

Deal or No Deal: An Overview of Procedural Safeguards

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**MATERIALS ACCOMPANYING A PRESENTATION
AT THE 2010 TRI-STATE REGIONAL
SPECIAL EDUCATION LAW CONFERENCE
November 4 – 5, 2010
Omaha, Nebraska**

I Introduction

Procedural safeguards are extremely important under our system of special education. In the first United States Supreme Court decision interpreting the predecessor of the Individuals with Disabilities Education Act, 20 U.S.C. Section 1400, et seq (hereafter sometimes referred to as the “IDEA”), the Court stressed the importance of procedural safeguards in the statutory system adopted by the Congress, noting that the procedural safeguards gave parents a “large measure of participation at every stage of the ... process.” Board of Educ., Hendrick Hudson Central Sch. Dist. v. Rowley, 455 U.S. 175, 102 S.Ct. 3034, 3038 and 3049, 553 IDELR 656 (1982). The court went on to emphasize that compliance with the Act’s procedural safeguards is a critical component of a free appropriate public education. Rowley, supra 102 S.Ct. at 3051.

More recently, the Supreme Court rejected an argument that school districts should have the burden of persuasion due to an advantage in information. The Court reasoned that Congress had leveled the playing field by requiring school districts to share information and protect the rights of parents by adopting the extensive system of procedural safeguards contained in the IDEA. “Schaffer v. Weast 546 U.S. _____, _____, 126 S.Ct. 528, 44 IDELR 150 (2005).

Section 615 of the IDEA is entitled “Procedural Safeguards,” and most procedural safeguards for parents are contained in that section. However, some procedural safeguards are found in other sections of the Act or in the federal regulations. In addition to the required Notice of Procedural Safeguards, Section 615(d), there are a number of specific procedural safeguards. The specific procedural safeguards include the following: independent educational evaluation , Section 615 (b)(1) and 34 C.F.R. Section 300.502;

prior written notice, sections 615(b)(3)-(4) and (c)(1); informed parental consent, Section 614 (a)(1)(D); access to educational records, Section 615(b)(1); state complaints, 34 CFR Section 300.151, et seq; mediation, Section 615(e); child's placement during a challenge or "stay put," Section 615 (j); procedures for an interim alternative education, Section 615 (k); unilateral placement in private school when FAPE in issue, Section 612 (a)(10)(C); due process hearings, Section 615 (f); if a two tiered system, state appeals, Section 615 (q); civil actions appealing a due process decision, Section 615 (q); and attorneys' fees, Section 615 (i)(C)(3).

II. Notice of Procedural Safeguards-

A copy of the procedural safeguards of the notice must be provided to the parents only one time per year, except that it must also be given upon initial referral or parental request for evaluation, upon the first occurrence of filing of a due process complaint, and upon request by a parent. Section 615(d)(1)(A). The regulations clarify that the notice must also be provided upon the parents' filing of the first state complaint and on the date on which the decision to take disciplinary action is made. 34 CFR Section 300.504(a); 71 Fed. Register No. 156 at page 46692 (August 14, 2006). The regulations also make it clear that a parent will receive more than one copy of the notice of procedural safeguards if they also request an evaluation or file a state complaint or due process hearing or they request a copy. 34 CFR Section 300.504(a); 71 Fed. Register No. 156 at page 46692 (August 14, 2006). The local educational agency may also place a copy of the procedural safeguards notice on their website if they have one. Section 615(d)(1)(B). OSEP has noted that publishing the notice on its website does not relieve the LEA of the

responsibility of offering the parent a printed copy of the notice unless the parent evidences a clear preference to obtain the information electronically 71 Fed. Register No. 156 at page 46693 (August 14, 2006).

The procedural safeguards notice must include a full explanation of procedural safeguards, written in the native language of the parents (unless clearly not feasible) and written in an easily understandable manner, relating to the following:

- `(A) independent educational evaluation;
 - `(B) prior written notice;
 - `(C) parental consent;
 - `(D) access to educational records;
 - `(E) the opportunity to present and resolve complaints, including--
 - `(i) the time period in which to make a complaint;
 - `(ii) the opportunity for the agency to resolve the complaint; and
 - `(iii) the availability of mediation;
 - `(F) the child's placement during pendency of due process proceedings;
 - `(G) procedures for students who are subject to placement in an interim alternative educational setting;
 - `(H) requirements for unilateral placement by parents of children in private schools at public expense;
 - `(I) due process hearings, including requirements for disclosure of evaluation results and recommendations;
 - `(J) State-level appeals (if applicable in that State);
 - `(K) civil actions, including the time period in which to file such actions; and
 - `(L) attorneys' fees.
- Section 615 (d)(2).

OSEP has published a model Notice of Procedural Safeguards in order to reduce confusion about what must be included in the notice. 71 Fed. Register No. 156 at page

46693 (August 14, 2006). The model notice is 44 pages long. The model notice form is available on the website: <http://idea.ed.gov/>.

Although OSEP frowns upon dual filings of state complaints and due process hearings for the same incident, the regulations clarify that the notice of procedural safeguards must explain both procedures and the differences between the two. 34 CFR Section 300.504(c); 71 Fed. Register No. 156 at page 46693 (August 14, 2006).

III. Particular Procedural Safeguards

A. Preliminary Procedural Safeguards

1. Parental Consent

Where the parent does not provide consent for the initial evaluation, the school district may invoke procedural safeguards, such as mediation or a due process hearing, to pursue such evaluation. Section 614 (a)(1)(D)(ii)(I). If the parent refuses to consent to services for the child, however, the school district shall not provide special education and related services to the child and the district may not invoke mediation or the due process hearing system. Section 614 (a)(1)(D)(ii)(II). Where the parent refuses to consent to services or fails to respond to a request to provide such services, the school district is relieved of the obligation to provide FAPE to the student and is not required to convene an IEP team meeting or to develop an IEP for the child. Section 614 (a)(1)(D)(ii)(III)(aa) and (bb).

OSEP has clarified that a school district must make reasonable efforts to obtain the informed parental consent for an initial evaluation and document these efforts in the

same manner as documenting efforts to obtain parent participation in IEP team meetings. 71 Fed. Register No. 156 at page 46631 (August 14, 2006). A school district may, but is not required to, utilize the procedural safeguards to obtain parental consent for an evaluation although OSEP believes the override procedures should be used only in rare circumstances. 71 Fed. Register No. 156 at page 46632 (August 14, 2006).

The reasonable efforts required of a school district do not require the convening of an IEP team meeting, although a school district may convene an IEP team meeting in order to obtain informed consent. 71 Fed. Register No. 156 at page 46634 (August 14, 2006).

Where a child is home schooled or placed by his parents in a private school at their own expense, the school district may not use the procedural safeguards to attempt an override of lack of consent. 34 CFR Section 300.300(d)(4); 71 Fed. Register No. 156 at page 46635 (August 14, 2006).

REVOCAION OF CONSENT

The federal Office of Special Education Programs made several changes to the federal IDEA regulations effective on December 31, 2008. The most significant change involved parental revocation of consent. 34 C.F.R. Sections 300.300 and 300.9 were amended to provide that parents are now permitted to revoke in writing their consent for the continued provision of special education and related services after having received services. School districts are no longer able to use mediation or a due process hearing to seek to override or challenge the parents' lack of consent. School districts will not be deemed to be in violation of the ACT for denial of FAPE where the parent has revoked consent to the continued provision of special education and related services

Concerning the situation where a parent revokes consent and the student then gets disciplined, OSEP said the following in a June, 2009 Q & A document:

Question A-3: Do the discipline provisions apply if the child violates the school's code of student conduct after a parent revokes consent for special education and related services under §300.300(b)?

Answer: No. Under §§ 300.9 and 300.300, parents are permitted to unilaterally withdraw their children from further receipt of special education and related services by revoking their consent for the continued provision of special education and related services to their children. When a parent revokes consent for special education and related services under §300.300(b), the parent has refused services as described in §300.534(c)(1)(ii); therefore, the public agency is not deemed to have knowledge that the child is a child with a disability and the child will be subject to the same disciplinary procedures and timelines applicable to general education students and not entitled to IDEA's discipline protections. It is expected that parents will take into account the possible consequences under the discipline procedures before revoking consent for the provision of special education and related services. 73 Federal Register 73012-73013.

You can find the entire Q& A discipline document here:
<http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C7%2C>

2. Independent Educational Evaluations

The parents of a child with a disability have the right to an independent educational evaluation (hereafter sometimes referred to as "IEE.") IDEA Section 615(b)(1). The IEE must be provided by the school district at public expense unless the

LEA files a due process complaint and shows that its evaluation was appropriate. 34 CFR Section 300.502(b). The U. S. Supreme Court found the right to an IEE to be a very important safeguard for parents, and relied on it in part, in rejecting the argument that school districts had an advantage in terms of expertise and knowledge. Schaffer v. Weast ___ U.S. ___, 126 S.Ct. 528, 44 IDELR 150 (2005).

Parents may obtain only one IEE at public expense each time the school district conducts an evaluation with which the parents disagree. 34 CFR Section 300.502(b)(5). The purpose of this regulation is to protect the parents' right to an IEE (OSEP rejected a suggestion limiting a parent to one IEE in a child's school career) while ensuring that a school district does not have to bear the cost of multiple IEEs concerning a single disagreement. 71 Fed. Register No. 156 at page 46690 (August 14, 2006).

OSEP has noted that where a hearing officer orders an IEE, parental consent is needed for the release of education records to the independent evaluator. If the parent refuses to consent, the hearing officer could decide to dismiss the parent's complaint. 71 Fed. Register No. 156 at page 46690 (August 14, 2006).

If a parent obtains an IEE at public expense, but disagrees with the result, the school district could introduce it as evidence in a due process hearing. 71 Fed. Register No. 156 at page 46690 (August 14, 2006).

