National Association of State Directors of Special Education, Inc.
225 Reinekers Lane • Suite 420 • Alexandria, VA 22314
Tel: 703-519-3800 • Fax: 703-519-3808 • • www.nasdse.org

IMPARTIAL HEARINGS UNDER THE IDEA: LEGAL ISSUES AND ANSWERS

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Perry A. Zirkel
University Professor Emeritus of Education and Law
Lehigh University
[www.perryzirkel.com]

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This updated Question-and-Answer document is specific to impartial hearing officers (IHOs) and the impartial hearings that they conduct under the Individuals with Disabilities Education Act (IDEA).[1] It does not cover the IHO's remedial authority, which is the subject of separate comprehensive coverage.[2] The sources are limited to the pertinent IDEA legislation and regulations, court decisions and the U.S. Department of Education's Office of Special Education's (OSEP) policy letters[3] that the author's research has revealed. Thus, the answers are subject to revision or qualification based on 1) applicable state laws; 2) additional legal sources beyond those cited; and 3) independent interpretation of the cited and additional pertinent legal sources.

The items are organized into various subject categories within two successive broad groups. For the specific organization, see the Table of Contents on the next page.

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[1] The coverage does not extend to the alternate third-party dispute decisional mechanism under the IDEA, the complaint resolution process (CRP). For a legal overview of CRP, see Perry A. Zirkel, *Legal Boundaries for the IDEA Complaint Resolution Process: An Update*, 313 EDUC. L. REP. 1 (2015). For a systematic comparison of the two mechanisms, see *Perry A. Zirkel, A Comparison of the IDEA's Dispute Resolution Processes: Complaint Resolution and Impartial Hearings*, 326 EDUC. L. REP. 1 (2016).

[2] Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2011); *see also* Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 EDUC. L REP. 785 (2012); Perry A. Zirkel, *Compensatory Education: An Annotated Update of the Law*, 251 EDUC. L. REP. 501 (2010).

[3] Although OSEP policy letters do not have the binding effect on IHOs of either the IDEA or, within their jurisdictions, court decisions, they provide a nationally applicable interpretation that courts often find persuasive. See, e.g., Perry A. Zirkel, *Do OSEP Policy Letters Have Legal Weight?* 171 EDUC. L. REP. 391 (2003). *But cf.* Seth B. v. Orleans Parish Sch. Dist., 810 F.3d 961, 968 (5th Cir. 2015) (regarding the OSEP interpretation of "questionable value" and relying instead on the relevant regulation).

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I. IHO ISSUES

IHO QUALIFICATIONS

1. Does the IDEA provide any standards for IHO competence?

Yes, the 2004 amendments provided, for the first time, the competence standards in terms of knowing special education law, conducting hearings and writing decisions. Specifically, the IDEA competency standards require IHOs to:

> (ii) possess knowledge of, and the ability to understand, the provisions of [the IDEA], Federal and State regulations pertaining to [the IDEA], and legal interpretations of [the IDEA] by Federal and State courts;
>
> (iii) possess the knowledge and ability to conduct hearings in accordance with appropriate, standard legal practice; and
>
> (iv) possess the knowledge and ability to render and write decisions in accordance with appropriate, standard legal practice.[4]

2. Similarly, does the IDEA provide for individually enforceable training requirements for IHOs?

No, training requirements are entirely a matter of state law,[5] which the courts have interpreted as not incorporated in the IDEA.[6]

3. What about the impartiality requirements of the IDEA?

In contrast to competence and training, IHO impartiality has been the subject of extensive litigation, and the courts have been notably deferential in providing wide latitude to IHOs

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[4] 20 U.S.C. § 1415(f)(3)(A) (2008). In the relatively few pertinent cases prior to these statutory standard, the courts rejected challenges to IHO competency as beyond the scope of the IDEA. See, e.g., Carnwath v. Grasmick, 115 F. Supp. 2d 577 (D. Md. 2000); Cavanagh v. Grasmick, 75 F. Supp.2d 446 (D. Md. 1999). After enactment of this standard, the case law has been very limited and rather deferential. See, e.g., Bohn v. Cedar Rapids Cmty. Sch. Dist., 69 IDELR ¶ 8 (N.D. Iowa 2016).

[5] See, e.g., OSEP commentary accompanying 1999 IDEA regulations, 64 Fed. Reg. 12,613 (Mar. 12, 1999). In the commentary accompanying the 2006 IDEA regulations, OSEP added that the general supervisory responsibility of each SEA includes ensuring that its IHOs are sufficiently trained to meet these newly specified qualifications. 71 Fed. Reg. 46,705 (Aug. 14, 2006).

[6] See, e.g., C.S. *ex rel*. Struble v. Cal. Dep't of Educ., 50 IDELR ¶ 63 (S.D. Cal. 2008); Adams v. Sch. Bd., 38 IDELR ¶ 6 (D. Minn. 2002); Carnwath v. Grasmick, 115 F. Supp. 2d 577 (D. Md. 2000); Carnwath v. Bd. of Educ., 33 F. Supp. 2d 431 (D. Md. 1998); *cf.* D.A. v. Fairfield-Suisun Unified Sch. Dist., 58 IDELR ¶ 105 (N.D. Cal. 2012) (SEA not responsible in California for IHO training/ competence); Canton Bd. of Educ. v. N.B., 343 F. Supp. 2d 123 (D. Conn. 2004) (lack of systemic violation). *But cf.* J.E. v. Chappaqua Cent. Sch. Dist., 68 IDELR ¶ 48 (S.D.N.Y. 2016) (applying state law criteria in upholding competence of IHO).

in these cases, generally not requiring the appearance of impropriety standard that applies to judges.[7] The leading but still not per se exception is *ex parte* communications.[8] The overlapping issue of recusal is largely a matter of state law, although an occasional court decision has identified criteria or procedures.[9]

4. Would a school district's notification to an IHO that his or her selection is contingent on the parent's approval violate the IDEA (in terms of having a "chilling effect" on the parent's right to object to the IHO)?

Not according to OSEP's interpretation, because the IDEA does not provide parents' with a veto right in the appointment of IHOs.[10] However, a few state laws provide for party participation in the selection process, which would appear to suggest the opposite answer.[11]

IHO IMMUNITY

5. Do IHOs have the same sort of sweeping, absolute immunity that judges have?

Yes, within the scope of their authority as IHOs.[12]

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[7] See, e.g., Peter Maher & Perry A. Zirkel, *Impartiality of Hearing and Review Officers under the Individuals with Disabilities Education Act: A Checklist of Legal Boundaries,* 83 N. DAKOTA L. REV. 109 (2007); Elaine Drager & Perry A. Zirkel, *Impartiality under the Individuals with Disabilities Education Act*, 86 EDUC. L. REP. 11 (1994).

[8] See, e.g., Hollenbeck v. Bd. of Educ., 699 F. Supp. 658 (N.D. Ill. 1988). *But cf.* Cmty. Consol. Sch. Dist., No. 93 v. John F., 33 IDELR ¶ 210 (N.D. Ill. 2000) (based on proof of lack of actual bias, rejected ex parte challenge).

[9] See, e.g., Falmouth Sch. Comm. v. Mr. and Mrs. B., 106 F. Supp. 2d 69, 73 (D. Mass. 2000).

[10] Letter to Stadler, 24 IDELR 973 (OSEP 1996).

[11] See, e.g., Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3, 5 (2010). The approach in these few states is more limited than mutual selection. See, e.g., 105 ILL. COMP. STAT. ANN. 5/14-8.02a(f)(5) (permitting each party the right to one substitution in the rotational assignment of the IHO).

[12] See, e.g., Singletary v. Dep't of Health & Human Serv., 848 F. Supp. 2d 558 (E.D.N.C. 2012), *aff'd on other grounds*, 502 F. App'x 340 (4th Cir. 2013), *cert. denied*, 133 S. Ct. 2881 (2013); Luo v. Baldwin Union Free Sch. Dist., 60 IDELR ¶ 281 (E.D.N.Y. 2013), *aff'd on other grounds*, 556 F. App'x 1 (2d Cir. 2014); T.O. v. Cumberland Cty. Bd. of Educ., 69 IDELR ¶ 182 (E.D.N.C. 2017); Luo v. Owen J. Roberts Sch. Dist., 68 IDELR ¶ 245 (E.D. Pa. 2016); B.J.S. v. State Educ. Dep't, 699 F. Supp. 2d 586 (W.D.N.Y 2010); Stassart v. Lakeside Joint Sch. Dist., 53 IDELR ¶ 51 (N.D. Cal. 2009); J.R. v. Sylvan Union Sch. Dist., 49 IDELR ¶ 253 (E.D. Cal. 2008); DeMerchant v. Springfield Sch. Dist., 47 IDELR ¶ 94 (D. Vt. 2007); Sand v. Milwaukee Pub. Sch., 46 IDELR ¶ 161 (E.D. Wis. 2006); Walled Lake Consol. Sch. v. Doe, 42 IDELR ¶ 3 (E.D. Mich. 2004); Weyrich v. New Albany-Floyd Cty. Consol. Sch. Corp., 2004 WL 3059793 (S.D. Ind. 2004); *cf.* M.O. v. Ind. Dep't of Educ., 635 F. Supp. 2d 847 (N.D. Ind. 2009) (IDEA review officers).

II. HEARING/DECISION ISSUES

RESOLUTION SESSIONS

6. Does the resolution process under 34 C.F.R. § 300.510 apply when a local education agency (LEA) files a due process complaint?

No, OSEP has explained that this process is not required in such cases.[13] Rather, the 45-day period starts when the state education agency (SEA) and the parent receive the school district's complaint. According to OSEP, in such cases, the parent's right to a sufficiency challenge and the parent's obligation to respond to the issues raised in the district's complaint remain the same.[14] For cases where the parent raises a sufficiency challenge, OSEP added: "one way for an LEA to amend a due process complaint that is not sufficient is for the parent to agree in writing and be given an opportunity to resolve the LEA's due process complaint through a resolution meeting."[15]

7. Are the discussions that occur in resolution sessions confidential?

According to OSEP's interpretation, the only confidentiality provisions that apply are the student records provisions in 34 C.F.R. § 300.610 and the Family Educational Rights and Privacy Act (FERPA).[16] Absent a voluntary agreement between the parties to do otherwise, OSEP's position is that either party may introduce evidence at the hearing of the discussions unaffected by the cited, limited confidentiality provisions.[17] Nevertheless, the admissibility and the weight of such evidence would appear to be within the IHO's discretion, including the effect of the prevailing posture concerning offers of settlement. Although OSEP's opinion is that "[a] State could not … require that the participants in a resolution meeting keep the discussions confidential,[18] some states have adopted laws saying so.[19]

8. After filing for the hearing, may the parent unilaterally waive the resolution session?

No, unlike mediation, which must be voluntary on the part of each party,[20] waiver of the

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[13] Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) (updated and amended version of 2009 document).

[14] *Id.*

[15] *Id.*

[16] *Id.* For a recent ruling that discussions during resolution sessions were not confidential, see Friendship Edison Pub. Charter Sch. v. Smith, 561 F. Supp. 2d 74 (D.D.C. 2008).

[17] Letter to Cohen, 67 IDELR ¶ 217 (OSEP 2015); Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013); 71 Fed. Reg. 46,704 (Aug. 14, 2006); *see also* Letter to Baglin, 53 IDELR ¶ 164 (OSEP 2008) (LEA may not require a parent to sign a confidentiality agreement as a condition for having a resolution session, but the parties could agree to confidentiality).

[18] 71 Fed. Reg. 46,704 (Aug. 16, 2006).

[19] See, e.g., OHIO ADMIN. CODE 3301-51-05(K)(9)(a)(3) (2009).

[20] 34 C.F.R. § 300.506(b)(1) (2011).

resolution session must be mutual (and in writing).[21] A recent court decision seems to support this interpretation.[22] Moreover, the regulations require delay of the due process hearing if the parent fails to participate in the resolution session in the absence of such mutual agreement, and they also authorize the IHO to dismiss the case upon the district's motion if the parent's refusal to participate persists for the 30-day period despite documented reasonable efforts on the district's part to obtain parental participation.[23]

9. Do difficulties communicating with the parents excuse a district's delay in conducting the resolution session within the required 15-day period?

No, according to the federal district court in the District of Columbia, at least if the parent has legal representation.[24]

10. After convening the resolution session, may the district refuse to discuss the issues raised in a parent's due process complaint, instead only offering to convene an IEP team meeting to address these issues?

No, according to OSEP, this position would violate the IDEA.[25]

11. In a case where the parent filed for the hearing and either party refused to participate in the resolution session, must the other party seek the IHO's intervention?

Yes, according to OSEP,[26] which has interpreted 34 C.F.R. § 300.510(b)(4) and 300.510(b)(5) to mean: "The hearing officer's intervention will be necessary to either dismiss the complaint or to commence the hearing, depending on the circumstances."[27]

12. Would a parent's request to participate in the resolution session in person justify an IHO's dismissal of her due process complaint?

Not, according to OSEP, without considering whether the parent had valid reasons for refusing to physically attend the meeting.[28] Indeed, if the parent informs the district in advance of the meeting that circumstances prevent attendance in person, the district must offer the parent alternative means of participation, such as telephone or videoconferencing.[29]

[21] *Id*. § 300.532(c)(3). The parties' other option is a mutual agreement to mediation. *Id*.
[22] Spencer v. District of Columbia, 416 F. Supp. 2d 5 (D.D.C. 2006).
[23] 34 C.F.R. §§ 300.510(b)(3)–(4).
[24] Massey v. District of Columbia, 400 F. Supp. 2d 66 (D.D.C. 2005).
[25] Letter to Casey, 61 IDELR ¶ 203 (OSEP 2013).
[26] Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013).
[27] *Id*.
[28] Letter to Walker, 59 IDELR ¶ 262 (OSEP 2012).
[29] Letter to Savit, 64 IDELR ¶ 250 (OSEP 2014).

13. Would a state law that permits postponement of the resolution timeline when the SEA or LEA receives the parent's due process complaint shortly before or during an extended holiday break be consistent with the IDEA?

No, not according to OSEP.[30] The specified period is 15 calendar days,[31] and the only exceptions are the alternate agreements between the parent and the LEA to waive the resolution meeting or to utilize the mediation process.[32]

14. May the parties mutually agree to extend the 15-day resolution period to resolve an expedited due process complaint?

No, according to OSEP. The agency based its conclusion that this deadline was absolute on the lack of any such waiver authority in 34 C.F.R. § 300.542(c) and the overriding purpose of promptness in the applicable disciplinary cases.[33]

15. If 15 days after the parent's filing for a due process hearing, the school district fails to convene or participate in the resolution session, what may the parents do to move the matter forward?

The parent may seek the IHO's intervention to start the timeline for the hearing.[34] In a recent ruling, a federal district court concluded that this parental right is voluntary; thus, the parent's choice not to exercise it did not excuse the district's failure.[35]

16. If, after the parent files for a hearing, the parties neither waive nor hold the resolution session after 30 days, what happens on day 31?

According to OSEP, the 45-day timeline for conducting the hearing and issuing a decision starts

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[30] Letter to Anderson, 110 LRP 70096 (OSEP 2010); *see also* Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013).

[31] 20 U.S.C. § 1415(f)(1)(b); 34 C.F.R. § 510(a).

[32] See *supra* note 20 and accompanying text.

[33] Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013); *see also* Letter to Gerl, 51 IDELR ¶ 166 (OSEP 2008).

[34] 34 C.F.R. § 300.510(b)(5); *see also* 71 Fed. Reg. 46,702 (Aug. 14, 2006). For varying judicial consequences, *compare* O.O. v. District of Columbia, 573 F. Supp. 2d 41 (D.D.C. 2008) (concluding that LEA's failure to convene a resolution session constituted harmless error), *with* JMC & MEC v. La. Bd. of Elementary & Secondary Educ., 50 IDELR ¶ 157 (M.D. Cal. 2008) (ruling that where LEA failed to convene the resolution session within 15 days, the settlement agreement before due process hearing was not enforceable).

[35] Dep't of Educ. v. T.G., 56 IDELR ¶ 97 (D. Haw. 2011).

on day 31.[36]

17. Does insufficiency of the complaint postpone the timeline or negate the requirement for the resolution session?

Not according to OSEP. More specifically, the commentary accompanying the regulations declared: "We agree with S. Rpt. No. 108–185, p. 38 [i.e., the IDEA's legislative history], which states that the resolution meeting should not be postponed when the LEA believes that a parent's complaint is insufficient."[37]

18. Does a non-attorney parent advocate's presence at the resolution session trigger the district's qualified right to attend with its attorney?

