

## Top 10 Actions that Spur Special Education Impartial Hearing Requests

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**Brian Carnevale:** Hi, my name is Brian Carnevale from Harris Beach, and I'm your host for today's episode. I'm joined by Jeff Weiss the co-leader of Harris Beach Educational Institutions Industry Team. Today we're going to be discussing the actions or inactions that school districts take that most often lead to hearing requests from parents; and Jeff, I really like this style. I know you've got a top ten list that you'll walk us through so it'll be a sort of a different format for our podcast listeners. Before we get that list just give us a brief overview of your background and your practice.

**Jeff Weiss:** Yes, thank you Brian. I graduated law school from the University of Buffalo in 1996. So, I've been practicing law for approximately twenty-four years. I started out as a litigator and for approximately the last fifteen or so years I've been practicing education law focusing on special education which is the school district's procedural and substantive obligations with respect to students with disabilities. I only represent school district's so I have a certain point of view on all the issues that we're going to discuss but I think based on my experience I'm able to call them as I see them and I'm usually fair and objective.

**Brian Carnevale:** That's great Jeff. We're looking forward to walking through the list. For a little bit of background why don't you start with, what's the impact of an impartial hearing request on the school district? So, who's involved, what are the resources that are used, what are the potential consequences for a district, just kind of level set us in that way.

**Jeff Weiss:** Parents of students with disabilities have a number of procedural rights with respect to their children. If a parent disagrees with a recommendation of the School District Committee on Special Education or the Section 504 Team, they would have the right to challenge the recommendation of the school district in an impartial hearing. There are a seemingly endless number of grounds on which a parent can bring a partial handling request ranging from procedural, such as who was in attendance at a committee on special education meeting, timely notices, consent rights and substantive claims such as challenging the appropriateness of a program or a service recommended by the school district so when a parent brings a request it is extensive process, it's highly regulated, usually the parent and the school district represented by attorneys and there are various pleading requirements where a parent must submit an impartial hearing

request. The school district must respond to the impartial hearing request, there's a mandatory resolution session and if there is no settlement at some point that needs to be an impartial hearing where the school district needs to retain an impartial hearing officer who serves as the judge. There's a court reporter present, sometimes hearings last many days, usually they last several days some have been known to last ten or even twenty days. There's significant cost involved, it's very stressful on the staff. In terms of consequences, obviously if the parent prevails, they obtain relief from the school district. It could be a new service, a new program, a new placement. There also could be monetary rewards for parents in the form of tuition reimbursement if a parent prevails at a special education hearing and the district must pay their attorney's fees. And on top of that it's a very stressful experience for the staff involved. So, you know obviously there's an incentive for school districts to comply with their legal obligations and to avoid impartial hearing requests, so that they won't have to experience this process.

**Brian  
Carnevale:**

Yeah, that makes sense. Sounds like a major undertaking. So, you know, making sure that our audience is aware of both those actions and inactions to avoid an impartial hearing request obviously critical. Jeff, earlier you said that you call them like you see them, so when you built this list can I assume that they're all incidents based on things that you've seen from your client's incidents that you've experienced.

**Jeff Weiss:**

Yes that's correct. I didn't do any formal research, I didn't cumulate any data, I just sat back and asked myself, what are the trends, what am I seeing? What are the most common reasons why parents are bringing hearing requests? I want to clarify the outset that these aren't necessarily legal mistakes by school districts. There are sometimes when school districts are complying with the law but for various reasons the parents still believe there is a need to initiate an impartial hearing request, so I've observed all of these over the years and based on my observations I'm usually able to advise clients to avoid certain missteps or actions and limit the chances that they will receive an impartial hearing requests.

**Brian  
Carnevale:**

Well, without further delay I wish I had a drum roll or something here for you Jeff, but short of that, why don't you take it away? Why don't you walk us through you know maybe the first couple of items on your top ten list.

**Jeff Weiss:**

Thank you.