3. Prior Written Notice

A school district must provide prior written notice to the parents whenever it proposes to, or refuses to, initiate or change the: identification, evaluation, placement, or FAPE. IDEA Section 615(b)(3). See 34 CFR Section 300.503(a). The notice must contain the following: a description of the action; an explanation of why the district

proposes or refuses the action; a description of each evaluation procedure, assessment, record or report relied upon; a statement that the parents have protections under the procedural safeguards; sources for the parents to contact to obtain assistance; a description of other options considered and why they were rejected; and a description of the factors that are relevant to the district's proposal or refusal. IDEA Section 615(c)(1). See 34 CFR Section 300.503(b).

“Prior” written notice is an unfortunate choice of words. This does not mean that the notice must be given before the decision is made. Indeed, OSEP has pointed out that the notice must be given a reasonable amount of time before the school district implements the proposal, or refusal, described in the notice. The proposal triggers an obligation to convene an IEP team meeting, but providing prior written notice before the meeting could suggest that the district's action was made without parent input and participation. 71 Fed. Register No. 156 at page 46690 (August 14, 2006).

OSEP has published a model form for prior written notice consistent with current statutory and regulatory requirements. The model form is available on the website: <http://idea.ed.gov/>.

B. Procedural Safeguards Relating to Dispute Resolution

1. Tools For Dispute Resolution

There are four dispute resolution mechanisms provided by the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, et seq, (hereafter sometimes referred to as “IDEA”) and the accompanying federal regulations: mediation, state complaints,

resolution sessions, and due process hearings. In addition, some states and districts are experimenting with fifth method-facilitated IEP meetings.

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

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

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

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

Here is the OSEP Questions and Answers (Document) On Procedural Safeguards and Due Process Procedures For Parents and Children With Disabilities:

<http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C6%2C>

2. Legal Citations for Dispute Resolution

State complaints procedures are set forth in the federal regulations at 34 C.F.R. §§ 300.151 – 300.153. Mediation is provided for in IDEA at § 615(e). See 34 C.F.R. § 300.506. Due process hearings (as well as resolution sessions) are described in the IDEA at § 615 generally, especially sub§ (f).

3. Specific Procedural Safeguards Pertaining to Dispute Resolution

A. Facilitated IEPs

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

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

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

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

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

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

B. Mediation

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

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

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

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

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

ADDITIONAL RESOURCES for MEDIATORS: In addition to the general IDEA resources, mediators should frequently visit the CADRE website. The Consortium for Appropriate Dispute Resolution in Special Education is an OSEP funded group that encourages mediation, IEP facilitation and other means of special education dispute

resolution that are less formal and legalistic than due process hearings. Their website is loaded with helpful articles, materials and other information and may be found at <http://www.directionservice.org/cadre/index.cfm>

Here is the OSEP Topic Brief on Mediation:

[http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CTopicalBrief%2C21%
2C](http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CTopicalBrief%2C21%2C)

C. State Complaint Procedures

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

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

<http://directionservice.org/cadre/pdf/ComplExtOSEP2010.pdf>

Where a state complaint and a due process hearing are requested on the same topic, the complaint investigator must set aside the portion of the complaint being addressed by

due process until the hearing officer issues a decision. 34 C.F.R. §300.152(c). 71 Fed. Register No. 156 at page 46606 (August 14, 2006).

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

When a state has finished processing a state complaint, a party who disagrees with the result may file a due process hearing complaint on the same issue if the statute of limitations has not passed. 71 Fed. Register No. 156 at page 46607 (August 14, 2006).

Here is the OSEP Topic Brief on State Complaint Procedures:

[http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CTopicalBrief%2C22%
2C](http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CTopicalBrief%2C22%2C)

D. Resolution Session Meetings

A mandatory resolution session was added to the special education dispute resolution process in 2004. IDEA § 615 (f)(1)(B). Within 15 days of receipt of a due process hearing complaint from a parent, the school district must convene a meeting with the parents, a representative of the LEA with “decision making authority,” and relevant member(s) of the IEP team who have “specific knowledge of the facts identified in the complaint.” The purpose of the resolution session is to permit the parents to discuss their complaint and the underlying facts and to provide the LEA the opportunity to resolve the complaint. The LEA may not bring their lawyer unless the parent has a lawyer. The

parties may avoid the resolution session only by waiving the meeting in writing or by participating in mediation. § 615(f)(1)(B)(i). If the LEA has not resolved the complaint to the satisfaction of the parents within 30 days after receipt of the complaint, the hearing may occur and “all applicable timelines for a due process hearing” shall commence. § 615(f)(1)(B)(ii). If the resolution session results in a written settlement agreement, the agreement is legally binding and enforceable in court, except that if either party suffers from “buyer’s remorse,” they may void the agreement within three business days after it is executed. § 615(f)(1)(B)(iii) and (iv).

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

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

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

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

34 C.F.R. § 300.510(b)(5), that provides that where an LEA fails to schedule the resolution meeting within fifteen days, or the LEA delays the due process hearing by scheduling the resolution session at times or places that are inconvenient for the parent, or the LEA otherwise fails to participate in good faith in the resolution process, the parent may seek the intervention of the hearing officer to begin the due process hearing. 71 Fed. Register No. 156 at page 46702 (8/14/06). Although OSEP stated that it believes that such occurrences would be very rare, it agreed with commenters that parents should be able to request that the hearing officer begin the hearing process timelines in such cases. 71 Fed. Register No. 156 at page 46702 (8/14/06).

Although the resolution meeting includes “relevant” members of the IEP Team, it is clear that the resolution meeting is not an IEP Team meeting. The purpose of the resolution meeting is for parents to discuss their complaint and the underlying facts and for the LEA to have an opportunity to resolve the dispute. § 615(f)(1)(B)(i)(IV); 71 Fed. Register No. 156 at page 46701 (8/14/06). In response to a commenter who questioned whether a resolution meeting agreement supersedes decisions made by the IEP Team,

OSEP stated that nothing in the Act or regulations requires an IEP Team to reconvene following a resolution agreement that includes IEP-related matters. 71 Fed. Register No. 156 at page 46703 (8/14/06).

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

Here is an analysis by CADRE of Resolution Meetings- State Supports and Practices:

<http://directionservice.org/cadre/ResolutionMeetings-StateSupportsandPractices.cfm>

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

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

E. Due Process Hearings

A due process hearing resembles a court trial. Increasingly, parties are represented by lawyers. Opening statements are made. Testimony is provided by parents, teachers, related service providers, administrators, and many others- often by expert witnesses. Although the formal rules of evidence are generally not applied, exhibits, or documentary

evidence, are offered and admitted. The tone is increasingly adversarial. Either closing arguments are made or written briefs are submitted. Hearing officer decisions are generally lengthy and legalistic in tone. The decision of the hearing officer may be appealed to one or more courts.

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

IDEA imposes a two-year statute of limitations on due process complaints. Unless state law imposes a contrary limitations period, a party must request a due process hearing within two years of the date that the party knew or reasonably should have known about the alleged action that forms the basis of the complaint. § 615 (f)(3)(C). The statute of limitations recognizes two exceptions – cases in which the parent was prevented from requesting the hearing due either to specific misrepresentations by the LEA that it had resolved the problem or to the LEA’s withholding of information that the IDEA requires it to provide. § 615 (f)(3)(D). OSEP has clarified that a state may adopt a statute of limitations either shorter or longer than two years by statute or regulation, but not by common law, subject to the notification provisions of IDEA. 71 Fed. Register No. 156 at pages 46696-97 (August 14, 2006). It is the province of the hearing officer to determine whether a specific complaint has been filed within the statute of limitations and whether an amended complaint relates to a previous complaint. 71 Fed. Register No. 156 at pages 46698 (August 14, 2006).

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

IDEA provides that the party requesting the due process hearing “...shall not be allowed to raise issues at the due process hearing that were not raised in the (due process hearing) notice...,” unless the other party agrees. § 615 (f)(3)(B). see, 34 CFR §300.511(d); 71 Fed. Register No. 156 at pages 46705 -06 (August 14, 2006). However, note that IDEA § 615 (o) provides that nothing in § 615 “... shall be construed to preclude a parent from filing a separate due process complaint on an issue separate from a due process complaint already filed.”

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

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

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

be conducted at a time and place that is reasonably convenient to the parents and student. 34 CFR § 300.515(d); 71 Fed. Register No. 156 at page 46707 (August 14, 2006).

Representation by Non-Attorneys in Due Process Hearings

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

Some commenters, including this author, asked OSEP to clarify whether it was sufficient for a state by rule or regulation to specify that parties could be represented by non-lawyers or whether the ability of a lay advocate to represent parents is instead controlled by state law regarding the unauthorized practice of law. OSEP’s “response” was as follows:

Discussion: Whether an SEA may have a State regulation or procedural rule permitting non-attorney advocates to represent parties at due process hearings or whether that issue is controlled by State attorney practice laws is determined by State law. If State law is silent on the question of whether non-attorney advocates can represent parties in due process hearings, there is no prohibition under the Act or its implementing

regulations on nonattorney advocates assuming a representational role in due process hearings. 73 Fed Register No. 231 at page 73018 (12/1/2008)

Here is the OSEP Topic Brief on Due Process Hearings:

[http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CTopicalBrief%2C16%
2C](http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CTopicalBrief%2C16%2C)

Here is the OSEP Questions and Answers On Procedural Safeguards and Due Process Procedures For Parents and Children With Disabilities:

[http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C6
%2C](http://idea.ed.gov/explore/view/p/%2Croot%2Cdynamic%2CQaCorner%2C6%2C)

III Miscellaneous Other Procedural Safeguard Issues

1. Procedural Violations

Section 615 (f)(3)(E) provides that the decision of the hearing officer must be on substantive grounds. Moreover, this section also provides that in matters alleging a procedural violation, a hearing officer may only find a denial of FAPE if the procedural inadequacies impede FAPE; or significantly impede the parents' opportunity to participate; or cause a deprivation of educational benefits. Many courts had already read the old IDEA to the same effect. For example, see, D. L. ex. rel. J. L. v. Unified Sch. Dist. 42 IDELR 139 (Tenth Cir. 2004); M. L. v. Federal Way Sch. Dist. 39 IDELR 236 (Ninth Cir. 2003); and Gadsby v. Grasmick 25 IDELR 621 (Fourth Cir. 1997). These rulings are now codified in the statute.

