National Association of State Directors of Special Education, Inc.
King Street Station I • 1800 Diagonal Road • Suite 320 • Alexandria, VA 22314
Tel: 703-519-3800 • Fax: 703-519-3808 • • www.nasdse.org

IMPARTIAL HEARINGS UNDER THE IDEA: LEGAL ISSUES AND ANSWERS

Updated and Revised

Perry A. Zirkel
University Professor of Education and Law
Lehigh University

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This updated Question-and-Answer document is specific to impartial hearing officers (IHOs) and the impartial hearings that they conduct under the Individuals with Disabilities Education Act (IDEA). 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. More specifically, here is the table of contents:

[1] Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2011); *see also* Perry A. Zirkel, *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 impropriety standard that applies to judges.[6] The leading but still not per se exception is *ex parte* communications.[7]

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[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. 46705 (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).

[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).

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]

[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., B.J.S. v. State Educ. Dep't, 699 F. Supp. 2d 586 (W.D.N.Y 2010); Stassart v. Lakeside Joint Sch. Dist., 53 IDELR ¶ 51 (N.D. Cal. 2009); J.R. *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).

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] 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

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[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*.

[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. 46704 (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*.

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?

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 based its conclusion that this deadline was absolute on the lack of any such waiver authority in 34 C.F.R. § 300.542(c) and the overriding purpose of promptness in the applicable disciplinary cases.[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] In a recent ruling, a federal district court concluded that this parental right is voluntary; thus, the parent's choice not to exercise it did not excuse the district's failure.[25]

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

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[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).

[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*..; *see also* Letter to Gerl, 51 IDELR ¶ 166 (OSEP 2008).

[24] 34 C.F.R. § 300.510(b)(5) (2008); *see also* 71 Fed. Reg. 46702 (Aug. 14, 2006). For varying judicial consequences, *compare* O.O. v. District of Columbia, 573 F. Supp. 2d 41 (D.D.C. 2008) (concluding that LEA's failure to convene a resolution session constituted harmless error), *with* JMC & MEC v. Louisiana Bd. of Elementary & Secondary Educ., 50 IDELR ¶ 157 (M.D. Cal. 2008) (ruling that where LEA failed to convene the resolution session within 15 days, settlement agreement before due process hearing was not enforceable).

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

decision starts.[26]

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

Not according to OSEP. More specifically, the commentary accompanying the regulations declared: "We agree with S. Rpt. No. 108–185, p. 38 [i.e., the IDEA's legislative history], which states that the resolution meeting should not be postponed when the LEA believes that a parent's complaint is insufficient."[27]

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

Not according to OSEP, even if the advocate is entitled under state law to represent the parent/student at a due process hearing.[28]

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

Not necessarily.[29]

SUFFICIENCY PROCESS

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

Citing the pertinent IDEA regulations and the comments accompanying them, OSEP answered that 1) the IHO must identify the specific insufficiencies in the notice; 2) the filing party may amend its complaint if the other party provides written consent and has an opportunity for mediation or a resolution session; 3) the IHO may, if the filing party does not exercise this amendment option, dismiss the insufficient complaint; and 4) the party may re-file if within the two-year limitations period.[30]

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[26] 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*.

[27] 71 Fed. Reg. 46698 (Aug. 14, 2006).

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

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

[30] Office of Special Education Programs, Questions and Answers on Procedural Safeguards and Due Process Procedures for Parents and Children with Disabilities, 52 IDELR ¶ 266 (June 2009). Available at http://www.ed.gov/policy/speced/guid/idea/procedural-safeguards-q-a.pdf.

17. 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.[31]

18. 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.[32] 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.[33] Providing a third approach, the Eighth Circuit recently held, in an unpublished decision, that the IDEA does not provide for judicial review of IHO sufficiency decisions.[34]

JURISDICTION

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

The issue is not clearly settled. According to a federal district court decision in the District of Columbia, the answer is yes.[35] 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.[36] Other courts have extended this answer even if the child's residency changes.[37] OSEP agrees with this answer.[38] However, the Eighth Circuit answered the question no at least under a Minnesota law that requires the impartial hearing to be "conducted by and in the school district

[31] *Id*.

[32] M.S.-G. v. Lenape Reg'l High Sch. Dist. Bd. of Educ., 306 F. App'x 772 (3d Cir. 2009); *cf.* Lago Vista Unified Sch. Dist. v. S.F., 50 IDELR ¶ 104 (W.D. Tex. 2007) (ruling that IHO exceeded his authority by addressing claim not properly raised in the hearing complaint).