The first item on my list is using a one-size-fits-all approach to reading instruction. It seems that reading instruction claims are on the rise and in terms of the law, school districts have the right to determine the teaching methodology, the form of reading instruction, the reading program provided to the student that's determined by the CSC and the school

personnel and ultimately the test is whether or not the student is making progress under the program recommended amended by the CSC. Now, it's not uncommon, however, for parents to ask for specific reading programs such as Orton Gillingham or the Wilson Program or so on and there are certain circumstances when a school district is not able to comply with such a request by a parent and that might be okay legally as long as the program recommended by the district is successful. If the student exhibits progress with their program, the district can say that they've maintained, that they've fulfilled their obligations under the law. Again, it all goes back to whether or not the student is making progress, reading, they look at factors such as fluency, comprehension and so on, but I observed that there are some district where they will only have one reading methodology or one reading program and that tends delete the parental frustration. So what I've observed is that the districts invest more in reading where they have more options to offer parents in specific situations, those districts tend to avoid impartial hearing requests. It's still possible that there will be disagreements but the school districts that invest in reading programs and various options tend to receive less reading focused hearing requests.

Now, my second reason why parents bring impartial hearing requests deals with a concept called least restrictive environment, placing students in more restrictive settings. They're various settings in which could be placed ranging from the general education classroom with non-disabled peers to various special classes with fifteen students or twelve students or six students or eight students. Sometimes there are programs outside of a school district and it is legally permissible to place a student in a more restrictive program but each time a more restrictive move is made, the school district has to exhaust all possible supplementary support aids and services. What that means is they have to try everything in one setting before going to a more restrictive setting. There are seemingly endless number of options that schools can try. Assistive technology, personal aides accommodations, program modifications, test accommodations. It's important that parents are involved in this process at the outset when a school district is considering the possible moves to a more restrictive setting so they're not surprised when a move happens. I find that the schools that work with the parent in the long-term, that educate the parent on what they're trying, are less likely to receive a partial hearing request again. For instance, moving a student with behavioral needs to a more restrictive setting, their various options a behavioral intervention plan, a personal aid, time out rooms, and so on. You have to make sure especially when a parent is likely to object to a more restrictive placement that you've exhausted all possible supplementary supports aids and services you've worked with the parents so there's no surprise and that when the move is made the parent understands and ideally agrees with the move.

**Brian  
Carnevale:**

That all make sense Jeff, thanks. In moving us from restrictive setting considerations to home instruction considerations what should administrators be aware of there when placing a student on home instruction for an extended period of time?

**Jeff Weiss:**

What I've observed is that most parents at some point grow frustrated with their children receiving home instruction and usually that's not uncommon for those parents to reach out to attorneys and bring a claim against the district based on their frustration. There are various reasons why a student would be placed on home instruction. One possibility is that they're truly need to be instructed at home. For instance, if they're homebound, physically homebound, or they're going through anxiety and they're unable to attend school in a traditional school setting then they need to be educated at home. It's the only option. There are other circumstances. If a district is unable to secure a placement and for student for instance, as I mentioned before a six one-one class, if a district wants to place a student in a six one-one class in a BOCES nearby but that program is filled and there's no other options, some schools will place a student on home instruction awaiting placement. And always say, those scenarios are very risky. You can call that home instruction awaiting an impartial hearing request. At some point the parent will grow frustrated that got their child is home. They want to see their child flourish, they want to see them interact with the community, with their friends. And so what I've observed is that we really need heightened attention in these situations, do everything we can to end the home instruction as quickly as possible and get the student into a traditional program setting. Now, one thing that's important, there may be circumstances when you just have no other options, and like I said, that's a risky situation, it is important for schools to continue to repeatedly update the parent on its attempt to find a new placement. When parents hear nothing they get concerned understandably and they're more likely to bring a hearing request. So that's something to look out for in our current times.

**Brian  
Carnevale:**

And Jeff, fourth on the list is giving parents the impression that their opinions are not necessarily being considered. Tell us a little bit about that one.

