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**IMPARTIAL HEARINGS UNDER THE IDEA:
LEGAL ISSUES AND ANSWERS**

© January 2016*

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* This document is an updated revision of the original January 2013 version.

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 letters³ 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.

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*, __ EDUC. L. REP. __ (forthcoming 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 of the IDEA and, within their jurisdictions, court decisions, they provide a nationally applicable interpretation that courts tend to find persuasive. See, e.g., Perry A. Zirkel, *Do OSEP Policy Letters Have Legal Weight?* 171 EDUC. L. REP. 391 (2003).

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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 in these cases, generally not requiring the appearance of impropriety standard that applies

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).

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).

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 of his or her selection conditional upon the parent's approval violate the IDEA?

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

IHO IMMUNITY

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

Yes.¹¹

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 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).

¹¹ 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); *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 Cnty. 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.¹² 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.¹³ 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."¹⁴

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).¹⁵ 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.¹⁶ 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,¹⁷ some states have adopted laws saying so.¹⁸

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,¹⁹ waiver of the resolution session must be mutual (and in writing).²⁰ A recent court decision seems to support

¹² 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).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *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).

¹⁶ Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013); 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); 71 Fed. Reg. 46,704 (Aug. 14, 2006).

¹⁷ 71 Fed. Reg. 46,704 (Aug. 16, 2006).

¹⁸ See, e.g., OHIO ADMIN. CODE 3301-51-05(K)(9)(a)(3) (2009).

¹⁹ 34 C.F.R. § 300.506(b)(1) (2011).

²⁰ *Id.* § 300.532(c)(3). The parties' other option is a mutual agreement to mediation. *Id.*

this interpretation.²¹ 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.²²

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.²³

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.²⁴

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,²⁵ 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."²⁶

12. Would a parent's request to participate in the resolution session by phone 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.²⁷

²¹ *Spencer v. Dist. of Columbia*, 416 F. Supp. 2d 5 (D.D.C. 2006).

²² 34 C.F.R. § 300.510(b)(3)-(4).

²³ *Massey v. Dist. of Columbia*, 400 F. Supp. 2d 66 (D.D.C. 2005).

²⁴ Letter to Casey, 61 IDELR ¶ 203 (OSEP 2013).

²⁵ Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013).

²⁶ *Id.*

²⁷ Letter to Walker, 59 IDELR ¶ 262 (OSEP 2012).

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.²⁸ The specified period is 15 calendar days,²⁹ 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.³⁰

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.³¹

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.³² 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.³³

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 on day 31.³⁴

²⁸ 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).

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

³⁰ *See supra* note 20 and accompanying text.

³¹ 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).

³² 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. Dist. 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).

³³ Dep't of Educ. v. T.G., 56 IDELR ¶ 97 (D. Haw. 2011).

³⁴ 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.*

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.”³⁵

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.³⁶

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.”³⁷

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.”³⁸

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

Not necessarily.³⁹

³⁵ 71 Fed. Reg. 46698 (Aug. 14, 2006).

³⁶ Letter to Lawson, 55 IDELR ¶ 232 (OSEP 2010).

³⁷ Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013).

³⁸ *Id.*

³⁹ 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).

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.”⁴⁰

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.⁴¹

SUFFICIENCY PROCESS

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

No.⁴²

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.⁴³

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.⁴⁴

⁴⁰ J.Y. v. Dothan City Bd. of Educ., 63 IDELR ¶ 33 (M.D. Ala. 2014).

⁴¹ *Id.*

⁴² 34 C.F.R. § 300.508(d).

⁴³ Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013).

⁴⁴ *Id.*

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.⁴⁵ 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.⁴⁶ 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.⁴⁷

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.⁴⁸

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.⁴⁹

⁴⁵ *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).

⁴⁶ *Alexandra R. v. Brookline Sch. Dist.*, 53 IDELR ¶ 93 (D.N.H. 2009); *see also* *Escambia Cnty. 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).

⁴⁷ *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.

⁴⁸ *Jalloh v. Dist. of Columbia*, 535 F. Supp. 2d 13 (D.D.C. 2008); *Sykes v. Dist. of Columbia*, 518 F. Supp. 2d 261 (D.D.C. 2007).

⁴⁹ Letter to Inzelbuch, 62 IDELR ¶ 122 (OSEP 2013).

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.⁵⁰ 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.⁵¹ Other courts have extended this answer even if the child's residency changes.⁵² OSEP agrees with this answer.⁵³ 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."⁵⁴ 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.⁵⁵

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.⁵⁶

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.⁵⁷

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."⁵⁸

⁵⁰ D.S. v. Dist. of Columbia, 699 F. Supp. 2d 229 (D.D.C. 2010); *see also* L.R.L. v. Dist. of Columbia, 896 F. Supp. 2d 69 (D.D.C. 2012).

