DEAL OR NO DEAL: TOP FIVE TOOLS TO RESOLVE SPECIAL EDUCATION DISPUTES EARLY & THOROUGHLY

Jim Gerl
Scotti & Gerl
216 South Jefferson Street
Lewisburg, WV 24901
(304) 645-7345 phone
(304) 645-7362 fax
jimgerl@yahoo.com email
blog: http://specialeducationlawblog.blogspot.com/

© 2010 James Gerl

Written Materials to Accompany
A Presentation at the
4th Annual Wyoming Special Education
Leadership Symposium
July 27, 2010

I. INTRODUCTION

A. Tools For Dispute Resolution

There are four dispute resolution mechanisms provided by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq, (hereafter sometimes referred to as "IDEA") and the accompanying federal regulations: mediation, state complaints, resolution sessions, and due process hearings. In addition, some states and districts are experimenting with fifth method-facilitated IEP meetings.

Special education disputes may be resolved through any of the five methods or by any combination of the methods. It is highly unusual under the law for an aggrieved party to be permitted to invoke more than one resolution option. Although mediation is often used in combination with litigation, it is rare for other formal methods to be combined. An unhappy party could file a state complaint wait for the results and then file a due process hearing over the same dispute. The same dispute can be submitted at any time in the process to mediation. A resolution session occurs in every due process filed by a parent unless waived or submitted to mediation in lieu thereof. It is true that if the complaint and due process are filed at the same time, the portions of the state complaint duplicating the due process complaint are held in abeyance until resolution of the due process, but if they are not filed at the same time, there is no prohibition upon the utilization of multiple methods.

Adding to the frustration of this lack of finality is the fact that the result of most of the options may also be appealed to one or more levels of the court system. The U. S. Supreme Court has noted that the judicial review process for special education cases takes a long time, referring to the appellate process as "ponderous." *Town of Burlington v. Dept of Educ* 471 U.S. 358, 105 S.Ct. 1996, 556 IDELR 389 (1985).

This link is to the NICHCY Training Program – Module 18: Options for Dispute Resolution:

http://www.nichcy.org/Laws/IDEA/Pages/module18.aspx

B. Legal Citations for Dispute Resolution

State complaints procedures are set forth in the federal regulations at 34 C.F.R. §§ 300.151 – 300.153. See, the Wyoming Special Education Regulations, ch. 7, §7(b).

Mediation is provided for in IDEA at § 615(e). See 34 C.F.R. § 300.506; See, the Wyoming Special Education Regulations, ch. 7, §7(a).

Due process hearings 9as well as resolution sessions) are described in the IDEA at § 615 generally, especially sub§ (f). See, the Wyoming Special Education Regulations, ch. 7, §7(c).

II. Top Five Tools for Special Education Dispute Resolution

A. Facilitated IEPs

In order to help IEP teams reach agreements, several states and districts have been experimenting with facilitated Individualized Education Program (IEP) meetings. The use of externally facilitated IEP meetings is a growing national trend. When relationships between parents and schools are difficult, facilitated meetings may be helpful.

While a facilitator does not chair the IEP team meeting, he helps keep members of the team focused on the development of the IEP while at the same time defusing conflicts and disagreements that may arise during the meeting. At the meeting, the facilitator uses a number of communication and other skills that create an environment in which the IEP team members can listen to and consider each other's suggestions and work together to complete the development of an IEP that will provide FAPE for the child.

The type of person who facilitates the meeting varies. Sometimes, a member of the team will facilitate the meeting. In some cases, a district representative with expert facilitation skills may be called in to help the team complete the IEP process. In other cases, another parent, a trained parent advocate, or support person may facilitate the meeting. Occasionally a student may lead his own IEP meetings.

When IEP teams reach an impasse or meetings are expected to be extremely contentious, however, an **independent**, trained facilitator not affiliated with the team or school district may be able to help guide the process. The presence of the trained facilitator helps keep the team members on task. The facilitator also is trained in using techniques to help prevent miscommunications and disagreements from derailing the IEP process.

IEP team meeting facilitation has been tried in Wyoming. The results have been very successful.

A helpful guide to IEP Facilitation by the TAA Alliance and CADRE may be found here: http://www.taalliance.org/publications/pdfs/facilitatediep.pdf

All of the materials from the presentations at the National Conference on IEP Facilitation sponsored by CADRE are available here: http://www.directionservice.org/cadre/conf2005/

B. Mediation

Mediation is a highly flexible way to resolve disagreements between school systems and parents of children with disabilities. An impartial person, called a mediator, helps parents and school district personnel to communicate more effectively and develop a written document that contains the details of their agreement. The mediator has been trained in effective mediation techniques.

Participation in mediation is completely **voluntary**; parents and school districts only have to participate if they choose to. The mediation process is also **confidential**; discussions cannot be used in any future due process hearing or court proceeding. 34 CFR § 300.506(b)(8); 71 Fed. Register No. 156 at pages 46695-96 (August 14, 2006).

IDEA requires state education agencies to provide a mediation system at no cost to the parties; mediation is free for both parents and school districts. Mediation must be available at any point in the process, including disputes arising before a due process complaint has been filed. IDEA §615(e).

A mediation agreement must state that mediation discussions are confidential and may not be used in a subsequent due process hearing or court proceeding. § 615(e)(2)(F)(i). IDEA specifically provides that mediation agreements are enforceable in court. § 615(e)(2)(F)(iii). OSEP has noted that nothing prevents parties to a mediation from agreeing to have the mediator facilitate an IEP team meeting. 71 Fed. Register No. 156 at page 46695 (August 14, 2006).

Mediators must be selected on a random, rotational or other impartial basis, and one such impartial basis would be agreement by the parties. 71 Fed. Register No. 156 at page 46695 (August 14, 2006). Because mediators are not selected by the parents, states are not required to provide a list of their mediators or their qualifications to the parents or the public in general. 71 Fed. Register No. 156 at page 46695 (August 14, 2006).

ADDITIONAL RESOURCES for MEDIATORS: In addition to the general IDEA resources, mediators should frequently visit the CADRE website. The Consortium for Appropriate Dispute Resolution in Special Education is an OSEP funded group that encourages mediation, IEP facilitation and other means of special education dispute resolution that are less formal and legalistic than due process hearings. Their website is loaded with helpful articles, materials and other information and may be found at http://www.directionservice.org/cadre/index.cfm

Here is the OSEP Topic Brief on Mediation:
http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CTopicalBrief%2C21%2C

C. State Complaint Procedures

Each state education agency must maintain a state complaint procedure. 34 C.F.R. §§300.151-300.153. OSEP has stated that the state complaint system is required even though Congress has not specifically provided or addressed a state complaint system in the IDEA. 71 Fed. Register No. 156 at page 46606 (August 14, 2006).

Within one year of an alleged violation of the Act, any entity may file a state complaint. 34 C.F.R. §§300.151-300.153. A ruling is required within 60 days subject to extension for exceptional circumstances or an agreement to mediate. 34 C.F.R. §300.152. Only agreement, and not consent, is required to extend the 60 day time limit for processing complaints. 71 Fed. Register No. 156 at page 46604 (August 14, 2006). Here is an analysis by the Regional Resource Centers concerning how the exceptional circumstances exception should be applied: http://directionservice.org/cadre/pdf/ComplExtOSEP2010.pdf

Where a state complaint and a due process hearing are requested on the same topic, the complaint investigator must set aside the portion of the complaint being addressed by due process until the hearing officer issues a decision. 34 C.F.R. §300.152(c). 71 Fed. Register No. 156 at page 46606 (August 14, 2006).

Where a state complaint investigator finds that IDEA has been violated, a corrective action is ordered. The relief that may be awarded includes compensatory education and reimbursement. 34 C.F.R. § 300.151(b). The purpose of this change to the federal regulations in 2006 was to make it clear that states have broad flexibility in awarding an appropriate remedy in resolving state complaints. 71 Fed. Register No. 156 at page 46602 (August 14, 2006).

When a state has finished processing a state complaint, a party who disagrees with the result may file a due process hearing

complaint on the same issue if the statute of limitations has not passed. 71 Fed. Register No. 156 at page 46607 (August 14, 2006).

