



# PACE

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# **Special Education:** How Not to Get Sued And What to Do if You Are

**Joel Hungerford, Hungerford Law**  
**Andrea Schiers, OSBA**

# TYPES OF COMPLAINTS

- US Dept. of Education, Office for Civil Rights (OCR)
- Oregon Dept. of Education (ODE)
- Request for Due Process Hearing (Due Process)
- Internal Complaint, Board Policy KL, AC (Internal)
- Lawsuit (Tort)

# OCR Complaints

**WHAT:** Allegations of discrimination under Section 504, Americans with Disabilities Act (e.g., website accessibility)

- Frequently connected to IDEA/FAPE concerns
- Will include list of requested documents to produce

**WHO:** Director of SPED, Student Support Services

- With assistance from counsel, PACE attorneys

**WHEN:** Notice from OCR will provide a response timeline

- Reasonable extensions typically granted

# OCR Complaints, cont'd

## PROCESS:

- Option of voluntary resolution agreement
- Mediation is available if both parties agree
- Provide narrative response, with documentation
- OCR interviews relevant staff
  - Staff can have another person present at the interview
- OCR issues findings .... Eventually

# ODE Complaints

**WHAT:** Allege violations of IDEA

- Typical concerns: IEP evaluations and/or design
- Will include list of requested documents to produce

**WHO:** Director of SPED, Student Support Services

- With assistance from counsel, PACE attorneys

**WHEN:** Must respond in writing within 10 business days

- May include onsite interviews
- ODE issues decision within 60 days of receiving the complaint
- One month (30 days) for reconsideration and/or judicial review

# Due Process Hearings

**WHAT:** Allege violations of IDEA or Section 504

- Typical concerns: IEP implementation, evaluations
- Trial-like hearing with Administrative Law Judge, court reporter

**WHO:** Superintendent; Director of SPED, Student Support Services; private counsel

**WHEN:** A few quick deadlines and then months

- Within 10 days – provide written response
- Within 15 days – challenge sufficiency of motion
- As soon as possible – request reassignment

# Internal Complaints

**WHAT:** Allege anything related to student with disability

- Board Policy AC, Nondiscrimination
- Board Policy JFCF, Hazing/Harassment/Intimidation/Menacing/Bullying
- Board Policy KL, Public Complaints

**WHO:** Appropriate staff identified in the Policy, AR

- With assistance from counsel, PACE attorneys as needed

**WHEN:** Timeline identified in the Policy, AR

- If additional time is necessary, communicate that to the complainant with the reason for the delay and estimated new timeline



# Lawsuit

## WHAT:

- State court: tort claims
- Federal court: appeal of admin. hearing, federal lawsuit (§1983)

**WHO:** Superintendent; Director of SPED, Student Support Services; private counsel

**WHEN:** Longest process; will often take years

# CURRENT TRENDS

# Charter Schools

- A public charter school may not limit enrollment based on, among other things, disability or the terms of an IEP. ORS 3383.125(1)(c)
- School districts must serve resident students with disabilities attending public charter schools within the district. OAR 581-15-2075(2)
  - Child Find
  - Implementing IEPs
  - Supplementary and related services

# Abbreviated School Days

- Recent Lawsuit Against ODE
  - Filed by Disability Rights Oregon; Alleges ODE is failing all districts, but smaller districts in particular
- ORS 343.161 (and SB 263)
  - Must be done via IEP process – watch out for principals
  - Allowed – do not use as a long-term solution
  - Have a step-in/step-up plan
  - Notification obligations each term

# Abbreviated School Days, cont'd

- Parent-selected abbreviated school day:
  - E.g., pull out for ABA or other private services
  - Stand-ready letter
    - Offer to convene IEP team to discuss (i.e., cut off IEP allegations)
    - Note you stand ready to provide services
    - Discourage/be honest about FAPE impact

# Evaluations

- Go-to allegation – does not matter if student is already eligible under different category
  - Most common: Emotional Disturbance (ED), Traumatic Brain Injury (TBI)
  - ED overlap with ASD – no ED primary, ASD secondary. OAR 581-015-2000(4)(b)(A)
  - How to prevent: Ask the question (e.g., rule out). Have good processes in place (SSTs, etc.)

# Evaluations, cont'd

- What to watch for:
  1. Attendance
  2. Grades
  3. Behavior
- When attendance becomes a problem:
  - Red flag (Child Find trigger)
  - Functional Behavioral Analysis
  - IEP Team meeting(s); SST meeting; Parent contact
  - Stand ready letter

# Implementation

- Becoming more common
- Does every minute count?
  - Day-to-day school activities
  - “Material” failure to implement
- Specially Designed Instruction v. Accommodations
  - Make sure of comm. between SPED teachers/aides



# Recording Meetings

- **Hidden:** cannot “Obtain or attempt to obtain the whole or any part of a conversation by means of any device, contrivance, machine or apparatus, whether electrical, mechanical, manual or otherwise, if not all participants in the conversation are specifically informed that their conversation is being obtained.” ORS 165.540(1)(c)
- **Not hidden:** District “has the option to require, prohibit, limit, or otherwise regulate the use of recording devices at IEP meetings.” *Letter to Anonymous*, 40 IDELR 70 (OSEP 2003)

# Recording Meetings, cont'd

- Proactive Decision: adopt written procedure or policy
- Note exceptions:
  - Necessary to participate in the IEP process (e.g., disability such as processing disorder)
    - Use other accommodations. See, e.g., *Belvidere Cmty. Unit Sch. Dist. No. 100*, 112 LRP 12955 (SEA IL 02/27/12) (Parent with ADHD and dyslexia asked to record, but district offered to pay for an advocate to take notes and assist)
  - Language barriers. See *E.H. v. Tirozzi*, 16 735 F.Supp. 53 (D. Conn. 1990) (Parent from Denmark asked to record to later listen to recording with dictionary)

# Recording Devices, cont'd

- If you do allow:
  1. Make your own copy (do not rely on parent(s))
  2. Keep as educational record
- Student accommodation: IEP team decision
- AngelSense
  - Deactivation agreement available online

# Section 504 Plans

- Combined IDEA/504 Litigation
- IDEA consent revoked/refused, effect on 504?
  - 1996 OCR *Letter to McKethan*: rejecting services under IDEA is tantamount to rejecting services under 504
  - 2013 Colorado Federal court in *Kimble v. Douglas County SD*: revocation of consent under IDEA does **NOT** eliminate “the broader protection of Section 504 and the ADA.”
    - District “required to convene a Section 504 meeting and develop a 504 plan after [parents] revoked consent for IDEA services[.]”