⁵¹ 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.

⁵² See, e.g., D.H. v. Lowndes Cnty. 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).

⁵³ Letter to Goetz & Reilly, 57 IDELR ¶ 80 (OSEP 2011).

⁵⁴ Thompson v. Bd. of Educ., 144 F.3d 574 (8th Cir. 1998).

⁵⁵ Letter to Goetz & Reilly, 58 IDELR ¶ 230 (OSERS 2012).

⁵⁶ A.H. v. Independence Sch. Dist., 466 S.W.3d 17 (Mo. Ct. App. 2015).

⁵⁷ 64 Fed. Reg. 12,613 (Mar. 12, 1999); Letter to Wilde, 113 LRP 11932 (OSEP 1990).

⁵⁸ 71 Fed. Reg. 46,706 (Aug. 14, 2006).

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.⁵⁹ However, the IHO does not have jurisdiction in such cases as the appellate mechanism for the SEA’s CRP rulings.⁶⁰

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.⁶¹ 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.⁶²

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.⁶³

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

Yes, according to a recent Ninth Circuit decision.⁶⁴

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

Yes.⁶⁵

⁵⁹ 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).

⁶⁰ 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).

⁶¹ 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)

⁶² 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). 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).

⁶³ Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013).

⁶⁴ *Compton Unified Sch. Dist. v. Addison*, 598 F.3d 1191 (9th Cir. 2010).

⁶⁵ *Lillbask v. Conn. Dep’t of Educ.*, 397 F.3d 77 (2d Cir. 2005).

38. 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.⁶⁶

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

Not in most cases.⁶⁷

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

Yes.⁶⁸

41. 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.⁶⁹

42. 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.⁷⁰ 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."⁷¹

43. 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.⁷²

⁶⁶ See, e.g., *N.J. Protection & Advocacy v. N.J. Dep't of Educ.*, 563 F. Supp. 2d 474 (D.N.J. 2008).

⁶⁷ 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).

⁶⁸ 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 Annotated Overview, 286 EDUC. L. REP. 12 (2013). 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).

⁶⁹ Letter to Lipsett, 52 IDELR ¶ 47 (OSEP 2008).

⁷⁰ 34 C.F.R. §§ 300.300(b)(3)(i) and 300.300(b)(4)(ii).

⁷¹ 73 Fed. Reg. 73,011 (Dec. 1, 2008).

⁷² *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).

44. 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.”⁷³ Such consent disputes when concerned with evaluation, rather than services, may be another matter.⁷⁴

45. 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,⁷⁵ the more defensible answer would appear to be “it 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,⁷⁶ 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.⁷⁷

46. 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.⁷⁸

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

The limited case law is unsettled on this question. Some jurisdictions support an affirmative

⁷³ Letter to Cox, 54 IDELR ¶ 60 (OSEP 2009); *see also* Letter to Ward, 56 IDELR ¶ 237 (OSEP 2010).

⁷⁴ *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).

⁷⁵ *See, e.g.,* Bourne Pub. Sch., 37 IDELR ¶ 261 (Mass. SEA 2002); Northwest R-1 Sch. Dist., 40 IDELR ¶ 221 (Mo. SEA 2004); Fairfax Cnty. Pub. Sch., 38 IDELR ¶ 275 (Va. SEA 2003).

⁷⁶ 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).

⁷⁷ *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.

⁷⁸ A.O. *ex rel.* M.W. v. El Paso Indep. Sch. Dist., 368 F. App’x 539 (5th Cir. 2010).

answer,⁷⁹ but other courts say no.⁸⁰ 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.⁸¹ Whether exhaustion applies to judicial enforcement of settlement agreements is a separate issue, which depends in part on the terms of the settlement agreement.⁸²

48. 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 process⁸³ and, alternatively, the courts,⁸⁴ rather than the IHO process.⁸⁵

⁷⁹ See, e.g., *Mr. J. v. Bd. of Educ.*, 32 IDELR ¶ 202 (D. Conn. 2000); *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).

⁸⁰ See, e.g., *H.C. v. Colton-Pierrepoint Cent. Sch. Dist.*, 341 F. App'x 687 (2d Cir. 2009); *J.K. v. Council Rock Sch. Dist.*, 833 F. Supp. 2d 436, 450 (E.D. Pa. 2011); *Sch. Bd. of Lee Cnty. v. M.C.*, 35 IDELR ¶ 273 (Fla. Dist. Ct. App. 2001).

⁸¹ Letter to Shaw, 50 IDELR ¶ 78 (OSEP 2007).

⁸² *F.H. v. Memphis City Sch.*, 64 F.3d 638 (6th Cir. 2014).