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

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

[35] D.S. v. Dist. of Columbia, 699 F. Supp. 2d 229 (D.D.C. 2010).

[36] This obligation is different from the child find and proportional-services obligations for children voluntarily placed in private schools, which are based on the school's location, not the child's residency. See *infra* note 40 and accompanying text.

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

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

responsible for assuring that an appropriate program is provided."[39] The court reasoned that such challenges were moot because the new school district is responsible for providing the hearing.

20. 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.[40]

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

Similarly, according to the OSEP commentary accompanying the 2006 IDEA regulations, "such matters should be left to the discretion of [IHOs] in light of the particular facts and circumstances of a case."[41]

22. 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.[42] However, the IHO does not have jurisdiction in such cases as the appellate mechanism for the SEA's CRP rulings.[43]

23. 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.[44] 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.[45]

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

[40] 64 Fed. Reg. 12,613 (Mar. 12, 1999).

[41] 71 Fed. Reg. 46706 (Aug. 14, 2006).

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

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

[44] 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)

[45] 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. 46590 (Aug. 14, 2006).

24. 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.[46]

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

Yes, according to a recent Ninth Circuit decision.[47]

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

Although there may be exceptions where the issue is relatively limited and a single plaintiff is bringing the claim, the IHO generally does not have jurisdiction for class-action type claims.[48]

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

Not in most cases.[49]

28. 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.[50]

29. 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.[51]

30. 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

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[46] 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).

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

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

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

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

[51] 34 C.F.R. §§ 300.300(b)(3)(i) and 300.300(b)(4)(i).

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."[52]

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

Although various hearing and review officers have broadly answered this question with a "no," often based on the coverage of the Family Educational Rights and Privacy Act (FERPA),[53] the more defensible answer would appear to be "it depends" in light of the overlapping coverage of the IDEA. More specifically, if the student records issue concerns the identification, evaluation, FAPE, or placement of the child, it would appear to be within the concurrent jurisdiction of the IHO,[54] with one possible exception—if the issue concerns amending the child's record (based, for example, on inaccurate or misleading information), the IDEA regulations may be interpreted as reserving the matter exclusively for the FERPA hearing procedure.[55]

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

Yes, according to a recent unpublished Fifth Circuit decision that reasoned, apparently properly, that the effect under the IDEA may be in terms of precluding recovery of attorneys' fees but not subject matter jurisdiction.[56]

33. 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,[57] but others, in unpublished decisions, say no.[58] 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.[59]

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

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

[54] 34 C.F.R. §§ 300.507(a) and 300.613-300.621.

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

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

[57] 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).

[58] 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).

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

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

No. The, prevailing view is that the appropriate forums are the state complaint resolution process[60] and, alternatively, the courts,[61] rather than the H/RO process.[62]

35. 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."[63] 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*.[64] Conversely, the limited case law arguably answers no to this question as a matter of remedial authority, whether for declaratory[65] or injunctive[66] relief.

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[60] *See, e.g.*, Wyner v. Manhattan Beach Unified Sch. Dist., 223 F.3d 1026, 1028-29 (9th Cir. 2000); Bd. of Educ. of Wappingers Cent. Sch. Dist., 47 IDELR ¶ 115 (N.Y. SEA 2006); Crown Point Cent. Sch. Dist., 46 IDELR ¶ 269 (N.Y. SEA 2006); Newtown Bd. of Educ., 41 IDELR ¶ 201, at 827 (Conn. SEA 2004). *But cf.* Lake Travis Indep. Sch. Dist. v. M.L., 50 IDELR ¶ 105 (W.D. Tex. 2007) (allowing IHO enforcement based on state law). However, parents need not exhaust the state's complaint resolution process before seeking judicial enforcement of an H/RO order. Porter v. Bd. of Trustees, 307 F.3d 1064, 1074 (9th Cir. 2002).

[61] The usual procedure is a § 1983 action. *See, e.g.*, Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.3d 272, 279 (3d Cir. 1996); Dominique L. v. Bd. of Educ. of City of Chicago, 56 IDELR ¶ 65 (N.D. Ill. 2011); L.J. v. Audubon Bd. of Educ., 47 IDELR ¶ 100 (D.N.J. 2006); *cf.* Dudley v. Lower Merion Sch. Dist., 768 F. Supp. 2d (E.D. Pa. 2011) (alternate avenue of IDEA itself). However, this avenue may be only open to parents, not districts. *See, e.g.*, Metro. Sch. Dist. v. Buskirk, 950 F. Supp. 899, 903 (S.D. Ind. 1997).