During the hearing in cases alleging a procedural violation, the hearing officer will have to carefully rule on evidentiary objections to ensure that evidence connecting

the procedural violation to one of the specified grounds is forthcoming. In cases in which a party is not represented by counsel, the matter is complicated by the hearing officer's duty to make a complete record. In such cases, the hearing officer will likely ask a number of questions of the unrepresented party to determine the result of the alleged procedural violations or the effect of said procedural violations upon FAPE, the opportunity of the parents to participate in the process, or the deprivation of educational benefit.

OSEP has clarified that the requirement that a hearing officer base his decision on substantive grounds applies only to cases alleging denial of FAPE; a hearing officer still has jurisdiction over LRE cases and other matters alleging issues involving identification, evaluation and placement. 71 Fed. Register No. 156 at pages 46705-06 (August 14, 2006). The new amendment does not affect these types of cases.

2. Attorneys' Fees

IDEA'04 changed the section on attorneys' fees to provide that a school district or SEA may now recover their attorneys' fees from the parent's attorney who files a complaint that is frivolous, unreasonable, or without foundation or who continues to litigate after the litigation clearly becomes frivolous, unreasonable, or without foundation. Section 615 (i)(3)(B)(i)(II). Also, the statute now provides that a school district or SEA may now recover their attorneys' fees from the *parent* or the parent's attorney where the claim was presented for an improper purpose, such as to harass, to cause unnecessary delay or to needlessly increase the cost of litigation. Section 615 (i)(3)(B)(i)(III). The standard for an award against a parent's attorney or a parent is very high, and it is unlikely that many awards of attorneys' fees will be made against parent's

attorneys, and especially against parents without attorneys. These new provisions, however, may cause counsel who represent parents to decline borderline cases. There could also be awards in those rare cases in which parents clearly abuse the system. OSEP declined to clarify the standard for an award of attorney's fees against a parent stating that judicial interpretations would likely vary on a case-by-case basis and should be left to the discretion of the court. 34 CFR Section 300.517(c)(2)(ii); 71 Fed. Register No. 156 at page 46708 (August 14, 2006).

The provision permitting an award of attorneys' fees to parents who prevail in a due process or court proceeding remains unchanged in IDEA'04. The regulations provide that attorney's fees may not be awarded for attending IEP team meetings, except where they are convened as a result of judicial action, an administrative proceeding, or in the discretion of the state, for a mediation. 71 Fed. Register No. 156 at pages 46708-09 (August 14, 2006).

ADDITIONAL RESOURCES: OSEP has also published a Question and Answer document, Questions and Answers On Procedural Safeguards and Due Process Procedures For Parents and Children With Disabilities (OSEP Revised June 2009). The Q & A document is available at the OSEP idea website: <http://idea.ed.gov/>. In addition, NICHY, also known as the National Dissemination Center for Children with Disabilities, has issued a series of training module on procedural safeguards. The training modules are available online at <http://idea.ed.gov/> and at: <http://www.nichcy.org/training/contents.asp>

IV. Judicial and Administrative Decisions Interpreting Procedural Safeguards

A. Procedural Safeguards In General

1. New Lothrop Area Pub Sch. Dist. 41 IDELR 174 (SEA Mich 3/22/4).

The hearing officer deferred ruling upon a motion to dismiss based upon the failure of the parents to object to an IEP earlier pending an evidentiary hearing to include among other things whether the parents received the required notice of procedural safeguards.

2. San Ramon Valley Unified Sch. Dist. 106 LRP 22400 (SEA Calif. 4/5/6). Procedural violations can only constitute a denial of FAPE where they significantly impede the parents' opportunity to participate in the decision making process or where they cause a deprivation of educational benefit.

3. Dean ex rel Dean v. Sch Dist of the City of Niagara Falls 615 F. Supp.2d 63, 53 IDELR 159 (N.D.NY 5/7/9) and 52 IDELR 261 (N.D.NY 3/12/9) Court excused exhaustion

B. Independent Educational Evaluation

1. Los Angeles Unified Sch Dist v. DL 548 F.Supp.2d 815, 49 IDELR 252 (C.D. Calif 3/10/8) Court held that there is no statutory right to an IEE where there has been no district evaluation, but Court ordered the district to pay for an independent evaluation as an equitable remedy where district failed to ever conduct an evaluation. Muscogee County Sch Dist 108 LRP 69483 (SEA Ga 11/19/8) Where parent refused to consent to evaluation, there was no **district evaluation** and HO denied IEE; Letter to Zirkel 109 LRP 6810 (OSEP 12/11/8) In an RtI scenario, a parent is not entitled to an IEE at public expense until the district first completes an evaluation; Interboro Sch Dist 109 LRP 56717 (SEA Penna 6/9/9) HO rejected request for IEE at public expense where parents

commissioned the IEE before they had a school district evaluation to disagree with; St Vrain Valley Sch Dist RE-IJ 107 LRP 7439 (SEA Colo 11/27/6) Where the parents did not request an IEE at public expense or disagree with a district evaluation, a neuropsychological evaluation was not an IEE.

2. Blake by Jack & Yvonne B v. Council Rock Sch Dist 51 IDELR 100 (ED Penna 10/3/8) Court **denied** IEE at public expense where district evaluation is **appropriate**. (appropriate instruments and instructions were used by evaluator; evaluation was appropriate); Glendale Unified Sch Dist 51 IDELR 146 (SEA Calif 7/25/8); Everett Sch Dist 108 LRP 49020 (SEA Wash 8/1/8); Garvey Sch Dist 109 LRP 23281 (SEA Calif 2/25/9) Ho found district OT evaluation appropriate despite lack of fine motor assessment and denied IEE at public expense; Capistrano Unified Sch Dist 52 IDELR 272 (SEA Calif 5/13/9) HO ruled that school district did not have to pay for IEE, finding district eval appropriate despite the fact that the evaluator administered a parent questionnaire for kids under 3, two days after the child turned 3.; PR & BR ex rel CR v. Woodmore Local Sch Dist 47 IDELR 41 (N.D.Ohio 1/8/7) Court denied IEE at public expense where district evaluation is appropriate. See also, Baldwin Community Schs 106 LRP 62609 (SEA Mich 10/5/6); In re: Student with a Disability 106 LRP 54086 (SEA Wash 8/3/6).

3. Manheim Township Sch Dist 109 LRP 62296 (SEA Penna 3/10/9) HO **awarded** IEE at public expense where school psychologist failed to properly assess a student's cognitive abilities and applied a faulty statistical formula.

4. JP by EP & EP v. Ripon Unified Sch Dist 52 IDELR 125 (E.D. Calif 4/14/9) Court excused school district's **delay** of over 3 months after IEE request before filing due

process where district produced correspondence showing ongoing settlement discussions with parents; Pajaro Valley Sch Dist v. JS 47 IDELR 12 (N.D.Calif 12/15/6) Where a school district delayed more than three months after a parent request for an **IEE** before filing a due process complaint, the court held that this procedural violation denied the parents the opportunity to participate in the process. Jefferson County Bd of Educ 107 LRP 26631 (SEA Ala 3/29/7) Where the school district failed to file for due process, HO ordered an IEE at public expense.

5. Harris v. District of Columbia 50 IDELR 194 (D.DC 6/23/8) Court reversed HO and held that a parent request for an **independent FBA** is the equivalent of a request for an IEE and same rules apply because IDEA recognizes that a child's behavior is inextricably linked to his education.

6. KB ex rel JB v. Haldeon Bd of Educ 52 IDELR 263 (D.NJ 6/30/9) Court held that graduation from middle school district did not moot request for IEE.

7. Westchester Area Sch Dist 106 LRP 53547 (SEA PA 8/17/6) **Dicta** by the Supreme Court in the *Schaffer v. Weast* decision does not give every parent in a due process hearing the right to an IEE to give independent opinion as to appropriateness.

C. Prior Written Notice

1. AB by WFB v. San Francisco Unified Sch Dist 51 IDELR 158 (N.D. Calif 10/30/8) A school district's written offer to provide extended school year services satisfied the PWN requirement for the school district's refusal to fund a private summer

camp. Court held that although the notice did not include the district's reasoning and the information upon which the decision was based, it was sufficient.

2. Sch Union No 37 vs. Mrs C ex rel DB 518 F.3d 31, 49 IDELR 179 (1st Cir. 2/26/8) The First Circuit held that where the parent had received 25 prior written notices, she could not claim she was unaware of her due process rights to permit exception to the statute of limitations.

3. Letter to Lieberman 52 IDELR 18 (OSEP 8/15/8) OSEP said that an LEA may use the **IEP** form as PWN, but only where the IEP contains **all** of the information required by 34 CFR § 300.503.

4. Anchorage Sch. Dist. v. Parents of MP 106 LRP 27407 (Alaska S.Ct. 4/13/6). Where a school district changed the placement of a student with autism without notifying the parents that there was going to be a change in placement, the student was denied FAPE. Although the school district gave the parents a form called "prior written notice," the form did not state that there was a change so that the regular education classroom teacher would now deliver special education services to the student. Noting that prior written notice is one of the more important procedural requirements of the IDEA, the Court found a denial of FAPE. Contrast, AU by NU and BU v. Roane County Bd of Educ 107 LRP 29667 (E.D. Tenn 5/23/7).

5. Stringer v. St.James R-1 Sch. Dist. 106 LRP 27908 (8th Cir. 5/3/6). The Eighth Circuit affirmed the dismissal of the parents' claim where they alleged, among other things, failure of the school district to provide prior written notice but failed to include any allegations of fact to support their claim.

D. Parental Consent

1. Jefferson County Bd of Educ 110 LRP 2743 (SEA Alabama 9/29/9)

Parent revoked consent and then student had several disciplinary infractions. Parent then sought to have the student immediately reclassified as eligible and filed for dp. HO ruled that parent cannot turn SpEd off and on like a **faucet**. HO found no violation by the district in taking a reasonable time to reevaluate the student; In Re: Student with a Disability 110 LRP 30076(SEA Conn 3/12/10) Where a parent hogtied a school district by selectively revoking consent for certain evaluations and programs, HO found that the student's educational plan was appropriate under IDEA.

