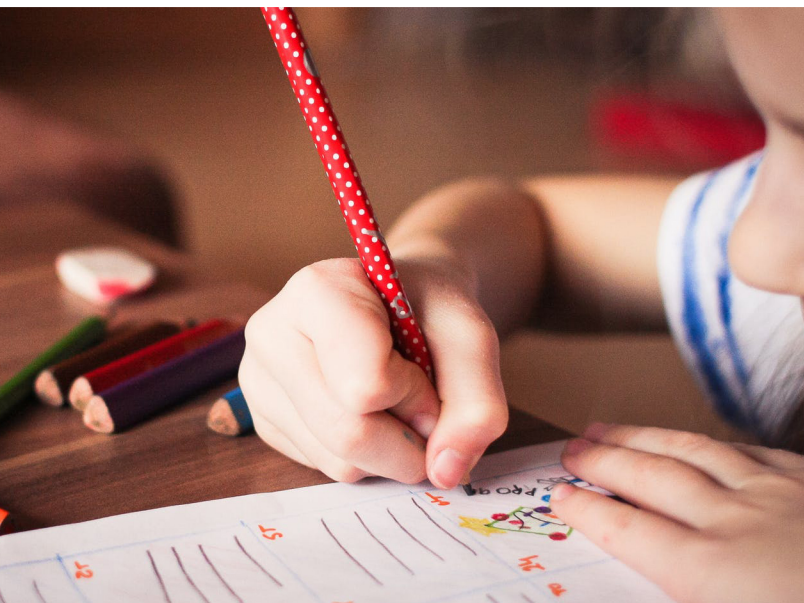


PWSA SCHOOL SUCCESS KIT

INDIVIDUALIZED EDUCATION PROGRAMS:

10 Tips: How to Use IDEA 2004 to Improve Education for Children with Disabilities

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by Wayne Steedman, Esq.

On July 1, 2005, the Individuals with Disabilities Education Act of 2004 (IDEA 2004) went into effect. In 10 Tips: How to Use IDEA 2004 to Improve Education for Children with Disabilities, you will learn how to use IDEA 2004 and the No Child Left Behind Act (NCLB) to ensure that the needs of children with disabilities are met, while improving educational outcomes and results.

1. Use the Findings and Purposes in IDEA 2004 to Establish a Higher Standard for a Free, Appropriate Public Education (FAPE).

In 1982, the U. S. Supreme Court issued the first decision in a special education case in *Board of Education v. Rowley*, 458 U. S. 176. In *Rowley*, the Court held that school districts did not have to provide the “best” education for disabled students but merely had to provide services so the child received “some educational benefit.” *Rowley* established a low standard for a “free appropriate public education” (FAPE).

When you read the Findings and Purposes of IDEA 2004, you will see that Congress raised the bar for a free appropriate public education (FAPE).

Prepare Children to Lead Productive, Independent Lives

In “Findings” of IDEA 2004 (Section 1400(c)), Congress found that “30 years of research and experience has demonstrated that the education of children with disabilities can be made more effective by having high expectations for such children,” educating them in the regular classroom so they can “meet developmental goals and, to the maximum extent possible, the challenging expectations that have been established for all children and be prepared to lead productive and independent adult lives, to the maximum extent possible.” (Section §1400(c)(5)(A))

Prepare Children for Employment, Independent Living – and Further Education

In “Purposes” of IDEA 2004 (Section 1400(d)), Congress describes what they intend the law to accomplish. In IDEA 2004, Congress added “further education” as a purpose of the law:

The purposes of this title are to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to **meet their unique needs and prepare them for further education, employment and independent living**. (Section 1400(d)(1)(A))

When Congress added “further education” to the Purposes of IDEA 2004, they established a new outcome for special education, an outcome that had never been identified before.

When you read in “Findings” that disabled children should be given the opportunity to meet the “challenging expectations that have been established for all children” and “improve academic achievement and functional performance... to the maximum extent possible” (Section 1400(c)(5)(E) and you read that one Purpose of the law is to prepare children for “further education,” you are looking at a new legal standard for a free appropriate public education.

As a parent or teacher, you need to understand that when Congress reauthorized IDEA 2004, they raised the bar. To meet these new legal requirements in IDEA 2004, schools will have to use scientifically based instruction and provide more intensive special education services.

