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IMPARTIAL HEARINGS UNDER THE IDEA: LEGAL ISSUES AND ANSWERS

Updated and Revised

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The highlighted parts on this current version are updates since the 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). It does not cover the IHO's remedial authority, which is the subject of separate comprehensive coverage.[1] The sources are limited to the pertinent IDEA legislation and regulations, court decisions and the U.S. Department of Education's Office of Special Education's (OSEP) policy letters[2] 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] Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update*, 31 NAT'L ASS'N ADMIN. L. JUDICIARY J. 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).

[2] 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).

TABLE OF CONTENTS

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.[3]

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

No, training requirements are entirely a matter of state law,[4] which the courts have interpreted as not incorporated in the IDEA.[5]

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

[3] 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).

[4] 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).

[5] See, e.g., C.S. *ex rel.* Struble v. California 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).

to judges.[6] The leading but still not per se exception is *ex parte* communications.[7]

4. Would a school district's notification to an IHO of his or her selection subject to 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.[8]

IHO IMMUNITY

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

Yes.[9]

[6] 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).

[7] 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).

[8] 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).

[9] 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); 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. Indiana 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.[10] 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.[11] 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."[12]

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).[13] 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.[14] 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,[15] some states have adopted laws saying so.[16]

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,[17] waiver of the resolution session must be mutual (and in writing).[18] A recent court decision seems to support

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[10] 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).

[11] *Id.*

[12] *Id.*

[13] *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).

[14] 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).

[15] 71 Fed. Reg. 46,704 (Aug. 16, 2006).

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

[17] 34 C.F.R. § 300.506(b)(1) (2011).

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

this interpretation.[19] 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.[20]

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.[21]

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.[22]

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,[23] 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."[24]

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.[25]

[19] Spencer v. Dist. of Columbia, 416 F. Supp. 2d 5 (D.D.C. 2006).
[20] 34 C.F.R. § 300.510(b)(3)-(4).
[21] Massey v. Dist. of Columbia, 400 F. Supp. 2d 66 (D.D.C. 2005).
[22] Letter to Casey, 61 IDELR ¶ 203 (OSEP 2013).
[23] Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 61 IDELR ¶ 232 (OSEP 2013).
[24] *Id*.
[25] 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.[26] The specified period is 15 calendar days,[27] 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.[28]

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.[29]

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.[30] 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.[31]

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[32]

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[26] 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).

[27] 20 U.S.C. § 1415(f)(1)(b); 34 C.F.R. § 510(a).

[28] See *supra* note 18 and accompanying text.

[29] 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).

[30] 34 C.F.R. § 300.510(b)(5); *see also* 71 Fed. Reg. 46,702 (Aug. 14, 2006). For varying judicial consequences, *compare* O.O. v. District of Columbia, 573 F. Supp. 2d 41 (D.D.C. 2008) (concluding that LEA's failure to convene a resolution session constituted harmless error), *with* JMC & MEC v. Louisiana 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, settlement agreement before due process hearing was not enforceable).

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

[32] 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."[33]

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.[34]

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.[35]

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."[36]

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

Not necessarily.[37]

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[33] 71 Fed. Reg. 46698 (Aug. 14, 2006).

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

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

[36] *Id.*

[37] 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).

SUFFICIENCY PROCESS

22. 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.[38]

23. 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.[39]

24. 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.[40] 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.[41] 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.[42]

25. 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

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

[39] *Id*.

[40] M.S.-G. v. Lenape Reg'l High Sch. Dist. Bd. of Educ., 306 F. App'x 772 (3d Cir. 2009); *cf.* 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).

[41] 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).

[42] Knight v. Washington Sch. Dist., 56 IDELR ¶ 189 (8th Cir. 2011). According to the court, the proper resolution for the IHO is to dismiss the case without, not with, prejudice.

substantive rights—an appropriate sanction for failure to adhere to requirement.[43]

JURISDICTION

26. 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.[44]

27. 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.[45] 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.[46] Other courts have extended this answer even if the child's residency changes.[47] OSEP agrees with this answer.[48] 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."[49] 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.[50]

28. 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.[51]

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[43] 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).

[44] Letter to Inzelbuch, 113 LRP 32485 (OSEP 2013).

[45] 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).

