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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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MITCH DOWLER and IN CHA DOWLER, individually and as limited  
guardian ad litem for NAM SU CHONG, *et al.*,

Plaintiffs/Appellants,

vs.

CLOVER PARK SCHOOL DISTRICT NO. 400,

Defendant/Respondent.

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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Washington State Association for Justice Foundation

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## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of injured persons, including an interest in the extent to which federal legislation may impair the rights of Washington citizens under the Washington Law Against Discrimination, Ch. 49.60 RCW (WLAD), and common law.

## **II. INTRODUCTION AND STATEMENT OF THE CASE**

This case is about federalism, the concept of dual sovereignty, and the extent to which federal legislation based upon the U.S. Constitution Spending Clause may be interpreted to impair remedies provided by state law.

Suit was commenced in Pierce County Superior Court by Mitch and In Cha Dowler, individually and as limited guardians for Nam Su Chong, a developmentally disabled student, and other plaintiffs (collectively Dowler), against Clover Park School District No. 400 (School District). The underlying facts are drawn from the briefing of the

parties. See Dowler Br. at 1-19; School District Br. at 1-9; Dowler Reply Br. at 1-4.

For purposes of this amicus curiae brief, the following facts are relevant: Dowler alleges that in the course of providing special education services the School District engaged in disability discrimination in violation of WLAD, and committed tortious acts constituting "negligence, outrage and other common law causes of action." Dowler Br. at 1. Dowler seeks, inter alia, general damages for pain and suffering and emotional distress caused by the School District's wrongful conduct. See Dowler Br. at 11-12; School District Br. at 36. Dowler does not state any claims under federal law. See Dowler Br. at 1.

The special education services provided to Dowler by the School District were funded under the Individuals with Disabilities Education Act, 20 U.S.C. §§1400 et seq. (IDEA). As one condition of accepting this funding, the state of Washington agreed to create and maintain an administrative review system grounded in due process principles for participants challenging the adequacy of the "free appropriate public education" (or FAPE) required to be provided under the IDEA. See 20 U.S.C. §1415.<sup>1</sup>

The School District moved for summary judgment of dismissal of all state law claims because Dowler failed to exhaust administrative remedies under IDEA's exhaustion provision, 20 U.S.C. §1415(*l*). See

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<sup>1</sup> The full text of the current version of 20 U.S.C. §1415 is reproduced in the Appendix to this brief.

School District Br. at 5.<sup>2</sup> Dowler contended that §1415(*l*) does not apply for three reasons. First, Dowler does not raise any IDEA educationally-related concerns in the civil action. Second, the IDEA remedy is futile, in any event. Third, §1415(*l*) does not apply to state law claims for relief. See Dowler Br. at 1-2, 19-22.

For its part, the School District argued that IDEA administrative remedies are sufficient, even though not equivalent to those available in a civil action, that the administrative remedies are not futile, and that §1415(*l*) applies to state law claims because Washington special education law is identical to and encompasses federal law. See School District Br. at 1-2, 20, 47.

The superior court granted summary judgment of dismissal based upon Dowler's failure to exhaust administrative remedies under §1415(*l*). See Dowler Br. Appendix (summary judgment orders). Dowler appealed, and this Court granted direct review.

### III. ISSUE PRESENTED

Does the IDEA exhaustion provision, 20 U.S.C. §1415(*l*), require Washington citizens pursuing WLAD or common law tort claims in court to exhaust IDEA administrative remedies?

### IV. SUMMARY OF ARGUMENT

The text of the IDEA exhaustion provision, embodied in 20 U.S.C. §1415(*l*), only applies to federal claims, not claims based upon WLAD or state tort law. There is no reference in §1415(*l*) to state law claims. Moreover, §1415(*l*) cannot be interpreted to include state law claims

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<sup>2</sup> The full text of 20 U.S.C. §1415(*l*) is set forth infra at 7, and in the Appendix.

implicitly because IDEA is based on the Spending Clause, U.S. Constitution Art. I §8, cl. 1, and, as a consequence, any limitation on state law claims can only be imposed if it is *unambiguously* set forth in the statutory provision.

In addition, there is no provision of Washington law — including statutes and regulations implementing IDEA — that imposes an exhaustion requirement on Washington citizens who pursue state remedies for disability discrimination or tortious conduct occasioned by a school district's delivery of special education services. Absent such a statute or regulation, there is no basis for the Court to impose an exhaustion requirement under Washington law.

## V. ARGUMENT

### *Introduction*

This brief only addresses the issue of whether §1415(*I*)'s exhaustion of remedies requirement applies to claims for relief *under state law*. Dowler has preserved this issue for review. See Dowler Br. at 3, 20. However, the parties' briefing on this point requires supplementation. See Dowler Br. at 20, 44; School District Br. at 20.<sup>3</sup>

This case is unique in that more often than not questions about the impact of federal legislation on state law involve preemption analysis under the Commerce Clause, U.S. Constitution, Art. I §8, cl. 3. Here, as

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<sup>3</sup> The parties' briefing discusses extensively federal case law addressing how §1415(*I*) interfaces with other *federal* laws. See Dowler Br. at 22-40; School District Br. at 13-21; Dowler Reply Br. at 6-15. For an example of how refined the analysis is in the effort to

explained below, the predicate for IDEA and the §1415(l) exhaustion requirement is the Spending Clause, which requires an entirely different analysis. See U.S. Constitution Art. I §8, cl. 1.<sup>4</sup>

The consequences of applying §1415(l) to state law claims are potentially severe. Plaintiffs who fail to timely invoke administrative remedies may lose the right to pursue their state law claims. On the other hand, those who pursue administrative remedies run the risk that key administrative findings of fact would be determinative in subsequent court proceedings, based upon collateral estoppel. See e.g. Reninger v. Dep't of Corrections, 134 Wn.2d 437, 442, 449-54, 954 P.2d 782 (1998) (vacating jury verdict for tortious interference with a contractual relation based upon administrative fact-finding of state Personnel Appeals Board); see also Smith v. Bates Technical College, 139 Wn.2d 793, 808-11, 991 P.2d 1135 (2000) (declining to impose exhaustion of remedies requirement under the circumstances, and recognizing potential adverse effect of collateral estoppel based upon administrative findings).

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harmonize §1415(l) with other federal remedies, see Payne v. Peninsula School District, 598 F.3d 1123, 1128 (9<sup>th</sup> Cir. 2010) (majority and dissenting opinions).

<sup>4</sup> The U.S. Constitution Art. I §8, cl. 1 (Spending Clause) provides: "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts, and Excises shall be uniform throughout the United States."