Not according to OSEP, even if the advocate is entitled under state law to represent the parent/student at a due process hearing.[38]

19. What is the legal result if a parent fails or refuses to participate in the resolution session upon the district's timely attempt to schedule the session within 15 days?

According to OSEP, the district's obligation is to "continue to make diligent efforts throughout the remainder of the 30-day resolution period to convince the parent to participate in a resolution meeting." Examples of such efforts include "detailed records of telephone calls made or attempted and the results of those calls and copies of correspondence sent to the parents and any responses received." Moreover, at the conclusion of this 30-day period, the LEA "may request that a hearing officer dismiss the complaint when the LEA is unable to obtain the participation of a parent in a resolution meeting, despite making reasonable efforts to obtain the parent's participation and documenting its efforts.[39]

20. For violations of the resolution-session requirements, must the other party seek the intervention of the IHO?

Yes, according to OSEP, "[t]he appropriate party must seek the hearing officer's intervention to either dismiss the complaint or to initiate the hearing timeline, depending on the circumstances."[40]

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[36] Letter to Worthington, 51 IDELR ¶ 281 (OSEP 2008). However, mitigating this eventuality, OSEP also stated that the SEA has the responsibility to enforce the LEA's affirmative obligation to convene the resolution meeting within 15 days of receiving the parent's complaint. *Id*. Moreover, state regulations may contribute to the conclusion that the faiulure to waive or hold the resolution session precludes holding the impartial hearing. Colbert Cty. Bd. of Educ. v. B.R.T., 51 IDELR ¶ (S.D. Ala. 2008).

[37] 71 Fed. Reg. 46698 (Aug. 14, 2006).

[38] Letter to Lawson, 55 IDELR ¶ 232 (OSEP 2010).

[39] Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013).

[40] *Id*.

21. Does a district's delay in conducting the resolution session constitute a denial of FAPE?

Not necessarily.[41]

22. Must the district representative at the resolution session have final and absolute authority to resolve the complaint?

Not quite, according to a recent unpublished decision. In rejecting the superintendent and special education director in the circumstances of this case, the court concluded that said representative "satisfies the statutory requirement only if he or she, in fact, has the authority—by express delegation or otherwise—to make the decision about what the LEA will or will not do to resolve the issues presented in the IDEA complaint."[42]

23. Would the district's violation of this requirement be the basis for an IHO order based on denial of FAPE?

No, according to the same decision, without an evidentiary basis that this procedural violation impeded the child's substantive right to FAPE.[43]

SUFFICIENCY PROCESS

24. Does the IDEA require the noncomplaining party to specify the basis for its insufficiency motion?

No.[44]

25. What steps are available to the complaining party if an IHO rules that the due process complaint is insufficient?

Citing the pertinent IDEA regulations and the comments accompanying them, OSEP answered that 1) the IHO must identify the specific insufficiencies in the notice; 2) the filing party may amend its complaint if the other party provides written consent and has an opportunity for mediation or a resolution session; 3) the IHO may, if the filing party does not exercise this amendment option, dismiss the insufficient complaint; and 4) the party may re-file if within the two-year limitations period.[45]

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[41] See, e.g., J.D.G. v. Colonial Sch. Dist., 748 F. Supp. 2d 361 (D. Del. 2010) (no denial of FAPE where parents contributed to the delay and no harm to child).

[42] J.Y. v. Dothan City Bd. of Educ., 63 IDELR ¶ 33 (M.D. Ala. 2014).

[43] *Id*.

[44] 34 C.F.R. § 300.508(d).

[45] Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013).

26. If the filing party, with written consent from the other party, amends its complaint, do the 15-day timeline for the resolution meeting, the 30-day resolution period and the party participation requirement re-commence?

Yes, according to OSEP.[46]

27. Have courts been supportive of strict IHO interpretations of the IDEA's sufficiency requirements?

The limited case law to date leaves the answer to this question unsettled. The Third Circuit upheld an IHO's dismissal of a case where the parent unsuccessfully argued that the Supreme Court's characterization in *Schaffer v. Weast* of the IDEA's pleading requirements as "minimal" allowed less than strict compliance with all of the required elements of the complaint.[47] Yet, in another unpublished decision, the federal district court in New Hampshire reversed an IHO's dismissal for insufficiency, alternatively citing with approval this dictum in *Schaffer* and the school district's failure to contest the matter within the prescribed 15-day window.[48] Providing a third approach, the Eighth Circuit recently held, in an unpublished decision, that the IDEA does not provide for judicial review of IHO sufficiency decisions.[49]

28. Conversely, do courts favor a strict interpretation of the IDEA's requirements for the defendant's response to the complaint?

No, to the extent that the federal district court in the District of Columbia has ruled that a default judgment, i.e., dismissal with prejudice, would generally not be—without affecting the student's substantive rights—an appropriate sanction for failure to adhere to requirement.[50]

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[46] *Id*.

[47] M.S.-G. v. Lenape Reg'l High Sch. Dist. Bd. of Educ., 306 F. App'x 772 (3d Cir. 2009); *cf*. D.F. v. Collingswood Borough Bd. of Educ., 596 F. App'x 49 (3d Cir. 2015) (affirming dismissal for insufficiency based on IDEA pleading standards, without specifying them); J.T. v. Hopewell Valley Reg'l Bd. of Educ., 66 IDELR ¶ 48 (D.N.J. 2015) (ruling that court lack jurisdiction but upholding, based on abundance of caution due to not clearly settled issue, IHO's denial decision); Lago Vista Unified Sch. Dist. v. S.F., 50 IDELR ¶ 104 (W.D. Tex. 2007) (ruling that IHO exceeded his authority by addressing claim not properly raised in the hearing complaint).

[48] Alexandra R. v. Brookline Sch. Dist., 53 IDELR ¶ 93 (D.N.H. 2009); *see also* Escambia Cty. Bd. of Educ. v. Benton, 406 F. Supp. 2d 1248 (N.D. Ala. 2005); Anello v. Indian River Sch. Dist., 47 IDELR ¶ 104 (Del. Fam. Ct. 2007).

[49] Knight v. Washington Sch. Dist., 56 IDELR ¶ 189 (8th Cir. 2011); *see also* G.R. v. Dallas Sch. Dist. No. 2, 55 IDELR ¶ 246 (D. Or. 2010). According to *Knight*, the proper resolution for the IHO is to dismiss the case without, not with, prejudice.

[50] Jalloh v. District of Columbia, 535 F. Supp. 2d 13 (D.D.C. 2008); Sykes v. District of Columbia, 518 F. Supp. 2d 261 (D.D.C. 2007).

JURISDICTION

29. Do IHOs have jurisdiction for violations of the prehearing, including sufficiency, process?

Yes, at least for a district's failure to send a prior written notice to the parent regarding the subject matter of the parent's due process complaint and the failure to provide a response to the complaint within the resulting required 10 days.[51]

30. Other than unilateral placement (i.e., tuition reimbursement) cases, do IHOs have jurisdiction for the IDEA claims of a child who resides in, but is not enrolled, in the school district?

The issue is not clearly settled. According to a federal district court decision in the District of Columbia, the answer is yes.[52] The court based its conclusion on the language of the IDEA that triggers a school district's obligations, including Child Find, on residency, not enrollment.[53] Other courts have extended this answer even if the child's residency changes.[54] OSEP agrees with this answer.[55] However, the Eighth Circuit answered the question no at least under a Minnesota law that requires the impartial hearing to be "conducted by and in the school district responsible for assuring that an appropriate program is provided."[56] The court reasoned that such challenges were moot because the new school district is responsible for providing the hearing. OSEP subsequently explained that, "without additional legal authority," it could not take action contrary to change this jurisdictional difference.[57]

Conversely, a recent decision within the Eighth Circuit addressed the issue of whether the IHO has jurisdiction for the case when the parents moved their residence to outside the district and did not file for the hearing until after moving.[58]

31. Who has the authority to determine whether a parent's hearing request constitutes a new issue compared to the parent's previous adjudicated request?

According to OSEP commentary accompanying the 1999 IDEA regulations, this jurisdictional issue is for the IHO—not the school district (or the SEA)—to decide.[59]

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[51] Letter to Inzelbuch, 62 IDELR ¶ 122 (OSEP 2013).

[52] D.S. v. District of Columbia, 699 F. Supp. 2d 229 (D.D.C. 2010); *see also* L.R.L. v. District of Columbia, 896 F. Supp. 2d 69 (D.D.C. 2012).

[53] This obligation is different from the child find and proportional-services obligations for children voluntarily placed in private schools, which are based on the school's location, not the child's residency. See *infra* note 61 and accompanying text.

[54] See, e.g., D.H. v. Lowndes Cty. Sch. Dist., 57 IDELR ¶ 162 (M.D. Ga. 2011); Alexis R. v. High Tech Middle Media Arts Sch., 53 IDELR ¶ 15 (S.D. Cal. 2009); Grand Rapids Pub. Sch. v. P.C., 308 F. Supp. 2d 815 (W.D. Mich. 2004).

[55] Letter to Goetz & Reilly, 57 IDELR ¶ 80 (OSEP 2011).

[56] Thompson v. Bd. of Educ., 144 F.3d 574 (8th Cir. 1998).

[57] Letter to Goetz & Reilly, 58 IDELR ¶ 230 (OSERS 2012).

[58] A.H. v. Independence Sch. Dist., 466 S.W.3d 17 (Mo. Ct. App. 2015).

[59] 64 Fed. Reg. 12,613 (Mar. 12, 1999); Letter to Wilde, 113 LRP 11932 (OSEP 1990); *see also* Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013), at C-16.

32. Do IHOs have jurisdiction for issues raised by the non-complaining party during the pre-hearing or hearing process?

Similarly, according to the OSEP commentary accompanying the 2006 IDEA regulations, "such matters should be left to the discretion of [IHOs] in light of the particular facts and circumstances of a case."[60]

33. Do IHOs have jurisdiction for cases that the parent has previously subjected to the SEA's IDEA complaint resolution process ("CRP")?

Yes, and they are not bound by the CRP rulings.[61] However, the IHO does not have jurisdiction in such cases as the appellate mechanism for the SEA's CRP rulings.[62]

34. Do IHOs have jurisdiction over free appropriate public education (FAPE) issues for students whom parents have voluntarily placed in private, including parochial, schools (in contrast with those unilaterally placed for tuition reimbursement)?

No, except for the Child Find obligation of the school district where the private school is located.[63] Arguably, an additional exception is the extent that a few courts have interpreted state laws, such as those providing for dual enrollment, as extending LEA obligations for special education and/or related services to parentally-placed children in private schools.[64]

35. Do IHOs have jurisdiction for a complaint based on the child's teacher not being highly qualified?

No, not according to the administering agency's interpretation.[65]

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[60] 71 Fed. Reg. 46,706 (Aug. 14, 2006).

[61] See, e.g., Grand Rapids Pub. Sch. v. P.C., 308 F. Supp. 2d 815 (W.D. Mich. 2004); Lewis Cass Intermediate Sch. Dist. v. M.K., 290 F. Supp. 2d 832 (W.D. Mich. 2003); Donlan v. Wells Ogunquit Cmty. Sch. Dist., 226 F. Supp. 2d 261 (D. Me. 2002); Letter to Douglas, 35 IDELR ¶ 278 (OSEP 2001); Letter to Chief State Sch. Officers, 34 IDELR ¶ 264 (OSEP 2000); Letter to Lieberman, 23 IDELR 351 (OSEP 1995).

[62] See, e.g., Va. Office of Protection & Advocacy v. Va., 262 F. Supp. 2d 648 (E.D. Va. 2003); *see also* Millay v. Surry Sch. Dep't, 707 F. Supp. 2d 56 (D. Me. 2010).

[63] 34 C.F.R. § 300.140. See, e.g., E.W. v. Sch. Bd., 307 F. Supp. 2d 1363 (S.D. Fla. 2004); Gary S. v. Manchester Sch. Dist., 241 F. Supp. 2d 111 (D.N.H. 2003)

[64] See, e.g., Veschi v. Nw. Lehigh Sch. Dist., 772 A.2d 469 (Pa. Commw. Ct. 2001), *appeal denied*, 788 A.2d 382 (Pa. 2001); Dep't of Educ. v. Grosse Point Sch., 701 N.W.2d 195 (Mich. Ct. App. 2005); R.M.M. v. Minneapolis Pub. Sch., 67 IDELR ¶ 65 (Minn. Ct. App. 2016). In its commentary accompanying the 2006 IDEA regulations, OSEP opined that "[w]hether dual enrollment alters the rights of parentally-placed private school children with disabilities under State law is a State matter." 71 Fed. Reg. 46,590 (Aug. 14, 2006).

[65] Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013).

36. Do IHOs have jurisdiction for Child Find claims, although the IDEA is ambiguous or silent about this issue?

Yes, according to a Ninth Circuit decision.[66]

37. Do IHOs have jurisdiction for safety concerns with the child's IEP?

Yes.[67]

38. Do IHOs have jurisdiction for district's promotion and retention decisions?

No, according to OSEP, unless related to FAPE or placement, such as where "a student does not receive the services that are specified on his or her IEP that were designed to assist the student in meeting the promotion standards."[68] Moreover, such matters may be regarded as within the school district's exclusive authority.[69]

39. Do IHOs have jurisdiction for claims of systemic IDEA violations?

Although there may be exceptions where the issue is relatively limited and a single plaintiff is bringing the claim, the IHO generally does not have jurisdiction for class-action type claims.[70]

40. Do IHOs have jurisdiction in terms of SEAs as defendants?

Not in most cases.[71]

41. Do IHOs have jurisdiction to determine and order the stay-put for a child with disabilities?

Yes.[72]

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[66] Compton Unified Sch. Dist. v. Addison, 598 F.3d 1191 (9th Cir. 2010).

[67] Lillbask v. Conn. Dep't of Educ., 397 F.3d 77 (2d Cir. 2005).

[68] Letter to Anonymous, 35 IDELR ¶ 35 (OSEP 2000).

[69] *Cf.* Saucon Valley Sch. Dist. v. Robert O., 785 A.2d 1069 (Pa. Commw. Ct. 2001) (ruling the IHO's remedy was ultra vires for gifted student).

[70] See, e.g., N.J. Protection & Advocacy v. N.J. Dep't of Educ., 563 F. Supp. 2d 474 (D.N.J. 2008).

[71] See, e.g., Chavez v. N.M. Pub. Educ. Dep't, 621 F.3d 1275 (10th Cir. 2010); *cf.* R.W. v. Ga. Dep't of Educ., 48 IDELR ¶ 207 (N.D. Ga. 2007), *aff'd*, 353 F. App'x 422 (11th Cir. 2009).

[72] See, e.g., 71 Fed. Reg. 46,704 (Aug. 14, 2006); *see also* Letter to Stohrer, 17 IDELR 55 (OSEP 1990); Letter to Chassey, 30 IDELR ¶ 51 (OSEP 1997). For stay-put generally, see Perry A. Zirkel, *"Stay-Put under the IDEA: An Updated Annotated Overview*, 330 EDUC. L. REP. 8 (2016). For the strong status of the IHO's stay-put order upon a party's challenge to it in court, see Abington Height Sch. Dist. v. A.C., 63 IDELR ¶ 97 (E.D. Pa. 2014).

42. Do IHOs have jurisdiction for parental challenges to an IEP that the parent agreed to or an IEP that is not the most recent one?

Yes, according to OSEP, provided that the filing is within the prescribed statute of limitations.[73]

43. Do IHOs have jurisdiction to override a parent's refusal to provide consent for initial services or for a parent's subsequent revocation of consent for continued services?

No, the regulations are rather clear that these matters are no longer within the IHO's jurisdiction.[74] However, on the opposite side, the commentary to the amended IDEA regulations clarify that for selective refusals if the parent and district disagree "about whether the child would be provided with FAPE if the child did not receive a particular special education or related service, the parent may use the due process procedures in subpart E of these regulations to obtain a ruling that the service with which the parent disagrees is not appropriate for their child."[75]

44. What if the parent's refusal is for consent for an initial evaluation and the child is either parentally placed in a private school or is home-schooled?