⁸³ See, e.g., *Wyner v. Manhattan Beach Unified Sch. Dist.*, 223 F.3d 1026, 1028-29 (9th Cir. 2000); *B.D. v. Dist. 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).

⁸⁴ 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); *cf.* *D.E. v. Cent. Dauphin Sch. Dist.*, 765 F.3d 260 (3d Cir. 2014); *Dudley v. Lower Merion Sch. Dist.*, 768 F. Supp. 2d (E.D. Pa. 2011) (alternate avenue of IDEA itself). 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*

49. 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.”⁸⁶ On the other hand, the limited case law arguably answers “no” to this question more generally as a matter of remedial authority, whether for declaratory⁸⁷ or injunctive⁸⁸ relief.

50. 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.⁸⁹

51. 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

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).

⁸⁵ However, where the district is the initiating party, the outcomes 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).

⁸⁶ 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.

⁸⁷ See, e.g., Saki v. State of Haw., Dep’t of Educ., 50 IDELR ¶ 103 (D. Haw. 2008); Mifflin Cnty. 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 second 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.

⁸⁸ See, e.g., C.W.L. v. Pelham Free Sch. Dist., ___ F. Supp. 3d ___ (S.D.N.Y. 2015); Dist. of Columbia v. Walker, ___ F. Supp. 3d ___ (D.D.C. 2015); Lofisa S. v. State of Haw. Dep’t of Educ., 60 IDELR ¶ 191 (D. Haw. 2013); Sch. Bd. of Martin Cnty. 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*.

⁸⁹ Paul K. *ex rel.* Joshua K. v. State of Haw., 567 F. Supp. 2d 1231, 1236 (D. Haw. 2008).

his discretion, would address whether such a violation has occurred.”⁹⁰

52. 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.⁹¹

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

No, according to a recent decision in California.⁹²

TIMELINES IN GENERAL

54. 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.⁹³

55. Does an IHO’s exceeding the 45-day regulatory deadline constitute a valid basis for appeal?

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.⁹⁴ Conversely, in the minority of cases where the court concludes that this procedural violation is prejudicial, this conclusion may contribute to one or more consequences to the defendant LEA—attorneys’ fees,⁹⁵ an exception to the exhaustion

⁹⁰ Letter to Ramirez, 60 IDELR ¶ 230 (OSEP 2012); *cf.* Dist. 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).

⁹¹ See, e.g., Morris v. Dist. of Columbia, 38 F. Supp. 3d 57 (D.D.C. 2014).

⁹² Douglas v. Cal. Office of Admin. Hearings, 78 F. Supp. 3d 942 (N.D. Cal. 2015).

⁹³ 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*.

⁹⁴ 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); Grant v. Indep. Sch. Dist. No. 11, 43 IDELR ¶ 220 (D. Minn. 2005); Wilkins v. Dist. of Columbia, 571 F. Supp. 2d 163 (D.D.C. 2008); O.O. v. Dist. 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).

⁹⁵ See, e.g., Scorch v. Dist. 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. New York City 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).

doctrine,⁹⁶ the extension of the period for tuition reimbursement,⁹⁷ other remediable denial of FAPE,⁹⁸ or the possibility (under Sec. 504) of compensatory damages.⁹⁹

56. 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 and for specific periods of time;¹⁰⁰ and 2) the defendant agency—whether the LEA or the SEA—ultimately must be able to show the documentation and justification for the extensions.¹⁰¹

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

Yes, subject to state law,¹⁰² denying continuances is within the good faith discretion of IHOs with due consideration to unrepresented parents.¹⁰³

⁹⁶ 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).

⁹⁷ See, e.g., *Rose v. Chester Cnty. 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).

⁹⁸ *Miller v. Monroe Sch. Dist.*, ___ F. Supp. 3d ___ (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 postponements); *Blackman v. Dist. 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).

⁹⁹ *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).

¹⁰⁰ 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).

¹⁰¹ 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).

¹⁰² 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).

¹⁰³ 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 Cnty. 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).

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

Not, under the preemption doctrine,¹⁰⁴ if they are provide less protection to the child, unless the IDEA expressly provides for state variation, as it does for the limitations periods¹⁰⁵ or for evaluation.¹⁰⁶

EXPEDITED HEARINGS

59. 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.¹⁰⁷

60. 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.¹⁰⁸

61. 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).¹⁰⁹ 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.¹¹⁰ 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.¹¹¹

¹⁰⁴ 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., *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U. S. 645, 655 (1995).

¹⁰⁵ 34 C.F.R. §§ 300.507(a)(2) and 300.516(b).

¹⁰⁶ *Id.* § 300.301(c).

¹⁰⁷ *Id.* § 300.532(c)(1).