[46] This obligation is different from the child find and proportional-services obligations for *f*r.e.children voluntarily placed in private schools, which are based on the school's location, not the child's residency. See *infra* note 55 and accompanying text.

[47] 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).

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

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

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

[51] 64 Fed. Reg. 12,613 (Mar. 12, 1999); Letter to Wilde, 113 LRP 11932 (OSEP 1990).

29. 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."[52]

30. 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.[53] However, the IHO does not have jurisdiction in such cases as the appellate mechanism for the SEA's CRP rulings.[54]

31. 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.[55] 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.[56]

32. 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.[57]

33. 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.[58]

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[52] 71 Fed. Reg. 46,706 (Aug. 14, 2006).

[53] 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).

[54] See, e.g., Virginia Office of Protection & Advocacy v. Virginia, 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).

[55] 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)

[56] 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).

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

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

34. 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.[59]

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

Not in most cases.[60]

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

Yes.[61]

37. 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.[62]

38. 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.[63]

39. 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.[64]

40. 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

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

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

[61] 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).

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

[63] 34 C.F.R. §§ 300.300(b)(3)(i) and 300.300(b)(4)(ii).

[64] *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).

exclusively (i.e., not under the IDEA) to the resolution mechanisms available "based on State or local law."[65] Such consent disputes when concerned with evaluation, rather than services, may be another matter.[66]

41. 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,[67] 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,[68] with one possible exception—if the issue concerns amending the child's record (based, for example, on inaccurate or misleading information), the IDEA regulations may be interpreted as reserving the matter exclusively for the FERPA hearing procedure.[69]

42. 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.[70]

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

The limited case law is unsettled on this question. Some jurisdictions support an affirmative answer,[71] but others, in unpublished decisions, say no.[72] 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

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

[66] 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).

[67] 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).

[68] 34 C.F.R. §§ 300.507(a) and 300.613-300.621.

[69] *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.

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

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

[72] See, e.g., H.C. v. Pierrepont Cent. Sch. Dist., 341 F. App'x 687 (2d Cir. 2009); Sch. Bd. of Lee Cnty. v. M.C., 35 IDELR ¶ 273 (Fla. Dist. Ct. App. 2001).

mediation or resolution processes.[73]

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

No. The, prevailing view is that the appropriate forums are the state complaint resolution process[74] and, alternatively, the courts,[75] rather than the H/RO process.[76]

45. 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."[77] On the other hand, the limited case law arguably answers "no" to this question more generally as a matter of remedial authority, whether for

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

[74] *See, e.g.*, Wyner v. Manhattan Beach Unified Sch. Dist., 223 F.3d 1026, 1028-29 (9th Cir. 2000); 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* Dispute Resolution Procedures under Part B of the IDEA, 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 H/RO 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).

[75] 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*. 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., A. v. Hartford Bd. of Educ., __ F. Supp. 2d __ (D. Conn. 2013); T.B. v. San Diego Unified Sch. Dist., 56 IDELR ¶ 152 (S.D. Cal. 2008).

[76] However, for a recent case where the enforcement route was a second IDEA hearing, see Bd. of Educ. v. Illinois 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).

[77] 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.

declaratory[78] or injunctive[79] relief.

46. 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.[80]

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

Yes. More specifically, according to OSEP, "there may be instances where a hearing officer, in his discretion, would address whether such a violation has occurred."[81]

TIMELINES IN GENERAL

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

It depends on the circumstances, especially whether the delay results in a denial of FAPE to the child. 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.[82] Conversely, if this procedural violation is prejudicial, this conclusion may contribute to one or more consequences to the defendant LEA—attorneys' fees,[83] an exception to the exhaustion

[78] See, e.g., Saki v. State of Hawaii, Dep't of Educ., 50 IDELR ¶ 103 (D. Hawaii 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.

[79] See, e.g., Lofisa S. v. State of Hawaii Dep't of Educ., 60 IDELR ¶ 191 (D. Hawii 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. Delaware 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*.

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

[81] 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).

[82] Heather S. v. Wisconsin, 125 F.3d 1045 (7th Cir. 1995); *see also* 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).

