

DEMYSTIFYING SETTLEMENT AGREEMENTS¹

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As any lawyer or hearing officer will attest, it is almost always better to settle a case than to go to hearing. There are several reasons for this. First, it avoids the delay, expense, uncertainty and emotional strain associated with a hearing. Second, hearing officers are relatively limited with respect to the types of relief that they can order, while there is much more flexibility to craft a remedy in a settlement agreement.

However, there are few agreements that are more legally complex than a settlement agreement. While a well crafted settlement agreement can be very effective in resolving disputes and allowing the parties to move forward, a poorly crafted agreement can create new problems and sometimes give rise to even more litigation. The purpose of this article is to explain how a settlement agreement is structured, the meaning and purpose of the legal boilerplate that most settlement agreements contain, and to point out some common pitfalls to avoid.

Attached is a Sample Settlement Agreement in Word format that we will use to illustrate the issues discussed in this article. For convenience, the different sections of the Sample Settlement Agreement discussed are indicated by bold capital letters in brackets, which correspond to the bold, bracketed items in the Sample Settlement Agreement. Each specific paragraph of the Sample Settlement Agreement is also referenced and explained.

[TITLE]

The title identifies the nature of the agreement and identifies the case being settled.

[PREAMBLE]

In the introductory paragraph, the parties and the proceeding are identified and abbreviated terms are assigned. The preamble may include language about the purpose of the agreement. If you are intending to preserve certain claims while settling others, a brief statement at the beginning of the Agreement makes that intention clear. Although the preamble is not a substitute for the waiver and release provisions that appear later in the document, the scope of the release being

¹ The information in this article is not intended to constitute legal advice or substitute for obtaining legal advice from your own counsel.

given is generally a serious deal point, which should be addressed early on so that there are no misunderstandings.

The preamble in the Sample Settlement Agreement is for a settlement of educational claims only. Thus, the preamble provides notice that the Parties do not intend to settle any non-IDEA claims, such as personal injury tort claims, or civil rights claims that may exist under Section 504 of the Rehabilitation Act, the Americans with Disability Act, Section 1983, or state civil rights statutes.. The preamble should also specify the time period covered by the settlement. Consideration must be given to whether the settlement covers all educational claims up through the date of settlement, or for some shorter period of time.

[SUBSTANTIVE OBLIGATIONS]

The substantive obligations are the heart of the settlement. It is important to keep in mind that the more clearly the obligations are defined, the less likely it will be that the parents will have to bring a lawsuit to enforce the agreement or, even worse, will end up with an agreement that looks good on paper but is functionally ineffective.

To illustrate what can go wrong, we once had a case where the parents came to us seeking to invalidate a settlement agreement they had entered into before engaging our services. The agreement provided that they had agreed to resolve “all issues” with respect to the coming year in exchange for the school district’s agreement to hold an IEP meeting by a certain date and develop an IEP that would include certain specific services identified in the agreement “as a minimum.” The problem was that the IEP the school district subsequently developed included only the minimum services specified in the agreement. The school district refused to consider any of the additional services that the parents believed the student also required. Even worse, the parties were unable to reach agreement on placement and goals, and the school district refused to convene another IEP meeting because the settlement agreement only referenced a single meeting. This left the student with an incomplete and inadequate IEP and no recourse under the settlement agreement.

Obviously, it is possible for settlement agreements to include a variety of benefits, including: reimbursement for educationally related expenses; compensatory educational services; prospective educational services to be provided by either school district staff or private providers; staff training; books and supplies; accommodations; development of a new IEP; etc. Whatever the elements, the key to a successful agreement is specificity. The more specific the terms, the less

likely that there will be misinterpretations and disagreements when it comes time to implement the agreement.

[REIMBURSEMENT]²

Perhaps the most common type of agreement is for reimbursement of prior educational expenses for which the parents have paid. When drafting a reimbursement provision, it is important to carefully define the scope of what will be reimbursed, what documentation is necessary to support the reimbursement, and the timeline for payment.

1. Reimbursement Amount. Identifies the total amount of agreed-upon reimbursement, and the address to which payment should be transmitted.
2. Reimbursable Educational Expenses. Specifies the time period during which educational expenses must have been incurred to be reimbursable and provides the definition of the phrase “Educational Expenses.” The definition should reflect the type of educational expenses that will be reimbursed, as appropriate for your case.
3. Reimbursement Documentation. Specifies the documentation that must be submitted in support of the parents’ reimbursement claim, the address to which that documentation must be submitted, and the timeline for payment from the date on which the documentation is received from the District.