Similarly, the IHO does not have jurisdiction to override the parent's refusal.[76]

45. Do IHOs have jurisdiction in disputes between two parents, who both have legal authority to make educational decisions for the child, with regard to consent or revocation of consent for special education services?

No, according to OSEP's interpretation. IHOs do not have jurisdiction for any disputes between parents as compared to disputes between parents and "public agencies." In such cases, the IDEA allows either parent to provide or revoke consent, with their disagreements being subject exclusively (i.e., not under the IDEA) to the resolution mechanisms available "based on State or local law."[77] Such consent disputes when concerned with evaluation, rather than services, may be another matter.[78]

46. Do IHOs have jurisdiction for issues arising concerning the education records of the child?

Although various hearing and review officers have broadly answered this question with a "no," often based on the coverage of FERPA,[79] the more defensible answer would appear to be "it

[73] Letter to Lipsett, 52 IDELR ¶ 47 (OSEP 2008).

[74] 34 C.F.R. §§ 300.300(b)(3)(i) and 300.300(b)(4)(ii).

[75] 73 Fed. Reg. 73,011 (Dec. 1, 2008).

[76] *Id.* § 300.300(d)(4); *see also* Fitzgerald v. Camdenton R-III Sch. Dist., 439 F.3d 773 (8th Cir. 2006); Durkee v. Livonia Cent. Sch. Dist., 487 F. Supp. 2d 313 (W.D.N.Y. 2007).

[77] Letter to Cox, 54 IDELR ¶ 60 (OSEP 2009); *see also* Letter to Ward, 56 IDELR ¶ 237 (OSEP 2010).

[78] See, e.g., J.H. v. Northfield Pub. Sch. Dist., 52 IDELR ¶ 165 (D. Minn. 2009); Zeichner v. Mamaroneck Union Free Sch. Dist., 52 IDELR ¶ 264 (N.Y. Sup. Ct. 2009).

[79] See, e.g., Bourne Pub. Sch., 37 IDELR ¶ 261 (Mass. SEA 2002); Northwest R-1 Sch. Dist., 40 IDELR ¶ 221 (Mo. SEA 2004); Fairfax Cty. Pub. Sch., 38 IDELR ¶ 275 (Va. SEA 2003).

depends" in light of the overlapping coverage of the IDEA. More specifically, if the student records issue concerns the identification, evaluation, FAPE, or placement of the child, it would appear to be within the concurrent jurisdiction of the IHO,[80] with one possible exception—if the issue concerns amending the child's records (based, for example, on inaccurate or misleading information), the IDEA regulations may be interpreted as reserving the matter exclusively for the FERPA hearing procedure.[81]

47. Do IHOs have jurisdiction where the district offered, and the parent refused, a settlement prior to the hearing that offered all the relief that the parents sought?

Yes, according to a recent unpublished Fifth Circuit decision that reasoned, apparently properly, that the effect under the IDEA may be in terms of precluding recovery of attorneys' fees but not subject matter jurisdiction.[82]

48. Do IHOs have jurisdiction for enforcement of private settlement agreements?

The limited case law is unsettled on this question. Some jurisdictions support an affirmative answer,[83] but other courts say no.[84] OSEP has stated that 1) the IDEA only provides for judicial enforcement of settlement agreements as part of mediation or the resolution process and 2) a state may have uniform rules specific to an IHO's authority or lack of authority to review and/or enforce settlement agreements reached outside of the mediation or resolution processes.[85]

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[80] 34 C.F.R. §§ 300.507(a) and 300.613-300.621. Additionally, a federal court concluded that the IDEA reference to "all records" is more expansive than "education records" under FERPA. Pollack v. Reg'l Sch. Unit 75, 65 IDELR ¶ 206 (D. Me. 2015).

[81] *Id*. §§ 300.619-300.621. The additional scope of education records that, alternatively, "are otherwise in violation of the privacy or other rights of the child" extends the boundaries of the exception potentially to swallow the rule. *Id*. § 300.619. The opposing interpretation is that these regulations require, exhaustion-like, resort to the FERPA hearing procedure as a prerequisite for IHO jurisdiction.

[82] A.O. *ex rel*. M.W. v. El Paso Indep. Sch. Dist., 368 F. App'x 539 (5th Cir. 2010).

[83] See, e.g., Mr. J. v. Bd. of Educ., 32 IDELR ¶ 202 (D. Conn. 2000); State v. v. Mo. Dep't of Elementary & Secondary Educ., 307 S.W.2d 209 (Mo. Ct. App. 2010); *cf*. Springfield Local Sch. Dist. Bd. of Educ. v. Jeffrey B., 55 IDELR ¶ 158 (N.D. Ohio 2010); D.B.A. v. Special Sch. Dist. No. 1, 2010 WL 5300946 (D. Minn. Dec. 20, 2010) (upholding IHO's authority to enforce mediated settlement agreement within limited circumstances); State ex rel. St. Joseph Sch. v. Missouri Dep't of Elementary & Secondary Educ., 307 S.W.3d 209 (Mo. Ct. App. 2010) (ruling that IHO had jurisdiction to decide whether settlement agreement existed and, if so, whether either party failed to comply with it); I.K. v. Sch. Dist. of Haverford Twp., 961 F. Supp. 2d 674 (E.D. Pa. 2013), *aff'd*, 567 F. App'x 135 (3d Cir. 2014); A.S. v. Office for Dispute Resolution, 88 A.3d 256 (Pa. Commw. Ct. 2014) (ruling that IHO had jurisdiction to decide whether settlement agreement existed); Smith v. Quakertown Cmty. Sch. Dist., 65 IDELR ¶ 180 (Pa. Commw. Ct. 2015) (ruling that IHO had jurisdiction for interrelated claim for additional compensatory education).

[84] See, e.g., H.C. v. Colton-Pierrepont Cent. Sch. Dist., 341 F. App'x 687 (2d Cir. 2009); W. Chester Area Sch. Dist. v. A.M., __ A.3d __ (Pa. Commw. Ct. 2017); J.K. v. Council Rock Sch. Dist., 833 F. Supp. 2d 436, 450 (E.D. Pa. 2011); Sch. Bd. of Lee Cty. v. M.C., 35 IDELR ¶ 273 (Fla. Dist. Ct. App. 2001). The *West Chester Area School District* decision also addressed whether the IHO had jurisdiction to address the parent's duress claim for the settlement agreement, concluding that such jurisdiction existed under Pennsylvania law.

[85] Letter to Shaw, 50 IDELR ¶ 78 (OSEP 2007).

Whether exhaustion applies to judicial enforcement of settlement agreements is a separate issue, which depends in part on the terms of the settlement agreement.[86]

49. Do IHOs have jurisdiction to enforce a previous IHO decision, typically arising when a school district has allegedly failed to implement its orders?

No. The, prevailing view is that the appropriate forums are the state complaint resolution process under the IDEA[87] and, alternatively via various legal bases, the courts,[88] rather than the IHO process.[89]

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[86] F.H. v. Memphis City Sch., 64 F.3d 638 (6th Cir. 2014).

[87] *See, e.g.*, Wyner v. Manhattan Beach Unified Sch. Dist., 223 F.3d 1026, 1028-29 (9th Cir. 2000); B.D. v. District of Columbia, 75 F. Supp. 3d 225 (D.D.C. 2014); Bd. of Educ. of Wappingers Cent. Sch. Dist., 47 IDELR ¶ 115 (N.Y. SEA 2006); Crown Point Cent. Sch. Dist., 46 IDELR ¶ 269 (N.Y. SEA 2006); Newtown Bd. of Educ., 41 IDELR ¶ 201, at 827 (Conn. SEA 2004); *see also* Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013). *But cf.* Lake Travis Indep. Sch. Dist. v. M.L., 50 IDELR ¶ 105 (W.D. Tex. 2007) (allowing IHO enforcement based on state law). However, parents need not exhaust the state's complaint resolution process before seeking judicial enforcement of an IHO order. Porter v. Bd. of Trustees, 307 F.3d 1064, 1074 (9th Cir. 2002). Moreover, the complaint resolution process—in contrast to a court—does not have jurisdiction for an IHO's refusal to hear or decide an issue. Letter to Hathcock, 19 IDELR 631 (OSEP 1993); *cf.* Letter to Jacobs, 48 IDELR ¶ 287 (OSEP 2007) (interpreting the IDEA to allow appeals of IHO decisions to court—or. presumably, to the second tier in the two-tier states—but not to the SEA where the IHO does not work under the auspices of a "public agency," such as when a separate state office of administrative law conducts the hearing).

[88] The usual procedure is a § 1983 action. *See, e.g.*, Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 279 (3d Cir. 1996); Robinson v. Pinderhughes, 810 F.2d 1270, 1274-75 (4th Cir. 1987); Dominique L. v. Bd. of Educ. of City of Chicago, 56 IDELR ¶ 65 (N.D. Ill. 2011); L.J. v. Audubon Bd. of Educ., 47 IDELR ¶ 100 (D.N.J. 2006). However, the § 1983 avenue may be open only to parents, not districts. *See, e.g.*, Metro. Sch. Dist. v. Buskirk, 950 F. Supp. 899, 903 (S.D. Ind. 1997). Another alternative is under Section 504 and the ADA. See, e.g., Stropkay v. Garden City Union Free Sch. Dist., 593 F. App'x 37 (2d Cir. 2014); A. v. Hartford Bd. of Educ., 976 F. Supp. 2d 164 (D. Conn. 2013); T.B. v. San Diego Unified Sch. Dist., 56 IDELR ¶ 152 (S.D. Cal. 2008). Where the district belatedly implemented the IHOs orders, a federal court ruled that the parents lacked standing for such an enforcement action. A.S. v. Harrison Twp. Bd. of Educ., 66 F. Supp. 3d 539 (D.N.J. 2014). Finally, the courts are split as to whether the IDEA is a viable avenue for judicial enforcement. See, e.g., B.D. v. District of Columbia, 817 F.3d 792 (D.C. Cir. 2016) (discussing the case law to date and rejecting the view that a particular provision of the IDEA provides such a cause of action).

[89] However, the concurring judge in a recent federal appeals court decision pointed to the U.S. Department of Education's brief in a previous case to conclude that the IHO route "might" be viable. B.D. v. District of Columbia, 817 F.3d 792, 803 (D.C. Cir. 2016). Moreover, where the district is the initiating party, the answer may vary. *Compare* Fresno Unified Sch. Dist. v. K.U., 63 IDELR ¶ 250 (E.D. Cal. 2014), *with* Bd. of Educ. v. Ill. State Bd. of Educ., 741 F. Supp. 2d 920 (N.D. Ill. 2010). For the related issue of whether the IHO has the jurisdiction to reopen the case upon the request of either party for enforcement purposes, see Bd. of Educ. of Ellenville Cent. Sch. Dist., 28 IDELR 337 (N.Y. SEA 1998). For the applicable time period for implementation, see Letter to Voigt, 64 IDELR ¶ 220 (OSEP 2014).

50. Do IHOs have the authority—whether viewed as a matter of jurisdiction or remedies—to raise and resolve an issue *sua sponte*, i.e., on their own without either party raising it?

This issue is unsettled. An OSEP policy interpretation seems to suggest a "yes" answer for the particular issue of the child's "stay-put."[90] On the other hand, the limited case law arguably answers "no" to this question more generally whether viewed as a matter of the underlying issue or the predicate remedy, whether for declaratory[91] or injunctive[92] relief.

51. Does expiration of the 45-day period, including any extensions, prior to the start of the hearing deprive the IHO of jurisdiction for the case?

No, according to a federal district court decision in Hawaii. Contrary to the IHO's interpretation, the court concluded that this automatic divestiture of jurisdiction would "fly in the face of the very spirit of the IDEA and could result in a "serious injustice" to the rights of the parent and child with a disability.[93]

52. In a disciplinary hearing, where manifestation determination is at issue, does the IHO have jurisdiction to determine whether the student violated the school's code of conduct?

Yes. More specifically, according to OSEP, "there may be instances where a hearing officer, in his discretion, would address whether such a violation has occurred."[94]

53. Do IHOs have the authority to dispose of a case on the grounds of mootness?

Yes, but they should make sure that the case meets the applicable relatively narrow standard for mootness.[95]

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[90] Letter to Armstrong, 28 IDELR 303 (OSEP 1997). The question to OSEP contained the at least partial *sua sponte* condition that "stay put is not raised as an issue during the pre-hearing stages," but the answer did not specifically differentiate this contingency.

[91] See, e.g., C.W.L. v. Pelham Union Free Sch. Dist., 149 F. Supp. 3d 451 (S.D.N.Y. 2015); Saki v. State of Haw., Dep't of Educ., 50 IDELR ¶ 103 (D. Haw. 2008); Mifflin Cty. Sch. Dist. v. Special Educ. Due Process Appeals Bd., 800 A.2d 1010 (Pa. Commw. Ct. 2002); Bd. of Educ. v. Redovian, 18 IDELR 1092 (N.D. Ohio 1992). The third case provides only limited authority, because the court was addressing the authority of the second-tier review panel, not the IHO, and its rationale included that doing so "without the benefit of a full factual record and adjudication on the issue [would result in] in a premature interruption of the administrative process." *Id*. at 1014.

[92] See, e.g., District of Columbia v. Walker, 109 F. Supp. 3d 58 (D.D.C. 2015); Lofisa S. v. State of Haw. Dep't of Educ., 60 IDELR ¶ 191 (D. Haw. 2013); Sch. Bd. of Martin Cty. v. A.S., 727 So.2d 1071 (Fla. Ct. App. 1999); *cf.* Neshaminy Sch. Dist. v. Karla B., 26 IDELR 827 (E.D. Pa. 1997); Slack v. Del. Dep't of Educ., 826 F. Supp. 115 (D. Del. 1993); Mars Area Sch. Dist. v. Laurie L., 827 A.2d 1249 (Pa. Commw. Ct. 2003) (ruling specific to IDEA review officers). The first decision was the only one specific to IHOs, and it is ambiguous as to whether the basis was *functus officio* rather than *sua sponte*.

[93] Paul K. *ex rel*. Joshua K. v. State of Haw., 567 F. Supp. 2d 1231, 1236 (D. Haw. 2008).

[94] Letter to Ramirez, 60 IDELR ¶ 230 (OSEP 2012); *cf.* District of Columbia v. Doe, 611 F.3d 888 (D.C. Cir. 2010) (ruling that this issue is within IHO's authority if matter of FAPE).

[95] See, e.g., Morris v. District of Columbia, 38 F. Supp. 3d 57 (D.D.C. 2014).

54. Do IHOs have jurisdiction when the parent names an SEA as a defendant?

According to OSEP, this issue is within the IHO's discretionary authority. More specifically, the IHO "has the authority to determine, based on the individual facts and circumstances in the case, whether the SEA is a proper party to the due process hearing."[96]

55. Do IHOs have remedial authority for the extent of related services determined by another agency via an interagency agreement under state law?

Yes, according to a recent Ninth Circuit decision, but ultimately the answer depends not only on the IDEA but also the state (which, in this case, was California) law.[97]

TIMELINES IN GENERAL

56. If the district allegedly failed to respond to the parents' due process complaint within the required 10-day period, what is the appropriate avenue of relief?

According to OSEP, the appropriate recourse for the parents is to proceed with the hearing, with the IHO having the discretion to add and resolve this issue.[98]

57. Does an IHO's exceeding the 45-day regulatory deadline constitute a valid basis for judicial relief?

Not in the majority of the cases, because the courts treat it as a procedural violation, which often does not result in harm to the student. For example, in a Seventh Circuit case where the court upheld the IHO's decision that the district had provided an appropriate program for the child, the parent's claim was to no avail.[99] Conversely, in the minority of cases where the court concludes that this procedural violation is prejudicial, this conclusion may contribute to one or more

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[96] See, e.g., Letter to Anonymous, 69 IDELR ¶ 189 (OSEP 2017). For the overlapping case law, including the Tenth Circuit's decision in *Chavez v. New Mexico Public Education Department,* 621 F.3d 1275 (10th Cir. 2010) that OSEP indirectly cited, see Perry A. Zirkel, *State Education Agencies as Defendants under the IDEA and Related Federal Laws: A Compilation of the Court Decisions*, 336 EDUC. L. REP. 667 (2016).