2. Fitzgerald ex rel SF v. Camdenon R-III Sch. Dist. 45 IDELR 59 (8th

Cir. 3/1/6). The Eighth Circuit reversed the ruling of the district court, and held that the parents' refusal to provide consent for initial evaluation should not be overridden. The court noted that the parents had withdrawn the student from school and had had him privately evaluated. The Eight Circuit noted in a footnote that there had been no allegations of abuse or neglect, no allegations that the parents were not acting in the interest of the student, and no allegations that other state proceedings were pending. See also, Durkee ex rel MD v. Livonia Sch Dist 107 LRP 10797 (W.D.NY 2/28/7) {same, citing new 34 CFR section 300.300(d)(4)(1).}

2. Durkee ex rel MD v. Livonia Sch Dist 107 LRP 10797 (W.D.NY

2/28/7) The court held that the parents' refusal to provide consent for **initial** evaluation should not be overridden. {The court cited 34 CFR section 300.300(d)(4)(1).}

3. In re Student with a Disability 108 LRP 69495 (SEA NY 11/18/8)

Where district failed to prove that it had made reasonable efforts to obtain **informed** consent, it could not use lack of consent as a defense for failure to provide services.

4. Letter to Sarzynski 51 IDELR 193 (OSEP 5/6/8) OSEP clarified that consent is necessary not just for evaluations to determine eligibility, but also for evaluations to determine the nature and extent of services needed. But consent is not required if the evaluation occurs as a part of instruction for all students (eg. mastery of information in chapter six of math textbook).

5. Letter to Champagne 53 IDELR 198 (OSEP 11/17/8) OSEP opined that once consent is given for the initial provision of special education, the consent remains valid if the student transfers to another LEA or another state or otherwise moves (eg. The services being delivered change from one type of public agency to another,)

6. In Re RW & Orange county Social services Agency v. AW 109 LRP 17060 (Calif App Ct 3/26/9) State appellate court affirmed juvenile court decision to limit parent's educational decision-making rights and to order consent to a residential placement over parent's objections; Biddeford Sch. Dist. 44 IDELR 87 (SEA Maine 4/20/5) HO approved the placement of a student despite the father's refusal to consent to it where the child's aunt who was legally responsible for decisions concerning the student's welfare had consented to the placement.; EN by Nesbitt v. Rising Sun- Ohio County Community Sch. Corp. 720 N.E.2d 447, 31 IDELR 136 (Indiana Ct. App. 12/7/99). Where the parents failed to cooperate with the school district and refused to consent to a proposed IEP, there was no basis for the appointment of a limited guardian

to handle the educational affairs of the student. The state appeals court overturned the appointment of the guardian.

7. Memorandum to State Directors of Special Educ 107 LRP 24996 (OSEP 5/3/7) OSEP clarified that consent must be obtained from parents before their **insurance or public benefits** are accessed one time for the specific services and duration of services contained in an IEP unless additional hours of services or different amounts of services are to be charged. Letter to Hill 107 LRP 13113 (OSEP 3/15/7) OSEP interprets the IDEA to require a district to get parental consent each time it proposes to access public benefits or insurance of the parent or child. However, this does not require consent each time a billing occurs. Letter to Caplan 50 IDELR 168 (OSEP 3/17/8) When an IEP team intends to discuss postsecondary goals and transition services, it must invite a representative from the agency likely to deliver services. District must obtain parental consent for the agency representative to attend the IEPT meeting;

8. GB by TB v. San Ramon Valley Unified Sch Dist 51 IDELR 35 (N.D. Calif 9/16/8) Court affirmed HO decision **overriding** consent for **reevaluation**; Whitter Union HS Dist 53 IDELR 170 (SEA Calif 9/15/9) (same); Reyes v. Valley Stream Sch Dist 52 IDELR 105 (E.D. NY 3/26/9) (other eval after initial eval); Bangor Sch Dist 109 LRP 37603 (SEA Maine 3/10/9); Johnson by Johnson v. Duneland Sch. Corp. 92 F.3d 554, 24 IDELR 693 (7th Cir. 8/12/96). The Seventh Circuit affirmed the district court ruling that parental consent is not required for a reevaluation. But see, MTV v. DeKalb County Sch. Dist 106 LRP 24219 (11th Cir. 4/18/6), in which the Eleventh Circuit required the parent to consent to the triennial evaluation of the student if they wanted the student to continue receiving services.

9. NOTE decided before new regulations: Shelby S by Kathleen T v. Conroe Indep Sch Dist 454 F.3d 450, 45 IDELR 269 (Fifth Cir. 6/26/6) Where the district needed to independently evaluate a medically fragile student's medical needs, the Fifth Circuit approved the override of parental consent. The court held that privacy rights are not violated where the student's guardian could avoid the evaluation by declining special education services rather than submit to the evaluation.

10. Fife Sch. Dist. 45 IDELR 86 (SEA Wash. 7/22/5) The hearing officer overrode the parent's refusal to consent to an evaluation of a student where the parent's concerns were addressed by a minimally invasive evaluation procedure; San Diego Unified Sch Dist 107 LRP 21607 (SEA Calif 4/10/7); Los Angeles unified Sch Dist 47 IDELR 314 (SEA Calif 4/9/7) (parent insistence that former LEA conduct evaluation was unreasonable); Situate Public Schs 107 LRP 17969 (SEA Mass 3/30/7) (HO noted that school personnel agreed to be mindful of parents' concern regarding student's anxiety about changes in his daily schedule.) See also, Springfield Township Sch. Dist. 43 IDELR 261 (SEA PA 7/1/5)(parent concerns about confidentiality were unfounded); Magnolia Elementary Sch. Dist. 105 LRP 507 (SEA Calif 12/31/4); Ellington Bd of Educ 107 LRP 7447 (SEA Conn 1/9/7) (HO ordered override of lack of parental consent where the student was having considerable anxiety and panic attacks.)

11. Durkee ex rel MD v. Livonia Cent Sch Dist 47 IDELR 298 (W.D. NY 4/23/7) The court declined to award attorney's fees to parents who prevailed against a school district's due process complaint seeking to override parental consent for evaluation. The court warned that such an award could have a chilling effect upon LEAs from seeking such overrides. See also, MS and DS ex rel MS v. Mullica Township Bd of

Educ 47 IDELR 251 (D. NJ 4/12/7) Court denied reimbursement for a unilateral placement where the parent refused to consent to reevaluation, thus depriving the district of the opportunity to provide an IEP.

12. Memorandum to State Directors of Special Educ 107 LRP 24996 (OSEP 5/3/7) OSEP clarified that consent must be obtained from parents before their insurance or public benefits are accessed one time for the specific services and duration of services contained in an IEP unless additional hours of services or different amounts of services are to be charged.

13. Letter to Manasevit 42 IDELR 233 (OSEP 7/19/4). A parent's failure to provide consent to services relieves the school district of the obligation to provide FAPE. School districts are cautioned to document all attempts to obtain consent. Where a parent fails to consent to services, the student may be disciplined in the same manner as non-disabled students.

14. Letter to Fulcrost 42 IDELR 271 (OSEP 7/14/4). The consent provisions of the IDEA reflect a judgment that once parents are knowledgeable about proposed services and receive a proposed IEP, they have a right to make a decision as to whether the initial placement is appropriate for their child. (Consider IDEA'04 change relieving LEA of obligation to prepare an IEP and how this may affect "informed" consent.)

15. Letter to Hill 107 LRP 13113 (OSEP 3/15/7) OSEP interprets the IDEA to require a district to get parental consent each time it proposes to access public benefits or insurance of the parent or child. However, this does not require consent each time a billing occurs.

E. Access to Records/ Confidentiality

1. Letter to Anonymous 53 IDELR 235 (US Dept of Educ 12/17/8)

The federal Department of Education interprets the 2008 changes to FERPA regulations. Concerning the greater flexibility given to school administrators where there is a threat to health or safety, it stated that where officials have a rational basis for concluding that there is a significant and articulatable threat to the **safety or health** of the student or others, they may release personally identifiable information contained in an educational record

2. NP ex rel JP v. East Orange Bd of Educ 51 IDELR 191 (D. NJ 11/26/8) Court reversed HO ruling and permitted parents discovery of student's educational records on appeal. Court found that IDEA gives parents the **right to access** to all educational records of the student without unnecessary delay and that HO improperly denied the parents access to the records during the administrative proceeding. Court would not permit district to **evade** its **obligations** merely because it had managed to evade them at the administrative hearing level; CG & SB v. Commonwealth of Penna. Dept of Educ 52 IDELR 72 (M.D. Penna 3/16/9) SEA violated IDEA & FERPA by submitting a discovery response that provided enough detailed information to personally identify the students receiving SpEd even though their names were not released; In re Students with Disabilities 109 LRP 3187 (SEA Montana 2/27/9) State compliance officer ruled that a district violated IDEA and FERPA when it destroyed student records without notice to parents and where the persons who destroyed the records were not properly trained in confidentiality requirements; Washoe County Sch Dist 109 LRP 78026 (SEA NV 4/2/9) School district violated FERPA and IDEA when it deleted emails to parent

concerning the child's education from their server without notifying parent. Contrast, Hensley v. Colville Sch Dist 109 LRP 6538 (Wash Ct App 2/3/9) Where parent could not clearly identify what student records had not been provided, court found no unlawful denial of access to records.

3. Albuquerque Public Schs 53 IDELR 275 (SEA NM 8/26/9) HO held that by filing a dp complaint, parents **waive** any claim that school district may not review the student's records. Despite FERPA and IDEA privacy provisions, access to the student's educational records is a vital part of the school district's right to defend and its right to a fair hearing.

4. Disability Law Center of Alaska v. Anchorage Sch Dist 581 F.3d 936, 53 IDELR 2 (9th Cir. 9/9/9) Ninth Circuit recognized an exception to FERPA permitting **protection and advocacy** organizations to review educational records and to investigate allegations of abuse/neglect of persons with disabilities; Disability Rights Wisconsin, Inc v. Wisconsin Department of Public Instruction 463 F.3d 719, 46 IDELR 122 (7th Cir. 9/13/6) In a case alleging use of a seclusion room to discipline students with disabilities, the Seventh Circuit held that where as here there is probable cause that abuse or neglect has occurred, consent of legal guardians is not required before release of records to an advocacy and protection agency, reversing 44 IDELR 35. See also, State of Connecticut Office of Protection and Advocacy for Persons with Disabilities v. Hartford Bd. of Educ. 464 F.3d 229, 46 IDELR 121 (2d Cir. 9/15/6) (similar order), affirming 44 IDELR 64.

