

# A Costly Mistake: Waiting Too Long To Correct an Error in an IEP

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## Education Law Notes

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It is not uncommon for school districts and parents to disagree over what is to be included in a child’s individualized education program (“IEP”). The Individuals with Disabilities Education Act (“IDEA”) provides a process whereby parents who disagree with the district’s IEP can request a due process hearing to challenge the IEP. A key part of the resolution process is that there is a thirty-day resolution period, starting when the complaint is filed, during which the district has an opportunity to resolve the dispute that is the basis of the complaint. The Second Circuit of the U.S. Court of Appeals, however, recently held in *Board of Education of the*

*Yorktown Central School District v. C.S.*, that the school district cannot unilaterally change the IEP during the resolution period. Rather, the district is locked into defending the IEP as it existed prior to the due process complaint being filed. While the *Yorktown Central* complaint addressed a situation where a family unilaterally enrolled a student in a private placement and then sought tuition reimbursement, the analysis likely would not change in other situations. Thus, it is important that IEPs offered to parents reflect the actual program being offered to the student.

When parents who disagree with an IEP decide to unilaterally enroll their children in a private school and plan to seek tuition reimbursement for that placement, the first step in that process is generally for them to give the district ten days’ prior written notice of their intention, including a statement of their concerns regarding the proposed IEP. The ten-day notice requirement makes it possible for the district to reassess the IEP and cure any defects in it, thus reducing the likelihood that the district will be found responsible for funding the private placement. A parent who fails to give the ten-day notice risks being denied reimbursement for the private placement.

If the parents and the district do not resolve the concerns during the ten-day notice period and the parents proceed to unilaterally place their child in a private school, the parents may then seek tuition reimbursement by filing a due process complaint against the district. Once a due process complaint is filed, the parties enter into a thirty-day resolution period, during which a resolution meeting is held between the parties and the

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district has an opportunity to resolve the dispute that is the basis of the due process complaint.

In the *Yorktown Central* case, however, the district found out just how costly failing to fix a scrivener's error in the IEP during the ten-day notice period can be. The case involved an IEP for the student's Seventh Grade year. The IEP in question indicated that the student, who had multiple disabilities and was identified as learning disabled, would be in a class with twelve students and two adults. The parents, however, were informed verbally on several occasions that the Seventh Grade classes all had a ratio of fifteen students to two adults.

The parents rejected the IEP and gave the district the ten-day written notice that they disagreed with the IEP, including an alleged failure to include a small class and that they intended to enroll the student in a private school. The district did not respond to this notice within the ten-day period. The parents then unilaterally enrolled the student in a private school and filed a request for a due process hearing in order to seek tuition reimbursement, citing in large part that the IEP said the student would have a class size of twelve students but that the parents had been informed that all available classes had fifteen students. During the resolution period, the district unilaterally amended the IEP to fix what they deemed to be a scrivener's error to reflect the class size would be fifteen students. There was a question as to whether the amended IEP was delivered to the parents within the thirty-day resolution period. After receiving the IEP, the parents then filed an amended complaint alleging that both the twelve-person and fifteen-person classes were too large.

The Second Circuit held that while the IDEA allows a district to *propose* changes to the IEP during the resolution period, it does not permit a district to *unilaterally* amend an IEP during this period. The Court noted that this allows a parent who has unilaterally placed their child in a private placement to rely on the contents of the child's written IEP when making the decision to do so. Districts that wish to offer a revised IEP into evidence at due process to refute a parents' unilateral placement of a child at a private placement, must make any offered changes during the ten-day notice period before due process has been filed. If the parents reject the offered changes, the district would be able to introduce the proposed IEP to support a finding that the parents unreasonably rejected the revised IEP.

In the case discussed here, both the due process hearing officer and the District Court found that the class size of fifteen students would have offered the student a free appropriate public education as required by the IDEA. The district, however, ultimately ended up paying a high price for the scrivener's error because the Second Circuit found that the program in the IEP, which offered a twelve-student class, could not be implemented by the district, which had no such class. The Court, therefore, ordered the district to reimburse the parents for the private school placement.

**What is the take-away from this case?** First, a school district should make sure that its staff proofreads the IEP that is sent to the parents. Second, if a ten-days' notice of a private placement letter is received, the district should immediately review the IEP and determine if any changes need to be made. Any proposed changes to the IEP must be given to the parents during this ten-day period if they are to be considered at due

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process. Once that period is over, the district has no further opportunity to make unilateral changes to a proposed IEP and enter them into evidence during a due process hearing.

If your school has questions about this or any other special education issue, please contact one of our school law attorneys.

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