Art. I §8, cl. 3 (Commerce Clause) provides Congress with the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

**A.) The Text Of IDEA's Exhaustion Provision, 20 U.S.C. §1415(l), Is Unambiguous And Does Not Require Exhaustion Of Administrative Remedies To Pursue State Law Claims.**

IDEA is a comprehensive federal act addressing the special education needs of disabled children, and is designed to make available to these children a FAPE comparable to that provided to non-disabled students. See generally Florence County School Dist. Four v. Carter, 510 U.S. 7, 9 (1993); Tunstall v. Bergeson, 141 Wn.2d 201, 228, 5 P.3d 691 (2000). IDEA was first enacted in 1970 as part of the Education of the Handicapped Act, 84 Stat. 175, and substantially amended by the Education for All Handicapped Children Act of 1975, 89 Stat. 773. See Schaffer v. Weast, 546 U.S. 49, 51-52 (2005).

IDEA provides federal funding to states that comply with the conditions imposed by the act. See 20 U.S.C. §§1411-12. The basis for federal involvement is the U.S. Constitution Spending Clause, Art. I §8, cl. 1. See Schaffer, 546 U.S. at 51. IDEA is considered a model of "cooperative federalism." Id. at 52 (quoting Little Rock School Dist. v. Mauney, 183 F.3d 816, 830 (8<sup>th</sup> Cir. 1999)).

Among the conditions that IDEA imposes on state (and local) educational agencies to receive funding is that these agencies must establish and maintain administrative review systems by which children with disabilities and their parents may challenge relevant determinations. The system is required to include a due process hearing mechanism,

culminating in an opportunity for judicial review in state court or federal district court. See 20 U.S.C. §1415.

Washington has agreed to participate in IDEA and, in exchange, the state receives federal funds to assist in providing a FAPE to the state's disabled children. See RCW 28A.155.090(7); WAC 392-172A-01000 et seq. In accordance with its agreement, the state maintains an administrative review system based upon §1415's requirements. See WAC 392-172A-05080 through 05125. These state provisions are discussed in more detail in §C., infra.

Among the provisions of §1415, setting forth the requirements for state (and local) agencies' administrative review system, is subsection (l), the exhaustion of remedies requirement at issue in this appeal. Section 1415(l) provides:

**Rule of construction.**

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. §12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. §791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action *under such laws* seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(Emphasis added.)<sup>5</sup>

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<sup>5</sup> Subsection (f) of §1415 addresses the administrative hearing requirements and subsection (g) of the statute sets forth the right to appeal to the state educational agency from an adverse hearing determination. See Appendix.

The implementing regulations for §1415(l) contain a substantially similar exhaustion

The plain language of this provision only requires exhaustion of remedies before commencing a civil action based upon *federal* law. Subsection (l) first declares that it should not be construed to restrict remedies available under the U.S. Constitution, two specific federal acts relating to disability law, and "other Federal laws protecting the rights of children with disabilities."<sup>6</sup> It then states the exception, "requiring exhaustion of remedies before the filing of a civil action *under such laws*." (Emphasis added.) The only antecedent laws referenced are federal laws. Section 1415(l) does not expressly impose an exhaustion of remedies requirement for state laws such as the WLAD and common law tort claims involved here.

The question then becomes whether an exhaustion requirement for state-based claims can be read into §1415(l), by implication or otherwise.

**B.) Because IDEA Is Based On The U.S. Constitution Spending Clause, Any Exhaustion Requirement Must Be Unambiguously Stated In The Text Of §1415(l), And It Cannot Be Implied Or Otherwise Imposed In The Process Of Interpreting The Statute.**

As explained above, IDEA is predicated on the Spending Clause of the U.S. Constitution. The spending power of Congress is not unlimited, but rather is subject to a number of restrictions. See South Dakota v. Dole, 483 U.S. 203 (1987) (explaining governing principles of Spending

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of remedies provision. See 34 CFR §300.516(e). The text of the current version of 34 CFR §300.516 is reproduced in the Appendix to this brief.

<sup>6</sup> To the extent a federal claim referenced in §1415(l) is cognizable in state court, the court would be required to consider the statute's exhaustion requirement under the Supremacy Clause, U.S. Constitution, Art. VI §2. Whether the §1415(l) exhaustion requirement would apply to such federal claims in state court raises the same issues that are discussed at length in the parties' briefing.

Clause analysis). Among these restrictions on Spending Clause legislation is that conditions imposed by Congress on state receipt of federal funds must be *unambiguous*, thereby allowing the state to make an informed decision with a full understanding of the consequences of accepting the federal funding. See id. at 207.<sup>7</sup> This restriction is based upon the contractual nature of the federal-state collaboration in Spending Clause legislation. See Pennhurst State School v. Halderman, 451 U.S. 1, 17 (1981).

Given that a Spending clause condition must be unambiguous, it cannot be reasonably inferred that Congress intended to require exhaustion of administrative remedies for state law claims in a provision that only references federal laws. Congress must be deemed to have known when enacting IDEA that, under principles of federalism and dual sovereignty, states have the right to fashion their own civil justice systems and substantive laws governing civil liability. See Martinez v. California, 444 U.S. 277, 282 (1980) (recognizing "a State's interest in fashioning its own rules of tort law is paramount to any discernable federal interest, except perhaps an interest in protecting the individual citizens from state action that is wholly arbitrary or irrational").

In the same vein, it cannot be reasonably inferred that the State of Washington agreed to diminish the rights of its citizens to invoke state law

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<sup>7</sup> Other restrictions on Spending Clause legislation are: exercise of the spending power must be in pursuit of the general welfare, the conditions must relate to the particular financial project or program, and there must be no other constitutional defect in the grant of federal funds. See Dole at 207-08.

remedies as a condition of receiving IDEA funding when the terms of its Spending Clause "contract" do not impose such a condition. The School District cannot argue such a requirement may be implied in §1415(l). See Dole at 207. Nor does the School District have the prerogative to advance or acquiesce in an interpretation of §1415(l) that subjects state law claims to its exhaustion requirement. As explained in New York v. United States, 505 U.S. 144, 181 (1992):

The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals. State sovereignty is not just an end in itself: "Rather, federalism secures to citizens the liberties that derive from the diffusion of sovereign power."

\* \* \* \*

Where Congress exceeds its authority relative to the States, therefore, the departure from the constitutional plan cannot be ratified by the "consent" of state officials.