¹⁰⁸ *Id.* For elaboration, see Letter to Huefner, 47 IDELR ¶ 228 (OSEP 2007).

¹⁰⁹ *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.

¹¹⁰ 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).

¹¹¹ *Id.*

62. Do the IDEA provisions for specific IHO extensions apply, whether directly or via state law, to expedited hearings?

Arguably 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.¹¹²

63. 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.”¹¹³ 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.¹¹⁴

64. 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.¹¹⁵

HEARING PROCEDURES, INCLUDING EVIDENTIARY MATTERS

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

The IDEA does not provide for discovery (beyond the five-day rule),¹¹⁶ 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.¹¹⁷ However, in a Florida case, the appellate court held that in the absence of state law the IHO lacked authority to order discovery.¹¹⁸

¹¹² 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)).

¹¹³ 71 Fed. Reg. 46,726 (Aug. 14, 2006).

¹¹⁴ *B.G. v. Ocean City Bd. of Educ.*, 64 IDELR ¶ 105 (D.N.J. 2014).

¹¹⁵ Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013).

¹¹⁶ 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).

¹¹⁷ Letter to Stadler, 24 IDELR 973 (OSEP 1996).

¹¹⁸ *S.T. v. Sch Bd. of Seminole Cnty.*, 783 So. 2d 1231 (Fla. Dist. Ct. App. 2001).

66. Does the IDEA require a prehearing conference?

No, although it is generally regarded as best practice for IHOs, and some state laws require it.¹¹⁹

67. 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.¹²⁰

68. 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.”¹²¹

69. 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.¹²²

70. 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 sessions¹²³ and implicitly with regard to complaints that the hearing officer deems to be insufficient.¹²⁴ A federal district court recently upheld dismissal with prejudice where the parents repeatedly violated the IHO’s hearing orders.¹²⁵ 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.¹²⁶ The scope of other circumstances and the extent of doing so “with prejudice” would appear to be a matter of state law.¹²⁷ In general, it would appear to be advisable to 1) hold a hearing where the basis is a factual matter of

¹¹⁹ See, e.g., 105 ILL. COMP. STAT. ANN. 5/14-8.02a(g)(40).

¹²⁰ 34 C.F.R. § 300.515(d).

¹²¹ *G.M. v. Dry Creek Joint Elementary Sch. Dist.*, 595 F. App’x 698 (9th Cir. 2014).

¹²² 34 C.F.R. § 300.508(d)(3).

¹²³ 34 C.F.R. § 300.510(b)(4).

¹²⁴ *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).

¹²⁵ *Edward S. v. W. Noble Sch. Corp.*, 63 IDELR ¶ 34 (N.D. Ind. 2014).

¹²⁶ *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).

¹²⁷ 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).

material dispute¹²⁸; 2) limit dismissing the case with prejudice to cases of rather egregious conduct by the filing party, whether separately sanctionable or not¹²⁹; and 3) issue a written opinion with factual findings and legal conclusions sufficient to withstand judicial review.¹³⁰ 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.¹³¹

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

Yes.¹³² For example, the weighing of testimony, even in the absence of rebuttal or objection, is within the IHO's authority.¹³³ The generally applicable judicial standard of review is abuse of discretion, which usually favors the IHO.¹³⁴ 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.¹³⁵ Similarly, courts have provided

¹²⁸ See, e.g., Hazelton Area Sch. Dist., 36 IDELR ¶ 30 (Pa. SEA 2001).

¹²⁹ See, e.g., Bd. of Educ. of Hillsdale Cmty. Sch., 32 IDELR ¶ 62 (Mich. SEA 1999).

¹³⁰ For an example of an IHO decision 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).

¹³¹ *Silva v. Dist. 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 refiling 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..

¹³² 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)

¹³³ *McAllister v. Dist. of Columbia*, 53 F. Supp. 3d 55 (D.D.C. 2014).

¹³⁴ 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. Dist. 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). For further support, 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").

¹³⁵ *A.G. v. Dist. of Columbia*, 794 F. Supp. 2d 133 (D.D.C. 2011); *Gill v. Dist. of Columbia*, 751 F. Supp. 2d 104 (D.D.C. 2010), *further proceedings*, 770 F. Supp. 2d 112 (D.D.C. 2011); *Henry v. Dist. of Columbia*, 750 F. Supp. 2d 94 (D.D.C. 2010).

ample latitude to IHOs in maintaining an efficient completion of the case, keeping the parties focused on the issues.¹³⁶

72. 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 the witness's pertinent experience with the child¹³⁷ and the witness's relevant expertise.¹³⁸

73. 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.¹³⁹ 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.¹⁴⁰

74. 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.¹⁴¹ Although OSEP has referred to the IHO's responsibility "to accord each party a meaningful opportunity to exercise these rights during the course of the hearing,"¹⁴²

¹³⁶ See, e.g., *A.M. v. Dist. of Columbia*, 933 F. Supp. 2d 13 (D.D.C. 2013).