[97] Douglas v. Cal. Office of Admin. Hearings, 650 F. App'x 312 (9th Cir. 2016).

[98] Letter to Inzelbuch, 62 IDELR ¶ 122 (OSEP 2013). Given its overlapping subject matter and breadth, this OSEP letter is also included in the Jurisdiction section *supra*.

[99] Heather S. v. Wis., 125 F.3d 1045 (7th Cir. 1995); *see also* J.D. v. Pawlet Sch. Dist., 224 F.3d 60 (2d Cir. 2000); Oskowis v. Sedona-Oak Creek Unified Sch. Dist., 67 IDELR ¶ 150 (D. Ariz. 2016); Grant v. Indep. Sch. Dist. No. 11, 43 IDELR ¶ 220 (D. Minn. 2005); Wilkins v. District of Columbia, 571 F. Supp. 2d 163 (D.D.C. 2008); O.O. v. District of Columbia, 573 F. Supp. 2d 41 (D.D.C. 2008); E.M. v. Pajaro Valley Sch. Dist., 48 IDELR ¶ 39 (E.D. Cal. 2007); G.W. V. New Haven Unified Sch. Dist., 46 IDELR ¶ 103 (ND. Cal. 2006).

consequences to the defendant LEA—attorneys' fees,[100] an exception to the exhaustion doctrine,[101] the extension of the period for tuition reimbursement,[102] other remediable denial of FAPE,[103] or the possibility (under Sec. 504) of compensatory damages.[104] A district's failure to process the parents' request for an impartial hearing is a separate matter, which in flagrant circumstances may require remedial relief even in the absence of denial of FAPE.[105] In any event, regardless of the judicial consequences, OSEP continues to emphasize its responsibility to monitor compliance with this timeline, with the limited exception for allowable extensions.[106]

58. Do the IDEA regulations' allowance for extensions excuse any such alleged delay?

Yes, but 1) the extensions must be at the request of a party (not unilaterally by the IHO) and for specific periods of time;[107] and 2) the defendant agency—whether the LEA or the SEA—

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[100] See, e.g., Scorah v. District of Columbia, 322 F. Supp. 2d 12 (D.D.C. 2004); *cf.* Engwiller v. Pine Plains Cent. Sch. Dist., 110 F. Supp. 2d 236 (S.D.N.Y. 2000) (ruling that state violated IDEA timeliness requirement for failing to take appropriate action in response to IHO's failure to issue her decision after a protracted period, resulting in attorneys' fees and possibly other consequences adverse to the LEA and/or SEA); Bd. of Educ. of Green Local Sch. Dist. v. Redovian, 18 IDELR 1092 (N.D. Ohio 1992) (possible attorneys' fees where no denial of FAPE). *But see* K.C. v. N.Y.C. Educ. Dep't, 66 IDELR ¶ 123 (S.D.N.Y. 2015) (ruling that plaintiff-parents obtaining the requested relief in terms of receiving overdue, but unfavorable decision does not qualify them as prevailing parties for attorneys' fees).

[101] See, e.g., McAdams v. Bd. of Educ., 216 F. Supp. 2d 86 (E.D.N.Y. 2002). In a case where the court concludes that the SEA is the responsible agency, the SEA would be liable for the attorneys' fees. See, e.g., Engwiller v. Pine Plains Cent. Sch. Dist., 110 F. Supp. 2d 236 (S.D.N.Y. 2000).

[102] See, e.g., Rose v. Chester Cty. Intermediate Unit, 24 IDELR 61 (E.D. Pa. 1996), *aff'd mem*., 114 F.3d 1173 (3d Cir. 1997). *But cf.* C.W. v. Rose Tree Media Sch. Dist., 395 F. App'x 824 (3d Cir. 2010) (not where no denial of FAPE).

[103] Miller v. Monroe Sch. Dist., 131 F. Supp. 3d 1107 (W.D. Wash. 2015) (ruled that the district denied FAPE to the child for the 142-day period beyond the 75-day timeline that was attributable to district-requested, parent-objected-to postponements, entitling parent to tuition reimbursement for that limited period of FAPE denial); Blackman v. District of Columbia, 277 F. Supp. 2d 301 (D.D.C. 2003) (ruling that gross failure to provide timely hearings and decisions was violation of FAPE); *cf.* Dep't of Educ. v. T.G., 56 IDELR ¶ 97 (D. Haw. 2011) (adopting per se denial of FAPE approach for outright denial to provide a hearing).

[104] K.J. v. Greater Egg Harbor Reg'l High Sch. Dist. Bd. of Educ., 65 IDELR ¶ 179 (D.N.J. 2015) (dismissing IDEA claim as moot but denying dismissal of Sec. 504 money damages claim).

[105] I.R. v. Los Angeles Unified Sch. Dist., 805 F.3d 1164 (9th Cir. 2015).

[106] Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013), at C-21.

[107] 34 C.F.R. § 300.515(c). According to OSEP, the IHO need not grant the request for an extension, and where the IHO does grant it, the IHO must provide the parties with notice of not only this ruling but also the specific date for the final decision. Letter to Kerr, 22 IDELR 364 (OSEP 1994). More recently, OSEP emphasized that the extension must be for a specific period even if the requesting party does not specify a time period. Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013).

ultimately must be able to show the documentation and justification for the extensions.[108]

59. Does the IHO have discretion to deny such requests?

Yes, subject to state law,[109] denying continuances is within the good faith discretion of IHOs with due consideration to unrepresented parents.[110]

60. May states specify time lines that differ from those that the IDEA specifies?

Not, under the preemption doctrine,[111] if they provide less protection to the child, unless the IDEA expressly provides for state variation, as it does for the limitations periods[112] or for evaluation.[113]

61. Does the state's monitoring responsibility to assure correction of noncompliance within limit the IHO's remedial order for compensatory education to one year?

Not in light of the statute of limitations and broad IHO remedial authority under the IDEA. OSEP recently appeared to agree with the inapplicability or at least relaxed applicability of the regulation requiring the state to correct noncompliance "as soon as possible, an in no case later than one year"[114] by opining that "hearing decisions must be implemented within the timeframe prescribed by the [IHO] or, if there is no timeframe prescribed by the [IHO], within a reasonable timeframe set by the State as required by 34 CFR §§ 500.111–300.514."[115] Nevertheless, it is effective practice for IHOs write their remedial orders in such a way that the state can verify the district's initiation of implementation and plan for completion of the award.

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[108] See, e.g., Lillbask *ex rel*. Mauclare v. Sergi, 117 F. Supp. 2d 182 (D. Conn. 2000); *see also* L.C. v. Utah State Bd. of Educ., 125 F. App'x 252 (10th Cir. 2005). For related dicta as to the possible consequences of abusing the extension exception, see *Doe v. East Greenwich School Department*, 899 A.2d 1258 (R.I. 2006).

[109] See, e.g., Lake Washington Sch. Dist. No. 414 v. Office of the Superintendent of Pub. Instruction, 51 IDELR ¶ 278 (D. Wash. 2009), *aff'd*, 634 F.3d 1065 (9th Cir. 2011); J.R. v. Sylvan Union Sch. Dist., 49 IDELR ¶ 253 (E.D. Cal. 2008) (refusing district's request to enjoin IHO's extension to parent under state "good cause" standard).

[110] See, e.g., P.J. v. Pomona Unified Sch. Dist. 248 F. App'x 775 (9th Cir. 2007); A.S. v. William Penn Sch. Dist., 63 IDELR ¶ 62 (E.D. Pa. 2014); J.D. v. Kanawha Cty. Bd. of Educ., 53 IDELR ¶ 225 (S.D. W.Va. 2009), *aff'd mem*., 357 F. App'x 515 (4th Cir. 2009); Lessard v. Wilton-Lyndborough Cooperative Sch. Dist., 47 IDELR ¶ 299 (D.N.H. 2007); D.Z v. Bethlehem Area Sch. Dist., 2 A.2d 712 (Pa . Commw. Ct. 2010); O'Neil v. Shamokin Area Sch. Dist., 41 IDELR ¶ 154 (Pa. Commw. Ct. 2004); *cf*. Horen v. Bd. of Educ., 655 F. Supp. 2d 794 (N.D. Ohio 2014) (rejecting 14th Amendment procedural due process claim).

[111] The doctrine, which is based on the supremacy clause in the Constitution, applies at least if the conflict, and Congressional intent for supplanting state law, is "clear and manifest." See, e.g., N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U. S. 645, 655 (1995).

[112] 34 C.F.R. §§ 300.507(a)(2) and 300.516(b).

[113] *Id*. § 300.301(c).

[114] *Id*. § 300.600(e).

[115] Letter to Zirkel, 68 IDELR ¶ 142 (OSEP 2016).

EXPEDITED HEARINGS

62. Under what circumstances is the parent entitled to an expedited hearing?

The IDEA regulations require the opportunity for an expedited hearing when the parent challenges a manifestation determination or any other aspect of a district-imposed disciplinary change in placement or interim alternate educational setting.[116]

63. Under what circumstances are school districts entitled to an expedited hearing?

The school district must have the opportunity for such a hearing upon requesting an interim alternate educational setting based on substantial likelihood of the current placement resulting in injury to the child or others.[117]

64. What is the timeline for an expedited hearing?

Unless the state has adopted different procedural rules, the deadlines are as follows, starting with the receipt of the complaint: resolution session – within 7 days; hearing – within 20 school days; decision – within 30 school days (actually, within 10 school days of the hearing if the hearing is more than one session).[118] According to OSEP, the reference to "school days" for the second and third parts of this specified schedule includes days during the summer period for school districts that "operate summer school programs for both students with, and students without, disabilities," but not when the summer programming is only ESY.[119] Moreover, OSEP clarified that the overall 45-day deadline, upon completion of the resolution period, applies regardless of whether the summer days count for these two steps.[120]

65. Do the IDEA provisions for specific IHO extensions apply, whether directly upon the request of one or both parties or via state law, to expedited hearings?

Apparently not, because—as summarized in the previous item—the IDEA regulation for expedited hearings provides its own timeline and the express allowance for state law variations preserves these deadlines.[121] Recently OSEP reached this conclusion, reasoning that "[t]here is no provision in the Part B regulations that would give a hearing officer conducting an expedited due process hearing the authority to extend the timeline for issuing this determination at the

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[116] 34 C.F.R. § 300.532(c)(1).

[117] *Id*. For elaboration, see Letter to Huefner, 47 IDELR ¶ 228 (OSEP 2007).

[118] *Id*. § 300.532(c)(2)-(4). The references to school days would seem to conflict during the summer months with the general requirement for issuance of the decision within 45 calendar days after completion of the resolution-session period. *Id.* § 300.515(a). However, the absence of extensions, or postponements, in the regulations for expedited hearings potentially mitigates this possible conflict.

[119] Letter to Cox, 59 IDELR ¶ 140 (OSEP 2012); *see also* Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013).

[120] *Id*.

[121] 34 C.F.R. § 300.532(c)(4). However, the accompanying preserved cross-referenced regulations for non-expedited hearings do not include the one concerning extensions (*id*. § 300.515(c)).

request of a party to the expedited due process hearing."[122] More recently, OSEP reaffirmed this conclusion, emphasizing that waiver of the IDEA timeline for expedited hearings is not permissible.[123]

66. In expedited hearings, does the usual five-day disclosure rule apply or does a special two-day rule replace it?

Although the proposed IDEA regulations contained a two-day exception for expedited hearings, the final version retained the five-day rule without exception. The Agency's stated reasoning was that "limiting the disclosure time to two days would significantly impair the ability of the parties to prepare for the hearing, since one purpose of the expedited hearing is to provide protection to the child."[124] In an analogous case under state law, a federal court in New Jersey remanded the case back to the IHO for a new hearing based on the prejudicial effect of not providing the requisite five-day notice.[125]

67. For expedited hearings, may a party challenge the sufficiency of the complaint or may an IHO otherwise extend the timeline for completion?

No, according to OSEP.[126]

68. Do the requirements for expedited hearings apply if the hearing request encompasses both the requisite disciplinary circumstances and one or more other issues?

In light of the qualified discretion accorded to IHOs, OSEP opines that in such cases "a hearing officer could decide that it is prudent to bifurcate the hearing, thus allowing for an expedited hearing on the discipline and removal issues, and a separate hearing on any other issues."[127]

HEARING PROCEDURES, INCLUDING EVIDENTIARY MATTERS

69. Are discovery procedures available in IDEA due process hearings?

The IDEA does not provide for discovery (beyond the five-day rule),[128] and very few state laws provide for it in IDEA hearings. If state law is silent in this matter, OSEP has stated that whether discovery procedures are available and, if so, their nature and extent are within the discretion of the IHO.[129] In a Florida case, the appellate court held that in the absence of state law the IHO

[122] Letter to Snyder, 67 IDELR ¶ 96 (OSEP 2015).
[123] Letter to Zirkel, 68 IDELR ¶ 142 (OSEP 2016).
[124] 71 Fed. Reg. 46,726 (Aug. 14, 2006).
[125] B.G. v. Ocean City Bd. of Educ., 64 IDELR ¶ 105 (D.N.J. 2014).
[126] Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013), at E-6.
[127] Letter to Snyder, 67 IDELR ¶ 96 (OSEP 2015).
[128] See, e.g., B.H. v. Joliet Sch. Dist., 54 IDELR ¶ 121 (N.D. Ill. 2010); Horen v. Bd. of Educ., 655 F. Supp. 2d 794 (N.D. Ohio 2009).
[129] Letter to Stadler, 24 IDELR 973 (OSEP 1996).

lacked authority to order discovery.[130] However, a year later the Florida's legislature repealed the exemption of IDEA hearings from the statute providing such authority.[131] In the relatively few jurisdictions that allow for discovery in IDEA cases, such as Florida and Massachusetts, related legal issues come to the fore.[132]

70. Does the IDEA require a prehearing conference?

No, although it is generally regarded as best practice for IHOs, and some state laws require it.[133]

71. Does the IDEA specify the time or place for the hearing?

No, except that the time and place be reasonably convenient to the parents and the child.[134]

72. Must the IHO enter a default judgment against the district for failing to file a sufficient response to the parents' complaint within 10 days of service?

No, as the Ninth Circuit explained, the IDEA only requires the district to "send to the parent a response" to the complaint and, thus, "[a] due process hearing is the redress for an unsatisfactory response."[135]

73. What is the proper procedure if the district fails to file any response at all to the complaint?

According to the Ninth Circuit, rather than go forward with the hearing, the IHO "must order a response and shift of the delay to the school district regardless of who is the prevailing party."[136] Moreover, the Ninth Circuit advised that the IHO should raise the issue sua sponte even if the parent does not make a motion on this matter.[137]

74. Does the IDEA allow the filing party to amend the complaint?

Yes, but only if (i) the other party consents in writing to the amendment and has the opportunity to resolve the due process complaint through the resolution meeting; or (ii) the IHO grants permission no later than five calendar days before the first hearing session.[138]

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[130] S.T. v. Sch. Bd. of Seminole Cty., 783 So. 2d 1231 (Fla. Dist. Ct. App. 2001).

[131] FLA. STAT. § 120.569(2)(f).

[132] See, e.g., Andover Pub. Sch., 68 IDELR ¶ 208 (Mass. SEA 2016) (partially granting parent's discovery request, specifically allowing for the redacted IEPs and 504 plans, but not the other specified information, for other students in the child's proposed placement).

[133] See, e.g., 105 ILL. COMP. STAT. ANN. 5/14-8.02a(g)(40).

[134] 34 C.F.R. § 300.515(d).

[135] G.M. v. Dry Creek Joint Elementary Sch. Dist., 595 F. App'x 698 (9th Cir. 2014).

[136] M.C. v. Antelope Union High Sch. Dist., 852 F.3d 840 (9th Cir. 2017).

[137] *Id.* at 851 n.6.

[138] 34 C.F.R. § 300.508(d)(3).