**Jeff Weiss:**

The key decision time in the special education process is at a Committee on Special Education or Section 504 meeting. The parents are there with relevant school members and experts. They're making determinations on how to best meet the student's needs. Now, there are circumstances when a parent will disagree with the district's recommendation. Ultimately, the decision at these meetings comes down to the recommendation by the Committee on Special Education chairperson or this Section 504 chairperson. But the parents are at the meeting and they have the right to participate and the school personnel have to listen and give consideration to all of the input provided by the parent. There are unfortunately times

when disagreements arise and the parents do not have unilateral veto power over a determination. There might be circumstances when there's a disagreement and that could lead to a formal claim after the meeting but during that sensitive time when there's clearly a disagreement between the recommendation, let's say the school district wants to place a student in a more restrictive setting over the parents objection, there's nothing we can do to make the parents agree with the district's recommendation. However, at that crucial time it's important to communicate to the parent that their input is being considered, we do hear what they have to say, we are concerned that they disagree and we're trying to work with them to the extent possible. These are very tough situations where a school has to look into a parents eyes and say, I'm sorry but I disagree with you, and oftentimes, you know, former claims are raised shortly thereafter but it's best for school personnel to communicate as clearly as possible to the parents that we hear you, we want to work with you. Maybe we can get your desired outcome in the future or maybe there's something we could do to the recommended program that the parent would find acceptable, try to find some middle ground but at a minimum try to make the parent feel that they are part of the process and their input is valuable and being considered.

**Brian  
Carnevale:**

And Jeff, in your experience I know that you've seen transportation concerns trigger issues with parents, whether that's repeated requests for school pickups or allowing a student to spend too much time on the school bus. Walk us through each of those scenarios and what districts should be aware of.

**Jeff Weiss:**

If it's consistent with the notion that parents don't want to see their children at home all day, there are times, and it is necessary at times, when school personnel feel the need to call parents to pick up their children. Maybe their child's having a bad day maybe the child has initiated the request to leave early and under those circumstances could be sound educational decisions to have the student leave. They're not being formally suspended but there's just the decision to remove the student for the day. You need to call the parent to pick them up. So rather than maybe placing the student in a separate section or addressing the needs of the student at that moment the parent is called and is requested to pick the student up. Not surprisingly, most parents don't like to receive those calls. They could be at work, they could be at home addressing other situations and there's clearly an expectation that when a student goes to school he or she stays there all day. I find that most parents, while they'll understand an occasional instance where they have to pick up a student, if a school is repeatedly calling a parent and asking to pick them up or similarly to transport the student, you know there could be circumstances where the students not behaving on the bus and there's a request by the school to transport the student somewhat regularly, parents get frustrated with that as well. These types of situations where a parent is repeatedly asked to

come in and pick up the child or transport the child leads to frustration, leads to a parent contacting an attorney and once the attorney gets involved, the parents' attorney is going to review all the records and maybe bring other claims that the parent wasn't even aware of. So, it is these, you know, the first step in the process oftentimes is repeated requests by the school to have a parent pick someone up during the school day. Again, it is necessary sometimes but if it becomes a repeated situation it is something maybe the school district needs to proactively address the program before the parent does, because again it's not uncommon in those situations for parents to grow frustrated and to contact an attorney. So on a related note, in terms of frustration, I mentioned before sometimes kids are placed in programs far away from the school and a lousy circumstance involves students with disabilities, maybe young children, maybe students with severe disabilities and it's not ideal but these students are often asked to be on a school bus for a long time. Maybe an hour even an hour and a half. I've heard of circumstances two hours. There's no black and white rule in the law as to whether or not a bus ride is too long time wise. There's no law that says if it was more than ninety minutes it's inappropriate or more than sixty minutes it's now it's inappropriate but again there's not necessarily a legal requirement. But parents understandably grow frustrated when their children, especially young children or especially really disabled children are on a school bus for a long time. And sometimes it's inevitable. There's nothing we can do about it. But in these circumstances if you ever see, you know, when I see a school district receive a complaint by a parent, maybe an informal complaint, concerned about the length of time on a bus, that's an important time for a school district to act, see what's possible see if the route could be changed, see if maybe we could work with another school district who's also sending a student to a faraway program. Because again, those circumstances parents will grow frustrated and they will call an attorney. And again, once the attorney gets involved all bets are off as to what the attorney is going to claim. And again, in terms of cost, the cost for an extra bus run might be much less than the cost of an impartial hearing. So when we're looking at where to invest our resources, this is an area school district's need to look at, because again, most parents will grow frustrated quickly with young children or severely disabled children on a bus for very long time.

**Brian  
Carnevale:**

We're more than halfway through the list and to recap for our listeners Jeff has covered so far one-size-fits-all approach to reading instructions, restrictive settings, home instruction, parental opinions as related to CSC recommendations and transportation concerns both allowing a student to spend too much time on the bus and repeated requests for school pickups. Now moving into the second half of the list Jeff, field trips and extracurricular activities can spur potential issues. Walk the listeners through your experience from those angles.