¹³⁷ 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 Cnty. 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).

¹³⁸ 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).

¹³⁹ 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).

¹⁴⁰ 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).

¹⁴¹ Letter to Kerr, 22 IDELR 364 (OSEP 1994). For the prescribed hearing rights, see 34 C.F.R. § 300.512.

¹⁴² Letter to Anonymous, 23 IDELR 1073 (OSEP 1995).

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.¹⁴³ 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.¹⁴⁴

75. 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.¹⁴⁵ 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.¹⁴⁶

76. 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 attendance of witnesses."¹⁴⁷ However, except where the parties jointly agree or where state law

¹⁴³ 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. Dist. 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. Dist. 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).

¹⁴⁴ Letter to Kane, 65 IDELR ¶ 20 (OSEP 2015).

¹⁴⁵ 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."

¹⁴⁶ 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* *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 thrust 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).

¹⁴⁷ See, e.g., Letter to Anonymous, 23 IDELR 1073 (OSEP 1995) (citing 34 C.F.R. § 300.512(a)(2)).

provides such authority,¹⁴⁸ the applicable case law is inconclusive.¹⁴⁹

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

According to OSEP, yes.¹⁵⁰

78. 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.¹⁵¹

79. 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 covering the student with disabilities whose parent initiated the hearing also included identifiable information for 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.¹⁵²

80. Do IHOs have contempt powers?

No, unless state law provides such authority.¹⁵³

¹⁴⁸ See, e.g., *E.D. v. Enterprise City Bd. of Educ.*, 213 F. Supp. 2d 1252 (N.D. Ala. 2003).

¹⁴⁹ 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).

¹⁵⁰ Letter to Steinke, 28 IDELR 305 (OSEP 1997).

¹⁵¹ *S.A. v. Tulare Cnty. 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).

¹⁵² Letter to Anonymous, 113 LRP 14615 (FPCO 2013).

¹⁵³ See, e.g., *E.D. v. Enterprise City Bd. of Educ.*, 213 F. Supp. 2d 1252 (N.D. Ala. 2003).

81. 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.¹⁵⁴ The published case law is scant and somewhat supportive.¹⁵⁵

82. 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.¹⁵⁶

83. 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.¹⁵⁷

84. 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 that parent a choice,¹⁵⁸ 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."¹⁵⁹ The 2004 amendments have retained this choice-providing language. However, the choice is for one or the other, not both.¹⁶⁰

¹⁵⁴ Letter to Armstrong, 28 IDELR 303 (OSEP 1997).

¹⁵⁵ 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).

¹⁵⁶ *Philbin v. Bureau of Special Educ. Appeals*, 54 IDELR ¶ 96 (D. Mass. 2020).

¹⁵⁷ Letter to Stadler, 24 IDELR 973 (OSEP 1996).

¹⁵⁸ See, e.g., *Edward B. v. Paul*, 814 F.2d 52 (1st Cir. 1987).

¹⁵⁹ 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).

¹⁶⁰ Letter to Maldonado, 49 IDELR ¶ 257 (OSEP 2007).

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

Yes, according to OSEP.¹⁶¹

86. 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.¹⁶²

87. 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.¹⁶³

88. 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.¹⁶⁴

89. May an IHO admit hearsay evidence?

Generally yes unless state law dictates otherwise,¹⁶⁵ but relying on it in the IHO's decision without corroborative proof may be problematic.¹⁶⁶

90. 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,¹⁶⁷ although the results typically

¹⁶¹ Letter to Connelly, 49 IDELR ¶ 135 (OSEP 2007).

¹⁶² Zhou v. Bethlehem Area Sch. Dist., 976 A.2d 1284 (Pa. Commw. Ct. 2009).

¹⁶³ See, e.g., Kingsmore v. Dist. of Columbia, 466 F.3d 118 (D.C. Cir. 2006); J.R. v. Sylvan Union Sch. Dist., 50 IDELR ¶ 130 (E.D. Cal. 2008).

¹⁶⁴ See, e.g., J.W. v. Fresno Unified Sch. Dist., 611 F. Supp. 2d 1097 (E.D. Cal. 2009) (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).

¹⁶⁵ See, e.g., Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13 (D.D.C. 2008); Sykes v. Dist. 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).

¹⁶⁶ 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).