[62] However, for a recent case where the enforcement route was a second IDEA hearing, see *Bd. of Educ. v. Illinois State Bd. of Educ.*, 741 F. Supp. 2d 920 (N.D. Ill. 2010). For the related issue of whether the IHO has the jurisdiction to reopen the case upon the request of either party for enforcement purposes, see *Bd. of Educ. of Ellenville Cent. Sch. Dist.*, 28 IDELR 337 (N.Y. SEA 1998).

[63] *Id*.

[64] 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.

[65] See, e.g., Saki v. State of Hawaii, Dep't of Educ., 50 IDELR ¶ 103 (D. Hawaii 2008); Mifflin County Sch. Dist. v. Special Educ. Due Process Appeals Bd., 800 A.2d 1010 (Pa. Commw. Ct. 2002). The second case provides only limited authority, because the court was addressing the authority of the second-tier review panel, not the IHO, and its rationale included that doing so "without the benefit of a full factual record and adjudication on the issue [would result in] in a premature interruption of the administrative process." *Id*. at 1014.

[66] 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*.

36. 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.[67]

TIMELINES IN GENERAL

37. 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.[68] Conversely, if this procedural violation is prejudicial, this conclusion may contribute to one or more consequences to the defendant LEA—attorneys' fees,[69] an exception to the exhaustion doctrine,[70] or the extension of the period for tuition reimbursement.[71] In a recent unpublished decision, the federal district court in Hawaii treated such a delay as a per se violation, but perhaps the dual status of Hawaii as the SEA and LEA may be a distinguishable factor.[72]

38. 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;[73] and 2) the defendant agency—whether the LEA or the SEA—ultimately must be able to show the documentation and justification for the extensions.[74]

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

[68] Heather S. v. Wisconsin, 125 F.3d 1045 (7th Cir. 1995); *see also* Wilkins v. Dist. of Columbia, 571F. Supp. 2d 163 (D.D.C. 2008).

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

[70] 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).

[71] 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). *But cf*. C.W. v. Rose Tree Media Sch. Dist., 395 F. App'x 824 (3d Cir. 2010) (not where no denial of FAPE).

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

[73] 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).

[74] See, e.g., Lillbask *ex rel*. Mauclare v. Sergi, 117 F. Supp. 2d 182 (D. Conn. 2000); *see also* L.C. v. Utah State Bd. of Educ., 125 F. App'x 252 (10th Cir. 2005).

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

Yes, subject to state law,[75] denying continuances is within the good faith discretion of IHOs with due consideration to unrepresented parents.[76]

EXPEDITED HEARINGS

40. 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.[77]

41. 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.[78]

42. What is the timeline for an expedited hearing?

Unless the state has adopted different procedural rules, the deadlines are as follows, starting with the receipt of the complaint: resolution session – within 7 days; hearing – within 20 school days; decision – within 30 school days (actually, within 10 school days of the hearing if the hearing is more than one session).[79]

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

Although the proposed IDEA regulations contained a two-day exception for expedited hearings, the final version retained the five-day rule without exception. The Agency's stated reasoning was that "limiting the disclosure time to two days would significantly impair the ability of the

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

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

[77] 34 C.F.R. § 300.532(c)(1) (2008).

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

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

parties to prepare for the hearing, since one purpose of the expedited hearing is to provide protection to the child."[80]

HEARING PROCEDURES, INCLUDING EVIDENTIARY MATTERS

44. 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.[81] However, in a Florida case, the appellate court held that in the absence of state law the IHO lacked authority to order discovery.[82]

45. 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[83] and implicitly with regard to complaints that the hearing officer deems to be insufficient.[84] 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[85]; 2) limit dismissing the case with prejudice to cases of rather egregious conduct by the filing party, whether separately sanctionable or not[86]; and 3) issue a written opinion with factual findings and legal conclusions sufficient to withstand judicial review.[87]

46. 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

[80] 71 Fed. Reg. 46726 (Aug. 14, 2006).

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

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

[83] 34 C.F.R. § 300.510(b)(4) (2009).

[84] *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).