[COMPENSATORY EDUCATION]

Compensatory education may be used to make up for services that the school district had previously agreed to provide in an IEP but failed to deliver, or to make up for the school district’s failure to include required services in the IEP.

Generally, the agreement should specify specific services to be provided during a specified time period, either using school district staff or an outside agency.

Sometimes the parties agree that the school district will set aside a fund of money to be used to fund compensatory education. This might occur where, for example, the school district does not have a contract with the agreed-upon service provider.

² Any settlement that involves the payment of money has the potential for raising tax issues. It is beyond the scope of this article to provide any advice in this regard. If there is any concern about possible tax implications of a settlement, it is important to seek the advice and input of a competent tax attorney.

Under these circumstances, the school district could undertake to reimburse the parents up to a certain set amount.

Where the amount of funding for future services is substantial, it is possible to establish an educational trust to pay for compensatory education services consistent with the terms of the trust. This is a very complicated undertaking that raises considerations as to the cost of setting up the trust, the selection of the trustee, the cost of administration of the trust, development of the trust instrument, and assuring mutual accountability to the school district and the parents. Accordingly, it should not be attempted without the assistance of counsel.

4. Compensatory Educational Services Provided by District Staff. This provision is for compensatory education services to be provided by school district staff. It is important to specify the total hours of services as well as the frequency and duration of the services to be provided. As reflected in this provision, it is not unusual for the school district to insist that if compensatory services are not used by a certain date, they are forfeited.
5. Compensatory Educational Services Provided by Certified Nonpublic Agency. Most states require that third parties providing services to special education students be certified by the state. These entities are typically referred to as certified nonpublic schools or agencies. It is best to agree on which agency will provide the services and also to agree as to what will happen if that agency is unable or unwilling to provide all the agreed-upon services.
6. Compensatory Educational Services to be Funded by District. Under this provision, the parent would pay for the compensatory services and then be reimbursed by the school district.
7. Compensatory Services are Supplemental to Current Services. This provision clarifies that the compensatory education services are in addition to, and not a substitute for, the student's ongoing educational program.

[CURRENT IEP SERVICES AND/OR ACCOMMODATIONS]

Sometimes a settlement agreement includes provisions for ongoing services that the student requires in order to receive a FAPE going forward. Because these are expected to be ongoing services that would be included in the student's stay put placement in the event of a future disagreement, these provisions require that the school district will develop an IEP Addendum that will include the services identified in the settlement agreement.

8. Ongoing Services Provided by District Staff under IEP Addendum. When agreeing to ongoing services to be provided by school district staff, it is important to specify not only the nature and amount of the services, but also the qualifications of the district staff that will be providing the services.
9. Ongoing Services Provided by Certified Nonpublic Agency under IEP Addendum. It is best to agree on which agency will provide the services and also to agree as to what will happen if that agency is unable or unwilling to provide all the agreed-upon services.
10. Accommodations Under IEP Addendum. Settlement agreements sometimes include accommodations to be added to the IEP. Although each agreement is unique, the general principal that it is important to be as specific as possible in describing the obligations of the school district still applies. The sample provision addresses the school district's obligation to provide the student with audio books, and attempts to address the problem of finding out at the last minute that the books are not available.

[DEVELOPMENT OF MISSING ELEMENTS OF IEP]

Some agreements include provisions to develop new portions of an IEP, such as the goals and objectives that were missing or inadequate. Again, it is important to be as specific as possible as to how this will be accomplished.

11. Goals and Objectives Under IEP Addendum. In the Sample Settlement Agreement, the District and the Parents are agreeing to allow a third party, the Student's NPA, to develop the goals and objectives, which will then be incorporated into the Student's IEP. Obviously, both sides are giving substantial deference to the NPA, essentially agreeing in advance to whatever goals and objectives are developed.