75. Do IHOs have authority to dismiss a case and, if so, with prejudice?

Hearing officers certainly have the authority for dismissal in certain circumstances. For example, the IDEA regulations provide this authority explicitly with regard to parents' failure to participate in resolution sessions[139] and implicitly with regard to complaints that the hearing officer deems to be insufficient.[140] A federal district court recently upheld dismissal with prejudice where the parents repeatedly violated the IHO's hearing orders.[141] Another federal court ruled that dismissal with prejudice should be reserved for extreme cases, with close calls—especially for *pro se* parents—being against this sanction.[142] The scope of other circumstances and the extent of doing so "with prejudice" would appear to be a matter of state law.[143] In general, it would appear to be advisable to 1) hold a hearing where the basis is a factual matter of material dispute[144]; 2) limit dismissing the case with prejudice to cases of rather egregious conduct by the filing party, whether separately sanctionable or not[145]; and 3) issue a written opinion with factual findings and legal conclusions sufficient to withstand judicial review.[146] Finally, for the variation of a contingent order of dismissal with prejudice, a federal district court recently upheld the authority under an IHO's equitable powers when state law does not expressly prohibit such an order, with the possible abuse of discretion based on the circumstances.[147]

[139] 34 C.F.R. § 300.510(b)(4).

[140] *Id*. § 300.508(c). As a general matter, OSEP has opined that "apart from the hearing rights set out at § 300.308, decisions regarding the conduct of Part B due process hearings are left to the discretion of hearing officers." Letter to Anonymous, 23 IDELR 1073, 1075 (OSEP 1995).

[141] Edward S. v. W. Noble Sch. Corp., 63 IDELR ¶ 34 (N.D. Ind. 2014).

[142] Nickerson-Reti v. Lexington Pub. Sch., 893 F. Supp. 2d 276 (D. Mass. 2012); *cf*. Mylo v. Baltimore Sch. Comm'rs, 948 F.2d 1282 (4th Cir. 1991) (ruling, specific to judicial action, that the sanction for the parent should not generally extend to dismissal for the student).

[143] See, e.g., Edward S. v. W. Noble Sch. Dist., 63 IDELR ¶ 34 (N.D. Ind. 2014); Stancourt v. Worthington City Sch. Dist. Bd. of Educ., 44 IDELR ¶ 166 (Ohio Ct. App. 2005) (upholding dismissal with prejudice under state law); *cf*. T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438 (W.D.N.Y. 2012) (review officer dismissal with prejudice under state law standards).

[144] *See, e.g.*, Hazelton Area Sch. Dist., 36 IDELR ¶ 30 (Pa. SEA 2001).

[145] *See, e.g.*, Bd. of Educ. of Hillsdale Cmty. Sch., 32 IDELR ¶ 62 (Mich. SEA 1999).

[146] For an example of an IHO decisions that did not meet this sufficiency test, see A.B. v. Clarke County Sch. Dist., 52 IDELR ¶ 259 (M.D. Ga. 2009). Of course, even where the decision is sufficiently specific, it is subject to being reversed on appeal to court. See, e.g., Alexandra R. v. Brookline Sch. Dist., 53 IDELR ¶ 93 (D.N.H. 2009).

[147] Silva v. District of Columbia, 57 F. Supp. 3d 62 (D.D.C. 2014). In this case, the court concluded that the contingent order of dismissal with prejudice was not an abuse of discretion where the filing party withdrew her complaint one week before the hearing and the IHO allowed 30 days for either refilling or requesting recusal. However, the court recommended that additional findings of facts and statements of appeals rights "might have been helpful to all parties." *Id*. at 68..

76. Do IHOs have wide discretion with regard in conducting the hearing, including determining the scope of evidence?

Yes.[148] For example, the weighing of testimony, even in the absence of rebuttal or objection, is within the IHO's authority.[149] The generally applicable judicial standard of review is abuse of discretion, which usually favors the IHO.[150] However, the federal district court for the District of Columbia has required IHOs to provide parents with a flexible opportunity for providing evidence to support the remedies of tuition reimbursement and compensatory education where the parents prove the requisite entitlement for such relief.[151] Similarly, courts have provided ample latitude to IHOs in maintaining an efficient completion of the case, keeping the parties focused on the issues.[152]

77. Do IHOs have the authority to determine procedural issues that the IDEA does not address?

Yes, according to OSEP, just as long as "such determinations are made in a manner that is consistent with a parent's or a public agency's right to a timely due process hearing."[153]

78. What are the key factors that IHOs should carefully consider and reasonably explain in their credibility determinations?

Although various factors may apply depending on the circumstances, they include the extent of

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[148] In the commentary accompanying the IDEA regulations, OSEP's illustrations of IHO's broad procedural discretion include 1) determining appropriate expert witness testimony (71 Fed. Reg. 46,691 (Aug. 14, 2006)); 2) ruling upon compliance with timelines and the statute of limitations (*id*. at 46,705-46,706); 3) determining whether the non-complaining party may raise other issues at the hearing not specified in the complaint (*id*. at 46706); and 4) providing proper latitude for pro se parties (*id*. at 46,699)

[149] McAllister v. District of Columbia, 53 F. Supp. 3d 55 (D.D.C. 2014).

[150] See, e.g., O'Toole v. Olathe Unified Sch. Dist. No. 233, 144 F.3d 692, 709 (10th Cir. 1998); D.Z. v. Bethlehem Area Sch. Dist., 2 A.3d 712, 721 (Pa. Commw. Ct. 2010); *cf.* Sch. Bd. v. Brown, 769 F. Supp. 2d 928 (E.D. Va. 2010) (upholding time limits and extensions favoring parents); Jalloh v. District of Columbia, 535 F. Supp. 2d 13 (D.D.C. 2008) (upholding IHO's exclusion of evidence); Renollett v. Indep. Sch. Dist. No. 11, 42 IDELR ¶ 201 (D. Minn. 2005), *aff'd on other grounds*, 440 F.3d 1007 (8th Cir. 2006) (upholding IHO's limiting the issues, per state law for timely hearings). *But cf.* J.C. v. N.Y.C. Dep't of Educ., 66 IDELR ¶ 239 (S.D.N.Y. 2015) (prejudicial exclusion). For further support of the prevailing view, see the commentary accompanying the regulations. 71 Fed. Register 46,706 (Aug. 14, 2006) ("The specific application of those [general regulatory] procedures to particular cases generally should be left to the discretion of hearing officers who have the knowledge and ability to conduct hearings in accordance with standard legal practice. There is nothing in the Act or these regulations that would prohibit a hearing officer from making determinations on procedural matters not addressed in the Act so long as such determinations are made in a manner that is consistent with a parent's or a public agency's right to a timely due process hearing").

[151] A.G. v. District of Columbia, 794 F. Supp. 2d 133 (D.D.C. 2011); Gill v. District of Columbia, 751 F. Supp. 2d 104 (D.D.C. 2010), *further proceedings*, 770 F. Supp. 2d 112 (D.D.C. 2011); Henry v. District of Columbia, 750 F. Supp. 2d 94 (D.D.C. 2010).

[152] See, e.g., A.M. v. District of Columbia, 933 F. Supp. 2d 13 (D.D.C. 2013).

[153] Letter to Cohen, 67 IDELR ¶ 217 (OSEP 2015) (citing 71 Fed. Reg. 46,540, 46,704 (August 14, 2006)).

the witness's pertinent experience with the child[154] and the witness's relevant expertise.[155]

79. Do the Federal Rules of Evidence, such as Rule 702 concerning the standard for expert witnesses, apply to IDEA impartial hearings?

Not directly, because they apply to federal courts; for example, state courts may follow a different standard.[156] If state law does not specify the applicable procedural rules for IHOs, the Federal Rules would appear to provide guidance by analogy within the broad discretion of IHOs.[157] In general, the IDEA does not require detailed procedures and formal rules of evidence.[158]

80. May an IHO limit the number of days for the hearing?

Yes, according to OSEP, just as long as the IHO provides the parties with the hearing rights that the regulations prescribe.[159] Although OSEP has referred to the IHO's responsibility "to accord

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[154] See, e.g., Sebastian M. v. King Philip Reg'l Sch. Dist., 685 F.3d 79 (1st Cir. 2012); Bd. of Educ. v. Michael R., 44 IDELR ¶ 36 (N.D. Ill. 2005), *aff'd*, 486 F.3d 267 (7th Cir. 2007); *cf.* W. Windsor-Plainsboro Reg'l Sch. Dist. Bd. of Educ., 44 IDELR ¶ 159 (D.N.J. 2005) (ruling that exclusive reliance on parents' experts as "utterly persuasive" was unsupported in the record and, thus, not entitled to any deference). The child's teachers and other regular service providers merit special attention in this regard. See, e.g., Heather S. v. State of Wis., 125 F.3d 1045, 1057 (7th Cir. 1997); Arlington Cty. Sch. Bd. v. Smith, 230 F. Supp. 2d 704, 730 (E.D. Va. 2002). However, this factor is not without limits and is partly jurisdictional. For example, in the Ninth Circuit, the view was that according deference to the testimony of school personnel based on the child-experience factor, without careful consideration of the parents' witnesses, would not only create a discriminatory standard but also obviate the need for an impartial hearing. See, e.g., K.S. v. Fremont Unified Sch. Dist., 545 F. Supp. 2d 995, 1004 (N.D. Cal. 2008), *further proceedings*, 679 F. Supp. 2d 1046 (N.D. Cal. 2009), *aff'd*, 426 F. App'x 536 (9th Cir. 2011). For another example of the non-bright limits, compare the majority and minority (and lower court) opinions in the Fourth Circuit's 2-to-1 decision in *County School Board v. Z.P.*, 399 F.3d 298 (4th Cir. 2005).

[155] This overlapping factor often extends to the child's teachers and other district professional personnel, but not exclusively or arbitrarily. See, e.g., K.S. v. Fremont Unified Sch. Dist., 679 F. Supp. 2d 1046 (N.D. Cal. 2009), *aff'd*, 426 F. App'x 536 (9th Cir. 2011); *see also* Marshall v. Joint Sch. Dist. No. 2 v. C.B., 616 F.3d 632, 641 (7th Cir. 2009) (distinction between medical and educational professionals).

[156] See, e.g., See, e.g., People v. Basier, 710 N.E.2d 431 (Ill. Ct. App. 1999) (ruling that Illinois state courts follow the *Frye*, not *Daubert*, standard for expert witnesses).

[157] See, e.g., 71 Fed. Reg. 46,691 (Aug. 14, 2006). For a more complete analysis, see Perry A. Zirkel, *Expert Witnesses in Impartial Hearings under the IDEA*, 298 EDUC. L. REP. 648 (2014).

[158] See, e.g., Lillbask v. Sergi, 117 F. Supp. 2d 182, 192 (D. Conn. 2000):

> Due process does not require formal rules of evidence and procedure. Detailed rules of procedure are no panacea against lengthy, contentious, wasteful, divisive, or delay-causing arguments. Indeed, highly formalized systems of legal procedure can be fodder for delay. Due process is not always served by bringing every dispute into a mini-courtroom where only lawyers can navigate the myriad rules. A formalized system could serve to disenfranchise and exclude the very people meant to be served, namely the parents and the educators.

[159] Letter to Kerr, 22 IDELR 364 (OSEP 1994). For the prescribed hearing rights, see 34 C.F.R. § 300.512.

each party a meaningful opportunity to exercise these rights during the course of the hearing,"[160] the courts' aforementioned abuse of discretion standard provides ample latitude to the IHO to rule in favor of efficiency, particularly in light of the 45-day regulatory deadline.[161] More recently, OSEP has opined that a state best-practice guideline limiting a hearing to three sessions of six hours per session does not violate the IDEA just as long as it allows the IHO to make exceptions.[162]

81. Do IHOs have the discretion to determine the consequences of not meeting the five-day disclosure deadline?

A literal reading of the regulation would suggest an answer of No.[163] However, the authority to date supports an answer of Yes, including, but not limited, to prohibiting the introduction of the evidence or allowing the rescheduling of the hearing.[164]

82. Does the IHO have the authority to allow testimony by telephone or television?

According to OSEP, this matter is within the IHO's discretion, subject to judicial review in terms of whether the parties had meaningful opportunity to exercise the rights specified in the IDEA regulations, including the right to "present evidence and confront, cross-examine and compel the

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[160] Letter to Anonymous, 23 IDELR 1073 (OSEP 1995).

[161] See, e.g., B.S. v. Anoka Hennepin Pub. Sch., 799 F.3d 1217 (8th Cir. 2015) (upholding prehearing order of 9 hours per party based on circumstances of the case, including state law); T.M. v. District of Columbia, 75 F. Supp. 3d 233 (D.D.C. 2014) (viewing limitation on cross-examination as reasonable in the context of hearing specified in prehearing order as maximum of four days); A.M. v. District of Columbia, 933 F. Supp. 2d 193, 207 (D.D.C. 2013) (viewing the IHO's reduction of repetitive testimony and *sua sponte* questions in completing hearing in one day as efficiency rather than incompetence or bias); *cf.* L.S. v. Bd. of Educ. of Lansing Sch. Dist. 158, 65 IDELR ¶ 225 (N.D. Ill. 2015); Sch. Bd. v. Brown, 769 F. Supp. 2d 928 (E.D. Va. 2010) (upholding IHO's enforcement of time limits set with parties' agreement).

[162] Letter to Kane, 65 IDELR ¶ 20 (OSEP 2015).

[163] 34 C.F.R. § 300.512(a)(3): "Any party to a hearing . . . has the right to . . . [p]rohibit the introduction of any evidence . . . that has not been disclosed to that party at least five business days before the hearing."

[164] See, e.g., OSEP Commentary Accompanying 1999 IDEA regulations, 64 Fed. Reg. 12,614 (Mar. 12, 1999); Letter to Steinke, 18 IDELR 739 (OSEP 1992); *see also* Jason O. v. Manhattan Sch. Dist. No. 41, 173 F. Supp. 3d 744 (N.D. Ill. 2016); Avila v. Spokane Sch. Dist. No. 81, 64 IDELR ¶ 171 (E.D. Wash. 2014); LJ v. Audubon Bd. of Educ., 51 IDELR ¶ 37 (D.N.J. 2008); Warton v. New Fairfield Bd. of Educ., 217 F. Supp. 2d 261 (D. Conn. 2002); There are no "tests" for the IHO to follow in making such determinations, but the purpose of the rule is, in OSEP's view, "to allow all parties the opportunity to adequately respond to the impact of the evidence presented, and to eliminate the element of surprise as a strategy a party may employ to influence the outcome of the hearing decision." Letter to Steinke, 18 IDELR 739 (OSEP 1992); *cf.* Letter to Bell, EHLR 211:166 (OSEP 1979) ("It is not interpreted to mean that everything that will be used by either party must be revealed. It does mean that names of witnesses to be called and the general thrush of their testimony should be disclosed"). In the commentary accompanying the most recent IDEA regulations, OSEP added that nothing prevents parties from agreeing to a shorter period of time. 71 Fed. Reg. 46,706 (Aug. 14, 2006). For a recent decision where the failure to follow the five-day rule contributed to a judicial remand to re-do the hearing, see B.G. v. Ocean City Bd. of Educ., 64 IDELR ¶ 105 (D.N.J. 2014).

attendance of witnesses."[165] However, except where the parties jointly agree or where state law provides such authority,[166] the applicable case law is inconclusive.[167]

83. Do IHOs have the authority to compel the appearance of witness, including those who are not district employees?

According to OSEP, yes.[168]

84. May an IHO order the LEA to provide the parent with e-mails from or to school district personnel?

Presumably this discretion is within the IHO's subpoena power, even though the e-mails may not be student records under FERPA.[169]

85. Do IHOs have authority to order the district to provide the parent with access to the records of one or more other students as part of an impartial hearing?

Not without the consent of the parents of the other students, according to the Family Policy Compliance Office (FPCO), which is responsible for administering FERPA. For the hearing in question, which concerned a disciplinary record that included identifiable information about not only the student with disabilities whose parent initiated the hearing but also other students, FPCO provided this guidance:

> [A] school district should redact the names of, or information which would be directly related to, any other students mentioned in another student's education records before providing a parent access to the student's education records. In instances where joint records cannot be easily redacted or the information segregated out, the school district may satisfy a request for access by informing the parent about the contents of the record which relate to his or her child.[170]

Adding support for this answer, a federal district court recently upheld an IHO's refusal to allow the parents, via their expert, to access the records of other students. The court reasoned that even if the parents had obtained a court order to compel the district to produce redacted copies, the

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[165] See, e.g., Letter to Anonymous, 23 IDELR 1073 (OSEP 1995) (citing 34 C.F.R. § 330.512(a)(2)).

[166] See, e.g., E.D. v. Enterprise City Bd. of Educ., 213 F. Supp. 2d 1252 (N.D. Ala. 2003).