(Citation omitted.) A corollary to this principle should be that the School District cannot expand the scope of the §1415(l) exhaustion requirement in disregard of governing Spending Clause jurisprudence to serve its own purposes.

Section 1415(l) cannot be construed as either expressly or impliedly subjecting state law claims to its exhaustion requirement. The question remains whether there is any aspect of state law that imposes an exhaustion requirement.

**C.) Washington Law, Including Statutes and Regulations Implementing IDEA, Does Not Require Those Pursuing WLAD Or State Law Tort Claims To Exhaust IDEA Administrative Remedies.**

The School District appears to argue, independently of its exhaustion argument under §1415(I), that Dowler's state law claims are subject to an exhaustion requirement under state law, citing Smith v. Bates Technical College, 139 Wn.2d 793, 808, 991 P.2d 1135 (2000). See School District Br. at 49-50. However, the School District does not examine whether the elements of Washington's exhaustion of administrative remedies doctrine apply to this case. See id.

Under Washington law, exhaustion is not required unless: "(1) a claim is cognizable in the first instance by an agency alone; (2) the agency has clearly established mechanisms for the resolution of complaints by aggrieved parties; and (3) the administrative remedies can provide the relief sought." Smith, 139 Wn.2d at 808. While state statutes and regulations implementing IDEA may establish a complaint resolution mechanism within the meaning of the second element, the remaining elements are not satisfied.

With respect to the first element, no Washington law confers exclusive original jurisdiction on an administrative agency for WLAD or common law tort claims. Washington statutes and regulations governing special education in general do not impose an exhaustion of remedies requirement for state law claims. See Ch. 28A.155 RCW (special education); RCW 28A.300.070 (enabling statute authorizing

superintendent of public instruction to receive and administer federal funds).

Likewise, IDEA implementing regulations, promulgated pursuant to RCW 28A.155.090(7), do not impose an exhaustion requirement for state law claims.<sup>8</sup> See Ch. 392-172A WAC. The regulation that authorizes a civil action for judicial review also contains an exhaustion requirement that, like §1415(I), refers only to federal laws. See WAC 392-172A-05115. Subsection (5) of this regulation states:

Nothing in this part restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973, or other federal laws protecting the rights of students with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the act, the due process procedures under WAC 392-172A-05085 and 392-172A-05165 must be exhausted to the same extent as would be required had the action been brought under section 615 of the act.

(Emphasis added.)<sup>9</sup> The text mirrors §1415(I)'s exhaustion requirement, and serves to confirm the State of Washington's understanding of its "contract" with the federal government under IDEA. There is no basis for imposing an exhaustion of remedies requirement for state law claims.<sup>10</sup>

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<sup>8</sup> The full text of the current version of RCW 28A.155.090 is reproduced in the Appendix to this brief.

<sup>9</sup> The full text of the current version of WAC 392-172A-05115 is reproduced in the Appendix to this brief. This provision became effective July 30, 2007, after a complaint was filed in this matter. See WAC 392-172A-05115 (end note regarding effective date); School District Br. at 3. However, the predecessor regulation, WAC 392-172-360, contained similar language. The full text of former WAC 392-172-360 is also reproduced in the Appendix to this brief.

<sup>10</sup> This conclusion is consistent with, if not mandated by, the right of access to courts under WLAD, see RCW 49.60.030(2) (court action authorized); RCW 49.60.020 (stating "[n]or shall anything herein contained be construed to deny the right to any person to institute any action or pursue any civil or criminal remedy based upon an alleged violation of his or her civil rights"). With regard to both WLAD and common law tort

Furthermore, as to the third element under Smith, the parties recognize that the available administrative remedies under state statutes and regulations implementing IDEA cannot provide the relief sought, such as damages for personal injury and emotional distress. See Dowler Br. at 45; School District Br. at 18 (noting “absence of monetary damages” under IDEA). As a result, Washington’s exhaustion of administrative remedies doctrine is inapplicable to this case. See Smoke v. City of Seattle, 132 Wn. 2d 214, 225 & n.2, 937 P.2d 186 (1997) (indicating lower court statement that “exhaustion is required regardless of whether the administrative remedies give rise to the end relief sought by a claimant” is “contrary to the rulings of this court”).

Underlying the elements of the doctrine of exhaustion of administrative remedies is the concern that courts should exercise a degree of deference when an agency “possess[es] expertise in areas outside the conventional expertise of judges.” See Smith at 808. Agencies have no particular expertise with respect to WLAD and state tort law claims for money damages. Under IDEA, these types of claims for relief are beyond the agency’s purview. However, they are commonplace for judges and juries. As relevant here, both judges and juries are competent to resolve disputes over the claimed legitimacy of the School District’s special education techniques, and to determine whether it is liable under WLAD

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claims, Washington citizens also enjoy rights of access to courts and trial by jury under the Washington Constitution, Art. I §21. See Putman v. Wenatchee Valley Med. Ctr., 166 Wn. 2d 974, 979, 216 P.3d 374 (2009) (access to courts); Sofie v. Fibreboard Corp., 112 Wn. 2d 636, 645, 771 P.2d 711, 780 P.2d 260 (1989) (trial by jury).

or state tort law. See generally Restatement (Second) of Torts §§147(2) & 150-55 (1965) (describing privilege and liability of persons such as teachers, who are in control of a child or group of children).

The School District points to two cases from other jurisdictions where state courts have applied §1415(I)'s exhaustion requirement to state-based civil claims. See School District Br. at 20.<sup>11</sup> However, these cases are either distinguishable or unpersuasive. The Montana Supreme Court's decision in Shields v. Helena School Dist. No. 1, 943 P.2d 999, 1005-06 (Mont. 1997), imposes an exhaustion requirement on state law claims because Montana's law at the time required exhaustion of remedies before bringing any unlawful discrimination claim under state law, including one based on tort liability. No similar provision applies in this case to either WLAD or tort claims.

To the extent the Montana Supreme Court also relied upon the Wyoming Supreme Court's opinion in Koopman v. Fremont County School Dist. No. 1, 911 P.2d 1049 (Wyo. 1996) — also cited by the School District — its analysis is unpersuasive. See Shields, at 1004-05. Koopman involved both federal and state law claims, and the Wyoming

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<sup>11</sup> The School District also cites to a federal district court opinion, Waterman v. Marquette Alger Intermediate School D., 739 F. Supp. 361 (W.D. Mich. 1990). See School District Br. at 20. While Waterman notes that plaintiffs alleged state tort claims along with federal claims, it does not discuss in particular the applicability of the exhaustion of remedies requirement to the state law claims.

