special Education Director  
Address

Re: Student Name / School District Name – Due Process Complaint Form

Dear [School District’s Attorney or Special Education Director],

Paragraph 1: Introduce yourself and your child. Let the reader know that this is a Due Process Complaint, and provide the basic information required in the complaint.

Example: My name is [name of parent]. This is a Due Process Complaint filed on behalf of my [son or daughter, first and last name,] against the [name of school district]. We reside at [address]. [Child’s name]’s date of birth is [date].

Paragraph 2: Provide relevant information about your child’s eligibility as a gifted student. Write a brief statement (one or two sentences) about why you are filing the complaint.

You may want to use the following questions as a guide for this paragraph:

- Is the student identified as gifted? If yes, when were they identified?
  - What is the date on the first Multidisciplinary Evaluation Report and your child’s first GIEP?
- What type of gifted education services do they currently receive from the school district?
- Why are you filing this complaint at this time? What made you decide to file it at this time?

### **Nature of the Problem**

This section should describe the problem that led you to file a Due Process Complaint. It should describe the problem in enough detail that the school district will understand why you are filing the complaint and what issues you will be asking the Hearing Officer to decide. In this section, you may want to describe why you believe the school district is violating the law, or why your position is legally correct. You may need to educate yourself on the law in order to write this section of the complaint. You will find resources on how to learn about the law in this manual, as well as phone numbers for organizations you can call for assistance in understanding the law.



### **Proposed Resolution**

This section should describe what you are asking the District to do in order to resolve your complaint.

For example, depending on the issues involved in your complaint, you may be asking the District to do one or more of the following in order to resolve your complaint:

- Provide a reevaluation for your child
- Provide an appropriate placement for your child
- Provide the services necessary for your child to receive an appropriate education Provide educational services to make up for services they have failed to provide in the past

Note: Your proposed resolution may include other suggestions other than any of the examples listed above. Your proposed resolution should be specific to your complaint, and should describe what you want the District to do to resolve your complaint.

Sincerely,  
Your Name

#### IMPORTANT INFORMATION:

You have the option of filling out the "Due Process Complaint Form" that is available through the Office for Dispute Resolution. You may also choose to write your Due Process Complaint in the form a letter to the School District or the School District's Attorney (a sample of this format is included above). To file the complaint, you must send a copy to either the District or their Attorney. You must also send a copy of your complaint to the Office for Dispute Resolution (ODR). To file your complaint with ODR, attach it to an e-mail addressed to [odr@odr-pa.org](mailto:odr@odr-pa.org).

It is important for you to understand that your complaint must provide enough information to allow the District to understand why you are filing the complaint and what you are asking them to do to resolve it. If you do not, your complaint may be deemed insufficient. If your complaint is deemed insufficient, you may ask the Hearing Officer for an opportunity to amend it. It is also important for you to understand that your complaint must include every issue that you would like the Hearing Officer to decide. If you fail to raise an issue in your complaint, the Hearing Officer will not permit you to raise that issue at your Due Process Hearing.

This document provides an example of one way to write a Due Process Complaint. You do not have to follow this format, but you should include the following information in your complaint:

1. Name of Child
2. Child's Address
3. Name of School Child Attends
4. A description of the nature of the problem, including facts related to the problem.
5. A proposed resolution to the problem, to the extent that you know of one and can offer one.



**SAMPLE “DUE PROCESS COMPLAINT”**

May 20, 2015

*Via e-mail and first class mail*

Mr. Joseph Smith, Esquire  
Smith & Lucas  
555 Main St.  
Hometown, PA 15155

Re: Jane Doe / Hometown School District – Due Process Complaint

Dear Mr. Smith,

My name is Joanna Doe. This is a Due Process Complaint filed on behalf of my daughter, Jane Doe, against the Hometown School District. We reside at 123 Main Street Hometown, PA 15155, an address located within the Hometown School District. Jane’s date of birth is March 3, 1999.

Jane is a 16-year-old student who is gifted. She currently attends 10<sup>th</sup> grade at Hometown High School. Through her GIEP, Jane receives math and science enrichment and is enrolled in a 10<sup>th</sup> grade Honors English class.

**Nature of the Problem**

At Jane’s most recent GIEP meeting, on May 1, 2015, the school district recommended that Jane no longer participate in honors English class for 11<sup>th</sup> grade. We disagree with the District’s proposal and file this Due Process Complaint seeking an order to prevent the District from changing Jane’s English class at the end of this school year.

We agree with Jane’s Honors English teacher that Jane can be successful in Honors English for 11<sup>th</sup> grade. Jane has also expressed an interest in remaining in Honors English class and she would benefit from continuing in that class again next year.