Meet Developmental Goals & Challenging Expectations Established for Non- Disabled Children “to the Maximum Extent Possible”

While the phrase “to the maximum extent possible” was included in earlier amendments to IDEA, there is significant qualitative difference in how this phrase is used in IDEA 2004. In IDEA 1997, the phrase “to the maximum extent possible” described the need to provide disabled children with access to the general curriculum and prepare children for life after school.

In IDEA 2004, the phrase “to the maximum extent possible” describes the requirements to meet the developmental goals and challenging expectations established for non-disabled children, to prepare children with disabilities to lead independent and productive adult lives, and to improve their academic achievement and functional performance.

Provide Teachers with Knowledge & Skills in Scientifically Based Instructional Practices

Congress also found that the education of children with disabilities can be made more effective if **all school personnel** who work with children with disabilities receive “high quality, intensive” professional development and training to ensure that they have “the skills and knowledge necessary to improve the academic achievement and functional performance of children with disabilities, including the use of **scientifically based instructional practices**, to the maximum extent possible.” (Section 1400(c)(5)(E)).

2. Use IDEA 2004 and No Child Left Behind (NCLB) to Obtain a Better Individualized Education Program (IEP).

When Congress reauthorized IDEA 2004, they specifically noted the intent to coordinate IDEA 2004 with the No Child Left Behind Act. (Section 1400(c)(5)(C)) Many definitions in IDEA 2004 come directly from NCLB, including the requirements for highly qualified teachers.

A “highly qualified teacher” has full State certification (no waivers), holds a license to teach, and meets the State’s requirements. Special educators who teach core academic subjects must meet the highly qualified teacher requirements in NCLB and must demonstrate competence in the academic subjects they teach. (Section 1401(10))

Closing the Gap

The purpose of the No Child Left Behind Act is “to ensure that **all children** have a fair, equal, and significant opportunity to obtain a **high quality education and reach, at a minimum, proficiency** on challenging State academic achievement standards and State academic assessments.” (20 U.S.C. 6301) The purpose of NCLB can be accomplished “by meeting the educational needs of low-achieving students [including] children with disabilities...” and “closing the achievement gap between high- and low-performing children and “ensuring access of children **to effective, scientifically based instructional strategies** and challenging academic content. (Section 6301(3), Section 6301(9))

IDEA 2004 requires states to establish performance goals for children with disabilities that are the same as the state’s definition of adequate yearly progress under NCLB (Section §1412(a)(15)).

Attacking Low Expectations

Congress also found that implementation of the IDEA “has been impeded by low expectations and an insufficient focus on applying replicable research and proven methods of teaching and learning for children with disabilities.” (Section 1400(c)(5))

School personnel often assert that it is unreasonable to expect a child to achieve more than one year of academic progress in one year. School personnel assert this even more vigorously when they develop IEP goals for disabled children, goals that often reflect their low expectations.

But if a disabled child is two, three, or more academic years behind his nondisabled peers, the only way to “close the gap” is for the disabled child to make more than one year of academic progress in one year. When children with disabilities receive intensive instruction from teachers who are skilled in the use of scientifically based instruction, it is not unusual for these children to make more than one year of progress in an academic year.

Parents and teachers must learn about the requirements of NCLB and IDEA 2004 to ensure that these legal requirements are met. Although there is no private right of action under NCLB (i.e., parents cannot sue schools when they fail to meet NCLB’s requirements), the failure to meet NCLB requirements can be used as evidence that a child did not receive an appropriate education. (To learn more about No Child Left Behind and IDEA, see ***Wrightslaw: No Child Left Behind***, published by Harbor House Law Press)

3. Include Research Based Methodology in the IEP.

Congress found that implementation of IDEA “has been impeded by the failure of schools to apply replicable research on proven methods of teaching and learning.” IDEA 2004 includes numerous references to “scientifically based instructional practices” and “research based interventions.” In describing permissible uses of federal funds, IDEA 2004 includes “providing professional development to special and regular education teachers who teach children with disabilities based on **scientifically based research to improve educational instruction.**” (Section 1411(e)(2)(C)(xi)).

The child’s IEP must include “a statement of the special education and related services and supplementary aids and services, based on **peer-reviewed research** to the extent practicable to be provided to the child.” (Section 1414(d)(1)(A)(i)(IV))

In determining whether a child has a specific learning disability, IDEA 2004 describes a process by which the IEP team “may use a process that determines if the child responds to **scientific, research based intervention** as a part of the evaluation process.” (Section §1414(b)(6)(B))

This language in IDEA 2004 creates new requirements for schools to use scientific research based instructional practices and interventions that are based on accepted, peer-reviewed research, if such research exists.

