Ratwik, Roszak & Maloney, P.A.

730 Second Avenue South, Suite 300
Minneapolis, Minnesota 55402

(612) 339-0060
Fax (612) 339-0038
www.ratwiklaw.com

# Choose your own Adventure:
# Preparing your response to an administrative complaint

**Laura Tubbs Booth**
**ltb@ratwiklaw.com**

**Christian R. Shafer**
**crs@ratwiklaw.com**

**Elizabeth M. Meske**
**emm@ratwiklaw.com**

**2019 MASE Fall Leadership Conference**

**October 24, 2019**

## I. MINNESOTA DEPARTMENT OF EDUCATION ("MDE") COMPLAINTS: AN OVERVIEW

**A. Proper Parties.** Parents, individuals, or organizations may file a signed, written complaint with the Minnesota Department of Education (MDE) if they believe a district or public education agency has violated federal or state special education requirements. 34 C.F.R. §§ 300.151-300.153.

**B. Required Content of Complaint.** Under 34 C.F.R. § 300.153, a complaint must include the following:

1. A statement that a public agency has violated a requirement the Individuals with Disabilities Education Act ("IDEA");

2. The facts on which the statement is based;

3. The signature and contact information for the complainant; and

4. If alleging violations with respect to a specific child--

    a. The name and address of the residence of the child;

    b. The name of the school the child is attending;

    c. In the case of a homeless child or youth (within the meaning of section 725(2) of the McKinney-Vento Homeless Assistance Act (42 U.S.C. 11434a(2)), available contact information for the child, and the name of the school the child is attending;

    d. A description of the nature of the problem of the child, including facts relating to the problem; and

    e. A proposed resolution of the problem to the extent known and available to the party at the time the complaint is filed.

**C. Statute of Limitations.** The complaint must allege a violation that occurred not more than one year prior to the date that the complaint is received by the MDE. *See* 34 C.F.R. § 300.153.

**D. Copy Must Be Provided to School District.** The party filing the complaint must forward a copy of the complaint to the Local Education Agency ("LEA") or public agency serving the child at the same time the party files the complaint with the MDE. 34 C.F.R. § 300.151.

**E.** **Interplay Between Due Process Hearings and Complaints.** If a complaint investigation and a due process hearing are requested on the same issues, the complaint will remain on hold until the due process hearing has ended. The federal regulations (34 C.F.R. § 300.152) specifically provide that:

> (1) If a written complaint is received that is also the subject of a due process hearing under § 300.507 or §§ 300.530 through 300.532, or contains multiple issues of which one or more are part of that hearing, the State must set aside any part of the complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the complaint that is not a part of the due process action must be resolved using the time limit and procedures described in paragraphs (a) and (b) of this section.
>
> (2) If an issue raised in a complaint filed under this section has previously been decided in a due process hearing involving the same parties--
>
> > (i) The due process hearing decision is binding on that issue; and
> >
> > (ii) The State Educational Agency ("SEA") must inform the complainant to that effect.
>
> (3) A complaint alleging a public agency's failure to implement a due process hearing decision must be resolved by the SEA.

**F.** **Ten Calendar Days to Respond.** The MDE generally requires a written response to complaints within ten calendar days. The specific date by which a school district must respond will be stated in the MDE's notice to the school district regarding the complaint.

**G.** **Extensions not guaranteed.** Although extensions are often granted, an extension beyond ten days to file a written response is not guaranteed. Whether an extension is granted seems to depend, in part, on the complaint investigator who is assigned to the complaint.

**H.** **Don't Delay: Lots of work to be done in ten days.** In addition to drafting a written response to the complaint, during this ten-day period, a school district must gather the documentation requested by the MDE. Depending on the nature

of the complaint, as well as the volume of documents requested, this process may require a significant amount of time and effort. The more organized and complete a school district's files are, the easier it will be for the school district to gather all of the requested documents.

***Practice Tip:*** Haste makes waste. Be sure to leave time to review and carefully analyze the documents you have gathered before sending them to the MDE. In the rush to gather documents and draft a response, it can be easy to incorrectly identify the IEP that was in effect at the time of the alleged violation.