5. Loch v. Bd of Educ of Edwardsville Community Sch Dist #7 49 IDELR 131 (S.D, Ill 1/7/8) Court held that the school district did not have to give parents

the number of IEPs it had developed over three years or information about any **students other** than their daughter, noting that such information is protected by FERPA. The court approved the district giving information by number rather than name. AB v. Clarke County Sch Dist 52 IDELR 99 (M.D. Ga 3/30/9) Court denied the request of parents of a student with disabilities for the educational and social services records of another student who had allegedly sexually assaulted their daughter, citing privacy concerns and a lack of relevance. Contrast, Blunt v. Lower Merion Sch Dist 52 IDELR 191 (E.D. Penna 5/7/9) Although recognizing that other students have a privacy interest in their ed records, court ordered district to produce records to class plaintiffs alleging that black students with disabilities did not receive appropriate services. Court ordered district to first redact names, addresses and ssn#s; . LMP ex rel EP, DP & KP v. Sch Bd of Broward County 53 IDELR 49 (S.D. Fla 8/18/9) Court granted parent's discovery request regarding services provided to other students with autism because it goes to the heart of their predetermination claim, noting court order exception to FERPA and state law.; Jefferson County Bd. of Educ. 106 LRP 15703 (SEA Ala. 3/10/6). The IDEA gives parents the right to access to all educational records of the student without unnecessary delay. See also, Garden Grove Unified Sch Dist 106 LRP 63864 (SEA Calif 9/27/6) Where the district failed to produce tests given to the student to measure how he was responding to a reading program, this procedural violation significantly impeded the parent's opportunity to participate in the process. But see, Cupertino Union Sch Dist 106 LRP 73664 (SEA Calif 11/29/6) Where the district failed to produce copies of all student records until the day before hearing, HO imposed no sanctions where parent was able to read all records before the hearing began; Pueblo 60 Sch Dist 106 LRP 73672 (SEA Colo 10/16/6) The

federal complaints officer ruled that it would not violate FERPA or IDEA confidentiality for a principal to tell other students also sent to his office that one student was in special education where he had been in special education for nine years and the information could have been ascertained without reference to the educational records of the student.; Letter to Martinez 107 LRP 691 (FPCO 8/16/6) Where an OT complained that she was exposed to a student with an infectious disease because it was illegal for the district to tell her, the FPCO ruled that FERPA allows such disclosures under two exceptions: health/safety, and that providers/teachers had a legitimate interest in the information; AA v. Houston County Sch. Dist. 106 LRP 29478 (M.D. Ga. 5/4/6). A teacher's placing of a portable commode behind her desk for use by a prekindergarten student between scheduled bathroom breaks and discussions by school officials with the student's pediatrician did not violate the privacy rights of the parents or the student under IDEA, ADA, Section 504 or FERPA. Because school officials were discussing the student's medical treatment as it related to his education, they were meeting the requirements of the IDEA; Baker v. Mitchell –Waters 826 N.E.2d 894, 43 IDELR 113 (Ohio App. Ct. 4/1/5). The state appellate court held that records of alleged abuse by teachers that did not refer directly to individual students were not protected under FERPA.

6. Jaccari J v. Bd of Educ of the City of Chicago Dist No. 299 52 IDELR 280 (N.D.Ill 7/22/9) Court ruled that **incident reports** showing the use of physical restraints are educational records under FERPA and IDEA and ordered district to produce the incident reports for the grandparents of a student with an emotional disturbance.

7. SA by LA & MA v. Tulare County Office of Educ 53 IDELR 111 (E.D.Calif 9/24/9) Court upheld school district policy of only producing hard copies of

emails that were actually placed in a student's file, rather than all emails wherever kept, in response to documents requests. Court found policy consistent with FERPA.

8. Letter Re: Scott City Sch Dist 107 LRP 47713 (FPCO 4/23/7)

Assessment and evaluation test booklets and **protocols** are not educational records under FERPA. However, a school district must respond to a parent request for information, for example by reading test questions to parents or other reasonable methods of allowing parents to interpret student answers.

9. Montgomery County Public Schs 50 IDELR 58 (SEA Md

1/28/8) State complaint investigator found that a school district violated IDEA by attempting to impose confidentiality on a **resolution** meeting; Marinette Sch Dist 107 LRP 8221 (SEA Wisc. 2/14/7) HO dismissed a due process complaint where the parent refused to participate in a resolution meeting unless the district representatives signed a confidentiality agreement. Parent had no right to demand such confidentiality.

10. CB ex rel EB v. Pittsford cent Sch Dist 53 IDELR 75 (W.D.NY

9/15/9) Noting IDEA's confidentiality provisions, court rejected a school district's motion to strike a parents complaint as an "**anonymous** pleading" because the parent and child identified themselves only by initials. Contrast, SR & MC ex rel MC v. Bd of Educ of New York City 49 IDELR 255 (S.D. NY 2/25/8) Court held that neither FERPA nor IDEA gave the parents a right to pursue a federal court action without stating the **names** of the parents and the child. Court gave parents one week to provide the names. JA v. Gutierrez, Preciado & House, LLP 108 LRP 66191 (Cal Ct App 10/21/8) A school district and its law firm had a right to disclose student records to **codefendants** in a lawsuit despite FERPA and state laws re privacy.

11. Hough by Abbott v. Shakopee Public Schs 608 F.Supp.2d 1087, 53 IDELR 232 (D.Minn 3/30/9) Court rejected the argument that students with disabilities do not have a reasonable expectation of **privacy** at school, holding that a school district requirement that students with disabilities submit daily to intrusive searches violated their Fourth Amendment rights and was struck down by the Court.

12. Letter to Anonymous 109 LRP 25224 (FPCO 4/6/9) FPCO ruled that parent could not force district to remove a document with a diagnosis of pervasive developmental disorder from a student's educational records. The fact that the parents disagreed with the SpEd director re eligibility is not sufficient basis to have the document removed from the educational records under the FERPA **amendment** policy.

13. Wittenberg ex rel JW v. Winston Salem/Forsyth County Bd of Educ 53 IDELR 45 (M.D.NC 8/19/9) Because **mediation** discussions are confidential, court agreed to place a mediation agreement under seal.

14. Plainfield Bd of Educ v. RN 52 IDELR 249 (D.Conn 6/26/9) Court denied school district motion to submit entire administrative record under seal rather than requiring it to first redact all personally identifiable information.

15. Gaumond v. Trinity Repertory Co. 46 IDELR 254 (Rhode Island S. Ct. 11/14/6). Where a student with a disability was injured while descending theater stairs on a field trip, the parents, who sued the theater, attempted to resist certain discovery requests from the theater on the basis of a "***disabled student – school privilege.***" The court declined parent's request that it recognize the privilege. The parents argued that based upon IDEA confidentiality and FERPA provisions that this

privilege cloaks all confidential education records with protection from discovery in a civil action.

F. Stay Put –Student’s Placement During Due Process or Litigation

1 John M. by Christine M & Michael M v. Bd of Educ of the Evanston Township HS Dist No. 202 502 F.3d 708, 48 IDELR 177 (7th Cir. 9/17/7) The Seventh Circuit noted that determining “then current educational placement” is an inexact science requiring a **fact driven** approach. Respect for the purpose of the stay put provision requires focus upon the child’s educational needs so the educational status quo for a “growing, learning, young person” often makes rigid adherence to a particular educational methodology an impossibility. Stay put, therefore, requires **flexibility** in interpreting the educational placement per the last agreed upon IEP and flexibility concerning the child’s needs. (reversing 46 IDELR 218 (N.D. Ill 9/26/6).

2. Bd of Educ of the Tuxedo Union Free Sch Dist 49 IDELR 238 (SEA NY 1/9/8) SRO held that for stay put purposes, placement is not necessarily location but the special education and related services program as contained in the **last agreed upon IEP** unless the parties agree otherwise. Robert M & Deborah M ex rel Jordan M v. State of Hawaii 51 IDELR 211 (D. Haw 12/19/8) Educational placement encompasses more than location, and a district violated stay put by terminating mental health services to a student where they were a substantial component of the child’s IEP; Contrast, Millay ex rel YM v. Surry Sch Dist 632 F.Supp.2d 38, 52 IDELR 251 (D. Maine 6/18/9) last agreed upon placement = status quo; Caldwell-West Caldwell Bd of Educ 107 LRP 10462 (SEA NJ 11/2/6). When a parent files for due process the stay put placement is the **last agreed**

upon placement; unless the parties agree otherwise. See also, Yonkers City Sch Dist 106 LRP 49300 (SEA NY 8/10/6) (same.)

3. Laster v. District of Columbia 44 IDELR 124 (D.D.C. 9/28/05). Noting that the “then current placement” is more than the physical building containing the school, the court ruled that the LEA violated the stay put requirement by not placing the student in a comparable **program** when the student’s then current placement became unavailable; Roselle Park Bd of Educ 106 LRP 66965 (SEA NJ 9/14/6). Where the then current out-of-state placement is no longer available, the district’s in-state placement offering substantially the same educational program and services is the appropriate stay put program.

4. Joshua A by Jorge A v. Rocklin Unified Sch Dist 559 F.3d 1036, 52 IDELR 1 (9th Cir. 3/19/9) Ninth Circuit held that the stay put provision requires a district to comply with a district court order even if the matter has been appealed to the circuit court of appeals.

5. ND v. State of Hawaii, Dept of Educ 53 IDELR 186 (D. Haw 10/21/9) Stay put provision of IDEA did not require court to strike down 17 **furlough Fridays** caused by the bad economy. Court held that because some IEP students could receive the benefits of their IEPs, it could not conclude that stay put prevented the furloughs. If IEP services not delivered to a specific student, possible IDEA violation. See, DK & AK by Kellet v. State of Hawaii, Dept of Educ 53 IDELR 187 (D. Haw 10/22/9) (similar facts, etc).