Here is the OSEP Topic Brief on State Complaint Procedures: http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CTopicalBrief%2C22%2C

D. Resolution Session Meetings

A mandatory resolution session was added to the special education dispute resolution process in 2004. IDEA § 615 (f)(1)(B). Within 15 days of receipt of a due process hearing complaint from a parent, the school district must convene a meeting with the parents, a representative of the LEA with "decision making authority," and relevant member(s) of the IEP team who have "specific knowledge of the facts identified in the complaint." The purpose of the resolution session is to permit the parents to discuss their complaint and the underlying facts and to provide the LEA the opportunity to resolve the complaint. The LEA may not bring their lawyer unless the parent has a lawyer. The parties may avoid the resolution session only by waiving the meeting in writing or by participating in mediation. § 615(f)(1)(B)(i). If the LEA has not resolved the complaint to the satisfaction of the parents within 30 days after receipt of the complaint, the hearing may occur and "all applicable timelines for a due process hearing" shall commence. § 615(f)(1)(B)(ii). If the resolution session results in a written settlement agreement, the agreement is legally binding and enforceable in court, except that if either party suffers from "buyer's remorse," they may void the agreement within three business days after it is executed. § 615(f)(1)(B)(iii) and (iv).

Attorneys who represent parents are barred from seeking attorney's fees and costs if they decide to participate in the resolution session. § 615 (i)(3)(D)(ii)and(iii).

Unless one of the exceptions apply, the 45 day deadline for the hearing officer decision begins after the resolution period ends. 34 C.F.R. §300.510(b)(2).

Unlike the mediation provisions of the Act, which contain a specific guarantee of confidentiality for any discussions during a mediation session, §615 (e)(2)(G), there is no confidentiality protection for discussions that take place during a resolution session. OSEP specifically rejected the request of several commenters on the proposed 2006 federal regulations to clarify whether discussions at resolution meetings are confidential because the Act is silent regarding confidentiality. 71 Fed. Register No. 156 at page 46704 (8/14/06). OSEP went on to say that although the parties could negotiate a confidentiality agreement as a part of their written resolution agreement, a state **could not** require the parties to a resolution meeting to keep the discussions confidential. 71 Fed. Register No. 156 at page 46704 (8/14/06)(emphasis not in original).

The federal regulations provide that where a parent does not participate in the resolution meeting, the timelines for both the resolution process and the hearing will be delayed. 34 C.F.R. § 300.510(b)(3). To avoid the potential perpetual stay-put problem caused by the proposed regulations, the final federal regulations added a provision that if the LEA is unable to obtain the participation of the parent after reasonable efforts (which now must be documented in the same manner as IEP Team meeting participation), the LEA may, at the conclusion of the 30 day period, request that the hearing officer dismiss the due process complaint. 34 C.F.R. § 300.510(b)(4).

34 C.F.R. § 300.510(b)(5), that provides that where an LEA fails to schedule the resolution meeting within fifteen days, or the LEA delays the due process hearing by scheduling the resolution session at times or places that are inconvenient for the parent, or the LEA otherwise fails to participate in good faith in the resolution process, the parent may seek the intervention of the hearing officer to begin the due process hearing. 71 Fed. Register

No. 156 at page 46702 (8/14/06). Although OSEP stated that it believes that such occurrences would be very rare, it agreed with commenters that parents should be able to request that the hearing officer begin the hearing process timelines in such cases. 71 Fed. Register No. 156 at page 46702 (8/14/06).

Although the resolution meeting includes "relevant" members of the IEP Team, it is clear that the resolution meting is not an IEP Team meeting. The purpose of the resolution meeting is for parents to discuss their complaint and the underlying facts and for the LEA to have an opportunity to resolve the dispute. § 615(f)(1)(B)(i)(IV); 71 Fed. Register No. 156 at page 46701 (8/14/06). In response to a commenter who questioned whether a resolution meeting agreement supersedes decisions made by the IEP Team, OSEP stated that nothing in the Act or regulations requires an IEP Team to reconvene following a resolution agreement that includes IEP-related matters. 71 Fed. Register No. 156 at page 46703 (8/14/06).

The purpose underlying the resolution meeting is described in a portion of the conference committee report that discusses the resolution session states that these changes address "unscrupulous lawyers and an overly complex system" that has "led to an abundance of costly and unnecessary lawsuits." The conference report goes on to explain that the resolution sessions are needed because "...(t)oo often, schools are unaware of parental complaints and concerns until an official complaint is filed and the legal process is already underway." H.R. 1350 Conference Report, (November 17, 2004).

Here is an analysis by CADRE of Resolution Meetings- State Supports and Practices:
http://directionservice.org/cadre/ResolutionMeetings-StateSupportsandPractices.cfm

Here is a 2006 presentation by me concerning the resolution session at a CADRE National Conference:

http://directionservice.org/cadre/conf2006/Session%205.5%20-%20Jim%20Gerl%20Handout.pdf

E. Due Process Hearings

A due process hearing resembles a court trial. Increasingly, parties are represented by lawyers. Opening statements are made. Testimony is provided by parents, teachers, related service providers, administrators, and many others- often by expert witnesses. Although the formal rules of evidence are generally not applied, exhibits, or documentary evidence, are offered and admitted. The tone is increasingly adversarial. Either closing arguments are made or written briefs are submitted. Hearing officer decisions are generally lengthy and legalistic in tone. The decision of the hearing officer may be appealed to one or more courts.

Parents and local education agencies may file a due process complaint for any matter related to the identification, evaluation, educational placement or the provision of a free and appropriate public education to a child with a disability. IDEA §§ 615(f);615(b)(6).

IDEA imposes a two-year statute of limitations on due process complaints. Unless state law imposes a contrary limitations period, a party must request a due process hearing within two years of the date that the party knew or reasonably should have known about the alleged action that forms the basis of the complaint. § 615 (f)(3)(C). The statute of limitations recognizes two exceptions – cases in which the parent was prevented from requesting the hearing due either to specific misrepresentations by the LEA that it had resolved the problem or to the LEA's withholding of information that the IDEA requires it to provide. §

615 (f)(3)(D). OSEP has clarified that a state may adopt a statute of limitations either shorter or longer than two years by statute or regulation, but not by common law, subject to the notification provisions of IDEA. 71 Fed. Register No. 156 at pages 46696-97 (August 14, 2006). It is the province of the hearing officer to determine whether a specific complaint has been filed within the statute of limitations and whether an amended complaint relates to a previous complaint. 71 Fed. Register No. 156 at pages 46698 (August 14, 2006).

In addition to the requirement that a hearing officer not have a personal or professional interest that would conflict with objectivity, three more qualifications for due process hearing officers were added in 2004. The following new qualities are required in a hearing officer: the knowledge and ability to **conduct hearings** in accordance with standard legal practice; the knowledge and ability to **write decisions** in accordance with standard legal practice; knowledge of and ability to understand special education **law.** § 615 (f)(3)(A)(ii)-(iv). The changes in the qualifications for hearing officers are significant. The fact that the Congress amended this section signals at least some concern about hearing officers. SEA personnel who train and select hearing officers need to be mindful of these changes to the law. Those who train hearing officers should be people with experience in conducting due process hearings and in writing decisions thereafter. New hearing officers should be able to cite prior experience concerning these qualifications. OSEP has noted that pursuant to its general supervisory responsibility, each SEA must ensure that its hearing officers are sufficiently trained to meet the new qualifications established by IDEA. 71 Fed. Register No. 156 at page 46705 (August 14, 2006).

IDEA provides that the party requesting the due process hearing "…shall not be allowed to raise issues at the due process hearing that were not raised in the (due process hearing) notice…," unless the other party agrees. § 615 (f)(3)(B). see, 34 CFR §300.511(d); 71 Fed. Register No. 156 at pages 46705 -06 (August 14, 2006). However, note that IDEA § 615 (o) provides

that nothing in § 615 "… shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed."