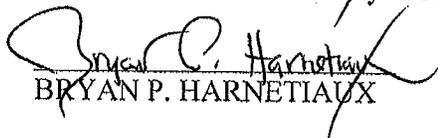
Notably, in some federal cases involving both federal and state law claims, if the federal court has found a failure to exhaust remedies under §1415(I), it has dismissed the federal claims and declined to exercise supplemental jurisdiction over the state law claims. See e.g., Payne, 598 F.3d at 1125 n.1; Cave v. East Meadow Union Free Sch. Dist., 514 F.3d 240, 250-51 (2<sup>nd</sup> Cir. 2008) (declining to exercise supplemental federal

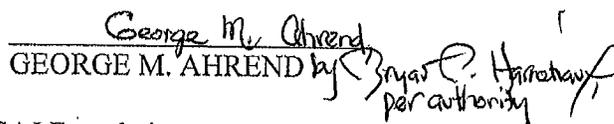
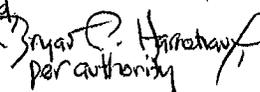
Supreme Court did not treat them separately. There is no indication that the Wyoming court was presented with the argument that 20 U.S.C. §1415(f) — the predecessor to §1415(l) — did not apply to state-based claims. Koopman is unpersuasive for this reason, and, to the extent that Shields relies on Koopman, Shields is also unpersuasive.<sup>12</sup> These authorities do not support imposition of an exhaustion requirement under Washington law.

## VI. CONCLUSION

The Court should adopt the analysis set forth in this brief and hold that 20 U.S.C. §1415(l) does not require exhaustion of IDEA administrative remedies before bringing WLAD and state law tort claims in court.

DATED this 18<sup>th</sup> day of April, 2011.

  
BRYAN P. HARNETIAUX

  
GEORGE M. AHREND by   
per authority

On behalf of WSAJ Foundation

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jurisdiction over state law claims); Dallas v. Roosevelt Union Free Sch. Dist., 644 F. Supp. 2d 287 (E.D.N.Y. 2008) (same)

<sup>12</sup> Dowler refers to the Kentucky case of Meers v. Medley, 168 S.W.3d 406 (Ky.App. 2004), *review denied* (2005), *cert. denied*, 546 U.S. 1093, 1095 (2006). See Dowler Br. at 32-33. In Meers, during the course of finding §1415(l) inapplicable to civil claims based on both federal and state law, the court noted in dicta that even if §1415(l)'s exhaustion requirement applied, the court "harbored grave doubts" whether it would apply to the state law civil rights claims. See id., 168 S.W.3d at 410 n.1.

# Appendix

## 20 U.S.C. §1415. Procedural safeguards

### (a) Establishment of procedures

Any State educational agency, State agency, or local educational agency that receives assistance under this subchapter shall establish and maintain procedures in accordance with this section to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a free appropriate public education by such agencies.

### (b) Types of procedures

The procedures required by this section shall include the following:

(1) An opportunity for the parents of a child with a disability to examine all records relating to such child and to participate in meetings with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child.

(2)(A) Procedures to protect the rights of the child whenever the parents of the child are not known, the agency cannot, after reasonable efforts, locate the parents, or the child is a ward of the State, including the assignment of an individual to act as a surrogate for the parents, which surrogate shall not be an employee of the State educational agency, the local educational agency, or any other agency that is involved in the education or care of the child. In the case of--

(i) a child who is a ward of the State, such surrogate may alternatively be appointed by the judge overseeing the child's care provided that the surrogate meets the requirements of this paragraph; and

(ii) an unaccompanied homeless youth as defined in section 11434a(6) of Title 42, the local educational agency shall appoint a surrogate in accordance with this paragraph.

(B) The State shall make reasonable efforts to ensure the assignment of a surrogate not more than 30 days after there is a determination by the agency that the child needs a surrogate.

(3) Written prior notice to the parents of the child, in accordance with subsection (c)(1), whenever the local educational agency--

(A) proposes to initiate or change; or

(B) refuses to initiate or change,

the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to the child.

(4) Procedures designed to ensure that the notice required by paragraph (3) is in the native language of the parents, unless it clearly is not feasible to do so.

(5) An opportunity for mediation, in accordance with subsection (e).

(6) An opportunity for any party to present a complaint--

(A) with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child; and

(B) which sets forth an alleged violation that occurred not more than 2 years before the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for presenting such a complaint under this subchapter, in such time as the State law allows, except that the exceptions to the timeline described in subsection (f)(3)(D) shall apply to the timeline described in this subparagraph.

(7)(A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) (which shall remain confidential)--

(i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and

(ii) that shall include--

(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

(II) in the case of a homeless child or youth (within the meaning of section 11434a(2) of Title 42, available contact information for the child and the name of the school the child is attending;

(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(IV) a proposed resolution of the problem to the extent known and available to the party at the time.

(B) A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of subparagraph (A)(ii).

(8) Procedures that require the State educational agency to develop a model form to assist parents in filing a complaint and due process complaint notice in accordance with paragraphs (6) and (7), respectively.

(c) Notification requirements

(1) Content of prior written notice

The notice required by subsection (b)(3) shall include--

(A) a description of the action proposed or refused by the agency;

(B) an explanation of why the agency proposes or refuses to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action;

(C) a statement that the parents of a child with a disability have protection under the procedural safeguards of this subchapter and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained;

(D) sources for parents to contact to obtain assistance in understanding the provisions of this subchapter;

(E) a description of other options considered by the IEP Team and the reason why those options were rejected; and

(F) a description of the factors that are relevant to the agency's proposal or refusal.

(2) Due process complaint notice

(A) Complaint

The due process complaint notice required under subsection (b)(7)(A) shall be deemed to be sufficient unless the party receiving the notice notifies the hearing officer and the other party in writing that the

receiving party believes the notice has not met the requirements of subsection (b)(7)(A).

(B) Response to complaint

(i) Local educational agency response

(I) In general

If the local educational agency has not sent a prior written notice to the parent regarding the subject matter contained in the parent's due process complaint notice, such local educational agency shall, within 10 days of receiving the complaint, send to the parent a response that shall include--

(aa) an explanation of why the agency proposed or refused to take the action raised in the complaint;

(bb) a description of other options that the IEP Team considered and the reasons why those options were rejected;

(cc) a description of each evaluation procedure, assessment, record, or report the agency used as the basis for the proposed or refused action; and

(dd) a description of the factors that are relevant to the agency's proposal or refusal.

(II) Sufficiency

A response filed by a local educational agency pursuant to subclause (I) shall not be construed to preclude such local educational agency from asserting that the parent's due process complaint notice was insufficient where appropriate.