6. City of Chicago Public Sch Dist # 229 109 LRP 6675 (SEA Ill 10/8/8) Stay put placement is not contingent upon the **likelihood** (or unlikelihood) of success on the

merits. Under a fact driven approach, where a nurse was an integral part of the student's overall educational program under his IEP, a nurse was required for the stay put placement.

7. PR v. Roxbury Township Bd of Educ 49 IDELR 155 (D. NJ 2/6/8) **HO decision** awarding reimbursement for private placement had the effect of an **agreement** between parties so district had to fund placement during appeal. New York City Dept of Educ 50 IDELR 90 (SEA NY 2/11/8) Where HO ruled in favor of parents an ordered district to develop an IEP, HO decision was stay put and the district was required to develop an IEP until federal appeal was resolved. Student X v. New York City Dept of Educ 51 IDELR 122 (E.D. NY 10/30/8) Where parties had not appealed 2005 HO decision, placement in that decision was stay put pending challenge to 2006 IEP. Bd of Educ of the Appoquinimink Sch Dist v. Johnson ex rel SQJV 51 IDELR 182 (D. Del 11/25/8) Where HO panel found no denial of FAPE, district did not need to fund sign language interpreter as stay put during appeal. See, Winkleman v. Ohio Dept of Educ 51 IDELR 14 (N.D. Ohio 8/19/8) Although 1st tier HO had ordered reimbursement, LEA was not obligated to pay for private placement until SRO ruled on the issue and Winkleman v. Parma City Sch Dist 51 IDELR 126 (N.D. Ohio 10/24/8) Where SRO agrees that reimbursement is appropriate, district must fund private placement during further appeals; Escambia County Bd. of Educ. v. Benton 358 F.Supp.2d 1112, 43 IDELR 5 (S.D. Ala. 2/28/05). Quoting the federal regulations, the court held that where a SRO or HO decision agrees with the parents that a change of placement is appropriate, the ordered placement must be treated as an agreement between the parents and LEA for purposes of stay put during appeals of the HO decision. Accordingly, the court

concluded that during an appeal, the placement ordered by the HO is the stay put placement.

8. Stanley C & Lonnie C ex rel MC v. Metro Sch Dist of southwest Allen Co Schs 50 IDELR 163 (N.D. Ind 5/27/8) Where parties **agree** to another placement to a certain date, that placement is the stay put placement but only through the date agreed to); Faranza K ex rel SK v. Indiana Dept of Educ 53 IDELR 180 (N.D. Ind 10/30/9) Stay put placement was the last agreed upon placement, even though parent wrote “for now” on the IEP form; In re Student with a Disability 110 LRP 1175 (SEA NY 12/23/9) Stay put is the last agreed upon placement at the time the dp complaint is filed (subject to later agreement by the parties to change placement); Ewing Township Bd of Educ 52 IDELR 87 (SEA NJ 2/23/9) Where parents were divorced and each had custody (5days vs 2 days) a district agreement with one but not both parents was not sufficient to create stay put placement; LY ex rel JY v. Bayonne Bd of Educ 53 IDELR 92 (D.NJ 9/15/9) Where school district (=LEA) objected to charter school placement, it was not the stay put placement because it was not agreed to; KG v. Plainville Bd of Educ 47 IDELR 38 (D.Conn. 1/9/7) Where the parties had agreed to three previous settlement agreements, the then current placement was the placement agreed upon in the settlement even though the term of the settlement had expired. See also, City Sch. Dist of the City of Buffalo v. Darlene S and timothy S. ex rel MS 45 IDELR 90 (W.D.NY 2/6/6)

9. . In re Student with a Disability 108 LRP 69499 (SEA NY 11/17/8) SRO held that **temporary** placements are excluded from then current placements and that an IEP designed for summer months was not the stay put placement as it would compromise

the status quo. Stancourt ex rel Stancourt v. Worthington City Sch Dist 51 IDELR 19 (Ohio Ct App 9/9/8) Proposed changes in BIP only are not enough to trigger stay put.

10. CP v. Leon County Sch Bd 466 F.3d 1318, 46 IDELR 182 (11th Cir. 10/16/6). The Eleventh Circuit held that a district did not violate the stay put provision of the IDEA by not revising the IEP for over one year where the parent had filed for due process and an appeal had been pending. See also, CP v. Leon County Sch Bd 47 IDELR 212 (11th Cir. 4/10/7) (same result on reconsideration).

11. MM & HM ex rel AM v. New York City Dept of Educ 583 F.Supp.2d 498, 51 IDELR 128 (S.D. NY 10/20/8) When transitioning from **ISFP** to public school at age 3, stay put placement is not IFSP see, Zoe M v. Blessing 52 IDELR 184 (D. Ariz 5/15/9)

12. Letter to Huefner 107 LRP 13117 (OSEP 10/3/6). When an **expedited** hearing is requested, the stay put placement under IDEA'04 is the interim alternative educational setting (IAES) chosen by the IEP team. See, Stoeckel ex rel DS v. Stoner 47 IDELR 266 (N.Y. S. Ct. 4/6/7).

G. Mediation and Settlement

1. JD by Davis v. Kanawha County Bd of Educ 571 F.3d 381, 52 IDELR 182 (4th Cir. 7/9/9) Fourth Circuit held that mediation discussions under IDEA are confidential. Accordingly where the school district offered a settlement stating that the terms would be the same terms as a failed mediation, district could not use the settlement offer to prove that it had made a more favorable settlement offer than the relief obtained by the parent at the due process hearing; Hawkins v. Berkeley Unified Sch Dist 250 F.R.D. 459, 51 IDELR 185 (N. D. Calif 11/20/8) Where an attorney's petition stated that

parents counsel gave the district an itemized attorneys fees invoice during mediation, Court granted a motion to strike because all discussions during mediation are confidential; Wittenberg ex rel JW v. Winston Salem/Forsyth County Bd of Educ 53 IDELR 45 (M.D.NC 8/19/9) Because mediation discussions are confidential, court agreed to place a mediation agreement under seal.

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

3. HC by CC v. Colton-Pierrepoint Cent Sch Dist 567 F.Supp.2d 340, 50 IDELR 252 (N.D. NY 7/29/8) HO has the authority to enforce a settlement agreement if it involves IDEA hearing issues: identification, evaluation, placement or services(FAPE). Federal court concluded that it has jurisdiction to enforce an IDEA settlement; JMC & MEC ex rel EGC v. Louisiana Bd of Elementary & Secondary Educ 50 IDELR 157 (M.D.LA 6/13/8) Where school district failed to convene a resolution meeting within 15 days of dp complaint, court held that a later IDEA settlement was enforceable in federal court; El Paso Independent Sch Dist v. Richard R ex rel RR 53 IDELR 175 (5th Cir 12/16/9) Fifth Circuit held that agreements from resolution session are enforceable. Accordingly a parent's refusal to accept an offer of all educational relief sought was unreasonable and no attorney's fees were awarded to parent's lawyer; . Chardon Local Sch. Dist. Bd. of Educ. v. AD 106 LRP 22226 (N.D.Ohio 3/27/6). The federal district court held that the HO and SRO had the authority to decide alleged violations of a settlement agreement. Because the student's IEP was in issue, the HO had jurisdiction over the dispute. See also, In re Student with a Disability 102 LRP 20843 (SEA WV

7/29/2)(hearing officer has authority to review claims regarding breach of a settlement agreement. Manchester Bd. of Educ. 106 LRP 25093 (SEA Conn 2/6/6)(hearing officer has authority to review claims regarding breach of a settlement agreement that relate to identification, evaluation, placement and FAPE, but no jurisdiction over whether misrepresentation, fraud or negligence was committed with regard to a settlement agreement). Ocean Township Bd of Educ 106 LRP 66875 (SEA NJ 9/25/6)(HO ordered parties to comply with the oral settlement they agreed to in a settlement conference with the HO and denied the parties' request to relitigate the underlying issues. Contrast, Eatonville Sch. Dist. 106 LRP 18798 (SEA Wash 3/6/6)(Enforcement of a settlement agreement is the responsibility of state and federal courts and not a due process HO.)

4. Lara v. Lynwood Unified Sch Dist 53 IDELR 18 (C.D.Calif 7/29/9)

Where settlement did not result from a mediation or resolution session, court held it had no jurisdiction to enforce the settlement; Petersen v. California Hearing Office 50 IDELR 250 (N.D. Calif 8/11/8) Where settlement agreement provided that parents waive all claims for 2004-2005 school year, Court refused to enforce provision requiring IEPT meeting for May 2005. McElroy by McElroy v. Tracy Unified Sch Dist 51 IDELR 184 (E.D. Calif 11/21/8) A release signed by parents waiving all special education claims did not constitute a waiver of 540, ADA, 1983 or claims for physical and emotional harm; WK & PK ex rel MK v. Sea Isle Bd of Educ 47 IDELR 61 (D.NJ 2/5/7) Federal court concluded that it has jurisdiction to enforce an IDEA settlement.; See also, JP by Pope v. Cherokee County Bd of Educ 107 LRP 10432 (11th Cir 2/27/7) The Eleventh Circuit concluded that the district court had authority to resolve issues concerning an alleged breach of settlement and FAPE, but it first required the parents to exhaust their

administrative remedies by proceeding through a due process hearing. Contrast, Cain v. Arts & Technology Academy Public Charter Sch 46 IDELR 163 (D.DC 9/28/6) Alleged breach of an IDEA settlement is a matter of contract law for the state, not the federal, courts; Bowman ex rel WB v. district of Columbia 46 IDELR 97 (D.DC 8/2/6) Court held that enforcement of IDEA settlements that do not result from mediation or resolution sessions are not enforceable in federal court. Contract law is a matter for the state courts; and MJ by CJ and JJ c. Clovis Unified Sch Dist 47 IDELR 253 (E.D. Calif 4/9/7) IDEA'04 provision regarding enforceability of settlements was not given retroactive application to a settlement before the effective date of IDEA'04. Contrast, Pedraza ex rel Pedraza v. Alameda Unified Sch Dist 47 IDELR 302 (N.D. Calif 3/27/7) (Although IDEA'04 amendments are not retroactive, the court would enforce a settlement agreement for school years after IDEA'04 took effect because the settlement agreement defines what constitutes FAPE.)