School officials often refuse to write educational methodologies into the IEP. They argue that teachers should be free to use an “eclectic approach” to educating children with disabilities, and should not be forced to use any specific methodology.

Congress rejected this practice when they reauthorized IDEA 2004.

By including frequent references to the need to use scientific, research based instruction and interventions, Congress clarified that methodology is vitally important. By requiring the child’s IEP to include “a statement of special education, related services and supplementary aids and services, based on peer reviewed research ...” (Section 1414(d)(1)(A)), Congress clarified that IEPs must include research-based methodology.

Including methodology in the child’s IEP will benefit the child’s parents and teachers. As participants in developing their child’s IEP, parents will benefit by having input into the instructional methods used to teach their children. The teachers who implement the IEP will benefit by having guidance from a team of professionals who are familiar with the child and who have reviewed the research to determine the interventions and instructional methods that are most likely to provide the child with educational benefit.

This is a win, win situation for all – especially for children who will benefit when they receive effective instruction from teachers who are trained in research-based instructional methods.

4. Ensure That Annual Goals are Comprehensive, Specific and Measurable.

IDEA 2004 eliminated short-term objectives and benchmarks for students with disabilities, except for those students who take alternate assessments. (Section 1414(d)(1)(A)(i)(I)) Although Congress may think they did teachers a favor by eliminating short-term objectives and benchmarks, they made teachers’ jobs more difficult. Annual goals will have to be far more comprehensive than they were under IDEA 1997.

Short Term Objectives

The problem is reminiscent of the game “Whack a Mole” where one knocks one mole down, only to have another mole appear in a different location. Since Congress eliminated short-term objectives and benchmarks, this information will now have to be included in the annual goals.

Eliminating short-term objectives creates as many problems for educators as it does for parents. Short-term objectives and benchmarks are steps that measure the child’s progress toward the annual goals in the IEP. When written correctly, short-term objectives provide teachers with a roadmap and a clear mechanism to evaluate the child’s progress.

Academic and Functional Goals

Although short-term objectives and benchmarks were eliminated in the federal law, under IDEA 2004 the IEP must include “**measurable annual goals**, including **academic and functional goals**.” (Section 1414(d)(1)(A)) IEP goals cannot be broad statements of what a child will accomplish in a year, but must now address the child’s academic achievement and functional performance. The IEP must specifically identify all the child’s needs, how the school will meet these needs, and how the school will measure the child’s progress objectively.

If the IEP goals are not specific and measurable and do not include academic and functional goals, the IEP is defective and open to a challenge that it denies the child a FAPE.

Parents must be vigilant. The danger is that the IEP team will propose annual goals that are not specific and measurable, do not meet the child’s academic and functional needs, and do not describe how the child’s progress will be measured.

Teachers will have to work harder and think more creatively to ensure that the annual goals address all the child’s educational needs and that the goals are written in clear, measurable language. If the IEP is based on the child’s “present levels of academic achievement and related developmental needs,” addresses the child’s academic and functional needs, and includes research validated instructional methods, the IEP should adequately address the child’s needs under IDEA 2004.

5. Use New Evaluation Procedures to Monitor Academic Progress and Progress on IEP Goals.

IDEA 2004 expanded the range of educational issues that must be evaluated and the timeframe within which these evaluations must be completed. After the parent provides consent, the school must complete the initial evaluation and determine if the child is eligible for special education services within 60 days. (Section 1414(a)(1)). Interestingly, the Act does not specify whether the required consent must be in writing.

When conducting an evaluation, the school shall use “a variety of assessment tools to gather relevant functional, developmental, and academic information, including information provided by the parents. (Section 1414(b)(2)). The child’s academic achievement or functional performance may necessitate a reevaluation. (Section 1414(a)(2))

These references to measuring and improving the child’s academic achievement and functional performance are new in IDEA 2004. The IEP team must now consider functional, developmental and academic information in developing an IEP that provides a child with a free appropriate public education (FAPE).

School personnel often claim that grades and performance on IEP goals are separate, and that academic failure does not mean that the child was denied a FAPE. IDEA 2004 rejects this claim. If the child is making progress on his IEP goals, but is receiving failing grades or is not making adequate progress in academic areas, this may be evidence that the child is not receiving a free appropriate public education.

To meet the threshold requirements for a FAPE, the school must ensure that the child with a disability makes adequate progress in academic achievement and functional performance, and on the IEP goals. If the child’s academic achievement and functional performance are not commensurate with the child’s progress on IEP goals, the child’s IEP needs to be revised. The parents and educators need to determine what adjustments need to be made to the child’s special education program and IEP.