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

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

[87] 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).

limitations.[88] The generally applicable judicial standard of review is abuse of discretion, which usually favors the IHO.[89]

47. 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.[90] Although OSEP has referred to the IHO's responsibility "to accord each party a meaningful opportunity to exercise these rights during the course of the hearing,"[91] the aforementioned abuse of discretion standard provides ample latitude to the IHO to rule in favor of efficiency, particularly in light of the 45-day regulatory deadline.

48. 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.[92]

49. 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."[93] However, except where the parties jointly agree or where state law

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[88] 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. 46691 (Aug. 14, 2006)); 2) ruling upon compliance with timelines and the statute of limitations (*id*. at 46705-46706); 3) determining whether the non-complaining party may raise other issues at the hearing not specified in the complaint (*id*. at 46706); and 4) providing proper latitude for pro se parties (*id*. at 46699).

[89] See, e.g., O'Toole v. Olathe Unified Sch. Dist. No. 233, 144 F.3d 692, 709 (10th Cir. 1998); D.Z. v. Bethlehem Area Sch. Dist., 2 A.3d 712 (Pa. Commw. Ct. 2010); *cf.* Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13 (D.D.C. 2008)(upholding IHO's exclusion of evidence).

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

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

[92] 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. 46706 (Aug. 14, 2006).

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

provides such authority,[94] an unpublished decision disagreed with the OSEP interpretation.[95]

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

According to OSEP, yes.[96]

51. 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.[97]

52. Do IHOs have contempt powers?

No, unless state law provides such authority.[98]

53. 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.[99] The published case law is scant and somewhat supportive.[100]

54. 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.[101]

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

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

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

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

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

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

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

[100] 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).

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

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.[102]

56. 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,[103] 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."[104] The 2004 amendments have retained this choice-providing language.

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

Not in the absence of a state law, according to a Pennsylvania appellate court in a gifted education case.[105]

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

The pertinent case law is insufficient to provide a clear answer where state law does not expressly provide this power.[106]

59. May an IHO admit hearsay evidence?

Generally yes unless state law dictates otherwise,[107] but relying on it in the IHO's decision without corroborative proof may be problematic.[108]

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

Yes, but only as background information.[109]

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

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

[104] 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).

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

[106] See, e.g., J.W. v. Fresno Unified Sch. Dist., 611 F. Supp. 2d 1097 (E.D. Cal. 2009) (rejecting challenge to non-use in connection with applicable state law); Ross v. Framingham Sch. Comm., 44 F. Supp. 2d 104 (D. Mass. 1999), *aff'd mem.*, 229 F.3d 1133 (1st Cir. 2000) (rejecting challenge to use but not addressing this issue squarely); *cf.* Brandon H. v. Kennewick Sch. Dist., 82 F. Supp. 2d 1174 (E.D. Wash. 2000) (citing Washington law specifying said authority).

[107] See, e.g., Glendale Unified Sch. Dist. v. Almasi, 122 F. Supp. 1093 (C.D. Cal. 2000).

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

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

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

It depends on the jurisdiction. For example, the First, Third, and Ninth Circuits have adopted this standard,[110] whereas the Fourth and Tenth Circuits have partially disagreed.[111] This approach considers the time of the educational decision, not the adjudicator's deliberations, as controlling to determine appropriateness.

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

This standard, which originates in contract law, exclusively restricts consideration to the final version of the IEP that the school system offered during the IEP process.[112] Various circuits have adopted it but typically only in limited circumstances or with exceptions.[113]

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

Yes, but only after providing due notice and ample opportunity for the party's participation. Courts tend to review such situations under an abuse of discretion standard, supporting IHO decisions more often than not.[114]

WRITTEN DECISIONS

64. 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.[115] Conversely, where the IHO's legal findings have such support, courts generally afford them notable

[110] See, e.g., Lessard v. Wilton Lyndeborough Coop. Sch. Dist., 518 F.3d 18, 29 (1st Cir. 2008); Adams v. State of Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999); Fuhrmann v. E. Hanover Bd. of Educ., 993 F.2d 1031, 1041 (3d Cir. 1993) (Mansmann, J., concurring)

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

[112] See, e.g., C.G. v. Five Town Cmty. Sch. Dist., 513 F.3d 279, 285 (2d Cir. 2006) (explaining but not either adopting or rejecting this standard).