[83] See, e.g., Scorah v. Dist. of Columbia, 322 F. Supp. 2d 12 (D.D.C. 2004).

doctrine,[84] or the extension of the period for tuition reimbursement.[85] In a recent unpublished decision, the federal district court in Hawaii treated such a delay as a per se violation, but perhaps the dual status of Hawaii as the SEA and LEA may be a distinguishable factor.[86]

49. 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;[87] and 2) the defendant agency—whether the LEA or the SEA—ultimately must be able to show the documentation and justification for the extensions.[88]

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

Yes, subject to state law,[89] denying continuances is within the good faith discretion of IHOs with due consideration to unrepresented parents.[90]

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

Not, under the preemption doctrine,[91] if they are provide less protection to the child, unless the IDEA expressly provides for state variation, as it does for the limitations periods[92] or for evaluation.[93]

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[84] 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).

[85] 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).

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

[87] 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).

[88] 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).

[89] 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).

[90] See, e.g., P.J. v. Pomona Unified Sch. Dist. 248 F. App'x 775 (9th Cir. 2007); 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); O'Neil v. Shamokin Area Sch. Dist., 41 IDELR ¶ 154 (Pa. Commw. Ct. 2004).

[91] 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).

[92] 34 C.F.R. §§ 300.507(a)(2) and 300.516(b).

[93] *Id*. § 300.301(c).

EXPEDITED HEARINGS

52. 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.[94]

53. 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.[95]

54. 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).[96] 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.[97] 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.[98]

55. 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."[99]

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[94] *Id.* § 300.532(c)(1).

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

[96] *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.

[97] 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).

[98] *Id.*

[99] 71 Fed. Reg. 46,726 (Aug. 14, 2006).

56. 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.[100]

HEARING PROCEDURES, INCLUDING EVIDENTIARY MATTERS

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

The IDEA does not provide for discovery (beyond the five-day rule),[101] 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.[102] However, in a Florida case, the appellate court held that in the absence of state law the IHO lacked authority to order discovery.[103]

58. Does the IDEA require a prehearing conference?

No, although it is generally regarded as best practice for IHOs, and some state laws require it.[104]

59. 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.[105]

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

Hearing officers certainly have the authority for dismissal in certain circumstances. For example, the IDEA regulations provide this authority explicitly with regard to parents' failure to participate in resolution sessions[106] and implicitly with regard to complaints that the hearing officer deems to be insufficient.[107] A federal district court recently ruled that dismissal with prejudice should be reserved for extreme cases, with close calls—especially for *pro se* parents—being against this sanction.[108] The scope of other circumstances and the extent of doing so "with

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

[101] 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).

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

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

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

[105] 34 C.F.R. § 300.515(d).

[106] 34 C.F.R. § 300.510(b)(4).

[107] *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).

[108] Nickerson-Reti v. Lexington Pub. Sch., 893 F. Supp. 2d 276 (D. Mass. 2012).

prejudice" would appear to be a matter of state law.[109] In general, it would appear to be advisable to 1) hold a hearing where the basis is a factual matter of material dispute[110]; 2) limit dismissing the case with prejudice to cases of rather egregious conduct by the filing party, whether separately sanctionable or not[111]; and 3) issue a written opinion with factual findings and legal conclusions sufficient to withstand judicial review.[112]

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

Yes, including, for example, whether to take evidence for the period before the statute of limitations.[113] The generally applicable judicial standard of review is abuse of discretion, which usually favors the IHO.[114] 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.[115]

62. 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

[109] See, e.g, 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).

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

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

[112] 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).

[113] See, e.g., Ford v. Long Beach Unified Sch. Dist., 291 F.3d 1086 (9th Cir. 2002); Dep't of Educ., State of Hawaii v. E.B., 45 IDELR ¶ 249 (D. Hawaii 2006). 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 46699).

[114] 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 (Pa. Commw. Ct. 2010); *cf.* 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).

[115] 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).

the witness's pertinent experience with the child[116] and the witness's relevant expertise.[117]

63. 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.[118] If state law does not specify the applicable procedural rules for IHOs, the Federal Rules of Evidence would appear to provide guidance by analogy within the broad discretion of IHOs.[119]

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

Yes, just as long as the IHO provides the parties with the hearing rights that the regulations prescribe.[120] 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,"[121] the 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.

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[116] 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 Wisconsin, 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).

[117] 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).

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

[119] 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*, __ EDUC. L. REP. __ (forthcoming 2014).

[120] Letter to Kerr, 23 IDELR 364 (OSEP 1994). For the prescribed hearing rights, see 34 C.F.R. § 300.512.