6. Give Consent Only for Evaluations or Portions of the IEP to Which You Agree.

IDEA 2004 requires the school to obtain parental consent before the initial evaluation and before implementing special education services in the IEP. Although the wording of the statute changed in IDEA 2004, the substantive effect is no different for initial evaluations.

Parental Consent for the Initial Evaluation

Before conducting an initial evaluation (the first assessments requested by a school when a child is suspected of having a disability), the school must obtain parental consent. (Section 1414(a). If the parent wants the child to receive special education services, there is no reason for the parent to deny consent for the initial evaluation unless the parent prefers to obtain evaluations from a specialist in the private sector. In that case, the parent may consent to the school doing some evaluations. For example, the parent may consent to the school conducting educational evaluations and have their independent psychologist conduct the psychological evaluation.

While IDEA 2004 requires IEP teams to **review** evaluations provided by the parent, the team is not required to accept the findings and recommendations in private evaluations. Private evaluations can lead to problems if they are improperly done or if the individual who conducts the evaluation does not meet state requirements. (Section 1414(b)(3))

Before scheduling an evaluation by an expert in the private sector (i.e. a child psychologist, school psychologist, neuropsychologist, or educational diagnostician), the parent should carefully review the individual's credentials. Here are some questions you need to answer:

- Does the evaluator meet state requirements to conduct the evaluation (for example, in most states a psychologist must be licensed to conduct psychological evaluations)?
- Does the school district generally accept evaluations from this evaluator?
- Is the evaluator willing to attend the eligibility or IEP meeting to explain his findings, educate the IEP team about the reasons for the recommendations and what is likely to happen if the recommendations are ignored?

If the parent refuses to consent to an initial evaluation by the school, the school may use mediation, resolution, or a due process hearing to obtain the evaluation. (Section 1414(a)(1)(D)(ii))

Parental Consent for Special Education & Related Services

The parent is also required to give consent for special education and related services. If the parent refuses to provide consent for services, the public school "shall not provide special education and related services to the child..." (Section 1414(a)(1)(D)(ii)(II)) This language represents a significant change from IDEA 1997 which required schools to seek mediation or due process to obtain parental consent for services.

This new language may create problems for parents who want their child to receive special education and related services, but disagree with part of the IEP and/or how the school plans to provide services in the IEP. The law does not prevent parents from consenting to parts of the IEP that are acceptable, while refusing consent for those parts of the IEP with which they disagree. There is some support for this approach in the IDEA 2004 statute.

IDEA 2004 maintains the "stay put" provisions of IDEA 1997. (Section §1415(j)) Under the "stay put" provision, the child can remain in the then-current educational placement and continue to receive the same services during proceedings to challenge the IEP, unless the parents and school agree otherwise. Although there is no "then-current educational placement" when there is a dispute between parent and school over the initial IEP, the fact that the parent and school agree on some part of the IEP creates an obligation for the school to implement those parts of the IEP to which the parent provided consent.

If you want to consent to part of the IEP, here are some suggestions:

- Initial each part of the IEP to which you agree.
- Next to the signature line, write that you do not consent to any part of the IEP that you did not initial.

Think about how you want to resolve your dispute or disagreement with the school. IDEA 2004 includes additional procedures to resolve disputes. (See Tip #10) As a parent, you need to understand that the school is under no obligation to seek resolution of the dispute and is actually prohibited from doing so under IDEA 2004. (Section 1414(a)(1)(D)(ii)(II)).

7. Insist that the Child's Regular Education Teacher(s) Participate in IEP Meetings.

IDEA 2004 lists the individuals who are required members of the IEP team:

- The parents
- Not less than one regular education teacher
- Not less than one special education teacher
- An individual who can interpret the instructional implications of evaluations
- A representative of the school district who has supervisory responsibilities and is knowledgeable about the general education curriculum and agency resources. Section 1414(d)(1)(B))

Congress changed IDEA 2004 to allow members of the IEP team to be excused from attending IEP meetings, even when their area of the curriculum or related service will be discussed. As a parent, you do not have to consent to this. Before a team member can be excused, the individual must submit a written report to the IEP team **and the parent must consent in writing**. (Section 1414(d)(1)(C)).

The demands placed on a teacher's time are great. In the end, the time spent developing a comprehensive IEP that addresses the child's unique needs will save time. More important, input from all the child's teachers will benefit the child. Regardless of whether the parent consents to a regular education teacher being excused from an IEP meeting, the law still requires that at least one regular education teacher attend the meeting.