**I. MDE Has Sixty Calendar Days to Resolve the Complaint.** The MDE has 60 calendar days from the date a complaint is received to investigate and resolve a complaint. MDE may take additional time if the parent and school district agree to put the complaint on hold during mediation or in other alternative means of dispute resolution. This timeline may also be extended if there is a due process hearing pending.

## II. OCR COMPLAINTS: AN OVERVIEW

### A. Procedural Requirements.

1. Insufficient Complaints. The following are *not* complaints:

    a. anonymous correspondence;

    b. courtesy copies of correspondence or documentation filed with or otherwise submitted to another person or entity;

    c. inquiries that solely seek advice or information from OCR;

    d. allegations that are communicated to OCR only orally and not in writing.

2. Dismissal of Complaints. OCR will dismiss a complaint for the following reasons:

    a. The allegation fails to state a violation of one of the laws OCR enforces;

    b. The allegation lacks sufficient detail; or

    c. The allegation is so speculative, conclusory, or incoherent that it is not sufficiently grounded.

3. Waivers. A complainant has 180 calendar days after the date of the last act of alleged discrimination to file a complaint. A complainant may request a waiver of this rule for good cause. A waiver may be granted for any of the following reasons:

   a. The complainant could not reasonably be expected to know the act was discriminatory within 180 days of its occurrence;

   b. The complainant was unable to file a complaint within 180 days because of incapacitating illness or circumstances;

   c. The complainant filed a complaint alleging the same discriminatory conduct within the 180-day period with another civil-rights-enforcement agency; or

   d. The complainant filed an internal grievance with a recipient of federal financial assistance within 180 days of the occurrence.

4. Request for Reconsideration of Dismissal of Complaint. A complainant may request reconsideration of the OCR's dismissal of the complaint within 60 days of the complaint's dismissal.

**B. The OCR's Jurisdiction.** In order to investigate a complaint, the OCR must have jurisdiction over the subject matter of the complaint. The OCR only has jurisdiction over specific types of claims including claims that fall under the following categories:

1. Race and National Origin Discrimination. The OCR exercises jurisdiction under Title VI of the Civil Rights Act of 1964 ("Title VI"). Title VI prohibits discrimination on the basis of "race, color, or national origin." 42 U.S.C. § 2000d; *see also* 34 C.F.R. § 100.3.

2. Sex Discrimination and Sexual Harassment. The OCR investigates complaints under Title IX of the Education amendments of 1972 ("Title IX"). Title IX provides, in relevant part, that: "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance." 20 USC § 1681(a).

3. Disability Discrimination. The OCR has jurisdiction to investigate complaints of disability discrimination under two separate federal statutes.

a. Section 504 of the Rehabilitation Act of 1983, 29 U.S.C. § 794, ("Section 504"). Section 504 prohibits school districts from discriminating against an individual with a disability solely by reason of that disability. 29 U.S.C. § 794.

b. Title II of The Americans with Disabilities Act, 42 U.S.C. § 12131-65 ("ADA"). The United States Department of Justice has designated the OCR as the entity for investigating ADA claims pertaining to public schools. Like Section 504, Title II of the ADA prohibits public entities from discriminating against individuals with disabilities.

4. Age Discrimination. The Age Discrimination Act of 1975 prohibits entities that receive federal funding from discriminating against individuals based on age. *See, generally,* 34 C.F.R. § 110.10. The Age Discrimination Act of 1975 does not, however, provide the OCR with jurisdiction to consider age discrimination claims brought by employees. 34 C.F.R. § 110.02(b)(2).

**C. Types of Complaints the OCR Investigates.** The OCR will only accept a complaint if the complaint is not being dealt with in another agency.

1. Students

a. Peer-to-peer harassment

b. Staff actions

c. Failure to accommodate or provide FAPE

2. Parents

a. Age discrimination

b. Sex-based discrimination

c. Racial discrimination

d. Disability Status

e. Retaliation

3. Employees

a. Sex-based discrimination

b. Racial discrimination

c. Discrimination based upon disability status

d. Retaliation

*Note: These claims may also be investigated by the EEOC.*

## III. BEFORE THE COMPLAINT: PREPARING FOR THE POSSIBLITY OF AN ADMINISTRATIVE COMPLAINT OR DUE PROCESS HEARING

### A. Review and Revise Data Retention Policy and Practices.

1. Understand the Requirements of State and Federal Law Regarding Data Retention.

   a. Minnesota Statutes, section 138.17 governs the preservation and orderly disposition of records that are maintained by a school district. Pursuant to this statute, a general records retention schedule has been established for school districts.