(ii) Other party response

Except as provided in clause (i), the non-complaining party shall, within 10 days of receiving the complaint, send to the complaint a response that specifically addresses the issues raised in the complaint.

(C) Timing

The party providing a hearing officer notification under subparagraph (A) shall provide the notification within 15 days of receiving the complaint.

(D) Determination

Within 5 days of receipt of the notification provided under subparagraph (C), the hearing officer shall make a determination on the face of the notice of whether the notification meets the requirements of subsection (b)(7)(A), and shall immediately notify the parties in writing of such determination.

(E) Amended complaint notice

(i) In general

A party may amend its due process complaint notice only if--

(I) the other party consents in writing to such amendment and is given the opportunity to resolve the complaint through a meeting held pursuant to subsection (f)(1)(B); or

(II) the hearing officer grants permission, except that the hearing officer may only grant such permission at any time not later than 5 days before a due process hearing occurs.

(ii) Applicable timeline

The applicable timeline for a due process hearing under this subchapter shall recommence at the time the party files an amended notice, including the timeline under subsection (f)(1)(B).

(d) Procedural safeguards notice

(1) In general

(A) Copy to parents

A copy of the procedural safeguards available to the parents of a child with a disability shall be given to the parents only 1 time a year, except that a copy also shall be given to the parents--

(i) upon initial referral or parental request for evaluation;

(ii) upon the first occurrence of the filing of a complaint under subsection (b)(6); and

(iii) upon request by a parent.

(B) Internet website

A local educational agency may place a current copy of the procedural safeguards notice on its Internet website if such website exists.

(2) Contents

The procedural safeguards notice shall include a full explanation of the procedural safeguards, written in the native language of the parents (unless it clearly is not feasible to do so) and written in an easily understandable manner, available under this section and under regulations promulgated by the Secretary relating to--

- (A) independent educational evaluation;
- (B) prior written notice;
- (C) parental consent;
- (D) access to educational records;
- (E) the opportunity to present and resolve complaints, including--
  - (i) the time period in which to make a complaint;
  - (ii) the opportunity for the agency to resolve the complaint; and
  - (iii) the availability of mediation;
- (F) the child's placement during pendency of due process proceedings;
- (G) procedures for students who are subject to placement in an interim alternative educational setting;
- (H) requirements for unilateral placement by parents of children in private schools at public expense;
- (I) due process hearings, including requirements for disclosure of evaluation results and recommendations;
- (J) State-level appeals (if applicable in that State);
- (K) civil actions, including the time period in which to file such actions; and
- (L) attorneys' fees.

(e) Mediation

(1) In general

Any State educational agency or local educational agency that receives assistance under this subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a complaint pursuant to subsection (b)(6), to resolve such disputes through a mediation process.

(2) Requirements

Such procedures shall meet the following requirements:

(A) The procedures shall ensure that the mediation process--

(i) is voluntary on the part of the parties;

(ii) is not used to deny or delay a parent's right to a due process hearing under subsection (f), or to deny any other rights afforded under this subchapter; and

(iii) is conducted by a qualified and impartial mediator who is trained in effective mediation techniques.

(B) Opportunity to meet with a disinterested party

A local educational agency or a State agency may establish procedures to offer to parents and schools that choose not to use the mediation process, an opportunity to meet, at a time and location convenient to the parents, with a disinterested party who is under contract with--

(i) a parent training and information center or community parent resource center in the State established under section 1471 or 1472 of this title; or

(ii) an appropriate alternative dispute resolution entity,

to encourage the use, and explain the benefits, of the mediation process to the parents.

(C) List of qualified mediators

The State shall maintain a list of individuals who are qualified mediators and knowledgeable in laws and regulations relating to the provision of special education and related services.

(D) Costs

The State shall bear the cost of the mediation process, including the costs of meetings described in subparagraph (B).

(E) Scheduling and location

Each session in the mediation process shall be scheduled in a timely manner and shall be held in a location that is convenient to the parties to the dispute.

(F) Written agreement

In the case that a resolution is reached to resolve the complaint through the mediation process, the parties shall execute a legally binding agreement that sets forth such resolution and that--

(i) states that all discussions that occurred during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding;

(ii) is signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(iii) is enforceable in any State court of competent jurisdiction or in a district court of the United States.

(G) Mediation discussions

Discussions that occur during the mediation process shall be confidential and may not be used as evidence in any subsequent due process hearing or civil proceeding.

(f) Impartial due process hearing

(1) In general

(A) Hearing

Whenever a complaint has been received under subsection (b)(6) or (k), the parents or the local educational agency involved in such complaint shall have an opportunity for an impartial due process hearing, which shall be conducted by the State educational agency or by the local educational agency, as determined by State law or by the State educational agency.

(B) Resolution session

(i) Preliminary meeting

Prior to the opportunity for an impartial due process hearing under subparagraph (A), the local educational agency shall convene a meeting with the parents and the relevant member or members of the IEP Team who have specific knowledge of the facts identified in the complaint--

(I) within 15 days of receiving notice of the parents' complaint;

(II) which shall include a representative of the agency who has decisionmaking authority on behalf of such agency;

(III) which may not include an attorney of the local educational agency unless the parent is accompanied by an attorney; and

(IV) where the parents of the child discuss their complaint, and the facts that form the basis of the complaint, and the local educational agency is provided the opportunity to resolve the complaint,

unless the parents and the local educational agency agree in writing to waive such meeting, or agree to use the mediation process described in subsection (e).

(ii) Hearing

If the local educational agency has not resolved the complaint to the satisfaction of the parents within 30 days of the receipt of the complaint, the due process hearing may occur, and all of the applicable timelines for a due process hearing under this subchapter shall commence.

(iii) Written settlement agreement

In the case that a resolution is reached to resolve the complaint at a meeting described in clause (i), the parties shall execute a legally binding agreement that is--

(I) signed by both the parent and a representative of the agency who has the authority to bind such agency; and

(II) enforceable in any State court of competent jurisdiction or in a district court of the United States.

(iv) Review period

If the parties execute an agreement pursuant to clause (iii), a party may void such agreement within 3 business days of the agreement's execution.

(2) Disclosure of evaluations and recommendations

(A) In general

Not less than 5 business days prior to a hearing conducted pursuant to paragraph (1), each party shall disclose to all other parties all evaluations completed by that date, and recommendations based on the offering party's evaluations, that the party intends to use at the hearing.

