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IMPARTIAL HEARINGS UNDER THE IDEA: LEGAL ISSUES AND ANSWERS

Updated and Revised

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This 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—hearing officer issues and hearing/decision issues.

[1] Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act*, 58 ADMIN. L. REV. 401 (2006); *see also* 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).

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

[3] 20 U.S.C. § 1415(f)(3)(A) (2008).

[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. Bd. of Educ., 33 F. Supp. 2d 431 (D. Md. 1998).

impropriety standard that applies 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 states 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]

II. HEARING/DECISION ISSUES

RESOLUTION SESSIONS

6. Does the resolution process under 34 C.F.R. §300.510 apply when a school district files a due process complaint?

No, OSEP has said 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. OSEP added: "If the complaint is determined to be insufficient under 34 CFR §300.508(d)(2) and is not amended, the complaint could be dismissed."[11]

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[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 (2010).

[9] See, e.g., Stassart v. Lakeside Joint Sch. Dist., 53 IDELR ¶ 51 (N.D. Cal. 2009); J.R. *ex rel*. W.R. v. Sylvan Union Sch. Dist., 49 IDELR ¶ 253 (E.D. Cal. 2008); DeMerchant v. Springfield Sch. Dist., 47 IDELR ¶ 94 (D. Vt. 2007); Walled Lake Consol. Sch. v. Doe, 42 IDELR ¶ 3 (E.D. Mich. 2004); Weyrich v. New Albany-Floyd County 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).

[10] Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 52 IDELR ¶ 266 (OSEP 2009) (alternatively available at http://www.ed.gov/policy/speced/guid/idea/procedural-safeguards-q-a.pdf).

[11] *Id*.

Moreover, in such cases, OSEP stated that 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.[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.[18] A recent court decision seems to support 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. 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?

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[12] *Id.*

[13] Office of Special Education Programs, Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities (June 2009). Available at http://www.ed.gov/policy/speced/guid/idea/procedural-safeguards-q-a.pdf. 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] *Id.*; 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) (2008).

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

[19] Spencer v. Dist. of Columbia, 416 F. Spp. 2d 5 (D.D.C. 2006).

[20] 34 C.F.R. § 300.510(b)(3)-(4) (2008).

Yes, according to OSEP,[21] 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."[22]

10. 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 cited the lack of any such authority in 34 C.F.R. § 300.542(c) and the overriding purpose of promptness in the applicable disciplinary cases.[23]

11. 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.[24]

12. 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, on day 31, the 45-day timeline for conducting the hearing and issuing a decision starts.[25]

SUFFICIENCY PROCESS

13. 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

[21] Office of Special Education Programs, Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities (June 2009). Available at http://www.ed.gov/policy/speced/guid/idea/procedural-safeguards-q-a.pdf

[22] *Id.*

[23] *Id.*

[24] 34 C.F.R. § 300.510(b)(5) (2008); *see also* 71 Fed. Reg. 46702 (Aug. 14, 2006). For varying judicial consequences, *compare* OO 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).

[25] 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.*

party may re-file if within the two-year limitations period.[26]

14. 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.[27]

15. Are courts 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.[28] 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.[29] Providing a third approach, a federal district court in Missouri recently held that the IDEA does not provide for judicial review of IHO sufficiency decisions.[30]

JURISDICTION

16. Do IHOs have jurisdiction for the IDEA claims of a child who resides in, but is not enrolled, in the school district?

Yes, according to a federal district court decision in the District of Columbia.[31] 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.

17. 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.[32]

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

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[26] *Id.*
[27] *Id.*
[28] M.S.-G. v. Lenape Reg'l High Sch. Dist. Bd. of Educ., 306 F. App'x 772 (3d Cir. 2009).
[29] Alexandra R. v. Brookline Sch. Dist., 53 IDELR ¶ 93 (D.N.H. 2009).
[30] Knight v. Washington Sch. Dist., 54 IDELR ¶ 185 (E.D. Mo. 2010).
[31] D.S. v. Dist. of Columbia, 699 F. Supp. 2d 229 (D.D.C. 2010).
[32] 64 Fed. Reg. 12,613 (Mar. 12, 1999).

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."[33]

19. 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.[34] However, the IHO does not have jurisdiction in such cases as the appellate mechanism for the SEA's CRP rulings.[35]

20. 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.[36] Arguably, an additional exception is the extent that a few courts have interpreted state laws, such as those providing for dual enrollment, as extending local education agency (LEA) obligations for special education and/or related services to parentally placed children in private schools.[37]

21. 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.[38]

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

[33] 71 Fed. Reg. 46,706 (Aug. 14, 2006).

[34] 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., 40 IDELR ¶ 8 (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).

[35] See, e.g., Virginia Office of Protection & Advocacy v. Virginia, 262 F. Supp. 2d 648 (E.D. Va. 2003).

[36] 34 C.F.R. § 300.140 (2008). 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)

[37] 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).