¹⁶⁷ See, e.g., Ford v. Long Beach Unified Sch. Dist., 291 F.3d 1086 (9th Cir. 2002); Indep. Sch. Dist. No. 413 v. H.M.J., ___ F. Supp. 3d ___ (D. Minn. 2015); J.Y. v. Dothan City Bd. of Educ., 63 IDELR ¶ 33 (M.D. Ala. 2014); Dep't of Educ., State of Haw. v. R.H., 61 IDELR ¶ 127 (D. Haw. 2013) (citing Dep't of Educ., State of Haw. v. E.B., 45 IDELR ¶ 249 (D. Haw. 2006)); A.I. v. Dist. of Columbia, 402 F.

only are usable as background information.¹⁶⁸

91. 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,¹⁶⁹ whereas the Fourth and Tenth Circuits have partially disagreed.¹⁷⁰ This approach considers the time of the educational decision, not the adjudicator’s deliberations, as controlling to determine appropriateness.

92. 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.¹⁷¹ Various circuits have adopted it but typically only in limited circumstances or with exceptions.¹⁷²

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

No,¹⁷³ unless the other either party agrees¹⁷⁴ or—at least in the Second Circuit—“opens the

Supp. 2d 152 (D.D.C. 2005); 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.* *Phyllene v. Huntsville City Bd. of Educ.*, ___ F. App’x ___ (11th Cir. 2015) (allowing evidence from beyond the limitations period to establish child find violation upon reevaluation).

¹⁶⁸ See, e.g., *Dep’t of Educ., State of Haw. v. E.B.*, 45 IDELR ¶ 249 (D. Haw. 2006).

¹⁶⁹ See, e.g., *R.E. v. New York City 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)

¹⁷⁰ See, e.g., *M.S. ex rel. Simchick v. Fairfax Cnty. 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).

¹⁷¹ 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).

¹⁷² See, e.g., *R.E. v. New York City 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).

¹⁷³ See, e.g., *R.E. v. New York City Dep’t of Educ.*, 694 F.3d 167, 187-88 (2d Cir. 2012); *Cnty. 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. Dist. of Columbia*, 53 F. Supp. 3d 55 (D.D.C. 2014); *T.G. v. New York City 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).

¹⁷⁴ 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);

door” (e.g., via its opening statement or via its questioning of witnesses).¹⁷⁵ 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.”¹⁷⁶ 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.¹⁷⁷

94. 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.¹⁷⁸

95. 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.¹⁷⁹

96. 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.¹⁸⁰

97. May an IHO order the evaluation of a 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 the IHO has this authority and that the evaluation is at public expense (i.e., the district is responsible for payment).¹⁸¹ The limits are those that apply to the district’s use of evaluators.¹⁸²

¹⁷⁵ M.H. v. New York City Dep’t of Educ., 685 F.3d 217, 250 (2d Cir. 2012); Y.S. v. New York City 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).

¹⁷⁶ A.S. v. New York City Dep’t of Educ., 573 F. App’x 63 (2d Cir. 2014) (citing C.F. v. New York City Dep’t of Educ., 746 F.3d 68, 78 (2d Cir. 2014)).

¹⁷⁷ J.W. v. New York City Dep’t of Educ., 95 F. Supp. 3d 592 (S.D.N.Y. 2015).

¹⁷⁸ 71 Fed. Reg. 46,706 (Aug. 14, 2006).

¹⁷⁹ B.P. v. New York City Dep’t of Educ., 841 F. Supp. 2d 605 (E.D.N.Y. 2012).

¹⁸⁰ Compare J.D. v. Kanawha Cnty. 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); Cnty. 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).

¹⁸¹ 34 C.F.R. § 300.502(d).

¹⁸² *Id.* § 300.502(e).

98. May school employees 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.”¹⁸³

99. 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.¹⁸⁴

100. 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.¹⁸⁵

DECISIONAL ISSUES

101. 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.¹⁸⁶

102. 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.”¹⁸⁷

¹⁸³ Letter to Reisman, 60 IDELR ¶ 293 (OSEP 2013).

¹⁸⁴ I.D. v. Westmoreland Sch. Dist., 17 IDELR 684 (D.N.H. 1991).

¹⁸⁵ Woods v. N.J. Dep’t of Educ., 858 F. Supp. 51 (D.N.J. 1993).

¹⁸⁶ Compare C.B. v. Dep’t of Educ., 322 F. App’x 20 (2d Cir. 2009) (academic only), with Mr. I. v. Maine Sch. Admin. Dist. No. 55, 480 F.3d 1 ¶ (1st Cir. 2007) (extends to social dimension).

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

103. Has the *Rowley* floor-based substantive standard for denial of FAPE changed as a result of the subsequent amendments to the IDEA?