OSEP noted that states have considerable latitude in developing procedural rules for due process hearings and that determinations upon procedural matters not specifically addressed by IDEA are within the sound discretion of the hearing officer so long as the parties' right to a timely hearing is not denied. 71 Fed. Register No. 156 at page 46704 (August 14, 2006). Other items left to the discretion of the hearing officer include the following: decisions concerning appropriate expert witness testimony. 71 Fed. Register No. 156 at page 46691 (August 14, 2006); ruling upon compliance with timelines and the statute of limitations. 71 Fed. Register No. 156 at page 46705 (August 14, 2006); determining when dismissals are appropriate. 71 Fed. Register No. 156 at page 46699 (August 14, 2006); whether the non-complaining party may raise other issues at the hearing that were not raised in the due process complaint. 71 Fed. Register No. 156 at page 46706 (August 14, 2006); the meaning of the word "misrepresentation" for purposes of the exception to the statute of limitations for filing a due process complaint. 71 Fed. Register No. 156 at page 46706 (August 14, 2006); and providing proper latitude for pro se parties. 71 Fed. Register No. 156 at page 46699 (August 14, 2006).

Concerning the five business day rule for disclosure of evidence prior to a due process hearing, OSEP commented that nothing prevents parties from agreeing to a shorter period of time. 71 Fed. Register No. 156 at page 46706 (August 14, 2006).

As to the location and time of due process hearings, OSEP resisted the suggestion that they be conducted in a "mutually convenient" time and place, fearing that the large number of participants to a hearing would necessitate long delays if mutually convenient times and locations were required. The regulations retain the requirement that hearings be conducted at a time and place that is reasonably convenient to the parents and

student. 34 CFR § 300.515(d); 71 Fed. Register No. 156 at page 46707 (August 14, 2006).

Here is the OSEP Topic Brief on Due Process Hearings:
http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CTopicalBrief%2C16%2C

Here is the OSEP Questions and Answers On Procedural Safeguards and Due Process Procedures For Parents and Children With Disabilities:
http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C6%2C

III. A Brief Comparison of Dispute Resolution Methods

IV. Policy Considerations: Is There a Better Way?

V. Recent Caselaw Concerning Dispute Resolution

A. Mediation and Settlement

1. JD by Davis v. Kanawha County Bd of Educ 571 F.3d 381, 52 IDELR 182 (4th Cir. 7/9/9) Fourth Circuit held that mediation discussions under IDEA are **confidential.** Accordingly where the school district offered a settlement stating that the terms would be the same terms as a failed mediation, district could not use the settlement offer to prove that it had made a more favorable settlement offer than the relief obtained by the parent at the due process hearing; Hawkins v. Berkeley Unified Sch Dist 250 F.R.D. 459, 51 IDELR 185 (N. D. Calif 11/20/8) Where an attorney's petition stated that parents counsel gave the district an itemized attorneys fees invoice during mediation, Court granted a motion to strike because all discussions during mediation are confidential; Wittenberg ex rel JW v. Winston Salem/Forsyth County Bd of Educ 53 IDELR 45 (M.D.NC 8/19/9) Because mediation discussions are confidential, court agreed to place a mediation agreement under seal.

2. RM & DM ex rel BM v. Waukee Community Sch Dist 589 F.Supp.2d 1141, 51 IDELR 216 (D. Iowa 12/5/8) Mediation alone without a due process hearing is not sufficient to exhaust administrative remedies before filing a court action.

3. HC by CC v. Colton-Pierrepont Cent Sch Dist 567 F.Supp.2d 340, 50 IDELR 252 (N.D. NY 7/29/8) HO has the authority to **enforce** a settlement agreement if it involves IDEA hearing issues: identification, evaluation, placement or services(FAPE). Federal court concluded that it has jurisdiction to enforce an IDEA settlement; JMC & MEC ex rel EGC v. Louisiana Bd of Elementary & Secondary Educ 50 IDELR 157 (M.D.LA 6/13/8) Where school district failed to convene a resolution meeting within 15 days of dp complaint, court held that a later IDEA settlement was enforceable in federal court; El Paso Independent Sch Dist v. Richard R ex rel RR 53 IDELR 175 (5th Cir 12/16/9) Fifth Circuit held that agreements from resolution session are enforceable. Accordingly a parent's refusal to accept an offer of all educational relief sought was unreasonable and no attorney's fees were awarded to parent's lawyer; . Chardon Local Sch. Dist. Bd. of Educ. v. AD 106 LRP 22226 (N.D.Ohio 3/27/6). The federal district court held that the HO and SRO had the **authority** to decide alleged violations of a settlement agreement. Because the student's IEP was in issue, the HO had jurisdiction over the dispute. See also, In re Student with a Disability 102 LRP 20843 (SEA WV 7/29/2)(hearing officer has authority to review claims regarding breach of a settlement agreement. Manchester Bd. of Educ. 106 LRP 25093 (SEA Conn 2/6/6)(hearing officer has authority to review claims regarding breach of a settlement agreement that relate to identification, evaluation, placement and FAPE, but no jurisdiction over whether misrepresentation, fraud or negligence was committed with regard to a settlement agreement). Ocean Township Bd of Educ 106 LRP 66875 (SEA NJ 9/25/6)(HO ordered parties to comply with the oral settlement they agreed to in a settlement conference with the HO and denied the parties' request to relitigate the underlying issues. Contrast, Eatonville Sch. Dist. 106 LRP 18798 (SEA Wash 3/6/6)(Enforcement of a settlement agreement is the responsibility of state and federal courts and not a due process HO.)

4. Lara v. Lynwood Unified Sch Dist 53 IDELR 18 (C.D.Calif 7/29/9) Where settlement did not result from a mediation or resolution session, court held it had n**o jurisdiction** to enforce the settlement; Petersen v. California Hearing Office 50 IDELR 250 (N.D. Calif 8/11/8) Where settlement agreement provided that parents waive all claims for 2004-2005 school year, Court refused to enforce provision requiring IEPT meeting for May 2005. McElroy by McElroy v. Tracy Unified Sch Dist 51 IDELR 184 (E.D. Calif 11/21/8) A release signed by parents waiving all special education claims did not constitute a waiver of 540, ADA, 1983 or claims for physical and emotional harm; WK & PK ex rel MK v. Sea Isle Bd of Educ 47 IDELR 61 (D.NJ 2/5/7) Federal court concluded that it has jurisdiction to enforce an IDEA settlement.; See also, JP by Pope v. Cherokee County Bd of Educ 107 LRP 10432 (11th Cir 2/27/7) The Eleventh Circuit concluded that the district court had authority to resolve issues concerning an alleged breach of settlement and FAPE, but it first required the parents to exhaust their administrative remedies by proceeding through a due process hearing. Contrast, Cain v. Arts & Technology Academy Public Charter Sch 46 IDELR 163 (D.DC 9/28/6) Alleged breach of an IDEA settlement is a matter of contract law for the state, not the federal, courts; Bowman ex rel WB v. district of Columbia 46 IDELR 97 (D.DC 8/2/6) Court held that enforcement of IDEA settlements that do not result from mediation or resolution sessions are not enforceable in federal court. Contract law is a matter for the state courts; and MJ by CJ and JJ c. Clovis Unified Sch Dist 47 IDELR 253 (E.D. Calif 4/9/7) IDEA'04 provision regarding enforceability of settlements was not given retroactive application to a settlement before the effective date of IDEA'04. Contrast, Pedraza ex rel Pedraza v. Alameda Unified Sch Dist 47 IDELR 302 (N.D. Calif 3/27/7) (Although IDEA'04 amendments are not retroactive, the court would enforce a settlement agreement for school years after IDEA'04 took effect because the settlement agreement defines what constitutes FAPE.)

5. Haden C by Tracey C v. Western Placer Unified Sch dist 52 IDELR 189 (E.D. Calif 5/11/9) Court required **exhaustion** before a parent could enforce a settlement (not clear if from resolution meeting) because interpretation of meaning of the agreement is clear therefore dp hearing necessary; JMC & MEC ex rel EGC v. Louisiana Bd of Elementary and Secondary Educ 584 F.Supp.2d 894, 51 IDELR 95 (M.D. Louisiana 10/20/8) Court required exhaustion by filing a due process hearing before enforcing a settlement that happened after the resolution meeting but before a hearing.

6. Irvine Unified Sch Dist 53 IDELR 204 (SEA Calif 9/28/9) HO held that IDEA settlement **waiver** releasing district from"… violations that might occur as a result of this agreement…" was ambiguous and did not prevent parents from pursuing a reevaluation claim; Somoza v. New York City Dept of Educ 107 LRP 10339 (S.D.NY 2/21/7) The federal court held that **waiver** of future IDEA claims constitutes waiver of a vital civil right requiring highest scrutiny by the courts. Where a pro se parent signed an ambiguous settlement agreement resulting from a boilerplate form settlement and received no adequate explanation of the terms of the agreement, the court found the waiver of IDEA claims to be ineffective. Any such waiver must be knowingly and voluntarily given. Contrast, Amy S. v. Danbury Local Sch. Dist. 106 LRP 2067 (6th Cir. 3/31/6). The Sixth Circuit affirmed the dismissal of the parents IDEA claims where the parents had signed a mediation agreement unambiguously stating that it resolves all pending IDEA issues.