[CONTINUING OBLIGATION TO PROVIDE FAPE]

12. Continuing Obligation to Provide FAPE. This provision clarifies that in addition to providing the services identified in the settlement agreement, the school district has an ongoing obligation to provide the student with whatever else the student requires in terms of special education and related services, in order to constitute FAPE. This is particularly relevant when the agreement includes compensatory education services, as such services are understood to be in addition to the services that the student otherwise normally would require in order to receive FAPE, as reflected in paragraph 7, above.

[STAY PUT]

13. Stay Put Placement and Services. Where the settlement agreement involves only reimbursement or compensatory education, it typically will not impact the stay put in the event of a future dispute. However, where the settlement agreement includes ongoing services or a change in placement, it is important to consider what the stay put will be if another disagreement arises. It is best to clearly define what the stay put will be in the settlement agreement itself.

[ATTORNEYS' FEES]

14. Reimbursement of Parents' Reasonable Attorneys Fees. Typically, payment of attorneys' fees is addressed separately from reimbursement for other types of expenses. Instead of proof of payment, school districts typically require the attorneys' billing statement (redacted so as to protect attorney/client and work product privileges), and payment is generally made to the attorney directly.

Sometimes school districts are unwilling to agree to reimburse parents for reasonable attorneys' fees incurred in the due process proceeding, and suggest that such determination be decided by a court of competent jurisdiction. Although the suggestion has appeal because parents are anxious to commence the agreed-upon services for their child, and it is simple to carve out reimbursement for attorneys' fees from the release provisions (discussed below), under the Supreme Court's decision in *Buckhannon Board & Care Home v. West Virginia Dept. of Health*, 532 U.S. 598 (2001), there is a serious risk that courts may not have jurisdiction to award attorneys' fees under the IDEA when the parties have voluntarily settled the case.

[MUTUAL RELEASES]

15. Claims Released by Student and Parents. It is very important to consider exactly what claims the student and parents intend to release. As discussed in the Preamble section above, the scope of the settlement should be clearly defined. Paragraph 15 of the Sample Settlement Agreement provides for a settlement of educational claims only. Although a release of educational claims may be sufficient, school districts often seek a release of all existing claims to date, whether or not they were raised in the due process case being settled and even whether they are known or unknown at the time.

Careful consideration must be given before providing a release of all claims, particularly unknown claims. At the very least, parents should consider

whether the overall settlement provides adequate consideration for releasing all claims.

Sometimes there are agreements that provide for prospective releases, *i.e.*, a release of any potential future claims. For example, a school district that agrees to provide ongoing services may request a release to the effect that the parent will not challenge the sufficiency of the ongoing services to meet the student's educational needs. Such a request is not entirely unreasonable, but the prospective release must be carefully drafted. For example, while a parent might be willing to agree to not challenge the appropriateness of the agreed-upon services, they should preserve their right to pursue a claim for the school district's failure to provide the services. In general, it is best to avoid including a prospective release in a settlement agreement.

16. Claims Released by School District. Typically school districts draft releases that only go in one direction, *i.e.*, the parents release the school district. We strongly recommend that releases be mutual. There is no reason for the student and parents to provide a release while continuing to be exposed to any possible liability, *e.g.*, a school district's attempt to recover attorneys' fees under IDEA on the grounds that the due process complaint was frivolous or presented for an improper purpose.

17. Releases Do Not Affect Enforceability. The purpose of this provision is to clarify that the waiver and release provisions in the agreement are not intended to preclude a party from being able to bring an action to enforce the terms of the agreement itself, or to release a party from any new violations that occur after the date the agreement is signed.

[ENFORCING THE SETTLEMENT AGREEMENT]

18. Enforcement of Settlement Agreement Reached at Resolution Session OR Settlement Agreement Reached Through Mediation. The IDEA provides that a settlement reached at a Resolution Session or through the mediation process is enforceable in federal or state court. Otherwise, a settlement agreement is only enforceable in state court as a breach of contract action. Thus, where the settlement agreement was reached at a Resolution Session or through mediation, it is good practice to specifically note this in the agreement.

19. Attorneys' Fees for Enforcing Agreement. This provision provides that if a party brings an action to enforce the agreement, that party is entitled to recover reasonable attorneys' fees. Keep in mind that this is a reciprocal provision, so that if the school district brings the enforcement action and prevails, the school

district can recover its reasonable attorneys' fees from the parents. While this is an unlikely occurrence, it is conceivable, particularly where the parents have agreed to a future assessment of the student and later dispute the nature or scope of the proposed assessment, and refuse to sign the assessment plan.