[167] *Compare* Genn v. New Haven Bd. of Educ., 65 IDELR ¶ 73 (D. Conn. 2015); Walled Lake Consol. Sch. v. Jones, 24 IDELR 738 (E.D. Mich. 1996) (no), *with* Draper v. Atlanta Indep. Sch. Sys., 480 F. Supp. 2d 1331 (N.D. Ga. 2007), *aff'd on other grounds*, 518 F. 3d 1275 (11th Cir. 2008); Hampton Sch. Dist. v. Dobrolowski, 17 EHLR 518 (D.N.H. 1991) (at the judicial level) (yes, where sufficient justification).

[168] Letter to Steinke, 28 IDELR 305 (OSEP 1997).

[169] S.A. v. Tulare Cty. Office of Educ., 53 IDELR ¶ 111 (E.D. Cal. 2009) (ruling that only those e-mails that not only personally identify the student but also are in the student's permanent file qualify as education records under FERPA); *see also* E.D. v. Colonial Sch. Dist., 69 IDELR ¶ 245 (E.D. Pa. 2017) (ruling that parent was not entitled to access to e-mails not maintained by district).

[170] Letter to Anonymous, 113 LRP 14615 (FPCO 2013).

IHO would not have erred in denying their request in light of the overriding individualized nature of FAPE.[171]

86. Do IHOs have contempt powers?

No, unless state law provides such authority.[172]

87. Do IHOs have the authority to issue disciplinary sanctions against a party or the party's attorney for what the IHO regards as hearing misconduct?

Again, the answer is a matter of state law, according to OSEP.[173] The published case law is scant and somewhat supportive.[174]

88. May an IHO dismiss a hearing after multiple postponements?

It depends on state law. In a recent Massachusetts case, the court reversed such a dismissal where the hearing officer did so after granting the latest postponement request, but state law required the hearing officer to either 1) deny the motion for postponement or 2) grant it and set a new hearing date.[175]

89. May the school district or its attorney provide the IHO with the student's education records without prior consent of the parent?

Yes, according to OSEP, if the parent filed for the hearing. Conversely, according to OSEP, if the district filed for a hearing, the school district may do so but only after providing due disclosure to the parent and via witnesses, not on an *ex parte* basis.[176]

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[171] M.A. v. Jersey City Bd. of Educ., 69 IDELR ¶ 57 (D.N.J. 2016).

[172] See, e.g., E.D. v. Enterprise City Bd. of Educ., 213 F. Supp. 2d 1252 (N.D. Ala. 2003).

[173] Letter to Armstrong, 28 IDELR 303 (OSEP 1997).

[174] See, e.g., G.M. v. Dry Creek Joint Elementary Sch. Dist., 59 IDELR ¶ 223 (C.D. Cal. 2012) (upholding IHO's decision to partially award attorneys' fees of $3880 to district for frivolous claim of parent's attorney); K.S. v. Fremont Unified Sch. Dist. 545 F. Supp. 2d 995 (N.D. Cal. 2008) (upholding IHO's decision to grant sanctions against parent's attorney); Moubry v. Indep. Sch. Dist. No. 696, 32 IDELR ¶ 90 (D. Minn. 2000) (upholding IHO's order for parent's attorney to pay $2,432 as a sanction for filing a frivolous fourth hearing request–based on Minnesota statute repealed in 2004); Edward S. v. W. Noble Sch. Corp. 63 IDELR ¶ 34 (N.D. Ind. 2014) (upholding IHO's dismissal with prejudice where parents repeatedly violated IHO's hearing orders); Stancourt v. Worthington City Sch. Dist., 841 N.E.2d 812 (Ohio Ct. App. 2005) (ruling that IHO has implied powers similar to those of a court but in this case the sanction of dismissal with prejudice was too harsh). For a comprehensive analysis, see Salma A. Khaleq, *The Sanctioning Authority of Hearing Officers in Special Education*, 32 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2012).

[175] Philbin v. Bureau of Special Educ. Appeals, 54 IDELR ¶ 96 (D. Mass. 2020).

[176] Letter to Stadler, 24 IDELR 973 (OSEP 1996).

90. Does the IDEA entitle the parent to a choice between a written or electronic (e.g., audio-taped) transcript of the hearing?

Yes. Although the IDEA previously did not offer the parent a choice,[177] the 1997 amendments revised the language to provide parents with "the right to a written, or, at the option of the parents, electronic verbatim record of such hearing."[178] The 2004 amendments have retained this choice-providing language. However, the choice is for one or the other, not both.[179]

91. Does this right to a transcript extend to prehearing sessions?

No, according to a recent unpublished Eleventh Circuit decision, unless state law expressly provides otherwise.[180]

92. Does this right to a transcript continue after the applicable period for filing for judicial review?

Yes, according to OSEP.[181]

93. Is the parent entitled to a translation of the hearing transcript into his/her native language?

Not in the absence of a state law, according to a Pennsylvania appellate court in a gifted education case.[182]

94. Does the failure to provide the parent with the complete transcript or recording amount to a denial of FAPE?

It depends on whether the missing testimony is significant in terms of affecting the child's substantive right to FAPE.[183]

95. May IHOs take official notice of a fact or standard akin to a court's power of judicial notice?

The pertinent case law is insufficient to provide a clear answer where state law does not expressly provide this power.[184]

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[177] See, e.g., Edward B. v. Paul, 814 F.2d 52 (1st Cir. 1987).

[178] 20 U.S.C. § 1415(h)(3) (2009). Thus, the First Circuit's aforementioned *Edward B.* decision is no longer good law. See, e.g., Stringer v. St. James Sch. Dist., 446 F.3d 799 (8th Cir. 2006).

[179] Letter to Maldonado, 49 IDELR ¶ 257 (OSEP 2007).

[180] A.L. v. Jackson Cty. Sch. Bd., 635 F. App'x 774 (11th Cir. 2015).

[181] Letter to Connelly, 49 IDELR ¶ 135 (OSEP 2007).

[182] Zhou v. Bethlehem Area Sch. Dist., 976 A.2d 1284 (Pa. Commw. Ct. 2009).

[183] See, e.g., Kingsmore v. District of Columbia, 466 F.3d 118 (D.C. Cir. 2006); J.R. v. Sylvan Union Sch. Dist., 50 IDELR ¶ 130 (E.D. Cal. 2008).

[184] See, e.g., J.W. v. Fresno Unified Sch. Dist., 626 F.3d 431 (9th Cir. 2010) (rejecting challenge to non-use in connection with applicable state law); Ross v. Framingham Sch. Comm., 44 F. Supp. 2d 104 (D. Mass. 1999), *aff'd mem.*, 229 F.3d 1133 (1st Cir. 2000) (rejecting challenge to use but not addressing this issue squarely); *cf.* Brandon H. v. Kennewick Sch. Dist., 82 F. Supp. 2d 1174 (E.D. Wash. 2000) (citing Washington law specifying said authority).

96. May an IHO admit hearsay evidence?

Generally yes unless state law dictates otherwise,[185] but relying on it in the IHO's decision without corroborative proof may be problematic.[186]

97. May an IHO admit evidence from the period prior to the applicable statute of limitations?

Yes. This determination is within the IHO's broad discretion,[187] although the results typically only are usable as background information.[188]

98. Does the "snapshot" rule, or evidentiary standard, apply for IHO's assessment of the appropriateness of IEPs?

It depends on the jurisdiction. For example, the First, Second, Third, and Ninth Circuits have adopted this standard,[189] whereas the Fourth and Tenth Circuits have partially disagreed.[190] This approach considers the time of the educational decision, not the adjudicator's deliberations, as controlling to determine appropriateness.

99. On the other hand, what is the "four corners" evidentiary rule in relation to FAPE determinations?

This standard, which originates in contract law, exclusively restricts consideration to the final version of the IEP that the school system offered during the IEP process.[191] Various circuits

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[185] See, e.g., Jalloh v. District of Columbia, 535 F. Supp. 2d 13 (D.D.C. 2008); Sykes v. District of Columbia, 581 F. Supp. 2d 261 (D.D.C. 2007); Glendale Unified Sch. Dist. v. Almasi, 122 F. Supp. 1093 (C.D. Cal. 2000).

[186] See, e.g., Speight v. Dep't of Corrections, 989 A.2d 77 (Pa. Commw. Ct. 2010) (ruling in context of administrative hearings generally, rather than IDEA IHO hearings specifically, in Pennsylvania).

[187] See, e.g., Phyllene W. v. Huntsville City Bd. of Educ., 630 F. App'x 917 (11th Cir. 2015); Indep. Sch. Dist. No. 413 v. H.M.J., 123 F. Supp. 3d 1100 (D. Minn. 2015); *cf.* 71 Fed. Reg. 46,706 (Aug. 14, 2006) (listing compliance with the statute of limitations as one of the examples of the IHO's broad discretion); *cf.*

[188] See, e.g., Pangerl v. Peoria Unified Sch. Dist., 67 IDELR ¶ 36 (D. Ariz. 2016); Dep't of Educ., State of Haw. v. E.B., 45 IDELR ¶ 249 (D. Haw. 2006).

[189] See, e.g., R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167 (2d Cir. 2012); Lessard v. Wilton Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 29 (1st Cir. 2008); Adams v. State of Or., 195 F.3d 1141, 1149 (9th Cir. 1999); Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1041 (3d Cir. 1993) (Mansmann, J., concurring)

[190] See, e.g., M.S. *ex rel*. Simchick v. Fairfax Cty. Sch. Bd., 553 F.3d 315, 326-27 (4th Cir. 2009); O'Toole v. Olathe Dist. Sch. Unified Sch. Dist., 144 F.3d 692, 702-03 (10th Cir. 1998).

[191] See, e.g., C.G. v. Five Town Cmty. Sch. Dist., 513 F.3d 279, 285 (2d Cir. 2008) (explaining but not either adopting or rejecting this standard).

have adopted it but typically only in limited circumstances or with exceptions.[192]

100. May the party that requested the hearing raise issues not in the complaint?

No,[193] unless the other either party agrees[194] or—at least in the Second Circuit—"opens the door" (e.g., via its opening statement or via its questioning of witnesses).[195] Clarifying that "the waiver rule is not to be mechanically applied," the Second Circuit has explained that "[t]he key … is fair notice and preventing parents from 'sandbag[ging] the school district' by raising claims after the expiration of the resolution period."[196] In a recent case, a federal district court in New York concluded that the parent had provided fair notice of the issue of methodology via a general reference in the complaint to the lack of sufficient progress in a similar program.[197] Reaching a similar result as the Second Circuit's exceptions, the Ninth Circuit found applicable to IDEA hearings the federal evidentiary rule that treats issues as raised in the complaint if tried by express or implied consent.[198]

101. May the other (i.e., noncomplaining) party raise issues not in the complaint?

The regulations do not address this question, but the accompanying commentary takes the position that the answer is a matter of state procedures and, in their absence, the IHO's discretion.[199]

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[192] See, e.g., R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167 (2d Cir. 2012); D.S. v. Bayonne Bd. of Educ., 602 F.3d 503 (3d Cir. 2010); Sytsema v. Acad. Sch. Dist., 538 F.3d 1306 (10th Cir. 2008); A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 (4th Cir. 2007); Knable v. Bexley City. Sch. Dist., 238 F.3d 755 (6th Cir. 2001); Union Sch. Dist. v. Smith, 15 F.3d 1519 (9th Cir. 1994). For a more recent, state appellate court decision, see Jenna R.P. v. City of Chicago Sch. Dist. No. 229, 3 N.E.3d 921 (Ill. Ct. App. 2013).

[193] See, e.g., R.E. v. N.Y.C. Dep't of Educ., 694 F.3d 167, 187-88 (2d Cir. 2012); Cty. of San Diego v. Cal. Special Educ. Hearing Office, 93 F.2d 1458 (9th Cir. 1996). For examples of enforcement of this stricture, see McAllister v. District of Columbia, 53 F. Supp. 3d 55 (D.D.C. 2014); T.G. v. N.Y.C. Dep't of Educ., 973 F. Supp. 2d 320 (S.D.N.Y. 2013); Saki v. State of Haw. Dep't of Educ., 50 IDELR ¶ 103 (D. Haw. 2008).

[194] 20 U.S.C. § 1415(f)(3)(B); 34 C.F.R. § 00.511(d). For application of this general requirement to the levels beyond the IHO, see, e.g., R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 268-69 (S.D.N.Y. 2012);

[195] M.H. v. N.Y.C. Dep't of Educ., 685 F.3d 217, 250 (2d Cir. 2012); Y.S. v. N.Y.C. Dep't of Educ., 62 IDELR ¶ 56 (S.D.N.Y. 2013) (via its witnesses and via cross examination of the other side's witnesses). This exception is narrowly limited. See, e.g., B.P. v. N.Y.C. Dep't of Educ., 634 F. App'x 845 (2d Cir. 2015).

[196] A.S. v. N.Y.C. Dep't of Educ., 573 F. App'x 63 (2d Cir. 2014) (citing C.F. v. N.Y.C. Dep't of Educ., 746 F.3d 68, 78 (2d Cir. 2014)).

[197] J.W. v. N.Y.C. Dep't of Educ., 95 F. Supp. 3d 592 (S.D.N.Y. 2015).

[198] M.C. v. Antelope Union High Sch. Dist., 852 F.3d 840 (9th Cir. 2017).

[199] 71 Fed. Reg. 46,706 (Aug. 14, 2006); *see also* Letter to Cohen, 67 IDELR ¶ 217 (OSEP 2015).

102. May the complaining party raise additional issues via a reservation of rights provision in their complaint?

No, according to a published federal court decision in New York.[200]

103. Does an IHO have authority to proceed with the hearing in the absence of a party?

In general, courts review such matters on an abuse of discretion standard, which makes it advisable for the IHO to provide and document due notice to the non-appearing party and ample opportunity for rescheduling participation. Thus, it would appear to be in effect a last resort within the need for a prompt decision. In applying these limited circumstances, courts have upheld the IHO in the clear majority of cases.[201]

104. May an IHO order the independent evaluation of the child? If so, who is responsible for payment of the evaluator, and are there any limits to the cost and qualifications?

The IDEA regulations make clear that if the IHO orders the evaluation it is at public expense (i.e., the district is responsible for payment).[202] The courts have recognized that this regulation provides the underlying authority for such an order,[203][204] including its use for providing an expert assessment for determining a compensatory education award per the qualitative approach. The cost and qualifications limits are those that apply to the district's use of evaluators.[205]

105. Does the school system have the legal right to object to the parent's choice to have the hearing open or closed to the public?

Not according to OSEP.[206]

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[200] B.P. v. N.Y.C. Dep't of Educ., 841 F. Supp. 2d 605 (E.D.N.Y. 2012).

[201] *Compare* J.D. v. Kanawha Cty. Bd. of Educ., 2009 WL 4730804 (S.D. W. Va. Dec. 4, 2009), *aff'd mem.*, 357 F. App'x 515 (4th Cir. 2009); A.S. v. William Penn Sch. Dist., 63 IDELR ¶ 62 (E.D. Pa. 2014); Horen v. Bd. of Educ., 655 F. Supp. 2d 794 (S.D. Ohio 2009); *cf.* Doe v. E. Greenwich Sch. Dep't, 45 IDELR ¶ 281 (R.I. 2006) (upholding dismissal via exhaustion analysis); Cty. of Tolumne v. Special Educ. Hearing Office, 2006 WL 165045 (Cal. Ct. App. Jan. 14, 2006) (unpublished and noncitable), *with* Millay v. Surry Sch. Dep't, 707 F. Supp. 56 (D. Me. 2010).

[202] 34 C.F.R. § 300.502(d).

[203] See, e.g., B.D. v. District of Columbia, 817 F.3d 792 (D.C. Cir. 2016); Lopez-Young v. District of Columbia, 211 F. Supp. 3d 42 (D.D.C. 2016).

[204] See, e.g., Luo v. Council Rock Sch. Dist., 68 IDELR ¶ 245 (E.D. Pa. 2016); Lyons v. Lower Merion Sch. Dist., 56 IDELR ¶ 169 (E.D. Pa. 2010); Manchester-Essex Reg'l Sch. Dist. Comm. v. Bureau of Special Educ. Appeals, 490 F. Supp. 2d 49, 54 (D. Mass. 2007). Indeed, it is reversible error for an IHO not to issue such an order in certain circumstances. See, e.g., M.Z. v. Bethlehem Area Sch. Dist., 521 F. App'x 74, 77 (3d Cir. 2013) (ruling that the IHO erred by not ordering an IEE at public expense upon finding the district's evaluation to be inappropriate).