[38] Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 52 IDELR ¶ 266 (OSEP 2009) (alternatively available at http://www.ed.gov/policy/speced/guid/idea/procedural-safeguards-q-a.pdf).

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.[39]

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

Only in unusual cases.[40]

24. 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.[41]

25. 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.[42]

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

No, according to OSEP's interpretation. IHOs do not have jurisdiction for any disputes between parents as compared to disputes between parents and "public agencies." In such cases, the IDEA allows either parent to provide or revoke consent, with their disagreements being subject exclusively (i.e., not under the IDEA) to the resolution mechanisms available "based on State or local law."[43]

27. 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?

Not 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.[44]

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

[40] See, e.g., Chavez v. Bd. of Educ., 614 F. Supp. 2d 1184 (D.N.M. 2008).

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

[42] 34 C.F.R. §§ 300.300(b)(3)(i) and 300.300(b)(4)(i).

[43] Letter to Cox, 54 IDELR ¶ 60 (OSEP 2009).

[44] A.O. *ex rel.* M.W. v. El Paso Indep. Sch. Dist., 54 IDELR ¶ 42 (5th Cir. 2010).

28. 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,[45] but others, in unpublished decisions, say no.[46] OSEP has stated that 1) the IDEA only provides for judicial enforcement of settlement agreements as part of mediation or the resolution process and 2) a state may have uniform rules specific to an IHO's authority or lack of authority to review and/or enforce settlement agreements reached outside of the mediation or resolution processes.[47]

29. 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?

In the same, more recent commentary, OSEP stated that "[s]uch decisions are best left to individual State's procedures for conducting due process hearings."[48] However, in an earlier policy interpretation, OSEP seemed to suggest that an IHO had the authority to decide the particular issue of the child's "stay-put" *sua sponte*.[49] Conversely, the limited case law arguably answers no to this question as a matter of remedial authority, whether for declaratory[50] or injunctive[51] relief.

[45] 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).

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

[47] Letter to Shaw, 50 IDELR ¶ 79 (OSEP 2007).

[48] *Id*.

[49] 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.

[50] See, e.g., Mifflin County Sch. Dist. v. Special Educ. Due Process Appeals Bd., 800 A.2d 1010 (Pa. Commw. Ct. 2002). The characterization of this issue is only tentative, 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.

[51] See, e.g., Sch. Bd. of Martin County 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 oficio* rather than *sua sponte*.

30. 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.[52]

TIMELINES IN GENERAL

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

It depends on 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.[53] Conversely, if this procedural violation is prejudicial, this conclusion may contribute to one or more consequences to the defendant LEA—attorneys' fees,[54] an exception to the exhaustion doctrine,[55] or the extension of the period for tuition reimbursement.[56]

32. 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;[57] and 2) the defendant agency—whether the LEA or the SEA—ultimately must be able to show the documentation and justification for the extensions.[58]

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

[53] Heather S. v. Wisconsin, 125 F.3d 1045 (7th Cir. 1995).

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

[55] 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).

[56] See, e.g., Rose v. Chester County Intermediate Unit, 24 IDELR 61 (E.D. Pa. 1996), *aff'd mem*., 114 F.3d 1173 (3d Cir. 1997).

[57] 34 C.F.R. § 300.515(c) (2008). 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).

[58] See, e.g., Lillbask *ex rel*. Mauclare v. Sergi, 117 F. Supp. 2d 182 (D. Conn. 2000)

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

Yes, subject to state law,[59] denying continuances is within the good faith discretion of IHOs with due consideration to unrepresented parents.[60]

EXPEDITED HEARINGS

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

The IDEA regulations require 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.[61]

35. 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.[62]

36. 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 days; decision – within 30 days (actually, within 10 days of the hearing if the hearing is more than one session).[63]

37. The IDEA regulations for expedited hearings allow for mutual written waiver of the resolution session, but may the parties mutually agree, instead, to extend the period for the resolution session?

No, according to OSEP given the expedited purpose of the hearing and the absence of any such option in the regulations, OSEP concluded that the 15-day deadline is absolute.[64]

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[59] See, e.g., Lake Washington Sch. Dist. No. 414 v. Office of the Superintendent of Pub. Instruction, 51 IDELR ¶ 278 (D. Wash. 2009) (refusing district's request to enjoin IHO's extension to parent under state "good cause" standard).

[60] See, e.g., J.D. v. Kanawha County Bd. of Educ., 53 IDELR ¶ 225 (S.D. W.Va. 2009); J.R. *ex rel*. W.R. v. Sylvan Union Sch. Dist., 49 IDELR ¶ 253 (E.D. Cal. 2008); Lessard v. Wilton-Lyndborough Cooperative Sch. Dist., 47 IDELR ¶ 299 (D.N.H. 2007.

[61] 34 C.F.R. § 300.532(c)(1) (2008).

[62] *Id*.