      School districts may not destroy records without complying with the schedule or developing its own schedule that has been approved by the Minnesota Historical Society.

   b. This restriction even pertains to educational data that the District is not required to retain, such as time out logs, student performance data, meeting notes and parent communication records.

2. Consider Developing your own Data Retention Policy and/or Set of Data Collection/Retention Practices to Reflect Past Experiences and Best Practices.

   a. This is really the only way that the School District can establish consistent practices as to what, where, and how records are retained.

   b. A consistent practice as to record maintenance is a vital element to being able to successfully defend a school district in an administrative complaint or hearing.

c. Many service providers do not understand how broadly educational data is defined. Generally, the term includes any document that a school district maintains as a result of a student's school attendance. This includes, but is not limited to: teacher notes; test results, health records, enrollment information, disciplinary and attendance records, grading books, e-mails and/or parent correspondence. Educational data could include information concerning a student's parents that the school obtained as a result of the student's school enrollment.

d. Know the limitations of the "desk drawer exception," which excepts certain records that are created relevant to a student from the definition of "educational data" under the law. *See* Minn. Stat. § 13.32, subd. 1(a). Contrary to the manner in which it is generally viewed, the "desk drawer" exception is a very narrow exception under the law.

In order for files to fall under the "desk drawer" exception, the records must be kept in the sole possession of the teacher who creates the records and not be accessible to or revealed to any other individual, except a substitute teacher. Discussing or sharing the records with *any* other staff (or other individual) for *any* reason removes the records from this "desk drawer" exception.

Any document which falls into this exception must be destroyed at the end of the school year in which it was created. Any document which is not destroyed at the end of the relevant school year becomes educational data.

There is very little reason for a teacher to create "desk drawer" files on their students. If data is sufficiently important to be reduced to a written or other permanent format, then it is sufficiently important to warrant access by administrators or other teachers who will work with the student.

e. Administrative hearings and complaints are generally subject to a very tight timeline and do not provide for a "discovery" process through which copies of records may be located and sought. If a school district is unable to locate and access pertinent records quickly, it will not be able to successfully rebut allegations and/or meet its burden at a hearing.

f. A school district's failure to adhere to its legal responsibilities to retain and maintain student records could cast doubt on its adherence with other, more substantive, laws.

3. Create an Expectation that Practices and Policy Must Be Followed.

a. Stress importance of consistency and adherence to policy through training.

b. Build this requirement into job descriptions.

c. Monitor through regular random file reviews. Make this a responsibility of your coordinators or supervisors.

4. Enforce Policies Consistently.

**B. Develop Consistent Communication Processes and Expectations.**

1. Within the School District:

a. Between teachers, service providers, and paraprofessionals;

i. *Require regular meetings* between teachers and paraprofessionals.

ii. *Maintain electronic log* for each student for purposes of tracking communications and activities, services, parent communications, current issues.

b. Between direct service providers and administrators;

i. All school district personnel must understand that, as school district employees, their duty to represent the school district does not end at the gates of the school house. Staff members must understand that it is expected that they will *communicate information about parent concerns* to school district administrators when they learn of it. Even when they're sharing information informally, parents often have an expectation that the information will be passed on and some sort of school district action will occur.

c. Between administrators;

i. Principals often forget to communicate with the school district's special education director when a matter arises within their schools regarding a special education student or teacher. Regardless of whether the matter concerns student discipline or poor performance on the part of a special education student, many of these issues, if handled improperly, have potentially damaging special education ramifications for a school district. Thus, it is imperative that building administrators *consult with special education administrators on the "front end"* of these issues so that an appropriate course of action and response to the problem can be decided upon and pursued.

ii. In order to effect such a change, the special education administrator will often need to convince and *gain the support of the school district's superintendent*.

d. Between administrators and the school board.

i. *Provide school board ongoing training* on special education topics, including basic requirements, upcoming law revisions and potential concerns

ii. C*onsider providing school board regular reports*. Having "face time" in front of a school board when crises aren't brewing builds credibility for administrators, which allows for more effective communication when complaints requiring school board attention do arise.

iii. *Celebrate successes and achievement* in order to acknowledge school board's support and include them on the team.