**Jeff Weiss:**

So with field trips and extra-curricular activities, school districts are obligated to accommodate students with disabilities to ensure that they're able to participate in those activities. Again, field trips, extracurricular activities, team sports, and so on. School districts are not required to modify the program or event but they are required to accommodate it. So again, if there's an eligibility requirement like to make a sports team, if a student with a disability does not meet the requirements then they don't make the team. However, if there's an accommodation that we can provide to enable a student to try out for a team or to participate in an activity or a field trip, we have to do that. Oftentimes it is a difficult process to determine what accommodations are necessary to enable a student to participate. Now we could be talking about a simple event like participating in the chess club or we could also be talking about the senior trip to Europe for two weeks and if their school sponsored the same assessment has to be made. What can we do to accommodate the student and enable him or her to participate? It's important that these decisions be made well in advance of the activities. You don't want to do this the night before or the morning of the activity. They have to be done well in advance and they should be done by the Committee on Special Education or the Section 504 team with a group of professionals there to consider it. Now again, if you go through that process and you determine that a student cannot safely participate even with accommodations and it would be permissible to prohibit the student from participating, that should be a relatively rare occasion when that happens but the reaction by parents when they're denied the right to participate in these activities is often strong. It is not uncommon for these types of circumstances to lead impartial hearing requests. So again, parents want to see their children thrive, they want to see them participating, they want to see them happy, they want to see them with their friends, they want to see them learning and enjoying and in these situations can children look forward to the trips, they look forward to these after school activities. It's often a difficult time when a student is not able to participate due to disability. Again, it does happen when schools do refuse participation when it turns out there was the way to accommodate. There are a lot of options whether it's the personal aid or sometimes a nurse is involved or other interventions, so again not saying let all students participate in all activities because it may not be safe, there may not be accommodations that will enable them to participate but whenever there's a circumstance when a student is denied the right to participate because of a disability related reason the district should be on high alert for potential claim and that's a good time to be proactive and communicate with the parent as to why this decision was made. And I think I can now kind of go to a related reason dealing with the CSC or Section 504 decision should be made, should not be made based on stereotypes or generalities. All decisions with respect to a student's programming, educational services, the field trips, and so on, they need to be made based on the student's individualized needs. It's

when a parent feels that that a school is making a decision based on a generality or stereotype. Well No. 1 is a chance it's inaccurate and doesn't apply to the student. No. 2 parents feel that they're being disregarded, they feel like they're child is being denied services and being sort of shortchanged in their school experience. And you know examples of this are when we're at a CSC meeting and school personnel might say oh, I know this student has autism but three years ago we had another student with autism who was unable to participate in this activity, since that student was unable to participate, we're not going to let this student participate. That type of decision making in addition to being very frustrating, probably infuriating to parents, is inconsistent with the law. We need to look at each student's individual needs. That's why all decisions need to be made at a CSC meeting or Section 504 meeting with the experts from the school involved, the teachers, service providers and the parent. It's not uncommon for maybe someone from the school to believe that that a student is unable to participate in a certain activity or perform or have a certain skill and then the parent will say, oh, my child is able to do that at home or in another setting. One example would be if there is a decision not to allow a student with behavioral needs to go to the zoo because there could be concerns about the number of students there, there could be distractions that may not be viewed as a safe circumstance for the child but at the meeting it turns out the parent might say, oh, we've gone to many activities like that, even more crowded, even more distractions and more stimuli and the student successfully went and the school should use that meeting as an opportunity to get successful techniques from the parent. They want to say how did how did you do that? How did the student successfully participate in that activity? You want to carry that over. You don't want to learn this after the decision is made at an impartial hearing. That's a good way to lose a hearing when a school denies access to an activity and a parent at the hearing explains how the student would be able to participate. So again, another example is with respect to assistive technology, I've seen situations where school personnel have assumed that a student with disabilities is unable to use a specific piece of assistive technology and then at the CSC meeting the parent explains that the student is in fact able to use that technology and does use it at home but if we didn't ask the parent we would have made a decision based on a generality or a stereotype and not only is that inaccurate and inconsistent with the law but it's very frustrating to parents and oftentimes that type of logic by school personnel leads them to call attorneys and bring formal claims against them.