[CONFIDENTIALITY]

20. Confidentiality. It is not unusual for school districts to insist that the settlement agreement remain confidential. There are also circumstances where the parents may wish to keep the settlement agreement confidential. If the settlement agreement was reached through the mediation process, the negotiations, if not the agreement itself, are confidential as a matter of law. 20 U.S.C. § 1415(e)(2)(G). Even if the statutory confidentiality provision does not apply, the parties can still agree, as part of the settlement, that their settlement communications, including the agreement itself, are confidential.

It is important to specify that the confidentiality provision will not preclude either party from introducing the agreement in court for purposes of enforcement, so long as it is filed under seal. It is also advisable to require that notice be given if there is a request by a third party for a copy of the agreement, which will allow the other party to take whatever legal steps are available to prevent the release of the agreement.

[BOARD APPROVAL]

21. Board Approval. It is not unusual that an agreement must be approved by the school board before it is final. Obviously, it is not appropriate to dismiss the case until after the school board approves the agreement. Thus, some understanding must be reached as to how and when the case will be dismissed when board approval is required. One way of dealing with this is to agree to request that the hearing office take the case off-calendar until after the expected date for board approval, with the understanding that it will be dismissed after the board approves the agreement. If the hearing office will not agree to take the case off-calendar, it may be possible to request a continuance of the hearing until a date by which it is reasonably certain that the board will have considered the agreement.

[MISCELLANEOUS PROVISIONS]

22. Representations and Warranties. The purpose of this provision is to prevent a party from attempting to repudiate the settlement on the grounds that they were under duress at the time of signing, didn't understand the terms of the agreement, didn't understand that the agreement was binding, *etc.* School

districts typically insist on a provision like this. A parent should make sure that all of these statements are true before signing an agreement, as it is very difficult to overturn a settlement agreement on such grounds, even if there is no specific provision to this effect included in the agreement.

23. Full Cooperation in Consummating Agreement. This requires that the parties use their best efforts to complete the execution of the documents and to do whatever other things are required under the agreement, such as prepare an IEP addendum.
24. No Admission of Liability. School districts typically require a provision stating that they do not admit any wrongdoing. We recommend making this provision reciprocal.
25. No “Prevailing Party.” This provision makes clear that the only attorneys’ fees available are those identified in the agreement.
26. Interpretation. This is to clarify that there are no hidden or specialized meanings with respect to the language used in the agreement.
27. Not to be Construed as Drafted by One Party. This provision is typically included when there are attorneys on both sides of the agreement. Where the parent is not represented by counsel and the school district attorney drafts the agreement, the parent may not want to include this provision.
28. Entire Agreement. This provision limits the terms of the settlement to what is stated in the written agreement. It is important to make certain that every aspect of the agreement is specified in writing, as it is very difficult to try to introduce additional verbal understandings, whether or not the agreement contains this provision.
29. Modification by Writing Only. This provision makes it clear that the terms of the settlement agreement cannot be modified except in writing.
30. Authority to Enter Agreement. This provision clarifies that the parties signing the agreement are legally authorized to do so.
31. No Prior Assignment of Rights. This provision clarifies that there are no other parties who need to be included in the agreement in order for it to be binding.
32. Binding Upon Successors and Assigns. This provision makes clear that this agreement is binding upon successors in interest to one of the parties.

- 33.No Third Party Beneficiaries. This provision makes it clear that there is no third-party beneficiary who can claim rights under the agreement. For example, the agreement would not give a nonpublic agency identified in the agreement any rights to sue to enforce the agreement.
- 34.Severability of Terms. This provision allows the agreement to survive even if some portion of it is held to be invalid or unenforceable.
- 35.Execution in Counterparts. This provision is designed to facilitate the obtaining of signatures when parties are in diverse locations.
- 36.Effective Date. This provision makes clear that the agreement is effective only when signed by all of the parties. Thus, if the parties sign the agreement on different days, the date of the final signature is controlling as to the effective date of the agreement.

[SIGNATURES]

Often there are a number of drafts exchanged before the parties reach final agreement. We recommend specifying the total number of pages that are in the final agreement. We also recommend that one signor from each side initial each page of the final agreement, in order to provide clarity as to which version of the agreement controls.

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