2. With Parents:

a. *Document all communications* at the time or soon after they occur. This includes incidental and out of school contacts if anything relevant to student or special education program is mentioned. Teachers and service providers need to view data of this nature not as a burden, but a shield which will protect them at the time of a conflict and assist them in proving the appropriateness and value of the services that they provided.

b. Experience is a wonderful teacher. Use it to your advantage. *Consider having staff persons who have responded to a complaint or testified at a hearing provide training* to your staff during which they share their stories and stress the value of such documentation.

c. *Respond appropriately to parent requests for records.* E-mails and other electronic data are considered educational data that must be retained by a school district and provided to parents upon their request.

d. *Use professional judgment when drafting communications.* Staff should be reminded on a regular basis that e-mail is not a vehicle for private conversations. Judgmental, disparaging or personal remarks should never be included in e-mails which relate to students. Emails should always be drafted objectively and professionally. Staff should be warned not to reduce a comment or observation to writing (especially those regarding the personality of the parents) if they are not prepared to defend it under oath at a hearing. Additionally, informal "texting lingo" is not appropriate when a teacher is electronically communicating with a parent or student.

e. As a good practice, staff members should be required to *print or save all electronic communications on a regular basis* for placement in each student's special education file. The importance of such a practice has increased exponentially as parents increasingly use electronic means to communicate with the school district.

f. Teachers and service providers must *establish professional boundaries*. It is very important that staff members do not confuse a nice, supportive relationship with the need to be consciously competent and professional (i.e. "I don't need to collect data, the mom loves me"). Regardless of the friendly nature of their past relationship with a parent in the past, when conflicts arise, parents will do what they need to do to defend their position because they believe that is in the best interest of their child.

g. *Draft complete and legally sufficient due process documents.*

i. Draft all due process documents clearly. Use complete and grammatical sentences which say what they mean and mean what they say. Statements should not require additional

explanation and/or interpretation. For example, if a team determines that a student will receive certain supports, such as a paraprofessional, the document must clearly provide when, where and how that paraprofessional will serve the student.

ii. IDEA requires that each school district provide parents with written notice whenever the district proposes to initiate or change, or refuses to initiate or change, the identification, evaluation, or educational placement of a child, or the provision of a free appropriate education to the child. 20 U.S.C. § 1415(b)(3).

Every prior written notice should include the following:

- a description of the action proposed or refused by the school district;
- an explanation of why the school district proposes or refuses to take the action;
- a description of any other options the school district considered and the reasons why those options were rejected;
- a description of each evaluation procedure, test, record, or report the school district used as a basis for the proposed or refused action;
- a description of any other factors that are relevant to the agency's proposal or refusal;
- a statement that parents of a child with a disability have protection under the procedural safeguards of IDEA, 20 U.S.C. § 1415, and the means by which a copy of a description of the procedural safeguards can be obtained; and
- a list of sources for parents to contact to obtain assistance in understanding their rights under IDEA.

iii. Compliance with the requirements of prior written notice continues to be a major concern in many school districts. A school district's failure to adequately set forth its rationale in rendering educational decisions can confuse and anger parents, and most importantly, severely compromise the school district's ability to defend itself in a local due process hearing.

*Practice Tip:* Prior written notices need to address each of the elements required under law *and* each of the decisions that the IEP team renders during the meeting, even when the issue appears not to be a parent concern. *See Buffalo Hector Independent School District No. 2159,* 55 IDELR 85 (SEA, 2010).

## C. Train Staff to Conduct Defensible IEP Meetings.

1. IEP teams must render professional, educationally defensible decisions.

   a. Must "consider" parents' views, not simply acquiesce.

      i. *Conflicting Obligations.* An IEP team owes one duty to a child with a disability and a different duty to the child's parents. The team has a substantive obligation to provide the child with FAPE, and it has a procedural obligation to provide the parents an opportunity to be equal participants in the IEP decision-making process. These obligations can come into conflict when parents demand services which the other team members believe to be inappropriate for the child. In that situation, the child's right to FAPE trumps the parents' procedural rights, and school districts must refuse to provide the service it believes would be inappropriate for the child.