If the child receives any educational services in a regular education class or may receive educational services in a regular education class, the regular education teacher(s) should attend the IEP meeting. Although the law only requires one teacher to attend, all regular education teachers with whom the child has or will have contact should attend the IEP meetings. If the child's teachers do not attend an IEP meeting, it is likely that important information will be missed or overlooked. Without input from the child's teachers, other members of the IEP team, including the receiving teachers, will not understand the child's unique needs and how to address these needs.

The parent should not consent to team members being excused from IEP meetings unless the circumstances are exceptional. If a team member's area will be discussed, the teacher or related services provider needs to attend the meeting to provide information and answer any questions that arise. If you encounter a problem getting the required members of your child's team to attend the IEP meeting, write a letter to request that all of your child's regular education teachers and related service providers attend the IEP meeting. (To learn how to write effective letters to the school, read the chapters on letter writing in *Wrightslaw: From Emotions to Advocacy* published by Harbor House Law Press)

7. Avoid Three-Year IEPs Like the Plague.

The three-year IEP was the dumbest idea Congress came up with when they reauthorized IDEA 2004. Determining a child's unique academic, developmental and functional needs, developing measurable annual goals, determining how these goals will be met, how the child's progress will be measured, and how the parents will be advised of their child's progress at regular intervals is difficult enough when only done once a year.

Anyone who thinks that parents and school personnel can develop an IEP that will meet a disabled child's needs for three years is ignorant about child development and education. Fortunately, three year IEPs are a pilot program that will be available in no more than 15 states. (Section 1414(d)(5)). If your state submits a proposal and is approved for the three year IEP pilot program, the IEP team **must obtain your consent** before they develop a three-year IEP. Do not grant consent.

Find out if your state was approved for the IEP pilot program. If your state was approved for the pilot program, you need to double-check the beginning and ending dates on any IEP for your child. Before you sign consent to implement your child's IEP, make sure the IEP has an ending date that is no longer than twelve months after the IEP was developed.

You are not limited to one IEP meeting a year. Parents and teachers can request an IEP meeting to review and revise the child's IEP more often than once a year. IDEA 2004 provides that the IEP team **shall revise the IEP** to address:

- Any lack of expected progress toward the IEP goals or in the general education curriculum,
- The results of any reevaluation,
- Information provided to or by the parents,
- The child's anticipated needs, and
- Other matters. (Section 1414(d)(4).

8. Challenge Suspension or Expulsion if Child's Behavior was a Manifestation of the Disability, or if the Alternate Placement Does Not Provide FAPE.

Suspending and expelling children are the remedies of little minds. Perhaps that is why Congress decided to make it easier for school administrators to suspend and expel kids with disabilities from school in IDEA 2004.

IDEA 2004 permits the school to suspend a disabled child from the current program or place the child into an interim program for **up to 10 days** if the child violates a "code of student conduct." (Section 1415(k)(1)(A))

If the school wants to suspend the child for **longer than 10 days**, they must convene an IEP meeting to determine whether the child's behavior is a manifestation of the child's disability. If the school concludes that the child's behavior was not a manifestation of the disability, the school can discipline the child in the same way and to the same extent that a non-disabled student can be disciplined. (Section 1415(k)(1)(C))

Congress also made it easier for the school to determine that the child's behavior is not a manifestation by eliminating key elements of the manifestation determination process in IDEA 1997. IDEA 2004 does not require the IEP team to determine whether the child's IEP and placement are appropriate. IDEA 2004 only requires the IEP team to determine whether the child's behavior "was caused by or had a direct and substantial relationship to the child's disability" or "whether the behavior was the "direct result of the local education agency's failure to implement the IEP." (Section 1415(k)(1)(E))

This means the school could provide a child with an inappropriate special education program and placement, and could expel the child from school. There are several strategies you can use to ensure that the school does not use behavior problems as a way to deprive your child of an appropriate education.

IDEA 2004 still requires school districts to provide a free appropriate public education to **all children** with disabilities, **including children who have been suspended or expelled** from school. (Section 1414(k)(1)(D) and Section 1412(a)(1))

If the school places your child into an alternate setting, you must diligently investigate whether or not the child's IEP is being fully implemented. If the IEP is not being implemented, you may force its implementation through the dispute resolution procedures in the law. One strategy is to challenge the IEP team's determination that the behavior was not a manifestation of the child's disability. Parents must only request a due process hearing if they are prepared and have a valid claim. (See Tip # 10).