7. Carney ex rel Carney v. State of Nevada 50 IDELR 253 (D. Nevada 7/29/8) IDEA settlement agreement did not bar 504 and ADA claims where the agreement reserved the right of the parents to seek relief for tort claims. Contrast, In Re Student with a Disability 108 LRP 25900 (SEA NY 3/31/8) SRO dismissed an appeal of a HO dismissal where the school district had agreed to meet all of the parents demands.

8. VM & KM ex rel DM v. Brookland Sch Dist 50 IDELR 100 (E.D. Ark. 5/6/8) Where HO incorporated a settlement agreement into his decision and ordered school district to provide relief, there was sufficient judicial imprimatur to confer prevailing party status for attorneys fees.

9. AM v. Westside Union Sch Dist 51 IDELR 47 (C.D. Calif 7/25/8) Purported breach of an IDEA settlement is not a constitutional violation giving rise to a § 1983 cause of action.

B. State Complaint Procedures

1. Independent Sch Dist No 192 v. Minnesota Dept of Educ 49 IDELR 105 (Minn Ct App 12/24/7) State appellate court overturned an SEA complaint decision requiring a school district to reimburse parents for private tutoring services. The court held that the SEA failed to comply with federal regulations concerning state complaint procedures by failing to i**nterview** the parties and by not conducting an **on-site** investigation. Although the school district had denied FAPE, the SEA's **corrective** action of reimbursement for the tutor had no nexus to the school district violations regarding failure to provide behavioral services.

2. Pedroza et al v. Los Alamitos Unified Sch Dist 108 LRP 79901 (9th Cir 12/2/8) Ninth Circuit affirmed dismissal for failure to **exhaust** where parents had filed a **state complaint** but no dp hearing. Miller ex rel JH v. West Feliciana Sch Bd 51 IDELR 46 (M.D. Louisiana 8/11/8) (same); See, Bd of Educ of the Lenape Regional HS District v. New Jersey Dept of Educ, et al 945 A.2d 125, 50 IDELR 75 (NJ Ct App 4/22/8) State appellate court held that state complaint findings against a district may not be **appealed** to court where state regulations do not permit such appeals. Contrast, SA by LA & MA v. Tulare County Office of Educ 109 LRP 1507 (E.D. Calif 1/5/9) and 109 LRP 10904 (E.D.Calif 2/10/9) Court held it is OK to appeal state complaint ruling to court without exhausting dp procedures; and ; Independent Sch Dist No. 12 v Minnesota Dept of Educ 767 N.W.2d 748, 52 IDELR 265 (Minn Ct App 6/23/9) School district appealed state complaint ruling to state court.

3. Millay ex rel YRM v. Surry Sch Dist 584 F.Supp.2d 219, 51 IDELR 159 (D. Maine 10/28/8) Where state complaint investigator ordered LEA to provide student's residential placement IEP at her local elementary school, court found that rather than parents change of status quo to be the **stay put** placement.

4. Letter to Copenhaver 108 LRP 33611 (OSEP 3/17/8) Because Act and regulations are silent, SEAs can choose to permit the filing of due process complaints and state complaints by **email**. If so, SEA must adopt procedural safeguards by regulation re filing dates, resolution timelines, etc.

C. Resolution Session

1. Friendship Edison Public Charter Sch v. Smith ex rel LS 50 IDELR 192 (D. DC 6/20/8) Court ruled that discussions during a resolution session are **not confidential** as a matter of law. Court overturned HO ruling to the contrary. Montgomery County Public Schs 50 IDELR 58 (SEA Md 1/28/8) (state complaint) School districts cannot impose confidentiality, citing OSEP analysis of comments. LEA violated IDEA by cancelling resolution meeting when parents declined to sign a confidentiality agreement; Homer Central Sch Dist 106 LRP 65707 (SEA NY 10/27/6). SRO affirms HO decision to admit discussions from a resolution meeting at a subsequent due process hearing. SRO concluded that discussions at a resolution meeting are not confidential as a matter of law. See also Marinette Sch Dist 107 LRP 8221 (SEA Wisc. 2/14/7) HO dismissed a due process complaint where the parent refused to participate in a resolution meeting unless the district representatives signed a confidentiality agreement.

2. El Paso Independent Sch Dist v. Richard R ex rel RR 53 IDELR 175 (5th Cir 12/16/9) Fifth Circuit held that agreements from resolution session are enforceable. Accordingly a parent's refusal to accept an offer of all educational relief sought was unreasonable and no attorney's fees were awarded to parent's lawyer.

3. Mr & Mrs S ex rel BS v. Rochester Community Schs 106 LRP 58719 (W.D. Mich. 10/2/6). The parents were dissatisfied with the district evaluation and requested an IEE at public expense. The district felt that its evaluation was appropriate and filed a due process complaint. A resolution meeting was scheduled and the district's **attorney** arrived before the meeting to review documents and to train school personnel for the resolution meeting. The attorney left before the meeting began. After two hours, the parties reached an initial agreement. The district personnel brought the agreement down the hall to their lawyer who retyped it adding legal language. After subsequent revisions, the parties signed the agreement. The parents then faxed the agreement to their lawyer who advised them that the agreement gave up their right to an IEE. Upon learning what the agreement meant, the parents rescinded the agreement immediately. The parents then filed a state complaint, and the SEA found a violation of the IDEA issuing a corrective order requiring district personnel to notify all resolution process participants if a parent does not have an attorney present, an LEA may not have an attorney participate in the resolution process from the beginning until the end. The court reversed holding that there is a distinction between the resolution meeting and the agreement creation period. The court held that the ban on LEA lawyers, and the restriction on fees for parent attorneys, applies only to the resolution meeting itself and not to the agreement drafting period. The court noted that the LEA attorney may not be physically present or listen in over the telephone or confer with participants during the resolution meeting only. The Court also noted that the participation of the lawyer should apply only to the conversion of the substantive agreement to a legally enforceable agreement. The Court declined to review the alleged ethical violations by the district's lawyer because the state Attorney Grievance Committee was the proper forum for such complaints.

4. Washington Township Bd of Educ 108 LRP 25305 (SEA NJ 3/26/8) HO dismissed dp complaint where pro se parent refused to participate in the resolution meeting; Sch Dist of Philadelphia 106 LRP 53542 (SEA PA 8/22/6) SRO panel refused

to consider the issue of whether the parents alleged failure to **participate** should have delayed the hearing because it was raised improperly on an interlocutory appeal. Contrast, Weiner Sch Dist 106 LRP 29396 (SEA Ark. 2/27/6) in which a hearing officer did issue an order delaying the due process and resolution session timelines; and Chesterfield County Sch Dist 106 LRP 49379 (SEA SC 12/21/5) where a parent failed to participate in the resolution meeting and otherwise failed to prosecute his due process complaint, a hearing officer dismissed the complaint.

5. OO by Pabo v. District of Columbia 573 F.Supp.2d 41, 51 IDELR 9 (D. DC 8/27/8) Court affirmed HO decision that LEA failure to convene a resolution session was a harmless procedural error; North Pocono Sch Dist 106 LRP 60454 (SEA PA 9/25/6) SRO panel reversed a HO who erred by awarding compensatory education in part to remedy a school district's failure to convene a resolution meeting. See also In Re: Student with a Disability 47 IDELR 119 (SEA Alaska 8/22/6) Failure to hold a resolution meeting is not a denial of FAPE.

6. JMC & MEC ex rel EGC v. Louisiana Bd of Elementary & Secondary Educ 50 IDELR 157 (M.D. Calif 6/13/8) Court refused to enforce a settlement that happened before dp hearing where district failed to convene a resolution meeting within 15 days, noting that Congress did not intend that all IDEA settlements be enforceable in court.

7. Letter to Baglin 53 IDELR 164 (OSEP 10/30/8) OSEP opined that an 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.