      ii. *The "What Would It Hurt?" Standard.* School personnel must be instructed and understand that, although they may prefer to avoid conflict, it is inappropriate to provide a student with services simply because the parents are requesting them and the team does not believe the services will harm the student. The team should agree to provide only those services which it reasonably believes the Student needs to receive educational benefit. It is not a valid defense to argue that the parent requested the service.

b. Follow the IEP process and conduct a complete meeting.

i. Remember: ESY and a student's potential need for assistive technology must always be raised and discussed at an annual IEP meeting.

c. Preparation is paramount.

i. Best practices include developing agendas, holding pre-meetings to brainstorm options and share information, and obtaining necessary background information concerning programs, technology or potential placements you intend to recommend.

ii. It may be appropriate to have team members prepare reports ahead of time and may come to IEP meetings with pre-formed opinions regarding the best program for the child, as long as there remains flexibility and a willingness to consider parents 'objections and suggestions. Preparation of this nature does not equal predetermination.

d. It is okay for an IEP team meeting to end in a disagreement.

IEP meetings are not contract negotiations. In the end, the School District has a responsibility to propose what it believes will provide the student FAPE. The school district must move forward and comply with that obligation once it meets its additional responsibility of providing the parent an adequate opportunity to participate and considering the parents' position and concerns.

2. Thoroughly document the meeting.

a. Use and retain meeting sign in sheets and other documents that may establish team member's presence and full and complete discussion of issues.

b. Assign someone the task of note taking.

i. Note taking assignments should be determined very deliberately. Service providers, such as occupational, physical and speech therapists are often a good choice

because they are used to taking notes in the course of their work with students.

ii. Note takers must be provided clear expectations of their tasks. Notes must reflect an understanding that the issues discussed and considered at the meeting are just as important as the ultimate decisions rendered there. Alternatives and options raised and discussed at the meeting, especially those offered by a parent, and the IEP team's response to each, should be documented.

iii. Notes must be drafted in a clear and objective manner, much as a newspaper reporter was writing a story on the meeting. It may be more comfortable for the note drafter to deal with an issue at conflict in a meeting in a vague or evasive manner. However, this type of tactic will not later assist the district in proving what was discussed at the meeting.

c. While it is not required, consider providing copies of notes to team members, including parents, for review and clarification. This will make it difficult for a parent to dispute the validity of the notes when or if a dispute later arises.

## III. FIRST STEPS: ACTIONS TO TAKE UPON RECEIVING AN MDE COMPLAINT

**A. Director's Actions.** At a minimum, the director of special education should take the following actions in response to an MDE complaint:

1. Contact the IEP manager to familiarize yourself with the case if you have not been previously involved.

2. Contact the other district administrators that need to be informed.

3. Make a determination of the validity of the complaint.

4. Conduct a risk assessment:

a. Do you admit noncompliance or fight the complaint?

b. Do you respond on your own, or do you need an attorney?

5. Contact the assigned MDE complaint investigator immediately after you have an understanding of the issues. Consider whether it would be helpful to request a copy of the original complaint if it has not been provided by the parent or the MDE.

6. Consider whether it would be beneficial to contact the parent(s) in an effort to resolve the complaint informally. By way of example, relevant factors would include the nature of the violation; the district's history with the parent; and whether the parent is represented by counsel.

**B. When Should You Consult with Legal Counsel?** Several factors should be considered in deciding whether to obtain the assistance of legal counsel in responding to a complaint. For example:

1. Does the complaint involve complex legal issues or unfamiliar legal standards?

2. Is the student/parent represented by counsel?

3. Do you anticipate further legal action if the district receives an adverse decision from the MDE? For instance, do you expect the parent to later request a due process hearing on the same issue or to file a claim for disability discrimination under the Minnesota Human Rights Act or under Section 504 of the Rehabilitation Act of 1973?

4. Is the issue or potential corrective action of a magnitude that you expect the district to appeal if it receives an adverse decision?

5. Does the MDE complaint involve an allegation that is a hot-button issue for the MDE?

6. Does the complaint contain an allegation of a systemic violation?

## IV. DRAFTING AN APPROPRIATE AND EFFECTIVE RESPONSE

**A. Determine the Facts.** In order to determine the approach the school district should take in response to a complaint, the director must determine the facts. In some cases this is a simple task. In other cases, however, the task can be quite difficult, particularly if the district has experienced turnover with key staff members, such as a special education teacher, the IEP manager, or a special education supervisor. The task can also be difficult if records have been lost or have not been maintained in an orderly manner.