No.¹⁸⁸

104. 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.¹⁸⁹

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

No.¹⁹⁰

106. 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.¹⁹¹

107. 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.¹⁹² However, some state laws have put the burden of proof in such cases on the district.¹⁹³ Conversely, lower courts have extended the Supreme Court's ruling to other issues, such as whether the child is eligible¹⁹⁴ and

¹⁸⁸ 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).

¹⁸⁹ 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*, __ J. NAT'L ASS'N ADMIN. L. JUDICIARY __ (forthcoming 2016).

Van Duyn v. Baker Sch. Dist., 5J, 502 F.3d 811 (9th Cir. 2007); see also *Sumter Cnty. Sch. Dist. v. Heffernan*, 642 F.3d 478 (4th Cir. 2011); *Melissa S. v. Sch. Dist.*, 183 F. App'x 184 (3d Cir. 2006); *Savoy v. Dist. of Columbia*, 844 F. Supp. 2d 273 (D.D.C. 2012).

¹⁹⁰ 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).

¹⁹¹ See, e.g., *Larson v. Indep. Sch. Dist. No. 316*, 40 IDELR ¶ 231 (D. Minn. 2004).

¹⁹² *Schaffer v. Weast*, 546 U.S. 49 (2005).

¹⁹³ 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).

¹⁹⁴ *Antoine M. v. Chester Upland Sch. Dist.*, 420 F. Supp. 2d 396, 45 IDELR ¶ 120 (E.D. Pa. 2006).

whether the child's placement is in the least restrictive environment (LRE).¹⁹⁵

108. 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.¹⁹⁶

WRITTEN DECISIONS

109. 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.¹⁹⁷

110. 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.¹⁹⁸ Conversely, where the IHO's legal findings have such support, courts generally afford them notable deference.¹⁹⁹ In general, the deference increases where the IHO's factual findings are careful

¹⁹⁵ L.E. v. Ramsey Bd. of Educ., 435 F.3d 384 (3d Cir. 2006).

¹⁹⁶ 34 C.F.R. § 300.516(c)(3).

¹⁹⁷ 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).

¹⁹⁸ See, e.g., M.O. v. Dist. of Columbia, 20 F. Supp. 3d 31 (D.D.C. 2013); S.G. v. Dist. 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. New York City 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. Dist. 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. Cnty. 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).

¹⁹⁹ See, e.g., D.B. v. Craven Cnty. Bd. of Educ., 32 IDELR ¶ 86 (4th Cir. 2000); Doyle v. Arlington Cnty. 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).

and thorough.²⁰⁰ 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.²⁰¹

111. 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.²⁰²

112. 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.²⁰³ Conversely, however, an IHO's legal conclusion that fails to reference the supporting facts may not receive judicial deference.²⁰⁴ 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).²⁰⁵

113. Do IHO 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.²⁰⁶

²⁰⁰ 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 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 Cnty. Bd. of Educ.*, 65 IDELR ¶ 66 (E.D.N.C. 2015).

²⁰¹ See, e.g., *G. v. Fort Bragg Dependent Sch.*, 343 F.3d 295, 303 (4th Cir. 2003).

²⁰² See, e.g., *B.E.L. v. State of Haw. Dep't of Educ.*, 63 F. Supp. 3d 1215 (D. Haw. 2014).

²⁰³ *Joshua A. v. Rocklin Unified Sch. Dist.*, 49 IDELR ¶ 249 (E.D. Cal. 2008), *aff'd*, 391 F. App'x 692 (9th Cir. 2009).

²⁰⁴ See, e.g., *Marc M. v. Dep't of Educ., State of Haw.*, 762 F. Supp. 2d 1235 (D. Haw. 2011).

²⁰⁵ *M.O. v. Dist. of Columbia*, 20 F. Supp. 3d 31 (D.D.C. 2013); *see also J.M. v. New York City Dep't of Educ.*, 62 IDELR ¶ 120 (S.D.N.Y. 2013) (unduly short analysis of the case issues).

²⁰⁶ See, e.g., *L.O. v. E. Allen Cnty. 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); *Dist. 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).

114. 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.²⁰⁷ Such corrections may be either *sua sponte* or, when its does not change the substance or outcome of the decision, at the request of either party.²⁰⁸

MISCELLANEOUS

115. 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”²⁰⁹ standard.²¹⁰ 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.²¹¹ The deference for factual findings tends to be less for those based on additional evidence²¹² and more for those that are careful and thorough.²¹³ Overall, the party challenging an IHO’s decision faces a steep “uphill climb.”²¹⁴

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

Yes.²¹⁵

²⁰⁷ OSEP Commentary Accompanying the IDEA regulations, 64 Fed. Reg. 12,613 (Mar. 12, 1999).

²⁰⁸ 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).

²⁰⁹ Bd. of Educ. v. Rowley, 158 U.S. 176, 206 (1982).

²¹⁰ 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).