(B) Failure to disclose

A hearing officer may bar any party that fails to comply with subparagraph (A) from introducing the relevant evaluation or recommendation at the hearing without the consent of the other party.

(3) Limitations on hearing

(A) Person conducting hearing

A hearing officer conducting a hearing pursuant to paragraph (1)(A) shall, at a minimum--

(i) not be--

(I) an employee of the State educational agency or the local educational agency involved in the education or care of the child; or

(II) a person having a personal or professional interest that conflicts with the person's objectivity in the hearing;

(ii) possess knowledge of, and the ability to understand, the provisions of this chapter, Federal and State regulations pertaining to this chapter, and legal interpretations of this chapter by Federal and State courts;

(iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and

(iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.

(B) Subject matter of hearing

The party requesting the due process hearing shall not be allowed to raise issues at the due process hearing that were not raised in the notice filed under subsection (b)(7), unless the other party agrees otherwise.

(C) Timeline for requesting hearing

A parent or agency shall request an impartial due process hearing within 2 years of the date the parent or agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this subchapter, in such time as the State law allows.

(D) Exceptions to the timeline

The timeline described in subparagraph (C) shall not apply to a parent if the parent was prevented from requesting the hearing due to--

- (i) specific misrepresentations by the local educational agency that it had resolved the problem forming the basis of the complaint; or
- (ii) the local educational agency's withholding of information from the parent that was required under this subchapter to be provided to the parent.

(E) Decision of hearing officer

(i) In general

Subject to clause (ii), a decision made by a hearing officer shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education.

(ii) Procedural issues

In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies--

- (I) impeded the child's right to a free appropriate public education;
- (II) significantly impeded the parents' opportunity to participate in the decisionmaking process regarding the provision of a free

appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

(iii) Rule of construction

Nothing in this subparagraph shall be construed to preclude a hearing officer from ordering a local educational agency to comply with procedural requirements under this section.

(F) Rule of construction

Nothing in this paragraph shall be construed to affect the right of a parent to file a complaint with the State educational agency.

(g) Appeal

(1) In general

If the hearing required by subsection (f) is conducted by a local educational agency, any party aggrieved by the findings and decision rendered in such a hearing may appeal such findings and decision to the State educational agency.

(2) Impartial review and independent decision

The State educational agency shall conduct an impartial review of the findings and decision appealed under paragraph (1). The officer conducting such review shall make an independent decision upon completion of such review.

(h) Safeguards

Any party to a hearing conducted pursuant to subsection (f) or (k), or an appeal conducted pursuant to subsection (g), shall 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 children with disabilities;

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) the right to a written, or, at the option of the parents, electronic verbatim record of such hearing; and

(4) the right to written, or, at the option of the parents, electronic

findings of fact and decisions, which findings and decisions--

(A) shall be made available to the public consistent with the requirements of section 1417(b) of this title (relating to the confidentiality of data, information, and records); and

(B) shall be transmitted to the advisory panel established pursuant to section 1412(a)(21) of this title.

(i) Administrative procedures

(1) In general

(A) Decision made in hearing

A decision made in a hearing conducted pursuant to subsection (f) or (k) shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (g) and paragraph (2).

(B) Decision made at appeal

A decision made under subsection (g) shall be final, except that any party may bring an action under paragraph (2).

(2) Right to bring civil action

(A) In general

Any party aggrieved by the findings and decision made under subsection (f) or (k) who does not have the right to an appeal under subsection (g), and any party aggrieved by the findings and decision made under this subsection, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States, without regard to the amount in controversy.

(B) Limitation

The party bringing the action shall have 90 days from the date of the decision of the hearing officer to bring such an action, or, if the State has an explicit time limitation for bringing such action under this subchapter, in such time as the State law allows.

(C) Additional requirements

In any action brought under this paragraph, the court--

- (i) shall receive the records of the administrative proceedings;
- (ii) shall hear additional evidence at the request of a party; and
- (iii) basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) Jurisdiction of district courts; attorneys' fees

(A) In general

The district courts of the United States shall have jurisdiction of actions brought under this section without regard to the amount in controversy.

(B) Award of attorneys' fees

(i) In general

In any action or proceeding brought under this section, the court, in its discretion, may award reasonable attorneys' fees as part of the costs--

(I) to a prevailing party who is the parent of a child with a disability;

(II) to a prevailing party who is a State educational agency or local educational agency against the attorney of a parent who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation, or against the attorney of a parent who continued to litigate after the litigation clearly became frivolous, unreasonable, or without foundation; or

(III) to a prevailing State educational agency or local educational agency against the attorney of a parent, or against the parent, if the parent's complaint or subsequent cause of action was presented for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation.

(ii) Rule of construction

Nothing in this subparagraph shall be construed to affect section 327 of the District of Columbia Appropriations Act, 2005.

(C) Determination of amount of attorneys' fees

Fees awarded under this paragraph shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) Prohibition of attorneys' fees and related costs for certain services

(i) In general

Attorneys' fees may not be awarded and related costs may not be reimbursed in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent if--

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

(II) the offer is not accepted within 10 days; and

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

(ii) IEP Team meetings

Attorneys' fees may not be awarded relating to any meeting of the IEP Team unless such meeting is convened as a result of an administrative proceeding or judicial action, or, at the discretion of the State, for a mediation described in subsection (e).

(iii) Opportunity to resolve complaints

A meeting conducted pursuant to subsection (f)(1)(B)(i) shall not be considered--

(I) a meeting convened as a result of an administrative hearing or judicial action; or

(II) an administrative hearing or judicial action for purposes of this paragraph.

(E) Exception to prohibition on attorneys' fees and related costs

Notwithstanding subparagraph (D), an award of attorneys' fees and related costs may be made to a parent who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Reduction in amount of attorneys' fees

Except as provided in subparagraph (G), whenever the court finds that--

(i) the parent, or the parent's attorney, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, reputation, and experience;

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding; or

(iv) the attorney representing the parent did not provide to the local educational agency the appropriate information in the notice of the complaint described in subsection (b)(7)(A),

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) Exception to reduction in amount of attorneys' fees

The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(j) Maintenance of current educational placement

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

(k) Placement in alternative educational setting

(1) Authority of school personnel

(A) Case-by-case determination

School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.

(B) Authority

School personnel under this subsection may remove a child with a disability who violates a code of student conduct from their current placement to an appropriate interim alternative educational setting, another setting, or suspension, for not more than 10 school days (to the extent such alternatives are applied to children without disabilities).