[63] *Id*. § 300.532(c)(2)-(4).

[64] Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 52 IDELR ¶ 266 (OSEP 2009) (alternatively available at http://www.ed.gov/policy/speced/guid/idea/procedural-safeguards-q-a.pdf).

HEARING PROCEDURES, INCLUDING EVIDENTIARY MATTERS

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

Very few state laws provide for discovery 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.[65]

39. 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[66] and implicitly with regard to complaints that the hearing officer deems to be insufficient.[67] The scope of other circumstances and the extent of doing so "with prejudice" would appear to be a matter of state law. In general, it would appear to be advisable to 1) hold a hearing where the basis is a factual matter of material dispute[68]; 2) limit dismissing the case with prejudice to cases of rather egregious conduct by the filing party, whether separately sanctionable or not[69]; and 3) issue a written opinion with factual findings and legal conclusions sufficient to withstand judicial review.[70]

40. 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.[71] The generally applicable judicial standard of review is abuse of discretion, which usually favors the IHO.[72]

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

[66] 34 C.F.R. § 300.510(b)(4) (2009).

[67] *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).

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

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

[70] 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., 2009 WL 2957991 (D.N.H. 2009).

[71] 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 46,706); and 4) providing proper latitude for pro se parties (*id*. at 46,699).

[72] See, e.g., O'Toole v. Olathe Unified Sch. Dist. No. 233, 144 F.3d 962 (10th Cir. 1998).

41. 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.[73]

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

Yes, including, but not limited, to prohibiting the introduction of the evidence or allowing the rescheduling of the hearing.[74]

43. 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."[75] However, except where the parties jointly agree or where state law provides such authority,[76] an unpublished decision disagreed with the OSEP interpretation.[77]

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

According to OSEP, yes.[78]

45. 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.[79]

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[73] Letter to Kerr, 23 IDELR 364 (OSEP 1994). For the prescribed hearing rights, see 34 C.F.R. § 300.512 (2008).

[74] 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). 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).

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

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

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

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

[79] S.A. v. Tulare County Office of Educ., 53 IDELR ¶ 111 (E.D. Cal. 2009).

46. Do IHOs have contempt powers?

No, unless state law provides such authority.[80]

47. 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.[81] The published case law is scant, but relatively supportive.[82]

48. 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.[83]

49. 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.[84]

50. 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,[85] 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."[86] The 2004 amendments have retained this choice-providing language.

WRITTEN DECISIONS

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

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

[82] See, e.g., 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); 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).

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

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

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

[86] 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).

51. 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.[87] Conversely, where the IHO's legal findings have such support, courts generally afford them notable deference.[88] In general, the deference increases where the IHO's factual findings are careful and thorough.[89]

52. 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.[90]

53. 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.[91]

[87] See, e.g., S.G. v. Dist. of Columbia, 498 F. Supp. 2d 304 (D.D.C. 2007); *cf.* Stanton v. Dist. of Columbia, 680 F. Supp. 2d 201 (D.D.C. 2010) (failure to include sufficient findings and reasoning for calculation of eompensatory 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. County Sch. Bd., 516 F.3d 154 (4th Cir. 2008) (credibility-based determinations need not be detailed in light of the 45-day deadline).

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

[89] See, e.g., Capistrano Unifed Sch. Dist. v. Wartenburg, 59 F.3d 884 (9th Cir. 1995); Anchorage Sch. Dist. v. D.S., 688 F. Supp. 2d 883 (D. Alaska 2010).

[90] Joshua A. v. Rocklin Unified Sch. Dist., 49 IDELR ¶ 249 (E.D. Cal. 2008).

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

MISCELLANEOUS

54. 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"[92] standard.[93] 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.[94]

55. Does res judicata apply to IHO decisions?

Yes.[95]

56. 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.[96]

57. 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.[97]

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

[93] 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).

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

[95] See, e.g., IDEA Pub. Charter Sch. v. Belton, 48 IDELR ¶ 90 (D.D.C. 2007).

[96] 20 U.S.C. §§ 1415(f)(3)(C); *see also id*. §1415(b)(6)(B).

[97] *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).

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

The answer is a matter of state law.[98] Approximately 10 states expressly prohibit their representation, and approximately 12 expressly permit it.[99] 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.[100]

59. 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.[101]

60. 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.[102] However, some state laws have put the burden of proof in such cases on the district.[103] Conversely, lower courts have extended the Supreme Court's ruling to other issues, such as whether the child is eligible[104] and whether the child's placement is in the least restrictive environment (LRE).[105]

61. 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.[106]

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[98] 34 C.F.R. § 300.512(a)(1).

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

[100] *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).

[101] 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.*

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

[103] N.Y. EDUC. LAW § 4404[1][c] (McKinney 2008). The limited exception is for the second step in tuition reimbursement cases, which is whether the parent's unilateral placement is appropriate. *Id.*

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

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

[106] 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).