1. Personally review all IEPs and evaluation reports before submitting them to the MDE.

2. Interview the key staff members and ask them to provide you with a copy of all relevant notes and any written communications they have had with the parent.

**B. Identify the Applicable Legal Standards.** The MDE will identify applicable legal standards in its notice of the complaint. However, additional legal standards may also apply. You must identify all applicable legal standards before determining whether the district is in violation of the law. Consult with your district's legal counsel if you are unsure about the applicable legal standards.

**C. Determine Whether the District is In Violation.** To determine whether the district is in violation of the law, apply the legal standards to the facts.

**D. Develop a Strategy for Responding to Clear Violations.** After you determine whether or not the district is in violation of the law, the next step is to develop a strategy for responding to the complaint. The following are potential strategies that should be considered when a clear violation has occurred:

1. **Consider the potential benefits of admitting clear errors.** Consider whether it would be beneficial to the district to admit errors.

    a. Admitting clear errors may help establish a positive relationship with the parents.

    b. The MDE appears to come down harder on school districts that deny obvious errors. Therefore, if the school district has clearly erred, rather than attempt to conceal or defend such an error, the best course of action may be to acknowledge the error, to explain how it occurred, and to propose a corrective action plan.

    c. In many cases, the MDE has accepted corrective action plans that have been proposed by school districts. This begs the questions: Would you rather pick your own punishment or have the MDE pick it for you?

2. **Consider the potential costs of admitting errors.** What are the consequences of admitting any errors?

a. Always assume that any admissions you make in response to a complaint can and will be used against you later. For example, after resolution of an MDE complaint, the parent may request a special education due process hearing against the district based on the same set of facts and legal issues. Any admissions made in the course of responding to an MDE complaint, as well as any adverse decision by the MDE, may be used against the district in the due process hearing.

b. Any admissions should be as concise as possible and limited to the particular situation alleged in the complaint.

**E. Develop a Strategy for Showing that the District is in Compliance.** If you believe the district is not in violation of the law, develop a strategy for responding to the complaint in the most persuasive manner possible.

1. **Focus on the facts.** In most cases, a school district's complaint response will be more persuasive to the MDE if it focuses on the facts rather than on the law. The guidelines for stating facts in a complaint response are similar to the guidelines for testifying. For instance:

   a. Always tell the truth.

   b. Do not volunteer information. Address only the issue that has been raised, and do so in a concise and straight-forward manner.

   c. Try to avoid taking the complaint personally or responding in an unnecessarily defensive or adversarial manner.

   d. Do not make any assertions unless you know they are true.

   e. Do not guess or speculate when providing information.

   f. If you do not understand an allegation or an issue, call the complaint investigator and ask for clarification.

2. **Limited discussion of legal standards.** When a discussion of the law is required, the legal standards should be presented and applied in a straightforward manner. Make sure you are applying the correct standards and that you are familiar with the manner in which those standards have been interpreted and applied in prior cases and complaint decisions. Consult with your district's legal counsel if you are unsure about the applicable legal standards.

3. **Tone of Admission is Key.** The old saying is true: It is not always what you say, but rather it is how you say it. By coming across in an honest manner, and by conceding clear errors on the part of the school district, the school district will generally be viewed more positively. In contrast, unnecessary arguments and a defensive tone are likely to engender greater scrutiny from the MDE.

## V. ATTORNEYS' FEES

### A. Limit Your School District's Exposure to Attorney Fees.

1. The IDEA provides that a court, in its discretion, may award attorneys' fees to the parents of a child with a disability who is the "prevailing party" in an action brought under the IDEA.

2. For purposes of the law, a parent is a "prevailing party" if he or she obtains "actual relief on the merits of the claim that materially altered the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Farrar v. Hobby*, 506 U.S. 103, 111-112 (1992); *Drennan v. Pulaski County Special Sch. Dist*, 458 F.3d 755, 756-57 (8th Cir. 2006).

3. Not all prevailing parties are due attorney fees. In *Farrar*, the U.S. Supreme Court held that "[i]n some circumstances, even a plaintiff who formally 'prevails' . . .should receive no attorney fees at all." *Farrar*, 506 US. at 115, 113 S.Ct. 566; *see also Hale v. Poplar Bluff R–I Sch. Dist.*, 280 F.3d 831, 833 (8th Cir. 2002) (denying prevailing party status where plaintiff "prevailed on only a small and technical part of their claim.")