²¹¹ See, e.g., Shore Reg’l Sch. Dist. v. P.S., 381 F.3d 194 (3d Cir. 2004); Amanda J. v. Clark Cnty. Sch. Dist., 267 F.3d 877 (9th Cir. 2001); Doyle v. Arlington Cnty. Sch. Bd., 953 F.2d 100 (4th Cir. 1991).

²¹² See, e.g., Alex R. v. Forrestville Cmty. Unit Sch. Dist., 375 F.3d 603 (7th Cir. 2004).

²¹³ See, e.g., Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884 (9th Cir. 1995). See notes 199–200 and accompanying text.

²¹⁴ 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).

²¹⁵ 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).

117. 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.²¹⁶

118. 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.²¹⁷

119. 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.²¹⁸

120. 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.²¹⁹

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

The answer is a matter of state law.²²⁰ Approximately 10 states expressly prohibit their representation, and approximately 12 expressly permit it.²²¹ 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

²¹⁶ T.G. v. Baldwin Park Unified Sch. Dist., 57 IDELR ¶ 33 (9th Cir. 2011).

²¹⁷ 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*, __ J. NAT'L ASS'N ADMIN. L. JUDICIARY (forthcoming 2016).

²¹⁸ Compare, e.g. D.K. v. Abington Sch. Dist., 696 F.3d 233 (3d Cir. 2012); W.H. v. Schuylkill 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).

²¹⁹ Compare A.R. v. New York City 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).

²²⁰ 34 C.F.R. § 300.512(a) (1).

²²¹ Perry A. Zirkel, *Lay Advocates and Parent Experts under the IDEA*, 217 EDUC. L. REP. 19 (2007).

ethics in terms of the unauthorized practice of law.²²²

122. 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.²²³

123. 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.²²⁴

124. 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, such as Section 504, to "intellectual disability."²²⁵

125. 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 on the right to a due process hearing that are not contemplated by the IDEA."²²⁶

126. 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.²²⁷

²²² *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).

²²³ *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.*

²²⁴ 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).

²²⁵ 124 STAT. 2643 (2010).

²²⁶ Letter to Lenz, 37 IDELR ¶ 95 (OSEP 2002).

²²⁷ *C.C. v. Beaumont Indep. Sch. Dist.*, 65 IDELR ¶ 109 (E.D. Tex. 2015); 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. Nevada Dep't of Educ.*, 113 P.3d 853 (Nev. 2005).

127. 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.²²⁸

128. 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.²²⁹

129. 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.²³⁰

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

No, according to a recent Ninth Circuit decision in light of the plain language of the IDEA and the final judgment principle.²³¹

131. 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.²³² However, various courts have interpreted stay-put to apply to the hearing officer's (or, in a two-tier state, the review officer's) decision ordering tuition reimbursement.²³³

132. 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 and that period is reasonable.²³⁴ 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.²³⁵

²²⁸ 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).

²²⁹ See, e.g., *Indep. Sch. Dist. No. 283 v. S.D.*, 948 F. Supp. 860 (D. Minn. 1995).

²³⁰ *Oakstone Cmty. Sch. v. Williams*, 58 IDELR ¶ 256 (S.D. Ohio 2012).

²³¹ *M.M. v. Lafayette Sch. Dist.*, 681 F.3d 1082 (9th Cir. 2012). Stay-put is a possible exception. See, e.g., *Houston Indep. Sch. Dist. v. V.P.*, 582 F.3d 576 (5th Cir. 2011).

²³² Letter to Philpot, 60 IDELR ¶ 140 (OSEP 2012).

²³³ 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).

²³⁴ Letter to Anonymous, 29 IDELR 179 (OSEP 1993).

²³⁵ Letter to Voigt, 64 IDELR ¶ 220 (OSEP 2014).

133. 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.²³⁶ 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 the this answer to the second question is that the law was not entirely clear or settled for this claim.

134. 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.²³⁷

135. 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.²³⁸

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

No, according to the Ninth Circuit.²³⁹ The court reasoned that the principles underlying the "final judgment rule"—the promotion of judicial efficiency and avoidance of multiple lawsuits—also applied to reviews of administrative decisions under the IDEA.

137. 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.²⁴⁰

²³⁶ Luo v. Baldwin Union Free Sch. Dist., 62 IDELR ¶ 260 (E.D.N.Y. 2014).

²³⁷ Silva v. Dist. of Columbia, 57 F. Supp. 3d 62 (D.D.C. 2014).

²³⁸ Tyk v. N.Y. State Educ. Dep't, 796 N.Y.S.2d 405 (App. Div. 2005).

²³⁹ M.M. v. Lafayette Sch. Dist., 681 F.3d 1082 (9th Cir. 2012).

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