[205] 34 C.F.R. § 300.502(e).

[206] Letter to Eig, 68 IDELR ¶ 109 (OSEP 2016).

106. What is the outer boundary of a parent's right in terms of having individuals, including members of the press, attend hearing that they have chosen to be closed?

According to OSEP, the outer limit is for "individuals who have some direct relationship to the parties and/or a personal need to understand the conduct of proceedings generally," thus not extending to members of the press. OSEP also added the reminder that an IHO may "remove any individual in attendance whose behavior is disruptive or otherwise interferes with conducting a fair and impartial hearing."[207]

107. Do school employees, whom the parent has not invited, have the right to attend a closed hearing?

According to OSEP, "absent parental consent, officials of participating agencies who are not authorized to attend the hearing under 34 C.F.R. § 300.512(a)(1)-(2) may not attend or have access to personally identifiable information from a closed hearing, unless such disclosure is necessary to meet a requirement of [Part B] with respect to the child who is the subject of the hearing" or they have "legitimate educational interests." OSEP also emphasized that in such matters, the IHO "is in the best position to ensure that the confidentiality of personally identifiable information is properly protected and that standard legal practice is followed in the due process hearing."[208]

108. Is opposing counsel entitled to the copy of an expert's notes for cross-examination if the expert uses the notes on direct examination?

A federal district court in New Hampshire, relying in part on the state-adopted Federal rules of Evidence, upheld an IHO's affirmative answer to this question.[209]

109. Does the attorney-client privilege apply to lay advocates in impartial hearings under the IDEA?

It depends on state law. For example, a federal magistrate concluded that New Jersey law implied an affirmative answer that extended to impartial hearings under the IDEA.[210]

DECISIONAL ISSUES

110. What is the role of medical, psychological, and educational diagnoses that are not listed in the IDEA classifications for eligibility?

Such diagnoses may provide a supplementary role, but they are not generally necessary; in cases

[207] *Id*.
[208] Letter to Reisman, 60 IDELR ¶ 293 (OSEP 2012).
[209] I.D. v. Westmoreland Sch. Dist., 17 IDELR 684 (D.N.H. 1991).
[210] Woods v. N.J. Dep't of Educ., 858 F. Supp. 51 (D.N.J. 1993).

of conflict in definitions or criteria, the IDEA specifications are controlling.[211]

111. Is the "educational performance" component of the eligibility definition limited to the academic, as compared with the social, dimension?

The two major appellate decisions are split on this interpretational issue.[212]

112. Are any of the procedural violations of the IDEA a per se denial of FAPE?

The only seeming possibility, depending on the interpretation of the relevant IDEA language, is where the proof is preponderant that the district "[s]ignificantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child."[213]

113. Has the *Rowley* floor-based substantive standard for denial of FAPE changed?

Yes.[214]

114. What is the prevailing standard for FAPE implementation cases?

Rather than 100% compliance, the leading judicial standards are (1) failure to implement a material, i.e., substantial or significant, portion of the IEP and (2) the same material failure plus lack of benefit.[215]

115. Do an IHO's minor corrections of the transcript constitute *per se* reversible error with respect to his/her decision?

No.[216]

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[211] See, e.g., Perry A. Zirkel, *The Role of the DSM in IDEA Case Law*, 39 COMMUNIQUÉ 30 (Jan. 2011). For illustrative policy interpretations specific to dyslexia, see, e.g., Letter to Unnerstall, 68 IDELR ¶ 22 (OSEP 2016); Dear Colleague Letter, 66 IDELR ¶ 188 (OSERS 2015).

[212] *Compare* C.B. v. Dep't of Educ., 322 F. App'x 20 (2d Cir. 2009) (academic only), *with* Mr. I. v. Me. Sch. Admin. Dist. No. 55, 480 F.3d 1 ¶ (1st Cir. 2007) (extends to social dimension).

[213] 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

[214] In *Endrew F. v. Douglas County School District Re-1*, 137 S. Ct. 988 (2017), the Supreme Court held, based on the confined facts and conclusions in *Rowley*, that the substantive standard is whether the IEP "is reasonably calculated to enable a child to make progress in light of the child's circumstances." In contrast, the change was not based on the IDEA amendments. See, e.g., Perry A. Zirkel, *Have the Amendments to the Individuals with Disabilities Education Act Razed Rowley and Raised the Substantive Standard for "Free Appropriate Public Education"?* 28 J. NAT'L ASS'N ADMIN. L. JUDICIARY 396 (2008).

[215] *Compare* Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 (9th Cir. 2007) (materiality alone), *with* Houston Indep. Sch. Dist., 200 F.3d 341 (5th Cir. 2000) (materiality/benefit). For a detailed analysis, see Perry A. Zirkel & Edward T. Bauer, *The Third Dimension of FAPE under the IDEA: IEP Implementation*, 36 J. NAT'L ASS'N ADMIN. L. JUDICIARY 409 (2016).

[216] See, e.g., Paschl v. Sch. Bd., 453 F.3d 1064 (8th Cir. 2008) (ruling that IHO's corrections to the transcript were, if error, harmless).

116. Would the verbatim adoption of all of either party's proposed findings of facts undermine the traditional deference to the IHO's findings and presumption of impartiality?

It certainly could do so.[217]

117. Who has the burden of persuasion at the hearing stage?

For FAPE cases, the Supreme Court held that under the IDEA, which is silent on this point, the burden of persuasion is on the challenging party, i.e., the parent.[218] However, some state laws have put the burden of proof in such cases on the district.[219] Conversely, lower courts have extended the Supreme Court's ruling to other issues, such as whether the child is eligible[220] and whether the child's placement is in the least restrictive environment (LRE).[221]

118. What is the standard, or quantum, of proof at the hearing stage?

Presumably it is the general civil standard of preponderance of the evidence, as derived from the judicial review stage.[222]

WRITTEN DECISIONS

119. Does the IHO have the discretion to restate the issue(s) of the case?

Yes, within reasonable limits, basically based on the IHO's consideration of the parties' arguments.[223]

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[217] See, e.g., Larson v. Indep. Sch. Dist. No. 316, 40 IDELR ¶ 231 (D. Minn. 2004).

[218] Schaffer v. Weast, 546 U.S. 49 (2005).

[219] N.Y. EDUC. LAW § 4404(1)(c) (McKinney 2008). The limited exception in New York is for the second step in tuition reimbursement cases, which is whether the parent's unilateral placement is appropriate. *Id*. Other state laws put the burden of production in FAPE cases on the district without making clear the possible distinction from the burden of persuasion. 105 ILL. COMP. STAT. 5/14-8.02a(g-55).

[220] Antoine M. v. Chester Upland Sch. Dist., 420 F. Supp. 2d 396, 45 IDELR ¶ 120 (E.D. Pa. 2006).

[221] L.E. v. Ramsey Bd. of Educ., 435 F.3d 384 (3d Cir. 2006).

[222] 34 C.F.R. § 300.516(c)(3).

[223] See, e.g., M.M. v. Lafayette Sch. Dist., 767 F.3d 842 (9th Cir. 2014); J.W. v. Fresno Unified Sch. Dist., 626 F.3d 431 (9th Cir. 2010); Ford v. Long Beach Unified Sch. Dist., 291 F.3d 1096 (9th Cir. 2002); M.M. v. Lafayette Sch. Dist., 58 IDELR ¶ 132 (N.D. Cal. 2012); K.E. v. Indep. Sch. Dist. No. 15, 54 IDELR ¶ 215 (D. Minn. 2010), *aff'd on other grounds*, 747 F.3d 795 (8th Cir. 2011); *cf.* Adam Wayne D. v. Beechwood Indep. Sch. Dist., 482 F. App'x 52 (6th Cir. 2012) (implicit notice to defendant-district); Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804 (5th Cir. 2003) (impartiality challenge); Renollett v. Indep. Sch. Dist. No. 11, 42 IDELR ¶ 201 (D. Minn. 2005), *aff'd on other grounds*, 440 F.3d 1007 (8th Cir. 2006) (limiting the issues). *But cf.* M.C. v. Antelope Union High Sch. Dist., 852 F.3d 840 (9th Cir. 2017) (questioning wisdom of IHO reframing issues where the complainant has legal representation).

120. May IHOs comment in the written decision to attorney conduct at the hearing?

OSEP has indirectly addressed this issue by opining that a state law that expressly allows such comments is not contrary to the IDEA provided that the comment is 1) linked to a relevant issue (e.g., a complaint perceived to be frivolous, unreasonable, or without foundation) and 2) does not preclude a party's ability to address such comments in court or in any application for attorneys' fees.[224]

121. Do the IHO's legal findings need support in the record?

Yes, without such support a court may find them to be arbitrary and capricious.[225] Conversely, where the IHO's legal findings have such support, courts generally afford them notable deference.[226] In general, the deference increases where the IHO's factual findings are careful and thorough.[227] Moreover, given the grey area of mixed questions of fact and law, the boundary between factual findings and legal conclusions under the IDEA is not a bright line. For example, in the Fourth Circuit at least, the appropriateness of an IEP is a question of fact.[228]

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[224] Letter to Zimberlin, 34 IDELR ¶ 150 (OSEP 2000).

[225] See, e.g., J.G. v. Baldwin Park Unified Sch. Dist., 78 F. Supp. 3d 1268 (C.D. Cal. 2015); M.O. v. District of Columbia, 20 F. Supp. 3d 31 (D.D.C. 2013); S.G. v. District of Columbia, 498 F. Supp. 2d 304 (D.D.C. 2007); *cf.* Dep't of Educ. v. Ria L., 64 IDELR ¶ 236 (D. Haw. 2014) (remand for failure to explain credibility findings); J.M. v. N.Y.C. Dep't of Educ., 62 IDELR ¶ 120 (S.D.N.Y. 2013) (where extensive attention to facts not directly related to the core issue of the case and contradictory findings on this issue); R.C. v. Great Meadows Reg'l Bd. of Educ., 62 IDELR ¶ 61 (D.N.J. 2013) (in the absence of an evidentiary hearing); Stanton v. District of Columbia, 680 F. Supp. 2d 201 (D.D.C. 2010) (failure to include sufficient findings and reasoning for calculation of compensatory education); Options Pub. Charter Sch. v. Howe, 512 F. Supp. 2d 55 (D.D.C. 2007) (entire lack of factual findings nullified IHO's decision). *But cf.* J.P. v. Cty. Sch. Bd., 516 F.3d 254 (4th Cir. 2008) (credibility-based determinations need not be detailed in light of the 45-day deadline); *see also* B.E.L. v. State of Haw. Dep't of Educ., 63 F. Supp. 3d 1215 (D. Haw. 2014); S.A. v. Weast, 898 F. Supp. 2d 869 (D. Md. 2012).

[226] See, e.g., Lathrop R-II Sch. Dist. v. Gray, 611 F.3d 419 (8th Cir. 2010); D.B. v. Craven Cty. Bd. of Educ., 32 IDELR ¶ 86 (4th Cir. 2000); Doyle v. Arlington Cty. Sch. Bd., 953 F.2d 100 (4th Cir. 1991); *cf.* Carlisle Area Sch. Dist. v. Scott P., 62 F.3d 520 (3d Cir. 1995) (credibility-based factual findings). However, the Seventh Circuit has made an ambiguous distinction between the "evidence" and IHO's "decision." Heather S. v. Wis., 125 F.3d 1045, 1053 (7th Cir. 1995).

[227] See, e.g., Pointe Educ. Serv. v. A.T., 610 F. App'x 702 (9th Cir. 2015); J.W. v. Fresno Unified Sch. Dist., 626 F.3d 431 (9th Cir. 2010); Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186 (2d Cir. 2005); Capistrano Unified Sch. Dist. v. Wartenburg, 59 F.3d 884 (9th Cir. 1995); Doyle v. Arlington Sch. Dist., 953 F.2d 100 (4th Cir. 1991); Kerkam v. Superintendent, D.C. Sch., 931 F.2d 84 (D.C. Cir. 1991); Anchorage Sch. Dist. v. D.S., 688 F. Supp. 2d 883 (D. Alaska 2010). Interestingly, the Ninth Circuit has counted the hearing officer's participation in the questioning of witnesses as part, although not necessarily the controlling part, of its "thorough and careful" calculus for according deference. R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 942 (9th Cir. 2007); Park v. Anaheim High Sch. Dist., 464 F.3d 1025, 1029 (9th Cir. 2006). Conversely, a court exhibited disappointment and aversion to a case where the hearing officer adopted verbatim the 480 factual findings and 79 legal conclusions proposed by one of the parties. B.H. v. Johnston Cty. Bd. of Educ., 65 IDELR ¶ 66 (E.D.N.C. 2015).

[228] See, e.g., G. v. Fort Bragg Dependent Sch., 343 F.3d 295, 303 (4th Cir. 2003).

122. Does the IHO have to limit the factual findings in the written decision to those essential for the legal conclusions?

Although it may be appropriate practice, as a matter of efficiency, to do so, there is no such legal requirement; i.e., it is not reversible error to include additional facts.[229]

123. Do IHOs have similar qualified discretion with regard to their legal conclusions?

Yes. For example, writing shortcuts, such as cutting and pasting a selected group of conclusions from another decision, are not legal error if well founded.[230] Conversely, however, an IHO's legal conclusion that fails to reference the supporting facts may not receive judicial deference.[231] For example, a federal court recently vacated and remanded a hearing officer's decision that "lack[ed] sufficiently detailed reasoning" (which in this case overlapped with insufficiently explained fact-finding).[232]

124. Do IHO remedial orders need to have a specific evidentiary foundation?

Yes, but the reversals on this basis are relatively infrequent and more a matter of the underlying substance than the quality of the writing.[233]

125. Are IHOs allowed to amend their decisions for technical errors?

OSEP interprets the matter was within the discretion of SEAs and IHOs, provided that where amendments are allowed, proper notice should be accorded to both parties.[234] Such corrections may be either *sua sponte* or, when its does not change the substance or outcome of the decision,

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[229] See, e.g., B.E.L. v. State of Haw. Dep't of Educ., 63 F. Supp. 3d 1215 (D. Haw. 2014).

[230] Joshua A. v. Rocklin Unified Sch. Dist., 49 IDELR ¶ 249 (E.D. Cal. 2008), *aff'd*, 391 F. App'x 692 (9th Cir. 2009).

[231] See, e.g., Marc M. v. Dep't of Educ., State of Haw., 762 F. Supp. 2d 1235 (D. Haw. 2011).

[232] M.O. v. District of Columbia, 20 F. Supp. 3d 31 (D.D.C. 2013); *see also* T.S. v. Utica Cmty. Sch., 69 IDELR ¶ 95 (E.D. Mich. 2017); J.M. v. N.Y.C. Dep't of Educ., 62 IDELR ¶ 120 (S.D.N.Y. 2013) (unduly short analysis of the case issues).

[233] See, e.g., Somberg v. Utica Cmty. Sch., 67 IDELR ¶ 139 (E.D. Mich. 2016) (viewing IHO's denial of compensatory education as not entitled to deference due to lack of explanation and justification); L.O. v. E. Allen Cty. Sch. Corp., 58 F. Supp. 3d 882 (N.D. Ind. 2014) (invalidating various IHO orders in the absence of sufficient factual foundation or legal violations); District of Columbia v. Pearson, 923 F. Supp. 2d 82 (D.D.C. 2013) (ruling that any FAPE-related remedial relief requires not only ruling that district denied FAPE but also reasonably specific evidentiary basis); *cf.* Cupertino Union Sch. Dist. v. K.A., 75 F. Supp. 3d 1088 (N.D. Cal. 2014) (vacating and remanding IHO compensatory education award for lack of evidentiary support).

[234] OSEP Commentary Accompanying the IDEA regulations, 64 Fed. Reg. 12,613 (Mar. 12, 1999).

at the request of either party.[235]

126. Must IHOs redact their written decisions to avoid information that is not personally identifiable to the student(s)?