(C) Additional authority

If school personnel seek to order a change in placement that would exceed 10 school days and the behavior that gave rise to the violation of the school code is determined not to be a manifestation of the child's disability pursuant to subparagraph (E), the relevant disciplinary procedures applicable to children without disabilities may be applied to the child in the same manner and for the same duration in which the procedures would be applied to children without disabilities, except as provided in section 1412(a)(1) of this title although it may be provided in an interim alternative educational setting.

(D) Services

A child with a disability who is removed from the child's current placement under subparagraph (G) (irrespective of whether the behavior is determined to be a manifestation of the child's disability) or subparagraph (C) shall--

(i) continue to receive educational services, as provided in section 1412(a)(1) of this title, so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and

(ii) receive, as appropriate, a functional behavioral assessment,

behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.

(E) Manifestation determination

(i) In general

Except as provided in subparagraph (B), within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the local educational agency, the parent, and relevant members of the IEP Team (as determined by the parent and the local educational agency) shall review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine--

(I) if the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or

(II) if the conduct in question was the direct result of the local educational agency's failure to implement the IEP.

(ii) Manifestation

If the local educational agency, the parent, and relevant members of the IEP Team determine that either subclause (I) or (II) of clause (i) is applicable for the child, the conduct shall be determined to be a manifestation of the child's disability.

(F) Determination that behavior was a manifestation

If the local educational agency, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team shall--

(i) conduct a functional behavioral assessment, and implement a behavioral intervention plan for such child, provided that the local educational agency had not conducted such assessment prior to such determination before the behavior that resulted in a change in placement described in subparagraph (C) or (G);

(ii) in the situation where a behavioral intervention plan has been developed, review the behavioral intervention plan if the child already has such a behavioral intervention plan, and modify it, as necessary, to address the behavior; and

(iii) except as provided in subparagraph (G), return the child to the placement from which the child was removed, unless the parent and the local educational agency agree to a change of placement as part of the modification of the behavioral intervention plan.

(G) Special circumstances

School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, in cases where a child--

(i) carries or possesses a weapon to or at school, on school premises, or to or at a school function under the jurisdiction of a State or local educational agency;

(ii) knowingly possesses or uses illegal drugs, or sells or solicits the sale of a controlled substance, while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency; or

(iii) has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of a State or local educational agency.

(H) Notification

Not later than the date on which the decision to take disciplinary action is made, the local educational agency shall notify the parents of that decision, and of all procedural safeguards accorded under this section.

(2) Determination of setting

The interim alternative educational setting in subparagraphs (C) and (G) of paragraph (1) shall be determined by the IEP Team.

(3) Appeal

(A) In general

The parent of a child with a disability who disagrees with any decision regarding placement, or the manifestation determination under this subsection, or a local educational agency that believes that maintaining the current placement of the child is substantially likely to result in injury to the child or to others, may request a hearing.

(B) Authority of hearing officer

(i) In general

A hearing officer shall hear, and make a determination regarding, an appeal requested under subparagraph (A).

(ii) Change of placement order

In making the determination under clause (i), the hearing officer may order a change in placement of a child with a disability. In such situations, the hearing officer may--

(I) return a child with a disability to the placement from which the child was removed; or

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

(4) Placement during appeals

When an appeal under paragraph (3) has been requested by either the parent or the local educational agency--

(A) the child shall remain in the interim alternative educational setting pending the decision of the hearing officer or until the expiration of the time period provided for in paragraph (1)(C), whichever occurs first, unless the parent and the State or local educational agency agree otherwise; and

(B) the State or local educational agency shall arrange for an expedited hearing, which shall occur within 20 school days of the date the hearing is requested and shall result in a determination within 10 school days after the hearing.

(5) Protections for children not yet eligible for special education and related services

(A) In general

A child who has not been determined to be eligible for special education and related services under this subchapter and who has engaged in behavior that violates a code of student conduct, may

assert any of the protections provided for in this subchapter if the local educational agency had knowledge (as determined in accordance with this paragraph) that the child was a child with a disability before the behavior that precipitated the disciplinary action occurred.

(B) Basis of knowledge

A local educational agency shall be deemed to have knowledge that a child is a child with a disability if, before the behavior that precipitated the disciplinary action occurred--

(i) the parent of the child has expressed concern in writing to supervisory or administrative personnel of the appropriate educational agency, or a teacher of the child, that the child is in need of special education and related services;

(ii) the parent of the child has requested an evaluation of the child pursuant to section 1414(a)(1)(B) of this title; or

(iii) the teacher of the child, or other personnel of the local educational agency, has expressed specific concerns about a pattern of behavior demonstrated by the child, directly to the director of special education of such agency or to other supervisory personnel of the agency.

(C) Exception

A local educational agency shall not be deemed to have knowledge that the child is a child with a disability if the parent of the child has not allowed an evaluation of the child pursuant to section 1414 of this title or has refused services under this subchapter or the child has been evaluated and it was determined that the child was not a child with a disability under this subchapter.

(D) Conditions that apply if no basis of knowledge

(i) In general

If a local educational agency does not have knowledge that a child is a child with a disability (in accordance with subparagraph (B) or (C)) prior to taking disciplinary measures against the child, the child may be subjected to disciplinary measures applied to children without disabilities who engaged in comparable behaviors consistent with clause (ii).

(ii) Limitations

If a request is made for an evaluation of a child during the time period in which the child is subjected to disciplinary measures under this subsection, the evaluation shall be conducted in an expedited manner. If the child is determined to be a child with a disability, taking into consideration information from the evaluation conducted by the agency and information provided by the parents, the agency shall provide special education and related services in accordance with this subchapter, except that, pending the results of the evaluation, the child shall remain in the educational placement determined by school authorities.

(6) Referral to and action by law enforcement and judicial authorities

(A) Rule of construction

Nothing in this subchapter shall be construed to prohibit an agency from reporting a crime committed by a child with a disability to appropriate authorities or to prevent State law enforcement and judicial authorities from exercising their responsibilities with regard to the application of Federal and State law to crimes committed by a child with a disability.

(B) Transmittal of records

An agency reporting a crime committed by a child with a disability shall ensure that copies of the special education and disciplinary records of the child are transmitted for consideration by the appropriate authorities to whom the agency reports the crime.

(7) Definitions

In this subsection:

(A) Controlled substance

The term "controlled substance" means a drug or other substance identified under schedule I, II, III, IV, or V in section 202(c) of the Controlled Substances Act (21 U.S.C. 812(c)).

(B) Illegal drug

The term "illegal drug" means a controlled substance but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any other authority under that Act [21 U.S.C.A. § 801 et seq.] or under any other provision of Federal law.