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

65. Do IHOs have the discretion to determine the consequences of not meeting the 5-day disclosure deadline?

A literal reading of the regulation would suggest an answer of No.[122] 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.[123]

66. 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."[124] However, except where the parties jointly agree or where state law provides such authority,[125] an unpublished decision disagreed with the OSEP interpretation.[126]

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

According to OSEP, yes.[127]

68. 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.[128]

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[122] 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."

[123] 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 thrush of their testimony should be disclosed"). In the commentary accompanying the most recent IDEA regulations, OSEP added that nothing prevents parties from agreeing to a shorter period of time. 71 Fed. Reg. 46,706 (Aug. 14, 2006).

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

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

[126] Walled Lake Consol. Sch. v. Jones, 24 IDELR 738 (E.D. Mich. 1996).

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

[128] 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).

69. 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.[129]

70. Do IHOs have contempt powers?

No, unless state law provides such authority.[130]

71. 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.[131] The published case law is scant and somewhat supportive.[132]

72. 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.[133]

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

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

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

[132] See, e.g., G.M. v. Drycreek Joint Elementary Sch. Dist., 59 IDELR ¶ 224 (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); 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 NAT'L ASS'N ADMIN. L. JUDICIARY J. 1 (2012).

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

73. 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.[134]

74. 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,[135] 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."[136] The 2004 amendments have retained this choice-providing language.

75. 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.[137]

76. 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.[138]

77. 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.[139]

78. May an IHO admit hearsay evidence?

Generally yes unless state law dictates otherwise,[140] but relying on it in the IHO's decision without corroborative proof may be problematic.[141]

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

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

[136] 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).

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

[138] 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).

[139] 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).

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

Yes, but only as background information.[142]

80. 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,[143] whereas the Fourth and Tenth Circuits have partially disagreed.[144] This approach considers the time of the educational decision, not the adjudicator's deliberations, as controlling to determine appropriateness.

81. 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.[145] Various circuits have adopted it but typically only in limited circumstances or with exceptions.[146]

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

No,[147] unless the other either party agrees[148] or — at least in the Second Circuit—"opens the

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[140] See, e.g., 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).

[141] 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).

[142] See, e.g., Dep't of Educ. v. E.B., 45 IDELR ¶ 249 (D. Hawaii 2006).

[143] 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 Oregon, 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)

[144] 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).

[145] 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).

[146] 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); John M. v. Bd. of Educ., 502 F.3d 708 (7th Cir. 2007); A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 (4th Cir. 2007); Doe v. Defendant I, 898 F.3d 1106 (6th Cir. 1990); 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, __ N.E.2d __ (Ill. Ct. App. 2013).

[147] 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. California Special Educ. Hearing Office, 93 F.2d 1458 (9th Cir. 1996). For examples of enforcement of this stricture, see T.G. v. New York City Dep't of Educ., __ F. Supp. 2d __, *modified*, 62 IDELR ¶ 20 (S.D.N.Y. 2013); Saki v. State of Hawaii Dep't of Educ., 50 IDELR ¶ 103 (D. Hawaii 2008).

door" (e.g., via its opening statement or via its questioning of witnesses).[149]

83. 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.[150]

84. 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.[151]

85. 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.[152] The limits are those that apply to the district's use of evaluators.[153]

86. 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

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[148] 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);

[149] 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).

[150] 71 Fed. Reg. 46,706 (Aug. 14, 2006).

[151] *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); 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).

[152] 34 C.F.R. § 300.502(d).

[153] *Id*. § 300.502(e).

due process hearing."[154]

DECISIONAL ISSUES

87. 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.[155]

88. 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."[156]

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

No.[157]

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

Rather than 100% compliance, the judicial standard is failure to implement a material, i.e., substantial or significant, portion of the IEP.[158]

WRITTEN DECISIONS

91. 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.[159]

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[154] Letter to Reisman, 60 IDELR ¶ 293 (OSEP 2013).

[155] *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).

[156] 20 U.S.C. § 1415(f)(3)(E); 34 C.F.R. § 300.513(a)(2).

[157] 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 NAT'L ASS'N ADMIN. L. JUDICIARY J. 396 (2008).