If you attempt to argue that the IEP and/or placement were not appropriate as the reason for the behavior being a manifestation, you may be met by a claim from the school district that your action was frivolous. Parents can certainly argue that the IEP and/or placement are not appropriate. You should also include claims that the behavior for which the child is being disciplined was caused by or had a direct and substantial relationship to the child's disability, and/or that the child's misbehavior was the direct result of the school's failure to implement the IEP, if these claims are valid and you have support for them.

Under IDEA 2004, "stay put" does not apply to appeals of disciplinary decisions, so the child must remain in the alternate program until the removal period expires or until a hearing officer orders the student's return to school.

9. Avoid Due Process Hearings if Possible.

Due process hearings should be your last resort, after you have attempted all other methods to resolve the dispute. Due process hearings are often an expensive and lengthy process. There are few absolutes in the law, and perhaps even fewer absolutes in the context of special education disputes. The adversarial nature of due process hearings often creates a wound in the relationship between parents and school personnel that never heals.

Try to resolve your dispute through IEP meetings, mediation, and/or the Resolution Session before you request a due process hearing.

Mediation

Parents and schools can attempt to resolve their dispute through mediation. Mediation is a confidential process that allows parties to resolve disputes without litigation. The mediator helps the parties express their views and positions and understand the other's view and positions. Before entering into mediation, you need to understand your rights and the law. When you mediate, your goals are to resolve the problems and protect the parent-school relationship.

If the dispute is resolved in mediation, IDEA 2004 requires the parties to execute a legally binding agreement that sets forth the terms of the resolution. (Section 1415(e)(2)(F))

Resolution Session

IDEA 2004 includes a new mandatory "resolution session" if the parties did not use the mediation process. (Section 1415(f)(1)(B)) The Resolution Session provides the parties with an opportunity to resolve their dispute before the due process hearing.

The school district must send "the relevant member or members of the IEP team" who have knowledge about the facts in the parents' complaint and a school district representative who has decision-making authority. The school board attorney may not attend the Resolution Session unless an attorney accompanies the parent. The parents and school district may waive the Resolution Session or use the mediation process. If the school district has not resolved the complaint to the parents' satisfaction within 30 days of receiving the complaint, the due process hearing can be held (Section 1415(f)(1)(B)(ii))

Due Process Hearing

If your attempts to resolve your dispute have been unsuccessful, you may decide to request a due process hearing. Consult with an attorney who is knowledgeable about this area of law first. Many of the pre-trial procedures and timelines for due process hearings are new in IDEA 2004. These pre-trial procedures are technical and cumbersome.

IDEA 2004 includes other disincentives for parents who file for due process. If the parents' claim is found to be "frivolous, unreasonable, or without foundation," the parents' attorney can be held liable for the school district's attorney's fees. (Section 1415(i)(3)(B)). If the parents' complaint was filed "for any improper purpose, such as to harass, to cause unnecessary delay, or to needlessly increase the cost of litigation," the parents can be held liable for the school district's attorney's fees.

Congress only envisioned shifting the school district's attorney's fees to parents or their attorneys in extraordinary cases. This fee shifting statutory language closely follows Rule 11 of the Federal Rules of Civil Procedure and a case from the U. S. Supreme Court (*Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978)). Cases in which a plaintiff is forced to pay a defendant's attorneys under Rule 11 or the *Christiansburg* standard are rare.

Parents should not be deterred from requesting a due process hearing out of fear that they may have to pay the school's attorney's fees, if they are filing in good faith and have a valid claim. You should avoid a due process hearing if possible. The best way to avoid a due process hearing is to prepare for a due process hearing as soon as you realize that you have a disagreement or dispute with the school about your child's special education program.

If you have a well-organized case and a clear, simple theme, you will be in a stronger position if you need to request a due process hearing. You must be able to document your attempts to resolve the dispute.

You must also be able to describe your concerns about the school's proposed program or placement and your proposed solution. When you document your concerns, you make it more likely that others will understand your position and help you resolve the dispute.

The URL for *10 Tips: Using IDEA 2004 to Improve Education of Children with Disabilities* is
www.wrightslaw.com/idea/art/10.tips.steedman.htm

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As a member of the Wrightslaw Speaker's Bureau, Mr. Steedman provides training in special education legal and advocacy issues. Wrightslaw special education law & advocacy programs are designed to meet the needs of parents, educators, health care providers, advocates, and attorneys who represent children with disabilities.

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