**Brian  
Carnevale:**

Alright Jeff. We're in the homestretch numbers nine and ten dealing with school related student anxiety at home and not adequately addressing bullying claims. Can you cover those two for us?

**Jeff Weiss:**

To be clear, if a student has anxiety at home, school districts can argue legally that it's outside their responsibility, legally. The school is obligated to find an appropriate program at school so that the student is able to make sufficient progress in light of his or her disability. However, if the facts are, the reality is, if a student is experiencing anxiety at home related to school and the student is communicating that anxiety to a parent, the parent is very likely to bring a claim against the school district. The parents are going to connect the dots and again, this is all about avoiding claims as opposed to legal requirements and we would be wise to address whatever we can during the school day to avoid that anxiety at home. And so one point here is you cannot address the anxiety at home if you're unaware that the anxiety is going on so it's important to communicate with parents as much as possible on this issue. You know, oftentimes at CSC meetings the first question to the parent is, how is the student doing? That's a great place to start but we need to go more specific. How is the student doing at home? And it's possible the parent might communicate with the district at that time about things that the school district wasn't aware of whether there's great anxiety about homework, whether there's great anxiety about making friends at school, whether there's a potential bullying issue, whether they're just anxiety about the next phase of the students' life. These are things that the district should be aware of and with as many resources should address in the student's program. Again, it's all fact specific based on the certain circumstances that the student is experiencing or perceives to be the case and we want to find out if this student has anxiety and if it's somehow related to school we need to make sure as schools that we're addressing that during the school day because again, remember I said at the start, for a program to be appropriate, the student needs to be making sufficient progress if a student is experiencing anxiety at home related to school it wouldn't be surprising if at some point this crosses over and limits the student's progress in school. Then it really becomes a school program problem. So get as much information as you can about how the student is doing at home and try to address that during the school day.

Now the last piece is dealing with bullying. Unfortunately, many students are bullied in school, not just students with disabilities, so this is a problem seemingly for all students. However, when a student with a disability is bullied under the emerging case law, the school district has an obligation to address the bullying and this is done several ways. Number one, the school needs to stop the bullying, and of course that applies for general ed and students with disabilities as well, but if the bullying impacts the student's needs, if they have anxiety at school, if they're not able to focus as much on their work, the school district needs to address those emerging needs in the student's IEP or Section 504 plan. So legally when a student is bullied, again the student with a disability is bullied, the school district needs to be on heightened alert to make sure that the program continues to be appropriate. Now again, if a parent is

aware that the child is being bullied that's obviously going to create upset and frustration, they're going to do whatever they can to stop the bullying and in these situations it's not uncommon for them to call a lawyer who can, armed with the information that bullying related issues could cross over into the appropriateness of a special education program, it's not uncommon for parents attorneys to raise these claims. In fact, it's very common that these types of issues are raised in impartial hearing requests. So again, it's crucial that a school district find out that the child you know whether or not that child's being bullied and address them promptly and adequately so that the parent is not frustrated with the process. I find that if these situations are not being addressed properly and promptly there's a good chance the parents going to a call a lawyer and bring a due process complaint alleging that the program is inappropriate.

**Brian  
Carnevale:**

Thanks Jeff this is our first Letterman Show style top ten list and I think you did a great job and provided a ton of value for our listeners. Is there anything else that you wanted to cover; any other thoughts before we wrap up?

**Jeff Weiss:**

No I think we've covered it all, I'm glad to go through all of these items. You know, I do find that these schools that are proactive in addressing situations at the outset have a better chance of avoiding the type of litigation claims than those districts that sort of sit back and wait for things to happen.

**Brian  
Carnevale:**

Well thanks again Jeff. We appreciate you joining us today. Sharing the top ten list built from two decades in education law. For our listeners: for more information visit [www.HarrisBeach.com/education](http://www.HarrisBeach.com/education). While you're there you can contact Jeff, sign up for legal alerts and learn more about our statewide team. For Harris Beach Clients, make sure to save the date for our Spring Special Education seminars taking place on May 13<sup>th</sup> in Rochester and May 15<sup>th</sup> and 20<sup>th</sup> in Buffalo. Thanks for joining us.

**Announcer:**

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