[113] See, e.g., C.G. v. Five Town Cmty. Sch. Dist., 513 F.3d 279 (1st Cir. 2008); John M. v. Bd. of Educ., 502 F.3d 708 (7th Cir. 2007); A.K. v. Alexandria City Sch. Bd., 484 F.3d 672 (4th Cir. 2007); Doe v. Defendant I, 898 F.3d 1106 (6th Cir. 1990); Union Sch. Dist. v. Smith, 15 F.3d 1519 (9th Cir. 1994).

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

[115] 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 compensatory education); Options Pub. Charter Sch. v. Howe, 512 F. Supp. 2d 55 (D.D.C.

deference.[116] In general, the deference increases where the IHO's factual findings are careful and thorough.[117]

65. 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.[118] Conversely, however, an IHO's legal conclusion that fails to reference the supporting facts may not receive judicial deference.[119]

66. 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.[120]

MISCELLANEOUS

67. 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"[121] standard.[122] 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

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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).

[116] 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).

[117] See, e.g., Capistrano Unified Sch. Dist. v. Wartenburg, 59 F.3d 884 (9th Cir. 1995); Doyle v. Arlington Sch. Dist., 953 F.2d 100 (4th Cir. 1991); Kerkam v. Superintendent, D.C. Sch., 931 F.2d 84 (D.C. Cir. 1991); Anchorage Sch. Dist. v. D.S., 688 F. Supp. 2d 883 (D. Alaska 2010). Interestingly, the Ninth Circuit included the hearing officer's participation in the q uestioning of witnesses as part of its "thorough and careful" calculus for according deference. R.B. v. Napa Valley Unified Sch. Dist., 496 F.3d 932, 942 (9th Cir. 2007).

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

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

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

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

[122] 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).

review for the IHO's legal conclusions.[123]

68. Does res judicata apply to IHO decisions?

Yes.[124]

[123] 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).

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

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

No, according to the Ninth Circuit; each school year represents a separate issue.[125]

70. 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.[126]

71. 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.[127]

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

The answer is a matter of state law.[128] Approximately 10 states expressly prohibit their representation, and approximately 12 expressly permit it.[129] 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.[130]

73. 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.[131]

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

[126] 20 U.S.C. §§ 1415(f) (3) (C); *see also id*. §1415(b) (6) (B).

[127] *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).

[128] 34 C.F.R. § 300.512(a) (1).

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

[130] *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).

[131] 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*.

74. 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.[132] However, some state laws have put the burden of proof in such cases on the district.[133] Conversely, lower courts have extended the Supreme Court's ruling to other issues, such as whether the child is eligible[134] and whether the child's placement is in the least restrictive environment (LRE).[135]

75. 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.[136]

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

Not any longer. On October 5, 2010, the President signed legislation popularly known as "Rosa's law" that changes the reference from "mental retardation" in the IDEA and other federal legislation, such as Section 504, to "intellectual disability."[137]

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

Yes, within reasonable limits, basically based on the IHO's consideration of the parties' arguments.[138]

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

Not according to OSEP, because such notice limits "would impose additional procedural hurdles on the right to a due process hearing that are not contemplated by the IDEA."[139]

79. Does the parent's qualified right to interpretive services extend to a transcript in the parent's

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

[133] 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*.

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

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

[136] 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).

[137] 124 STAT. 2643 (2010).

[138] *Compare* Ford v. Long Beach Unified Sch. Dist., 291 F.3d 296 (9th Cir. 2002); J.W. v. Fresno Unified Sch. Dist., 611 F. Supp. 2d 1097 (E.D. Cal. 2009); *cf.* Adam J. v. Keller Indep. Sch. Dist., 328 F.3d 804 (5th Cir. 2003) (impartiality challenge), *with* K.E. v. Indep. Sch. Dist. No. 15, 54 IDELR ¶ 215 (D. Minn. 2010).

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

native language?

No, according to Pennsylvania's intermediate, appellate court.[140]

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

Only if 1) allowed by the state's applicable procedures and 2) the reconsideration is before the final decision and is issued within the 45-day, or properly extended, timeline.[141]

81. May an IHO proceed with the hearing in the absence of one of the parties?

In general, courts review such matters on an abuse of discretion standard, which makes it advisable for the IHO to provide and document due notice to the non-appearing party and ample opportunity for rescheduling participation. Thus, it would appear to be in effect a last resort within the need for a prompt decision. In applying these limited circumstances, courts have upheld the IHO in the clear majority of cases.[142]

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

[141] Letter to Wiener, 57 IDELR ¶ 79 (OSEP 2011).

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