[158] 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). However, courts in the Fourth Circuit tend to accord wide latitude to hearing officers' factual findings. See, e.g., S.A. v. Weast, 898 F. Supp. 2d 869 (D. Md. 2012).

[159] See, e.g., 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.

92. 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.[160] Conversely, where the IHO's legal findings have such support, courts generally afford them notable deference.[161] In general, the deference increases where the IHO's factual findings are careful and thorough.[162]

93. 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.[163] Conversely, however, an IHO's legal conclusion that fails to reference the supporting facts may not receive judicial deference.[164] 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).[165]

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).

[160] See, e.g., M.O. v. Dist. of Columbia, __ F. Supp. 2d __ (D.D.C. 2013); S.G. v. Dist. of Columbia, 498 F. Supp. 2d 304 (D.D.C. 2007); *cf.* 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 ththisissue); 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).

[161] 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. Wisconsin, 125 F.3d 1045, 1053 (7th Cir. 1995).

[162] See, e.g., 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, in one case the Ninth Circuit included 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).

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

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

[165] M.O. v. Dist. of Columbia, __ F. Supp. 2d __ (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).

94. 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.[166]

MISCELLANEOUS

95. 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"[167] standard.[168] 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.[169] The deference for factual findings tends to be less for those based on additional evidence[170] and more for those that are careful and thorough.[171] Overall, the party challenging an IHO's decision faces a steep "uphill climb."[172]

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

Yes.[173]

97. 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.[174]

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

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

[168] See, e.g., 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).

[169] 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).

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

[171] See, e.g., Capistrano Unified Sch. Dist. v. Wartenberg, 59 F.3d 884 (9th Cir. 1995). See *supra* notes 162–163 and accompanying text.

[172] 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).

[173] See, e.g., Lillbask v. Connecticut Dep't of Educ., 397 F.3d 77 (2d Cir. 2005); IDEA Pub. Charter Sch. v. Belton, 48 IDELR ¶ 90 (D.D.C. 2007).

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

98. 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, 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) arguably extends back up to another two years for when the alleged violation arose.[175]

99. 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.[176]

100. Do IHOs have the authority to provide consent decree status to a settlement for purposes of attorneys' fees, but only upon proper order?

Yes, but only upon proper order.[177]

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

The answer is a matter of state law.[178] Approximately 10 states expressly prohibit their representation, and approximately 12 expressly permit it.[179] In the other states, the decision would appear to be in the IHO's discretion, with some IHOs not allowing it as a matter of legal ethics in terms of the unauthorized practice of law.[180]

102. 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.[181]

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[175] 20 U.S.C. §§ 1415(f) (3) (C); *see also id.* §1415(b)(6)(B).

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

[177] *Compare* A.R. v. New York City Dep't of Educ., 407 F.3d 65 (2d Cir. 2005), *with* Maria C. v. Sch. Dist. of Philadelphia, 43 IDELR ¶ 243 (3d Cir. 2005); Traverse Bay Intermediate Sch. Dist. v. Michigan Dep't of Educ., 49 IDELR ¶ 156 (W.D. Mich. 2008).

[178] 34 C.F.R. § 300.512(a) (1).

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

[180] *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).

[181] Woods v. New Jersey 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.*

103. Who has the burden of persuasion at the hearing?

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.[182] However, some state laws have put the burden of proof in such cases on the district.[183] Conversely, lower courts have extended the Supreme Court's ruling to other issues, such as whether the child is eligible[184] and whether the child's placement is in the least restrictive environment (LRE).[185]

104. 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.[186]

105. 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."[187]

106. 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."[188]

107. 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

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

[183] 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).

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

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

[186] 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).

[187] 124 STAT. 2643 (2010).

[188] Letter to Lenz, 37 IDELR ¶ 95 (OSEP 2002).

final decision and is issued within the 45-day, or properly extended, timeline.[189]

108. 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.[190]

109. 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.[191]

110. 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, has varying limits.[192]

111. 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.[193]

112. 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.[194]

113. 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.[195]

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[189] 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).

[190] 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).

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

[192] *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. Michigan Dep't of Educ., 49 IDELR ¶ 156 (W.D. Mich. 2008) (not without specified requisites).

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

[194] 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).

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

114. 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?

Yes, according to OSEP, just as long as 1) state law allows it, and 2) the state's period for the appeal and that period is reasonable.[196]

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