PULLMAN &COMLEY

Taking The "Due" Out of Due Process – OSERS and Compliance Complaints

Education Law Notes

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During a brief altercation in Dashiell Hammett's classic novel, *The Maltese Falcon*, the protagonist, Sam Spade, warns one of his antagonists that "when you're slapped, you'll take it and like it." That is much the same approach taken by the United States Department of Education's Office of Special Education and Rehabilitative Services ["OSERS"] when it issues a "Dear Colleague" letter. Despite the convivial salutation, what follows is usually anything but dear or collegial. OSERS' April 15, 2015 Dear Colleague letter is no exception. The April 15 letter asserts that when a special education dispute arises between parents and a school district, the district should defer to the parents' choice of forum, even if doing so is antithetical to the district's interests.

The Individuals with Disabilities Education Improvement Act of 2004 ["IDEA"] provides that either parents or school districts can request what is commonly known as a "due process" hearing before a state-appointed hearing officer should disputes arise involving a student's special education status, evaluations, programming or placement. The IDEA, however, also requires state educational agencies to establish a separate complaint resolution process, under which parents can submit their claims directly to their state's department of education.

The resolution process provides no hearing, no opportunity for the school district to call witnesses or to cross-examine the parents and their witnesses under oath, and no opportunity to challenge either the admissibility or legitimacy of the parents' documents and contentions. Instead, an employee of the state educational agency reviews the parents' contentions, formulates written questions for the district, and after reviewing the latter's responses can issue corrective actions, from which districts have little, if any, opportunity to appeal. In short, the complaint resolution process takes the "due" out of due process, and many school districts are extremely wary of it, for while due process has its own inherent flaws, at least it provides a substantive opportunity to be heard.

Despite this, OSERS expresses bewilderment as to "why a public agency would seek a due process hearing when there is already an active State complaint on the same issue or issues." It promptly concludes that there is *no* good reason, writing: "It appears that in some instances, public agencies may have filed due process complaints against parents in an effort to prevent the State complaint process from moving forward." OSERS' letter bases this contention upon the fact that when the subject of a parentally filed compliance complaint is also submitted by either party to due process, the state education agency must table further

consideration of the compliance complaint until due process has concluded.

OSERS laments that filing for due process "while a parent's [compliance] complaint resolution is ongoing could result in preventing the parent, who may not have the resources to participate in a due process hearing, from exercising his or her right to engage in dispute resolution through the . . . complaint process." Thus, OSERS "strongly believes that it is in the best interest of parents and school districts to respect parents' choice of forum for resolution of their disputes." While it is obvious why this would be in the *parents*' best interests, OSERS neglects to explain why it would be in the district's. To the contrary, OSERS' position suggests that a district should subordinate its own interests to helping the parent more easily navigate an adversarial course of action against it.

So What Does It Mean?

As noted, the IDEA recognizes the primacy of due process over compliance complaints. In addition, it sets forth an extensive, detailed iteration of the parties' pre-hearing, hearing, and post-hearing rights and obligations. It is, therefore, not surprising that the IDEA provides no support for either OSERS' characterization of these safeguards as burdensome or its assertion that districts should forego them.

Nonetheless, to bolster its contention that school districts should help fuel their own immolation, OSERS ominously asserts that "diverting resources into adversarial processes between parents and public agencies is contrary to Congressional intent . . . to resolve . . . disagreements in positive and constructive ways." The reference to Congressional intent may suggest that OSERS or one of its sister offices, such as the Office for Civil Rights, may investigate or otherwise scrutinize school districts who initiate due process in these situations. Thus, while school districts have the right to defend themselves by way of due process, in these situations, their "dear colleagues" at the United States Department of Education may be watching.

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