8. New York City Dept of Educ 106 LRP 39990 (SEA NY 6/21/6), a resolution meeting was held on Wednesday December 7th, and the parties entered into a settlement agreement. On December 12th, the parent sent the district a letter voiding the agreement. Because the letter was mailed within three business days of the agreement, the state review officer held that the settlement agreement was properly invalidated within the **buyer's remorse** period and the matter could proceed to hearing.

9. Richland Sch. Dist. Two 106 LRP 49389 (SEA SC 3/29/6). A state review officer ducked the issue of whether under the IDEA a parent has the right to receive separate notice of the right to revoke a resolution agreement, although he noted that if the parents ever reenroll the student in the district that the hearing officer should rule on the issue.

10. Melrose Pub Schs 46 IDELR 119 (SEA Mass. 5/26/6), the hearing officer denied the parent's motion to exclude the Special Education Administrator for the school district from the resolution meeting because she happens to be an attorney. Where the administrator had never represented the district and she had previously been a member of the student's IEP Team, she was permitted to attend the resolution meeting.

11. Hopkins Pub Schs 106 LRP 37009 (SEA Mich. 4/22/6). A hearing officer determined that a resolution meeting is not required when an LEA files a due process hearing complaint notice. The hearing officer noted that the resolution session process is only required when a parent files a due process complaint notice.

12. In Re: Foxborough Regional Charter Sch 106 LRP 34379 (SEA Mass. 5/30/6) The hearing officer rejected the school district argument that a resolution meeting was an **IEP Team meeting**, and that an offer of extended school year services made at a

resolution meeting constituted a program proposed by the IEP Team. Accordingly, the hearing officer ruled for the parents and ordered ESY services and two IEES. See, also West Hartford Bd of Educ 106 LRP 25095 (SEA Conn. 2/3/6), rejecting an argument that a resolution meeting supplants the IEP Team meetings.

13. In DeSoto County High Sch 106 LRP 39825 (SEA Miss. 6/14/6), the parent notified the hearing officer that she was confused by the notice of the resolution meeting. The hearing officer assured the parent that the school district was required under the law to schedule a resolution meeting. The parent did then attend, but the resolution meeting did not result in an agreement, and the matter proceeded on to a due process hearing.

14. Massey v. District of Columbia 105 LRP 54466 (D.D.C. 11/3/05). The parents were not required to **exhaust** administrative remedies because the LEA's continuing noncompliance with procedural requirements and its blatant disregard of the IDEA statutory requirements rendered compliance with administrative options futile. The procedural violations included the failure to schedule resolution sessions within 15 days of the complaint, the failure of the LEA to file an "answer" to due process complaints, and the failure to place the student for several weeks. Concerning the failure to schedule **resolution sessions**, the Court rejected the LEA's assertion that they could not reach the parents by telephone. Contrast Spencer v. District of Columbia 416 F.Supp.2d 5, 45 IDELR 11 (D.D.C. 1/11/06), in which the parent filed for due process on December 6, 2005. The LEA scheduled a resolution meeting for December 21st. The parent withdrew the due process complaint on December 14th. The LEA cancelled the resolution meeting. The parent then refilled the due process complaint on December 21st. The LEA scheduled a resolution meeting in January, 2006. The parent then filed in federal court for injunctive relief claiming that the LEA had not convened a resolution meeting within 15 days of the original filing and, therefore, exhaustion of administrative remedies was futile. The U. S. District Court rejected the argument and required the parent to first exhaust administrative remedies by pursuing the due process hearing.

15. Norwood Public Schools 44 IDELR 104 (SEA Mass. 8/19/05). The hearing officer concluded that she had authority to enforce a settlement that resulted from a **resolution session**. The hearing officer held that any settlement concerning issues of identification, evaluation, placement or FAPE was subject to the hearing officer's jurisdiction. Contrast, Bowman ex rel WB v. District of Columbia 46 IDELR 97 (D.D.C. 8/2/6) Court held that IDEA settlements that do not result from mediation or a resolution meeting are not enforceable in federal court. Contract issues are the province of state courts. See also, Cain v. Arts & Technology Academy Public Charter Sch 46 IDELR 163 (D.DC 9/28/6) Alleged breach of an IDEA settlement is a matter of contract law for the state, not the federal, courts (not a resolution agreement.)

D. Due Process Hearings

1. In General

a. DB by CB v. Houston Independent Sch Dist 48 IDELR 246 (D.Tex. 9/28/7). Court rejected a claim by the parent that the dp HO denied them a fair hearing by **sleeping** through the hearing. The court did not credit the allegations where the hearing transcript revealed that the HO appeared to be awake while asking questions of witnesses and when ruling on objections and where the parents failed to preserve their objection by objecting to the alleged napping on the record.

b. The federal regulations were amended effective December 31, 2008 to make an important change to the policy interpretation by OSEP regarding the representation of parties (primarily parents) by **non-lawyers** in due process hearings. Prior to the change, it had been the long-standing interpretation of OSEP that a non-lawyer could represent parents at a due process hearing in much the same way that a lawyer could represent a party. After certain lower courts declared such a practice to be a violation of "unauthorized practice" statutes, OSEP changed 34 C.F.R. § 300.512 (a)(1) to specify that whether a party has the right to be represented by a non-lawyer at a due process hearing shall be determined by state law.

c. JD by Davis v. Kanawha County Bd of Educ 53 IDELR 225 (SD WVa 11/4/9), aff'd 54 IDELR 184 (4th Cir. 2010), HO has **discretion** to control hearing procedures and absent an abuse of discretion, HO will be upheld; In re Student with a Disability 109 LRP 56222 (SEA NY 8/14/9) The parties to a dp hearing are obligated to comply with the reasonable directives of the HO regarding the conduct of the hearing.

d. JD by Davis v. Kanawha County Bd of Educ 53 IDELR 225 (SD WVa 11/4/9), aff'd 54 IDELR 184 (4th Cir. 2010), Pro se parent requested indefinite **continuance** and ho requested more information. Parent refused to provide more information as to parent's medical conditions on privacy grounds. HO granted a short continuance but denied request for an indefinite continuance as not permitted under IDEA. Ct affirmed HO denial of indefinite continuance. JR by WR & NR v. Sylvan Union Sch Dist 48 IDELR 253 (E.D. Calif 3/10/8) Court affirmed HO denial of a continuance where HO stated a good reason for the denial. Lessard v. Wilton-Lyndborough Cooperative Sch Dist 47 IDELR 299 (D. NH 4/23/7) Court upheld HO decision to deny continuance to allow testimony of expert where his report was already in evidence and testimony would provide no information beyond the report.

e. Compton Unified School District v. Addison 110 LRP 17236 (9th Cir. 2010). The Court held that due process hearings are not limited to matters that have been addressed in a prior written notice to the parents; rather they may pertain to any matter related to identification, evaluation, placement or FAPE.

f. Matanuska-Sustina Borough School District v. D.Y. 54 IDELR 52 (D Alaska (2010) The broad equitable authority of a HO to fashion relief where there has been a violation of IDEA includes the power to order a $50,000 comp ed fund and to require the district to hire a particular expert to work with the student.

g. Lancaster Elementary Sch Dist 50 IDELR 26 (SEA Calif 1/7/8) Where school district filed dp complaint and parent did not appear, HO proceeded with the hearing and allowed district to present its evidence.

h. Letter to Copenhaver 108 LRP 33611 (OSEP 3/17/8) Because Act and regulations are silent, SEAs can choose to permit the filing of due process complaints and

state complaints by **email**. If so, SEA must adopt procedural safeguards by regulation re filing dates, resolution timelines, etc.

i. Tredyffrin-Easttown Sch Dist 108 LRP 31928 (SEA Penna 5/28/8) SRO panel held that the wide latitude afforded HO includes the ability to deny or grant a request for witness **sequestration**; Newport Public Schs 109 LRP 9847 (SEA Mich 2/2/9) Where a witness violated a sequestration order, HO found the witness to be not credible and a "frequent liar." ???

j. In re Student with a Disability 109 LRP 1338 (SEA KS 1/2/9) HO denied a motion to declare parent self-representation the unauthorized practice of law where to do so would make even more uneven the uneven playing field enjoyed by the district…"???;

k. LJ by VJ & ZJ v. Audobon Bd of Educ 51 IDELR 37 (D. NJ 9/10/8) Court affirmed HO ruling prohibiting school district from introducing evidence it had failed to disclose under five business day rule for **disclosure**. Purposes of 5 day rule include avoiding surprise and encouraging prompt resolution of disputes.