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

6. Irvine Unified Sch Dist 53 IDELR 204 (SEA Calif 9/28/9) HO held that IDEA settlement waiver releasing district from "... violations that might occur as a result of this agreement..." was ambiguous and did not prevent parents from pursuing a

reevaluation claim; Somoza v. New York City Dept of Educ 107 LRP 10339 (S.D.NY 2/21/7) The federal court held that waiver of future IDEA claims constitutes waiver of a vital civil right requiring highest scrutiny by the courts. Where a pro se parent signed an ambiguous settlement agreement resulting from a boilerplate form settlement and received no adequate explanation of the terms of the agreement, the court found the waiver of IDEA claims to be ineffective. Any such waiver must be knowingly and voluntarily given. Contrast, Amy S. v. Danbury Local Sch. Dist. 106 LRP 2067 (6th Cir. 3/31/6). The Sixth Circuit affirmed the dismissal of the parents IDEA claims where the parents had signed a mediation agreement unambiguously stating that it resolves all pending IDEA issues.

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

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

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

H. State Complaint Procedures

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

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

3. Millay ex rel YRM v. Surry Sch Dist 584 F.Supp.2d 219, 51 IDELR 159 (D. Maine 10/28/8) Where state complaint investigator ordered LEA to provide student's

residential placement IEP at her local elementary school, court found that rather than parents change of status quo to be the stay put placement.

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

I. Resolution Session

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

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

3. Mr & Mrs S ex rel BS v. Rochester Community Schs 106 LRP 58719

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

the alleged ethical violations by the district's lawyer because the state Attorney Grievance Committee was the proper forum for such complaints.

4. Washington Township Bd of Educ 108 LRP 25305 (SEA NJ 3/26/8) HO dismissed dp complaint where pro se parent refused to participate in the resolution meeting; Sch Dist of Philadelphia 106 LRP 53542 (SEA PA 8/22/6) SRO panel refused to consider the issue of whether the parents alleged failure to participate should have delayed the hearing because it was raised improperly on an interlocutory appeal. Contrast, Weiner Sch Dist 106 LRP 29396 (SEA Ark. 2/27/6) in which a hearing officer did issue an order delaying the due process and resolution session timelines; and Chesterfield County Sch Dist 106 LRP 49379 (SEA SC 12/21/5) where a parent failed to participate in the resolution meeting and otherwise failed to prosecute his due process complaint, a hearing officer dismissed the complaint.

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

6. JMC & MEC ex rel EGC v. Louisiana Bd of Elementary & Secondary Educ 50 IDELR 157 (M.D. Calif 6/13/8) Court refused to enforce a settlement that happened before dp hearing where district failed to convene a resolution meeting within

15 days, noting that Congress did not intend that all IDEA settlements be enforceable in court.

7. Letter to Baglin 53 IDELR 164 (OSEP 10/30/8) OSEP opined that an LEA may not require a parent to sign a confidentiality agreement as a condition for having a resolution session, but the parties could agree to confidentiality.

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

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

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

11. Hopkins Pub Schs 106 LRP 37009 (SEA Mich. 4/22/6). A hearing officer determined that a resolution meeting is not required when an LEA files a due

process hearing complaint notice. The hearing officer noted that the resolution session process is only required when a parent files a due process complaint notice.

12. In Re: Foxborough Regional Charter Sch 106 LRP 34379 (SEA Mass. 5/30/6) The hearing officer rejected the school district argument that a resolution meeting was an IEP Team meeting, and that an offer of extended school year services made at a resolution meeting constituted a program proposed by the IEP Team. Accordingly, the hearing officer ruled for the parents and ordered ESY services and two IEES. See, also West Hartford Bd of Educ 106 LRP 25095 (SEA Conn. 2/3/6), rejecting an argument that a resolution meeting supplants the IEP Team meetings.

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

14. Massey v. District of Columbia 105 LRP 54466 (D.D.C. 11/3/05). The parents were not required to exhaust administrative remedies because the LEA's continuing noncompliance with procedural requirements and its blatant disregard of the IDEA statutory requirements rendered compliance with administrative options futile. The procedural violations included the failure to schedule resolution sessions within 15 days of the complaint, the failure of the LEA to file an "answer" to due process complaints, and the failure to place the student for several weeks. Concerning the failure to schedule resolution sessions, the Court rejected the LEA's assertion that they could not

reach the parents by telephone. Contrast Spencer v. District of Columbia 416 F.Supp.2d 5, 45 IDELR 11 (D.D.C. 1/11/06), in which the parent filed for due process on December 6, 2005. The LEA scheduled a resolution meeting for December 21st. The parent withdrew the due process complaint on December 14th. The LEA cancelled the resolution meeting. The parent then refilled the due process complaint on December 21st. The LEA scheduled a resolution meeting in January, 2006. The parent then filed in federal court for injunctive relief claiming that the LEA had not convened a resolution meeting within 15 days of the original filing and, therefore, exhaustion of administrative remedies was futile. The U. S. District Court rejected the argument and required the parent to first exhaust administrative remedies by pursuing the due process hearing.

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

J. Due Process Hearings

1. In General

- a. DB by CB v. Houston Independent Sch Dist 48 IDELR 246 (D.Tex. 9/28/7).

Court rejected a claim by the parent that the dp HO denied them a fair hearing by sleeping through the hearing. The court did not credit the allegations where the hearing transcript revealed that the HO appeared to be awake while asking questions of witnesses and when ruling on objections and where the parents failed to preserve their objection by objecting to the alleged napping on the record.

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

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

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

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

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

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

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

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

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

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

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

m. Knight ex rel JKN v. Washington Sch Dist 51 IDELR 209 (E.D. Mo. 12/22/8) Where SEA regulations permitted HO panel chair to eliminate frivolous due process claims and ho panel chair dismissed 4 of 5 issues, and was asked by parent attorney to recuse himself, chair then had heated exchange with the attorney on the record

and dismissed the fifth issue in retaliation for motion to recuse. Court reversed noting that especially dismissal of the fifth claim was improper because it denied parents an opportunity to present evidence, confront and cross-examine witnesses, etc.; Dept of Educ, State of Hawaii v. Karen I & Marcus I 53 IDELR 157 (D. Haw 9/21/9) Where HO took it upon himself to conduct 2d hearing after being reversed without a remand by the state court, federal court refused to award attorneys fees based upon order that should never have been issued.

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

2. Burden of Persuasion

a. Schaffer v. Weast 546 U.S. 49, 126 S.Ct. 528, 44 IDELR 150 (11/14/5).

The Supreme Court held that the burden of persuasion in an IDEA due process hearing is upon the party challenging the IEP. The “burden of persuasion” involves which party loses if the evidence is closely balanced. In any civil legal proceeding, if the evidence for both sides is equal, the party with the burden of persuasion loses. The Court exempted from its decision, however, the burden of persuasion applicable in those states that have laws or regulations placing the burden upon the school district.

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

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

3. Parties

a. NB UNPUBLISHED Keene v. Zelman 53 IDELR 5 (6th Cir. 7/29/9) UNPUBLISHED Parents brought a class action against Ohio SEA alleging illegal policies including improper HO training. Also alleged was that HOs were told to do nothing for the first 30 days and bill no more than one hour during that time. Sixth Circuit approved settlement that included an agreement to retrain HOs and an award of \$81,000 vs SEA; Quatroche v. East Lynne Bd of Educ 604 F.Supp.2d 96, 53 IDELR 96 (D. Conn. 3/31/9) If allegation had been that an SEA system of HO training affected a number of dp hearings, parent would state claim for a systemic violation. Here the allegation was only one dp complaint, therefore no systemic violation; Chavez ex rel Chavez v. Bd of Educ of Tularosa Municip Schs 52 IDELR 229 (D.NM 2/24/9) SEA denied FAPE to student but parents not prevailing party; Emma L v. Eastin 52 IDELR 43 (N.D. Calif 2/24/9) Where LEA did miserable job of providing FAPE, and SEA is ultimately responsible for FAPE, court held SEA to an enhanced role; Delaware Valley Sch Dist v PW by James & Patricia W 52 IDELR 192 (M.D. Penna 5/5/9) Although parents may sue SEA for LEAs failure to provide FAPE, the LEA may not sue the SEA for indemnification and contribution under IDEA; DW v. Delaware Valley Sch Dist 109 LRP 80026 (M.D. Penna 12/29/9) Complaint alleging that SEA failed to properly monitor or supervise the LEA with respect to the provision of FAPE to a student stated a cause of action against the SEA; Stengle v. Office of Dispute Resolution 109 LRP 24455

(M.D. Penna 4/27/9) SEA did not violate First Amendment by cancelling contract of HO who who wrote articles about issues pending before her as HO; CG v. Commonwealth of Penna, Dept of Educ 53 IDELR 150 (M.D. Penna 9/29/9) Dist court certified a class action re the manner that SEA distributes IDEA funds; King v. Pioneer Regional Educ Service Agency 53 IDELR 196 (Georgia Ct App 11/5/9) State appeals court ruled that SEA's general supervisory responsibilities under IDEA do not include being subject to tort-like damages; Independent Sch Dist No. 12 v Minnesota Dept of Educ 767 N.W.2d 748, 52 IDELR 265 (Minn Ct App 6/23/9)

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

between SEA and parents finding systemic violations by SEA. Blunt v. Lower Merion Sch Dist 50 IDELR 128 (E.D. Penna 6/6/8) SEA had to defend IDEA suit alleging improper supervision and monitoring of LEAs, improper state complaint procedures, and child find procedures. Orange County Dept of Educ v. AS SEA was responsible for the residential placement of a homeless student placed by the juvenile court where state law did not specify which LEA would be responsible for special education costs. Ohio Department of Education 108 LRP 15709 (SEA Ohio 1/13/8) SEA is not a proper party to a due process hearing involving a dispute between a parent and the LEA. LMP ex rel EP, DP & KP v Florida Dept of Educ 51 IDELR 36 (S. D. Fla 9/15/8) Court did not reach parent challenge to allegation that SEA did not allow HOs to award certain relief where parents had not shown denial of FAPE to triplets, therefore relief issues were moot. Grossmont Union High Sch Dist v. California Dept of Educ 108 LRP 71212 (Calif App. Ct 12/29/8) State appellate court affirmed dismissal of LEA complaint against SEA demanding more funds from SEA arguing that the state imposed an undue financial burden upon districts by failing to demand that the federal government fully fund IDEA before promising full compliance.

c. Fuentes v. Bd of Educ of the City of New York 540 F.3d 145, 51 IDELR 4 (2d Cir. 8/26/8) (before 2006 fed regs took effect) Second Circuit certified question to the New York Court of Appeals of what the educational decision-making rights of a non custodial parent are under state law where the divorce decree was silent; Fuentes v. Bd of Educ of the City of New York 907 N.E.2d 696, 52 IDELR 164 (NY Ct App 4/30/9) NY appellate court held that under state law, the custodial parent has the sole right to control educational decisions pertaining to the child unless the divorce decree or custody order

specifies otherwise. Fuentes v. Bd of Educ of the City of New York 589 F.3d 46, 52 IDELR 152 (2d Cir. 6/15/9) because noncustodial parent was not given educational decision-making rights under the divorce decree or custody order, he could not bring IDEA challenge re his son's education.