4. "The most critical factor in determining the reasonableness of a fee award is the degree of success obtained." *Linda T. v. Rice Area School District*, 417 F.3d 704, 708 (7th Cir. 2005) (*citing Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S.Ct 1933. 76 L.Ed. 2d 40 (1983) (*internal citations omitted).*

### B. Limiting Factors

1. Ten Day Offer of Settlement.

   a. IDEA prohibits the award of attorneys' fees to a parent for any legal services performed after receipt of a timely written offer of settlement if such offer is not accepted and the court determines

that the relief finally obtained is not more favorable to the parent than was the settlement offer. 20 U.S.C. § 1415(i)(3)(D)(i)(I)-(III).

b. The earlier a school district makes the settlement offer, the better. There is nothing in the law that would prohibit a school district from making a ten-day settlement award prior to a resolution session.

2. Attorney's Conduct.

a. Courts may deny an award of attorneys' fees to a plaintiff who is a prevailing party if special circumstances render such an award to be unjust. *See Borengasser v. Arkansas State Bd. Of Educ,* 996 F.2d 196, 199 (8th Cir. 1993). Courts are extremely hesitant to find that an attorney's conduct has rendered an award of attorney fees to be unjust.

However, a in one District of Minnesota case, the court noted that a reduction in attorneys' fees would have been warranted because the parent and counsel for the student "unreasonably protracted the final resolution of the controversy," canceling or refusing to attend four IEP meetings over the course of a five-month time and thereby delaying the implementation of a new IEP for the student for several months after the school district first became aware of the parent's concerns. *K.E. by K.E. and T.E. v. Independent School Dist. No. 15, St. Francis*, 54 IDELR 215 (D. Minn. 2010). Additionally, in that case, counsel for the student stated on the record during a pre-hearing conference that she would "bank her annual salary" that the resolution session required by 20 U.S.C. § 1415(f)(1)(B) would be unsuccessful, and—based on the uncontradicted affidavit of counsel for the District—demonstrated her belief in its futility by using profanity throughout the session and placing her feet on the table and whistling during opening comments. The conduct of the parent and counsel for the student were therefore determined to "frustrate[ ] the operation of a collaborative process and put the School District in an untenable position." *Lessard v. Wilton Lyndeborough Coop. Sch. Dist.*, 518 F.3d 18, 30 (1st Cir. 2008).

b. When a court determines that awarding attorneys' fees would not further the congressional purpose of IDEA or would be unfair to the defendant, it may, in its discretion, refuse to award the fees requested by the plaintiff. *See Fischer v. Rochester Community*

*Schs.*, 780 F. Supp. 1142 (E.D. Mich. 1991) (refusing to award attorneys' fees based, in part, on fact that attorney unnecessarily aggrandized and protracted the misunderstanding between the parties); *Hyden v. Board of Educ. of Wilson County*, 714 F. Supp. 290 (M.D. Tenn. 1989) (denying attorneys' fees award to parents, where parents' attorney had unreasonably protracted IEP process and caused administrative hearing to be necessary).

## C. School District's Ability to Collect Fees.

1. In order to obtain attorney fees from a parent or parent's attorney, a school district would need to establish that the action was *frivolous, unreasonable or without foundation.* 34 CFR § 300.517(a)(1)(ii) or was initiated *for an improper purpose, such as to harass, cause unnecessary delay or needlessly increase the cost of litigation.* 34 CFR § 300.517(a)(1)(iii).

2. Neither IDEA or its regulations define "frivolous," unreasonable," or "without foundation." Thus, the task of interpreting and applying this provision of IDEA has been left to the courts. A review of relevant case law establishes that, so far, the terms have been very narrowly construed.

## D. Once Again, Documentation is the Key.

1. In order to prove that an award of attorney's fees is unjust or that circumstances of a particular case warrant an award of fees to a school district, a school district will be required to present detailed evidence to the Court.

2. In the *K.E.* case, discussed above, the school district was able to present the court with clear documentation describing the attorney's conduct at meetings and hearings. That documentation, and the attorney's failure to rebut it, was the basis for the Court's holding.