l. Laster v District of Columbia 109 LRP 3932 (D.DC 1/22/9) Court ordered parties to resolve their disputes through a dp hearing and to stop filing motions with the court to circumvent.

m. Knight ex rel JKN v. Washington Sch Dist 51 IDELR 209 (E.D. Mo. 12/22/8) Where SEA regulations permitted HO panel chair to eliminate frivolous due process claims and ho panel chair dismissed 4 of 5 issues, and was asked by parent attorney to recuse himself, chair then had **heated exchange** with the attorney on the record and dismissed the fifth issue in retaliation for motion to recuse. Court reversed noting that especially dismissal of the fifth claim was improper because it denied parents an opportunity to present evidence, confront and cross-examine witnesses, etc.; Dept of Educ, State of Hawaii v. Karen I & Marcus I 53 IDELR 157 (D. Haw 9/21/9) Where HO took it upon himself to conduct 2d hearing after being reversed **without a remand** by the state court, federal court refused to award attorneys fees based upon order that should never have been issued.

n. Letter to Lipsiit 109 LRP 6755 (OSEP 12/11/8) A parent or school district may file a due process hearing request concerning an IEP that is **not** the **most recent** IEP if it is within the 2 year statute of limitations.

2. Burden of Persuasion

a. Schaffer v. Weast 546 U.S. 49, 126 S.Ct. 528, 44 IDELR 150 (11/14/5). The Supreme Court held that the burden of persuasion in an IDEA due process hearing is upon the party challenging the IEP. The "**burden of persuasion**" involves which party loses if the evidence is closely balanced. In any civil legal proceeding, if the evidence for both sides is equal, the party with the burden of persuasion loses. The Court exempted from its decision, however, the burden of persuasion applicable in those states that have laws or regulations placing the burden upon the school district.

Concerning the IDEA due process hearing process, the Court noted that such hearings are deliberately informal. The Court went on to note that the IDEA due process hearing was set up by Congress with the intention of giving the hearing officers the flexibility they need to ensure that each side can fairly present its evidence.

b. MM by LR v. Special Sch Dist No. 1 512 F.3d 455, 49 IDELR 61 (8th Cir. 1/4/8) Despite state law placing burden on school district, Eighth Circuit held that the party bringing the action has the burden of persuasion.

3. Parties

a. NB UNPUBLISHED Keene v. Zelman 53 IDELR 5 (6th Cir. 7/29/9) UNPUBLISHED Parents brought a class action against Ohio SEA alleging illegal policies including improper HO training. Also alleged was that HOs were told to do nothing for the first 30 days and bill no more than one hour during that time. Sixth Circuit approved settlement that included an agreement to retrain HOs and an award of $81,000 vs SEA; Quatroche v. East Lynne Bd of Educ 604 F.Supp.2d 96, 53 IDELR 96 (D. Conn. 3/31/9) If allegation had been that an SEA system of HO training affected a number of dp hearings, parent would state claim for a systemic violation. Here the allegation was only one dp complaint, therefore no systemic violation; Chavez ex rel Chavez v. Bd of Educ of Tularosa Municip Schs 52 IDELR 229 (D.NM 2/24/9) SEA denied FAPE to student but parents not prevailing party; Emma L v. Eastin 52 IDELR 43 (N.D. Calif 2/24/9) Where LEA did miserable job of providing FAPE, and SEA is ultimately responsible for FAPE, court held SEA to an enhanced role; Delaware Valley Sch Dist v PW by James & Patricia W 52 IDELR 192 (M.D. Penna 5/5/9) Although parents may sue SEA for LEAs failure to provide FAPE, the LEA may not sue the SEA for indemnification and contribution under IDEA; DW v. Delaware Valley Sch Dist 109 LRP 80026 (M.D. Penna 12/29/9) Complaint alleging that SEA failed to properly monitor or supervise the LEA with respect to the provision of FAPE to a student stated a cause of action against the SEA; Stengle v. Office of Dispute Resolution 109 LRP 24455 (M.D. Penna 4/27/9) SEA did not violate First Amendment by cancelling contract of HO who who wrote articles about issues pending before her as HO; CG v. Commonwealth of Penna, Dept of Educ 53 IDELR 150 (M.D. Penna 9/29/9) Dist court certified a class action re the manner that SEA distributes IDEA funds; King v. Pioneer Regional Educ Service Agency 53 IDELR 196 (Georgia Ct App 11/5/9) State appeals court ruled that SEA's general supervisory responsibilities under IDEA do not include being subject to tort-like damages; Independent Sch Dist No. 12 v Minnesota Dept of Educ 767 N.W.2d 748, 52 IDELR 265 (Minn Ct App 6/23/9)

b. JR by WR & NR v. Sylvan Union Sch Dist 48 IDELR 253 (E.D. Calif 3/10/8) Court rejected allegations that California **SEA** & OAH systematically violated IDEA by failing to provide knowledgeable HOs where allegation was based only upon conjecture. CS by Struble v California Dept of Educ 50 IDELR 63 (S.D. Calif 4/30/8) Court denied injunction vs SEA regarding failure to provide 80 hours of SpEd law training per year to HOs; holding parent unlikely to prevail on merits because 80 hour requirement was a contract requirement and parent not a party to the contract, See same case, 50 IDELR 125 (S.D. Calif 6/9/8) refusing reconsideration of prior ruling. Keene v. Zelman 50 IDELR 135 (S.D. Ohio 5/23/8) SEA was responsible for attorneys fees for case against its administration of the hearing system but not for the attorney fees for LEA's denial of FAPE. New Jersey Protection & Advocacy v. New Jersey Dept of Educ 50 IDELR 188 (D. NJ 6/30/8) Court permitted advocacy group to pursue a complaint against SEA alleging LRE violations and improper systemic monitoring and compliance activities that did not correct the violations. Jamie S. v. Milwaukee Public Schs 50 IDELR 127 (E.D. Wisc 6/6/8) LEA could not contest a settlement agreement between SEA and parents finding systemic violations by SEA. Blunt v. Lower Merion Sch Dist 50 IDELR 128 (E.D. Penna 6/6/8) SEA had to defend IDEA suit alleging improper supervision and monitoring of LEAs, improper state complaint procedures, and

child find procedures. Orange County Dept of Educ v. AS SEA was responsible for the residential placement of a homeless student placed by the juvenile court where state law did not specify which LEA would be responsible for special education costs. Ohio Department of Education 108 LRP 15709 (SEA Ohio 1/13/8) ESA is not a proper party to a due process hearing involving a dispute between a parent and the LEA. LMP ex rel EP, DP & KP v Florida Dept of Educ 51 IDELR 36 (S. D. Fla 9/15/8) Court did not reach parent challenge to allegation that SEA did not allow HOs to award certain relief where parents had not shown denial of FAPE to triplets, therefore relief issues were moot. Grossmont Union High Sch Dist v. California Dept of Educ 108 LRP 71212 (Calif App. Ct 12/29/8) State appellate court affirmed dismissal of LEA complaint against SEA demanding more funds from SEA arguing that the state imposed an undue financial burden upon districts by failing to demand that the federal government fully fund IDEA before promising full compliance.

c. Fuentes v. Bd of Educ of the City of New York 540 F.3d 145, 51 IDELR 4 (2d Cir. 8/26/8) (before 2006 fed regs took effect)Second Circuit certified question to the New York Court of Appeals of what the educational decision-making rights of a non custodial **parent** are under state law where the divorce decree was silent; Fuentes v. Bd of Educ of the City of New York 907 N.E.2d 696, 52 IDELR 164 (NY Ct App 4/30/9) NY appellate court held that under state law, the custodial parent has the sole right to control educational decisions pertaining to the child unless the divorce decree or custody order specifies otherwise. Fuentes v. Bd of Educ of the City of New York 589 F.3d 46, 52 IDELR 152 (2d Cir. 6/15/9) because noncustodial parent was not given educational decision-making rights under the divorce decree or custody order, he could not bring IDEA challenge re his son's education.