This issue is reserved to state law and policy, but OSEP has clarified that the SEA is ultimately responsible for redacting, before public dissemination of the decision, "any personal characteristics or other information that would make it possible to identify the student who is the subject of the written decision with reasonable certainty or make the student's identity easily traceable."[236] This redaction does not extend to the IHO's name, the district's name, or the case number unless it would result in personally identifiable information to the student(s).[237]

MISCELLANEOUS

127. What is the standard of judicial review for an IHO's decision?

The lower courts have varied in their interpretation and application of the Supreme Court's "due weight"[238] standard.[239] However, the general theme is to provide a 1) presumptive deference to the IHO's factual findings, particularly with regard to credibility of witnesses, and 2) de novo review for the IHO's legal conclusions.[240] The deference for factual findings tends to be less for those based on additional evidence[241] and more for those that are careful and thorough.[242] Overall, the party challenging an IHO's decision faces a steep "uphill climb."[243]

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[235] Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013) (updated and amended version of 2009 document).

[236] Letter to Anderson, 48 IDELR ¶ 105 (OSEP 2006).

[237] Letter to Anonymous, 67 IDELR ¶ 188 (OSEP 2016).

[238] Bd. of Educ. v. Rowley, 158 U.S. 176, 206 (1982).

[239] See, e.g., Perry A. Zirkel, *Judicial Appeals of Hearing/Review Officer Decisions under the IDEA*, 78 EXCEPTIONAL CHILD. 375 (2012); James Newcomer & Perry A. Zirkel, *An Analysis of Judicial Outcomes of Special Education Cases*, 65 EXCEPTIONAL CHILD. 469 (1999); *cf.* Perry A. Zirkel, *The Standard of Review Applicable to Pennsylvania's Special Education Appeals Panel*, 3 WIDENER J. PUB. L. 871 (1994).

[240] See, e.g., Shore Reg'l Sch. Dist. v. P.S., 381 F.3d 194 (3d Cir. 2004); Amanda J. v. Clark Cty. Sch. Dist., 267 F.3d 877 (9th Cir. 2001); Doyle v. Arlington Cty. Sch. Bd., 953 F.2d 100 (4th Cir. 1991).

[241] See, e.g., Alex R. v. Forrestville Cmty. Unit Sch. Dist., 375 F.3d 603 (7th Cir. 2004).

[242] See, e.g., Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884 (9th Cir. 1995). *See supra* notes 220–228 and accompanying text. However, as the Ninth Circuit recently concluded, the long duration of the hearing, the active involvement of the IHO, and the extended length of the written decision do not invoke judicial deference where the IHO failed to address all the issues and evidence. M.C. v. Antelope Union High Sch. Dist., 852 F.3d 840 (9th Cir. 2017).

[243] See, e.g., James S. v. Town of Lincoln, 59 IDELR ¶ 191 (D.R.I. 2012). For an empirical examination that shows the high correlation in outcomes upon judicial review, see Perry A. Zirkel, *Judicial Appeals of Hearing/Review Officer Decisions under the IDEA*, 78 EXCEPTIONAL CHILD. 375 (2012).

128. Does an IHO have authority to grant res judicata or collateral estoppel effect to a previous IHO decision?

Yes.[244]

129. Does an IHO's FAPE or placement decision for one academic year have a binding effect, via res judicata or collateral estoppel, on FAPE or placement for the next academic year?

No, according to the Ninth Circuit; each school year represents a separate issue.[245]

130. What is the statute of limitations for filing for a due process hearing under the IDEA?

In short, two years unless state law prescribes a different period. However, the interpretation and application are not that easy because the statutory language, which the regulations repeat without elaboration, 1) provides for two not completely clear exceptions; 2) requires determination of the triggering point of when the parent or district had actual or constructive notice of the alleged violation; and 3) may have a broader effect in terms of the scope of the violation and/or remedy.[246]

131. Have courts generally interpreted the statute of limitations period and its exceptions broadly or narrowly?

Although the case law is limited and not uniform, the majority of the courts have taken a relatively narrow view.[247]

132. Does an IHO have authority to confer consent decree status on a settlement agreement?

Only in limited circumstances. However, the case law is not sufficiently on point for a clearer answer. The court decisions concerning whether the parent is entitled to attorneys' fees as the prevailing party as the result of such a consent decree are only indirectly applicable and, in any event, have varying limits.[248]

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[244] See, e.g., Lillbask v. Conn. Dep't of Educ., 397 F.3d 77 (2d Cir. 2005); Horen v. Bd. of Educ., 950 F. Supp. 2d 946 (N.D. Ohio 2013); IDEA Pub. Charter Sch. v. Belton, 48 IDELR ¶ 90 (D.D.C. 2007).

[245] T.G. v. Baldwin Park Unified Sch. Dist., 57 IDELR ¶ 33 (9th Cir. 2011).

[246] 20 U.S.C. §§ 1415(b)(6)(B) and 1415(f)(3)(C)-(D)). For a recent but not necessarily universal interpretation, see G.L. v. Ligonier Valley Sch. Dist. Auth., 802 F.3d 601 (3d Cir. 2015). For a synthesis of the evolving case law, which is largely strict about the triggering date and exceptions but much more varied about the remedial effect, see, e.g., Perry A. Zirkel, *Of Mouseholes and Elephants: The Statute of Limitations for Impartial Hearings Under the Individuals with Disabilities Education Act*, 35 J. NAT'L ASS'N ADMIN. L. JUDICIARY 305 (2016).

[247] *Compare, e.g.* D.K. v. Abington Sch. Dist., 696 F.3d 233 (3d Cir, 2012); W.H. v. Schuykill Valley Sch. Dist., 954 F. Supp. 2d 315 (E.D. Pa. 2013), *with* Ravenswood City Sch. Dist. v. J.S., 870 F. Supp. 2d 780, 59 IDELR ¶ 77 (N.D. Cal. 2012).

[248] *Compare* A.R. v. N.Y.C. Dep't of Educ., 407 F.3d 65 (2d Cir. 2005) (yes), *with* Maria C. v. Sch. Dist., 142 F. App'x 78 (3d Cir. 2005) (not without proper order); Traverse Bay Sch. Dist. v. Mich. Dep't of Educ., 49 IDELR ¶ 156 (W.D. Mich. 2008) (not without specified requisites).

133. May lay advocates represent parents at due process hearings?

The answer is a matter of state law.[249] Approximately 10 states expressly prohibit their representation, and approximately 12 expressly permit it.[250] In the other states, the decision would appear to be in the IHO's discretion, with some IHOs not allowing it as a matter of legal ethics in terms of the unauthorized practice of law.[251]

134. To whatever extent it may bear on the IHO's position in the previous item, if the lay advocate provides such representation, are his/her communications privileged at subsequent judicial proceedings to the same extent as allowed under the attorney-client privilege?

Yes, according to a published federal magistrate's decision in New Jersey.[252]

135. May an IHO remand a case back to the district for further action or information rather than deciding the case?

No, such action would appear to violate the IDEA's imperative for a timely final decision.[253]

136. Is it advisable for an IHO to use the term "mental retardation" in a written decision referring to a child with this classification?

Not any longer. On October 5, 2010, the President signed legislation popularly known as "Rosa's law" that changes the reference from "mental retardation" in the IDEA and other federal legislation and regulations, such as Section 504, to "intellectual disability."[254]

137. May a state, via its procedures or IHO, limit the issues to those raised previously at the IEP team level?

Not according to OSEP, because such notice limits "would impose additional procedural hurdles

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[249] 34 C.F.R. § 300.512(a) (1).

[250] Perry A. Zirkel, *Lay Advocates and Parent Experts under the IDEA*, 217 EDUC. L. REP. 19 (2007).

[251] *But cf.* Kay Seven & Perry A. Zirkel, *In the matter of Arons: Construction of the IDEA's Lay Advocate Provision Too Narrow?* 9 GEORGETOWN J. ON POVERTY L. & POL'Y 193 (2002) (criticizing the Delaware decision).

[252] Woods v. N.J. Dep't of Educ., 858 F. Supp. 51 (D.N.J. 1993). The court did not definitively rule on the related question of work-product protection, although seeming to lean in the same directions for the answer. *Id*.

[253] See, e.g., Muth v. Cent. Bucks Sch. Dist., 839 F.2d 113 (3d Cir. 1988), *rev'd on other grounds sub nom. Dellmuth v. Muth*, 491 U.S. 223 (1989); *cf.* M.Z. v. Bethlehem Area Sch. Dist., 521 F. App'x 74 (3d Cir. 2013), *cert. denied*, 134 S. Ct 479 (2013) (ruling that upon finding the district's evaluation inappropriate, the IHO must approve the parent's request for an independent educational evaluation at public expense rather than ordering curative measures for the district's evaluation).

[254] 124 STAT. 2643 (2010).

on the right to a due process hearing that are not contemplated by the IDEA."[255]

138. May an IHO reconsider his/her decision upon the request of either party or both parties?

Only if 1) allowed by the state's applicable procedures and 2) the reconsideration is before the final decision and is issued within the 45-day, or properly extended, timeline.[256]

139. May an IHO clarify his/her decision upon the request of either party or both parties?

Only if allowed by the state's applicable procedures and within a very limited time.[257]

140. Does an IHO have the authority to retain jurisdiction *sua sponte*?

No according to the limited applicable case law in light of the finality requirement for IHO decisions.[258]

141. Do parents have the right to place under seal the transcript and exhibits of an open due process hearing and for which the redacted IHO decision is available on the SEA website?

Yes, according to an unpublished federal district court decision in Ohio. The court relied on FERPA and the child's right to privacy.[259]

142. Does the IDEA permit interlocutory appeals of IHO prehearing orders or interim rulings (e.g., partial dismissal) to court?

No, according various courts.[260]

143. In a tuition reimbursement case, does the IDEA require payment during the stay-put?

Not necessarily, according to OSEP. It is a matter of state law, as interpreted by IHOs and courts.[261] However, various courts have interpreted stay-put to apply to the hearing officer's (or,

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[255] Letter to Lenz, 37 IDELR ¶ 95 (OSEP 2002); *see also* Letter to Dowaliby, 38 IDELR ¶ 14 (OSEP 2002); Letter to Zimberlin, 34 IDELR ¶ 150 (OSEP 2000).

[256] C.C. v. Beaumont Indep. Sch. Dist., 65 IDELR ¶ 109 (E.D. Tex. 2015); Letter to Colleye, 111 LRP 45430 (OSEP 2010); Letter to Weiner, 57 IDELR ¶ 79 (OSEP 2011). For the similar but separable issue of whether the state may seek clarification of the IHO's decision via the complaint resolution process, see Gumm v. Nev. Dep't of Educ., 113 P.3d 853 (Nev. 2005).

[257] See, e.g., T.G. v. Midland Sch. Dist., 848 F. Supp. 2d 902 (N.D. Ill. 2012); *see also* 71 Fed. Reg. 12,613 (Mar. 12, 1999).

[258] See, e.g., Indep. Sch. Dist. No. 283 v. S.D., 948 F. Supp. 860 (D. Minn. 1995).

[259] Oakstone Cmty. Sch. v. Williams, 58 IDELR ¶ 256 (S.D. Ohio 2012).

[260] M.M. v. Lafayette Sch. Dist., 681 F.3d 1082 (9th Cir. 2012); Hopewell Valley Reg'l Bd. of Educ. v. J.R., 67 IDELR ¶ 202 (D.N.J. 2016); I.K. v. Sch. Dist. of Haverford Twp., 961 F. Supp. 2d 674 (E.D. Pa. 2013). Stay-put is a possible exception. See, e.g., Houston Indep. Sch. Dist. v. V.P., 582 F.3d 576 (5th Cir. 2011).

[261] Letter to Philpot, 60 IDELR ¶ 140 (OSEP 2012).

in a two-tier state, the review officer's) decision ordering tuition reimbursement.[262]

144. May a school district delay implementation of an impartial hearing officer's remedial order in a decision in favor of the parent prior to expiration of the period for appeal?

It depends, according to OSEP. The threshold criteria are whether 1) state law allows it, and 2) the state's period for the appeal is reasonable.[263] However, the ultimate criterion is what is a "reasonable period of time" in terms of the particular case, which is a factual matter based on various factors including the timing of the district's decision to appeal and the nature of the relief that the IHO ordered.[264]

145. Does an IHO state a cognizable claim of abuse of process against a parent whose complaint for judicial appeal includes a § 1983 claim against the IHO filled with foul and demeaning language about the IHO? If not, is the IHO's suit for abuse for process frivolous, thus meriting sanctions?

Not in the Second Circuit according to a recent decision.[265] The reason for this answer to the first question that under the applicable state law, which was New York in this case, the improper use must be after, not in, the process, i.e., complaint. The reason for this answer to the second question is that the law was not entirely clear or settled for this claim.

146. Do IHOs have authority to enter a contingent final order?

Yes, in limited circumstances, according to a recent federal district court case. As the second step of its analysis, the court concluded that the IHO in the circumstances of this case, which included supporting standard operating procedures and appropriate standard practices, did not abuse her discretion in conditionally dismissing the parent's case with prejudice if she did not file a new complaint within 30 days.[266]

147. Do IHOs have a constitutional right to a hearing upon their termination?

No, according to the limited case law authority where the IHO received notice of the findings and an opportunity to reply in writing under the applicable state law.[267]

148. Is an IHO's prehearing order appealable to court?

No, according to the Ninth Circuit.[268] The court reasoned that the principles underlying the

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[262] See, e.g., Joshua A. v. Rocklin Unified Sch. Dist., 559 F.3d 1036 (9th Cir. 2009); Bd. of Educ. v. Schutz, 290 F.3d 476 (2d Cir. 2002); St. Tammany Parish Sch. Bd. v. State of La., 142 F.3d 776 (5th Cir. 1998); Susquenita v. Raelee S., 96 F.3d 78 (3d Cir. 1996).

[263] Letter to Anonymous, 29 IDELR 179 (OSEP 1993).

[264] Letter to Voigt, 64 IDELR ¶ 220 (OSEP 2014).

[265] Luo v. Baldwin Union Free Sch. Dist., 62 IDELR ¶ 260 (E.D.N.Y. 2014).

[266] Silva v. District of Columbia, 57 F. Supp. 3d 62 (D.D.C. 2014).

[267] Tyk v. N.Y. State Educ. Dep't, 796 N.Y.S.2d 405 (App. Div. 2005).

[268] M.M. v. Lafayette Sch. Dist., 681 F.3d 1082 (9th Cir. 2012).

"final judgment rule"—the promotion of judicial efficiency and avoidance of multiple lawsuits—also applied to reviews of administrative decisions under the IDEA.

149. Does an IHO have authority to order a district to comply with a violated procedural requirement even if the violation does not amount to a denial of FAPE?

Yes, just as long the order does not extend to relief that would require denial of FAPE, such as compensatory education.[269]

150. May an SEA assign cases to the same IHO who heard earlier one with the same parties and issue so as to resolve possible res judicata or collateral estoppel?

Yes, according to OSEP.[270]

151. Must the state make hearing officer decisions available to the public?

Yes, with FERPA-required redaction, which includes information that (a) would make the student identifiable with reasonable certainty or, according to OSEP, (b) would "make the student's identity easily traceable if disclosed to the school community or the community at large."[271]

152. In the wake of a parent filing a complaint for investigation under the SEA's complaint procedures process, may a district file for a due process hearing on the same issues to trigger the IDEA regulations' mandatory deferral by the complaint procedures process?

OSEP strongly encouraged districts not to do so, instead at least resorting to mediation. Here is OSEP's rationale:

> Public agencies that seek to force parents who have already exercised their right to file a State complaint into a potentially more adversarial due process hearing harm the "cooperative process" that should be the goal of all stakeholders. Moreover, diverting resources into adversarial processes between parents and public agencies is contrary to Congressional intent in the 2004 amendments to IDEA's dispute resolution procedures to give parents and schools expanded opportunities to resolve their disagreements in positive and constructive ways.[272]

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[269] 20 U.S.C. § 1415(f)(3)(E)(iii) (2012); Dawn G. v. Mabank Indep. Sch. Dist., 63 IDELR ¶ 63 (N.D. Tex. 2014).

[270] Letter to McDowell, EHLR 213: 162 (OSEP 1988).

[271] Letter to Anonymous, 67 IDELR ¶ 188 (OSEP 2016).

[272] Dear Colleague Letter, 65 IDELR ¶ 151 (OSEP 2015).