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

e. Letter to Anonymous 53 IDELR 127 (OSEP 3/30/9) OSEP provided opinion that IDEA requires **charter** schools, whether themselves a separate LEA or not, to ensure the availability of the full continuum of placements and that students with disabilities are placed in the LRE. There is no requirement that every placement on the continuum be used, but they must be available; Golden Door Charter Sch v. State Operated Sch Dist of

the City of Jersey City 948 A.2d 716, 50 IDELR 166 (N.J. App. Ct 6/17/8) Where a state statute requires charter schools to comply with all laws as to children with disabilities, the charter school and not the district of residence had to pay for its student's special education. SS by Shank v. Howard Road Academy 50 IDELR 191 (D.DC 6/25/8) Where charter school is an LEA, charter school is a proper party and parents could bring due process hearing re FAPE; Delaware College Preparatory Academy 53 IDELR 135 (SEA Del 7/30/9) HO Panel ruled that a charter school/LEA violated its child find obligation under IDEA by failing to identify a student as eligible where his extreme behaviors caused him to be suspended almost weekly. See, ADDITIONAL RESOURCE: Weber, Mark C., Special Education from the (Damp) Ground Up: Children with Disabilities in a Charter School-Dependent Educational System (October 12, 2009). Loyola Journal of Public Interest Law, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=1487667>; See, "Charters, Students With Disabilities Need Not Apply," by Prof. Thomas Herir, (op-ed piece) Education Week online January 25, 2010, http://www.edweek.org/ew/articles/2010/01/27/19hehir_ep.h29.html?tkn=QQNC6AY97%2B01O7%2Bu4nwLnioyJY%2BAvdDbAtIU

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

4. Record of Hearing

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

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

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

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

5. Timelines/ 45 day rule

a. Paul K & Stephanie K ex rel Joshua K v. State of Hawaii 567 F.Supp.2d 1231, 50 IDELR 187 (D. Haw 7/1/8) The parties extended the deadline for decision to 4/6/8. The parents requested another extension, 12 days after the deadline had elapsed and HO dismissed as untimely. The court reversed noting that the 45 day rule is a

procedural safeguard that protects children with disabilities; it is the responsibility of the SEA and the HO to ensure a timely decision, not the parents.

b. Lake Washington Sch Dist #414 v. Office of the Superintendent of Public Instruction 51 IDELR 278 (W.D. Wash 1/16/9) School district asked federal court for a temporary restraining order (reversing HO order on 12/31/8 granting a continuance to 5/18/9 because of two vacations, two unrelated trials and time for trial prep for parent's lawyer) and an order banning any extensions past 45 day period. Court denied the requests noting that the vague prejudice alleged by the district was outweighed by the prejudice to the parents in having a dp hearing with an unprepared lawyer.

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

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

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

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

6. Evidence

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

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

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

d. NP ex rel JP v. East Orange Bd of Educ 51 IDELR 191 (D. NJ 11/26/8)

Court reversed HO ruling and permitted parents discovery of student's educational records on appeal. Court found that HO improperly denied the parents access to the records during the administrative proceeding.

e. Duxbury Public Schs 108 LRP 19364 (SEA Mass 3/25/8) HO quashed

two subpoenas, one for superintendent, where parents could give no basis for any relevant testimony regarding IEP; district-wide policies are not relevant; GB & DB ex rel JB v. Bridgewater-Puritan Regional Bd of Educ 52 IDELR 39 (D. NJ 2/27/9) Court upheld HO rulings re relevance.

f. AG & LG ex rel NG v. Frieden 52 IDELR 65 (S.D.,NY 3/25/9) Court

ruled that HO erred where he prohibited leading questions on cross examination, but error was harmless where witnesses later indicate no knowledge.

g. Mahoney ex rel BM v. Carlsbad Unified Sch Dist 52 IDELR 131 (S.D.

Calif 4/8/9) Ct upheld ruling by HO permitting the use of an excluded document for the purpose of refreshing recollection of a parent re what she had told the district. Court found that HO did not rely upon excluded document in his decision.

h. Newport Public Schs 109 LRP 9847 (SEA Mich 2/2/9) Where a

witness violated a sequestration order, HO found the witness to be not credible and a "frequent liar." ???

i. York County Dist Three 49 IDELR 178 (SEA SC 1/24/8) SRO noted

wide discretion of HO as to evidentiary questions, and upheld exclusion of some parent exhibits.

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

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

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

(M.D. Ala 9/30/8) Court refused to admit additional evidence on appeal where the testimony would be redundant and repetitive of testimony already in the record.

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

7. Due Process Hearing System in General

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

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

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

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

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

8. Hearing Officer Qualifications

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

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

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

d. CS by Struble v. California Dept of Educ 50 IDELR 63 (S.D. Calif 4/30/8) Court rejected parent challenge based upon SEA failure to provide 80 hours of training per year as required by state law where parents failed to show that HOs were not qualified under IDEA standards. JR by WR & NR v. Sylvan Union Sch Dist 48 IDELR 253 (E.D. Calif 3/10/8) Court rejected allegations that California OAH systematically violated IDEA by failing to provide knowledgeable HOs where allegation was based only upon conjecture. MO by Ondrovic v. Indiana Dept of Educ 51 IDELR 6 (N.D. Ind. 8/29/8).

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

f. Kerry M. v. Manhattan Sch Dist No. 114 106 LRP 58405 (ND Ill. 9/29/6) Court rejected a claim that the state DOE failed to properly train its HOs where the HO conducted the specific hearing in question properly. See, HH by Hough v.

Indiana Bd of Special Educ Appeals 47 IDELR 250 (N.D. Ind. 4/12/7) (IDEA'04 HO qualifications apply only to HOs and not SROs???)

V. You Be the Judge: Juicy Hypothetical Fact patterns

1. Opie Taylor is a seventh grade student with an Emotional Disturbance. His IEP calls for a full-time special education separate class placement. Just after half way through the 2009-2010 school year, the student's legal guardian Aunt Bea sends a certified letter to the special education director stating that she revokes consent for special education and related services. The student is placed in a general education classroom. Two days later he gets into a fistfight with another student. The assistant principal suspends the student for 15 days. Later the same day, Aunt Bea sends another certified letter to the special ed director stating that she reinstates consent for special education. She includes in the letter a request for an expedited due process hearing challenging the suspension under IDEA. You are the hearing officer, what do you do?

2. The parents of LeBron King file a due process complaint alleging a denial of FAPE and invoking stay put. The school district and the parents agree to mediation in lieu of the resolution meeting. The school district makes an oral offer to settle, and the parents reject the offer. Prior to the hearing, the attorney for the school district sends the parents' attorney a written offer of settlement "on the same terms as were offered in the mediation of this case." The parents prevail at the due process hearing, but they do not get as much relief in the hearing officer's decision as they would have received if they had accepted the settlement offer. The parents' attorney petitions

the U. S. District Court for attorney's fees. The school district attorney objects. You are the federal judge, what do you do?

3. The state Department of Education receives a state complaint from an organization called "Citizens For Equal Rights For Real Americans" alleging that on numerous occasions three years ago children with disabilities who are real Americans (ie, Caucasian, male, non-gay, and of Western European descent) were treated less favorably than Non-American children with disabilities. In addition, the complaint alleges the following on-going procedural violations over the last three years for all children with disabilities: IEP teams do not include regular education teachers; requests for evaluations generally take over a year; resolution meetings scheduled after due process hearings are requested are always attended by the lawyer for the school district; the state's due process hearing officers are not qualified under IDEA because they are not properly trained on IDEA caselaw and on standard practice regarding how to conduct hearings and write decisions; the state notice of procedural safeguards has not been amended to include the right of parents to revoke services; the names and photos of kids in special education are routinely revealed to the press and the public; IEPs are routinely predetermined through the use of draft IEPs; and Prior Written Notice is generally given after decisions are made and not prior thereto. You are the state complaint investigator what do you do?

4. During day 12 of a 41 day due process hearing, counsel for the parents refuses to comply with an order by the hearing officer to not inform sequestered witnesses of the testimony of other witnesses. The hearing officer imposes sanctions upon the attorney, including a fine of \$1,500.00. On day 16, the parent announces at the beginning of the day that her lawyer could not be there that day because of a real estate

closing which he had forgotten about and so she would be represented that day by a non-lawyer advocate. The hearing officer denies the request. On day 19, the hearing officer falls asleep and snores audibly, but the parties ignore it and keep going ahead with the testimony. On day 26, after the hearing officer overrules an evidentiary objection, the attorney for the parents accuses the hearing officer of bias against the parents and calls him a “moron, goose-stepping hand puppet of the school district; the hearing officer responds by calling the parents’ lawyer an “insufferable jackass.” The hearing officer issues a 253 page decision ruling in favor of the school district on both issues presented. The parents appeal. You are the federal judge, what do you do?

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