d. In re Student with a Disability 108 LRP 24081 (SEA Conn 1/2/8) HO held that mother lacked authority to file due process complaint challenging decision of father, who had sole custody and educational decision-making authority, to agree to exit special education. Missouri Dept of Elementary & Secondary Educ 108 LRP 23396 (SEA Missouri 1/11/8) Mother who had custody and educational decision-making authority was **parent** under IDEA; Ewing Township Bd of Educ 52 IDELR 87 (SEA NJ 2/23/9) HO sided with parent that had custody 5 days a week over the parent with 2 days; Brainerd Independ Sch Dist #181 52 IDELR 145 (SEA Minn 3/27/9) Investigator found that district violated IDEA by failing to give notice and provide copies of evaluations to non-custodial parent; Zeichner v. Mamaroneck Union Free Sch Dist 881 N.Y.S..2d 883, 52 IDELR 264 (N.Y. SCt 6/24/9) (joint custody; both have decision-making authority); In re Student with a Disability 50 IDELR 297 (SEA NY 8/8/8) SRO dismissed complaint where parent was not an "aggrieved party." HO had ordered LEA to reimburse parents for two IEES, but parent also wanted SRO to order LEA wrong.

e. Letter to Anonymous 53 IDELR 127 (OSEP 3/30/9) OSEP provided opinion that IDEA requires **charter schools**, whether themselves a separate LEA or not, to ensure the availability of the full continuum of placements and that students with disabilities are placed in the LRE. There is no requirement that every placement on the continuum be used, but they must be available; Golden Door Charter Sch v. State Operated Sch Dist of the City of Jersey City 948 A.2d 716, 50 IDELR 166 (N.J. App. Ct 6/17/8) Where a state statute requires charter schools to comply with all laws as to children with disabilities, the charter school and not the district of residence had to pay for its student's special

education. SS by Shank v. Howard Road Academy 50 IDELR 191 (D.DC 6/25/8) Where charter school is an LEA, charter school is a proper party and parents could bring due process hearing re FAPE; Delaware College Prepatory Academy 53 IDELR 135 (SEA Del 7/30/9) HO Panel ruled that a charter school/LEA violated its child find obligation under IDEA by failing to identify a student as eligible where his extreme behaviors caused him to be suspended almost weekly. See, ADDITIONAL RESOURCE: Weber, Mark C., Special Education from the (Damp) Ground Up: Children with Disabilities in a Charter School-Dependent Educational System (October 12, 2009). Loyola Journal of Public Interest Law, Forthcoming. Available at SSRN: http://ssrn.com/abstract=1487667; See, "Charters, Students With Disabilities Need Not Apply," by Prof. Thomas Herir, (op-ed piece) Education Week online January 25, 2010, http://www.edweek.org/ew/articles/2010/01/27/19hehir_ep.h29.html?tkn=QQNC6AY97%2B01O7%2Bu4nwLnioyJY%2BAvdDbAtIU

f. Bd of Educ of the City of Sea Isle v. Kennedy 951 A.2d 987, 50 IDELR 227 (N. J. SCt 7/21/8) State Supreme Court affirmed an order removing a school board member who as father sought monetary relief in a FAPE claim. The court found an impermissible conflict of interest.

4. Record of Hearing

a. JR by WR & NR v. Sylvan Union Sch Dist 48 IDELR 253 (E.D. Calif 3/10/8) Court remanded matter where the administrative hearing resulted in only a partial record.

b. Letter to Connelly 108 LRP 2221 (OSEP 8/15/7)An SEA is obligated to provide at no charge to parent a verbatim copy of the transcript of the testimony at a dp hearing even where the time to appeal has run. A parent could use the transcript for future IEP team meetings. Letter to Maldonado 108 LRP 2251(OSEP 9/11/7) The public agency responsible for conducting the hearing is responsible for providing the verbatim record. Parent has the right to either a verbatim written record or a verbatim electronic record, not both.

c. Bethelehem Area Sch Dist v. Zhon 976 A.2d 1284, 53 IDELR 24 (Penna Commonwealth Ct 7/24/9) Parent whose primary language was Mandarin Chinese was provided an interpreter for the dp hearing and a translated order and opinion, but she had no right to a **translated** copy of the hearing transcript.

d. Bd of Educ of the Tuxedo Union Free Sch Dist 49 IDELR 238 (SEA NY 1/9/8) Where record did not specify whether student's services needed to be location-specific, SRO remanded for more specific order re same.

5***. Timelines/ 45 day rule***

a. Paul K & Stephanie K ex rel Joshua K v. State of Hawaii 567 F.Supp.2d 1231, 50 IDELR 187 (D. Haw 7/1/8) The parties extended the **deadline** for decision to 4/6/8. The parents requested another extension, 12 days after the deadline had elapsed and HO dismissed as untimely. The court reversed noting that the 45 day rule is a procedural safeguard that protects children with disabilities; it is the responsibility of the SEA and the HO to ensure a timely decision, not the parents.

b. Lake Washington Sch Dist #414 v. Office of the Superintendent of Public Instruction 51 IDELR 278 (W.D. Wash 1/16/9) School district asked federal court for a temporary restraining order (reversing HO order on 12/31/8 granting a continuance to 5/18/9 because of two vacations, two unrelated trials and time for trial prep for parent's

lawyer) and an order **banning** any extensions past 45 day period. Court denied the requests noting that the vague prejudice alleged by the district was outweighed by the prejudice to the parents in having a dp hearing with an unprepared lawyer.

c. Blackman, et al v. District of Columbia 581 F.Supp.2d 2, 108 LRP 58131 (D. DC 10/6/8) Court found that DC schools still had a long way to go and ordered Chancellor and state Superintendent to report back on several points including timeliness of HO decisions and implementation of HO decisions.

d. OO by Pabo v. District of Columbia 573 F.Supp.2d 41, 51 IDELR 9 (D. DC 8/27/8) Failure of HO to issue a timely decision (it was more than a year overdue) was unquestionably a violation of IDEA. Where parents withdrew the student before the due process complaint, the violation had no adverse impact upon the student.

e. CS by Struble v. California Dept of Educ 50 IDELR 63 (S.D. Calif 4/30/8) Court ruled that SEA's valid objection to burdensome request for irrelevant data concerning continuances was not a sufficient basis for concluding that the HOs routinely violate the 45 day timeline.

f. Elizabethtown Area Sch Dist 50 IDELR 24 (SEA Penna 3/25/8) SRO panel admonished HO for numerous continuances and poor **management** of the hearing process.

6. Evidence

a. Jalloh v. District of Columbia 535 F.Supp.2d 13, 49 IDELR 190 (D.DC 2/12/8) Formal court **rules of evidence** do not apply to due process hearings; Rocky Point Union Free Sch Dist 107 LRP 27842 (SEA NY 4/25/7) The formal rules of evidence used in civil proceedings are not applicable in due process hearings. The twin **criteria** for admission of evidence are relevance and reliability; Anello v. Indian River Sch Dist 109 LRP 7262 (D. Delaware 2/6/9) Court refused to consider parent claim that HO panel failed to follow Federal Rules of Evidence.

b. Sykes v. District of Columbia 49 IDELR 6 (D. DC 10/31/7) Court upheld HO admission of **hearsay** evidence noting the relaxed rules of evidence at dp hearing.

c. In re Student with a Disability 108 LRP 69495 (SEA NY 11/18/8) SRO **overturned** HO decision where HO improperly limited parents presentation of evidence by sustaining district objection to the cross-examination of a special ed teacher concerning whether she had implemented similar strategies and techniques with the student's brother. No basis was stated for objection by district or HO and ruling violated the parents' hearing rights; Blake C by Tina F v. Dept of Educ, State of Hawaii 51 IDELR 239 (D. Haw 1/15/9) Court ruled that HO erred by excluding all evidence before date of IEP and then used documents before that date to conclude that student made educational progress.

d. NP ex rel JP v. East Orange Bd of Educ 51 IDELR 191 (D. NJ 11/26/8) Court **reversed** HO ruling and permitted parents discovery of student's educational records on appeal. Court found that HO improperly denied the parents access to the records during the administrative proceeding.

e. Duxbury Public Schs 108 LRP 19364 (SEA Mass 3/25/8) HO quashed two **subpoenas**, one for superintendent, where parents could give no basis for any relevant testimony regarding IEP; district-wide policies are not relevant; GB & DB ex rel