After receiving the NORA at Jane’s most recent GIEP meeting, we requested mediation with the District. We participated in mediation on May 15, 2015, but were unable to resolve our disagreement. Following that meeting, the District again issued a NORA recommending that Jane no longer participate in Honors English after the end of this school year. We again disagreed and now file this Due Process Complaint Form

Pennsylvania’s Chapter 16 requires public schools to provide students with GIEPs a free appropriate public education (FAPE). Her current Honors English teacher and we believe she would benefit from continuing in Honors English beyond this school year.



**Proposed Resolution**

To resolve this complaint, we seek an order that the school district:

Permit Jane to participate in Honors English class in 11<sup>th</sup> grade during the 2015-16 school year.

Please feel free to contact me if you have any questions or would like to discuss this with me.

Sincerely,

*Joanna Doe*

**Joanna Doe**  
**(Parent of Jane Doe)**

cc: Office for Dispute Resolution (via e-mail)





**Appendix L: Blank Complaint Form**

[Blank Complaint Form](#)

**Appendix M: Guide to Mediation**

[Guide to Mediation](#)

**Appendix N: Gifted Due Process Procedures Fact Sheet**

[Gifted Due Process Procedures Fact Sheet](#)



## **Appendix O: Example of 5-Day Disclosure Letter**

Date:

Student Last Name/School District

ODR File No.:

Re: 5-Day Disclosures

Dear [School attorney's name]:

I intend to call the following witnesses and use the following exhibits at the hearing:

1. Jane Marks (parent)
2. Joe Marks (parent)
3. Mrs. Smith (teacher)
4. Dr. Jones (psychologist)

### **Exhibits**

1. Letter from [teacher's name] to [parent's name] dated 10/21/2006
2. Report card dated 11/21/06
3. Evaluation by [expert's name] dated 12/30/06
4. Homework samples August 2006-December 2006
5. Letter from [parent's name] to School dated January 2, 2007
6. NORA dated January 2007
7. GIEP developed January 2007
8. Homework samples January 2007-June 2007
9. Letter from [teacher's name] to [parent's name] dated 3/10/07
10. Final report card June 2007

**[Your Signature]**



**Appendix P: Examples of Marked Exhibits**

***Sample***

***Exhibit***

***In***

***Portrait***

***Format***



*Sample  
Exhibit  
in  
Landscape  
Format*



## **Appendix Q: Example of Cover Sheet for Exhibit Notebook**

Parent Exhibits  
Student Last Name/School District

<u>Tab</u>	<u>Exhibit #</u>	<u>Exhibit Name</u>
1	P-1	Letter from [teacher's name] to [parent's name] dated 10/21/2006
2	P-2	Report card dated 11/21/06
3	P-3	Evaluation by [expert's name] dated 12/30/06
4	P-4	Homework samples August 2006-December 2006
5	P-5	Letter from [parent's name] to School dated January 2, 2007
6	P-6	NORA dated January 2007
7	P-7	GIEP developed January 2007
8	P-8	Homework samples January 2007-June 2007
9	P-9	Letter from [teacher's name] to [parent's name] dated 3/10/07
10	P-10	Final report card June 2007



## **Appendix R: Sample Motion**

Jones Law Firm  
P. O. Box 388  
Center City, PA 99999

August 1, 2011

### ***Via Electronic Mail and First Class Mail***

Hearing Officer  
P. O. Box 91  
Pittsburgh, PA 10000

Re: Student vs. Pennsylvania School District, ODR File No. 12345-1112  
Motion to Dismiss

Dear Hearing Officer:

This office represents the Pennsylvania School District in this matter. Following our review of the Parents' due process complaint, we believe the Parents have attempted to raise one or more issues which do not set forth a valid claim. Therefore, please accept this Motion to Dismiss on behalf of the District or, in the alternative, a challenge to the jurisdiction of the hearing officer.

In their complaint, the Parents allege that the student is currently residing in the Arizona State School District. The Pennsylvania School District is no longer obligated to educate the student, including providing gifted educational programming. The Parents' FAPE claim should therefore be dismissed. The parents also seek reimbursement for tutoring expenses, which is a remedy that the hearing officer lacks authority to order. Accordingly, there is no reason to proceed with the hearing scheduled for August 29, 2011.

The District respectfully requests that the hearing officer conclude that the due process complaint fails to state a proper claim and dismiss the complaint.

Very truly yours,  
Allison Jones, Esquire



## Additional Resources

There are a number of excellent resources for tips and suggestions on effective communications between parents and schools:

The Pennsylvania Training & Technical Assistance Network (PaTTAN) has prepared *Communicating with Your School*.

CADRE, The Center for Appropriate Dispute Resolution in Special Education, has a wealth of resources for parents on their website, <http://www.directionservice.org/cadre/>





OFFICE FOR DISPUTE RESOLUTION

6340 Flank Drive

Harrisburg, PA 17112-2764

(800) 222-3353 (717) 901-2145

TTY USERS: PA Relay 711

[www.odr-pa.org](http://www.odr-pa.org)