(C) Weapon

The term "weapon" has the meaning given the term "dangerous

weapon" under section 930(g)(2) of Title 18.

(D) Serious bodily injury

The term "serious bodily injury" has the meaning given the term "serious bodily injury" under paragraph (3) of subsection (h) of section 1365 of Title 18.

(l) Rule of construction

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12101 et seq.], title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(m) Transfer of parental rights at age of majority

(1) In general

A State that receives amounts from a grant under this subchapter may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law)--

(A) the agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this subchapter transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this subchapter transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule

If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide

informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this subchapter.

(n) Electronic mail

A parent of a child with a disability may elect to receive notices required under this section by an electronic mail (e-mail) communication, if the agency makes such option available.

(o) Separate complaint

Nothing in this section shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.

Credits

(Pub.L. 91-230, Title VI, § 615, as added Pub.L. 108-446, Title I, § 101, Dec. 3, 2004, 118 Stat. 2715.)

### **34 C.F.R. §300.516 Civil Action.**

(a) General. Any party aggrieved by the findings and decision made under §§ 300.507 through 300.513 or §§ 300.530 through 300.534 who does not have the right to an appeal under § 300.514(b), and any party aggrieved by the findings and decision under § 300.514(b), has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under § 300.507 or §§ 300.530 through 300.532. The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(b) Time limitation. The party bringing the action shall have 90 days from the date of the decision of the hearing officer or, if applicable, the decision of the State review official, to file a civil action, or, if the State has an explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by that State law.

(c) Additional requirements. In any action brought under paragraph (a) of this section, the court--

- (1) Receives the records of the administrative proceedings;
- (2) Hears additional evidence at the request of a party; and
- (3) Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.

(d) Jurisdiction of district courts. The district courts of the United States have jurisdiction of actions brought under section 615 of the Act without regard to the amount in controversy.

(e) Rule of construction. Nothing in this part restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the Act, the procedures under §§ 300.507 and 300.514 must be exhausted to the same extent as would be required had the action been brought under section 615 of the Act.

(Authority: 20 U.S.C. 1415(i)(2) and (3)(A), 1415(l))

SOURCE: 71 FR 46755, Aug. 14, 2006; 72 FR 17781, April 9, 2007, unless otherwise noted.

**RCW 28A.155.090. Superintendent of public instruction's duty and authority**

The superintendent of public instruction shall have the duty and authority, through the administrative section or unit for the education of children with disabling conditions, to:

- (1) Assist school districts in the formation of programs to meet the needs of children with disabilities;
- (2) Develop interdistrict cooperation programs for children with disabilities as authorized in RCW 28A.225.250;
- (3) Provide, upon request, to parents or guardians of children with disabilities, information as to the special education programs for students with disabilities offered within the state;
- (4) Assist, upon request, the parent or guardian of any child with disabilities in the placement of any child with disabilities who is eligible for but not receiving special educational services for children with disabilities;
- (5) Approve school district and agency programs as being eligible for special excess cost financial aid to students with disabilities;
- (6) Consistent with the provisions of RCW 28A.150.390, 28A.160.030, and 28A.155.010 through 28A.155.160, and part B of the federal individuals with disabilities education improvement act, administer administrative hearings and other procedures to ensure procedural safeguards of children with disabilities; and
- (7) Promulgate such rules as are necessary to implement part B of the federal individuals with disabilities education improvement act or other federal law providing for special education services for children with disabilities and the several provisions of RCW 28A.150.390, 28A.160.030, and 28A.155.010 through 28A.155.160 and to ensure appropriate access to and participation in the general education curriculum and participation in statewide assessments for all students with disabilities.

[2007 c 115 § 11, eff. July 22, 2007; 1995 c 77 § 15; 1990 c 33 § 127; 1985 c 341 § 5; 1971 ex.s. c 66 § 9. Formerly RCW 28A.13.070.]

**WAC 392-172A-05115. Civil action.**

(1) Any party aggrieved by the findings and decision made under WAC 392-172A-05105 through 392-172A-05110 or 392-172A-05165 has the right to bring a civil action with respect to the due process hearing request. The action may be brought in any state court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy.

(2) The party bringing the action shall have ninety days from the date of the decision of the administrative law judge to file a civil action in federal or state court.

(3) In any action brought under subsection (1) of this section, the court:

(a) Receives the records of the administrative proceedings;

(b) Hears additional evidence at the request of a party; and

(c) Basing its decision on the preponderance of the evidence, grants the relief that the court determines to be appropriate.

(4) The district courts of the United States have jurisdiction of actions brought under section 615 of the act without regard to the amount in controversy.

(5) Nothing in this part restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973, or other federal laws protecting the rights of students with disabilities, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the act, the due process procedures under WAC 392-172A-05085 and 392-172A-05165 must be exhausted to the same extent as would be required had the action been brought under section 615 of the act.

Statutory Authority: RCW 28A.155.090(7) and 42 U.S.C. 1400 et. seq. 07-14-078, S 392-172A-05115, filed 6/29/07, effective 7/30/07.

**Former WAC 392-172-360 (2006). Final decision--Appeal to court of law.**

(1) A decision made in a hearing initiated pursuant to WAC 392-172-350 is final, unless modified or overturned by a court of law. Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal under this chapter has the right to bring a civil action under section 615 (e)(2) of the Individuals with Disabilities Education Act. A civil action may be filed in either state or federal court.

(2) In any action brought under this section, the court:

(a) Shall receive the records of the administrative proceedings.

(b) Shall hear additional evidence at the request of a party.

(c) Shall grant the relief that the court determines to be appropriate basing its decision on the preponderance of the evidence.

(3) The district courts of the United States have jurisdiction of actions brought under section 615 of the Individuals with Disabilities Education Act without regard to the amount in controversy.

(4) Nothing in this part restricts or limits the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990, Title V of the Rehabilitation Act of 1973, or other Federal laws protecting the rights of special education students, except that before the filing of a civil action under these laws seeking relief that is also available under section 615 of the Individuals with Disability Education Act, the procedures for a due process hearing in this chapter must be exhausted to the same extent as would be required had the action been brought under section 615 of the Individuals with Disabilities Education Act.

Statutory Authority: RCW 28A.155.090(7), 28A.300.070 and 20 U.S.C. 1400 et seq. 99-24-137, S 392-172-360, filed 12/1/99, effective 1/1/00.  
Statutory Authority: Chapter 28A.155 RCW. 95-21-055 (Order 95-11), S 392-172-360, filed 10/11/95, effective 11/11/95.