JB v. Bridgewater-Puritan Regional Bd of Educ 52 IDELR 39 (D. NJ 2/27/9) Court upheld HO rulings re **relevance**.

f. AG & LG ex rel NG v. Frieden 52 IDELR 65 (S.D,NY 3/25/9) Court ruled that HO erred where he prohibited **leading questions** on cross examination, but error was harmless where witnesses later indicate no knowledge.

g. Mahoney ex rel BM v. Carlsbad Unified Sch Dist 52 IDELR 131 (S.D. Calif 4/8/9) Ct upheld ruling by HO permitting the use of an excluded document for the purpose of refreshing recollection of a parent re what she had told the district. Court found that HO did not rely upon excluded document in his decision.

h. Newport Public Schs 109 LRP 9847 (SEA Mich 2/2/9) Where a witness violated a sequestration order, HO found the witness to be not credible and a "frequent liar." ???

i. York County Dist Three 49 IDELR 178 (SEA SC 1/24/8) SRO noted wide discretion of HO as to evidentiary questions, and upheld exclusion of some parent exhibits.

j. CN by Newman v. Los Angeles Unified Sch Dist 51 IDELR 98 (C.D. Calif 10/9/8) HO properly took **official notice** of the California Department of Education guidelines for G-tube feedings; JW by JEW & JAW v. Fresno Unified Sch Dist 611 F.Supp.2d 1097, 52 IDELR 194 (E.D. Calif 4/27/9) Court upheld HO refusal to take official notice of SEA guidelines for education of hearing impaired students where the document was not on parent exhibit list; Attleboro Public Schs 109 LRP 74987 (SEA Mass 11/18/9) HO used Mapquest to take official notice of the distance between two elementary schools at issue.

k. NM by MM & LM v. Sch Dist of Philadelphia 585 F.Supp.2d 657, 51 IDELR 154 (E.D. Penna 11/9/8) Court rejected parent argument that HO erred by failing to qualify their witness as an **expert** where the HO permitted the witness to answer all questions; GB & DB ex rel JB v. Bridgewater-Puritan Regional Bd of Educ 52 IDELR 39 (D. NJ 2/27/9) HO did not err in ruling upon motions to qualify experts; WH by BH & KK v. Clovis Unified Sch Dist 52 IDELR 258 (E.D. Calif 6/8/9) Court found that HO erred by excluding the testimony of the parent's expert witness.

l. AY & DY ex rel BY v. Cumberland Valley Sch Dist 569 F.Supp.2d 496, 50 IDELR 224 (M.D. Penna 7/7/8) Court allowed evidence on appeal of student's recent progress not to show public IEP inappropriate, rather only to show that private placement by parents was appropriate; Hupp v. Switzerland of Ohio Local Sch Dist 51 IDELR 131 (S.D. Ohio 9/2/8) Court denied parents motion to compel discovery for all sped kids in district noting that because IDEA services are based upon individual needs, the information sought would be irrelevant; KI v. Montgomery Public Schs 51 IDELR 104 (M.D. Ala 9/30/8) Court refused to admit additional evidence on appeal where the testimony would be redundant and repetitive of testimony already in the record.

m. Gaumond v. Trinity Repertory Co. 46 IDELR 254 (Rhode Island S. Ct. 11/14/6). Court declined parent's request that it recognize a "disabled student – school **privilege**." Parents argued that based upon IDEA confidentiality and FERPA provisions that this privilege cloaks all confidential education records with protection from discovery in a civil action. (NOTE: how would this privilege affect dp hearings?) See also, Catrone ex rel Catrone v. Miles, et al 107 LRP 36034 (Ariz. Ct App 6/26/7) Court declined the parents' invitation to create and enforce a "special education records"

privilege. In a medical malpractice suit, the parents sought to block discovery of the special education records of the patient's brother citing FERPA and IDEA privacy provisions. The court affirmed the lower court's order requiring production under a narrow protective order.

7. Due Process Hearing System in General

a. MO by CO &LO v. Indiana Dept of Educ 635 F.Supp.2d 847, 52 IDELR 93 (N.D. Ind 3/31/9) Court found no evidence that the second tier review panel routinely reversed HO decisions in favor of parents.

b. NB UNPUBLISHED Keene v. Zelman 53 IDELR 5 (6th Cir. 7/29/9) UNPUBLISHED Parents brought a class action against Ohio SEA alleging illegal policies resulting in widespread dismissals of dp complaints and improper HO training. Also alleged was that HOs were to do nothing for the first 30 days and bill no more than one hour during that time. Sixth Circuit approved settlement that included an agreement to retrain HOs and an award of $81,000 vs SEA.

c. Quatroche v. East Lynne Bd of Educ 604 F.Supp.2d 96, 53 IDELR 96 (D. Conn. 3/31/9) If allegation had been that an SEA system of HO training affected a number of dp hearings, parent would state claim for a systemic violation. Here the allegation was that lack of sufficient ho training affected only one dp complaint, therefore no systemic violation and court dismissed.

d. Stengle v. Office of Dispute Resolution 109 LRP 24455 (M.D. Penna 4/27/9) SEA did not violate First Amendment by cancelling contract of HO who wrote articles about issues pending before her as HO

e. Questions and Answers on Procedural Safeguards and Due Process Procedures 52 IDELR 266 (OSERS 6/1/9).

8. Hearing Officer Qualifications

a. NB UNPUBLISHED Keene v. Zelman 53 IDELR 5 (6th Cir. 7/29/9) UNPUBLISHED Parents brought a class action against Ohio SEA alleging illegal policies resulting in widespread dismissals of dp complaints and improper HO **training**. Also alleged was that HOs were to do nothing for the first 30 days and bill no more than one hour during that time. Sixth Circuit approved settlement that included an agreement to retrain HOs and an award of $81,000 vs SEA.

b. Quatroche v. East Lynne Bd of Educ 604 F.Supp.2d 96, 53 IDELR 96 (D. Conn. 3/31/9) If allegation had been that an SEA system of HO **training** affected a number of dp hearings, parent would state claim for a systemic violation. Here the allegation was that lack of sufficient ho training affected only one dp complaint, therefore no systemic violation and court dismissed.

c. York County District Three 49 IDELR 178 (SEA SC 1/24/8) SRO rejected parent argument that HO was improperly **trained and unqualified** even though ho decision contained numerous errors where his FAPE conclusion was correct. JW by JEW & JAW v. Fresno Unified Sch Dist 570 F.Supp.2d 1212, 51 IDELR 133 (E.D. Calif 7/9/8) Court rejected parent challenge to ho qualifications where parents failed to exhaust administrative remedies by taking advantage of California procedure permitting a preemptory challenge to a ho.

d. CS by Struble v. California Dept of Educ 50 IDELR 63 (S.D. Calif 4/30/8) Court rejected parent challenge based upon SEA failure to provide 80 hours of **training** per year as required by state law where parents failed to show that HOs were not

qualified under IDEA standards. JR by WR & NR v. Sylvan Union Sch Dist 48 IDELR 253 (E.D. Calif 3/10/8) Court rejected allegations that California OAH systematically violated IDEA by failing to provide knowledgeable HOs where allegation was based only upon conjecture. MO by Ondrovic v. Indiana Dept of Educ 51 IDELR 6 (N.D. Ind. 8/29/8).

e. Wooley ex rel EW v. Valley Center-Panama Unified Sch Dist 47 IDELR 66 (S.D. Calif 1/22/7) Court denied parents argument that exhaustion of administrative remedies should be excused because the state hearing officers are allegedly insufficiently **trained** and **unqualified** under IDEA'04. The Court noted that the parents could raise the issue on appeal after first having a due process hearing.

f. Kerry M. v. Manhattan Sch Dist No. 114 106 LRP 58405 (ND Ill. 9/29/6) Court rejected a claim that the state DOE failed to properly **train** its HOs where the HO conducted the specific hearing in question properly. See, HH by Hough v. Indiana Bd of Special Educ Appeals 47 IDELR 250 (N.D. Ind. 4/12/7) (IDEA'04 HO qualifications apply only to HOs and not SROs???)

NOTE: This document, and any discussion thereof, is intended for educational purposes only. Nothing stated or implied in this document, or in any discussion thereof, should be construed to constitute legal advice or analysis of any particular factual situation.